
(2010) 11 KL CK 0070
In the High Court Of Kerala
Case No : C.R.P. No. 498 of 2010

Vicar, Jerusalem, Marthoma Church

APPELLANT

Vs

Mamman Thomas and Others

RESPONDENT

Date of Decision : 04-11-2010

Acts Referred:

Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11, 11(11)
Kerala Education Act, 1958 — Section 6

Citation : (2011) 1 ILR (Ker) 142 : (2011) 1 RCR(Rent) 119

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : S. Sreekumar, P. Martin Jose, P. Prijith and S. Vaidyanathan, for the Appellant; V. Chitambaresh and A. Abdul Kharim and M. Sreekumar, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Satheesachandran, J.—The revision is directed against the order passed by the execution court, 1st Additional Munsiff Court, Thiruvananthapuram, in E.P. No. 379 of 2009 in O.S. No. 486 of 2005 negating the challenge raised by the revision Petitioner with another, the judgment-debtors, impeaching the executability of a decree for recovery of possession. Revision Petitioner is the 2nd judgment-debtor in the above execution petition. The decree executed by Respondents 1 to 4/the decree-holders, was one granting recovery of possession over a property comprising a building, declaring their title over the same. Executability of that decree was challenged by the judgment-debtors, the revision Petitioner and the 5th Respondent herein, contending that the building covered by the subject-matter fall within the ambit of the Kerala Buildings (Lease and Rent Control) Act (Act 2 of 1965) and they are liable to be evicted only on satisfaction of any of the grounds u/s 11 of the above Act, and no eviction is allowable on the basis of the decree for recovery of possession passed by the civil court. An objection was also raised by them that since a School is being conducted in the building involved, the judgment-debtors are protected from

eviction u/s 11(11) of the above Act. Yet another ground was canvassed to resist the execution contending that Section 6 of the Kerala Education Act prohibits alienation of the property of an educational institution including transfer of possession and, thus, the decree is a nullity and inexecutable. The execution court, repelling all the aforesaid objections raised by the judgment-debtors, ordered for delivery of the property to the decree-holders under the impugned order.

2. Notice given, the Respondents 1 to 4/the decree-holders have entered appearance. A counter-affidavit was filed by the 1st Respondent traversing the various grounds raised by the revision Petitioners/judgment-debtors to impeach the order of the execution court.

3. I heard the counsel on both sides. Before advertng to the submissions made by the counsel on both sides over the propriety, correctness and legality of the order of the execution court, the undisputed facts in the case deserve to be taken note of. The decree schedule property, having an extent of 13.5 cents, situated in Kawdiar, Village of Thiruvananthapuram Corporation comprise of a building, and, in which, an aided school is being conducted by the judgment-debtors, obtaining a lease over the property from the predecessor of the decree-holders. That registered lease deed executed in the year 1948 was exhibited as A-5 on the trial side. The demand for surrender and vacant possession of the leasehold not heeded to by the lessees/judgment-debtors, and resisting it even by disputing the title of the lessors, the suit was instituted for declaration of title and recovery of possession. Though the judgment-debtors contended that even before the execution of A-5 lease deed, they had been conducting the School and the deed was executed only for getting recognition for the School from the State Government, it has been concurrently held by all the courts that the rights and liabilities of the parties are governed by A-5 lease deed. After the dismissal of the second appeal filed by the Defendants/judgment-debtors, they pursued the challenges filing a SLP before the Apex Court, and that was also turned down negating all their challenges against the decree granted in favour of the Plaintiffs/decreed-holders. That decree for recovery of possession when proceeded with in execution, was resisted with the contentions as aforesaid. The objection of the judgment-debtors to the executability of the decree having been turned down by the execution court, one among the judgment-debtors/the 2nd judgment-debtor has filed this revision.

4. The learned Counsel for the revision Petitioner relying on Appukuttan v. Vasu 1978 KLT 776, M/s. East India Corporation Ltd. Vs. Shree Meenakshi Mills Ltd., , Mariyapanassari v. Amaravathy Ammal 1995 (1) K.L.J. 33 and Kunhibi, P.P. and Ors. v. Sherin, P.V. ILR 2010 Ker 933 contended that the jurisdiction of the civil Court in matters of eviction of a tenant from a building covered by the Rent Control Act is statutorily interdicted, and except to the limited extent provided under the Statute entitling the landlord to sue for eviction of the tenant in a civil court, and that too only on satisfaction of the conditions specified, under a

decree of civil court eviction of a tenant from the building covered by such Act is inexecutable. The Rent Control Act is a complete Code with the Tribunals constituted thereunder conferred with authority to determine the special rights and liabilities created by the Statute in conformity of the judicial principles of equity and fair play, and more so, with special jurisdiction to pass orders of eviction, but, only on satisfaction of the grounds specifically provided, and as such, the jurisdiction of a civil court to order eviction of a tenant from a building covered by the Rent Control Act is barred and any decree passed ordering such eviction is a nullity, is the submission of the counsel. Placing reliance on Balvant N. Viswamitra and Others Vs. Yadav Sadashiv Mule (dead) through Lrs. and Others, , it is contended that a defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order, and where a decree of eviction had been passed by a civil court repugnant to the provisions covered by the Rent Control Act, to which the building covered under the decree is applicable, it is a case of passing of a decree by a court which lacked inherent jurisdiction to do so, and such a decree or order passed by such court would be without jurisdiction, non est and void ab initio. Validity of such a decree or order, it is submitted by the counsel, can be challenged at any stage, even in execution or collateral proceedings. So much so, the judgment-debtors have not raised the contention on the trial side that they are insulated from eviction from the building in the subject-matter, the decree schedule property, by the protective shield under the Kerala Buildings (Lease and Rent Control) Act, (Act 2 of 1965), in no way interdicts them from challenging the inexecutability of the decree which had been passed by the civil court without jurisdiction and in violation of the statutory interdictions covered by the Rent Control Act, according to the counsel. The execution court went wrong in holding that the challenge against the executability of the decree canvassed by the judgment-debtors is barred by constructive res judicata for the reason that it has not been raised before the trial side, contends the counsel. Where the decree is void and non est, as the civil court lacked inherent jurisdiction to pass the decree of eviction, the principles of constructive res judicata cannot be pressed into service and have no application at all as the challenge of lack of jurisdiction strikes at the root of the matter and it can be set up at any stage of the proceedings, or in collateral proceedings, is the further submission of the counsel.

5. Per contra, the learned Counsel appearing for the Respondents/decreed-holders contended that the decree of recovery of possession was ordered by the civil court in respect of the subject-matter covered by the lease involving land and building, and over such a composite lease, the Rent Control Court has no jurisdiction. 13.5 cents of land with the building, wherein a School was conducted, was demised on lease by a registered lease deed (A-5), and it was not a case of building alone, and at no stage on the trial side, the judgment-debtors/Defendants had any contention that the lease involved in the case fall within the ambit of the Act 2 of 1965, according to the counsel. When such be the case, the contention raised before the execution court to challenge the

executability of the decree that the lease is covered by the Rent Control Act, and so much so, eviction can be ordered only on grounds stated under the provisions of that Act, according to the counsel is barred by the principles of *res judicata* and *estoppel*. Reliance is placed on *K.C.P.K.C.V. & Co. v. Venkitakrishnan and Ors.* 1998 (1) K.L.J. 581 in support of the proposition canvassed by the counsel. The learned Counsel relying on *Century Textiles Industries Ltd. Vs. Deepak Jain and Another*, contended that the execution court cannot go behind the decree and it must take the decree according to its tenor, and has no jurisdiction to widen its scope and is required to execute the decree as made. In the present case, where the decree for recovery of possession had been challenged upto the Apex Court by the judgment-debtors/Defendants, without raising any challenge as to inherent lack of jurisdiction by the civil court to pass the decree in respect of a lease over the subject-matter, which is not of a building alone, but of both land and building, according to the counsel, it was not open to the judgment-debtors to raise that challenge in execution. When the invalidity of a decree is sought to be raised before the execution court, it should be apparent on the face of the record, and the executing court cannot conduct a roving enquiry into the defect of jurisdiction canvassed, is the further submission of the counsel relying on *Vettimoodu Milk Producers Co-op. Society Ltd. and Ors. v. Catholic Syrian Bank Ltd.* 1994 K.H.C. 267 and *Rafique Bibi (D) by Lrs. Vs. Sayed Waliuddin (D) by Lrs. and Others*, . Lastly, stressing upon that A-5 registered lease deed over the subject-matter was a composite lease of land and building, and having rightly found so, the decree granted to the decree-holders on the basis of their title, with no challenge raised by the judgment-debtors that the lease related to building alone and, thus, they are liable to be evicted only on grounds under the Rent Control Act, the objections canvassed to resist the execution of the decree is barred by the principles of *res judicata* and *estoppel*. Objections against executability of the decree have been raised by the judgment-debtors, according to the counsel, only to protract the litigation and, thereby, deny the decree-holders from enjoying the fruits of the decree confirmed even by the Apex Court negating all challenges raised thereto by the Defendants/judgment-debtors.

6. Subject-matter covered by the suit giving rise to the decree for recovery of possession is 13.5 cents of land comprising a building, wherein a School is being conducted by the judgment-debtors. A-5 registered lease deed was executed only for enabling the judgment-debtors to get recognition from the State Government, the contention raised by them to resist the recovery of possession had been negated, and it has been held by all the courts that their rights as lessees are governed by the terms of that deed and that alone. A copy of the judgment rendered in the second appeal R.S.A. No. 1158 of 2009 and also copy of A-5 lease deed had been handed over to me for perusal by the learned Counsel for the decree-holders. A-5 shows that it is a composite lease of land and building and not of building alone. When the lease is of land and building, and at no stage before the passing of the decree any plea was canvassed by the judgment-debtors that they are insulated from eviction under the provisions of

the Rent Control Act, is it open to the judgment-debtors to resist the execution of the decree contending that the civil court lacked inherent jurisdiction as the building covered by the lease fall within the area covered by the Rent Control Act, is the short question emerging for consideration in the case. In the context, it is appropriate to understand what is void and how far a decree can be challenged before the execution court as void and nullity. The Apex Court in Rafique Bibi's case (cited supra) has held thus: "A decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court for passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail". Dilating further, the Apex Court in the above decision, held that two things must be clearly borne in mind when such a plea challenging the executability of the decree is raised as a nullity. Firstly, the court will invalidate an order only if a right remedy is sought by the right person in the right proceedings and circumstances. Secondly, the order of a superior court must always be obeyed no matter what flaws it may be thought to contain. Of course in a case where inherent lack of jurisdiction is patent on the face of the record, it will be open to the execution court to hold that the decree confirmed by the superior court is a nullity and void, but, in other cases, it is to take note that a distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable, and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. In the case of a decree suffering from illegality or irregularity of procedure, it cannot be termed inexecutable by the executing court; the remedy of the aggrieved person by such a decree is to have it set aside by taking appropriate legal proceedings or challenging before the superior court, failing which he must obey the command of the decree. The Apex Court in Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, has held that in the case of a decree made by a court which has no inherent jurisdiction an objection as to its validity may be raised before the execution court, provided, such objection appears on the face of the record. However, where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and it can be determined only examining the questions raised and decided at the trial or which could have been raised but not done, the executing court will have no jurisdiction entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. Though the decree granted in favour of the decree-holders, which had been challenged upto the Apex Court filing a Special Leave Petition, the judgment-debtors had no case whatsoever that they are insulated from eviction by the provisions of the Rent Control Act, and the civil court has no jurisdiction to pass the decree for recovery of possession. No doubt, the plea, which is sought to be urged in the execution proceedings was available to the judgment-debtors/Defendants when they challenged the decree before the first

appellate court, the High Court and also the Apex Court. Such a plea which was not taken before the passing of the decree cannot be allowed to be urged during the execution proceedings where such an objection as to lack of inherent jurisdiction of the court which passed the decree is not apparent on the face of the record, but, its determination warrant scrutiny of examination of the questions raised and decided at the trial between the parties. I find no reference to the decisions cited by the counsel on both sides with regard to a challenge before the execution court setting up a plea of lack of inherent jurisdiction of the court which passed the decree to contend that the decree is void and nullity, require to be examined in the given facts of the case. Where the subject-matter in the suit is of land and building, both covered by a registered lease deed, and the title of the lessor had been questioned by the lessee leaving him with no remedy but to sue for recovery of possession, after terminating the lease, and a decree thereof had been passed in favour of the title holder, there is no substance in the challenge raised before the execution court that the suit before the civil court for recovery of possession was barred. It is too late in the day for the judgment-debtors to raise a plea that A-5 registered lease deed, the recitals of which clearly demonstrate that it is a composite lease of land and building, pertains to building in the property alone, and as such, the decree passed not in consonance with the provisions of the Rent Control Act is nullity and inexecutable. Whatever challenge thereof if at all available should have been raised on the trial side. What is stated by the Apex Court in Rafique Bibi's case (cited supra) that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances, apply with full force to the facts of the case.

7. Though some other grounds had also been canvassed in the revision that there is a total embargo from evicting an educational institution u/s 11(11)(ii) of the Kerala Buildings (Lease and Rent Control) Act, 1965, and Section 6 of the Kerala Education Act, prohibits alienation of the property of an education institution including transfer of possession, in fairness, it has to be stated such grounds have not been pressed into service. The learned Counsel for the decree-holders submitted that protection covered by Section 11(11) (ii) of the Kerala Buildings (Lease and Rent Control) Act, 1965, is applicable to an educational institution only if it was an aided institution when the lease commenced, and in the present case, even the judgment-debtors have no case that it was a recognised Government aided institution when A-5 lease deed was executed in 1948. That question though raised in the revision does not require to be examined as the order of the execution court assailed on such a ground as well has not been canvassed.

8. The learned Counsel for the decree-holders inviting reference to the copy of the judgment rendered by this Court in the second appeal submitted that a request had been made at the time of hearing of the appeal for six months' time to vacate the suit property by the Appellants (judgment-debtors) since they are running an educational institution in the suit property. This Court, after

ascertaining the stand of the decree-holders from their counsel, who were prepared to grant such extension subject to an undertaking, while dismissing the appeal confirming the decree for recovery of possession passed concurrently by the two courts below granted the Appellants/judgment-debtors six months" time to vacate the suit property subject to furnishing of an undertaking before the trial court to comply with the terms and conditions fixed as to payment of arrears of rent, surrender etc. When the decree passed by this Court in second appeal was challenged by way of a Special Leave Petition, dismissing that petition, the Apex Court also granted three months" time to vacate and handover possession subject to the filing of an undertaking, within the time fixed, before the court below. Such extension of time was applied for before both the courts above by the Defendants/judgment-debtors is highlighted by the counsel for the decree-holders to contend that the objection now raised challenging the executability of the decree evidences a clear case of sheer contempt of the orders of the superior courts. However, the learned Counsel for the Respondents submitted that though there were orders by this Court and also the Apex Court in the Second appeal and SLP respectively, with regard to the period of time for surrender, no undertaking was given as ordered to bind themselves to have such extension for continuance of possession an enjoyment of the suit property and as such, they have not violated any orders of the court. Whether the judgment-debtors are liable for contempt or not for any violation is not a matter which can be gone into by this Court in the present revision, and as such, I refrain from commenting on the rival submissions made by the counsel with respect to that aspect. However, it is evident from the copy of the judgment rendered in the second appeal that there was in fact a request from the counsel for the Appellants seeking six months" time to vacate the suit property on the plea that the Appellants are running an educational institution. It was under those circumstances, after ascertaining the stand of the decree-holders/Plaintiffs, this Court had granted such extension subject to an undertaking and compliance of such other conditions imposed while disposing of the second appeal confirming the decrees of the courts below. The fact that no such undertaking was given as directed by the court, does not absolve the Appellants/judgment-debtors from blame when such an order was passed on their request canvassed setting forth the ground of continuance of the educational institution in the suit property to have the indulgence of this Court for such extension of time to surrender vacant possession. What transpired later would indicate the Appellants had no intention to surrender and the request for such extension made was made, to say the least, without any bona fides. Nothing more required to be stated thereof.

9. The challenge raised against the executability of the decree contending that it is void and inexecutable is devoid of any merit. Considering the facts and circumstances and the challenge to the execution of the decree despite seeking extension of time to surrender from this Court previously, I find necessarily call for mulcting the Petitioner with costs. The revision is dismissed with costs of the Respondents.