

Ali Haji Vs. Alima

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Court : Kerala

Decided On : Oct-28-1996

Reported in : II(1997)DMC343

Judge : P.K. Balasubramanyan, J.

Acts : [Family Courts Act, 1984](#) - Sections 7, 7(1) and 8; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 9 and 11

Appeal No. : CRP No. 1842 of 1996

Appellant : Ali Haji

Respondent : Alima

Advocate for Def. : Rajit, Adv.

Advocate for Pet/Ap. : S. Venkitasubramanya Iyer, Sr. Adv. and; V. Giri, Adv.

Disposition : Petition allowed

Judgement :

P.K. Balasubramanyan, J.

1. The decree-holder is the revision petitioner. He obtained a decree for mandatory injunction directing the judgment-debtor to vacate the plaint sheule property and a prohibitory injunction restraining her from entering the property

thereafter. The judgment-debtor was the wife of the decree-holder. According to the decree-holder the marriage was dissolved on 19.2.1991 and that aspect is not in dispute at this stage. The decree for mandatory injunction was put in execution by the decree-holder. The judgment-debtor raised a contention that the decree was void and consequently the Executing Court could not execute the decree. This contention was over-ruled by the Executing Court by its order dated 30.5.1996. But in C.R.P. 1002 of 1996 filed by the judgment-debtor this Court set aside the order of the Executing Court essentially on the ground that the question raised by the judgment-debtor had not been properly considered by the Executing Court and remanded the execution petition to the Executing Court for reconsideration of the question of want of jurisdiction vitiating the decree raised by the judgment-debtor. Thereafter by order dated 17.8.1996 the Executing Court held that the decree was a nullity and consequently refused to execute the decree. The decree-holder has filed this revision challenging that decision.

2. Now to the developments leading upto the decree. The [Family Courts Act, 1984](#), hereinafter called the Act, was enacted on 14.9.1984. It was extended to the State of Kerala by Notification dated 17.10.1989. The appointed day for the commencement of the Act was 21.10.1989. The suit was filed by the decree holder against his former wife on 27.7.1991, in the ordinary Civil Court namely Subordinate Judge's Court of Trichur. By a Notification dated 6.6.1992 and published in the Gazette the same day a Family Court at Ernakulam was established with the area of jurisdiction as Revenue Districts of Ernakulam and Trichur. The suit was decreed by the Civil Court namely Subordinate Judge's Court, Trichur on 3.7.1992. A Notification dated 1.6.1992 but published only on 7.7.1992 in Kerala Gazette No. 27 was issued appointing an Officer, a Retired District Judge as the Judge of Family Court Ernakulam with local limits of jurisdiction extending to the Revenue Districts of Ernakulam and Trichur. It is said that the Family Court at Ernakulam started functioning on 15.6.1992. It is not very clear how this could be done when the Notification naming the Presiding Officer of the Court was published only on 7.7.1992. After the suit was decreed, the decree-holder filed the present execution petition E.P. 170 of 1993. The judgment-debtor, meanwhile, filed an appeal against the decree before the District Court Trichur as A.S. 201 of 1992. That appeal was dismissed on 11.2.1993. The execution petition

was presumably kept stayed. The judgment debtor filed S.A. 195 of 1993 before this Court. That Second Appeal was dismissed on 14.8.1995. The Judgment-debtor filed a petition for Special Leave to appeal before the Supreme Court S.L.P. No. 23872 of 1995. The Supreme Court dismissed that petition for Special Leave by order dated 6.11.1995. It is thereafter that the judgment debtor filed an objection to the execution petition. That was on 6.12.1995, It was contended that the Family Court had come into existence on 6.6.1992 and in view of that, the decree was void and was a nullity. The objection, as earlier stated, was originally over-ruled by the Executing Court but after remand by this Court, was upheld by order dt. 17.8.1996. The question is whether the decree passed by the Civil Court on 3.7.1992 is a nullity, whether it is open to the judgment-debtor to raise this contention in view of the decree in A.S. 201 of 1992 and S.A. 195 of 1993 rendered subsequent to the extension of the Act and thirdly whether the objection raised by the judgment- debtor is available to be raised in Executing Court in that the objection to jurisdiction is apparent on the face of the decree.

3. According to the Full Bench of this Court in *R.K.V. Motors and Timbers v. R.T.O.*, 1982 KLT166, a Rule notified comes into force only on release of the Kerala Gazette containing the Notification bringing the Rule into force is released to the public. In this case, though the Notification naming the Presiding Officer is dated 1.6.1992 it was only published in Kerala Gazette No. 27 dated 7.7.1992. Going by the ratio of the decision of the Full Bench therefore, the earliest day when the said notification could be deemed to have come into force is 7.7.1992 though it is quite possible that the Notification itself was released to the public only after 7.7.1992. For the purpose of this case that aspect has not much relevance. Similarly, the constitution of the Court was published in the Gazette Extra-ordinary No. 679 dated 6.6.1992. Obviously, it might have been available only on the release of the Gazette, the date of which is not clear. In *Harla v. State of Rajasthan*, AIR 1951 SC 467, the Supreme Court has stated that a law must be promulgated or published before people can be penalised thereunder. A Court could be taken to be constituted only when the things required by the constitution for the existence of a Court concur and a Court cannot exist without a Judge. In the decision in *Supreme Court Legal Aid Committee v. State of India*, 1994 (6) SCC 73, while considering the question as to when can it be said that a Court is

constituted, their Lordships stated :

'Thus, when complete in its organised aspect with all the constituent elements of time, place and officers, that a Court is constituted in the general legal adaptation of the term. This is true of the initial constitution only; thereafter Court will exist even if the Court is without a Judge by reason of the Judicial Officer having vacated the office on resignation or retirement or removal or the like.'

Here it is a case of initial constitution and the Family Court became established not when a Notification constituting the Family Court at Ernakulam on 6.6.1992 was published but only when a Notification was published on 7.7.1992 naming the Judge as the first Presiding Officer of that Court. In this case, the suit was decreed by the Civil Court on 3.7.1992 before the Notification appointing the Judge was published in Kerala Gazette No. 27 dated 7.7.1992. In my view, therefore, even assuming that the Act has application to the case on hand, the decree passed on 3.7.1992 by the Civil Court cannot be considered to be one without jurisdiction.

4. The judgment-debtor had the right to raise the question based on the extension of the Act and the establishment of a Family Court for the Revenue District of Trichur in the appeal A.S. 201 of 1992 filed by her which was disposed of only on 11.2.1993. She did not raise that objection. Similarly, she did not raise that objection in S.A. 195 of 1993 filed by her in this Court. She also did not raise that objection before the Supreme Court in S.L.P. (Civil) No. 23872 of 1995 filed thereafter. 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 resjudicata from raising the contention of any illegality in the decree based on the establishment of the Family Court for the Revenue District of Trichur in execution of the decree. The plea based on the Act and the establishment of the Family Court might and ought to have been raised either in the appeal before the District Court or in the appeals thereafter. I am, therefore, of the view that the case of the judgment-debtor that the decree is in executable is not sustainable at this stage.

5. It is by now well settled that the Executing Court cannot go into a roving enquiry to find out whether the decree passed by the Court which has passed is one without jurisdiction. Want of jurisdiction must be apparent. In *V.D. Modi v. R.A.*

Rehman, AIR 1970 SC 1475, the Supreme Court has observed as follows :

'When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the Executing Court will have no jurisdiction to entertain an objection as to the validity of the decree ever. on the ground of absence of jurisdiction.'

To the same effect is the decision of the Supreme Court in *Sunder Dass v. Ram Prakash*, AIR 1977 SC 1201. Now the question for consideration is whether the voidness of the decree passed by the Civil Court on 3.7.1992 could be said to be apparent on the face of the record. This question actually arises only if we proceed on the assumption that the Family Court for the Revenue District of Trichur had been established in the full sense of the term before 3.7.1992. Section 7 of the Act provides that subject to the other provisions of the Act a Family Court shall have jurisdiction exercisable by any District Court or any Subordinate Civil Court under any law for the time-being in force in respect of suits and proceedings of the nature referred to in the Explanation. The Explanation clarifies which are the suits and proceedings that come within the purview of Sub-section (1) of Section 7. Clause (a) deals with a suit or proceeding between the parties to a marriage for a decree of nullity of marriage or restitution of conjugal rights or judicial separation or dissolution of marriage. This suit filed after a divorce by a person against his former wife for a mandatory injunction directing her to vacate the property occupied by her, cannot be said to be a suit between the parties to a marriage and cannot also be said to be a suit or proceeding coming within Clause (a) of the Explanation. Clause (b) of the Explanation relates to a suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of a

person. The said clause is also not attracted. Clause (c) of the Explanation contemplates a suit or proceeding between the parties to a marriage with respect to the property of the parties or either of them. Clause (d) of the Explanation relates to a suit for injunction arising out of a matrimonial relationship. Clause (e) to (g) deal with matters that might arise even after a divorce. Clause (e) relates to a suit for a declaration as to the legitimacy of any person. Clause (f) relates to a suit for maintenance and Clause (g) relates to a suit in relation to the guardianship of a person or custody of or access to a minor. According to learned Counsel for the judgment-debtor, this is a suit to which Clause (c) would apply because it is a suit between two persons who were parties to a marriage, though the marriage was not current and the dispute was with regard to a property claimed by the husband to be his own. But according to learned Counsel for the decree-holder on the scheme of Section 7 of the Act only Clauses (e) to (g) relate to matters which could arise even after a divorce between the spouses or arise because of a divorce between the spouses. According to him, Clauses (a) to (d) deal with cases where a marriage is subsisting between the parties. Here there has been a divorce. Since, the objection sought to be put forward in this case is under Clause (c) of the Explanation to Section 7(1) of the Act, a subsisting marital relationship has to be posited before it could be said that the jurisdiction of the Family Court is attracted in respect of a dispute relating to property of either of the parties. Section 8 of the Act says that where a Family Court has been established for any area, no District Court or any subordinate Civil Court shall have any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to Section 7(1) of the Act. So, if the suit is not of the nature referred to in Clauses (a) to (g) of the Explanation to Section 7(1) of the Act it could not be said that the jurisdiction of the Civil Court is ousted. In this connection, learned Counsel for the decree-holder also refers to the preamble to the Act which indicates that the Family Courts are established with a view to prompt resolution in and secure speedy settlement of, disputes relating to marriage. According to him a dispute between the two divorced spouses relating to the property would not be a suit coming within the purview of the Act. Whatever may be the correct answer to the question, whether a dispute between spouses already divorced, relating to the property standing in the name of one would come within the purview of Section 7(1) Explanation (c) of the Act,

one thing is clear and it is that, an answer cannot be said to be apparent on the face of the decree or from the scheme of the Act so as to enable an Executing Court to decline to execute the decree on the ground that it is a nullity. It is not apparent that the decree passed by the Civil Court in respect of the dispute is without jurisdiction especially when no such objection was raised even in appeal when there was an opportunity to do so. It is not a decree which could be treated as a nullity and the execution refused. Once it is seen that the question posed by the judgment-debtor thus would require a deep investigation into the matters agitated by the parties, it is clear that it is not open to the Executing Court to hold that the decree is a nullity on the assumption that the Act applied to the case on hand. In my view, the exclusion of jurisdiction cannot be said to be apparent in the case on hand and consequently, it cannot be said that the Execution Court was within its jurisdiction in refusing to execute the decree on reaching a conclusion that the decree was a nullity since it was passed by the Civil Court after the extension of the Act and the establishment of a Family Court for the Revenue District of Trichur. In this case, it is all the more so since there is considerable doubt whether it could be said that as on the date of the decision of the Civil Court, as a matter of fact, the Family Court had been established.

6. Learned Counsel for the judgment-debtor contended that there was no definition of 'family' in the Family Courts Act and the meaning of the expression 'family' contained in Order XXXII A Rule 6 of the Code of Civil Procedure could be adopted and it could be taken that a man not living together with his wife could also be treated as constituting a family and so looked at, a divorced husband and wife could also be treated as a family coming within the purview of the Act. Drawing sustenance from Section 125 of the Criminal Procedure Code and the observations in Shabanu's case, AIR 1985 SC 945, learned Counsel contended that a divorced husband and wife could also be parties to a marriage within the meaning of Clause (c) of Explanation to Section 7(1) of the Act. On the scheme of Section 7(1), it appears to me that Clauses (a) to (d) of the Explanation to Section 7(1) of the Act relate to disputes between the spouses in a subsisting marriage. In any event, I feel that the question whether the Act applies to the present suit between persons who are divorced, is a question that requires serious examination in the light of the relevant provisions of the Act and the various

provisions of law governing the question and it will not be open to an Executing Court to scrutinise the decree passed by the Civil Court in the suit in exercise of its limited jurisdiction, to hold that it is one without jurisdiction on the face of it. Even assuming that the Act applies to the case on hand, it is certainly not a want of jurisdiction in the decree that is apparent on the face of it. Thus, looking at it from any angle, I am of the view that the Executing Court has exceeded its jurisdiction in holding that the decree in the suit is a nullity and has failed to exercise the jurisdiction vested in it by law in refusing to execute the decree. This is, therefore, a clear case where I am called upon to exercise my jurisdiction under Section 115 of the Code of Civil Procedure to correct such an error or jurisdiction.

I, therefore, set aside the order of the Executing Court and allow the execution petition as prayed for by the decree-holder. The Executing Court will forthwith execute the decree. The execution petition is remitted to that Court for that purpose.

The Civil Revision Petition is thus allowed. But considering the nature of the disputes raised and the circumstances obtaining, I direct the parties to suffer their respective costs.

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