
(1982) 11 KL CK 0009

In the High Court Of Kerala

Case No : S.A. No. 749 of 1977 and Cross Objection S.A. No. 1121 of 1977

Manari Parvathi Amma and Others

APPELLANT

Vs

Nellikkal Parvathi Amma and Others

RESPONDENT

Date of Decision : 05-11-1982

Acts Referred:

Kerala Land Reforms Act, 1963 — Section 7, 7B

Citation : AIR 1983 Ker 127 : (1983) 1 ILR (Ker) 375

Hon'ble Judges : P.C. Balakrishna Menon, J;K. Bhaskaran, J

Bench : Division Bench

Advocate : V. Bhaskaran Nambiar, C.R. Natarajan, M.K. Ananthakrishnan and R. Bhaskaran, for the Appellant; T.R.G. Warriar and Sebastian Devis, for the Respondent

Final Decision : Dismissed

Judgement

Balakrishna Menon, J.—A common question as to the correctness of the decision of a learned Single Judge of this Court reported in Balakrishna Menon v. Rajagopala Menon (1974 Ker LT 85) is raised in both these Second Appeals.

2. Defendants 2 and 5 are the appellants in S. A. No. 749 of 1977. The suit is for partition of one item of property as belonging to the Manari tavazhi of Nellikkal tarwad. Plaintiffs and defendants 1 to 5 are the members of the tavazhi and the 1st defendant is its karanavan. The plaintiffs seek partition ignoring Ext. B3 lease dated 13-1-1958, granted by the prior karanavan kannan Nair to his niece the 2nd defendant. The suit was contested by defendants 3 and 5. According to them the plaintiffs are not members of the Manari tavazhi. The lease Ext. B3 is valid and that in any event, the 2nd defendant is entitled to the benefits of Section 7 of Kerala Act 1 of 1964 as amended by Act 35 of 1969. Both the Courts below have concurrently found that the plaintiffs are members of the Manari Tavazhi, Ext. 83 lease is invalid as opposed to Section 33 of the Madras Marumakkathayam Act, and the 2nd defendant being a member of the tavazhi in possession of the suit property is not entitled to the benefits of Section 7 of

Kerala Act 1 of 1964 as amended by Act 35 of 1969. On the question as to the applicability of Section 7 the courts below have relied on the decision of this court in Balakrishna Menon v. Rajagopala Menon 1974 Ker LT 85.

3. Defendants 2 to 5 are the appellants in section A. No. 1121 of 1977. The suit is for recovery of two items of properties on behalf of the tavazhi consisting of the plaintiffs and defendants 1 to 5. Both the items were allotted to the tavazhi as per Ext. A1 karar in the main tarwad. The prior Karanavan Rama Kurup granted a lease of a portion of item 1 to the 2nd defendant as per Ext. B3 dated 23-9-1952. Ext. A2 is the counter-part of Ext. B3 executed by the 2nd defendant in favour of Rama Kurup. The documents, recite a prior oral lease of item. 1 by Rama Kurup to the 2nd defendant. The remaining portion of item 1 was assigned by the 2nd defendant to defendants 3 to 5 as per Ext. B32 D/-6-3-1952. Rama Kurup granted a renewal of the oral lease relating to the portion covered by Ext. B32, as per Ext. B33 dated 11-11-1952. Ext. A3 is the counter-part of Ext- B33 lease granted by Rama Kurup to defendants 3 to 5 in renewal of the prior oral lease. Item 2 was outstanding in possession of tenants and Rama Kurup the prior karanavan executed a Kanam deed Ext. A4 dated 22-12-1952, in favour of defendants 1 and 2. The plaintiffs seek recovery of possession of both the items on behalf of the tavazhi ignoring the leases granted by Rama Kurup as beyond his powers, under the Madras Marumakkathayam Act.

4. Both the courts below have concurrently found that there was no oral lease of item 1 in favour of the 2nd defendant The trial court granted a declaratory decree that Ext. A4 Kanam of item 2 is invalid as beyond the powers of the karnavan u/s 33 of the Madras Marumakkathayam Act. Exts. B3 and B33 leases of item 1 were also found invalid, as opposed to Section 33 of the Madras Marumakkathayam Act. The suit was however dismissed by the trial Court in so far as it relates to item 1 on the finding that defendants 2 to 5 are deemed tenants u/s 7-B, of the Kerala Land Reforms Act. In appeal by the plaintiffs the lower appellate court has reversed the decision of the trial court and has granted a decree for recovery of possession of item 1 on payment of value of improvements effected by defendants 2 to 5. Defendants 3 to 5 who had constructed a house in a portion of item 1, and had been living there are however permitted to retain possession of the house as members of the tavazhi. The court below has held that defendants 2 to 5 being members of the tavazhi are not entitled to protection of Section 7 or 7-B of the Amended Kerala Land Reforms Act, in view of the decision of this court in 1974 Ker LT 85. It is against this that defendants 2 to 5 have filed S. A. No. 1121 of 1977.

5. The decision in 1974 Ker LT 85, arose out of proceedings initiated by way of a petition u/s 108 (2) of Act 35 of 1969, for re-opening a preliminary decree for partition of the properties of a Marumakkathayam tarwad of which the petitioner was also a member on the ground that he is a deemed tenant u/s 7 of Kerala Act 1 of 1964 as amended by Act 35 of 1969. This court rejected the claim for deemed tenancy for the following reasons stated at page 88 (of Ker LT) :

"The petitioner contends that he has been continuously in occupation of the properties of the tarwad honestly believing himself to be a tenant for not less than two years within a period of 12 years immediately preceding the 11th day of April, 1967. He also relies strongly on the Explanation to the said section which obliges the court to draw a presumption that a person who has been continuously in occupation of the land of another for two years within the said period of 12 years has been in occupation honestly believing to be a tenant. The essential prerequisite for the applicability of Section 7 is that a person should have been continuously in occupation of land belonging to another. Obviously, this condition is not satisfied in the present case. The petitioner is a co-owner of the properties and he has been in possession only of the lands belonging to himself and others. In fact the finding recorded in the suit both by the trial court and by the appellate court is that the properties were in the possession of the family and the petitioner was only cultivating it for and on behalf of the family under an arrangement entered into between him and all the other members. In such circumstances it is impossible to say that the petitioner has been in occupation "of the land of another" so as to entitle him to invoke the provisions of Section 7 of the Act. Moreover the case put forward by the petitioner in the written statement filed by him in the suit was that he had tenancy rights over the properties under a specific lease arrangement set up by him. The court went into the question whether the tenancy pleaded by the 5th defendant (petitioner) was true and arrived at the finding that the lease was not true. In such circumstances, when the court has held that the specific lease put forward by him is not true it is not open to the party to rely on the provisions of Section 7 and contend that he was honestly believing himself to be a tenant"

Thus a claim for deemed tenancy u/s 7 of the Act was rejected on the ground that a member of the tarwad in possession of tarwad property cannot be held to be in occupation of the land of another and also for the reason that! a specific lease set up by the defendant having been found against, it is not open to him to claim a deemed tenancy founded on honest belief that he is a tenant in occupation of the land for the period mentioned in Section 7 of the Act. Eradi J. (as he then was) followed the decision of Poti, J. (as he then was) in *Kunhambu Nair v. Kunhammaru Amma* 1973 Ker LT 10481 and held that on the specific lease set up by the defendant having been found against he must be presumed to know that the tenancy set up by him is false and in such circumstances there cannot be an honest belief that he is a tenant of the property concerned.

6. Eradi J. (as he then was) had occasion to consider the question again in *Kaliyannan v. Narasimha Iyer* 1974 Ker LT 286. The learned Judge stated at page 288;

"The oral lease which was set up by the defendant revision-petitioner as the foundation of his right to possession of the property was found to be untrue by all the courts. The subsequent registered document was also found to be invalid by the District Court as well as by this Court as not conveying any right whatever

in favour of the revision-petitioner. That in such circumstances a person who has set up a specific lease and failed to establish that plea cannot turn round and contend that he should be treated as a deemed tenant u./s. 7 of the Act has been held by this court in *Kunhambu Nair v. Kunhammaru Amma* 1973 Ker LT 10, a decision which has been followed by me in a number of subsequent unreported judgments. There is therefore no scope at all for invoking the provisions of Section 7 of the Act in aid of the petitioner.

6. Coming now to the plea raised by the petitioner based on Section 7B the petitioner can succeed only if he is able to make out that he was in occupation of the land of the 1st respondent on the 11th day of April, 1957 on the basis of the registered deed purporting to be a lease deed- In this connection, it becomes highly relevant to remember that according to the case put forward by the petitioner, his occupation commenced not on the basis of the registered deed but on the basis of an oral lease which has been found by the courts to be false. So, the occupation originated from trespass and not under the registered deed. A person who has occupied a land by trespass and has thereafter purported to take a registered deed from another who is not competent or had no right whatever to grant the same will not, in my view, come within the ambit of Section 7B because the said section is obviously intended to grant protection to persons who have bona fide entered upon the land on the basis of a document of lease granted in their favour by another who is ultimately found to be not competent to grant the lease, for which turn of events the grantee cannot be held responsible. The basic assumption underlying the said section is the absence of any collusion between the grantor and the grantee and the existence of bona fides on the part of the grantee even though the expression "bona fide" has not been specifically employed in the said section. The intention of the legislature is perfectly clear and the section has been introduced into the Act only with a view to grant protection to persons who may be in occupation of the land belonging to others under documents purporting to be leases but which, for some technical or legal reasons, may ultimately be found to be lacking in validity but not in bona fides".

7. A Division Bench of this court consisting of Govindan Nair C. J. and Janaki Amma J. in A. S. A. 3 of 1971 (1974) Ker LT 23 (Case No. 66) stated thus:

"There can be no doubt that the person claiming the benefit of Section 7B must be in possession under a registered document It is not sufficient if there was a registered document and there was possession also. The possession must be under the document. That is how the section is worded. The document may be invalid because the executant may not be solely entitled to the property or may otherwise be incompetent to execute the document. Nevertheless the protection under the section will arise because in such cases, normally, the possession claimed is under the registered document. But there can be cases where registered documents are executed not with any intention of creating any rights or even for passing possession but for other purposes. These are therefore

documents which are termed sham and documents which are benami under which no rights were intended to pass whether it be of title or possession. It will be too much to expect that the legislature intended that even in such cases, the protection u/s 7B must be available nor is such an interpretation justified by the wording of the section which in specific terms insists possession "under a registered document." In *Ahammed v. Moideen* 1974 Ker LT 549 a Division Bench consisting of Gopalan Nambiyar J. (as he then was) and Chandrasekhara Menon J. sated thus at page 551:

"We do not think that Section 7 can apply to the facts disclosed. True, the Section operates notwithstanding anything contained in Section 52 of the Transfer of Property Act. But we think that the appellant having obtained the assignment of the lease in his favour after the institution of the suit in the proper court, and his assignors having obtained his lease after the suit for redemption was instituted in a wrong court, may properly be taken into account in gauging the honest belief of the appellant referred to in the Section. On the facts, which have been sufficiently highlighted, we are unable to hold that the appellant can be regarded as having been continuously in occupation from the period contemplated by the Section with the requisite honest belief. The Explanation Ho Section 7 was relied on; but, as pointed out by a Full Bench of this Court in *Narayanan Asari Thankappan Asari v. Ammukutty* 1973 Ker LT 443 no doubt in dealing with the proviso to Section 2 (25) of the Act, more or less to the same effect, the presumption raised by the Explanation can apply only if the fact of occupation and the continuance in possession for the requisite period alone, are made out and nothing more appears. In this case, on the facts noticed by us, we think that there is clear enough evidence to show that the occupation even for the requisite period cannot be regarded or presumed to be under the honest belief that the appellant was a tenant. We therefore negative the claim for protection u/s 7 of the Act

6. We next come to Section 7B (1). What was stressed before us was that it would be enough to show that there was a registered deed purporting to be a lease deed and that in pursuance of the same the appellant or his predecessor-in-interest was in occupation of the land on the 11th day of April, 1957 and on 1-1-1970. It was stressed that it did not make any difference whether the person who granted the lease had no right over the land or was not competent to lease the land. While these two infirmities are specifically got rid of by the Section, we think that to accept the appellant's contention would be to take too narrow a view of the Section. We do not think that the Section was intended to protect collusive transactions, meant as a cloak to cover their real nature and purpose. In the instant case from the background of the facts, and the relationship between the parties, we are satisfied that the so-called lease in favour of the 4th defendant, assigned to the 6th defendant, was nothing more than a mere cloak for covering up the sinister design of making it appear that possession had passed from the mortgagee to the lessee. Such a transaction cannot, and is not, intended to be protected by Section 7B of the Act".

8. Both Sections 7 and 7-B require the person claiming a deemed tenancy to be in occupation of "the land of another" for the period mentioned in the respective sections. As to whether a member of a Marumakkathayam tarwad in possession of land belonging to the tarwad can be considered to be in occupation of "the land of another" was one of the questions decided in 1974 Ker LT 85. The learned Judge held that a member of the tarwad in possession of land belonging to the tarwad cannot be considered to be a person in occupation of "the land of another" and is not entitled to claim a deemed tenancy u/s 7.

9. In the decision of the Supreme Court in Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others, the following passage at page 7 in Sundara Iyer's Malabar and Aliyasanthana Law is quoted with approval (at p. 1099):

"The joint family in a Marumakkathayam Nayar tarwad consists of a mother and her male and female children, and the children of those female children, and so on. The issue of the male children do not belong to their tarwad but to the tarwad of their consorts. The property belonging to the tarwad is the property of all the males and females that compose it. Its affairs are administered by one of those persons, usually the eldest male, called the karnavan. The individual members are not entitled to enforce partition, but a partition may be effected by common consent. The rights of the junior members are stated to be (1) if males, to succeed to management in their turn, (2) to be maintained at the family house, (3) to object to an improper alienation or administration of the family property, (4) to see that the property is duly conserved, (5) to bar an adoption, and (6) to get a share at any partition that may take place. These are what may be called effective rights. Otherwise everyone is a proprietor and has equal rights".

In the decision of the Supreme Court in Dr. C. Annacheriam and Another Vs. Achotha Menon and Others,) it is stated thus at page 1112 (of Ker LJ): tat p. 133 of AIR):

"One more concept of the Malabar Law has to be borne in mind. The concept is that the properties belong to all the members of the tarwad and that apart from the right of management the karnavan has no larger right or interest than the other members".

It is therefore clear that a member of a tarwad in possession of tarwad property cannot be considered to be a person in occupation of "the land of another", and he is not entitled to claim the benefits of Sections 7 and 7-B of Act 1 of 1964 as amended by Act 35 of 1969.

10. Learned counsel for the appellants in S. A. No. 749 of 1977 has cited the decision of a Division Bench of this Court in Thomas v. Radhakumari Devi 1975 Ker LT 475 to show that a co-owner in possession is not precluded from claiming to be a lessee of the co-ownership property. Referring to the decision of the Supreme Court in Jahuri Sah and Others Vs. Dwarka Prasad Jhunjhunwala and

Others, the Division Bench observed at page 478 (of Ker LT) as follows:

"It is also true that co-owners are legally competent to come to any kind of arrangement for the enjoyment of their undivided property and are free to lay down any terms concerning the enjoyment of the property. There is no principle of law as stated by the Supreme Court which excludes them from providing in the agreement that those of them as are in actual occupation and enjoyment of the property shall pay to the other co-owners compensation. At the same time nothing prevents the co-owners from entering into a lease arrangement with one of the co-owners; the property can be put into possession of one of the co-owners as lessee with a fixed rental. In regard to the share of the other co-owners, the co-owner who has taken the lease is in the position of a lessee. The relevant law on the point has been discussed with clarity in great detail by Viswanatha Sastri, J. speaking for the Bench in Venkayya v. Subbarao AIR 1957 AP 619. The learned Judge stated that the interest of a co-sharer in common property can be sold, mortgaged, or leased to another co-sharer or to a stranger; Sections 7, 8 and 44 of the Transfer of Property Act recognise the validity of such transfers. It is not the law that one co-sharer can only release his interest in favour of the other co-sharers. There can be a conveyance of the interest of one co-sharer to another co-sharer or to all the remaining co-sharers with the statutory and other covenants applicable to such conveyance. Section 44 of the Transfer of Property Act provides that a transferee from a co-owner of his share of the property or any interest therein acquires, as to such share or interest, and so far as it is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same. A lessee from a co-sharer is entitled to the rights of his lessor and can even enforce a partition if it is necessary to give effect to his lease. Therefore, there should be a valid lease of his interest by a co-sharer in favour of another co-sharer".

The passage quoted above does not support the proposition of the learned counsel that a co-owner in possession of co-ownership property can be considered to be in possession of "the land of another". The decision does not relate to a case of deemed tenancy u/s 7 or 7-B of the Kerala Land Reforms Act. All that is laid down in the passage quoted above is that it is open by mutual agreement among co-owners to put one co-owner in possession of the entire property as a lessee with a fixed rental and in such arrangement he will be the owner in possession of the property in so far as it relates to his own share and will be a lessee vis-a-vis the other co-owners. He cannot for that reason be said to be in possession of the land of another, since he continues to be a co-owner in respect of the entire property. Under the Marumakkathayam Law as it stood at the relevant time no member of a Marumakkathayam tarwad had an alienable interest in the tarwad property and not even the karnavan was competent to create a lease in respect of his share in the tarwad properties. It is therefore not possible to hold that the appellants in this case are in possession of "the land of another" to attract the provisions of Section 7 or 7-B of Act 1 of 1964.

11. The learned counsel for the appellant has cited the decision in Smt. Pathummama Umma and Another Vs. The Special Tahsilar-cum-Land Tribunal and Another, . Considering Sub-section (2) of Section 75 of the K.L.R. Act the Full Bench held that the provision for requisition by a land-owner to the Kudikidappukaran to shift to an alternative site "belonging to him" connotes that the land-owner must be legally competent to transfer ownership and possession of the alternate site to the Kudikidappukaran. This Court observed (at p. 129):

"In other words, what is contemplated by the provision is that the landholder can require the Kudikidappukaran to shift only to an alternate site in respect of which he has the legal competence to transfer ownership and possession to the Kudikidappukaran. It then follows that a property which does not exclusively belong to the land-holder and over which he has only an undivided interest as a co-owner or a joint tenant cannot be regarded as a site "belonging to him" for the purposes of this sub-section."

The argument of learned counsel based on the above passage is that a co-owner cannot be considered to be the owner of the property which he owns in common with other co-owners. The decision does not support the proposition. The expression "new site belonging to him" occurring in Section 75 (2) of the Act was construed by this Court as relating to a site in respect of which the land-owner is capable of transferring the ownership and possession to the Kudikidappukaran. This decision is not an authority for the proposition that a member of a tarwad in possession of land belonging to the tarwad or a co-owner in possession should be considered to be in possession of land of another, within the meaning of Sections 7 and 7-B of the Kerala Land Reforms Act. We respectfully agree with the reasoning and conclusion of Eradi J. (as he then was) in 1974 Ker LT 85 and 1974 Ker LT 286. Both the Second Appeals are accordingly dismissed, but in the circumstances, without any order as to costs.

12. There is a memorandum of cross-objections by the 4th respondent in S. A. No. 749 of 1977, against the decree of courts below making the 1st defendant liable for the profits due to the other sharers. This apparently is a mistake as the property is in possession of the 2nd defendant under Ext. B-3 lease granted by the Karnavan Kannah Nair. The 2nd defendant should therefore be held liable to account for the profits due to the other sharers. The decree of the courts below is modified to this extent directing the 2nd defendant to account for the profits due to the other sharers from the date of suit. The Memorandum of Cross-objections is allowed without any order as to costs.