
(1998) 09 KL CK 0042
In the High Court Of Kerala
Case No : C.R.P. No. 1273 of 1996

Shaji	Vs	APPELLANT
Dinesan		RESPONDENT

Date of Decision : 24-09-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73, 73(2)

Citation : (1999) 1 CivCC 102 : (1998) 2 KLJ 647

Hon'ble Judges : S. Sankarasubban, J

Bench : Single Bench

Advocate : V.V. Asokan and Mr. K.I. Mayankutty Mather, for the Appellant; K.M. Joseph, for the Respondent

Final Decision : Allowed

Judgement

S. Sankarasubban, J.—The Civil Revision Petition is filed challenging the order dated 3.4.96 in cheque Application in LAR 6 of 1985 on the file of the Subordinate Judge's Court, Sherthala. The revision petitioner is the decree holder in O.S. 131/91 on the file of the Sub Court, Sherthala. That decree is dated 13.12.93. That decree was obtained against the first respondent for recovery of money due from him. The first respondent had some property which was acquired by the Government under the provisions of the Kerala Land Acquisition Act. A reference was made under the Land Acquisition Act as LAR 6/85 and an award was passed for enhancement of compensation on 31.1.1987. The petitioner attached the decree passed by the Sub Court, Sherthala in LAR 6/85. This was on 9.5.91. When the first respondent took out execution of the decree obtained by him against the State, the revision petitioner also moved for execution. The amount was deposited by the Government. The revision petitioner sought execution of the decree by payment to him of the amount due from the second respondent by filing E.R8/95. That E.P. was disposed of on 30.1.96 in the following terms.

"No objection for the decree holder in E. A. 106/96 to allow the Execution

Petition E.A. allowed. The decree holder in O.S. 131/91 is allowed to withdraw the amount in deposit in LAR 6/85."

Subsequently the petitioner filed the cheque application. When the cheque application came up for orders on 3.4.96. a representation was made on behalf of the third respondent that the third respondent had attached the decree in LAR 6/85 in the suit O.S.273/91. On such representation, the Court below passed the impugned order. The order reads as follows:

"There is attachment in O.S.273/91. Hence Application dismissed."

The third respondent has filed a counter. The third respondent has contended that he had instituted O.S.231/91 against the present first respondent and he has obtained a decree. He has also attached the decree in LAR 6/85. He further contended that the decree obtained by the petitioner against the first respondent was a conclusive one. Hence his contention is that the petitioner is not entitled to withdraw the amount.

2. The learned counsel for the third respondent admitted that no execution petition has been filed by the third respondent.

3. After hearing the counsel for the petitioner and the counsel for the respondents, I am of the view that the CRP has to be allowed and the impugned order set aside.

4. The learned counsel for the third respondent has very vehemently argued that the Executing Court has to consider the question whether the decree obtained by the petitioner against the third respondent was a collusive one, even though it is admitted that no contention was raised before the Executing Court. He further contended that since he has attached the decree, he has got a right to challenge the decree obtained by the petitioner against the first respondent. It is clear under S. 73 of the C.P.C. that to claim rateable proportion the person should have applied for execution. A mere attachment does not give any right.

5. In AIR 1928 545 (Bom.) it was held as follows:

"A person who has merely obtained an attachment before judgment cannot put up a claim for rateable distribution unless he has obtained a decree and made an application for execution."

To the same position, it is the decision reported in S.M. Thakkar Vs. A.K. Hazra and Sons and Others, , wherein it was held as follows:-

"Simply because a decree holder has obtained an attachment before judgment of his debtor's property, he will not thereby become entitled to get rateable distribution under S. 73, unless like other decree-holders, he applies for execution after getting the decree, and his execution application is made before the receipt of the assets".

6. The learned counsel for the petitioner relied on the decision of the Supreme

Court reported in S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, wherein it was held as follows:-

"The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. A person I, who's case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A judgment or decree obtained by playing fraud on the Court is a nullity and non est in the eyes of law. Such a judgment/decreed-by the first Court or by the highest Court has to be treated as a nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings."

But so far as S.73 of the CPC is concerned, the decisions sought to the effect that what is done under S. 73 is not a judicial act but is only an administrative act and Court cannot go into the question whether the decree obtained was collusive or not. In such circumstances, the Court have directed the party to resort to S. 73 clause (2).

7. In Dattatraya Govindseth Lubri Vs. Purshottam Narayanseth Dali, it was held as follows:

""The Court distributing assets under S. 73. cannot have greater power to go behind the decree, and should not deal with the question whether the decree is fraudulent. The remedy of the opponent raising the plea of fraud lies under S. 73(2)."

8. In Bibi Uma Habiba Vs. Mt. Rasoolan and Another, . it was observed as follows:

"The act of distribution under S. 73 is a ministerial act and therefore, where the first decree holder objects to rateable distribution on the ground that second decree-holder's decree was collusive and urges for judicial decision on the point: that his prayer should be disallowed."

In Mt. Annapurna Debi Vs. Ashutosh Deo Ghatwal, , a Division Bench of the Patna High Court held as follows:

"Under S. 73, a Court acts in an administrative capacity. It cannot therefore, inquire into the validity of a decree: any order to that purpose is entirely without jurisdiction."

Thus, on a scrutiny of the above decisions, it is clear that the third respondent is not entitled to stop the disbursement of the amount to the petitioner. He has not moved for execution and hence does not come under S. 73 of the CPC.

In the above view of the matter, the impugned order is set aside and the C.R.P. is allowed. The Court below is directed to disburse the amount to the petitioner as expeditiously as possible.