

(1959) 01 KL CK 0005
In the High Court Of Kerala
Case No : A.S. No. 595 of 1958

Samburaja Nadar and Another

APPELLANT

Vs

Purushotham Ramji and Co.

RESPONDENT

Date of Decision : 06-01-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 37

Citation : (1959) KLJ 378

Hon'ble Judges : K.T. Koshi, C.J.;C.A. Vaidialingam, J

Bench : Division Bench

Advocate : K.K. Mathew and George Vadakkal, for the Appellant; R. Krishnaswami and S. Ananthasubramania Iyer, for the Respondent

Final Decision : Allowed

Judgement

K.T. Koshi, C.J.—The appeal is from an order of the Additional District Judge at Parur refusing to admit the judgment-debtor in O.S. No. 22 of 1950 on the file of the erstwhile Parur District Court to the benefits of Act XXXI of 1958. The learned Judge bases his order on two grounds: (i) that in as much as the judgment-debtor has no agricultural or horticultural land in Kerala, but only in Tamilnad, he cannot get the benefits of the Kerala Act and (ii) that the court of the Additional District Judge at Parur had no jurisdiction to entertain the petition. As we are in full agreement with the learned Judge below on the second ground we do not seek to pronounce upon the first one though it is really an interesting question. On the second point what the learned Judge has stated may usefully be quoted here:-

The above decree was passed by the erstwhile District Court of Parur. This court is not a successor of that court. Under S. 37, C.P.C. the expression "court which passed a decree" or words to that effect, shall, in relation to the execution of decrees, be deemed to include (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction the court of first instance, and (b) where the court of first instance has ceased to exist or to have jurisdiction to

execute it, the court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit. This court has no jurisdiction at present to entertain or try any such suit. Original jurisdiction for suits now rests with the Subordinate Judge of Parur. Therefore, the petition ought to have been filed before the Subordinate Judge and not before this court. The application under the provisions of Act XXXI of 1958 have to be made in the court of first instance. Therefore, this court has no jurisdiction to entertain this petition or pass any orders on the same.

Consistently with the above view what the learned Judge should have done was to return the petition for presentation to the proper court and not dismiss it. We therefore set aside the order under appeal and remit the petition back to the lower court to be returned to the petitioner for presentation to the proper court. At the same time we leave the first point open for consideration afresh by the court competent to deal with the petition.

Before parting with the case we desire to point out that the respondent took two preliminary points before us, namely, that this appeal was incompetent in as much as Act XXXI of 1958 does not provide for an appeal and secondly that the prayer made was only for a stay of execution and that such a prayer was not envisaged by the Act. The latter point is really a question pertaining to the merits of the application and that will be dealt with by the court in proper time by a proper court. We may however state that it is the substance that matters and not the form. Clear as anything the petitioner was invoking the benefits of Act XXXI of 1958 and we do not see any reason why notwithstanding the wording of the actual prayer the petition should not be dealt with as such if and when it is presented to the subordinate Judge at Parur. As for the question as to appealability we need only refer to the decision of the Privy Council in *Adaikappa v. Chandrasekhara* (A.I.R. 1948 PR 12) and state that in view of that ruling the preliminary objection is without substance.

2. The appeal is in the result allowed in the above terms and the petition sent back to the lower court to be returned to the petitioner for presentation to the proper court. We make no order for costs here.

Order accordingly.