

(2016) 03 KAR CK 0188
In the Karnataka High Court
Case No : Writ Petition No. 26101 of 2005 (LR)

Eramma and Others

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 11-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 97

Citation : (2016) 03 KAR CK 0188

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : Sarat Chandra Bijai, Advocate, for the Appellant; B.P. Radha, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—1. Heard the learned counsel for the petitioner and the learned counsel for the respondent as well as the Government Pleader.

2. It is the case of the petitioner that respondent No. 3 had set up a claim as a tenant by filing Form No. 7 in respect of the land bearing survey No. 141/1 to 141/7 measuring in all 7 acre 87 cents of Machina village, Belthangady taluk, Dakshina Kannada District. However, the third respondent realizing the futility of his claim had given up the same in mid-stream and had contended that his elder brother one Venkappa Malekudiya, who is also no more and is now represented by his legal representatives, was the actual tenant in possession of the schedule property. The Tribunal had rejected the claim of respondent No. 3 on 28.7.1977. However, the elder brother Venkappa Malekudiya, respondent No. 4 had also filed an application in Form No. 7 though he was not a tenant.

It is the petitioner's further case that the schedule lands were the joint family properties of the petitioner and were being managed by Dooma Malekudiya, respondent No. 5 as the yajazman of the aliyasanthana family. Respondent No. 3 and Venkappa Malekudiya were brothers and they were born to one Lakshmi by

her earlier husband one Aitha Malekudiya. On the death of Aitha Malekudiya, Lakshmi had married Dooma Malekuidya. It is the further claim of the petitioner that Lakshmi and Dooma Malekudiya had brought up respondent No. 4 and Venkappa Malekuidya. The Land Tribunal had however conferred occupancy rights on Venkappa Malekudiya by an order dated 15.1.1981, as against which, a writ petition was filed before this court in WP 10056/1981 and this court had passed an order dated 4.8.1983 setting aside the order of the Tribunal and remanded the matter for a fresh inquiry. On such remand, the Tribunal had again passed an order dated 28.1.1992 granting occupancy rights in respect of the land bearing survey No. 184/1 measuring 5 acres and a portion of land bearing survey No. 184/1P2 in favour of the petitioner though the petitioner had not claimed any occupancy rights.

As against the said grant of occupancy rights, Venkappa Malekudiya had filed a writ petition in WP 39328/1992 and Venkappa Malekuidya had also filed another writ petition in WP 6235/1993. This court, by a separate order passed in WP 6235/1993, dated 13.11.1997, had confirmed the grant of occupancy rights in respect of survey No. 184/1P1 and also by a separate order dated 13.11.1997, allowed the writ petition filed by the petitioner and remanded the matter for a fresh inquiry. However, the order did not seek to disturb the grant of occupancy rights in respect of survey No. 184/1 in favour of Venkappa Malekudiya, as it was confirmed by the order passed in WP 6238/1993 filed by him. It is claimed that after the remand, the petitioner is said to have examined the witnesses including her daughter Seethamma, who was her power of attorney holder and during the pendency of the case before the Tribunal, Venkappa Malekudiya is said to have died and his legal representatives had come on record.

It was the case of the legal heirs of Venkappa Malekudiya that originally, the lands in question had been leased to respondent No. 3 and one Parameshwara by the said Dooma Malekudiya and after they abandoned the lands, the said Venkappa Malekudiya was cultivating the lands as a tenant and therefore the lands had been mortgaged by Dooma Malekudiya in favour of respondent No. 7 under a mortgage deed dated 3.2.1970 and thereafter, the mortgagee in possession Ammu Malekudiya had leased the land in favour of Venkappa Malekudiya.

It has been the case of the petitioner that the lands in question belonged to her joint family and there was lease granted by Dooma Malekudiya in favour of respondent No. 3 or in favour of Venkappa Malekudiya and the lease so granted by Dooma Malekuidya in favour of Narayana Malekudiya were all got up documents and in the partition suit filed in OS No. 13/1973 on the file of the Court of the Munsiff, Belthangady, against Dooma Malekudiya, the petitioner was allotted her share and Dooma Malekudiya had died in or about the 1984 and before his death, he had unequivocally stated in the execution case filed that no lands belonging to the joint family had been leased in favour of Narayana Malekudiya, through whom Venkappa Malekudia claims to have continued the

lease. Dooma Malekudia, who had participated before the Land Tribunal in respect of the claim of Narayana Malekudiya in the year 1977 had given a statement that the lands had not been leased in favour of Narayana Malekudiya. The Tribunal, thereafter by its impugned order, had granted occupancy rights over the subject lands while also including the lands in survey No. 184/1, which measured about 9 acre 66 cents. There was a reasoned order passed by the Chairman of the Land Tribunal holding that there were no material to show that the lands in question were tenanted, but however, other members of the Tribunal, without assigning any reasons, had opined that since there was grant of occupancy rights in favour of the applicants earlier, occupancy rights ought to be granted in their favour. It is in this background that the present petition is filed.

3. The learned counsel for the petitioner would contend that the impugned order rests only on the opinion expressed by the majority of the members and they have not assigned any reasons in arriving at their conclusion and on the other hand, on a close examination of the material on record, the chairman has pointed out that the several documents relied upon by the claimant seeking occupancy rights could not support the case of tenancy and has assigned reasons thereto. Hence, it would be required of this court to address the several documents relied upon by the claimant to address that on preponderance of probabilities, the tenancy has been established. The learned Counsel would canvass an argument that if each of the documents that are relied upon by the claimant - tenant is examined, it does not point to a case of tenancy at all. There is nebulous claim of possession having been transferred from one to another without clearly establishing the tenancy, which is sine qua non in establishing a claim for grant of occupancy rights. And in this regard, he would firstly draw attention to Annexure-R.1 which is relied upon by the claimants dated 4.4.1966, which is a lease deed said to have been executed by Dooma Malekudiya in favour of Narayana Malekudiya and Parameshwara Malekudiya and that lease deed has been negated by Narayana Malekudiya himself. Therefore, the said document would lose its credence. The so-called mortgage in favour of Ammu Malekudiya would at best indicate that possession was delivered to Ammu Malekudiya, who was not a tenant, but a mortgagee in possession and she, in turn, having granted lease in favour of the applicants and brothers cannot also be sustained in law. If mortgagee in possession is not to be treated as a deemed tenant under the KLR Act, the sub-tenancy could not also have been created by such a mortgagee in possession. Therefore, the learned counsel would submit that there is no tenancy in the eye of law.

Secondly, it is pointed out that even in the suit filed by the petitioner for partition, the petitioner has only proceeded against her family members in seeking her share of the property. The suit having resulted in Final Decree Proceedings and a delivery warrant having been issued in favour of the petitioner, a delivery receipt is issued of having delivered possession of the lands in question. The respondents -claimants had thereafter filed an application styled to be one under Order XXI Rules 97 and 100 of the Code of Civil Procedure,

1908, which application has been dismissed for default and therefore, there is no substance in the case of the applicants in claiming that they were in possession as lawful tenants and hence he would submit that the impugned order of the tribunal is wholly without basis and ought to be set at naught. It is also significant to note that even in the application filed by the claimants under Order XXI Rule 97, there is reference to a house property and a vague reference to other properties. There is no indication that they were in cultivation of the land.

4. On the other hand, the learned counsel for the respondent - claimant would seek to justify the impugned order.

5. The learned Government Pleader is non-committal in merely stating that the opinion is divided amongst the members of the Tribunal and she would only point out that the mortgage deed dated 3.2.1970 is a registered document and therefore to that extent, a registered document, whereby the mortgagee being in occupation of the land is established.

6. Given the above circumstances, the first and foremost question that would arise for consideration is whether there is legal tenancy established by virtue of the several documents that are produced. Since there is serious dispute about the such a tenancy, if one is to gather from the statements made in the course of the proceedings and the documents that are produced, Narayana Malekudiya, who is said to be the original lessee under a lease deed created by Dooma Malekudiya is negated. Therefore, the claim of tenancy rests on the alleged lease deed executed by Ammu Malekudiya in favour of the claimants. If in the eye of law or under the provisions of the KLR Act, a mortgagee in possession is not deemed to be a tenant, whether such tenancy could be created, would be the question. Therefore, any lease deed executed by a mortgagee in possession could not be construed as a lease at all as no sublease can be created by a person, who is not considered as a lessee in the eye of law. Consequently, there is no tenancy established.

However, it is also to be seen from the record that except for one entry in the year 1980, whereby the occupant is shown as Venkappa Malekudiya, there is no entry indicating that the land was under cultivation as on 1.3.1974 by such claimant.

Hence, it can be safely concluded that the claim of tenancy has not been established in the manner known to law. There was no basis for the impugned order by the majority of the members of the Tribunal to confer occupancy rights on the claimants.

Consequently, the petition succeeds and is accordingly allowed. The impugned order is quashed.