IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 8TH DAY OF JUNE 2015/18TH JYAISHTA, 1937

SA.No. 185 of 2002

AGAINST THE JUDGMENT IN AS 49/1999 of DISTRICT COURT,THODUPUZHA
DATED 04.09.2001

OS 96/1994 of SUB COURT, THODUPUZHA

APPELLANT/APPELANT /PLAINTIFF:

V.J.THANKACHAN,S/O.ULAHANAN JOHN,
VELLANJIYIL HOUSE, OLAMATTOM KARA, KARIKODU VILLAGE,
THODUPUZHA TALUK.

BY ADVS.SRI.H.B.SHENOY
SRI.B.ASHOK SHENOY

RESPONDENTS/RESPONDENTS/DEFENDANTS:
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1. STATE OF KERALA,REPRESENTED BY
   DISTRICT COLLECTOR, IDUKKI.

2. THE DIVISIONAL FOREST OFFICER,
   KOTHAMANGALAM.

R1& R2 BY SRI.M.P. MADHAVANKUTTY, SPL.GOVT.PLEADER
FOR FORESTS.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 08-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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S.A. NO. 185 OF 2002

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Dated this the 8th day of June, 2015.

JUDGMENT

Faced with the concurrent finding against him holding that suit is not maintainable, the plaintiff before the trial court has come up in appeal. He challenges the authority of the State to recover certain sum through revenue recovery proceedings alleging that he is a defaulter.

2. Most of the facts are not in dispute. It is an admitted fact that in a timber auction conducted on 6.10.1982, the plaintiff, who had deposited Rs. 5,000/- as security, bid the auction and came out successful. According to the plaintiff, the confirmation of auction had to be given within 15 days which did not take place and it took 108 days for the State to confirm the auction. By that time, according to the plaintiff, fire wood which he had bid had been damaged beyond use and therefore he did not remove the same.

Therefore, he was not liable to deposit the balance. The State, Forest Officer concerned, as the case may be, held that on re-auction the fire wood was sold at a much lesser price and they decided to realise an amount of Rs. 44,585/- from the plaintiff as damages. The plaintiff challenges the same in court of law claiming that he is not a defaulter and he is not liable to pay the amount. He also complained about the long delay in seeking to recover the amount.

3. The defendants resisted the suit. They pointed out that the plaintiff was successful in the bid for 322 metric tons of fire wood for a total amount of Rs.83,900/- in the auction held on 6.10.1982. They disputed the claim made by the plaintiff. The sale was to be confirmed within 15 days and they also disputed that due to the so-called delay alleged by the plaintiff, the firewood had been damaged. A chalan for a sum of Rs.82,591/- was issued to the plaintiff and he

sought to split up the same. That was granted and he remitted Rs.15,941/- and produced the chelan on 17.2.1983. He is alleged to have lifted 50 metric tones of firewood. They contended that due to the default committed by the plaintiff, the department was constrained to conduct re-auction of the firewood and in that process they had suffered loss and that the plaintiff was liable to make good the loss. It was that amount that was sought to be recovered through revenue recovery proceedings. They also contended that in view of the fact that revenue recovery proceedings had been initiated against the plaintiff, the suit is not maintainable.

4. Issues were raised for trial. It seems that only a proof affidavit was filed by the plaintiff and the defendants did not participate in the trial at all. Both the courts concurrently found that by virtue of Section 72 of the Revenue Recovery Act read with Section 79 of the Kerala

Forest Act any arrears due under the Forest Act for the purpose made mention thereof can be recovered through revenue recovery proceedings. The courts then held that once revenue recovery proceedings are initiated, the suit is barred. Thus the suit was dismissed and it was confirmed in appeal.

5. Notice was issued on the following question of law:

> "Whether the courts below were right in dismissing the suit as not maintainable under Section 72 of the Revenue Recovery Act."

6. Learned counsel appearing for the appellant contended that both the courts below have misdirected themselves both on facts and in law. Even assuming that Section 79 of the Kerala Forest Act enables the department to recover damages or whatever that may be through revenue recovery proceedings, the issue is whether the plaintiff is a defaulter and he is liable to pay damages. The

question to be determined is whether a civil suit is maintainable. As has been held by this Court in **Abdul Rahiman v. Divisional forest Officer** (1988(2) K.L.T. 290), **Kunhammed v. State of Kerala** (1999(3) K.L.T. SN 50), **Sudarsanan v. DFO** (1999(2) K.L.J. 241) and in **Kerala Small Industries Development Corporation Ltd. v. Prakasan** (2011(3 K.L.T. 893), it is not for one of the contracting parties to say that the other party is a defaulter and quantify the damages and recover the same. This vital aspect has been lost sight of by both the courts below and that resulted in a wrong decree being passed against the plaintiff.

7. Learned counsel for the respondents contended that Section 72 of the Revenue Recovery Act is very clear and it stipulates that any dispute between the recovering authority and the defaulter has to be resolved through the procedure provided as per the provision and not by a separate

suit especially when fraud is not alleged. Drawing attention to the plaint, the respondent contended that there is no allegation of fraud and therefore as held by the court below, the suit is not maintainable.

8. I am afraid that I cannot agree with the learned counsel for the respondent.

9. The fact that there was a bid for firewood and that the plaintiff had participated in the bid and he came out successful in the bid are not disputed. There is considerable controversy regarding the period during which the confirmation had to be made and also about the damages caused to the firewood. The plaintiff would allege that it is due to the long delay caused in giving confirmation that the firewood had been damaged and served no purpose and therefore he was unable to remove the same.

10. The respondent on the other hand would contend that when chelan was issued to the

plaintiff, he sought splitting up of the same and that was granted and he lifted 50 metric tons of firewood.

11. The plaintiff strongly disputed the above claim.

12. It is not in dispute that the plaintiff was slapped with a notice asking to pay a sum of Rs.44,585/-, i.e. after deducting the security amount deposited by him.

13. In the plaint the plaintiff categorically stated that he has not committed any default and therefore he could not be considered as a defaulter and Section 72 of the Revenue Recovery Act has no application. Section 81 of the Revenue Recovery Act as it then stood enables him to dispute the liability and it provides that filing of a suit on the conditions made mention thereof.

14. Section 72 of the Revenue Recovery Act before its amendment reads thus:

> **"72. General bar to jurisdiction of Civil Courts save where fraud alleged.**- Except as otherwise expressly provided in this Act, every question arising between the Collector or the authorised officer and the defaulter or his representative or any other person claiming any right through the defaulter, relating to the execution, discharge or satisfaction of a written demand issued under this Act or relating to the confirmation or setting aside by an order under this Act of a sale held in execution of such demand, shall be determined not by suit, but by order of-
>
> (i) the Board of Revenue, where the Collector is a party to the question;
>
> (ii) the Collector, in other cases:
>
> Provided that a suit may be brought in a civil court in respect of any such question on the ground of fraud."

Section 79 of the Kerala Forest Act reads thus:

> **"79. Recovery of money due to Government.**- All money, other than fines, payable to the Government under this Act or any rule made thereunder, or on account of

timber or forest produce or of expenses incurred in the execution of this Act in respect of timber or forest produce, or under any contract relating to timber or forest produce including any sum recoverable thereunder for the breach thereof or in consequence of its cancellation or under the terms of a notice relating to the sale of timber or forest produce by auction or by invitation of tenders, issued by or under the authority of a Divisional Forest Officer, and all compensation awarded to the Government under this Act may, if not paid when due, be recovered under the law for the time being in force, as if it were an arrear of land revenue.”

15. On reading the above two provisions, there can be no dispute regarding the fact that if it is admitted or found that the plaintiff is a defaulter falling within the ambit of Section 79 of the Kerala Forest Act, the amount so due from him can be recovered from him under Section 72 of the Revenue Recovery Act. If that be so, obviously the

bar would apply. But the principal question in this case is whether the plaintiff can be called as a defaulter. He disputes the very liability to pay the amount. He states that he has not committed breach of contract. Therefore, the essential question that arises for consideration is whether the plaintiff has committed breach of the contract and thereby whether he is liable to pay damages.

16. It is by now well settled that it is not within the province of one of the contracting parties to decide as to who is in breach and fix the quantum. Probably there may be cases where a person admits that he is in default and liquidated sum is mentioned to be paid as damages to the party who is not in breach. In such cases, it may be possible to recover the same.

17. Section 72 of the Revenue Recovery Act as it then stood deals with above cases. A reading of the provision would show that it does not deal with the question as to whether there is

an issue of breach and if that be so, who has committed breach, it is clear that Section 81 of the Revenue Recovery Act comes into play. Section 81 reads as follows:

> "**81. Saving of right to sue.-** (1) Nothing in this Act shall be held to prevent parties, deeming themselves aggrieved by any decision or order passed or proceedings taken (or purporting to be passed or taken) under this Act for arrears due or alleged to be due from such parties, from suing the Government in the Civil Court.
>
> (2) Civil Courts shall not take cognizance of any suit instituted as provided or in this Act, unless such suit has been instituted within ninety days from the time at which the cause of action arose:
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> Provided that the while time occupied by the Board of Revenue in revising the orders passed or proceedings taken by the Collector or the authorized officer or by the Government in revising the orders passed or proceedings taken by the Board

of Revenue shall be excluded in computing the said period of ninety days."

18. Sections 72 and 81 of the Revenue Recovery Act operate in two separate fields. Section 72 comes up for determination after quantum of damages had been made. Till then, Section 81 of the Revenue Recovery Act.

19. Section 81 of the Act is very clear regarding the fact that any person who is aggrieved by any decision or proceedings taken may approach the civil court for determination of the issue.

20. In a broad analogy, it is like suit and a decree. The suit determines the right of the parties and liability of the person concerned and that is put in execution. Similar is the case in Revenue Recovery Proceedings also. The right to determine as to who is in breach and what is the quantum of damages and what is the liability of the person concerned are matters not within the province of the revenue authorities. That is a

question to be determined by the civil court. This issue is no longer res integra in view of the decisions reported in **Abdul Rahiman v. Divisional Forest Officer** (1988(2) K.L.T. 290), **Kunhammed v. State of Kerala** (1999 (3) K.L.T. SN 50), **Sudarsanan v. DFO** (1999(2) K.L.J. 241), **Kerala Small Industries Development Corporation Ltd. v. Prakasan** (2011(3) K.L.T. 893), **Chinnaswamy v. State of Kerala** (2009(2) K.L.T. 525) and **Spl. Tahsildar v. Vasu** (2006(4) K.L.T.557) It is not necessary to refer to all these decisions as they laid down the same principle. It is sufficient if one refers to the decision in **Kerala Small Industries Development Corporation Ltd. v. Prakasan** (2011(3) K.L.T 893). The issue that arose for consideration in the said decision was whether the rent arrears could be demanded through revenue recovery proceedings by the authority concerned. There, like in the present case, Revenue Recovery Act provides for recovery of arrears due. The so-called defaulter disputed the liability to pay the amount and stated that he is not in arrears and therefore instituted the suit on that basis. The trial court held that suit is not barred. The authority concerned brought up the matter before this Court and this court, after considering the rival contentions held as follows:

> "5. Though learned counsel appearing for the appellant vehemently argued that the suit is barred under S.72 of the Revenue Recovery Act, as rightly found by the courts below, S.72 of Revenue Recovery Act has no application. S.72 provides that except as otherwise expressly provided in the Act, every question arising between the Collector or the authorised officer and the defaulter or his representative or any other person claiming any right through the defaulter, relating to the execution, discharge or satisfaction of a written demand issued under the Act or relating to the confirmation or setting

aside by an order under the Act of a sale held in execution of such demand, shall be determined not by suit, but by order of (i) the Board of Revenue where the Collector is a party to the question or (ii) the Collector in other cases. It is also provided that even in such case a suit will lie before a civil court in respect of any such question on the ground of fraud. The suit is not relating to the execution, discharge or satisfaction of a written demand issued under the Act. The suit is questioning the maintainability of demand for arrears of rent or damages as provided under the Act, in violation of the provisions of the Act. Therefore when the suit is challenging the right of the appellant, the fourth defendant, to demand or realise any amount which is not in accordance with the provisions of the Act, the suit is not barred under S.72 of the Kerala Revenue Recovery Act as claimed by the appellant.”

21. An identical question was considered in the decision reported in **Abdul Rahiman v.**

Divisional Forest Officer (1988(2) K.L.T. 290) also, wherein it was held as follows:

> 11 . It is contended that when the State is one of the contracting parties, and seeks to recover damages for breach of that contract, the State cannot be a Judge in its own cause and cannot be its own arbiter to determine the liability and quantum of damages. This question poses no problem as the matter is settled by several decisions, and the latest decision of the Supreme Court in State of Karnataka v. Rameshwara Rice Mills, Thirthahalli (AIR. 1987 SC. 1359) concludes the issue against the petitioner. The Supreme Court held thus:-
> "*The terras of Clause.12 do not afford scope for a liberal construction being made regarding the powers of the Deputy Commissioner to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. The crucial words in Clause.12 are and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party*

as may be assessed by the second party". On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of Clause.12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as painted out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of Clause.12 afford scope for being construed as empowering the officer of the state to decide upon the question of breach as well as assess the quantum of damages, we do *not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the Officer of the State, even though a party to the contract will be well within bis rights in assessing the damages occasioned by the breach in view of the specific terms of Clause.12.*

We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases *where the breach of conditions is admitted or it is not disputed.*"(emphasis supplied).

12. When a contract is broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby. This principle of S.73 of the Contract Act equally applies where one of the contesting parties is the Government. It is the breach of the contract that gives rise to the cause for damages. The primary duty therefore is to fix the liability for the breach. Assessment of damages is only an incidental or subsidiary function. The liability to pay damages is thus fastened where there is breach of contract. However, when a dispute arises as to whether the contract has been broken or not. that dispute cannot be settled by one of the parties to the contract, for, be cannot be an arbiter in his own cause. The dispute may have to be referred to an arbitrator or the matter has to be settled in a court of law. This principle applies to the Government also as a party to the contract.

Where the breach of the contract is admitted, i.e., where there is no dispute that the contract has been broken by one of the parties, the Government as the party entitled to claim compensation for the breach need not wait for a determination by any outside agency as to whether there was any breach of contract. In that event, the question of damages alone remains to be considered. A sum can be named in the contract as the amount to be paid in case of breach, an amount in liquidation of the claim for compensation. The contract can thus provide for liquidated damages in the event of breach and the Government claiming that amount as compensation for the admitted breach committed by the other party to the contract, need not seek the aid of court or any outside agency for the fixation of the quantum of damages. Similarly, if the contract itself provides that "that one party shall be liable to pay damages to the second party as may be assessed by the second party", the assessment by the second party, in case the breach is admitted, is binding on the first party and there is no more any necessity for a further quantification of the damages by any outside agency. The party assessing the damage can straightaway seek to recover the amount and if that party is the Government, it can have recourse to the remedy available under the Kerala Revenue Recovery Act.”

22. In the decision reported in **Abdul Rahiman v. Divisional Forest Officer (**1988(2) K.L.T. 290) this Court relied on in the decision of the Apex Court in **State of Karnataka v. Rameshwara Rice Mills Thirthahalli** (AIR 1987 SC 1359) and held that it is not within the province of one of the contracting parties to unilaterally determine whether breach has been committed and also quantify the amount due from the other side.

23. Learned counsel for the respondent very vehemently contended that in view of the amended provision of the Revenue Recovery Act, Section 81 of the Revenue Recovery Act had been

made subject to Section 72 of the above Act. If that be so, in any matter covered by Section 72 of the Act, Section 81 has no application.

24. Apart from the fact that there is no merit in the above contention, the provisions which were applicable at the time when the suit was filed determine the issue. It was the unamended provisions, Sections 72 and 81 of the Act that apply to the facts of the case.

25. It therefore follows that the finding of the courts below that the suit is not maintainable by virtue of Section 72 of the Revenue Recovery Act cannot be sustained. The other issues have not been determined mainly because the suit was dismissed on the preliminary issue regarding the maintainability which was confirmed in appeal. Anyway, in the light of the finding of this court that there is no bar in filing suit and the issues have to be determined, it is only proper that the matter be remanded to the trial court for

determining the other issues.

For the above reasons, the judgments and decrees of the courts below are set aside and the matter is remanded to the trial court for determination of other issues raised by the trial court. The parties shall appear before the trial court on 14.7.2015. The trial court may make every endeavour to dispose of the suit as expeditiously as possible, at any rate, within three months from the date of appearance of the parties.

P. BHAVADASAN,
JUDGE

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