

(2008) 01 KL CK 0077
In the High Court Of Kerala
Case No : C.R.P. No. 2330 of 2001 C

Narayana Bhakthan V. and Others

APPELLANT

Vs

The President, Anantha Narayanapuram

RESPONDENT

Date of Decision : 21-01-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, 11
Kerala Land Reforms Act, 1963 — Section 108A, 72C

Citation : (2008) 2 KLJ 1005

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : V. Santharam and Anto Thomas, for the Appellant; S. Dileep (GP), for the Respondent

Final Decision : Dismissed

Judgement

K.T. Sankaran

1. Suo motu proceedings were initiated u/s 72C of the Kerala Land Reforms Act in S.M.P.No.2/1994 on the file of the Land Tribunal, Pathanamthitta showing the petitioner herein as the cultivating tenant and the respondent herein Anantharanayanapuram - Thuravoor Thirumal Devaswom - as the landlord. By order dated 22-08-1997, the Land Tribunal allowed the claim of tenancy in respect of 51 cents of land made by the petitioner herein. On appeal by the landlord as A.A.No. 196 of 1997, the Appellate Authority (LR), Thiruvanthapuram reversed the order of the Land Tribunal and rejected the claim of tenancy made by the revision petitioner. The petitioner challenges the judgment of the Appellate Authority in this Revision. There was an earlier proceeding in respect of 76 cents of land including the extent of 51 cents of land involved in the present proceeding. That proceeding was S.M.P. No. 125 of 1976. There the petitioner and his two brothers were shown as cultivating tenants. The respondent herein was shown as the landlord in that proceeding. The Land Tribunal originally allowed S.M.P. No. 125 of 1976 upholding the claim of tenancy made by the

petitioner and his brothers. On appeal by the Devaswom, the Appellate Authority set aside the order of the Land Tribunal and remanded the case to the Land Tribunal. After remand, the proceeding was re-numbered as O.A.No.30 of 1978. By order dated 26.04.1978, the Land Tribunal dismissed the Original Application on the ground that the applicants (revision petitioner herein and others) did not adduce any evidence to prove the tenancy. The applicants in O.A.No.30 of 1978 filed appeal against that order. During the pendency of the appeal, there was a compromise between the parties and document registered as No.508 of 1980 dated 12.05.1980 was executed by the landlord Devaswom demising an extent of 15 cents out of the property in favour of the applicants in the O.A. The nomenclature of the document is gift. It is stated in the gift deed that the disputes were compromised at the intervention of the mediators. It is also discernible from the gift deed that the civil suit filed by the applicants against the Devaswom was agreed to be withdrawn. The decision of the Appellate Authority is not on record in the present proceeding.

2. In the present proceeding, the revision petitioner did not disclose anything about the earlier proceeding including the compromise. He filed a statement in the present case as if he is a cultivating tenant in respect of 51 cents of land. The Special Revenue Inspector filed a report stating that there was an earlier proceeding which ended in a compromise and an extent of 15 cents of land was made available to the applicants in the earlier proceedings. It is also stated in the Revenue Inspector's report that the said extent of 15 cents was demarcated. On the rear side of the extent of 15 cents of the land, the property belonging to the Devaswom is situated. The present claim of the revision petitioner is in respect of the property on the southern side of 15 cents covered by gift deed.

3. Before the Land Tribunal, the petitioner was examined as P.W. 1, Special Revenue Inspector was examined as P.W. 2 and three other independent witness were examined as P.Ws.3 to 5. The "karyasthan" of the Devaswom was examined as D.W.I. No documentary evidence was adduced on the side of the petitioners. The Devaswom produced Exts.D1 and D2. Ext.D1 is the order dated 26.04.1978 in O.A.No.30 of 1978. Ext.D2 is a letter dated 15.05.1993, admittedly written by the petitioner and submitted to the Devaswom stating that he was prepared to purchase the disputed land for a sum of Rs.6 lakhs.

4. It was contended by the Devaswom that the present proceeding is barred by res judicata in view of the dismissal of O.A. No.3() of 1978, the compromise and the execution of the gift deed. The revision petitioner, on the other hand, contended that he was not aware of the compromise and the execution of the gift deed and that the compromise between the parties and execution of the gift deed would not be a bar to the present proceeding. It was also contended that in the earlier proceeding, the revision petitioner did not get any notice. However, it is not disputed that Ext.D2 letter was issued by him. His case in the cross examination is that on a day when he attended the "Upanayanam" of a relative, he was forced to writ Ext.D2 letter. However, there is no such pleading in any of

the statements submitted by the petitioner. He also did not state so in his chief examination. Though independent witnesses were examined, no evidence was adduced to show that Ext.D2 letter was obtained from the petitioner under duress.

5. The Land Tribunal held that the proceeding in S.M.P.No. 125 of 1976 would not operate as *res judicata* and the execution of the gift deed would not affect the claim of the petitioner for 51 cents of land. The reason stated by the Land Tribunal for holding so is that the land involved stated by the Land Tribunal for holding so is that the land involved in S.M.P.No. 125 of 1976 and that involved in the present proceeding are different. In the earlier proceeding, an extent of 76 cents was involved whereas in the present proceeding, an extent of 51 cents out of that extent of 76 cents of land is involved. The Land Tribunal also stated that in the earlier proceeding, there persons including the petitioner were shown as cultivating tenants whereas in the present proceeding the petitioner alone claimed right as a cultivating tenant. The Land Tribunal accepted the evidence on the side of revision petitioner and held that he is a cultivating tenant. The Appellate Authority held that the claim made by the petitioner in the present proceeding is barred by *res judicata*. It was also held by the Appellate Authority that the evidence on record does not establish the tenancy right claimed by the petitioner.

6. The claim of tenancy made by the petitioner is an oral tenancy. He stated in evidence that up to 1968, the Devaswom used to issue receipts for payment of rent. No such receipts were produced. The evidence of P.Ws.3 to 5, who were examined to prove the payment of rent and also the continued possession by the petitioner, is not helpful in finding that the petitioner was holding the land as a cultivating tenant under the Devaswom. The evidence of these witnesses would not also prove that the petitioner paid any rent to the Devaswom. The evidence of P.W.2, the Special Revenue Inspector confirms what is stated in the report. In his report, he has clearly stated that there was an earlier proceeding and an order dated 26.04.1978 was passed by the Land Tribunal rejecting the claim of tenancy made by the petitioner and his two brothers. The report also discloses that the matter was compromised between the persons who claimed to be cultivating tenants and the Devaswom. The records would reveal that the Devaswom had recognised them as "kudikidappukars" as they were residing in the property. The report of the Revenue Inspector would clearly indicate that the extent of 15 cents of land covered by the gift deed was demarcated and stones were laid at the boundary. There is no evidence to prove that the petitioner was recognised as a tenant by the Devaswom or that he has paid any rent to the Devaswom. On the other hand, the earlier proceeding, the compromise and execution of the gift deed would establish that the tenancy claimed by the petitioner was not recognised by the Devaswom and it was rejected by the Land Tribunal in the order dated 26.04.1978. The fact that there was a suit pending between the parties and it was agreed to be withdrawn as per the terms of the gift deed would fortify the contention of the Devaswom that the matter was

really compromised between the parties.

7. Shri V. Santharam, learned counsel appearing for the petitioner contended that the compromise decree would not operate as *res judicata*. He placed reliance on the decision in *Susheela v. Kuttikrishnan* (1998 (2) KLT 188). He also raised a contention that the Devaswom having adduced evidence before the Land Tribunal and having not pressed for a hearing on the question of *res judicata* as the preliminary issue, the Devaswom cannot put forward the plea of *res judicata* at a later stage. His contention is that such plea of *res judicata* should be decided before the evidence is adduced. Shri Santharam also contended that the burden to prove the compromise and the consensus is on the Devaswom. The further contention of the petitioner is that in the facts and circumstances of the case, the Devaswom was bound to prove their possession of the property and the Devaswom should have produced the relevant documents to prove their possession.

8. Smt. Ranjini, learned counsel for the respondents contended that the finding of the Land Tribunal on the question of *res judicata* is perverse and against the dictum laid down by the Full Bench of this Court in *Khalid v. Sulekha* (1986 KLT 1113 (F.B.)) and *Kurichiyan Chandu v. Kunjuraman Nambiar* (1989 (2) KLT 763). She also contended that the entire burden of proof is on the person who claimed tenancy right and that no burden of proof lay on the respondents.

9. It is well settled that an order passed by the Land Tribunal would constitute *res judicata* in a subsequent proceeding before the Land Tribunal. (See *Govindan Gopalan v. Raman Gopalan* (1978 KLT 315) and *Kesava Bhat v. Subraya Bhat* (1979 KLT 766 (F.B.)) Section 108A of the Kerala Land Reforms Act, which was introduced by the Amendment Act. 27 of 1979, provides that the provisions of Section 11 of the CPC shall, so far as may be, apply to the proceedings before the Land Tribunal. The contention that the proceedings are barred by *res judicata* can be raised by the respondents and if the Land Tribunal finds that it is correct, the subsequent proceedings can be disposed of as barred by *res judicata*. In a suit, the question of *res judicata* can be raised as a preliminary point in certain circumstances. Sub-rule (2) of Rule 2 of Order XIV of the CPC states that where issues, both of law and of fact, arise in the same suit, and the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to: (a) the jurisdiction of the Court, or (b) a bar to the suit created by law for the time being in force. The said sub-rule also provides that the Court may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue. In *Shri M.L. Sethi Vs. Shri R.P. Kapur*, it was held that it is well settled that a plea of *res judicata* is a plea of law which concerned the jurisdiction of the court and a finding on the plea in favour of the party raising it would oust the jurisdiction of the court. If the question of *res judicata* can be decided without reference to the disputed questions of fact and without the necessity of there being any evidence to be

adduced, the Court would be justified in dealing with the said contention as a preliminary issue. However, if the Court finds that disputed questions of fact are involved or that the plea of res judicata is a mixed question of law and fact, the Court is not bound to decide the said question as a preliminary issue. Even if a party, who is entitled to request the court to consider the contention of res judicata as a preliminary issue, fails to make a request in that behalf at the appropriate time, that does not operate as a bar for him to raise the contention of res judicata at the final stage of the suit. Such a contention would not be barred by res judicata by his not requesting the same to be considered as a preliminary issue. On the other hand, if such a question is raised as a preliminary issue and a decision is rendered against the party raising it, he would be precluded at a later stage of the same proceeding from raising the very same contention that the suit is barred by res judicata. His remedy would be to challenge the same in the appeal against the final decision in the suit or other proceeding. Though Rule 2 of Order XIV as such may not apply to the proceedings before the Land Tribunal, I propose to dispose of this contention assuming that it applies. Viewed in that angle, I am inclined to hold that the contention raised by the petitioner on this ground is unsustainable. I am not expressing any view on the question whether a preliminary point could be raised before the Land Tribunal, since it is unnecessary for the present.

10. Equally unsustainable is the contention raised by the petitioner that the plea of res judicata would not be available as there was a compromise. What is relevant in this case is that O.A.No.30 of 1978 (the previous proceeding) was dismissed holding that the applicant has not adduced any evidence to prove the tenancy. That was a decision on the merits. The compromise took place during the stage of appeal against that order before the Appellate Authority. The decision of the Land Tribunal was not interfered with by the Appellate Authority. Parties settled the matter and a document dated 12-5-1980 was executed by the landlord. That does not take away the effect of dismissal of the O.A. in respect of the rest of the property which is not covered by the document dated 12.5.1980. When a claim is put forward for a larger extent and the dispute is compromised between the parties, it is puerile to contend that the matter is not compromised with respect to the extent of land which is not covered by the document executed in terms of the compromise. In the facts and circumstances of the case, the landlord Devaswom recognised the petitioners as kudikidappukars and accordingly, document dated 12.5.1980 was executed. That would not result in keeping alive the contention of the petitioner that he is a tenant in respect of 51 cents of land which formed part of the extent of land covered by the proceedings in which the compromise was arrived at. Therefore, I am of the view that the order in O.A.No.30 of 1978 is a bar to the present proceedings.

11. The view taken by the Land Tribunal that since the extent of property involved in the present proceeding and that involved in the earlier proceeding being different, there would be no bar of res judicata, is illegal and unsustainable. The present proceedings relate to a portion of the land which was

involved in the earlier proceedings. The question whether the extent of land or the items of land are the same is not relevant in deciding the question of res judicata. The Full Bench in Khalid v. Sulekha (1986 KLT 1113 (F.B.)), held as follows:

.....What is required to be proved or established to hold that there is bar of res judicata for the subsequent suit, is that in both the suits, the title of the parties agitated, is identical, but not the identity of the actual properties involved in the two litigations. It has been so declared by the Supreme Court in Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others, . The dictum reads:-

The test of res judicata is the identity of title in the two litigations and not the identity of the actual property involved in the two cases.

So also, the view taken by the Land Tribunal that there is no identity of the parties in the two proceedings is incorrect. The petitioner was a party in both the proceedings. In the earlier proceedings his two brothers were also the petitioners along with present petitioner. Therefore, there is identity of parties in the two proceedings. It is not the exact identity of all parties that is required for applying the principles of res judicata. (See Pandit Ishwardas Vs. State of Madhya Pradesh and Others,).

12. The order passed by the Land Tribunal in the earlier proceedings that the applicant in the O.A. did not adduce evidence to prove tenancy is a finding on the merits, though there is no discussion as to the facts and evidence in the case, which led the Land Tribunal to arrive at the finding. What constitutes res judicata is the final decision and not the discussion which led to that finding. In Kurichian Chandu v. Kunjuraman Nambiar (1989 (2) KLT 763) a Division Bench of this Court held thus:

By Ext. A5 order the Land Tribunal has dismissed O.A.829/1970 on the ground that the applicant has not produced any document to prove his tenancy. Such a decision by the Tribunal invested with jurisdiction to decide the question of tenancy cannot be said to be a decision not on merits and would have been res judicata in subsequent proceedings...

13. I find it difficult to accept the contention raised by the revision petitioner that the burden of proof to establish the terms of the compromise and the proceedings which led to the compromise in the appeal etc. are to be proved by the respondent landlord. The landlord Devaswom is relying on the compromise which led to the execution of the document dated 12.5.1980 to substantiate that the petitioner has abandoned his claim of tenancy and that the order dated 26.4.1978 passed in O.A. No.30 of 1978 has become final and, therefore, he is not entitled to raise the question of tenancy again in the present proceedings. The execution of the document as such is not specifically denied. What the petitioner says is that he is not aware of the document. At the same time, the evidence of the petitioner would indicate that he along with his two brothers are in possession of an extent of 15 cents as per the compromise and as per the

document executed on 12.5.1980. The petitioner is not entitled to plead ignorance in respect of the compromise and execution of the document since he was a party to O.A.No.30 of 1978 and appeal therefrom. There is no burden of proof on the landlord, as contended by the revision petitioner. The necessary facts have been pleaded and proved by the respondent Devaswom. On the other hand, the petitioner did not disclose the real and necessary facts either in the statement filed by him or in his chief examination.

14. Yet another circumstances which would compel the to hold that the Appellate Authority was right in rejecting the claim of tenancy is that the petitioner had issued Ext.D2 letter dated 15.4.1993 to the respondent Devaswom, wherein he made a request to the Devaswom to sell the property to him for a consideration of Rs. 6 lakhs. That Ext.D2 letter was written and sent by him is not disputed by the petitioner. His case is that under duress he was compelled to write such a letter. He did not say so in any of his statements or in his chief Examination. Only when the letter was confronted to him, he, for the first time, had put forward such a contention. It is difficult to accept the contention put forward by the petitioner. The petitioner has not stated in which year the lease was granted in favour of his father. Though he stated that up to 1968 rent was paid, he has not produced any rent receipts. There is no acceptable evidence to come to the conclusion that the petitioner is a cultivating tenant in respect of the property in question. The execution of the gift deed dated 12.5.1980 is also another circumstance which would negative the claim made by the petitioner. The facts and circumstances of the case and the evidence on record would justify the conclusion that the claim of tenancy put forward by the petitioner is not genuine. The Appellate Authority was justified in allowing the appeal and in setting aside the order passed by the Land Tribunal. The reasons stated by the Land Tribunal for taking the view that the proceedings are not barred by res judicata and that the petitioner is entitled to put forward the claim of tenancy again, is unsustainable for the aforesaid reasons.

For the aforesaid reasons, I am of the view that the Civil Revision Petition lacks merits. It is accordingly, dismissed. No order as to costs.