

(1970) 07 KL CK 0009

In the High Court Of Kerala

Case No : S.A. No's. 1369 of 1962 and 422 of 1964

Kelan's son Kodakkat Kannan and Others

APPELLANT

Vs

Tharakandi Kadissa and Others

RESPONDENT

Date of Decision : 24-07-1970

Acts Referred:

Malabar Tenancy Act, 1930 — Section 39, 43
Transfer of Property Act, 1882 — Section 100, 65A

Citation : AIR 1971 Ker 61

Hon'ble Judges : P.T. Raman Nayar, C.J;T.C. Raghavan, J;K.K. Mathew, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Raman Nayar, C.J.—The question in these appeals (arising out of two suits for arrears of rent between the same parties in respect of the same holding but for different periods) is whether, in a suit for recovery of arrears of rent in enforcement of the charge conferred by Section 39 of the Malabar Tenancy Act, a decree can be made for the sale of the holding free of the interest of a tenant of the defaulting tenant, in other words, of a sub-tenant, the sub-tenant being party to the suit. The courts below have answered this question in the affirmative rejecting the plea of the defendants sub-tenants that there should be a reservation of their interest. The sub-tenants have come to this Court by way of second appeal, and their appeals have been referred first to a Division Bench and then to a Full Bench for answering the question.

2. Section 39 by which the charge is conferred reads thus:

39. Arrears of michavaram and rent to be a first charge on holding after revenue.--Arrears of michavaram or rent due to the landlord together with interest, if any, payable on the same shall be a charge on the interest of the person from whom they are due in the holding in respect of which they are due as at the time of the creation of such interest, and such charge shall have priority over all other charges on the same except the charge for the revenue

and any dues thereon payable to Government or to a local authority and made a charge thereon by any law for the time being in force."

It is clear from its wording that the section not merely makes arrears of rent a first charge on the holding after revenue, but by expressly stating that the charge is on the interest of the defaulting tenant as at the time of the creation of his lease, puts it beyond doubt that the charge is free of all subsequent dealings by the defaulting tenant whether by way of mortgage or lease or otherwise. True, the main purpose of the Act is to confer on tenants the blessings of security of tenure and fair rent; but, it is not altogether unmindful of the landlord, and, by Section 39, seeks to secure for him the due payment of the rent by making it a charge on the holding. The security would be illusory if dealings by the tenant by way of mortgage or sub-lease--and a sub-lease, we might remark, is the most common form of such dealings being, as often as not, virtually an assignment though taking the form of a lease--were to prevail against it. A sub-tenant can have the fair rent payable by him to the tenant fixed, and, as this is not likely to be more than the rent payable by the tenant to the landlord, the tenant's right in the holding is practically valueless.

Having regard to its wording, as to its purpose, there can be no doubt that the charge given by Section 39 is free of any interest such as a sub-lease which the tenant might carve out of the holding and transfer to a third party. This, by itself, is sufficient to rule out "the applicability of Sub-section (1) of Section 65-A of the Transfer of Property Act by way of Section 100 thereof so as to make the sub-lease binding on the landlord who is in the position of a mortgagee, there being a contrary intention expressed within the meaning of Sub-section (3) of the section, if Section 39 of the Malabar Tenancy Act which creates the charge is to be regarded as the mortgage deed. But, reading Section 65-A of the Transfer of Property Act as a whole, and, in particular, Sub-section (3) thereof, we should think that the section can apply only in cases where there is in fact a contract as in a mortgage and that the words, "so far as may be" appearing in Section 100 would rule out its applicability to a statutory charge.

3. The principal contention before us has been that Section 43 of the Malabar Tenancy Act ensures the continuance of the sub-tenant on the holding notwithstanding the sale of the holding and that therefore the decree in a suit for sale in enforcement of the charge u/s 39 should, if the sub-tenant is party to the suit, provide that the sale is subject to the sub-tenancy. We do not think that the contention can be accepted. Section 43 runs thus:

"43. Rights of a cultivating tenant on the extinction of landlord's rights. (Central Act IV of 1882) -- Notwithstanding anything contained in the Transfer of Property Act, 1882, or in any other law for the time being in force, or in any contract, a cultivating tenant or the holder of a kudiyruppu shall be entitled to continue on the holding as such, although the rights of his immediate landlord or of any superior landlord have been extinguished, whether by eviction or by redemption of a mortgage or otherwise, subject, however, to a liability to pay fair rent and to

the provisions of this Act applicable to a cultivating tenant or the holder of a kudiyruppu, as the case may be."

In the first place, it is to be observed that the non obstante clause with which the section opens, "Notwithstanding anything contained in the Transfer of Property Act, 1882, or in any other law for the time being in force, or in any contract" does not take in the provisions of the Malabar Tenancy Act itself, and therefore does not exclude the operation of Section 39 thereof. And, if as we have found, the effect of Section 39 is that the sale is free of the sub-tenancy, it follows that Section 43 cannot apply to enable the sub-tenant to continue on the holding after the sale. It is as if the sale were of the sub-tenant's rights as well so that there can be no question of his continuing on the holding. Under the terms of Section 39, the sub-tenant is bound by the charge and by the sale pursuant thereto, and, so long as Section 43 does not exclude the operation of Section 39 so as to release the subtenant from the charge, there can be no question of the sub-tenant's rights being preserved.

It is as if the sale were in execution of a mortgage by which the sub-tenant is bound as for example a mortgage jointly executed by the tenant and the sub-tenant. The redemption of a possessory mortgage in a case where the mortgagee has inducted a tenant on the property stands on a different footing. For, there Section 43 of the Malabar Tenancy Act abrogates the "other law" -- Section 111(c) of the Transfer of Property Act -- the principle underlying which is applied to agricultural leases also. Not so with regard to Section 39 of the Malabar Tenancy Act which gives the landlord a charge embracing the entire holding including the interest carved out in favour of the sub-tenant and thereby makes a sale in enforcement of the charge binding on the sub-tenant.

4. We are also of the view that a sale of a tenant's holding, (unlike the determination of a lease or the redemption of a possessory mortgage) does not involve an extinguishment of his rights within the meaning of Section 43. It is only a transfer of those rights as in an assignment of a lease or a mortgage, and, from a sub-tenant's point of view is not the extinguishment of the rights of his landlord but only the substitution of one person for another as the landlord. On a sale in enforcement of a charge against the tenant u/s 39 it is the sub-tenancy and not the tenancy that is extinguished.

5. In the result we dismiss the appeals with costs.

Mathew, J.

6. The suits from which the appeals arise were instituted for recovery of arrears of rent for the years 1134 and 1135 (M. E.) on the basis of a marupat executed by the 1st defendant's predecessor-in-interest in favour of the predecessor-in-interest of the plaintiff. The appellants are sub-tenants under the 1st defendant. In the suits they raised various contentions; but we are only concerned with their claim for declaration that they are entitled to continue on the holding, even if the tenancy right of the 1st defendant is sold in execution of the decrees for the

arrears of rent. Both the courts below negated the claim and decreed the suits.

7. The respondents contend that Section 39 of the Malabar Tenancy Act created a first charge for the arrears of rent on the interest of the tenant in the holding as at the time of the creation of such interest, and that any sub-lease or other subordinate tenure created on the interest of the tenant would be subject to the claim of the landlord for recovery of arrears of rent. In other words, the contention is that by the creation of a first charge on the tenant's interest as security for arrears of rent, the landlord's claim to realise them by sale of the tenant's interest as it stood on the date of the creation of the interest is paramount and would prevail over any sub-lease created by the defaulting tenant in favour of the appellants. I do not think it necessary to dispute this proposition.

Section 43 of the Malabar Tenancy Act proceeds on the assumption that a sub-tenant has no right to continue on the holding when the right of his immediate landlord is extinguished. The only question is whether on the language of Section 43, a right to continue on the holding has been conferred on him notwithstanding the fact that the sub-tenancy has been determined with the extinguishment of the rights of the tenant, his immediate landlord, by sale of his interest in the holding in execution of a decree for the enforcement of the charge. Section 43 provides:

"Notwithstanding anything contained in the Transfer of Property Act, 1882, or in any other law for the time being in force, or in any contract, a cultivating tenant or the holder of a kudiyruppu shall be entitled to continue on the holding as such, although the rights of his immediate landlord or of any superior landlord have been extinguished, whether by eviction or by redemption of a mortgage or otherwise, subject, however, to a liability to pay fair rent and to the provisions of this Act applicable to a cultivating tenant or the holder of a Kudiyruppu, as the case may be."

8. It was argued for the respondent that if a tenant's interest is sold in execution of a decree for arrears of rent the effect is not to extinguish the rights of the tenant, but to transfer them to the purchaser; and the purchaser would become the immediate landlord instead of the defaulting tenant. In other words, the argument was that the effect of a sale in execution would be not to extinguish the rights of the immediate landlord, but to substitute the purchaser as the immediate landlord, and therefore, there is really no extinguishment of the rights of the immediate landlord within the meaning of Section 43. There are two answers to this argument. In the first place, a sale in execution, being a transfer by operation of law of all the interests of a tenant in the holding, involves an extinguishment of his rights in it and the creation of the same rights in the purchaser.

A transfer by act of parties or by operation of law has to be viewed from two aspects; from the point of view of the transferor, or the judgment-debtor as in this case, and from the point of view of the purchaser. From the point of view of

the transferor or judgment-debtor, it operates to extinguish his rights in the property, and from the point of view of the purchaser it operates as an acquisition of those rights. A transfer is divestitive as well as vestitive. "The transfer of a right is an event which has a double aspect. It is the acquisition of a right by the transferee and the loss of it by the transferor". (See Salmond on Jurisprudence, 10th Edn., page 34(i). Apart from that, it is possible to visualise a case where the execution purchaser of the tenant's rights is the landlord himself, in which case, the rights acquired will be merged in the property -- it was represented at the Bar that the plaintiff has purchased the rights of the 1st defendant-tenant in execution of the decree during the pendency of these appeals -- and in such a case, there can possibly be no doubt that the immediate landlord's rights are extinguished.

So when Section 43 speaks of the extinguishment of the rights of the immediate or any superior landlord, it means the extinguishment of the rights of the person who at the moment is the immediate or any superior landlord whether or not that is followed up by the acquisition of the same rights by another. In *Sri Ram Ram Narain Medhi Vs. The State of Bombay*, the Question was whether the vesting of the interest of the landlord in the tenant on the "Tillers" Day" would operate as extinguishment of the rights of the landlord in an "estate" within the meaning of Article 31-A of the Constitution. The argument was that as Article 31-A does not provide for a transfer of any rights in an estate, but only for modification or extinguishment of the rights therein, the vesting of the interest of the landlord in the tenant would not attract the Article. The Supreme Court negated the contention and observed that the vesting of the interest of the landlord in the tenant would operate as an extinguishment or modification of the rights of the landlord in the estate, and so Article 31-A would be attracted.

9. The purport of the expression "whether by eviction or by redemption of a mortgage or otherwise" in Section 43 came up for consideration in *Madhavi v. Kanaran* 1969 KLJ 386 and a Division Bench of this Court held that the word "otherwise" in the context is comprehensive enough to include all manner of extinguishment of the rights of any immediate or superior landlord. In other words, the court said that the Word "otherwise" should not be read as *ejusdem generis* with "by eviction or by redemption of a mortgage". The court further held that even if the lease created by a mortgagee is beyond his power u/s 76(a) of the Transfer of Property Act, and would determine with the redemption of the mortgage, the cultivating tenant, the lessee, would be entitled to continue on the holding u/s 43. In *S. A. No. 218 of 1967 (Ker) Krishna Iyer, J.*, followed the Division Bench ruling. There also the lease created by the mortgagee was beyond his power u/s 76(a) of the Transfer of Property Act, and therefore, determined with the redemption of the mortgage; still the cultivating tenant --the lessee -- was held entitled to continue on the holding by virtue of Section 43.

I see no reason for distinguishing the case of a cultivating tenant, whose tenancy comes to an end with the extinguishment of his immediate landlord's rights by

sale in execution of a decree for arrears of rent, and the case of a cultivating tenant under a mortgagee, whose lease is determined by redemption of the mortgage by reason of the fact that the lease was beyond the power of the mortgagee u/s 76(a). In both cases there is an extinguishment of the immediate landlord's rights, in the one case by the sale of the interest of the tenant, and in the other by redemption of the mortgage. If the legislature thought it proper to allow the lessee under the mortgagee to continue on the holding, notwithstanding the fact that he has no right under the law so to continue by paying fair rent as determined under the Act, where is the injustice in allowing a sub-tenant, who has equally no right to continue on the holding because his immediate landlord's rights have been extinguished by the sale in execution of the decree for arrears of rent, to continue on the holding by paying fair rent?

10. But it is said that the non obstante clause with which Section 43 opens does not take in the provisions of the Malabar Tenancy Act, but those only of the Transfer of Property Act, and does not exclude the operation of Section 39 of the former Act, and therefore, by virtue of the first charge created by that section, the sale in execution of the decrees would determine the sub-tenant's rights; and Section 43 would not enable him to continue on the holding. I do not think that if on the language of the operative portion of Section 43 and the purpose underlying it, there is no reason for making a distinction between the two cases, the fact that the non obstante clause does not take in the provisions of the Malabar Tenancy Act, but those only of the T. P. Act, and does not exclude the operation of Section 39, would be a reason for making it.

The non obstante clause is intended to clarify, and not to curtail the operative portion of the section. It is incorporated only by way of abundant caution. It cannot cut down the operative part of the section or restrict its scope. See the observations of the Supreme Court in *The Dominion of India and Another Vs. Shrinbai A. Irani and Another*, . Nor would this construction of S. 43 render Section 39 otiose as it still has a field of operation. Section 39 will have its full operation in all cases where a cultivating tenant does not come into the picture. It would operate and render invalid all dealings by a tenant, which would in any way diminish the legal effect of the first charge. For instance a simple mortgage created by the tenant would in all respects be subject to the first charge.

11. I venture to doubt, though that might not be necessary for my conclusion, whether the exclusion of Section 39 from the non obstante clause has any bearing at all on the construction of Section 43. Section 39 speaks of a first charge and its priority over other charges. Section 39 reads:

"Arrears of michavarom or rent due to the landlord together with interest, if any, payable on the same shall be a charge on the interest of the person from whom they are due as at the time of the creation of such interest, and such charge shall have priority over all other charges on the same except the charge for the revenue and any dues thereon payable to Government or to a local authority and made a charge thereon by any law for the time being in force." The section is

silent as regards the effect of a transfer of a tenant's interest by way of sub-tenancy on the first charge. We know for certain that the law is that a sale of the tenant's interest in pursuance of the first charge will annihilate the sub-tenancy; but where do we get that law? The law as regards such a transfer, and its legal effect on the prior charge is contained either in Section 100 read with Section 48 of the Transfer of Property Act or in the general law of the land. To put it in other words, if any landlord were to say that he has a first charge by operation of law on the tenant's interest, and that any subsequent transfer of that interest is subject to the first charge; and if we ask him for the basis in law of his statement, he will be able only to point out either to Section 100 read with Section 48 and the other provisions of the Transfer of Property Act, or to the general law of the land.

The non obstante clause includes both the Transfer of Property Act and the provisions of any other law for the time being in force, including the common law of the land; so that, though Section 39 creates a first charge by operation of law on the tenant's interest, the effect of that charge upon a subsequent transfer by way of sub-lease is not dealt with by Section 39 of the Malabar Tenancy Act, but by the Transfer of Property Act or by the general law. Therefore, the normal effect of a first charge is avoided by the expression "notwithstanding anything contained in the Transfer of Property Act, 1882, or in any other law for the time being in force" in the non obstante clause with which Section 43 opens.

12. Keeping in view the paramount purpose of the legislature in enacting Section 43, and seeing that there is no reason for making a distinction between the case of a lessee under a mortgagee whose lease terminates with the redemption of the mortgage, and the case of a sub-tenant whose tenancy terminates with the extinguishment of the rights of his immediate landlord by reason of the sale in enforcement of the charge u/s 39, I feel constrained to differ from my brethren. I would allow the appeals, and modify the decrees accordingly but without any order as to costs.

The Court

13. Appeals dismissed with costs.

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