(1970) 10 KL CK 0027

High Court Of Kerala

Case No: S.A. No. 1160 of 1967

Ammu Amma		APPELLANT
	Vs	
Appu Menon		RESPONDENT

Date of Decision: Oct. 23, 1970

Acts Referred:

- Transfer of Property Act, 1882 - Section 105

Citation: (1971) KLJ 83

Hon'ble Judges: P. Subramonian Poti, J

Bench: Single Bench

Advocate: K. Raghavan Nair, for the Appellant; A.P. Chandrasekharan, for the Respondent

Final Decision: Dismissed

Judgement

P. Subramonian Poti, J.

The interesting question that is raised in this second appeal is whether this Court should go into the merits of a question which was taken as conceded by counsel in the court below on the ground that such concession was on a question of law and therefore will not be binding on the party. In a suit for redemption the decree-holder obtained a decree for arrears of purappad and costs. He executed the decree for redemption and obtained delivery of the property. The money part of the decree remains to be realised. For recovery of this he filed an execution petition, whereupon, a plea that such execution was barred by limitation was set up by the 1st defendant. The execution would be so barred if the debt which is sought to be recovered is not one falling within the scope of the provisions of the Kerala Agriculturist Debt Relief Act, 1958 (hereinafter referred to as the Act). If the debt comes within the scope of that Act the decree could not have been put into execution during the period when the judgment-debtor could have availed of the benefits of payment in instalments under that Act. It is agreed that if the debt comes within the scope of the Act, then there would be no limitation. If, on the other hand, that Act would not apply then execution would be barred by limitation. The

decree-holder, in the execution petition, did not mention his case that Act 31 of 1958 would apply to the debt in question and therefore limitation is saved. Provisions of Act 1 of 1957 and Act 4 of 1961 were referred to in the execution petition as saving the petition from limitation. It is now agreed that it is a mistake and what ought to have been urged for the purpose saving limitation was Act 31 of 1958. If so urged, necessarily it would have had to be considered and from the judgment of the court below it would appear that the appellant was allowed to urge it. The execution court had held that the execution was barred. The appellate court, noticing the plea that, if the debt be one coming within the scope of Act 31 of 1958, there was no limitation, considered the applicability of the Act, but it was not called upon to go the merits of that question because, it would appear from the judgment that counsel on both sides agreed in submitting that the decree debt in the instant case was one to which Act 31 of 1958 applied. In view of this admission by the counsel the court found that there was no limitation. What is challenged in this appeal is that the concession made by the counsel was on a question of law and therefore irrespective of any such concession the party is entitled to challenge the finding I and, if allowed to do so, it must be found here on the merits that execution is barred since the debt does not come within the scope of the Kerala Agriculturists Debt Relief Act, 1958. A Full Bench decision of this Court had considered the question of authority of the counsel to enter into compromise and confess judgment on behalf of his client. That was in Souri Nayakam v. A.N. Menon (1968 KLT 1) 1968 K.L.J. 62, which by a majority held that counsel had authority to make the endorsement to compromise an action or confess judgment. That was a case where a suit for realisation of arrears of rent was resisted by the defendant denying the oral lease set up in the plaint. The defendant in that suit also contended that the rate of rent alleged was not true and that arrears of rent up to a particular period had been discharged. It appears that, later, the counsel for the defendant endorsed on the back of the plaint that the suit may be decreed as prayed for, and on the basis of that endorsement the court passed a decree. The defendant thereafter filed an application for setting aside the decree contending that the authority of counsel, just as authority of an agent, did not extend to acts beyond the terms embodied in the document conferring the authority. The plea that such authority had not been conferred did not find favour with the majority. That was because the Court was of the view that in the case of a counsel the Court was dealing with a profession where well-known rules had crystallised through usage. Such usage was found to be on a par with usage in trade where such usage becomes an additional term of the contract, so long as the term is not excluded by general law or by contract to the contrary. What I have to consider in this case is whether the Full Bench may be taken to have said that a concession by counsel whether on a question of law or on a question of fact is binding upon the party.

2. As I just now said, the facts of the case before the Full Bench would indicate that the question before Their Lordships was not whether a concession could be made

on a question of law or on a question of fact. The case before the Court was one of authority for confession of judgment. The only question that was considered by the Court was whether the counsel was competent to confess judgment on behalf of the client without special authority in that behalf.

3. It is well-settled that any concession by a counsel on a question of law may not preclude the party from agitating that question in appeal, unlike a concession made by a counsel on a question of fact. I need only refer to the decision of the Supreme Court reported in M.M.B. Catholicos v. M.T. Athanasius (A.I.R. 1954 S.C. 526) at page 544 of the decision.

They could not properly decline to go into the question of fact on account of the admission of the defendants'' Advocate that the plaintiffs remained in the Church. Such admission at best was an admission as to the cannon law and the decision that the defendant''s had voluntarily gone out of the Church even in the absence of an ecclesiastical verdict necessarily implies that the concession made by the defendants'' Advocate requiring an ecclesiastical verdict as a condition precedent to voluntary separation also was obviously wrong and an erroneous concession of law made by the defendants'' Advocate could not be relied upon for saving the plaintiffs.

The full Bench had no occasion to refer to this decision of the Supreme Court, nor to consider the question whether a concession by counsel on a question of law would be binding on the parties. In fact, as I pointed out earlier, the question before their Lordships having been only whether a counsel had authority to compromise or confess judgment there was no occasion to consider the question that is now before me in this appeal. If so, I am free to follow what has been said by the Supreme Court in the case just now referred to by me. I find that my learned brother Krishna Iyer, J., has also expressed the view that concession made by the defendant''s counsel in the case on a question of law cannot be held to bind the defendant if it is found to be wrong. I am referring to the decision in Kannan v. Lakshmi (1970 KLT 731). I am in respectful agreement with the view taken by my learned brother in that case.

4. Now it becomes necessary for me to decide the question on the merits and the question is whether Act 31 of 1958 would apply to the instant decree debt. That is a decree for recovery of purappad provided in a mortgage deed. It is a debt within the definition of the term in section 2(c) of Act 31 of 1958, forgetting for a moment the exclusion clause in the definition. The question is whether it is excluded by any of the exclusions in section 2(c). Learned counsel for the first defendant would rely on sub-clause (ix) in Section 2(c) which excludes any rent or michavaram payable for use and occupation of land or building from the definition of debt. The question therefore is whether purappad payable by a mortgagee is rent or michavaram, within the meaning of section 2(c)(ix) of Act 31 of 1958.

5. The terms "rent" and "michavaram" are not defined in the Act. Rent, in a wider sense of the term, may refer to all payments made by a person in occupation of a

land of another, to the owner. I do not think that the term is to be read in that sense in considering the provisions of Act 31 of 1958. Rent is an incident of a tenure and so long as ''rent'' is not defined in the statute one has to consider the definition of the term in the general law relating to land tenures. That law is the Transfer of Property Act, 1882. Section 105 of that Act defines a lease as follows:

105. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

The definition of the term "rent" contained in section 105 of the Transfer of Property Act makes it clear that it is something due from a tenant to a landlord and that is the definition which has necessarily to be applied in reading section 2(c) (ix) of Act, 31 of 1958.) The counsel has a case that the term "michavaram" would take in such dues as purappad. Michavaram is a term for which there is no definition in the Act or in any general law. The definition of michavaram in Acts such as Act I of, 1964 or in the Travancore Jenmi Kudiyan Act, 1908 may not be of any relevance in this context. The term "michavaram" normally denotes rent due under a kanom. It is varam or rent payable to the landlord and has got all the characteristics of rent. But what is paid is not the whole of the rent, but that portion of it left after appropriating a portion towards the interest on the kanom amount advanced. Therefore according to me the michavaram referred to in sub-clause (ix) really refers to payment of dues by a person holding under a kanom. I notice that the same view has been taken by my learned brother Madhavan Nair J. in the decision reported in N. Namboodiri v. Padmanabha Pillai (1964 KLT 174) 1964 K.L.J. 351.

6. In the above view the decree debt is one to which the provisions of Act 31 of 1958 applies. If so the execution now taken out by the decree-holder is in time. The second appeal has therefore to be dismissed, but in the circumstances of the case I direct the parties to suffer costs in this appeal. A contention is urged before me that further execution for recovery will have to be stayed in view of the provisions of the Kerala Ordinance XVIII of 1970. That of course is a matter for the execution court to consider when the matter comes up again before that court.