
(1961) 09 KL CK 0008
In the High Court Of Kerala
Case No : S.A. No. 241 of 1958

Nanu Vydiar

APPELLANT

Vs

Lakshmikutty Amma and Others

RESPONDENT

Date of Decision : 04-09-1961

Acts Referred:

Transfer of Property Act, 1882 — Section 76(a)

Citation : (1962) KLJ 314

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : C.K. Viswanatha Iyer, for the Appellant; V.P. Gopalan Nambiar for Respondent 4, for the Respondent

Judgement

S. Velu Pillai, J.—On the concurrent findings recorded by the two courts, the short question which arises in this Second Appeal, is whether the 4th defendant can set up fixity of tenure u/s 43 of the Malabar Tenancy Act as amended or not, that right being saved under the proviso to Clause (vii) of section 3, in Act IV of 1961. Two items of properties were involved in the suit, which were both covered by a mortgage, Ext. A1 of the year 1942 in favour of defendants 1 and 2; it was a mortgage with possession only with respect to item 2, and the 4th defendant claimed to be a lessee under defendants 1 and 2. The two courts have found, that the lease in favour of the 4th defendant had taken effect ; but they have not examined the further question whether the lease was granted by defendants 1 and 2 as an act of prudent management of the mortgage property. This question is material, in view of the decision of the Supreme Court in Asa Ram and Another Vs. Mst. Ram Kali and Another, in a case, u/s 29(a) of the U.P. Tenancy Act 1939 where, it was held, that it is only a person who is lawfully a tenant that can claim the rights intended to be conferred by that provision. This implies, that a tenant must be admitted as such by a person, who had the right to do so. As observed by the Supreme Court in the case cited, a mortgagee in possession would have the right to admit a tenant to the mortgaged property :

either if he is authorised in that behalf by the deed of mortgage, or if the transaction is one, which is protected by Section 76(a) of the Transfer of Property Act. But where the transaction is not one which could be upheld u/s 76(a), then there is no admission of tenant by any person having authority to do so, and such a transaction though valid as between the mortgagee and the lessee, cannot form the foundation on which any rights u/s 29, sub-section (a) of the Act could be based.

In my judgment, this reasoning applies with equal force to a case like the present, u/s 43 of the Malabar Tenancy Act.

2. The two courts have not considered this aspect. The case decided by the Supreme Court is also authority for holding, that being in the nature of an exception to the ordinary rule, that "any transfer of property mortgaged, by the mortgagee must cease when the mortgage is redeemed", it is for the tenant, who claims fixity of tenure to strictly establish it, and in doing so, he has to establish, that he was inducted into possession as a tenant lawfully as explained above. The 4th defendant has therefore to prove, that the lease in his favour is protected by the provisions of Section 76(a) of the Transfer of Property Act. The right claimed by the 4th defendant will therefore depend on the determination of this question. For the foregoing reasons, reopening the judgment and decree with respect to item 2, only to the extent necessary for deciding whether the lease in favour of the 4th defendant comes within the purview of Section 76(a) of the Transfer of Property Act or not, I send back the case to the first court for passing a revised decree with respect to that item in accordance with the decision on the above question. Subject to this, the decree under appeal is confirmed in other respects. I do not order costs in this Court.