

(2014) 10 KL CK 0345

In the High Court Of Kerala

Case No : Civil Revision Petition No. 657 of 2007

Deenamma

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 17-10-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Kerala Land Reforms Act, 1963 — Section 125, 125(1), 2(57)

Citation : (2014) 10 KL CK 0345

Hon'ble Judges : P. Bhavadasan, J

Bench : Single Bench

Advocate : L. Mohanan, Ligey Antony and M.V. Kiran Mohan, Advocate for the Appellant; Saiby Jose Kidangoor, Nair Ajay Krishnan, R.T. Pradeep and G. Sudheer, Advocate for the Respondent

Judgement

P. Bhavadasan, J.—Aggrieved by the order dated 05.10.2002 in S.M. 15 of 1993 which was confirmed in appeal as A.A. No. 86 of 2003 by order dated 21.03.2007, the petitioners have come up in revision.

2. The facts absolutely necessary for the disposal of this revision petition are as follows:

25 cents of land was mortgaged by four persons namely, Vally, Kuttan Assary, Kolappan Assary and Thankamma by Ottikuzhikanam in favour of one Philomina. Philomina assigned her rights to her father Antony as per Ext.A13. Kuttan Assary and Kolappan Assary filed O.S. 294 of 1968 against Philomina and Antony. By judgment dated 25.05.1972 that suit was dismissed holding that the defendants in the suit had fixity of tenure. Thereafter, Thankamma filed O.S. No. 1502 of 1968 for partition against her brothers without making the mortgagees as parties to the suit. The suit was decreed recognizing the half share of Thankamma. That prompted Thankamma to file O.S. No. 700 of 1979 against the mortgagees for redeeming her half share. That suit was dismissed by Ext. A14 which was confirmed in appeal as A.S. No. 234 of 1982 by judgment dated 04.02.1984

evidenced by Ext. A15 which was further confirmed in S.A. 201 of 1985 produced as Ext.A1 dated 11.09.1985.

3. While things stood thus, nearly two cents of property was acquired by the Government. The Government determined the share of the mortgagees" as Rs. 706/- and mortgagors as" Rs. 402/-. Since there was dispute regarding the person competent to receive the amount, the amount was deposited in court and reference was made under the Land Acquisition Act. It is not in dispute that on the basis of an understanding between the mortgagors, Thankamma received the entire Rs. 402/-deposited as mortgagors" share.

4. While so, Suo Motu proceedings No. 15 of 1993 was initiated for assignment of right, tile and interest over 25 cents of property in favour of the mortgagees who claimed to be cultivating tenants. That was allowed by order dated 26.02.1999. Thankamma preferred appeal as A.A. No. 12 of 1999 which was allowed by order dated 22.12.2000 and the matter was remanded for fresh consideration. After remand, before the Land Tribunal, P.W.1 was examined and Exts. A1 to A15 were marked from the side of the applicants. Thankamma on her behalf examined R.W.1 and marked Exts.B1 to B5. The Land Tribunal, after appreciation of the evidence, found that the mortgagees who are claiming to be the cultivating tenants were entitled to assignment of 11.750 cents of land and the balance extent had to be assigned in favour of Thankamma and accordingly an order was passed. That was challenged by the mortgagees in appeal. The Appellate Authority confirmed the order of the Land Tribunal. Thus, the mortgagees are before this Court.

5. Sri. L. Mohanan, learned counsel appearing for the revision petitioners contended that both the authorities below have misdirected themselves both on facts and in law. The fact that Thankamma received compensation in the land acquisition proceedings does not advance her case much. It is pointed out by the learned counsel that in the land acquisition proceedings, apportionment was made of the amount due to the mortgagees and mortgagors and the mortgagors" amount was fixed as Rs. 402/- and the amount due to the mortgagee was Rs. 706/- and on understanding between the mortgagors, Thankamma received the entire amount of Rs. 402/-.

6. Learned counsel for the revision petitioners drew the attention of this Court to the reliance placed on the decision in O.S. No. 1502/1968 to hold that Thankamma was in possession of 11.750 cents is misconceived. That was a suit for partition in which the petitioners herein were not a party and that was between mortgagors. Even assuming that Thankamma had obtained a share, that was only with regard to the mortgagors" right and not with respect to the mortgagees" right. Thankamma obtained half right over the property i.e. right of redemption. Reliance placed on Exts.B4 and B5 is not justified in the sense that they have later been cancelled by the authorities and so therefore that cannot enure to the benefit of the respondents herein. The authorities below found fault with the revision petitioners for not adducing oral evidence. In fact, the revision

petitioners have adduced Exts.A1 to A15 which would clearly show that the claim made by Thankamma is clearly unsustainable. May be that she has half share in the mortgage. But to say that she is in actual possession of 11.750 cents is unfounded. The authorities below have omitted to take note of Exts.A1, A14 and A15 which would clearly show that the claim made by Thankamma cannot be sustained.

7. Ext.A14 is a judgment in O.S. No. 700 of 1979 which was instituted by the predecessor in interest of Thankamma wherein it was clearly held that revision petitioners are entitled to fixity of tenure and the property cannot be redeemed. That was confirmed in appeal evidenced by Ext.A15 and in second appeal. Therefore, the claim of Thankamma is clearly barred. These vital aspects have been omitted to be noticed by the court below and therefore, the order assigning 11.750 cents to Thankamma cannot be sustained.

8. Learned counsel appearing for the contesting respondent pointed out that in view of the fact that there is nothing to show that the issue of fixity of tenure was referred to Land Tribunal for decision at the first instance, even assuming that there is an earlier decision, it cannot be binding and it is without jurisdiction. Learned counsel went on to point out that may be the suit was prior to commencement of Act 35 of 1969. But the issue regarding fixity of tenure was considered after the coming into force of the amendment Act and if that be so, on a plea raised by the petitioners herein, necessarily the issue had to be referred to Land Tribunal and any decision referred by the civil court without his knowledge is void. If that be so, the question of res judicata will not arise for consideration.

9. The plea may appear to be formidable. If one reads Section 125 of the Kerala Land Reforms Act as a whole, it becomes evident that the bar of jurisdiction is envisaged under Section 125(1) of the Act. That applies to only those cases which are instituted after the commencement of amendment Act. The proviso to Section 125(1) of the Act clearly shows that in matters already pending before court i.e. prior to Act 35 of 1969, the bar of jurisdiction made mention of in the main provision will not apply. If that be so, the question as to whether the issue was considered after coming into force of the Act is not the criteria but whether the suit was instituted after the commencement of Act 35 of 1969. Viewed from that angle, the contention has to fail.

10. The factors which impressed the authorities below are the decision in O.S. No. 1502 of 1968 and Exts.B4 and B5 documents. As rightly pointed out by the learned counsel for the petitioners, O.S. No. 1502 of 1968 was a suit for partition in which the revision petitioners were not parties. That related to mortgage right enjoyed by the family. It is true, half share of the mortgage right was conferred on Thankamma.

11. It is significant to notice that based on the said decree, Thankamma instituted O.S. No. 700 of 1979 for redemption of half share of mortgage

property. In the said suit, revision petitioners were parties and they contended that they are entitled to fixity of tenure. Ext.A14 is the judgment in O.S. No. 700 of 1979. In paragraph 10 of the said judgment, it is observed as follows.

"10. Issue No. 1: Plaintiff's case is that the suit is maintainable on the ground that there is no limitation. I have already found that the suit is barred by limitation and that the defendants have got fixity of tenure over the plaint property and that the plaint property cannot be redeemed. Under these circumstances the suit is not maintainable. Thus this issue is found accordingly."

12. Aggrieved by the dismissal of the suit, Thankamma carried the matter in appeal as A.S. No. 234 of 1982, the judgment of which is marked as Ext.A15. The lower appellate court had occasion to observe as follows:

"6. The finding of the court below that this suit is barred by resjudicata by reason of the decision in O.S. No. 294/68 cannot also be said to be wrong. It is true that the plaintiff was not a party to that suit, but that suit was filed by the brother of the plaintiff who was undoubtedly a co-owner. He filed the suit claiming absolute ownership of the whole of equity of redemption as according to him, plaintiff who is a female married out of the family was not entitled to claim any share in the family property. The partition suit O.S.1502/68 was filed by the plaintiff subsequent to the filing of O.S.294/68 and in that partition suit, plaintiff obtained a decree for a share in the family properties. So the suit O.S.294/68 was filed by the brother of the plaintiff who was then a part owner of the equity of redemption and it was in that suit that the court found that the mortgagee-defendant is a tenant entitled to fixity of tenure and therefore the property cannot be redeemed. The decision was confirmed in appeal also. The said decision is definitely binding on the plaintiff and in that view also the present suit is barred by resjudicata. Thus in any view of the matter, the plaintiff was not entitled to succeed and the lower court rightly dismissed the suit".

13. The matter was carried up in second appeal before this Court as S.A. No. 201 of 1985. This Court confirmed the judgment and decrees of the lower court. Thus the issue regarding tenancy stands confirmed by the decision in O.S. No. 700 of 1979 was confirmed in appeal and also in second appeal.

14. It is clearly found that the petitioners are mortgagees entitled to fixity of tenure and they cannot be evicted from the suit property. As rightly pointed out by the learned counsel for the petitioners the receipt of land acquisition award amount does not advance the case of the respondent. The amount received by Thankamma was the amount due to the mortgagors as apportioned by land acquisition officer and on an understanding between the mortgagors the entire amount was received by Thankamma. It is significant to notice that no portion of the award to the mortgagees' share was ever received by Thankamma as claiming to be in possession of any portion of the mortgaged property to which she was entitled to.

15. Before this Court, the petitioners have filed I.A. No. 2451/2014 under Order

41 Rule 27 of the Code of Civil Procedure to receive certain documents as additional evidence. That relates to cancellation of orders Exts.B4 and B5 based on which the Land Tribunal and the lower appellate authority issued certificate to Thankamma for 11.750 cents of land. The relevant document is marked as Exts.A16 and A17 respectively before this Court.

16. In the light of Exts.A16 and A17, reliance placed on Exts.B4 and B5 cannot survive. To say the least, the finding of the authorities below that Thankamma is in actual physical possession of 11.750 cents of land cannot be accepted. Even going by the definition of tenant under Section 2(57) of the Kerala Land Reforms Act, it is clear that the petitioners have been in actual possession of the property and Thankamma was never in possession of any portion of the property. The authorities below were therefore clearly in error in coming to the conclusion that Thankamma was in actual physical possession of 11.750 cents of land.

For the above reasons, this petition is allowed and that portion of the order upholding the right of Thankamma over 11.750 cents of land is set aside and it is held that the petitioners are entitled to purchase certificate in respect of that portion also. There will be no order as to costs.