

(1988) 10 KL CK 0033
In the High Court Of Kerala
Case No : C.R.P. No. 3983 of 1981

Iyatteri Shanmughan and Others

APPELLANT

Vs

Pathiyottil Radha and Others

RESPONDENT

Date of Decision : 25-10-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 115
Kerala Land Reforms Act, 1963 — Section 125

Citation : AIR 1989 Ker 227

Hon'ble Judges : M.M. Pareed Pillay, J

Bench : Single Bench

Advocate : P. Ramakrishnan Nair, for the Appellant; K.P. Dandapani, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Pareed Pillay, J.—Revision petitioners claim to be the cultivating tenants of the property. The lease set up by the revision petitioners is denied by respondents 1 and 2. The Land Tribunal allowed the Original Application. The Appellate Authority (Land Reforms) reversed the order of the Land Tribunal and held that the lease set up by the revision petitioners has not been established.

2. The case of the revision petitioners (applicants) is that the property was orally leased to the first revision petitioner and his brother Apputty in 1940 by Chandukutty. Chandukutty's daughter (1st respondent) filed the appeal before the Appellate Authority. As the lease set up by the revision petitioners is denied by the 1st respondent it is for them to establish it by adducing cogent evidence. The claim of the revision petitioners based on oral entrustment from the father of the first respondent has not been substantiated by any reliable evidence. It is contended by them that they are liable to pay rent of Rs. 15/-per annum and that it has been paid up to 1946. Evidence is found wanting to prove the lease. The Appellate Authority on a consideration of the evidence held that the oral lease set up has not been established.

3. O.S. 292 of 1973 was filed by the first respondent for injunction initially and it was later amended for declaration of title and recovery of possession. As the defendants in the suit (revision petitioners) claimed tenancy it was referred to the Land Tribunal u/s 125(3) of the Kerala Land Reforms Act. As the Land Tribunal upheld the tenancy set up by the defendants the Civil Court accepted it and dismissed the suit. Counsel for the revision petitioners submitted that the judgment in O.S. 292 of 1973 would operate as res judicata as against the respondents and the Appellate Authority obviously overlooked it. Counsel for the respondents contended that the plea of res judicata was never raised before the Appellate Authority and hence a plea which was not raised at the appropriate stage cannot be urged before the revisional Court for the first time. As the plea of res judicata involves mixed questions of law and fact the factual foundation for raising the said plea should definitely find a place in the pleadings. Absence of such pleading is detrimental to the belated plea of res judicata at a subsequent stage. The onus is on the person who sets up the plea of res judicata to establish it. As the onus is on the person who sets up the plea of res judicata he must definitely place all materials before the Court to enable it to consider whether the said plea has been established or not. Having failed to raise the same before the Land Tribunal and the Appellate Authority it cannot be raised for the first time in the revisional Court. If a party fails to raise the plea of res judicata the Appellate Authority or the revisional Court has no option but to hold that he has waived the plea. When the decree or order upon which the plea of res judicata is raised has not been produced, the plea cannot be maintained. The failure to raise the plea of res judicata cannot be supplemented by raising it at a later stage to the detriment of the opposite party. If one fails to raise the plea at the appropriate time and does not produce relevant materials or data to sustain the plea, the Court where the plea is advanced for the first time cannot accept it to the disadvantage of the opposite party. If a party omits to raise the plea of res judicata and allows the Appellate Authority to decide the matter in dispute on other evidence, he cannot later advance the plea to the surprise of the opposite party. As the revision petitioners failed to raise the plea of res judicata before the Land Tribunal or before the Appellate Authority, they cannot raise it for the first time before the revisional Court.

4. As the tenancy set up by the revision petitioners has not been proved the Appellate Authority was justified in allowing the appeal. There is no merit in the civil revision petition. The C.R.P. is dismissed. No order as to costs.