(1990) 07 KL CK 0073

High Court Of Kerala

Case No: A.S. No. 373/83

George Varghese — APPELLANT

Vs

Eapen Varkey — RESPONDENT

Date of Decision: July 13, 1990

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2, 11 , 47
- Kerala Agriculturists Debt Relief Act, 1970 - Section 10(4), 11(4), 11(5), 4(2), 7(15)
- Limitation Act, 1963 - Article 136, 11, 4, 5, 6(2)
- Transfer of Property Act, 1882 - Section 59A, 60

Citation: (1990) 2 KLJ 345

Hon'ble Judges: Padmanabhan, J

Bench: Single Bench

Advocate: K.C. John and George Varghese, for the Appellant; Joseph Therattil and Joseph Vadakkel, for the Respondent

Judgement

Padmanabhan, J.

Defendants 1 to 3 are the sons of Abraham Varghese from whom amounts were due to the Plaintiff under a simple mortgage charged on the suit property. Defendants inherited the property after his death subject to the mortgage charge. Third Defendant obtained Ext. B-1 order for discharging the debt under the provisions of the Kerala. Agriculturists'' Debt Relief Act 11 of 1970. Plaintiff and Defendants 1 and 2 were Respondents 1 to (sic). The scaled down debt was discharged on the whole by payment. The present suit is for realisation of the balance amount from the hypotheca and Defendants 1 and 2 on the allegation that they are not agriculturists entitled to the benefits of the Act. The suit was decreed repelling the contentions.. Second Defendant was also found to be an agriculturist, but not the Appellant-first Defendant. Decree was granted against him (not personal) and the hypotheca alone.

2. Contention of the first Respondent-Plaintiff in this suit and Ext. B-1 was that Defendants 1 and 2 are not agriculturists because they are paying income tax and sales tax. That allegation was not established. But in Ext. A-4 compromise, which resulted in a decree obtained by the first Respondent against the Appellant, he admitted that he is not entitled to the benefits of the Act. That was the sole basis for finding that he is not an agriculturist. That decree is dated 24th September 1971. A compromise decree also can operate as res judicata. But Ext. B-1 order binding on Plaintiff and Defendants 1 to 3 was rendered later on 24th July 1972. That petition was filed as if the Appellant and Respondents 2 and 3 are agriculturists entitled to the benefit of the Act. That claim was denied not on the ground of res judicata on account of Ext. A-4, but because they are paying income tax and sales tax. That contention was not established and the Court found in Ext. B-1 that Defendants 1 and 2 are prima facie agriculturists entitled to the benefits of the Act, though the claim of the third Defendant-Petitioner as agriculturist alone was considered and decided on the merits as that question alone was found necessary to be decided ultimately.

3. Anyhow, atleast the prima facie finding in favour of Defendants 1 and 2 is also there in Ext. B-1. Plea of res judicata is a contention which might and ought to have been raised by the first Respondent in that case against the Appellant. In Ext. B-1 proceedings, first Respondent was having the position of a Plaintiff as he is the person ultimately entitled to get an order which alone is executable as a decree. When the third Defendant-Petitioner sought relief on the ground that himself and Respondents 2 and 3 (Defendants 2 and 3) are agriculturists entitled to the benefit of the Act, the first Respondent, who actually contended that they are not agriculturists, was bound to put forward res judicata on the basis of Ext. A-4 also as one of the contentions to negative that claim. Not having done so and suffered an adverse order, he cannot now put forward res judicata as a plea because that contention is barred by the general principles of constructive res judicata even though Section 11 Explanation IV of the CPC as such may not apply. Even without that prima facie finding in favour of the Appellant and second Respondent in Ext. B-1, the position is that such a contention, which might and ought to have been raised, will be deemed to have been raised and was directly and substantially in issue and decided against the first Respondent. That is also the effect of a claim, which was not expressly granted by the decree or order. Ext. A-4 was superceded by Ext. B-1, which was also inter-parties, and it is capable of acting as res judicata on general principles. Therefore, on the pleadings and evidence, the only possible conclusion was that the Appellant is an agriculturist entitled to the benefits of the Act. If so, on that ground alone, the decree is not sustainable.

4. Being a simple mortgage, the debt, admittedly, comes under the Act. If Defendants 1 to 3 are agriculturists Ext. B-1 order and the payment under it will completely wipe off the debt. All the Defendants will come within the meaning of mortgagors u/s 59A of the Transfer of Property Act as heirs of the mortgagor

though the mortgage was not executed by them. Jointly or individually, they are entitled to redeem the mortgage. Liability under the mortgage is joint and indivisible without any personal liability. Even if one of them redeems the mortgages and gets the mortgage liability extinguished the benefits go to all and the entire mortgage is wiped off, so far as the mortgage is concerned. None of them could redeem their share alone unless any of the conditions laid down in Section 60 of the Transfer of Property Act is there. No such ground is admittedly available. If so, the redeeming co-mortgagor only steps into the shoes of the mortgagee so far as the other comortgagors are concerned and liable to be redeemed by them to the extent of their share. The effect of Section 4(2) and 11(4) of Act 11 of 1970 is also that the entire mortgage is extinguished by the order and payment. u/s 7(15) and 11(5), the order shall have the effect of a decree and executable as such. It is a subsequent order within the meaning of Article 136 of the Limitation Act, as provided in Section 6(2). That is the mandate of Section 11 and Section 4, read with Sections 5 and 7. Ext. B-1 petition was not for discharging the share of third Defendant alone, but it was for discharging the entire liability,

5. Counsel for the first Respondent relied on the decisions in Akella China Venkatavadhamulu and Others Vs. Muthangi Bachi Ramayya Garu and Others, Thangavelu Chetty v. Chinnaswami and Ors. AIR 1983 Mad 21 which followed V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar, and said that when the mortgage liability is payable jointly by an agriculturist and a non-agriculturist, the advantage of scaling down under the Kerala Agriculturists'' Debt Relief Act is available only to the agriculturist. There cannot be any dispute and Section 10(4) of Act 11 of 1970 also provides for it. But that benefit had to be availed of in Ext. B-1 itself, which is the only order having the effect of decree which could have been executed by the first Respondent. The argument that Section 10(4) is applicable only in a suit or execution application has no force since its effect under Sections 4(2) and 11(4) read with Sections 7(15) and 11(5) is to extinguish the entire liability and make it the only executable decree. It is, therefore, unnecessary to go into the question that Section 10(4) is not applicable as there is no debt payable by an agriculturist jointly with a non-agriculturist and what is involved is only an indivisible mortgage liability, for which the property alone could be proceeded. The question is only whether a fresh suit is maintainable or whether claim had to be agitated in Ext. B-1 itself.

6. When all the debtors and creditors were on the array of parties in Ext. B-1, it is undoubtedly binding on all. Cause of action against the agriculturist and the non-agriculturists arose out of the same cause of action on the same relief under it. It cannot be bifurcated and reserved for a fresh suit even with permission of Court. The principles involved in Order II Rule 2 and Section 11 of the CPC are applicable. The only benefits given to the agriculturist are scaling down the debt and instalment payment, which are not available to the non-agriculturist. As the person entitled to get the decree and execute the same, the mortgagee had to raise these contentions

in Ext. B-1 itself. When he suffered an order and allowed the debt to be wiped off statutorily that is an end of the matter and a fresh suit for the remaining relief against the same parties is barred. That is also a matter coming within execution, discharge or satisfaction of Ext. B-1 order, which amounts to an executable decree as defined in the CPC and a fresh suit is barred under the principles embodied in Section 47 of the Code also.

7. When the third Defendant discharged the entire liability under Ext. B-1, the Court passed Ext. A-5 order providing that the debt as regards the third Defendant is discharged. Therefore, it was argued that it is not discharged so far as Ors. are concerned as a suit will lie. Such an order was unnecessary and superfluous in view of the statutory effect of the other provisions. That effect cannot be overcome by Ext. A-5 apart from the fact that Ext. A-5 is not having any such effect. The order, which amounts to a decree discharging the entire liability, was satisfied and satisfaction was recorded. The mortgage is, therefore, completely extinguished and it merged in the order. It is a discharge of the entire liability and not the share of third Defendant alone.

8. When one of the two or more judgment-debtors jointly and severally liable under a decree or order is a non-agriculturist, appropriate directions will have to be made in the decree or order itself in respect of the amount due from the non-agriculturist Mathoo Paulo v. Kunjuvariath 1961 KLT 122. When the mortgage money is paid, there remains no debt due from the mortgagor to the mortgagee. The mortgage cannot thereafter continue. A security cannot continue after the loan is paid Prithi Nath Singh and Others Vs. Suraj Ahir and Others, and Varkey Paily v. Kurian Augusthy 1967 KLT 189. If the debt stands extinguished, it is not possible for the creditor to file suit on the debt. Discharge of a debt is different from a case where the debt is barred by limitation Union Bank of India, Ernakulam Vs. T.J. Stephen and Others, . Even if it be the case of a non-agriculturist surety, when the entire debt of the principal is wiped off by the scaling down under the Debt Relief Act, there is a statutory pro-tanto reduction or extinguishment of the liability of the surety (Subramania Chettiar and Anr. v. Moniam P. Narayanaswami Gounder AIR 1958 Mad 48 and Aypuni Mani v. Devassy Kochouseph 1965 KLT 1266. But that question does not arise here.

The trial Court was, therefore, not justified in granting a decree. The appeal is allowed and the decree and judgment are set aside. The suit is dismissed. No costs.