(2006) 10 KL CK 0031

In the High Court Of Kerala

Case No : S.A. No. 427 of 1996

Ayisha Beevi Subaida Beevi — APPELLANT

Vs

Ibrahim Kunju Shamsudeen and Another — RESPONDENT

Date of Decision : 19-10-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 9 Rule 8, Order 9 Rule 9, Order 9 Rule 9(1), 11
Kerala Compensation for Tenants Improvements Act, 1958 — Section 16
Kerala Land Reforms Act, 1963 — Section 125(3)

Citation : (2008) 1 KLJ 163

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : B. Krishna Mani, for the Appellant; G. Unnikrishnon, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Abdul Gafoor, J.—This appeal is by the 1st defendant, the only contesting defendant before the trial court.

2. The suit was one for redemption of the plaint scheduled property. It was dismissed on the ground that the suit, at the instance of the plaintiff, was barred in terms of Order IX Rule 9 of the Code of Civil Procedure, as the earlier suit filed by the mother the original mortgagor was dismissed for default. The plaintiff carried the matter in appeal. The appellate court found that the suit being one for redemption, the cause of action was a recurring one as in the case of partition suit, the bar under Order IX Rule 9 was not attracted. Consequently, as there was no much dispute with regard to the right of redemption, the suit was decreed. The value of improvements was also computed applying the provisions contained in Section 16 in the Compensation for Tenants Improvements Act, finding that the property was over cultivated. This appellate decree is under challenge mainly raising the question of law centered around whether the second suit was barred by Order IX Rule 9 of the Code of Civil Procedure. The further

question of law as to the propriety of the decision regarding the kudikidappu entered into by the appellate court without referring the claim to the Land Tribunal is also raised. The appellant raises yet another question, as to whether the court below was justified in reducing the value of improvements on the ground that the property was over cultivated.

3. The parties join on the platform that the mortgage deed was executed by the mother of the plaintiff in favour of the defendant and that the right of the mortgagor had devolved upon her legal heir, the plaintiff. The parties also join that the plaintiff''s mother had earlier instituted a suit for redemption and the suit had been dismissed for default.

4. The first among the substantial questions raised is whether, in the light of the dismissal of earlier suit and invocation of Order IX Rule 9 of the Code of Civil Procedure, whether a second suit for redemption, at the instance of the plaintiff, was maintainable. The point is now trite in the light of several decisions, including the one in Scubba Rao v. Raju AIR 1950 Fed 1. It has been held therein as follows:

Order 9, Rule 8, Civil P.C. is more properly applicable to the facts. The question then is whether a fresh suit for redemption is barred under the provisions of Order 9, Rule 9, Civil RC. The material part of that rule runs as follows:

Order 9 Rule 9(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action.

It will be noticed that the words used in the Rule are ''of the same cause of action''. The question therefore is whether the first suit, which was dismissed under Order 9, Rule 8, was based on the same cause of action as the suit from which the present appeal arises. As pointed out by the Judicial Committee of the Privy Council in AIR 1934 205 (Privy Council) the issues in the two suits for redemption are quite different. The questions are: (i) whether the plaintiff (Mortgagor) had the right to redeem when he filed the second suit, and (ii) what amount he was now liable to pay to redeem? The Board held in that case that the trial of these issues was not barred u/s 11, Civil P.C. It follows therefore that if the right of redemption is not extinguished, provisions like Order 9 Rule 9 or Order 23, Rule 1, will not debar the mortgagor from filing a second suit because, as in a partition suit, the cause of action in a redemption suit is a recurring one. The cause of action in each successive action, until the right of redemption is extinguished or a suit for redemption is time barred, is a different one.

5. A Full Bench of this Court in Narayana Shenoi v. Yasodabai 1954 KLT 530 also had taken the same view holding that:

As in a partition suit the action in a redemption suit is a recurring one. The cause of action in each successive action until the right of redemption is extinguished or a suit for redemption is time barred is a different one. Therefore, a second suit for redemption is maintainable.

6. The appellant did not have a case that the right of redemption that the plaintiff did have extinguished, at any point of time nor that his action was barred by limitation. Necessarily, the finding of the appellate court that the suit was maintainable was justified and the questions of law raised by the appellant/ first defendant with regard to the maintainability of the suit and the bar by reason of dismissal of the earlier suit does not arise for consideration and the answer is in the negative.

7. Section 125(3) of the Kerala Land Reforms Act enjoins on a civil court whenever a dispute as to the tenancy arises to refer that matter to the Land Tribunal. But every case, where the defendant raises the case of tenancy or kudikidappu, need not be referred. Only the cases, where such contention arises in the nature and circumstances of the case, need be referred before coming to the conclusion as to the sustainability of the claim for kudikidappu. This position is now trite. Therefore, that question of law raised by the appellant shall also be answered against her. The property in question extends about 1 acre 20 cents. 10 Cents had been set apart for kudikidappu. Necessarily, there will be homestead or hut, as the case may be, there. In the remaining portion of 110 cents, it is in evidence that, there were 103 cashew trees, 65 mango trees, 32 jack trees, 69 rubber trees and 50 coconut trees. The number of trees in the plaint schedule property, at the material point of time, is sufficient to indicate that there was over cultivation. If there is over plantation, the court is entitled to compute the compensation payable under the Kerala Compensation for Tenants Improvements Act, 1958 at reduced rate. That is what has been done by the court below. Therefore, the computation of value of improvements, as per the impugned judgment, is something which is depending upon the fact frame of the case on hand, rather than a question of law.

8. In the result, the appeal fails, dismissed with costs.

