

**Alagirisamy Naidu Vs. Dharmaraj Naidu**

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**Court :** Chennai

**Decided On :** Aug-03-1993

**Reported in :** (1993)2MLJ462

**Appellant :** Alagirisamy Naidu

**Respondent :** Dharmaraj Naidu

**Judgement :**

ORDER

**Pratap Singh, J.**

1. This civil revision petition is directed against the Order in EP. No. 85 of 1983 in O.S. No. 599 of 1982 on the file of District Munsif, Tenkasi.

2. Short facts are:- The revision petitioner had filed suit against the respondent and had obtained mortgage final decree. He filed E.P. No. 85 of 1983 for sale of the property in pursuance of the mortgage final decree. That was resisted by the respondent. He claimed that he is entitled to benefits of Tamil Nadu Act 50 of 1982 and so it must be deemed that the decree was discharged. Upholding the objections, the court below had held that the respondent was entitled to benefits of Act 50 of 1982 and had dismissed the execution petition. Aggrieved by the said order, the petitioner in the court below has come forward with this revision petition.

3. Mr. T.R. Rajaraman, the learned Counsel appearing for the revision petitioner, would submit that the respondent had raised the plea that he is entitled to the benefits of Act 13 of 1980 at the time of passing of preliminary decree and his claim was negated. He would further submit that at the time of passing of final decree, the respondent again took up the plea that he is entitled to benefits of Act 13 of 1980 and as well Ordinance 9 of 1982 which ultimately became Act 50 of 1982 and his claim was negated and while so, he cannot claim the benefits of Act 50 of 1982 in execution. He would further submit that the evidence available would show that respondent was not entitled to benefits of Act 50 of 1982 and the order of the court below contra is liable to be set aside. Per contra, Mr. T.M. Hariharan, the learned Counsel appearing for the respondent, would submit that even though his claim for benefits under Act 13 of 1980 was negated, that would not be a bar for claiming benefits of Act 50 of 1982 and there was change of circumstance and evidence now available would show that he was entitled to benefits of Act 50 of 1982.

4. I have carefully considered the submissions made by rival counsels. Ex. A-1 is the written statement filed by the defendant in the suit. In para 6 of the written statement, he had claimed the benefits of Tamil Nadu Act 31 of 1976 and the Debt Relief Act of 1980. Ex.A-2 is the counter filed by the respondent in the final decree petition. In para 4, he has stated that he is entitled to benefits of Act 13 of 1980 and Ordinance 9 of 1982. It is not in dispute that Ordinance 9 of 1982 later became Act 50 of 1982. The provisions of the Act 13 of 1980 and Act 50 of 1982 are similar. Though he had taken the plea that he was entitled to the benefits of the aforesaid Act and Ordinance, his claim was not accepted and preliminary decree and then final decree were passed. Even leaving apart Act 13 of 1980. still the fact remains that the respondent had claimed benefits of Ordinance 9 of 1982, which became Act 50 of 1982. When his claim was not upheld in the suit, he cannot put forth the same claim in the execution proceedings. In this regard, Mr. T.R. Rajaraman relied upon Explanation V to Section 11, Code of Civil Procedure. Explanation V reads as follows:

Explanation V: Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been

refused.

Explanation VII to Section 11, C.P.C. is also relevant and it reads as follows:

Explanation VII: The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as reference, respectively to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

On the principles of Section 11, Explanations V and VII, I am clear that when a claim was made and not accepted during trial of the suit the same cannot be agitated in execution proceedings.

5. Ex.B-1 is a certificate issued by the Tahsildar. In it, he has stated that the value of the house bearing Door No. 123, belongs to the respondent and that his salary for one year was Rs. 2,160. Regarding the income of the judgment-debtor, the Tahsildar was not authorised by the Act to issue any certificate. So the certificate with regard to the income cannot be taken into account unless the Tahsildar figured as a witness and testified to his certificate. But he was not examined in the court below. Mr. T.K. Hariharan, would submit that he was authorised to give discharge under Section 5 of Tamil Nadu Act 50 of 1982 and though this certificate Ex.B-1 was not a discharge certificate, it can be taken as a piece of evidence, without examination of the Tahsildar. I am not able to accept this submission. When the certificate was not authorised by any provision of Act, the proof of the contents of the same can be only by the examination of the author of the certificate or otherwise it cannot be looked into.

6. The court below has stated that the claim of the respondent for benefits of Act 13 of 1980 was rejected, but Act 50 of 1982 came into force later said so there is no bar to the judgment-debtor to claim the benefits of it. The court below had failed to see that the judgment -debtor had claimed the benefits of Ordinance 9 of 1982 and that claim was not accepted and that the said Ordinance 9 of 1982 later because Act 50/82. Because of this failure, the lower court had come to an erroneous conclusion and it is liable to be set aside. Taking the above view, on

question of law, I do not propose to discuss oral evidence of the respondent in this case.

7. In view of the above, the civil revision petition is allowed, setting aside the order of the court below in E.P. No. 85 of 1983. The trial court is directed to restore E.P. No. 85 of 1983 and proceed with it in accordance with law. No costs.

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