

(1998) 05 KL CK 0011

In the High Court Of Kerala

Case No : S.A. No's. 164 and 444 of 1997

State Bank of India and Ignatius

APPELLANT

Vs

Kuttappan and Others

RESPONDENT

Date of Decision : 20-05-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11, Order 21 Rule 66

Citation : (2000) 99 CompCas 309 : (1998) 3 ILR (Ker) 424

Hon'ble Judges : P.K. Balasubramanyan, J

Bench : Single Bench

Advocate : K.K. Chandran Pillai, in S.A. No. 164 of 1997 and N. Subramaniam and M.S. Narayanan, in S.A. No. 444 of 1997, for the Appellant; K.K. Chandran Pillai in respondent No. 2 in S.A. No. 444 of 1997, N. Subramaniam and M.S. Narayanan, in respondent No. 5 in S.A. No. 164 of 1997, Ranjit Thampan and Government Pleader for respondent Nos. 2 to 4 in S.A. No. 164 of 1997, for the Respondent

Final Decision : Allowed

Judgement

P.K. Balasubramanyan, J.—S. A. No. 164 of 1997 is by the first defendant and S. A. No. 444 of 1997 is by the fifth defendant in O. S. No. 408 of 1987 on the file of the Subordinate Judge's Court of Irinjalakuda. The suit was filed by the first respondent in these second appeals as the plaintiff, for a declaration that the proceedings initiated against him for recovery of amounts due to the first defendant, a nationalised bank, under the Kerala Revenue Recovery Act were illegal and invalid and to declare the title of the plaintiff over the plaint schedule property ignoring the sale conducted pursuant to the initiation of such proceedings and for recovery of possession of the property sold. There was also a prayer for the grant of a perpetual injunction restraining the fifth defendant, the purchaser at the revenue sale, from effecting any improvements in the property. Overruling the defences offered by the defendants, the trial court decreed the suit. The first defendant filed an appeal. That appeal was also dismissed. That dismissal is challenged by the first defendant in its second

appeal. The fifth defendant who had not filed an appeal before the lower appellate court challenging the decree of the trial court, has chosen to file S. A. No. 444 of 1997 challenging the decision of the lower appellate court. The question of the maintainability of the second appeal by the fifth defendant, he not having filed a first appeal before the lower appellate court, does not loom large in this case, since if the second appeal filed by the first defendant were to be allowed, the result would obviously benefit the fifth defendant as well.

2. The plaintiff had taken a loan from the first defendant-bank. He had not repaid it. The bank, therefore, filed O. S. No. 302 of 1980 for recovery of the money. That suit was decreed. The bank filed an execution petition. According to the plaintiff, on receipt of notice under Order 21, Rule 66 of the Code of Civil Procedure, he paid in the executing court, paltry amounts on various occasions totalling Rs. 900. Presumably finding that recovery through the executing court was proving to be time consuming, the first defendant-bank, sought the initiation of proceedings under the Revenue Recovery Act. As per S.R.O. No. 797 of 1979, the Government, in exercise of its power u/s 71 of the Kerala Revenue Recovery Act, 1968, declared that the provisions of the Revenue Recovery Act shall be applicable to recovery of amounts due from any person to any bank on account of any loan advanced to such person by that bank for agriculture or agricultural purposes. The first defendant, the State Bank of India, is specifically brought within the notification. The amount was an agricultural loan. On the first defendant getting the proceeding for recovery under the Kerala Revenue Recovery Act, 1968, initiated, the plaintiff filed O. S. No. 354 of 1986 on the file of the Munsiff's Court, Irinjalakuda for a permanent injunction restraining the defendants therein from initiating or continuing the proceedings under the Kerala Revenue Recovery Act, 1968. That suit was subsequently dismissed as withdrawn. It appears that the Government stayed the proceedings under the Revenue Recovery Act, but that stay was subsequently vacated. An extent of 2.20 acres belonging to the plaintiff was attached in terms of the Revenue Recovery Act. The sale originally proposed did not take place. The proposal for sale was again published and at the resultant sale, 30 cents out of the 2.20 acres attached, was sold for a sum of Rs. 10,400. The fifth defendant was the purchaser at the auction. The plaintiff filed an appeal before the Collector. That appeal was dismissed. A revision filed before the Board of Revenue by the plaintiff was also dismissed on July 3, 1987. Meanwhile, the sale having been confirmed, the 30 cents of property was delivered over to the fifth defendant.

3. On November 17, 1987, the plaintiff filed the present suit after the issuance of notice u/s 80 of the Code of Civil Procedure. Section 81 of the Revenue Recovery Act enables a person deeming himself aggrieved by any decision or order passed or proceeding taken under the Revenue Recovery Act to file a suit before the civil court within 90 days of the accruing of the cause of action. It is further provided that the time taken by a plaintiff for pursuing the statutory remedy of revision before the Board of Revenue would stand excluded in computing the period of limitation. Section 72 of the Act provides that any question relating to the

execution, discharge or satisfaction of a written demand issued under the Act or relating to the confirmation or setting aside of a sale under the Act, shall be determined not by a suit but by the order of the Board of Revenue or the Collector, as the case may be. To this bar of jurisdiction, saving is made when the ground alleged in the suit is one of fraud. In the present case, the plaintiff had exhausted the remedies available to him under the Revenue Recovery Act and had filed the suit on his plea that the proceedings could not have been initiated against him on the grounds set out by him in the plaint including one of fraud. It is, therefore, clear that the present suit is governed by Section 81 of the Act and is maintainable, even though it has now been found that there was no fraud established by the plaintiff as required by Section 72 of the Act. It has, therefore, to be taken that the present suit by the plaintiff is maintainable. There was no plea before me that the suit was not within time. It has, therefore, also to be taken that the suit was filed within time, by the plaintiff.

4. The argument on behalf of the plaintiff that appealed to the courts below was the argument that having obtained a decree on the loan and having filed a petition for execution under Order 21 of the Code of Civil Procedure, the first defendant-bank was disentitled to initiate proceedings under the Revenue Recovery Act for recovery of the decree debt. The courts below seem to have taken the view that the first defendant-bank was estopped from initiating proceedings under the Revenue Recovery Act, it having filed a petition for execution of the decree under Order 21, Rule 11 of the Code of Civil Procedure. No case of fraud or irregularity in the sale has been found by the courts below. The only question that requires to be considered is whether the view of the courts below that the initiation of the proceedings under the Revenue Recovery Act by the first defendant-bank was not possible, is correct or not.

5. There was a contention on behalf of the plaintiff before me that the first defendant-bank was simultaneously going ahead with the execution petition filed by it before the executing court. This contention does not appear to be correct in view of the specific plea raised by the first defendant-bank in its written statement that the first defendant, the decree holder in O. S. No. 302 of 1980, had withdrawn the execution petition since the plaintiff had not paid the amount and steps under the Revenue Recovery Act were taken for recovery of the amount. In spite of this plea, the plaintiff has not pursued his contention that the proceedings in execution of the decree in the executing court were being continued simultaneously. It is also not seen that such a contention was pursued before the courts below. The plaintiff as P.W.-1 admitted in evidence that he had notice of the withdrawal of the execution petition. Under the circumstances, the contention of the first defendant that the execution petition was still being proceeded with in the executing court, cannot be accepted.

6. The question then is whether after having obtained a decree on the loan and after having initiated proceedings under Order 21 of the CPC for realising the fruits of the decree, the first defendant-bank was entitled to invoke the

provisions of the Revenue Recovery Act for recovering the amount due under the decree. Learned counsel for the plaintiff contended that once a decree is obtained on a loan transaction, here it was a promissory note debt, the cause of action based on the loan gets merged in the decree and thereafter, the remedy of the first defendant-bank is only to execute the decree and no other. He argued that the concerned notification made it clear that the amount that was recoverable was only the amount due on a loan and in the present case it cannot be postulated that any amount is due on a loan advanced by the bank since the transaction of loan has merged in the decree.

7. There cannot be any dispute about the proposition that the cause of action based on the loan has merged in the decree. But the question is whether for that reason, the notification relied on by the first defendant-bank would become unavailable to it. Counsel for the bank points out that what the notification authorises is the recovery of amounts due on account of any loan advanced by the bank and the words are wide enough to cover the amounts covered by loans which had ripened into decrees. The notification u/s 71 of the Kerala Revenue Recovery Act enabling recovery of amounts due to the bank is issued in public interest. The intention obviously is to quicken the process of recovery so that the amounts will be available to the banks for recycling and for grant of fresh loans for agriculture and agricultural purposes. Taking note of the object sought to be achieved, the notification has to be construed not narrowly, but naturally. What it provides for is the recovery of amounts on account of any loan advanced. The recovery is not confined to a loan, advanced. It takes in recovery of any amount on account of a loan advanced. "On account of a loan advanced" would take in the amount due under a decree obtained on the basis of that loan. Therefore, I am not in a position to accept the contention of learned counsel for the plaintiff that the notification does not cover the amount due under a decree obtained on the basis of a loan, otherwise coming within the purview of the notification.

8. Learned counsel for the plaintiff then contended that the first defendant-bank having resorted to execution of the decree by invoking Order 21 of the Code of Civil Procedure, was estopped from getting initiated proceedings under the Revenue Recovery Act for recovery of the decree debt. Learned counsel relied on the decision of a learned single judge of this court in *Maniyan v. Federal Bank Ltd.* [1988] 2 KLT 722 wherein it was held that the decree holder would be estopped by the doctrine of election from pursuing his remedy under the Revenue Recovery Act. But this decision of the learned single judge was overruled by a Division Bench in *Canara Bank v. Thankappan* [1989] 2 KLT 74. The Division Bench after referring to the decisions of the Supreme Court and the relevant passages from *Spencer Bower and Turner*, on Estoppel by Representation, held that there will be no estoppel in such a situation. The doctrine of election is not applicable to such a situation since that principle would apply only in cases where the two courses of action available are mutually exclusive, and the opposite party on the faith of the representation by conduct or otherwise, had acted to his detriment or has adopted a course of action which

otherwise he would not have resorted to. The decision of the Division Bench was approved by a Full Bench of this court in Kerala Fisheries Corporation Ltd. Vs. P.S. John and Others, Learned counsel for the plaintiff pointed out that the case in Canara Bank v. Thankappan [1989] 2 KLT 74 was a converse case, but I do not think that that would make any difference to the principle that was recognised by the Division Bench and its applicability to the present case. It is not possible to hold that the two remedies open to the decree holder are mutually exclusive. It is also not possible to hold that the judgment debtor has acted to his detriment by accepting one of the courses of action adopted by the decree holder. Here, apart from paying some amounts in dribblets towards the amount claimed in the execution petition, nothing has been done by the plaintiff to his detriment because of the filing of the execution petition by the bank. Thus, both on principle and on fact there would arise no estoppel by election in this case. In view of the fact that this point is covered by the decision of the Division Bench which was approved by the Full Bench, I do not think it necessary to advert in more detail to the decisions in Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, , Maharashtra State Financial Corporation Vs. Swift Industries and another, ; Karnataka State Financial Corporation Vs. Rafiq and another, and in Haryana Financial Corporation Ltd., Chandigarh Vs. Bags and Cartons and another, relied on by counsel for defendant No. 5, the auction purchaser.

9. Learned counsel for the plaintiff relied on the decision in Kerala Agro Industries Corporation Ltd. v. U. Gopalakrishna Kunikullaya [1997] 1 KLJ 693 ; [1997] 2 KLT 310 to contend that the decision of the Full Bench in Kerala Fisheries Corporation Ltd. Vs. P.S. John and Others, cannot cover cases in which the loans were taken prior to the date of that judgment and in which proceedings had to be initiated for recovery within three years of the debt falling due, before the said Full Bench decision was rendered. I have gone through respectfully and with great care, the above decision brought to my notice. I have dealt with this aspect in my decision in Kerala Agro-Industries Corporation Ltd. v. Amminikutty Amma [1997] 2 KLT 931. I do not think it necessary to reiterate the reasons given therein. It was in I.C. Golak Nath and Others Vs. State of Punjab and Another, that the Supreme Court for the first time invoked the doctrine of prospective overruling, at the same time laying down its limitations. The majority observed (page 1669) :

"As this court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions : (1) the doctrine of prospective overruling can be invoked only in matters arising under our Constitution ; (2) it can be applied only by the highest court of the country, i.e., the Supreme Court, as it has the Constitutional jurisdiction to declare law binding on all the courts in India ; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its "earlier decisions" is left to its discretion to be moulded in accordance with the justice of

the cause or matter before it."

10. It is, therefore, clear that the said doctrine cannot be invoked by the High Court and that too in a second appeal from a suit questioning the initiation of proceedings under the Revenue Recovery Act on a plea of limitation. In Dr. Suresh Chandra Verma and others Vs. The Chancellor, Nagpur University and others, the Supreme Court has held (page 2028) :

"It is unnecessary to point out that when the court decides that the interpretation of a particular provision as given earlier was not legal, it in effect declares that the law as it stood from the beginning was as per its decision and that it was never the law otherwise. This being the case, since the Full Bench and now this court have taken the view that the interpretation placed on the provisions of law by the Division Bench in Harihar Amritrao Bhakare (Dr.) v. Chancellor, Nagpur University [1985] Lab IC 1481 was erroneous, it will have to be held that the appointments made by the University on March 30, 1985, pursuant to the law laid down in Bhakare's case were not according to law."

11. Since the decision in Kerala Agro Industries Corporation Ltd. v. U. Gopalakrishna Kunihullaya [1997] 1 KLJ 693 ; [1997] 2 KLT 310 proceeds on a basis contrary to what has been stated by the Supreme Court as above, it cannot be considered to be an authority for the proposition that any transaction entered into prior to the rendering of the decision by the Full Bench in Kerala Fisheries Corporation v. P.S. John [1997] 88 Comp Cas 104 (Ker), would not be governed by the law as declared by the Full Bench. I have to point out with respect that the decision in Kerala Agro Industries Corporation's case [1997] 1 KLJ 693 goes against the accepted principles of law and cannot therefore be considered to be an authority for the proposition said to have been enunciated in that decision as claimed by counsel. Since the decision of the Full Bench is binding on this court, it has to be accepted as the law and hence I have no hesitation in holding that the decision in Kerala Agro Industries Corporation Ltd. v. U. Gopalakrishna Kunikullaya [1997] 1 KLJ 693 ; [1997] 2 KLT 310 cannot be considered an authority for holding that the law as declared by the Full Bench in Kerala Fisheries Corporation Ltd. Vs. P.S. John and Others, will not affect transactions entered into prior to the date of the rendering of the Full Bench decision. I think that it is necessary to clarify and clearly indicate to the courts below that they are bound by the decision of the Full Bench in Kerala Fisheries Corporation v. P.S. John [1996] 1 KLT 814 ; [1997] 88 Comp Cas 104 and they are bound to apply the law declared by that Full Bench on the basis that that has always been the law, unless and until it is brought to their notice that the decision of the Full Bench has been reversed or overruled. I, therefore, reject the argument based on the decision in Kerala Agro Industries Corporation Ltd. v. U. Gopalakrishna Kunikullaya [1997] 1 KLJ 693 ; [1997] 2 KLT 310.

12. As indicated already, no fraud vitiating the proceedings under the Revenue Recovery Act was established by the plaintiff. Hence the plaintiff has not made out any case for interference with the proceedings under the Revenue Recovery

Act in terms of Section 72 of the Revenue Recovery Act. The decision of the authorities under the Act not having been shown to be amenable to interference u/s 72 of the Revenue Recovery Act, it has to be held that the plaintiff is not entitled to any relief. Only on establishing fraud as contemplated by Section 72 of the Revenue Recovery Act, the plaintiff would be entitled to relief in the suit. No such fraud having been established no relief can be granted to the plaintiff in the present suit.

13. The courts below granted the plaintiff a decree only on the basis that the bank was not entitled to invoke the Revenue Recovery Act, having obtained a decree based on the loan. On an interpretation of the concerned notification, I have held that the bank was entitled to resort to the Revenue Recovery Act. The trial court had itself found that there was no estoppel operating against the bank. In that circumstance, the decree now passed by the courts below is vitiated by substantial errors of law and requires to be interfered with by this court in second appeal.

14. I, therefore, allow this second appeal, set aside the judgments and decrees of the courts below and dismiss the suit filed by the plaintiff. Taking note of the circumstances of the case, I direct the parties to suffer their respective costs throughout.