

Kerala High Court

Philomina vs The Kerala State Industrial Corpn ... on 23 October, 2009

IN THE HIGH COURT OF KERALA AT ERNAKULAM

OP.No. 18343 of 2001(H)

1. PHILOMINA

... Petitioner

Vs

1. THE KERALA STATE INDUSTRIAL CORPN LTD

... Respondent

For Petitioner :SRI.K.RAMAKUMAR (SR.)

For Respondent :SRI.M.PATHROSE MATTHAI (SR.)

The Hon'ble MR. Justice PIUS C.KURIAKOSE

Dated :23/10/2009

O R D E R

PIUS C. KURIAKOSE, J.

OP.No.18343of 2001

Dated this the 23rd day of October, 2009

J U D G M E N T

The petitioner in this original petition is the second petitioner in WP(C) No. 6144 of 2007 which is already disposed of by this Court 19-9-2008 by common judgment in writ petition Nos. 6144 of 2007 and 5128 of 2008. The case of the petitioner is that she is a non-resident Indian owning landed property in Ernakulam and Cannanore Districts. Her husband Sri.Sebastian Chokkattu (first petitioner in WP(C) No. 6144 of 2007) was the Director of Trend Setters Group of Companies in the Special Economic Zone, Kakkanad, Kochi. It is stated that some of the companies in the group are facing winding up proceedings before this Court. Due to labour unrest all the companies in the group are now under lock out. Before the winding up proceedings started the companies in the Trend Setters OP. 18343/01

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Group had availed term loan from the first respondent KSIDC. Besides the assets of the companies certain properties belonging to the petitioner and her husband were offered as collateral security for the loan taken by the companies. The details of those properties seven items in number extending to a total of 4 acres 4 cents and 7 sq. links are mentioned in paragraph (2) of the writ petition. According to the petitioner, besides the properties mentioned in the writ petition no other properties belonging to the petitioner was offered as collateral security for the term loan taken by the Trend Setters Group of Companies from the first respondent. But now the third respondent Thaliparamba Tahsildar has issued Ext.P2 notice under section 49(2) of the Revenue Recovery Act to the petitioner informing that 3.63 acres of landed properties belonging to her as co-owner with her husband will be put to auction for realisation of the loan amount advanced by the first respondent to the Trend Setters Group of Companies. OP. 18343/01

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Ext.P2 was followed by Ext.P3 notice under section 36 of the Revenue Recovery Act.

2. The petitioner submits that the property mentioned in Exts.P2 and P3 notices belong jointly to the petitioner and her husband and that the said property was never offered as collateral security to the first respondent. Hence the proposed auction of that property for realisation of the loan taken from the first respondent is illegal. It is submitted that on receiving Exts.P2 and P3 the petitioner submitted Ext.P4 representation before the second respondent District Collector, Kannur requesting him to cancel the proposed auction. An identical representation was submitted by the petitioner before the third respondent Tahsildar also. In fact the second and third respondents were approached by the petitioner after submitting Ext.P4 through their authorised representatives. But it is known, that ignoring Ext.P4 the auction sale is going to be conducted pursuant to P2 and P3. It is in the above circumstance that the original petition OP. 18343/01

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was instituted with the following original prayers:

- i. To issue a writ of certiorari or other appropriate writ quashing Exts.P2 and P3 notices issued to the petitioner by the third respondent.
- ii. To declare that no property belonging to the petitioner other than that is specifically offered as collateral security is liable to be proceeded against for realising the loan taken by Trend Setters Group of Companies.

3. The first respondent KSIDC filed a detailed counter affidavit. It is contended therein that Sri.Sebastian Chokkattu and his wife the petitioner are Directors of different companies promoted by them. The Companies were closed down and wound up due to mismanagement and diversion of funds by the Managing Director and the other Directors including petitioner. The companies availed

loans from the first respondent. One such company is Trend Textiles Ltd. which was formerly known as Poly Fibre Products Ltd. The said company availed a short term loan of Rs.100 lakhs which was converted into a direct term loan on the terms and conditions stipulated in the loan OP. 18343/01

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agreement. Sri. Sebastian Chokkattu, petitioner's husband and the petitioner represented by her power of attorney holder Sri. Sebastian Chokkattu executed Ext. R1(a) deed of guarantee. Having executed Ext. R1(a) the petitioner is not entitled to deny its execution on her behalf by her power of attorney holder who is none other than her husband. It is further contended in the counter affidavit that the petitioner and her husband had promoted another company called Trend Setters Instyle India Ltd. They had also availed a short term loan which was at their request converted as a direct loan. The loan agreement in connection with that loan was executed on 23-10-1998 by the company. The petitioner and Sebastian Chokkattu have furnished personal guarantee and executed deed of guarantee on 23-10-1998. Ext. R1(b) is the copy of the deed of guarantee. It is then contended that as sureties the petitioner and her husband are liable for repayment of the loan given to Trend Textiles Ltd. and Trend Setters Instyle India Ltd. Both these OP. 18343/01

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companies committed default in repayment of the term loans. By Ext. R1(c) notices were issued to the Companies and the Directors calling upon them to pay the arrears lest R.R. proceedings would be taken. The letters sent to the petitioner and her husband Sebastian Chokkattu were returned unclaimed. Since there was default on the part of the borrower companies and the guarantors Sri. Sebastian Chokkattu and the petitioner, revenue recovery proceedings had to be initiated. R.R. proceedings have been taken against the immovable properties belonging to the petitioner and Sri. Sebastian Chokkattu since they were liable as sureties of the borrower companies. The properties in Payyavoor Village (subject matter of the writ petition) were attached by the third respondent. Notice of attachment was issued to the petitioner and to Sri. Sebastian Chokkattu and it is on their failure to pay the amount that the properties are brought for sale. P2 and P3 notices are therefore proper and valid. It is contended that the KSIDC is entitled to OP. 18343/01

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proceed against all the properties of the petitioner and her husband even if the properties are not mortgaged or charged as collateral security. Petitioner and her husband are guarantors and hence their properties can be attached and sold under the Revenue Recovery Act. The proposed sale is pursuant to an attachment order validly issued. The counter affidavit emphatically denies the averments of the petitioner that he has not furnished any personal guarantee for any loan taken from the first respondent. It is pointed out that admittedly she and her husband mortgaged the property in Thengode Village as security for loan to their companies they having executed R1(a) and (b) deeds of guarantee after executing loan documents. Right to take usufructs from the properties were sold long before the orders of this court. Loans given to Trend Textiles Limited and Trend

Textiles India Limited as short term loans were converted into direct term loans on the request of the said companies subject to specific terms and conditions in OP. 18343/01

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sanction letters No. 3566 and 3563 dated 4-10-1997 of the first respondent and the terms and conditions of the loan agreements executed on 23-10-1998 by the borrower companies and Sri.Sebastian Chokkattu and the petitioner as co-obligant. Exts. R1(d) and (e) copies of the loan agreements are relied on in this context. Notices sent to the borrower companies and to the guarantors the petitioner and Sebastian Chokkattu in the address given by them in the loan documents were returned unclaimed. R.R. proceedings in respect of direct term loans under agreements executed on 23-10-1990 are not barred by limitation. R.R. Proceedings were initiated against the borrower companies and the sureties within the period of limitation from the date of execution of the loan agreements and date of default and payments. R.R. proceedings were initiated only when loans were defaulted. Ext.R1 (f) copy of the requisition for initiation of R.R. proceedings is also produced. Reiterating that the R.R. proceedings are not OP. 18343/01

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barred by limitation it is stated that the loans in question were subject to terms and conditions of the loan agreements executed on 23-10-1998 and on the basis of deeds of guarantee executed by petitioner and her husband on 23-10-1998. The R.R. proceedings for sale of immovable property are dated 22-5-2001 pursuant to requisition by first respondent on 17-11-2000. The proceedings are therefore not barred by limitation at all. Along with the counter affidavit filed to IA. No. 2681/08, the first respondent has produced R1(g) which is copy of O.P. No. 26466 of 2002 filed before this Court by the petitioner. This is produced to show that the petitioner's contention that she was not aware of the attachment of her properties in Thengode Village in Ernakulam District is false. It is pointed out that in Ext.R1(g) O.P. it is clearly averred that except the properties specified in paragraph (2) mortgaged to KSIDC no other properties of the petitioner was offered as security and that the third respondent Tahsildar (RR), has OP. 18343/01

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attached 3.7595 hectares of property including properties belonging to the petitioner and her three minor daughters. The petitioner had produced as Ext.P2 in that O.P. the notice of attachment dated 16-4-2002. Along with the counter affidavit to IA. 2682/08 the first respondent has produced Ext. R1(h) copy of the minutes of the Director Board of Trend Textiles Limited declaring that the Managing Director Sri.Sebastian Chokkattu and Smt.Philomina Chokkattu, the Director are authorised duly and severally to deliver and deposit the title deeds with the KSIDC in respect of the immovable properties in order to create the equitable mortgage. It is further declared that Smt.Philomina Chokkattu, the petitioner had executed a power of attorney in favour of Sebastian Chokkattu empowering her to put signatures in all the documents to be executed in favour of KSIDC. It is also declared and resolved that Mr.Sebastian Chokkattu and Smt.Philomina Chokkattu are severally authorised to approve and finalise such other deeds and OP. 18343/01

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documents as may be required by KSIDC and the common seal of the company be affixed in the presence of the above two. Ext.R1(i) is copy of similar resolution adopted by Trend Setters Instyle India Limited.

4. The petitioner filed a reply affidavit on 9-7-2005 for answering the contentions raised by the first respondent. Ext.P5 and P6 copy of inspection reports issued by a qualified Company Secretary in practice in respect of Trend Setters Instyle India Limited is relied on to contend that Smt. Philomina Chokkattu was not a Director of these companies at any point of time. Ext.P7 is copy of the power of attorney executed by Philomina Chokkattu in favour of her husband Sebastian Chokkattu. It is contended on the basis of Ext.P7 that the petitioner appointed her husband as her attorney only in respect of her properties including the properties specifically mentioned therein. It is contended that on the strength of Ext.P7 Sri.Sebastian Chokkattu has no authority to execute a deed of guarantee or to make her OP. 18343/01

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a co-obligant in a loan agreement. Therefore, Ext.R1(a), R1(b), R1(d) and R1(c) documents produced by the KSIDC are void ab initio. It is then contended that all along the petitioner Smt.Philomina Chokkattu had been disputing her liability to discharge the loan liability of the defaulted companies. Even in the original petition she had stated that what is offered as surety for the loan by her power holder were properties at Thengode and no other properties belonging to her. Not even the Thengode properties cannot be proceeded against on the basis of R1(a), R1(b), R1(d) and R1(e) as they are void documents. When there is such a genuine dispute regarding the R.R. proceedings the first respondent ought not have proceeded with the recovery proceedings and the dispute ought to have been got adjudicated by a competent civil court of appropriate jurisdiction.

5. The petitioner has filed a further reply on 27-1- 2008. Along with the same the petitioner has produced OP. 18343/01

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Ext.P11 copy of the order of attachment made in respect of the properties situated at Thengode in Ernakulam District by the revenue recovery authorities. It is stated that Ext.P11 was not within the knowledge of the petitioner nor was the attachment made with notice to her. She came to know about it only on reading the counter affidavit filed by the first respondent. It is contended that Ext.P11 is absolutely without jurisdiction in violation of principles of natural justice, unauthorised and is liable to be declared void. On producing Ext.P11 the petitioner sought incorporation of additional ground (f) in the writ petition and additional prayer that all the records leading to Ext.P11 be called for and Ext.P11 be quashed by issuance of a writ of certiorari or other appropriate writ.

6. To the reply affidavit the first respondent KSIDC has filed an additional counter affidavit on 6th August 2005. It is reiterated therein that the petitioner's husband Mr. Sebastian Chokkattu and the

petitioner had promoted the OP. 18343/01

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companies and loan agreements and deeds of guarantees were executed by them as co-obligants. It is submitted that by Exts. R1(d) and R1(e) the petitioner and her husband Mr. Sebastian Chokkattu had agreed as co-obligants to mortgage their properties described in paragraph 2 of the O.P. as collateral security for the loans. It is also submitted that the borrower companies are the petitioner's family concerns with the petitioner and her husband and her close relatives as share holders. They have borrowed crores of rupees from financial institutions and banks and diverted the amounts and invested huge amounts in immovable properties and shares in companies. The properties purchased by the petitioner and her husband are not out of profit earned by the companies but by diversion of the loan amounts received by them. No amount was repaid against the loans due to the first respondent by borrower companies. The companies were closed down under the pretext of labour trouble after diverting the funds availed of OP. 18343/01

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from first respondent. Large amounts due to suppliers of raw materials and to others were not paid and defaulted and both the companies were ordered to be wound up by this Court. The petitioner was acting in concert with her husband in promoting the companies in availing the loans and in diverting the loan amounts to purchase properties in her name and in her husband's name. She authorised her husband to act on her behalf as power of attorney holder. Sri. Sebastian Chokkattu declared to the first respondent that he was duly authorised to execute the loan agreement and the guarantee agreements on petitioner's behalf as her power of attorney holder and had assured to produce the power of attorney to the respondent soon after. The petitioner is fully aware of the fact that her husband executed loan agreements on her behalf as co-obligant and agreed to mortgage and mortgaged her immovable properties also as her agent and attorney. The contention presently raised that the power of attorney given to her OP. 18343/01

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husband does not authorise him to execute guarantee agreement on her behalf is without bonafides. At any rate, Ext.P7 power of attorney is executed by the petitioner and the terms of that power of attorney are wide enough to enable Sri. Sebastian Chokkattu to act before all authorities and persons for matters relating to her and her properties. Clause 11 of Ext.P7 generally authorises Sri. Sebastian Chokkattu to act as attorney or agent and to execute and do all acts, deeds and things as fully and effectively as the petitioner herself would do personally. Petitioner's husband had declared that the petitioner had authorised him to execute the loan documents and guarantee agreement for availing the loan and had assured the first respondent that the power of attorney will be produced shortly. But after signing the loan agreement and deeds of guarantee and after mortgaging the petitioner's immovable properties Sri. Sebastian Chokkattu did not produce the power of attorney. The petitioner and her husband had resorted to OP. 18343/01

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defraud the first respondent after availing the loan. The petitioner has affirmed and admitted the mortgage of her immovable properties as collateral security by her husband in accordance with the loan agreements executed by him as power of attorney holder of the petitioner who has also a co-obligant. The additional counter affidavit goes on to reiterate the contentions already raised by the first respondent and deny the averments raised by the petitioner in the original petition as well as through the reply affidavit.

7. The additional 4th respondent Development Commissioner at Cochin Special Economic Zone, Kakkanad has also filed a counter affidavit. It is contended therein that Cochin Special Economic Zone has been set up by the Department of Commerce, Government of India to attract foreign investment in export oriented ventures. More than Rs.98 crores had been invested by the Government of India for developing the infrastructure in this 103 acre Zone to provide a world class setting for attracting investors OP. 18343/01

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globally. Special fast clearance mechanisms have also been instituted to ensure free working environments for the units in the zone. It is submitted that there were 54 functioning units in the Cochin Special Economic Zone in the year 2001 apart from another 12 units which were under implementation. For solving the water scarcity which was experienced by all the units it was decided to set up separate water supply system for 15 lakhs litres per day for the CSEZ with the funds available from Critical Infrastructure Balancing Scheme. CSEZ constructed a water intake well in Kadamprayar river close to its bank. The pumping installations are on the building constructed above the well. Since the intake well and pumping installations are on the bank of Kadamprayar river, there is no encroachment of land belonging to the petitioner. Pipelines have been laid through the pathway leading up to the river bank paying restoration charges to the local Panchayat. Referring to the prayers in the writ petition it is pointed out OP. 18343/01

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that the petitioner has not contended anything about the attachment of properties at Thengodu Village in Ernakulam District. As per records available in Kakkanad Village Office the Kerala State Industrial Development Corporation has attached the entire land area of the petitioner towards recovery of dues to them. Therefore the petitioner has no ownership over the property. If there is any encroachment as alleged by the petitioner, the objection should come from the KSIDC, who are the owners of the property. The petitioner has accepted the attachment of property in Ernakulam District which was mortgaged to KSIDC as collateral security. Therefore the allegation that the encroachment will interfere with the pending OP is baseless and the petitioner is not entitled for the relief as sought for in IA. No. 14420/06. Any restriction on the operation of this installation will affect the functioning of 90 industrial units and around 7250 employees who are solely dependent on this supply system. The second respondent District OP. 18343/01

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Collector, Kannur has filed a counter affidavit. It is contended therein that in the light of the proposal made by the Secretary, KSIDC the District Collector, Kannur authorised the Tahsildar, Taliparamba to collect an amount of Rs.9,98,44,000/- towards KSIDCs due from Sri.Sebastian Chokkattu. Accordingly, demand notice under Sections 7 and 34 were issued and got served to the defaulters by affixture on their building bearing door No.PP-V-112. But the defaulters were not ready to credit the same. Therefore an extent of 3.63 acres of land in R.S. No.6/1 of Payyavoor Desom of Payyavoor Village owned and possessed by Mr.Sebastian Chokkattu and Philomina Chokkattu was attached on 21-5-2001 and the same was put for sale. The sale was scheduled to be conducted on 23- 6-2001. Subsequently adjourned to 4-7-2001, 19-7-2001, 6-8-2001, 20-8-2001 and 24-9-2001 for want of bidders. On 24-9-2001 the auction sale could be conducted and one Jaseentha Joseph, D/o T.J.Joseph, Theyattuparambil, OP. 18343/01

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Payyavoor purchased the property for the highest bid amount of Rs.4,06,000/- and she deposited Rs.60,900/- on the same day being the 15% of the bid amount. During the course of the auction the petitioner sent a lawyer notice requesting to cancel follow up action of public auction. But in this case the RRC was initiated in accordance with the provisions of Section 69(1) and a reply was given to the advocate accordingly on 19-6-2001. Meanwhile the petitioner filed OP. No. 18343 of 2001 before this Court through her power of attorney holder and this court stayed the confirmation of the sale. Therefore the proceedings for confirmation of auction sale is kept in abeyance. Enquiry shows that Sri.Sebastian Chokkattu has obtained an Indian Passport dated 5-3-1991 in the name of Chokkattu Joseph Sebastian from the First Secretary Commission of India, Hon Kong and that Sri.Sebastian and Philomina are now residing in Dubai. The original petition is filed intentionally to defeat the Government policy of recovery.

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8. It was sri.K.Ramakumar, senior counsel who addressed me on behalf of the petitioner. The learned senior counsel addressed elaborately on the basis of the pleadings raised by the petitioner and the grounds raised in the original petition. All the arguments of Mr.Ramakumar were resisted by Sri.M.Pathrose Mathai, senior counsel for the KSIDC and also by the learned senior Govt. Pleader. The learned senior counsel Mr. Pathrose Mathai and Mr.Ramakumar drew my attention to various documents placed on records by their respective parties. I have considered the rival submissions, the pleadings raised by the parties and the materials placed on record.

9. I had occasion to decide WP(C) No. 6144 of 2007 filed by the petitioner and her husband Sri.Sebastian Chokkattu as well as WP(C) No. 5128 of 2008 filed by the their children represented by their father Sebastian Chokkattu. The prayers in WP(C). No. 6144 of 2007 were directed mainly against the land acquisition proceedings OP. 18343/01

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initiated for acquisition of their properties in Kakkanad Village including the properties which were mortgaged in favour of KSIDC. In WP(C) No. 5128 of 2008 filed by the children also the land acquisition proceedings were under challenge contending that some of the properties had been transferred to them and that they had acquired ownership over the properties by settlement deeds and that the acquisition of such properties is illegal. The following prayers which had something to do with the reliefs claimed in the present writ petition were also made in WP(C). No. 5128 of 2008. Prayer No.3 to declare by the issuance of an appropriate writ, order or direction that the 3rd respondent has no power of authority to get executed any loan agreement or guarantee agreement on the basis of Ext.P6 power of attorney (the power of attorney executed by Smt.Philomina in favour of Mr.Sebastian Chokkattu). Prayer No. 7 to declare by the issuance of an appropriate writ, order or direction, that the property belonging to the OP. 18343/01

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petitioners and covered by Exts.P3 to P5 settlement deeds are not liable to be attached for the alleged dues towards 3rd respondent either by initiating Revenue Recovery Proceedings or by recourse to any other proceedings. The above prayers were not granted under my common judgment dated 19-9-2008. It is understood that the above judgment has become final. In fact, I found under that judgment that the contention of the KSIDC that the very settlement deeds executed by the parents in favour of the children were executed with the object of defeating the creditor KSIDC was meritorious. I also noticed that all the properties were being enjoyed by the husband, wife and the children as a common holding. As for the reliefs sought for in the present writ petition which are essentially with respect to the attachment and sale pursuant to revenue recovery proceedings initiated in respect of properties in Payyavoor Village, what emerges prima facie from the documents, especially Exts.R1(a) to R1(d) relied on by the OP. 18343/01

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KSIDC is that the petitioner Smt.Philomina was a surety to the loan availed from the KSIDC. The liability of surety is co- extensive with that of the principal debtor and the creditor has a right to proceed against movable and immovable properties of the surety and against the surety also for recovering the amounts due under the loan transaction irrespective of whether the property had been mortgaged or had been specifically offered as security. In the instant case, what is discernible from the records is that demand notices under section 7 of the Revenue Recovery Act had been issued and it is in the wake of no response, that the properties in Payyavoor were attached under Section 34. Since the defaulters Sri.Sebastian and Smt.Philomina were not available for service, service was made by affixture on the door of the building existed at the address supplied by them. There was a valid requisition from the Secretary of the KSIDC to the District Collector for recovery of Rs.9,98,44,000/- due to the KSIDC. It is seen that the OP. 18343/01

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attachment was made on 21-5-2001 and that the sale was duly notified. It is also seen that sale had to be adjourned on several occasions for want of bidders and finally sale was conducted on 24-9-2001 and in the said auction sale the properties were purchased by the highest bidder one Jaseentha Joseph. But for the interim orders issued in this writ petition further proceedings in pursuance to the sale would also have followed. As stated already, on the terms of the documents produced by KSIDC there was personal liability for the petitioner also. The contention of the petitioner seems to be that the documents relied on by the KSIDC are void ab initio and beyond the scope of Ext. P7 power of attorney which was admittedly executed by her in favour of her husband Sebastian. This court cannot go into the question whether R1(a) to R1(d) are void ab initio for the reasons stated by the petitioner. According to me, the petitioner has to avail statutory remedies available to her under the Revenue Recovery Act and the Rules there under. OP. 18343/01

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Since fraud is alleged it may be open to the petitioner to approach the civil court also. I don't think that this is a case where the extraordinary jurisdiction of this court under Article 226 is to be exercised for granting the reliefs prayed for by the petitioner.

Original petition is dismissed, however, remedies if any, available to the petitioner under the Revenue Recovery Act and from the civil court are not foreclosed. No costs.

PIUS C.KURIAKOSE, JUDGE ksv/-

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PIUS C. KURIAKOSE, J.

O.P. No. 18343 of 2001 JUDGMENT 23rd October, 2009