

**(1986) 06 KL CK 0018**  
**In the High Court Of Kerala**  
**Case No : S. A. No. 725 of 1980**

Haneefa and another

APPELLANT

Vs

Naina Muhammed Rawther and Others

RESPONDENT

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**Date of Decision :** 06-06-1986

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 11  
Kerala Land Reforms Act, 1963 — Section 108, 108(3), 4, 4A, 4A(1)(a)

**Citation :** (1987) KLJ 29

**Hon'ble Judges :** S. Padmanabhan, J

**Bench :** Single Bench

**Advocate :** T.R.G. Warriar, Sebastian Davis, H. Sivaraman and K. Usha, for the Appellant; P.N.K. Achan and K. Vijayan, for the Respondent

**Final Decision :** Allowed

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## Judgement

S. Padmanabhan J.

1. The two substantial questions of law arising in this Second Appeal are:

(1) Whether refusal of permission to raise a plea under S, 4A of the Land Reforms Act as amended by Act 35/69 during the Preliminary decree Proceedings will operate as a bar in such a claim being raised subsequently in the final decree proceeding, and

(2) Whether the award of mesne profits before the full redemption price is deposited is correct.

The Second Appeal arises from O.S. 166/67 on the file of the Munsiff, Alathur. Respondents 5 and 7 before the first appellate court, who were impleaded as legal representatives of the deceased first defendant are the appellants. The suit was for redemption and recovery of possession on the basis of a possessory mortgage Ext A1 which was executed on 22-5-1917. Various contentions were raised by the defendants. Ultimately preliminary decree was for redemption on payment of the mortgage amount of Rs 600/-and value of improvements. Value

of improvements and rate of mesne profits were relegated for decision in the final decree. There was an appeal against the preliminary decree before the District Judge, Palghat. It was transferred over to the Subordinate Judge and disposed of by him, The appeal was dismissed. During the pendency of the appeal, the Kerala Land Reforms Act was amended by Act 35/69 which took effect from 1-1-1970. The defendants sought permission of the appellate court to claim the benefits of S. 4A of the Land Reforms Act as amended by Act 35/69. The petition was rejected on the ground that it is belated. Against the appellate decree there Was second appeal 836/73 before this Court, which was decided on 6-4-1976. It was held that the appellate court was justified in refusing permission to raise the contention based on S. 4A. Thereafter, the plaintiffs moved an application for passing a final decree. At that time defendants claimed benefits under S.-4A of the Land Reforms Act again. Both the trial court and the first appellate court rejected the plea on the ground that the refusal of permission to raise such a plea during the preliminary decree proceedings will operate as a bar in allowing the plea to be raised again. Along with the plaint, the plaintiffs deposited the mortgage amount of Rs. 600/- In the final decree proceedings, a commission was issued and on the basis of the commissioner's report Rs 20/- was allowed as value of improvements. But the courts below awarded mesne profits even from the date of suit.

2. The first question to be decided is whether the courts below were justified in law when they refused permission to raise a plea based on S 4A of the Land Reforms Act as amended. Normally a party is entitled to have all his contentions adjudicated by the court on the merits unless the contention is barred. The bar applicable in this case could only be on the basis of S. 11, of the Code of Civil Procedure. In order to operate as bar the matter must have been directly and substantially in issue between the parties and it mast have been heard and finally decided by the court. So also under Explanation IV to S. 11, any matter which might and ought to have been made a ground of defence or attack shall be deemed to have been a matter directly and substantially in issue. The refusal to raise an available plea which might and ought to have been raised at a previous stage and the consequent decision without considering such plea may operate as constructive res judicata. The question is whether the contention raised by the defendants based on S. 4A of the Land Reforms Act as amended is either barred by res judicata or barred under Explanation IV to S. 11 of the Code of Civil Procedure.

3. The Kerala Land Reforms Act was amended by Act 35/69 incorporating S. 4A and other provisions only during the pendency of this litigation Before that a mortgagee was not entitled to claim that he is a deemed tenant as provided in S. 4A. The claim under S.4A was not considered by the trial court, the first appellate court or this Court in second appeal on the merits, What happened was only that when the defendants wanted to raise such a contention permission was refused for that purpose on the ground that the claim was raised only at a belated stage. Therefore, by no stretch of imagination it could be said that the

claim under S. 4A was directly and substantially in issue between the parties or that it has been heard and finally, decided by the court. Therefore the bar of res judicata under S. 11 of the CPC cannot be applied.

4. In *Ariyaputra Naicken v. Muthu Chetty and Others* (AIR 1936 Madras 165), an identical question came up for consideration. It was held that whether a particular plea could be allowed to be raised or not is a question in the nature of a preliminary plea and any decision on that question is not a decision on the merits which could be regarded as res judicata. A similar question came up for consideration in *Kaderkunhi Beary and Others Vs. Kadre Beary and Others*, . That was a case in which a claim for protection under S. 4A (1) (a) and (b) read with S 13 of the Land Reforms Act was rejected by the trial court as well as the first appellate court on the sole ground that in a previous second appeal filed against the preliminary decree the attempt of the appellants to raise this ground was rejected by this Court. In that decision it was held:

If there is a decision on the merits of that claim that will conclude him finally. But a party who is not allowed to urge it cannot be debarred from urging it at a subsequent stage of the same proceeding. The respondents' counsel stated that the order refusing amendment of the appeal memorandum amounts to a decision on the merits of the claim for the benefit. I do not think so. With respect, whatever else it may amount to this does not amount to an adjudication of the merits of the claim. The reason given in the order seems to be totally unconnected with the adjudication of the merits of the claim. In this view, I hold that the order rejecting the petition for amendment of the appeal memorandum does not preclude the appellants from raising this claim over again at the final decree proceedings. The courts below are not right in holding that the above order concludes either expressly or impliedly the plaintiffs right to agitate this question over again. The decision in the earlier second appeal also does not preclude the appellants from raising this plea over again in the final decree proceedings. Therefore, the court has to adjudicate on the merits of the claim urged by the appellants.

The position in this case also is exactly the same. In the appeal against the preliminary decree the first appellate court refused permission to the appellants to amend their pleadings in order to claim benefit under S 4A. In second appeal this Court only confirmed the decision of the first appellate court. The claim under S 4A was not permitted to be raised and it was not considered on the merits. Therefore going by the above principles, the courts below ought to have allowed the appellants to raise such a plea and the same ought to have been considered on the merits.

5. Then the question to be considered is whether Explanation IV to S. 11 of the CPC is applicable. The Explanation deals with the bar of constructive res judicata. In order to operate that bar the plea must be one which not only might have been raised but also one which ought to have been raised. It is a well recognised principle of law that a party who acquires a fresh claim during the pendency of

the suit or afterwards can bring another suit on that fresh cause of action. In this case the plea under S 4A of the Land Reforms Act was not available to the defendants when the preliminary decree was passed in the year 1968. It was only when the appeal was pending before the first appellate court that the legislation came into force conferring the new benefit. As held in *Raghavan Nair v. Appu Kidiavu* (1979 KLT 458) the defendant in a suit is not bound to put forward a plea on the basis of a cause of action which arises during the pendency of the suit. If so, Explanation IV to S 11 of the CPC also cannot be applied for the purpose of precluding the defendants in raising that contention subsequently.

6. Section 108 of Act 35/1969 contains the transitory provisions. Section 108 (3) reads:

If in any suit, application, appeal, revision review, proceedings in execution of decree or other proceeding pending at the commencement of this section before any court tribunal, officer or other authority, any person claims any benefit, right or remedy conferred by any of the provisions of the principal Act or the Principal Act as amended by this Act, such suit, application, appeal revision, review, proceedings in execution or other proceedings shall be disposed of in accordance with the provisions of the principal Act as amended by this Act.

Here, the suit filed in 1967 is even now pending. It will end only when it is finally disposed of by passing the final decree. According to S I 8 (3), the suit could only be disposed of in accordance with the provisions of the Kerala Land Reforms Act as amended by Act 35 of 1969. That means the claim under S 4A will have to be considered and decided by the court. At a particular stage the court may disallow a party to raise a particular plea. If at a subsequent stage in the same proceedings such a plea is again raised, the previous refusal by itself cannot in law operate as a ground for disallowing the claim without going into it on the merits. So far as this case is concerned, there is no legal bar in entertaining and considering that claim. How far the claim will stand is a matter that will have to be considered by the trial court on the merits. Both sides did not want this Court to go into the merits of the claim under S.4A for the first time. On the basis of the above discussion, I am of opinion that both the courts below went wrong in refusing permission to raise a plea under S 4A of the Land Reforms Act as amended.

7. The next question to be considered is whether the courts below were correct in awarding mesne profits from the date of suit. The preliminary decree allowed redemption on payment of the mortgage amount and value of improvements. Quantum of improvements and mesne profits due to the plaintiffs were directed to be determined in the final decree proceedings. At the same time it was provided that the plaintiff will be entitled to mesne profits from the date of deposit of the mortgage amount. Mortgage amount was deposited along with the plaint. Therefore on the basis of this provision in the preliminary decree mesne profits were awarded in the final decree from the date of deposit of the mortgage amount and not from the date of deposit of the entire redemption price.

8. S 2 (12) of the C. P. C. defines mesne profits as those profits which the person in wrongful possession of the property actually received or with ordinary diligence have received therefrom. Therefore it is a condition precedent for awarding mesne profits that the possession of the person against whom mesne profits is awarded is wrongful. Under S. 4 (1) of the Compensation for Tenants Improvements Act, 1958 every tenant shall, on eviction, be entitled to compensation for improvements made by him, his predecessor or by any person not in occupation at the time of eviction, who derives title from either of them and for which compensation has not already been paid. So also it is provided therein that notwithstanding the determination of the tenancy or the payment or tender of the mortgage money or premium, if any, every tenant to whom compensation is due, shall be entitled to remain in possession until eviction in execution of a decree or order of court. Sub section (2) says that a tenant so continuing in possession shall, during such continuance, hold as a tenant subject to the terms of his lease or mortgage, if any. Tenant is defined in the Act as including a mortgagee also. Under S 5(3) in cases where revaluation of improvements become necessary that also has to be done by the executing court and in such cases the decree shall stand varied accordingly. Thus it follows that unless and until the entire redemption price including the full value of improvements is deposited the possession of the defendant cannot be said to be wrongful.

9. An identical question came up for consideration in *Raman v. Janardhana Pai* (1967 K.LT 560) and it was observed:

It is clear from S. 4 that until compensation for improvements is paid, the mortgagee is entitled to continue in possession, so that his possession, as long as his improvements are not paid for is not unlawful. The consequence is that by being so in possession he is not liable to pay mesne profits. Construing S 4 and sub section 3 of S 5 and also bearing in mind the meaning of mesne profits as defined in the Code of Civil Procedure, it is clear that the variation contemplated by sub-section 3 of S. 5 relates to the payment of mesne profits as well and not merely to the quantum of the improvements by adding the value of the subsequent improvements. It follows that until the value of the subsequent improvements is also paid, the mesne profits payable by the mortgagee do not start accruing. In this connection the wording of the latter half of sub section 3 of S. 5 relating to the other sums of money accruing due to the plaintiff may also be noted. Therefore the mortgagor could not have set off the value of improvements against the mesne profits, which did not yet accrue, since the mortgagee was liable to pay mesne profits only from the date of deposit of the additional value of improvements."

In the Division Bench Decision in *Rama Iyer v. Parvathi Amma* (1961 KLJ 995) also it was found that a person who is to receive value of improvements continues to be legally in possession and is a statutory tenant. The same is the view taken in another Division Bench decision of this court in *Raghavan v.*

Velayudhan (1984 KLT 713) wherein the principle laid down was;

A mortgagee who is entitled to be paid compensation for improvements under sub-section (3) of S. 5 will continue as a statutory mortgagee until actual eviction in execution of a decree or order of court, which should also provide for payment of the additional value of improvements due to the mortgagee under sub section (3) of S. 5. Whether the mortgagee continues in possession in terms of the mortgage deed or by virtue of the statutory provision, the relationship of the mortgagor and mortgagee will not be determined and his continuance in possession even after the deposit of the redemption price fixed prior to the commencement of Act 29 of 1958 will also be as a mortgagee. Such a mortgagee is also entitled to the benefits of S. 4-A of the Kerala Land Reforms Act, 1964

The Full Bench decision in Varkey Paily v. Kurian Augusthy (1967 KLT 189) relied on by the respondents cannot have any application to the facts of the present case. That was a case where no improvements were due and the question was regarding improvements effected after the tenancy was determined. So also the mortgage that was considered in that case has no relation to the mortgage deed involved in this case. So far as this case is concerned, the preliminary decree itself relegated the question of value of improvements to the final decree. The decision in Lakshmi Amma v. Vasundhara Panicker (1970 KLT SN 17) took the extreme view that a decree for mesne profits could be avoided when additional value of improvements was found due in execution. As a result of the foregoing discussion I am of opinion that the courts below went wrong in awarding mesne profits for periods prior to the deposit of the entire redemption price including value of improvements.

The result is that the second appeal is allowed and the final decrees and judgments passed by the courts below are set aside. The case is remanded to the trial court. The trial court will consider the claim of tenancy under S. 4A of the Land Reforms Act on the merits and dispose of the suit in accordance with law in the light of what is stated above. Parties are directed to suffer costs incurred before this Court. The parties shall appear before the trial court on 1-7-1986. Send back the records immediately.