

Sambandam Vs. Janakiammal

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Court : Chennai

Decided On : Jan-12-1996

Reported in : AIR1996Mad339

Judge : S.S. Subramani, J.

Acts : T.N. Debt Relief Act, 1980 - Sections 3, 4, 5 and 6;

Appeal No. : Civil Revn. Petn. No. 2902 of 1991

Appellant : Sambandam

Respondent : Janakiammal

Advocate for Def. : T.V. Krishnamachari, Adv.

Advocate for Pet/Ap. : R. Subramaniam, Adv.;M/s. K. Jayaraman and;V. Yuvakumar

Judgement :

ORDER

1. This revision is by the judgment-debtor in O.S. No. 260 of 1974, on the file of the District Munsif's Court at Sirkali.
2. A mortgage decree was obtained by the respondent herein and when the same was sought to be executed, the judgment-debtor claimed the benefit of Act 13 of 1980, i.e., Tamil Nadu Debt Relief Act 13 of 1980.

3. In execution petition when the property was brought to sale, the judgment-debtor moved the local Tahsildar to get certificate of discharge under S. 6 of the Act. It is seen that notice of the said application was given to the decree holder, but she did not appear. Naturally an ex parte order was passed by the Tahsildar issuing a certificate declaring that the debt has been discharged. In the meanwhile, in execution in Civil Court, a date was fixed for sale. The judgment-debtor, therefore, filed C.R.P. No. 2070 of 1983 before this Court, and this Court, as per order dated 12-7-1989, set aside the order of the Court below and directed the executing Court to consider the evidentiary value of the certificate issued by the Tahsildar and how far the judgment-debtor is entitled to the benefits of Act 13 of 1980.

4. After remand, by the impugned order, the Lower Court said that the judgment-debtor is not entitled to the benefits of Act 13 of 1980. The correctness of the same is challenged in this revision.

5. The learned counsel for the petitioner submitted that so long as the order of the Tahsildar remains unchallenged, the same having been issued by an authority under the Statute, it must be given proper weight, and so long as there is no counter evidence, the judgment-debtor is entitled to the benefits of Act 13 of 1980. It is also contended by learned counsel that while considering the entitlement to the benefit, the executing Court has taken into consideration irrelevant circumstances, i.e., the assets and income of the judgment-debtor as of 1986 were taken into consideration and, therefore, it is patently illegal.

6. I will first consider what is the evidentiary value of the certificate issued by the Tahsildar.

7. In 1982 TLNJ 66 (R. K. R. Radhakrishna Chettiar & Sons v. Tahsildar (Debt Relief), Kumbakonam), a Division Bench of this Court considered this aspect. In that case also, a mortgage decree was obtained and while the decree was pending execution, the judgment-debtor moved the Tahsildar for getting a certificate. The certificate was issued under S. 6 of the Act. The correctness of the same was challenged in a writ petition before this Court. While considering the same, their Lordships said that when a matter is pending before Civil Court, it is

not proper on the part of the judgment-debtor to move the Tahsildar to have the obligations under a decree discharged. This Court also said that while exercising the statutory power and issuing the certificate, the Tahsildar has exceeded his powers in declaring a decree debt which is pending execution before Civil Court as having been discharged, and, therefore, the certificate is of no value. The Bench held thus:--

'We are inclined to agree with the submissions made by the learned counsel for the petitioners in these cases. There is no dispute that in all these three cases, decrees have already been obtained by the petitioners in a Civil Court. In two cases mortgage decrees have been passed and in another case, money decree has been passed. All the said decrees are under execution before the Civil Court. Notwithstanding the existence of the decrees the Special Tahsildar and the Sub-Collector, Kumbakonam have invoked their power and have granted certificates of discharge in favour of the debtors. By granting such certificates, they have in fact, nullified the decrees passed by the Civil Court. We do not see how either the Special Tahsildar or the Sub-Collector can go behind the decrees. The status does not by-pass the decrees already passed by the Civil Court. Admittedly, there is no non obstante clause in either of the Ss. 4, 5 and 6. In the absence of a non obstante clause which is only in cases where the debt is not merged in a decree, the Tahsildar and the Appellate Authority cannot exercise their power under Ss, 5 and 6. In S. 4, there is no reference to Tahsildar or the Sub-Collector declaring an ordinary loan as having been discharged under S. 4. Therefore, the fact that no non obstante clause has been used in Ss. 4, 5 and 6, will clearly indicate that the Legislature does not contemplate the authorities constituted under the Act, sitting in judgment over the decrees passed by the Civil Courts. In this view of the matter, we have to hold that the Special Tahsildar, Kumbakonam and Sub-Collector, Kumbakonam have exceeded their statutory powers in declaring a decreedebt which is pending execution before a Civil Court, as having been discharged. Even assuming that the debtors in these cases are entitled to the benefits of the said Act, they have to approach the Civil Court where the matters are pending with an application claiming benefits under the Act and praying for investigation of their claim by the Civil Court. The petitions are therefore allowed.'

The argument of the learned counsel for the petitioner is that the Tahsildar is exercising his statutory power and in this case he has passed the order of issuing the certificate with notice to the decree holder. Even though an appeal is provided against the issue of certificate, the decree holder has not availed the same and, therefore, the decree holder is not entitled now to contend that the judgment-debtor not entitled to the benefits of the Act.

8. I cannot appreciate the said contention in view of the Bench decision. This Court has held in the decision cited supra that while issuing the certificate, the Tahsildar or the Appellate Authority is exceeding his statutory powers when the matter is pending before Civil Court. The remedy of the judgment-debtor is only to move the Civil Court and not the Tahsildar. If it is in excess of the jurisdiction, the certificate issued by the Tahsildar will be of no avail.

9. The next submission made by learned counsel for the petitioner is that the Court below has taken into consideration irrelevant materials to reject the claim of the petitioner.

10. Before answering the said point, we have to find out whether the petitioner herein has discharged his burden that he is entitled to the benefits of the Act. The initial burden is on the petitioner to prove that he is entitled to the benefits of the Act. From the order of the Court below, it is clear that the petitioner has not discharged the burden cast on him. Only if he proved prima facie that he is entitled to the benefits of the Act, the question whether the Court below has taken into consideration irrelevant materials can be considered. This Court, in (1983) 1 MLJ 95 (C. Munuswamy v. Sri Sarada College of Educational Trust) has held thus:

'With respect to burden of proof, there is no specific provision in the enactment itself relating to burden to proof, because it is only the letter and spirit of the provisions of the enactment regarding the burden of proof that has to be given effect; but in the absence of the same it is only a matter of discretion and of course, that discretion must be judicial discretion pure and simple and nothing else.'

The same was again considered in : (1984)2MLJ47 (Lakshmi Ammal v. Sundaramurthi Chetti) wherein it was held thus :

'..... It is well-settled that where a person is shown to come apparently within the meaning of 'debtor' under the debt relief statutes, the burden of proving that he is disqualified under one or the other provision lies on the creditor.'

In 1990 (2) MLW 120 (T. A. Subramania Chettiar v. Babi Ammal), this Court has held thus :--

'The burden is on the defendants to prove that they fall within the definition of 'debtor' under S. 3(d) of the Act. Only after the said burden is discharged, the onus will shift to the creditors to prove that the debtors fall within the exceptions mentioned in the proviso. The defendants have failed to discharge the burden cast on them under S. 3(d) of the Act. Hence, the question of the creditors proving the exception does not arise.'

I have also held in the decision reported in : (1995)1MLJ423 (T. K. Arumugham v. Kavundae Gounder) that the initial burden is on the debtor. In the said decision, the entire case law on the point has been discussed. The learned Counsel for the petitioner did not argue anything regarding the evidence adduced by his client. He only wanted this Court to look into the evidence adduced by the defendant which, according to me, is not the correct way of approaching the point.

11. The Court below has taken into consideration that the Judgment debtor is in possession of various items of properties and that he has purchased a property in 1986. While considering the question of granting the benefits of the Act, the financial position of the debtor sometime after the Act came into force is also a relevant factor which has to be taken into consideration. Even though the financial position as on the date when the Act came into force is a relevant aspect to be considered, it cannot be said that the subsequent financial position is irrelevant for all purposes. Under normal circumstances, a person will not get a high financial position all on a sudden taking into consideration his own well known sources of income. It is only in course of time that he gets a high position. If that be so, law can presume that even anterior to 1986 (in this case when the properties were

acquired), the Judgment debtor might have been in a good financial position, which disentitled him to get the benefits of the Act. So, the argument of the learned counsel for the petitioner that irrelevant factors have been taken into consideration by the Court below cannot be accepted.

12. In the result, the Civil Revision Petition is dismissed with costs.

13. I find that the decree in this case has been obtained in 1974 and till date the decree holder is not in a position to realise the fruits of the decree. I direct the executing Court to expedite the execution and take all steps that are necessary to see that the respondent herein gets the fruits of the decree obtained by her.

14. Petition dismissed.