

(2024) 11 KL CK 0090
In the High Court Of Kerala
Case No : Original Petition (C) No.177 Of 2023

T. K. Makkar

APPELLANT

Vs

Meeravu Haji

RESPONDENT

Date of Decision : 05-11-2024

Acts Referred:

Code of Civil Procedure, 1908 — Section 37, 37(b), 38, 146, Order 21 Rule 10
Family Courts Act, 1984 — Section 8
Waqf Act, 1995 — Section 7(5), 63, 83, 83(7), 83(8), 85
Administrative Tribunals Act, 1985 — Section 29
Recovery Of Debts And Bankruptcy Act, 1993 — Section 31

Citation : (2024) 11 KL CK 0090

Hon'ble Judges : Dr. Kauser Edappagath, J

Bench : Single Bench

Advocate : Vaisakhi V., Babu Karukapadath, M.A.Vaheeda Babu, P.U.Vinod Kumar, Arya Raghunath, T.M.Muhammed Musthaq, Ajwin P Lalson, Karukapadath Wazim Babu, P.Lakshmi, Aysha E.M., Dennis Biju, Abuasil A.K., Shawn Johnson, Manu Krishna S.K., P.K.Abdul Rahiman, M.A. Ahammad Saheer, T.M.Abdul Latheef, M.M.Aliyar, E.A.Haris, Muhammed Yasil, Nithin A.R., Jamsheed Hafiz

Final Decision : Allowed

Judgement

Dr. Kauser Edappagath, J

1. More than one and a half centuries ago, the Privy Council Raj Durbhunga v. Maharajah Coomar Ramaput Sing (1872) SCC OnLine PC 16 observed that - "the difficulties of a litigant in India begin when he has obtained a decree". This case is a live illustration of the said observation. A decree obtained in the year 2000, in a suit instituted in the year 1996, still remains unexecuted – without even settling the issue regarding the forum to execute it.

2. The petitioners are decree holders 7 to 12, 14 and 15 in EP No.23/2019 in OS No.403/1996 on the file of the Munsiff's Court, Kothamangalam (for short, the Executing Court). The other decree holders, except the 13th decree-holder, are no more. The 13th decree holder has been arrayed as respondent No.15 as he is

out of station. The respondent Nos.1 to 13 are the judgment debtors 3, 4, 6 to 8 and 10 to 17. The other judgment debtors are no more.

3. The suit was one for declaration, permanent prohibitory injunction and recovery of possession. The subject matter of the suit was a mosque known as Kuttulanji Muslim Mosque, established by the ancestors of the petitioners/plaintiffs. It is admittedly waqf property registered with the Kerala State Waqf Board. According to the plaintiffs, the management/ administration of the mosque has always been with their family named Thottathikkulam family, which dedicated the property, with one of its members as Mutawalli. In the meanwhile, certain persons in the locality unlawfully formed a committee purported to be for the administration of the mosque, and later, they attempted to assert the right of administration over it, which led to the father of petitioners 1 and 2 and some other members of the Thottathikkulam family instituting the suit. The defendants 2 to 9 were members of the said committee. The reliefs sought in the plaint fall within the ambit of Section 85 of the Waqf Act, 1995 (for short, 'the Waqf Act'). At the time of the institution of the suit, the Waqf Tribunal was not constituted in the State of Kerala. However, during the pendency of the suit, it was constituted. The defendants took a contention in the suit that the suit was not maintainable before the Civil Court in view of the bar under Section 85 of the Waqf Act. The said contention was overturned by the trial Court and the suit was decreed as per Ext.P1 judgment. It was declared that members of the plaintiffs' family are entitled to manage the affairs of the mosque and the Mutawalliship as per Ext.A5 Udampady. The defendants 2 to 9 were restrained by a permanent prohibitory injunction from making any decision which will adversely affect the rights of the plaintiffs' family. The plaintiffs were also allowed to recover possession of the mosque from defendants 2 to 9. Against Ext.P1 decree and judgment, some of the defendants preferred appeal as AS No.87/2000 before the Appellate Court. The appeal was dismissed as per Ext.P2 judgment. The decree has become final. The judgment and decree in the suit, as confirmed in the appeal, has found the right of administration of the mosque and the properties on the petitioners' family and has permitted the recovery of the possession of the mosque. The petitioners and other decree holders filed an execution petition before the Munsiff's Court, Muvattupuzha, for execution, which was transferred to the Executing Court and renumbered as EP No.23/2019.

4. In the meanwhile, the Kerala State Waqf Board appointed Adv. Hazeem Khan, 14th respondent herein, as interim Mutawalli of the mosque, replacing the committee as per Ext.P4 order dated 17/5/2022 passed by it. As the committee was replaced with interim Mutawalli, the petitioners filed EA No.2/2022 (Ext.P5) to implead him as the additional 16th respondent in the Execution Petition. The Executing Court, as per Ext.P6 order, dismissed Ext. P5 impleading petition, finding that interim Mutawalli is not a necessary party to the execution petition.

5. In the execution petition, the judgment debtors mainly took up two contentions: (i) the decree is inexecutable inasmuch as it was passed by a Court

which did not have jurisdiction, (ii) the execution petition is not maintainable before the civil Court/the Executing Court. Though the Executing Court repelled the challenge against the executability of the decree, it took the view that as per Section 37(b) of the Civil Procedure Code, 1908 (for short, 'the CPC'), it has no jurisdiction to execute the decree, and the remedy open to the petitioners is to file an execution petition before the Waqf Tribunal. Accordingly, Ext.P7 order was passed, returning the execution petition to be filed before the proper Court. The Original Petition has been filed challenging Exts.P6 and P7.

6. I have heard Sri. Babu Karukapadath, the learned counsel for the petitioners, Sri.M.. A. Ahammad Saheer, the learned counsel for respondents 1 to 5, Sri.Jamsheed Hafiz, the learned counsel for respondent No.6, and Sri.Abdul Latheef, the learned counsel for respondent No.13.

7. The petitioners filed the suit in the year 1996 and obtained Ext.P1 judgment in their favour in the year 2000 which was confirmed by the appellate Court as per Ext.P2 judgment in 2016. In the suit and in the appeal, the judgment debtors/defendants had taken a contention that the trial Court had no jurisdiction to try the suit. However, the said contention was turned down by both the trial Court and the appellate Court. The Executing Court, also in Ext.P7, sustained the said finding. The learned counsel for respondent No.13 submitted that Ext.P1 judgment is a nullity inasmuch as it was passed by a Court which had no inherent jurisdiction to entertain and try the suit and as such, its executability can be raised in the execution petition. True, the competency of the Court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. It is well settled that the validity of a decree can be challenged in execution proceedings on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction *Hira Lal Patni v. Sri. Kali Nath* AIR 1962 SC 199; *Sushil Kumar Mehta v. Gobind Ram Bohra* (1990) 1 SCC 193. It is equally settled that the Executing Court cannot go into the roving enquiry to find out whether the decree passed by the Court which passed it was one without jurisdiction. The want of jurisdiction must be apparent. Unless it is a case of total want of jurisdiction in the trial Court to pass a decree, the judgment debtor will be clearly barred by res judicata from raising the contention of any illegality in the decree in the execution proceedings *Ali Haji v. Alima* 1996 (2) KLT 997.

8. The question that emerges is whether the civil Court/trial Court lacked inherent jurisdiction to entertain and try the suit and the decree passed by it is a nullity. The case of the judgment debtors is that though the Waqf Tribunal was not constituted in Kerala at the time of the institution of the suit to deal with the dispute regarding the waqf properties, it was constituted by the time Ext.P1 judgment was delivered, and hence, going by Section 85 of the Waqf Act, the trial Court did not have jurisdiction to try and dispose of the suit.

9. Section 83 of the Waqf Act provides for the constitution of the Tribunals to

adjudicate upon the disputes relating to Waqfs and its properties. Section 85 bars the jurisdiction of the Civil Courts on such matters. Admittedly, the dispute involved in the suit is with respect to waqf property, which falls within the jurisdiction of the Waqf Tribunal. However, as stated already, at the time of the institution of the suit, the Waqf Tribunal was not constituted. Though the Act came into force on 1/1/1996 and the Act provided for the constitution of the Tribunal, the Tribunal was constituted by the State Government by Government Order dated 8/12/1988. The suit was filed after the commencement of the Act, but before the constitution of the Tribunal. To attract Section 85, there has to be a Tribunal. Only when the Tribunal is constituted does the bar under Section 85 comes into play. Thus, the institution of the suit was valid. Then, the question is, what is the position of the suits or other proceedings instituted during the interregnum between the commencement of the Act and the constitution of the Tribunal? The learned counsel for the 13th respondent submitted that in view of the express bar created by Section 85 of the Act, the Civil Court/Trial Court could not have proceeded with the matter because its jurisdiction had been taken away by that provision, and, therefore, the decree passed is a nullity. I am unable to subscribe to the said submission for the following reasons.

10. There is no provision in the Waqf Act to transfer a validly instituted suit to the Waqf Tribunal after the constitution of the Waqf Tribunal. In several Central and State enactments wherein an exclusive Tribunal is created for the purpose of dealing with the specified matters, provision is made for the transfer of pending cases, for example, Section 29 of the Administrative Tribunals Act, Section 8 of the Family Courts Act, Section 31 of Recovery of Debts due to the Banks and Financial Institutions Act, etc. But no such provision is there in the Waqf Act. On the other hand, Section 7(5) of the Waqf Act says that the Tribunal shall not have jurisdiction to determine any matter which is the subject matter of any suit or proceeding instituted or commenced in a civil suit under sub-section (1) of Section 6 before the commencement of the Act or which is the subject matter of any appeal from the decree passed before such commencement. The said provision makes it clear that if any suit has been instituted in any civil court prior to coming into force of the Waqf Act, then the Tribunal will have no jurisdiction to decide such matter, and it will be continued and concluded as if the Act has not come into force. Though the jurisdiction of the Tribunal is ousted in respect of the suits instituted prior to the commencement of the Act, the principles embodied in Section 7(5) could be applied to suits instituted before the constitution of the Tribunal as well. The fact that the provision for transfer of cases from the Civil Court to the Waqf Tribunal is not provided for in the Act is a pointer to the legislative intention that the suits filed earlier to the constitution of the Tribunal shall continue to be dealt with by the Civil Court. *P.Rama Rao & Others v. High Court of A.P.* (2000 (1) ALT 210). While dealing with the jurisdiction of the Family Court under Section 7, a Single Bench of this court in *Ali Haji (supra)* has held that Family Court becomes established not when a notification constituting the Family Court was published, but only when a notification is published naming the

Judge as the first Presiding Officer of that court and till then the civil court has jurisdiction and the decree passed is not one without jurisdiction. In the absence of a provision to transfer the pending suit to the Waqf Tribunal, the civil court has jurisdiction to adjudicate the pending suit despite the bar under Section 85. The bar of jurisdiction of Civil Courts under Section 85 of the Waqf Act would be effective only with effect from the constitution of the Waqf Tribunal; till such time, the jurisdiction of the Civil Court would continue as a rightful forum for the adjudication of the Waqf disputes. Since Ext.P1 judgment was passed by a court which was having jurisdiction, the finding on jurisdiction in Exts.P1 and P2 will operate as res judicata in the execution proceedings. Thus, the contention of the judgment debtors that the decree is not executable is only to be rejected.

11. In the impugned Ext. P7 order, the Executing Court found that it did not have jurisdiction to entertain the execution petition for the execution of the decree passed by it in view of the constitution of the Waqf Tribunal at the time the execution petition was filed. It appears that while arriving at such a finding, the Executing Court wrongly interpreted Section 37(b) of CPC and failed to take note of Section 38 and Order XXI Rule 10 of CPC.

12. Section 38 of CPC enacts that a decree may be executed either (a) by the Court which passed it; or (b) by the Court to which it is sent for execution. Order XXI Rule 10 provides that the holder of a decree shall apply to the Court which passed the decree to execute it. Section 37 defines the expression "Court which passed a decree". It reads thus:

"37. Definition of Court which passed a decree.

The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, 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.

Explanation.-- The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court; but, in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit."

Section 37, which defines the expression "Court which passed a decree", is inclusive and enlarges the scope of the said expression with the object of giving

greater facilities to a decree-holder in relation to the fruits of the decree passed in his favour. A reading of sub-clause (b) of Section 37 makes it clear that where the court of first instance has ceased to exist, the only court that can execute the decree is the Court which, at the time of making an application for execution of the decree would have jurisdiction to try the suit. Where the court of first instance has ceased to have jurisdiction to execute the decree passed by it, the same can be executed either by the Court of first instance which actually passed the decree or by the Court which at the time of making the execution application would have jurisdiction to entertain the suit in which the decree was passed. The question whether the Court of first instance, which ceased to have jurisdiction to execute the decree passed by it, continues to have jurisdiction to entertain an application for execution came up for consideration before the Supreme Court in *Merla Ramanna v. Nallaparaju* (AIR 1956 SC 87). It was held that the Court which passed the decree does not lose its jurisdiction to execute it by reason of the subject matter thereof being transferred subsequently to the jurisdiction of another Court. Thus, the court which has passed the decree is undoubtedly competent to execute the decree. Once it is established that the Court has jurisdiction to pass the decree, it does not cease to have jurisdiction to execute it merely because there was a subsequent alteration of the jurisdiction of the Court. The Court which passed the decree does not become *functus officio* by the mere fact of ceasing to have jurisdiction after passing the decree.

13. That apart, the word used in Section 37(b) is "ceased to have jurisdiction to execute it", and not "ceased to have jurisdiction to pass the decree". Even after the constitution of the Waqf Tribunal, the civil Court did not cease to have jurisdiction to execute the decree passed by the civil Court in respect of a waqf dispute or to execute a decree passed by the Waqf Tribunal. There is no express provision in the Waqf Act that the Waqf Tribunal is the only Forum to execute the decree relating to Waqf disputes. Section 83(7) of the Waqf Act says that the decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil court. Sub-section (8) of section 83 says that the execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in accordance with the provisions of CPC. Thus, even after the constitution of the Tribunal under the Waqf Act, the civil Court continues to have jurisdiction to execute a decree passed by the Waqf Tribunal. For these reasons, I hold that there is no bar for the civil Court to execute a decree passed by it relating to a waqf dispute even after the constitution of the Waqf Tribunal. The finding of the Executing Court in Ext.P7 to the contrary that by the establishment of the Waqf Tribunal, it lacks jurisdiction to execute the decree cannot be sustained.

14. During the pendency of the execution petition, respondent No.6, the Kerala State Waqf Board, appointed the 14th respondent as an interim Mutawalli of the mosque as per Ext.P4 order passed by it. A reading of Ext P4 would show that the Waqf Board found that the committee which was in the administration of the waqf was not entitled to administrate the waqf, and accordingly, it appointed the

14th respondent as interim Mutawalli of the mosque to administer it in the exercise of the power under Section 63 of the Waqf Act. The appointment of the 14th respondent as interim Mutawalli should be considered as a substitution of the management of the mosque from the judgment debtors to him. So, the 14th respondent is stepping into the shoes of the judgment debtors/committee.

15. Section 146 of CPC declares that where any proceeding may be taken or application made by or against any person under the Code, then the proceeding may be taken, or the application may be made by or against any person claiming under him. The primary object of introducing Section 146 of CPC is to facilitate the exercise of rights by persons in whom they come to be vested by assignment, creation, devolution or otherwise. The provisions of Section 146 of CPC apply to execution proceedings as well. A person claiming under a party to a litigation may be one who has either succeeded to the position of the latter in the litigation or has acquired from him, subsequent to the commencement of litigation, interest in the subject matter. Such interest may be either by an act of parties or by operation of law. Thus, a person claiming under the judgment debtor is entitled to defend the execution proceedings. The 14th respondent, who has been appointed as interim Mutawalli to administer the mosque, replacing the existing committee, no doubt, is a necessary party to the proceedings. The Executing Court went wrong in dismissing Ext. P5 application to implead the 14th respondent.

16. In the wake of the above findings, Exts.P6 and P7 are not sustainable, and they are, accordingly, set aside. Ext.P5 stands allowed. The Executing Court is hereby directed to proceed with the execution and complete it, as expeditiously as possible, at any rate, within a period of three months from the date of receipt of a copy of this judgment.

Original Petition is allowed as above.