
(1976) 01 KL CK 0013
In the High Court Of Kerala
Case No : A.S. No. 265 of 1972

State Bank of Travancore

APPELLANT

Vs

May C. George

RESPONDENT

Date of Decision : 05-01-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 11, Order 34 Rule 2
Kerala Agriculturists Debt Relief Act, 1970 — Section 2(4)

Citation : AIR 1977 Ker 8 : (1978) 1 ILR (Ker) 154

Hon'ble Judges : K. Bhaskaran, J; George Vadakkal, J

Bench : Division Bench

Advocate : K.C. John and J.B. Koshy, for the Appellant; M.V. Ibrahimkutty and Basheer, for the Respondent

Final Decision : Partly Allowed

Judgement

Bhaskaran, J.—The State Bank of Travancore, the decree-holder in the suit, is the appellant; the judgment-debtors are the Respondents. The respondents as defendants in the suit, pleaded inter alia that they were entitled to the benefits of the Kerala Agriculturists Debt Relief Act, Act XI of 1970 (for short the Act). The trial Court accepted the contention of the defendants and granted the relief as prayed for by them. What has been stated in paragraph 22 of the judgment reads as follows:

"Now we come-to the question as to the benefits of Act XI of 1970 to which the defendants are entitled. The debt is due to a banking company and it exceeds Rs. 3,000/- and so the number of half yearly instalments in which the debt shall be repaid is eight, because of the proviso (a) to Section 4(2) and the interest payable will be at 7 per cent per annum because of Section 5(2) of the Act. These are the benefits to which the defendants are entitled to under Act XI of 1970."

2. Though in the memorandum of appeal, various grounds have been raised to challenge the correctness of the decision of the trial Court that the judgment-

debtors were entitled to the benefits under the Act, in view of the provisions contained in Act XIII of 1073, the Counsel for the appellant did not press his contention relating to the applicability of the provisions of the Act to the debt contracted by the judgment-debtors. He, however, took strong objection to that portion of the decree by "which the Court below directed the judgment-debtors to pay interest only at 7% per annum instead of 12% per annum stipulated in the mortgage deed. He has also submitted that though the debt has been allowed to be paid in eight instalments, inasmuch as the judgment-debtors did not pay any instalments so far, and the period for paying the instalments is already over, they have virtually forfeited the right to pay the amount in instalments. As far as the latter/ contention is concerned, it is not necessary for us to go into the question as it is a matter which could be urged before the execution Court itself.

3. Counsel submitted that the trial Court, while granting the relief to the judgment-debtors under proviso (a) to Section 4(2) of the Act, overlooked the provisions contained towards the end of the proviso to Clause (1) of Sub-section (4) of Section 2 of the Act. The proviso to the said clause reads as follows:

"Provided that in the case of any debt exceeding three thousand rupees borrowed under a single transaction and due before the commencement of this Act to any banking company, any agriculturist debtor shall be entitled to repay such debt in eight equal half yearly instalments as provided in Sub-section (3) of Section 4, but the provisions of Section 5 shall not apply to such debt".

(emphasis supplied)

We find force in this contention. The wording in the proviso to Section 4(2)(a)(1) is unequivocal; besides a Division Bench of this Court in *Nafeesumma v. Indian Overseas Bank* 1974 KLT 853 has observed as follows:

"We might state that really the appellant here is not entitled to take advantage of the provision in Section 5(2), because it is specifically provided in Section 2(4) (1) that the provisions of Section 5 shall not be applicable to a debt exceeding three thousand rupees,"

We are therefore of the view that the Court below has gone wrong in decreeing interest only at 7% per annum u/s 5(2) of the Act, whereas under the terms of the contract, the appellant was entitled to interest at 12% per annum.

4. Counsel for the Respondents has a contention that as no element of borrowing is involved in the instant case, which arose out of a hypothecation bond executed by the prized subscribers to a Kuri, the disability under the proviso referred to above would not be applicable to the judgment-debtors. To support this contention, he has cited the Division Bench ruling of this Court in *Varkey Thomas v. Travancore Forward Bank Ltd.*, 1962 KLT 383; speaking for the Bench. Govindan Nair J. (as he then was) observed as follows:

"We think that sub-clause has no application. It has been held by a Full Bench of

the Travancore High Court in 16 TLT 143 that there is no element of borrowing in the case of a prized subscriber receiving the prize money and in executing a hypothecation bond as security for payment of the future instalments. This decision "has been followed in another case of the same High Court 1927 17 KLJ 7. We respectfully follow the above decisions and hold that Sub-clause (xi) of Clause (c) of Section 2 has no application."

We are not, however, in agreement with the contention based on the reasoning that no element of borrowing is involved in the case of a prized subscriber receiving the prize money, as, in our opinion, what the prized subscriber receives from the chit fund by executing a bond for payment of future instalments has definitely the characteristics of a loan. For this view we take, we find support in the ruling of the Full Bench of this Court in P.K. Achuthan and Another Vs. State Bank of Travancore, Calicut, Eradi J. speaking for the Bench has observed as follows:

"What actually transpires when a prized subscriber is allowed to draw the kuri amount is the grant of a loan to him from the common, fund in the hands of the foreman with the concessional facility of effecting the repayment in instalments subject to a stipulation that the said concession is liable to be withdrawn in the event of a default being committed in payment of any of the instalments. Thus, it is really a debt in praesenti but permitted to be paid by instalments, the benefit of the said facility being available to the debtor only so long as the instalments are regularly paid".

In the light of this clear ruling by the Full Bench which consisted of Govindan Nair, C. J., also, that the amount allowed to be drawn by the subscriber from the Kuri amount is a loan, with due respect, we have to hold that the observations suggesting the contra contained in 1962 KLT 383 do not hold good any longer. We are not persuaded to hold otherwise, though the Counsel for the Respondents has argued that as the observation by the Full Bench (in) P.K. Achuthan and Another Vs. State Bank of Travancore, Calicut, was made in a context different from that in which it was made by the Division Bench 1962 KLT 383, the ruling of the Full Bench would not apply to oases in which the application of debt laws comes up for consideration. We are of the view that irrespective of the context in which the observations are made, the fact remains that "what actually transpires when a prized subscriber is allowed to draw the kuri amount is the grant of a loan to him", and it cannot therefore be said that the element of borrowing is not involved in such cases. The contention of the Respondents' Counsel that the disability of not being entitled to the benefit of Section 5 on account of the debt being one exceeding Rs. 3,000/- borrowed under a single transaction and due before the commencement of the Act to a Banking Company as provided in the proviso to Section 2(4)(1) would not apply to their case because no element of borrowing is involved in the kuri transaction out of which the suit has arisen, has therefore to be rejected.

5. We are however of the opinion that the plaintiff decree-holder would be

entitled to the rate of interest as stipulated in the mortgage deed only till the date of the institution, of the suit.

6. In money suits, the general rule, as laid down in Section 34, Civil P. C., is to award interest, after the date of the institution of the suit on the adjudged principal, in the judicious discretion of the Court; it has also been the well settled practice by virtue of the special provisions contained in Rule 11, Order XXXIV, Civil P. C. to allow interest in mortgage suits on the principal adjudged at the rate payable on the principal, unless it is found to be penal, excessive or unconscionable, till the date fixed for redemption, and thereafter as fixed by the Court subject to the maximum of 6% per annum as provided in Section 34, Civil P. C. There appears to be a change in regard to the rate of interest payable in the case of mortgage suits after the date of the institution of the suit till the date of redemption on account of the amendment to Order XXXIV of the Code of Civil Procedure, 1908, brought into effect in the State of Kerala by the notification No. 84441386/70 dated 10-12-1973 published in Kerala, Gazette No. 3 dated 15-1-1974. By the said notification issued by the High Court of Kerala, Order XXXIV and Appendix D as they existed in the Code of Civil Procedure, 1908 have been substituted by the provisions provided by the amended provisions. The provisions of Order. XXXIV, Rule II, Civil P. C. in regard to interest have not been kept intact in the relevant provisions contained in Order XXXIV, as amended by the Kerala Notification. The relevant portion of Clause (a) of Rule 11, Order XXXIV, before the amendment provided as follows:--

"(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage-

(i) on the principal amount found or declared on the mortgage, at the rate payable on the principal or, where no such rate is fixed, at such rate as the Court deems reasonable"

The corresponding provision, after the amendment, is contained in Rule 2, Order XXXIV. Sub-rule (1) thereof, reads" as follows:

"In a suit for foreclosure, if the plain tiff succeeds, the Court shall pass a decree-

(a) declaring the amount due to the plaintiff on the date of such decree for-

(i) principal and interest on the mortgage"

Rule 4 provides that in a suit for sale, if the plaintiff succeeds, the Court shall pass a decree as mentioned in Clauses (a) and (b) (i) of Rule 2 (1).

7. It is significant to note that the provision regarding payment of interest upto the date of redemption has, by the amendment, undergone a substantial change inasmuch as the provision "at the rate payable on the "principal" is not retained in. the amended provision. The provision of Rule 2 of Order XXXIV, in its amended form, as is clear from Sub-rule (1) (a) (i) provides only for the interest

on the mortgage, in the place of "interest at the rate payable on the principal" as embodied in Order XXXIV before the amendment (Order XXXIV, Rule 11 (a) (i)).

8. On the question of procedure, we are inclined to hold that it is the amended procedure that has to be applied to the facts of the case. It would be wrong to assume that the absence of the words "at the rate payable on the principal" in the amended provisions is due to an accidental mistake or omission, and thereby continue to award interest on the principal adjudged in mortgage suits at the rate stipulated in the deed after the date of the institution of the suit till the date fixed for redemption. As we have already indicated, the appellant decreer-holder therefore would be entitled to interest on the principal, adjudged after the date of the institution of the suit, only at the rate of 6% per annum which is the maximum provided u/s 34, Civil, P. C.

9. Counsellor the appellant then submitted that as the amended provisions do not contemplate the parsing of a preliminary decree and a final decree, this Court may be pleased to pass a final decree itself in the matter. True it is, that the cumbersome procedure of passing two separate decrees, the preliminary and the final, has been done away with, by the amendment which provides only for the passing of a decree for foreclosure or for sale as the case may be; however, having regard being given to the fact that what we have done is only to examine the correctness of the preliminary decree passed by the Court below, we think the appropriate thing to do would be to direct the trial Court itself to pass a final decree in terms of the preliminary judgment as modified by this judgment as expeditiously as : possible, without requiring the de-cree-holder to make a formal application in that behalf.

10. The appeal is partly allowed; the preliminary decree passed by the Court below shall stand modified in so far as it relates to the interest on the principal adjudged to be at 12% at the contractual rate up to the date of the institution of the suit, and thereafter till realisation at 6% per annum; in all other respects the preliminary decree and judgment passed by the trial Court shall stand confirmed. As the appellant has partly succeeded and partly lost in the appeal, the parties will bear their respective costs in this appeal.