

(1999) 11 KL CK 0092
In the High Court Of Kerala
Case No : S.A. No. 253/90

Aringapeedikayil Abdulla and Others

APPELLANT

Vs

Karanchery Narayani and Others

RESPONDENT

Date of Decision : 29-11-1999

Acts Referred:

Hindu Minority and Guardianship Act, 1956 — Section 8
Kerala Land Reforms Act, 1963 — Section 125(3), 3(1), 52, 7, 7B
Transfer of Property Act, 1882 — Section 52

Citation : (1999) 11 KL CK 0092

Hon'ble Judges : P.K. Balasubramanyan, J

Bench : Single Bench

Advocate : R. Bhaskaran and R.K. Muraleedharan, for the Appellant; N.L. Krishnamoorthy and K. Lakshminarayanan for Respondents 11 and 12, for the Respondent

Judgement

P.K. Balasubramanyan, J.—This Second Appeal is by Defendant No. 9 in a suit which was filed by the Plaintiffs for recovery of possession with a claim for the alternate relief of partition. Defendant No. 9 is an assignee from Defendant No. 8 in the suit, the assignment being taken by him on 20th May 1969. According to Defendant No. 9, Defendant No. 8 was a lessee on the basis of a lease dated 12th March 1962 and the said right having been taken assignment of by Defendant No. 9, Defendant No. 9 was entitled to fixity of tenure under the Kerala Land Reforms Act and the Plaintiffs were not entitled either to recover the property or to recover khas possession of a share therein. Originally the contention of Defendant No. 9 was overruled and the suit was decreed for recovery of possession. That decree of the trial court dated 7th October 1970 was affirmed in appeal. Defendant No. 9 filed S.A. 376 of 1980 before this Court. This Court set aside the judgments and decrees of the courts below and remanded the suit to consider the question whether Defendant No. 9 was entitled to claim fixity of tenure u/s 7 of the Kerala Land Reforms- Act and whether the decree that is to be granted in the suit could not be one for partition rather than

recovery of possession. Pursuant to this remand, the trial court in compliance with the requirements of Section 125(3) of the Kerala Land Reforms Act held that Defendant No. 9 was not entitled to claim fixity of tenure u/s 7 of the Act and that the Plaintiffs were not entitled to recover possession but were only entitled to the separation and delivery to them of their share. Both the Plaintiffs and Defendant No. 9 went up in appeal. The appeal filed by the Plaintiffs was dismissed and the Plaintiffs have not pursued further their claim for recovery of possession of the entire property. In the appeal filed by Defendant No. 9, the lower appellate court held that on the pleadings and the evidence in the case Defendant No. 9 could not claim the protection of Section 7 of the Kerala Land Reforms Act and hence the preliminary decree for partition was justified. It is against this decree that Defendant No. 9 has filed this Second Appeal essentially raising the substantial question of law whether Defendant No. 9 was not entitled to the protection of Section 7 of the Kerala Land Reforms Act especially in the light of the explanation to that Section.

2. The plaint schedule property having an extent of 24 cents belonged to one Kelappan. Kelappan died in the year 1958. Defendant No. 1 in the suit is the widow of Kelappan and the Plaintiffs and Defendants 2 to 4 are the children of Kelappan. Of the Plaintiffs, Plaintiffs 2 and 3 are minors. Kelappan had another son Gopalan, who is dead. The widow of Gopalan is Defendant No. 5 in the suit and Defendants 6 and 7 are the children of Gopalan. Defendant No. 8 was allegedly the lessee of the property and Defendant No. 9 the assignee from Defendant No. 8. According to Defendant No. 9, on 12th March 1962 deceased Gopalan, son of Kelappan and Defendants 1 to 3 granted a lease of the plaint schedule property to Defendant No. 8 by a registered deed marked Ext. B-1. The lease purported to be on behalf of the Plaintiffs and Defendant No. 4, also all of whom were minors on that day. The mother, the widow of Kelappan acted as the guardian of the minors. On 20th May 1969 Defendant No. 8 assigned the leasehold under Ext. B-2 to Defendant No. 9. The grant of the lease by the mother was found to be not binding on the Plaintiffs and Defendant No. 4. But it was held by the lower appellate court that Defendant No. 4 not having questioned the transaction, was not entitled to claim any relief. It is on that basis that a decree for partition and delivery of three out of eight shares to the Plaintiffs was passed. It is the case of Defendant No. 9 that if his plea for fixity of tenure under the Kerala Land Reforms Act based on Section 7 of the Act is upheld, the Plaintiff would not be entitled to a division and separation of their share by metes and bounds but would be entitled only to divide the compensation that is payable by a cultivating tenant to a landlord in terms of the Act.

3. Section 7 of the Act as it occurred in the Parent Act, Act 1 of 1964 read as follows:

Certain persons occupying land honestly believing to be tenants, to be deemed tenants: Notwithstanding anything to the contrary contained in any law, or in any

contract, custom or usage, or in any judgment, decree or order of court, any person who, on the 11th day of April, 1957, was continuously in occupation of the land of another situate in Malabar, for not less than two years, honestly believing himself, to be a tenant and continued to be in occupation of such land at the commencement of this Act, shall be deemed to be a tenant.

The Section was amended by the Kerala Land Reforms Act, Act 35 of 1969. The Section as amended reads:

Certain persons occupying land honestly believing to be tenants, to be deemed tenants: Notwithstanding anything to the contrary contained in Section 52 or any other provision of the Transfer of Property Act, 1882, or any- other law, or in any contract, custom or usage, or in any judgment, decree or order of court, any person in occupation at the commencement of the Kerala Land Reforms (Amendment) Act, 1969, of the land of another situate in Malabar shall be deemed to be a tenant if he or his predecessor-in-interest was continuously in occupation of such land honestly believing himself to be a tenant for not less than two years within a period of twelve years immediately preceding the 11th day of April, 1967.

Explanation: Notwithstanding anything contained in the Indian Evidence Act, 1872, where a person has been continuously in occupation of any such land for two years within the said period of twelve years, it shall be presumed until the contrary is proved that he has been in such occupation honestly believing himself to be a tenant.

The effect of the amendment was to alter the date of occupation of two years within a period of 12 years referred to by the section and also to add the explanation. It can be seen that Defendant No. 9 who took an assignment of the leasehold interest only on 20th May 1969 could not by himself claim protection of Section 7 of the Act but he could claim that protection on the basis that Defendant No. 8, his assignor, was entitled to that protection and as assignee from Defendant No. 8 he is also entitled to that protection. This is especially so since Section 50 of the Act has provided that subject to the provisions of the Act the rights of a tenant are heritable and alienable.

4. The courts below held that it has not been shown that Defendant No. 8 was entitled to the protection of Section 7 of the Act on the materials available in the case. The courts below have held that what Defendant No. 8 took was a void lease in so far as it related to the share of the Minors when he took the lease from the guardian mother without her obtaining the requisite sanction from the District Court u/s 8 of the Hindu Minority and Guardianship Act. There was also no material to show that the transaction of lease on 12th March 1962, after the coming into force of the Kerala stay of Eviction Proceedings Act, Act 1 of 1957 and the Kerala Agrarian Relation Act, Act 4 of 1961 conferring fixity of tenure on tenants was a prudent act of a guardian Grinding on the minors. The courts below have therefore held that when Defendant No. 8 took a lease from the

guardian without satisfying himself that the guardian was competent to grant the lease and the lease was being granted under circumstances that justify the grant of such a lease, Defendant No. 8 could not be said to have acted bona fide and hence could not be held to be a person who was holding the land honestly believing himself to be a tenant. In that context, the courts below also took note of the failure of Defendant No. 8 to step into the box to speak to the bona fides of the transaction and the honest belief entertained by him regarding the property. The argument based on the explanation to Section 7 of the Act was met by the appellate court by pointing out that a person obtaining a lease of a minor's property from a person who had no right to grant the lease, cannot be said to be in occupation in the honest belief that he is a tenant and once that finding is rendered on the materials available, the explanation to Section 7 of the Act could not come to his rescue.

5. Before me, the argument was based solely on the explanation to Section 7 of the Act. Learned Counsel contended that the presumption available to the occupant by virtue of Section 7 of the Act has not been rebutted in the case and hence it may be held that defendant 8 was entitled to the protection of Section 7 of the Act and consequently his assignee, Defendant No. 9 was also entitled to protection. Learned Counsel referred to the decision in *Knnhambu Nair v. Kunhammaru Amma* 1973 KLT 1048 to contend that the scope of the explanation as referred to by the learned Judge in that decision would enable Defendant No. 8 to claim the protection of Section 7 of the Act.

6. The facts of the case in *Kunhambu Nair's* case 1973 K.L.T. 1048 can now be noticed. That was a case where the Defendant in a suit for recovery of possession on the strength of title had set up a lease and as a consequence fixity of tenure under the Kerala Land Reforms Act. He could not establish that lease and the same was found against by the courts below and that finding was accepted by the High Court in Second Appeal. It was contended on behalf of the Defendant that though he had failed to establish the tenancy set up by him, he would be entitled to the protection of Section 7 of the Act since he must be held to be a person who was in occupation of the land for not less than two years within a period of twelve years immediately preceding the 11th April, 1967 honestly believing himself to be a tenant. In support of the plea of honest belief the explanation to that section was relied on to point out that there was a presumption also available to the Defendant that his occupation was honestly believing himself to be a tenant. The learned Judge rejected the contention of the Defendant and held that the presumption indicated by the explanation to Section 7 of the Act stood rebutted by the fact that a specific lease set up by the Defendant was found against by the courts. While discussing the scope of explanation to Section 7, the learned judge also made observations regarding the situations in which according to the learned Judge the explanation would have operation. His Lordship said:

The most important requisite of that section is that the occupation must be under

the honest belief that he is a tenant, and if the circumstances belie any belief on his part of being a tenant then there is no case to apply Section 7. Where a person is found to be not holding under the arrangement of tenancy pleaded by him it would mean that he is not really a tenant and though he may profess to be a tenant he must know that the tenancy set up is false. Irrespective of his attempt to convince others that he is a tenant if he is really not a tenant, he cannot certainly say that he honestly believed that he is a tenant.

His Lordship then proceeded to envisage the circumstances in which, according to his Lordship the section may apply. His Lordship stated:

The section applies to a different set of cases. May be that a person has taken a document of lease for a property which is ultimately found to be different from the property occupied pursuant to the lease. Such occupation may be under the honest impression that it is of the property leased. A person may take a lease from an incompetent person such as a de facto guardian of a minor whose properties cannot be alienated by such guardian. He may not know that in law his lease is void. He comes under this protection of the section. May be that a person takes a document which is bad due to other vitiating circumstances. Here again honest belief may save him. A person who comes into possession of a property may believe that he is a tenant and that belief may be honest. In such a case law wants to give protection irrespective of whether he is really a tenant in law or not and irrespective of the character of his possession. If that be the case the one case to which, it can definitely be said, Section 7 would not be applicable is the case where actually the Defendant setting up a contention that he is a tenant knows that he is not one such. When he knows that he is not a tenant he cannot honestly believe that he is a tenant. If as a matter of fact the tenancy set up is false then the Defendant, merely because he has set up the tenancy, could not have believed that there was such a tenancy.

Then His Lordship stated the following about the scope of explanation to Section 7:

Now I will consider whether the explanation to the section makes any difference. I am referring to this because it is attempted by counsel Shri Balasubramonian rather very vehemently to contend that the explanation makes all the difference. It is true that the explanation allows a presumption to be made merely because of occupation of any person for a particular period that the occupation is under honest belief. But this presumption is not an irrebuttable presumption. It is a presumption, until the contrary is proved. Contrary may be proved by evidence or by circumstances of the case. If as in the circumstances here the finding binding on the parties indicates that the Defendant is really not a tenant the presumption stands automatically rebutted. Here is an adjudication as between the parties not in other proceedings but in the same proceedings and which is one of the questions for decision in the very appeal before the court that the Defendant is not a lessee and that being the case the explanation will not be of any assistance. Therefore the benefit of Section 7 will not be available to the

Defendant here.

7. According to counsel the illustrations given by the learned Judge while discussing the scope of Section 7 of the Act would take within its sweep the present case where the lease was taken by Defendant No. 8 from a guardian, a transaction which is now found to be not binding on the minor children of the grantor. Therefore according to counsel going by the reasoning in Kunhambu Nair's case 1973 KLT 1048, the claim of Defendant No. 9 has to be upheld. Counsel also referred to the decision in Rajeevi R. Hegde v. Thyampanna Shetty 1984 KLT 536 and Travancore Devaswom Board v. Krishnan 1980 KLT 787 to point out that notwithstanding the nonobstante clause in Section 3(1) of the Act the provision regarding deemed tenancy in which category the tenancy u/s 7 of the Act also falls, would apply and that reasoning also would support the argument that Defendant No. 9 was entitled to the protection of Section 7 of the Act. It appears to me that the decisions in Rajeevi R. Hegde's case 1984 KLT 536 and Travancore Devaswom Board's case 1980 KLT 787, do not really help in answering the question posed for consideration in this case. I may indicate that I have my own reservations about the view expressed in the two said, decisions regarding the scope of the exemption contained in Section 3(1) of the Act vis-a-vis the sections relating to deemed tenancy occurring in the same chapter. But that aspect is not relevant in this case.

8. I may straight away say that the observations in Kunhambu Nair's case 1973 K.L.T 1048 cannot be said to be an authoritative pronouncement on the question of the applicability of Section 7 to a case like the present where a person not only takes a lease from a guardian of minors without ensuring that the lease is for the benefit of the minors but without ensuring that the statutory requirements before the grant of such lease are fulfilled. The person who takes such a lease cannot be said to be a person entertaining an honest belief that he was obtaining a valid lease. It is of no avail to plead that the person who has taken the lease had not informed himself of the law of the land and then to contend that his belief must be taken to be honest. I have already observed that the lease in this case was clearly imprudent apart from being void for non-compliance with Section 8 of the Hindu Minority and Guardianship Act and it is clearly open to the minors to ignore the transaction and seek appropriate reliefs regarding the property. I have also observed that no prudent person and a guardian at that, could have granted a lease of land on 12th March 1962 after the Kerala Stay of Eviction Proceedings Act, (Act 1 of 1957) and the Kerala Agrarian Relations Act, (Act 4 of 1961) conferring fixity of tenure on tenants had come into force. In a sense, it can be postulated that Defendant No. 8 had taken a lease from the guardian knowingly well the risk that was involved in taking such a lease. In this case, Defendant No. 8 had not come forward to speak to the circumstances under which he took the lease or to justify a finding that the taking of the lease by him was a prudent or bona fide action. The Land Tribunal" and the lower appellate court have specifically commented on the failure of Defendant No. 8 to go to the box and to speak to the transaction including the

bona fides of the transaction. On the facts and in the circumstances of the case, it is clear that this approach by the Land Tribunal and the appellate court is fully justified. Defendant No. 9, the Appellant herein only obtained an assignment of the lease on 20th May 1969 and was not in a position to speak, about the circumstances that surrounded the transaction Ext. B-1 dated 12th March 1962. Whatever presumption that is enacted by the explanation to Section 7 of the Act in my view stands rebutted in the light of the facts established and in the circumstances of the case. Certainly, when the courts below have held that it has not been shown that Defendant No. 8 was holding the land for the requisite period honestly believing himself to be a tenant, this Court sitting in Second Appeal cannot find fault with that finding on the facts and in the circumstances of the case. It is not as if the courts below have ignored the explanation to Section 7 of the Act. The lower appellate court has specifically discussed the explanation and has thereafter come to the conclusion that Defendant No. 8 and his transferee Defendant No. 9 have not shown that Defendant No. 8 is entitled to claim fixity of tenure u/s 7 of the Act.

9. The illustrations given by the learned Judge in Kunhambu Nair's case 1973 KLT 1048 really are cases which may attract Section 7B of the Act. There is no claim for protection u/s 7B of the Act. The Supreme Court has held that even for a transaction to come u/s 7B of the Act, the occupation must be lawful and bona fide in K.M. Mathew v. Hamsa Haji 1987 (2) KLT 1. After all what the explanation does as observed by the learned Judge himself in Kunhambu Nair's case 1973 KLT 1048 is only to raise a presumption of honest believe. It is not an irrebuttable presumption. It is only a rebuttable presumption. The presumption can be rebutted not merely by direct evidence but also by other circumstances established in the case including the failure of the person who claims the benefit of Section 7 of the Act to go to the box to speak to the circumstances surrounding the transaction. On the pleadings and the evidence in the case, it cannot be said that the circumstances are not sufficient to rebut the presumption if any arising out of the explanation to Section 7 of the Act. In any event, this ground would not justify, while exercising the second appellate jurisdiction, the differing from the courts below on the question whether the presumption under explanation to Section 7 of the Act are rebutted or not rebutted. On a reappraisal of the relevant circumstances, I am of the view that the presumption if any available under explanation to Section 7 of the Act stands rebutted in this case.

I therefore hold that the Appellant as assignee from Defendant No. 8 is not entitled to claim the protection of Section 7 of the Act. The finding in that behalf by the lower appellate court deserves to be confirmed. I confirm that finding. Once that finding is confirmed, it is clear that the decree now passed by the lower appellate court is fully justified. I therefore confirm the judgment and decree of the lower appellate court and dismiss this Second Appeal. I make no order as to costs.