

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

THURSDAY, THE 3RD DAY OF FEBRUARY 2022 / 14TH MAGHA, 1943

WA NO. 18 OF 2022

APPELLANT/PETITIONER:

PRADEEP KUMAR.P
AGED 57 YEARS
S/O. PARAMESWARAN PILLAI, BUSINESS, PUNNAMPARAMBIL
BUILDINGS, COURT JUNCTION, PONKUNNAM.P.O,
KOTTAYAM
PIN - 686506
BY ADVS.
R.SURENDRAN
S.MAYUKHA

RESPONDENTS/RESPONDENTS:

- 1 THE STATE OF KERALA
REPRESENTED BY THE CHIEF SECRETARY TO GOVERNMENT,
SECRETARIAT, THIRUVANANTHAPURAM, PIN - 695001
- 2 THE PRINCIPAL SECRETARY TO GOVERNMENT OF KERALA
TAXES DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM, PIN -
695001
- 3 THE PRINCIPAL SECRETARY TO GOVERNMENT OF KERALA
LOCAL SELF GOVERNMENT DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM, PIN - 695001.
- 3 THE RURAL DEVELOPMENT COMMISSIONER
RURAL DEVELOPMENT DEPARTMENT, 4TH FLOOR, SWARAJ BHAVAN,
NANTHANCODU, KOWDIAR, THIRUVANANTHAPURAM, KERALA ,
PIN - 695003
- 4 THE STATE LEVEL BANKER'S COMMITTEE REPRESENTED BY ITS
CONVENOR
SLBC CELL, CANARA BANK, CIRCLE OFFICE, CANARA BANK
BUILDING, M.G ROAD, THIRUVANANTHAPURAM, PIN - 695001
- 5 THE SOUTH INDIAN BANK LTD., REPRESENTED BY THE CHIEF
MANAGER,
SOUTH INDIAN BANK LTD., KANJIRAPPALLY BRANCH, KOTTAYAM

DISTRICT, KERALA STATE, PIN - 686507

BY ADVS.

SRI.S.EASWARAN, STANDING COUNSEL FOR R6

SRI.K.P.HARISH, SENIOR GOVERNMENT PLEADER FOR R1 TO R4

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
03.02.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'CR'

JUDGMENT**SHAJI P.CHALY,J.**

This appeal is filed by the petitioner in the writ petition, challenging the judgment of the learned Single Judge in W.P.(C) No.22744 of 2020 dated 17.11.2021, whereby the writ petition was dismissed and refused to interfere with Exhibit P2 notification issued by the State of Kerala - 1st respondent, bearing SRO No.1002/2010 dated 2.11.2010 ; by which powers under clause (f) of section 58 of the Transfer of Property Act, 1882 (hereinafter called, "T.P. Act, 1882"), was exercised; and in supersession of all the previous notifications, all Corporations, Municipalities and Panchayats in the State of Kerala were notified for the purpose of the said provision.

2. The learned Single Judge, after making an in-depth analysis of the legislative history of the said provision and amendments made thereto, and placing reliance on various judgments, has arrived at the conclusion that the State Government has acted correctly, and it was was not obligated or enjoined by the provision to explain

why a particular territory has been either brought in, or excluded from the provisions of section 58(f) of the T.P. Act, 1882; and that the decisions are within the policy decision making realm into which the writ Court seldom and rarely enters. It is thus challenging the legality and correctness of the said judgment, the appeal is preferred.

3. The paramount contention advanced by the appellant is that; the finding of the learned Single Judge that the towns mentioned in the original provision, were those which were the hubs of businesses and commercial activities at that time and when the scope of businesses expanded in due time and when ease of doing commercial ventures required to be freed from the fetters of territorial limitations, Governments began to consider inclusion of more and more towns and areas into the fold of Section 58(f) of the T.P. Act, 1882; and therefore, it is irrefutable that what governs their minds in doing so is only the financial and commercial importance of such areas, which have to be offered the flexibility under the said provision, is unfounded and an outcome of guesswork.

4. It is also contended by the appellant that; the findings of the learned Single Judge in paragraph No.20 of the judgement, are without any support from the pleadings of the 1st respondent since the 1st respondent has not filed any counter

affidavit to justify Exhibit P2; that the finding of the learned Single Judge that the decision to bring in a particular territory or area within the umbra of Section 58(f) of the T.P. Act, 1882 is essentially a policy and financial decision, is basically incorrect in view of the legislative history; and that the power to specify those towns conferred on the State Government is to be exercised after conducting a study in to the existence of a practice of creating a mortgage by deposit of title deeds in such towns as on the date of commencement of Amendment Act, 1929 when section 58(f) was first introduced as a recognized category of mortgage.

5. It is also pointed out by the appellant that section 58(f) of T.P. Act, 1882 refers to persons in particular town; treatment of all persons within Grama Panchayat, Town Panchayat, Municipal Council and Municipal Corporation in the State as one category stating the reason of urbanisation is illegal; that the finding of the learned Single Judge that the words, "any other town" employed in section 58(f) in T.P. Act, 1882 does not indicate the territorial limits, as if it is under the delimitation processes, but only the areas to which Section 58(f) of the T.P Act, 1882 would apply, is without any reasoning, erroneous and illegal.

6. We have heard learned counsel for the appellant Adv.Sri.R.Surendran, learned Senior Government Pleader Sri.K.P.Harish for the State and its officials,

learned Standing Counsel Sri.S.Easwaran for the South Indian Bank Ltd , and perused the pleadings and materials on record.

7. Learned counsel for the appellant advanced arguments on the basis of the contentions deliberated above. Learned Standing Counsel Sri.S. Easwaran appearing for the 6th respondent Bank submitted that the T.P. Act, 1882 as it originally stood did not confer power to the State to issue notification specifying town for the purpose of creation of equitable mortgage; that it was introduced for the first time in 1929 when the Act was amended and power was conferred on the Governor General in Council to notify the towns other than Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab; that even in the said amendment there was an unqualified power vested in the Governor General in Council to notify the towns for the purpose of creation of equitable mortgage; that later, during 1977, the Law Commission of India took up a proposal for amendment of the various provisions of the T.P. Act, 1882; that it was felt that in order to achieve the economic progress, it is better that the provisions of section 58(f) is extended to all the territories, to which the Act extend with a power to the State Government to exclude certain areas from the scope of the clause, if it considered fit to do so. Therefore, it is submitted that the situation makes it clear that the primary

consideration before the State Government is the urbanisation of the areas under its control and the ease of doing commercial activity. It is also submitted that in its report dated 25th August, 1977, (which is produced before us), the Law Commission of India relied upon various judgments rendered by the Privy Council as well as High Courts in India to reach its conclusion.

8. The judgment so relied upon by the Law Commission of India would explain the situations more clearly and they are as follows:

(a) **The Himalaya Bank Limited Vs. F W Quarry and others** [(1895) ILR 17], wherein it is held that all 252 mortgages created prior to the transfer of T.P. Act 1882 was held to be valid applying the principles of justice, equity and conscience.

(b) **Jessie Moyle Stewart Vs. Bank of Upper India Ltd. Simla** [(1915) SCC Online Lah 260 = AIR 1916 Lah 39] wherein it is held in those parts of British India, where the T.P. Act 1882 is not in force, there can be no doubt that a perfectly valid equitable mortgage can be created by deposit of title deeds.

(c) **The Firm Moti Ram Mohan Lal vs. The Bharat National Bank Ltd.** [67 Ind Case 421], wherein it is held that mortgage created in Punjab, where

the Act does not extend was held to be valid following the judgment in Mrs.Steward Vs. Bank of Upper India]

(d) **Imperial Bank of India vs. Rai Gyaw Thu and Co. Ltd.** [76 Ind Cases 910] wherein it is held that it would be impossible at each subsequent advance that there should be search of registers because the registers searched would be not only the registers in the town itself by all those where the security of land mentioned in the deposited title deed might be situated and the exigencies of business require immediate advance without a delay which might be many days.

9. It is also submitted that the State Level Bankers Committee in its meeting held on 28th March, 2010 noticed that in the State of Orissa, the entire State has been notified as town for the purpose of creation of mortgage under section 58(f) of the T.P. Act, 1882, and therefore it was decided to take up the matter with the State Taxes Department, and it was accordingly that the notification was issued by the State Government on 2.11.2010. It is also brought to our notice that all District Headquarters in Punjab has been notified as per Punjab gazette notification dated 28.8.1975; all Block Headquarters specified as towns has been notified in the Punjab Gazette notification dated 23.6.1979, and still further the provision has been

extended to the whole of the State of Haryana as per notification in the Gazette dated 10.5.1972.

10. Learned counsel has also submitted that in the commentary of Sir Hari Singh Gour on the Transfer of Property Act, Platinum Ninth Edition, published in 1989, it has explained the real reason behind section 58(f) of the T.P. Act, 1882; that it is incorporated as a matter of convenience to the mercantile community.

11. We have evaluated the submissions made across the Bar. The question revolves around section 58(f) of the T.P. Act, 1882, which read thus:

*“ 58 [(f) **Mortgage by deposit of title-deeds.**—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.”*

12. The Transfer of Property Act, 1882 was introduced to define and amend certain parts of the law relating to the transfer of property by act of parties. The provisions were incorporated and conditions, limitations, restrictions and the parameters were made in the Act taking into account the situations prevailing in

the year 1882. Thereafter, when the economic activities gained momentum, certain amendments were made to the Act also by introducing section 58(f) in order to ensure that the economic activities are accelerated seamlessly by working out mechanisms so as to ease banking and financial transactions, but at the same time protecting the interest of the banks and other financial institutions also. It was accordingly that in the year 1929, the legislative assembly, as per the report of the Joint/Select Committee, introduced *clause (f) to section 58, which read thus:*

"(f) Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, and in any other town which the Governor General in Council may, by notification in the Gazette of India specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds."

13. Thereafter, in the year 1939, clause (f) was amended and certain of the towns notified were removed, and still later, after the independence, the provision was again amended to satisfy the felt necessities of the time, and in that process the State Government concerned is vested with powers to notify the provision. Therefore, it can be seen that taking into account the growth of the economic, industrial , agricultural, and commercial activities in the country and in order to

meet up with the necessities and requirements after the independence, the Union Government felt that suitable amendments were required to clause (f) and it was accordingly that the State Government concerned was empowered to notify clause (f) extending it to other areas, taking into account the State specific situations. It is easily gatherable from clause (f), that the power of the State Government under clause (f) is not saddled, restricted or circumscribed, and thus giving absolute power to expand the scope and horizon of the provision to tackle the situations so to have maximum advantage to the public and the needy in all respects.

14. In the quest for locating the evolution of the provision we find that, still later the Reserve Bank of India in 1968 appointed an expert group on State enactments having a bearing on commercial banks lending to agricultural sector with the following terms of reference among others:

"(i) To examine the provisions of the State laws relating to abolition of intermediaries, land tenure and tenancy reforms and similar other enactments which confer different degrees of rights in land on the tenant-cultivators and landholders belong to backward classes, tribals, etc. with particular reference to right of transferability through sale or mortgage or right to create a charge on land/crops and to suggest modifications, if any, required to facilitate their dealings with the commercial banks.

(v) To recommend measures for simplification of procedure for

registration of documents and of equitable mortgages, recovery of overdues, etc.

(iv) Other related measures/actions which will increase the commercial banks' participation in agricultural development programmes."

The references are answered in the report in the following manner:

“6.25 Many commercial banks have expressed the view that the number of centres where equitable mortgages could be created should be increased with a view to enlarging the facilities available to banks and borrowers in this regard.

6.26 The advantages inherent in a mortgage by deposit of title deeds are three-fold: firstly, it obviates the need for preparation and execution of the mortgage document; secondly, stamp duty and registration fee are avoided; and thirdly, the time taken in registration of the mortgage document is saved. This facility is, however, available only in certain notified towns and it is, therefore, not surprising that there should be a general demand for the extension of this facility to a larger number of centres (Appendix XVI).

6.27 The main constraint in extending this facility to a large number of centres would be the consequential loss of revenue to State Governments. It may, however, be possible to stipulate that the facility would be available at new centres only for borrowings from institutional agencies by agriculturists and thereby soften the impact on revenue. The State Governments should really not be concerned about this loss of revenue, as in any case, exemption from stamp duty/registration fee is available to co-operative societies in most States, and these transactions would be in the normal course have otherwise

been financed by co-operatives.”

15. The expert group examined about 16 enactments of the State of Kerala ; and in regard to the equitable mortgage, it is stated thus:

“iv. Equitable Mortgages

Out of 92 towns in the State (as per 1961 Census) only seventeen have been notified under Section 58(f) of the Transfer of Property Act, 1882, for creation of equitable mortgages.”

Thus, it can be seen that considerable deliberations and efforts were undertaken by the Reserve Bank of India in order to ease the method of mortgage to secure maximum advantage to the public at large for securing banking and financial benefits.

16. Therefore, it is clearly presumable that the provision in question was extended in the manner contained in the impugned notification by the State Government after making an in-depth analysis of various factors . Be that as it may, thrust of the contention advanced by the learned counsel for the appellant is relying upon the word, “town” contained under clause (f) that the State Government is not empowered to notify every Municipalities, Corporations and Panchayats as such ; or rather to put it more specific, the State Government should

have notified the towns to which the provision was extended. However, we do not find much force in the said contention, because the intention of conferring power on the State Governments by amending the provisions suitably is to enable the States to exercise the powers at its command more objectively and rationally for easing banking transactions, and for accelerating the economic, and other activities, also taking into account the convenience, requirements, welfare and interest of the public at large.

17. We are unable to comprehend how the notification has caused prejudice to the appellant. This is a query asked by us to ourselves, because the appellant is a beneficiary of the said provision. He has deposited his title deeds and secured money from the 6th respondent bank i.e., the South Indian Bank Ltd., Kanjirappally Branch, Kottayam district. Admittedly, repayment was defaulted, and it was consequent to which action was initiated under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, to recover the money due from the appellant. Therefore we do not think that the appellant is an aggrieved person in the context, to have invoked the discretionary remedy available under article 226 of the Constitution of India.

18. To put it otherwise, if the appellant has repaid the money in accordance with law and the agreement executed by and between the appellant and the 6th respondent bank, there would have been no proceeding against the appellant and the appellant would not have any complaint in respect of clause (f) of Section 58 of the T.P. Act, 1882, extended by the State Government to the Municipalities, Corporations and Panchayats. In our view, the expression "town" used in clause (f) in the year 1929, taking into account the prevailing situations then, was never expected to remain static forever, because we feel that urbanisation has taken place in a fairly speedy manner after the independence attained by the country . Therefore, the facilities that were available within the towns were extended to other Municipal areas, and still later to the villages and Panchayats also, and now there can be no segregation by and between a town, village, urban, semi-urban etc. in the matter of developmental activities in various sectors .

19. In our considered opinion, commercial activities, agricultural activities, and other economic & social activities have considerably accelerated irrespective of towns and villages thus enhancing the requirements of the citizens, depending the banks and other financial companies to carry on their activities uninterruptedly and

seamlessly. That is the reason why the banks have expanded their scope of business by providing loans in various sectors. That said, extension of clause (f) of Section 58 of the T.P. Act, 1882, to the entire State would only help the citizens because they don't have to depend on the banks situated in the notified towns for their financial needs and banking activities. Moreover, before the provision was extended to the entire State of Kerala, the banks situated in rural and unnotified areas, used to provide loans to the needy by depositing the title deeds with the branches of the banks situated in the notified areas, and the said methodology adopted by the banks were recognized by a division bench of this Court in the judgment in **Syndicate Bank v. Modern Tile and Clay Works** [1980 KHC 142], holding that such a procedure will not affect the binding nature of the mortgage; brought to our notice by the learned Senior Government Pleader.

20. That apart in order to understand the real implication of the concept of town, we find that Census of India, 2011, has classified the areas for census purposes and accordingly, they are broadly classified into rural and urban. Urban is perceived as Statutory Town and Out Growth. Statutory Town is conceived as a Municipality, Corporation, Cantonment Board or notified town area committee etc. Census Town is recognized as places that satisfy; (a) Minimum population of 5000

(b) At least 75% of the male main working population engaged in non-agricultural pursuits (c) A density of population of at least 400 per Sq.Km. Out Growth is recognized as a viable unit such as a village or part of a village contiguous to a statutory town and possesses the urban features in terms of infrastructure and amenities such as pucca roads, electricity, taps, drainage system, education institutions, post offices, medical facilities, banks etc.

21. That apart we are reminded of the usage and the doctrine of "Contemporanea Expositio". The principle of statutory interpretation, Ninth Edition, 2004 by Guru Prasanna Singh deals with the doctrine after referring to a number of judgments, and it is stated that the doctrine is confined to the construction of ambiguous language used in very old statutes where indeed a language itself had a rather different meaning in those days. It is further opined that the controlling effect of this aid which is known as 'executive construction' would depend upon various factors such as the length of time for which it is followed, the nature of rights and property affected by it, the injustice resulting from its departure and the approval it has received in judicial decisions or in legislation.

22. So also, a reference to some of the dictionaries to find out the scope of the term "town" employed in clause "f" would also give us adequate insight to arrive at

a logical conclusion. In Black's Law Dictionary (Revised Fourth Edition), it is defined as, *"quite commonly used as a generic term and as including both cities and villages"*. The word "city" has been defined in the said dictionary as *"a large town incorporated with certain privilege."* In Webster's Third New International Dictionary, "town" has been defined as a comparable settled area of any size as distinguished from surrounding rural territory". That apart the word "town" was considered by the Calcutta High Court in **Belait Sheikh v. State of West Bengal** [AIR 1952 Cal 753], wherein it is held as follows:

"In the absence of any definition in the Act has to be understood in the sense in which ordinary people understand it, namely that it is a place having the main attributes of the existence of houses in clear proximity, concentration of a large number of people in a comparatively small area and engagement of the bulk of the population in non-agricultural pursuits."

23. Similarly in **State v. Jagadish B. Rao** [AIR 1970 Goa 54] it is stated thus:

"It is not a term of art and therefore it is to be understood in its ordinary sense. The dictionary meaning of "town" is an assemblage of buildings, public or private, larger than a village and having a more complete and independent local Government."

24. Above all, Part IX and Part IXA are introduced into the Constitution of India dealing with Panchayats and Municipalities, considering the relevance, importance and functions to be discharged by the Panchayats and the Municipalities, consequent to which the State Governments were to undertake legislations for providing absolute power of self governance to the local bodies and thus, the Panchayats as well as the Municipalities have acquired a constitutional colour and responsibilities to carry on with its administration. These are also factors which persuaded the State Government to issue the notification, extending the provisions of section 58(f) of the T.P.Act, 1882 to the entire areas within the State.

25. Taking into account all the above aspects, we are of the considered opinion that there would not be any area in the State of Kerala without such developments and such population as is conceived for the purpose of census by the Union Government in the year 2011, especially due to the peculiar nature and lie of the State. Therefore, we have no hesitation to perceive that the State was right in all respects in extending the benefits of clause (f) of Section 58 of the T.P. Act, 1882 to the Corporations, Municipalities and the Panchayat areas. In the circumstances, we are of the clear opinion that the learned Single Judge was right in dismissing the writ petition, declining interference with the notification issued by the State

Government in that regard. Needless to say, the appellant has failed to make out any case of jurisdictional error or other legal infirmities persuading us to exercise our power conferred under section 5 of the Kerala High Court Act, 1958, in an intra court appeal.

Writ appeal fails, accordingly it is dismissed.

Sd/-
S.MANIKUMAR
CHIEF JUSTICE

Sd/-
SHAJI P.CHALY
JUDGE

smv