Thomas Job Vs. Thomas

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Court : Kerala

Decided On : Aug-27-2003

Reported in : AIR2004Ker47; 2003(3)KLT936

Judge : K. Padmanabhan Nair, J.

Acts : Kerala Legal Services Authorities Act, 1987 - Sections 21

Appeal No. : C.R.P. No. 1136 of 2003

Appellant : Thomas Job

Respondent : Thomas

Advocate for Def. : T.R. Ramachandran Nair, Adv.

Advocate for Pet/Ap. : V. Giri, Adv.

Disposition : Revision Petition allowed

Judgement :
ORDER

K. Padmanabhan Nair, J.

1. The judgment debtor in E.P.215 of 2001 in O.S.174 of 1979 on the file of the Additional Sub Court, Alappuzha is the revision petitioner. The Civil Revision Petition is directed against an order passed by the executing court directing the

decree holder to deposit Rs. 9,50,000/- within three days and to get the sale deed executed through court.

2. The revision petitioner and respondent are brothers. The respondent filed O.S.174 of 1979 for a decree of mandatory injunction to remove a building in the plaint schedule property and for surrender of vacant possession of the site occupied by the building to the plaintiff and in case the defendant refuses to vacate, for a decree allowing recovery of suit property. Originally on 31.10.1981 the suit was decreed. The revision petitioner challenged the decree and judgment in A.S.140 of 1983 before the District Court, Alappuzha. The lower appellate Court allowed the appeal, set aside the decree and judgment passed by the trial Court and dismissed the suit. The plaintiff filed S.A.574 of 1996 before this Court. This Court by judgment dated 3.9.1991 set aside the decrees passed by both the courts and remanded the suit to the trial Court for a de novo disposal after giving both sides an opportunity to amend the pleadings, if necessary, and adduce further evidence. After remand, the trial Court again decreed the suit on 26.7.1993. The respondent was allowed to recover plot No. 2 shown in red shade in Ext.C3 plan appended to the decree. The revision petitioner was directed to demolish and remove a portion of the building situated in the plaint schedule property. Mesne profits was also allowed. The revision petitioner filed A.S.34 of 1994 before the District Court, Alappuzha. While the appeal was pending before the District Court, the matter was referred to Lok Adalat under Section 20 of the Legal Services Authorities Act ('Act' for short). The matter was taken up by the Lok Adalat, District Legal Services Authority, Alappuzha held on 5.10.1999. An award was passed on that day itself. Subsequently the plaintiff-respondent filed the present Execution Petition alleging that the revision petitioner has not complied with the terms of the compromise and as such he is entitled to get the award executed through Court. According to him, he is entitled to get a sale deed executed in his favour in respect of the property scheduled in the award on deposit of Rs. 9,50,000/-. The prayer in the E.P. was to issue notice of the E.P. to the judgment debtor demanding him to comply with the terms of the award and in case he refuses to comply with that demand, to permit the respondent to deposit Rs. 9,50,000/- in court and execute the sale deed through court. The revision petitioner resisted the Execution Petition. The court below overruling the objection raised by the revision petitioner found that

the respondent took necessary steps to get sale deed executed within the stipulated time, but the execution of the document did not take place due to the failure on the part of the revision petitioner to receive notice in time. It was found that the decree holder is entitled to get the document executed through court as provided in the award. The respondent-decree holder was directed to deposit Rs. 9,50,000/- in the court within three days. That order is under challenge in this Civil Revision Petition.

3. The learned counsel appearing for the revision petitioner has argued that the award directed to be executed in this case is not a decree and the executing court cannot invoke its powers conferred on it under Section 148 of the Code of Civil Procedure to enlarge the time so as to enable the decree holder to deposit the amount. It is also argued that the only irresistible conclusion possible from the proved facts in this case is that the sale deed was not executed due to the fault of the respondent as he had no money with him and it was he who committed the breach of the compromise.

4. The learned counsel appearing for the respondent has argued that the executing court has considered all aspects and came to the conclusion that it was the revision petitioner who committed the breach and as such the respondent is entitled to get the award executed through court.

5. As I have already stated the revision petitioner is the elder brother of the respondent. The property originally belonged to their father. Before partition of the assets the revision petitioner constructed a theatre in that property. Subsequently a partition took place between the co-owners on 29.8.1967. Schedule No. 3 was allotted to the share of the respondent. A portion of the theatre constructed by the revision petitioner is situated in that property. The respondent filed the suit for recovery of property after demolition and removal of a portion of the theatre building situated in the plaint schedule property. The suit was decreed and while the appeal filed by the defendant against that decree and judgment was pending before the District Court, the matter was settled through Lok Adalat. The plaintiff-decree holder has filed this Execution Petition alleging that the revision petitioner has committed breach and he is not prepared to execute the sale deed as per the

terms of the award and hence he is entitled to get the sale deed executed through court on deposit of Rs. 9,50,000/- and he is also entitled to get a portion of the building demolished at the expense of the revision petitioner. The revision petitioner filed an objection contending that the Execution Petition is not maintainable. It was specifically contended that as per the terms of the award, the decree holder is bound to pay an amount of Rs. 9,50,000/- after one year but before the expiry of two years from 5.10.1999 onwards. The averment that in spite of repeated demands the revision petitioner did not execute the sale deed was denied. It was contended that breach was committed by the respondent and he had no money with him for getting the sale deed executed by the revision petitioner. It was also contended that the respondent is not entitled to be called as a decree holder as there is no decree in his favour. Hence he prayed for the dismissal of the Execution Petition.

6. In view of the contentions raised by the parties, it is necessary to consider whether the respondent is entitled to get the award passed by the Lok Adalat executed through a civil Court. Chap.VI deals with Lok Adalats. Section 19 deals with organisation of Lok Adalats. Section 19(5) provides as follows:-

'A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of -

(i) any case pending before; or

(ii) any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organised'.

Section 20 of the Act deals with cognizance of cases filed before the Lok Adalats. Sub-sections (3) and (4) of Section 20 reads as follows:-

'(3) Where any case is referred to a Lok Adalat under Sub-section (1) or where a reference has been made to it under Sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties' and shall be guided by the principles of justice, equity, fair play and other legal principles.'

Though the word 'award' does not occur in Sub-sections (3) and (4) of Section 20, Section 20(5) of the Act deals with the contingencies where no award is passed. Section 21 of the Act deals with award of Lok Adalat. It reads as follows:-

'21. Award of Lok Adalat.-

(1) Every award of the Lok Adalat shall be deemed to be a decree of a civil Court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under Sub-section (2) of Section 20, the court fee paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870(7 of 1870).

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award'.

Though Section 21 provides that the award shall be deemed to be a decree of the court, the manner of execution is not stated in the said section. The court which is competent to execute the award passed by the Lok Adalat is also not stated. In this connection, it is pertinent to note that under Section 19 of the Legal Services Authorities Act, Lok Adalat has got jurisdiction not only to determine and arrive at a compromise or settlement between the parties to a dispute in respect of a pending case alone, but to a matter which is falling within the jurisdiction of, and not brought before any court. So, an award can be passed in pre-litigation stage also. Even in such cases, the court which is competent to execute the award is not stated in the Section. Section 14 of the Kerala Buildings (Lease and Rent Control) Act provides that an order passed by the Rent Control Court can be executed by a civil Court as if it is a decree passed by the Munsiff Court. But such a provision is conspicuously absent in the Legal Services Authorities Act. Regulation 33 of the Kerala State Legal Services Authority Regulations provides that every award of the Lok Adalat shall be signed by the parties to the dispute and the panel

constituting the Lok Adalat. It also provides that the original award shall form part of the judicial records and a copy of the award shall be given to each of the parties free of cost duly certified to be true by the panel constituting the Lok Adalat. Regulation 34 provides that the award shall be categorical, lucid and shall be written in the regional language used in the local courts or in English. In this case the award was passed in the appeal while the same was pending before the District Court. The appeal was from a suit which was pending before the Sub Court. Since the award was passed in a case pending before the Subordinate Judge's Court that court can execute the award passed by the Lok Adalat.

7. Now I shall consider how far a civil Court is competent to extend or enlarge the time fixed in an award passed by the Lok Adalat. In fact the executing court has not considered this aspect; but it proceeded with the matter on the assumption that the decree holder had approached the executing court within the time agreed to between the parties. A reading of the order shows that the court below created the award as a compromise decree passed by a civil Court in which the court has affixed its signature and seal and hence the court gets authority to extend time. I have already discussed the provisions contained in the Legal Services Authorities Act, Rules and Regulations regarding the passing of an award by the Lok Adalat. But, by no stretch of imagination it can be held that an award passed by the Lok Adalat, though by a legal fiction created in Section 21 is equated to a decree, can be treated as a compromise decree passed by the civil Court. The distinction is that in a case pending before a civil Court when the parties enter into a compromise and invite the court to make an order in terms of the compromise, the court passes a decree in terms of the compromise. When the terms of compromise becomes integral part of the decree passed by the court and if a time is fixed for doing a particular act in that decree, the court gets jurisdiction to extend that time in appropriate cases. But, the Lok Adalat is not a court and does not possesses any of the powers of a civil Court conferred on it under the provisions of the Code of Civil Procedure. It is a body created under the provisions of a statute and is having only those powers conferred on it under the provisions of the Legal Services Authority Act. The Lok Adalat only certifies an agreement entered into between two parties as true and the original award itself is to be signed by the parties and the panel constituting the Lok Adalat. There is no provision which

enables a party to a compromise decree to affix his signature in the decree. So, the time fixed by the parties for the performance of a particular act and reduced into writing and signed by the parties and attested by the panel of Lok Adalat stands on an entirely different footing from a compromise decree passed by a civil Court. So, the civil Court gets no jurisdiction to vary the terms of the award or extend the time agreed to between the parties to such an award.

8. Now I shall consider how far the contention raised by the revision petitioner that the decree holder is not entitled to get the sale deed executed is correct. The prayer in the Execution Petition is to permit the decree holder to deposit Rs. 9,50,000/- in court and get the sale deed executed through court. The specific contention put forward by the revision petition is that since the decree holder had not offered the amount within the period agreed to between the parties before the Lok Adalat, his right to get the sale deed executed through court is extinguished and his only remedy is to recover Rs. 3,50,000/- from the revision petitioner.

9. The matter was settled in the Lok Adalat held on 5.10.1999. The relevant portion of the award reads as follows:-

'..... that the appellant-defendant shall execute a sale deed in respect of the property scheduled hereunder (separate) free of any encumbrance to the plaintiff-respondent or to his nominee after one year from today but within 2 years on payment of Rs. 9.5 lakhs to the appellant-defendant. In default by the appellant-defendant, the plaintiff-respondent shall be entitled to get the sale deed executed after depositing Rs. 9.5 lakhs through court by executing this award. If the sale deed is not got executed within the stipulated period of 2 years because of failure of the plaintiff-respondent, the appellant-defendant shall be liable to pay Rs. 3.5 lakhs to the plaintiff-respondent and in such case the prayer for recovery of possession with mesne profit will be given up by the plaintiff-respondent and that plaintiff-respondent shall realise the above said Rs. 3.5 lakh from the appellant-defendant charged upon the property scheduled hereunder'.

In this connection, the description of the property given in the award is also relevant. As per the award, an extent of 18 cents of property comprised in Survey Nos. 372/3 and 372/4 with the property covered by the award. The description of

the property reads as follows:-

'18 cents of land excluding the theatre complex standing therein and also in the plaint schedule property as the appellant has right to take the entire theatre building'.

A reading of the award reveals the following matters:

(i) A duty is cast upon the appellant-defendant to execute a sale deed in respect of the property scheduled to the award free of any encumbrance to the respondent-plaintiff or his nominee after one year from 5.10.1999 but within two years on receipt of Rs. 9,50,000/-.

(ii) If the appellant-defendant commits default, the respondent-plaintiff is entitled to get the sale deed executed after depositing Rs. 9,50,000/- through court by executing the award. If the sale deed is not executed within the time limit fixed because of the failure on the part of the respondent-plaintiff, the appellant-defendant need pay only an amount of Rs. 3,50,000/- to the respondent-plaintiff. If the breach is committed by the respondent-plaintiff, he is not entitled to get recovery of possession with mesne profits also.

Since the award was passed on 5.10.1999 that date can be excluded. So, the period of two years will expire on 5.10.2001. So, the sale deed has to be executed after 5.10.2000 but before 5.10.2001. According to the revision petitioner the sale deed could not be executed because of the fault on the part of the respondent, whereas the case of the respondent is that the same could not be executed because of the fault on the part of the revision petitioner. The specific case put forward by the revision petitioner was that the respondent was not ready and willing to take the sale deed within the period prescribed under the award. According to him, he made several demands. Finally, he sent a notice. Even then the revision petitioner was not prepared to execute the sale deed. The revision petitioner denied the case of the respondent that he made several demands. His specific case was that the respondent never had any cash with him for getting the sale deed executed. The learned Sub Judge had placed much reliance on Exts.A1, A2, A3, A4, A5, A7 and A8. Ext.A2 is a notice issued by the counsel

appearing for the respondent to the revision petitioner on 3.10.2001. It was returned to sender since it was unclaimed by the addressee. The learned counsel appearing for the respondent relying on Section 27 of the General Clauses Act and the decision reported in K.Bhaskaran v. Sankaran Vaidhyan Balan (AIR 1999 SC 3762) argued that when a notice sent by registered post was returned to the addressee with an endorsement 'unclaimed', there is a presumption that the notice is deemed to have been served on the sendee and the burden is on the revision petitioner to rebut that presumption. It is contended that the principle incorporated in Section 27 of the General Clauses Act can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. It is. argued that when it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. It is true that the notice issued by the lawyer appearing for the respondent had returned with an endorsement 'Unclaimed, hence returned to sender'. It is very pertinent to note that the notice was issued on 3.10.2001 Just two days prior to the last date fixed for executing the sale deed. On 4.10.2001 it reached the delivering Post Office. The endorsement made on the cover by the Postman on 4.10.2001 shows that originally the Postman had written 'Absent'. Then another word was also written and the Postman had noted the date. Subsequently the second word written was scored off and below that line it was written as 'Notice' and again initialled with date. It is very pertinent to note that going by the endorsement written in the back of the cover on 5.10.2001 also the cover was taken to the address and the addressee was absent. If the addressee was absent, I fail to understand how intimation of notice could have been served 4.10.2001 or 5.10.2001. There is nothing to indicate that the intimation was given to any member of the family of the revision petitioner. Further, if as a matter of fact intimation was given on 4.10.2001 why the Postman took the cover to the same addressee again on 5.10.2001 is not explained. In view of the endorsement that the addressee could not be found, it is not possible to apply the presumption available under Section 27 of the General Clauses Act in this case. It would appear that on 4.10.2001 and 5.10.2001 the revision petitioner was not available in that address. The decree holder has no case that the judgment debtor was keeping away to avoid receipt of notice. In this case the burden is on the decree

holder to prove that an attempt was made to serve the notice on the judgment debtor within the time allowed by law. For the reasons best known to the decree holder, he did not examine the Postman who took the notice to the addressee. In the absence of such evidence, it is not possible to accept the argument of the learned counsel for the decree holder that it must be presumed that it was served on the judgment debtor before 5.10.2001. On the other hand, it only disproves the case of the decree holder. Ext. A5 is the copy of the notice. It is very pertinent to note that that was not issued by the party, but by the Advocate of the decree holder. Even if Ext.A2 notice was served on the judgment debtor, it will not improve the case of the decree holder. As I already seated, it was issued on 3.10.2001. It could have been served on the judgment debtor on 4.10.2001. 5.10.2001 is the last date agreed to between the parties for execution of the sale deed. There is no statement in Ext. A2 to the effect that the decree holder is having cash with him for purchasing the property. There is no demand in Ext.A2 directing the judgment debtor to come to the Sub Registrar's Office either on 4.10.2001 or on 5.10.2001. All what is stated in Ext.A2 is that the decree holder was ready and willing to pay Rs. 9,50,000/- and hence the defendant has to execute the sale deed after receiving that amount on or before 5.10.2001. Eventhough it is not possible to accept the contention of the judgment debtor that the decree holder ought to have enclosed a Cheque or Demand Draft for Rs. 9,50,000/- along with the notice, there is nothing in Ext.A2 to show that the decree holder had Rs. 9,50,000/- even on the date of sending of the notice. Ext. A4 is the copy of the telegram issued by the decree holder on 26.10.2001. In the telegram also there is no mention that the decree holder is having Rs. 9,50,000/- with him. What is written in the telegram also is that the decree holder is ready and willing and continues to be ready and willing to pay Rs. 9,50,000/-. The decree holder was examined as PW.1. During chief examination he deposed that he was ready and willing to get the sale deed executed and prepared to deposit the amount on any day as directed by the court. He was examined on 22.2.2003. It is admitted by the decree holder that till that date no amount was deposited in court. A suggestion was put to him that he had not deposited the money as he was not having the requisite amount. According to him, prior to 3.10.2001 he was having cash. But, he further deposed that the amount was in the account maintained by

his brother and his brother had agreed to give the amount at any date. When a question was put to him the answer was The evidence was closed on 5.3.2003 and the case was posted for hearing to 12.3.2003. On 12.3.2003, the decree holder filed E.A.144 of 2003 for reopening the Execution Petition for further evidence. The learned Sub Judge by order dated 17.3.2003 allowed that petition, reopened the proceedings and marked Exts. A7 and A8 and posted the matter for further hearing to 25.3.2003 and then to 29.3.2003. On 29.3.2003 the matter was heard and the E.P. was allowed on 5.4.2003. The decree holder was granted three days time to deposit the amount and the same was deposited. According to the revision petitioner, Ext.A7 is a latter written by his brother on 25.2.2003 in which it is written that as and when required, he is willing to help the decree holder for deposit of the amount. The relevant portion reads as follows:-

If the statement contained in Ext.A7 is accepted as such, as on 25.2.2003 the decree holder had not informed his brother that he had to deposit Rs. 9,50,000/- in the court. It is very pertinent to note that the amount to be deposited was an ascertained amount. The parties had agreed that the defendant will execute the sale deed in respect of the award schedule property on receipt of Rs. 9,50,000/-. So, the respondent-plaintiff was fully aware of the fact on 5.10.1999 itself that for getting the sale deed executed he will have to pay Rs. 9,50,000/- to the judgment debtor. In addition to that amount, he will have to spent the money for purchase of the stamp paper and also to meet the registration charges. If we accept the statements contained in Ext. A7 on its face value, the only inference possible is that even after the lapse of four years he had not told his brother who, according to the decree holder, is prepared to give the money that he needed Rs. 9,50,000/- for purchasing the property. It is very difficult to believe that even without telling the brother of the respondent, the brother of the respondent knew that he will have to give Rs. 9,50,000/- to the respondent and he will be paying that amount. There is absolutely nothing on record to show that the brother of the respondent had Rs. 9,50,000/- in any bank at all. It is also very pertinent to note that after the disposal of the. Execution Petition the decree holder filed an affidavit before the executing court on 8.4.2003 in which it was averred that the decree holder requires a copy of the order very urgently to be forwarded to his brother to get the money. The strange aspect is that the amount was deposited in court on 8.4.2003. These two

aspects falsifies the case of the decree holder that his brother was actually having that amount. The statements given by the decree holder shows that he has no money at all even on 5.4.2003. The averments in the affidavit filed on 8.4.2003 shows that on that day the respondent had no money with him and his brother had not given him any amount. Then who deposited the amount? So, the evidence on record proves beyond any reasonable doubt that the decree holder had no money with him within the period stipulated in the award to purchase the property. Even on the day when the order was passed by the court below also he had no money.

10. The learned counsel appearing for the respondent has vehemently argued that the oral evidence given by the revision petitioner would show that the sale deed could not be executed because of the fault of the revision petitioner. It is pointed out that, as per the terms of the award the parties had agreed that on receipt of the money the judgment debtor will have to demolish the theatre complex and building and even on the date of examination of the judgment debtor, the theatre was functioning in the property. It is argued that the judgment debtor never informed the decree holder that he had demolished the theatre. I do not find any merit in this argument. The judgment debtor is not expected to demolish the building and then intimate the decree holder that he is ready and willing to execute the sale deed. The understanding was that the portion of the theatre complex need be demolished only on receipt of the money. There is absolutely nothing on record to show that the decree holder ever asked the judgment debtor that he will take the sale deed only after the demolition of the theatre complex. Even in the pleadings he had no such case. There is no documentary or oral evidence in support of the case. So, there is no merit in the argument advanced by the learned counsel for the respondent that the sale deed could not be executed within the time agreed to by the parties and incorporated in the award due to the fault on the part of the judgment debtor. On the other hand, the irresistible conclusion possible from the proved facts is that the decree holder had no money to get the sale deed executed and he deliberately issued Ext. A2 notice on the last moment only to create evidence to show that he was ready and willing to get the sale deed executed.

11. The case put forward by the decree holder is that he was ready and willing to get the sale deed executed. I do not think that there is any need to consider the

question of readiness and willingness in this case. The provisions of the Specific Relief Act can have no application to the facts of this case. It is not a case filed by the plaintiff for specific performance of the agreement contained in the award. This is a petition filed by him to execute that award. In such a case, it is not necessary to consider whether the decree holder was ready and willing to get the award executed after 5.10.2001. The only question to be decided is whether he was ready and willing to get the sale deed executed prior to that date and whether he had money with him. No question of enlargement of time also arises for consideration in this case. So, the principle laid down in Periyakkal v. Dakshyani (AIR 1983 SC 428) and Pioneer Engineering Co. v. D.H. Machine Tools (AIR 1986 Delhi 165) can have no application to the facts of this case. The terms of compromise was not entered into before the court and the court was not invited to make an order in terms of the compromise. In fact the court did not pass a compromise decree also. So, the time stipulated for payment of the money by the decree holder to the judgment debtor will not became the time allowed by the court. So, the court has no jurisdiction to extend the time in a case in which parties stipulate a time limit for the performance of the act before a Lok Adalat. The evidence on record clearly establishes that the respondent-decree holder had no money with him until the passing of the order by the executing court. Since he has not offered Rs. 9,50,000/- before 5.10.2001, he is not entitled to get the sale deed executed in his favour. His only remedy is to recover from the revision petitioner Rs. 3,50,000/- by executing this Execution Petition itself. For that limited purpose, the Execution Petition has to go back. It is seen that the court has not passed any order regarding the amount required for the purchase of the stamp paper for execution of the sale deed. There is no provision in the agreement that the amount required for the purchase of stamp papers can be adjusted from Rs. 9,50,000/-. The parties have to bear the registration fee, if any, also. The order of the executing court is silent about that aspect also.

In the result, the Civil Revision Petition is allowed. The order passed by the court below directing the respondent to deposit Rs. 9,50,000/- within three days and the further direction that upon such deposit he is entitled to get the sale deed executed through court are hereby set aside. The amount deposited will be refunded to the respondent. In case the decree holder has deposited any amount for purchase of

stamp paper, he is entitled to get back that amount also. The E.P. is remanded to the executing court for giving an opportunity to the respondent for realisation of Rs. 3,50,000/- as agreed to between the parties in the award of the Lok Adalat. I.A. No. 10 of 2003 shall stand dismissed.