

(1999) 09 KL CK 0016

In the High Court Of Kerala

Case No : C.R.P. No's. 20, 86, 2249 and 2272 of 1990 C

Sukumaran

APPELLANT

Vs

Gangadharan

RESPONDENT

Date of Decision : 14-09-1999

Acts Referred:

Trusts Act, 1882 — Section 82

Citation : (1999) 2 KLJ 890 : (2000) 1 RCR(Civil) 352

Hon'ble Judges : P.K. Balasubramanyan, J;K.A. Mohamed Shafi, J

Bench : Division Bench

Advocate : P.N.K. Achan, for the Appellant; C.P. Damodharan Nayar, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Balasubramanyan, J.—These revisions are by three judgment-debtors against the common decree-holder in the three suits. The judgment-debtors are the brothers of the decree-holder. The Plaintiff, brother was employed outside the country. According to him he was sending monies to his brothers and he wanted them to purchase some properties. The brothers purchased properties in their own names and refused to give the properties to the Plaintiff-brother, when he came back to this country. The Plaintiff brother hence filed these suits for recovery of possession of the properties on the plea that the consideration for the purchases proceeded from him and he was the beneficial owner of these properties. The Defendants resisted the suits. On 31st July 1985 the suits were decreed by the trial court. Appeals were filed by the Defendants before this Court. All the appeals were dismissed by this Court holding that the Defendants, brothers were trustees of the property and Section 82 of the Indian Trusts Act applies. The decision in the appeals is reported in Narayanan v. Gangadharan 1988 (1) KLT 933 The decision in the appeal was rendered on 27th August 1987. Thus in these cases not only the suits were instituted before the coming into force of the Benami Transactions (Prohibition) Ordinance 2 of 1988 which was

followed by the Benami Transactions (Prohibition) Act of 1988 but even the appellate decrees were rendered prior to the coming into force of the Benami Ordinance.

2. The Plaintiff sought to execute these decrees. The properties were delivered over in execution though ofcourse, that fact was disputed by the Defendants. In execution, the Defendants filed applications claiming that in view of the Benami Ordinance, the properties could not be delivered and the decrees could not be executed. These objections were overruled by the executing court. C.R.P. Nos. 1586, 1587 and 1588 of 1988 were filed in this Court. There was a fourth suit filed by the Plaintiff against Anr. brother which had also reached this Court. A learned Single Judge of this Court appears to have taken the view that even though the suit was prior to the Benami Ordinance and the decree was also prior to the Benami Ordinance, the decree could not be executed in view of the Benami Ordinance. The said decision is reported in *Narayanan v. Gangadharan* 1988 (2) KLT 307 this Court therefore allowed the three revisions and remanded the matter to the executing court for fresh decision. It is brought to our notice that the decision in 1988 (2) KLT 307 is pending in appeal before the Supreme Court as Civil Appeal No. 1782 of 1989.

3. After remand by this Court, the executing court held that the property had been delivered over even before the coming into force of the Benami Ordinance and hence there was no question of applying that Ordinance or the subsequent Act to deny the decree-holder the fruits of the decree. Thus the claims of the Petitioners were rejected. It is the said rejection that is challenged in these revisions by the judgment-debtors brothers.

4. It is now clear from the decision of the Supreme Court in *R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives)*, and the subsequent decisions including the one in *Pawan Kumar Gupta v. Rochiram Nagdeo* (1994) 4. S.C.C. 243 that the Benami Ordinance and the Benami Prohibition Act are not retrospective in operation. In these cases, the suits were filed before the Ordinance, the suits were decreed before the Ordinance, the appeals were dismissed before the Ordinance and the deliveries were effected before the Ordinance. There is therefore no question of the Benami Ordinance or the Benami Act being applied to find that the decrees have become inexecutable.

5. We are also of the view that the decision in *Narayanan v. Gangadharan* 1988 (2) KLT 307 cannot be considered to be good law. In *Asserikandy Kalliani v. Kunhimadhavi Amma* 1998 (2) KLT 941 this Court has taken a different view. It is pointed out that the decision in *Asserikandy Kalliani v. Kunhimadhavi Amma* 1998 (2) KLT 941 is also that of a Single Judge only and the correctness of that decision can be considered by the Division Bench. There cannot be any doubt about that position. But on a consideration of the relevant aspects, we see no reason why we should not accept the principle laid down in *Asserikandy Kalliani v. Kunchi madhavi Amma* 1998 (2) KLT 941 especially when the Act is held to be

not retrospective. It is clear that a decree passed by a court having jurisdiction, cannot be ignored or refused to be enforced, by a court called upon to execute that decree. When the decree cannot be treated as void, the executing court is not entitled to go behind the decree and consider whether on the materials available, the decree could or could not have been passed by the court which passed it. According to us, the executing court lacks jurisdiction to enter into such an enquiry and the principle postulated in *Narayanan v. Gangadharan* 1988 (2) KLT 307 T.M. that the executing court can do so, must be held to be not sustainable on the principle that the executing court has no power to go behind the decree. In this case, the Act or even the Ordinance, was not in force when the decree was passed and when the appeal was dismissed and hence the Act or the Ordinance could not be applied retrospectively to nullify the decree or to deny execution to the decree-holder.

6. We may also notice that in the judgment in appeal in these cases reported in 1988 (1) KLT 933, this Court had further stated that the judgment-debtors are trustees for their brother the decree-holder. Once they are held to be trustees, even going by the Benami Act the said Act cannot have application. The Defendants are disentitled to plead a breach of trust to resist the execution of the decree. On that principle also the judgment-debtors are not entitled to relief.

7. In the light of what we have stated above, we answer the reference made to us by holding that the decision in *Narayanan v. Gangadharan* 1988 (2) KLT 307 T.M does not lay down the correct law and in any event, the ratio therein cannot be applied in this case where the decree itself was passed prior to the coming into force of the Benami Ordinance, Ordinance 2 of 1988. We are also in agreement with the view of the executing court that the properties having been delivered over even before the Ordinance came into force, the judgment-debtors cannot put forward that Ordinance to raise claims based on it, in execution.

Thus on a consideration of the relevant aspects we see no reason to interfere with the orders of the executing court. We dismiss these Civil Revision Petitions. We make no order as to costs.