

(2013) 09 KL CK 0069
In the High Court Of Kerala
Case No : A.S. No. 528 of 2000

Poddar Plantations Ltd.

APPELLANT

Vs

Thekkemariveettil Madhavi Amma and Others

RESPONDENT

Date of Decision : 27-09-2013

Acts Referred:

Citation : (2014) 1 ILR (Ker) 813 : (2013) 4 KLJ 781

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : P.B. Krishnan, Geetha P. Menon, N. Ajith and P.B. Subramanyan, for the Appellant; Prabha R. Menon, A.P. Chandrasekharan (Sr.), V.M. Krishnakumar, M. Krishnakumar, K. Jayesh Mohankumar and P.R. Reena, for the Respondent

Judgement

Thomas P. Joseph, J.—The following points arise for a decision in the appeal, cross objection and the civil revision. (I) Whether the leased property is properly described by the plaintiffs in the plaint?

(II)(a) Whether the 2nd defendant is entitled to fixity of tenure under the Kerala Land Reforms Act (for short, the KLR Act")?

(b) Whether the 2nd defendant is entitled to fixity of tenure under the Malabar Tenancy Act (for short, "the Tenancy Act")?

(III) Whether the 2nd defendant is entitled to get compensation for improvements (allegedly) effected in the leased property under the Kerala Compensation for Tenants Improvements Act, 1959 (for short, "the Tenants Improvements Act")?

(IV) Whether the plaintiffs are entitled to get mesne profits and if so from which day?

(V) Whether the trial court was correct in allowing recovery of mesne profits by an amendment of the judgment and decree?

The appeal arises at the instance of the 2nd defendant, from the judgment and decree of the Sub Court, Kozhikode in O.S. No. 16 of 1975 allowing recovery of possession of the plaint B schedule items from the defendants. The Cross Objection arises from that part of the judgment and decree (as it originally stood) not providing for recovery of mesne profits to the plaintiffs though a finding in that regard is made in their favour. The Civil Revision is preferred by the 2nd defendant, challenging the order dated 28.11.2001 on I.A. Nos. 6658 and 6685 of 2000 in O.S. No. 16 of 1975 allowing amendment of the judgment and decree and incorporating relief of recovery of mesne profits. 2. Parties are referred as the plaintiffs and the defendants as in the trial court for convenience.

3. The plaintiffs allege that the suit property belonged in jenm to the Mariveettill tarwad of the plaintiffs. While so, the 1st defendant took the said property on lease as per Ext. A1, registered deed dated 04.07.1924. As per the decree for partition in O.S. No. 26 of 1945 of the Sub Court, Kozhikode the suit property and other items were allotted to the share of the plaintiffs and 14 others. The 4th plaintiff purchased right of the 14 others. Thus the plaintiffs got absolute title over the suit property. The period of lease as per Ext. A1 expired by 01.02.1974. Following that, the plaintiffs issued notice to the 1st defendant to surrender possession of the suit property to them. The plaintiffs learned that the 1st defendant has transferred its right under Ext. A1, to the 2nd defendant. The plaintiffs claimed that since the lease under Ext. A1 was lease of plantation, it is exempted from the provisions regarding fixity of tenure, etc., under the KLR Act. The plaintiffs are not liable to pay value of improvements to the defendants. Instead, they are entitled to get mesne profits from the suit property from 02.02.1974 but limited their claim from the date of suit, at the rate of Rs. 3,000/- per year or such other amount as found by the court.

4. The 1st defendant though appeared through counsel, did not file written statement.

5. The 2nd defendant filed writ statement on 12.06.1975 claiming that it does not admit title claimed by the plaintiffs over the suit property but admitting Ext. A1, lease deed in favour of the 1st defendant. It admitted that the period of lease as per Ext. A1 is 50 years from 01.02.1924. The 1st defendant was in possession and enjoyment of the area covered by Ext. A1 as a lessee. The 1st plaintiff sold 0.33 acres in Sy. No. 1054/1-3 to the Ayyappa Seva Sangham as per document No. 668 of 1971. The 1st defendant conveyed its right and interest over the developed area of 264.87 acres to the 2nd defendant as per Ext. A11, registered deed dated 11.01.1973. The balance undeveloped area of 79.73 acres is vested with the Government of Kerala as per provisions of the Kerala Private Forest (Vesting & Assignment) Act, 1971 (for short, "the Assignment Act"). Right of the 1st defendant as a lessee devolved on the 2nd defendant. The 2nd defendant is entitled to fixity of tenure under the KLR Act. At any rate, the 2nd defendant is entitled to get compensation for improvements since as per the law, tenants are entitled to get such compensation. The lease in favour of the 1st

defendant was not of a plantation or a forest. The lease was of a piece of land, later developed into a plantation. Claim of the plaintiffs that the lease is exempted from the provisions of the KLR Act is not correct. The 2nd defendant also contended that plaintiffs are not entitled to get mesne profits.

6. Learned Sub Judge framed issues whether the 2nd defendant is a "tenant" entitled to fixity of tenure under the KLR Act, whether the plaintiffs are entitled to recover possession of the suit property, whether they are entitled to get mesne profits and whether they are liable to pay compensation to the 2nd defendant for improvements.

7. In the plaint as originally filed, the schedule mentioned two items - Item No. 1 was the Ripon Estate with an extent of 206.92 acres in the old/re-survey numbers referred therein and bounded by the Palathur Estate on the east, Sy. Nos. 1160, 1159 and part of survey number No. 1209/9 on the south and Ripon Estate on the west and north. Item No. 2 of the plaint schedule was 120 acres in the resurvey numbers referred to therein and bounded by the rest of properties on all sides.

8. The issue regarding fixity of tenure under the KLR Act was referred to the Land Tribunal (for short, "the Tribunal") for a finding. The Tribunal referred to Ext. A1 and the settlement register (which neither of the parties had produced or relied in the Tribunal) and concluded that the 2nd defendant is not entitled to fixity of tenure under the KLR Act since the lease was of plantation (exceeding 30 acres in extent).

9. The 2nd defendant filed I.A. No. 4193 of 1977 in the trial court to appoint an Advocate Commissioner to prepare a sketch and plan of the suit property with the assistance of a Village Officer and assess compensation payable to the 2nd defendant for improvements effected in the property. That application was allowed. The Advocate Commissioner submitted Ext. C1, report on 16.10.1978. A sketch was also produced along with Ext. C1.

10. The Advocate Commissioner reported in Ext. C1 that though total extent of property described in the plaint schedule was 326.92 acres, at the time of inspection the Commissioner found the extent as 870.42 acres. The Commissioner reported that plantation area alone extended to 411.30 acres and that rest of the portion is forest land, waste and scrub. The Commissioner assessed compensation payable for the tea plants in the 411.30 acres, buildings, road and trees in that estate.

11. The plaintiffs amended the plaint as per order dated 02.08.1979 on I.A. No. 1961 of 1979. Paragraphs 10A to 10C were incorporated in the plaint. The plaint schedule was amended as the Ripon Estate measuring 590.11 acres in the re-survey numbers referred therein and bounded by the rest of Palathur estate on the east, rest of property and properties comprised in Sy. No. 1160 and 1159 and part of Sy. Nos. 1160, 1159 and part of Sy. No. 1209 on the south and rest of properties on the west and north.

12. In paragraph 10A of the plaint, the plaintiffs alleged that rent was fixed at Rs. 1.12 per acre (as per Ext. A1) for 326.92 acres which, it was supposed, was the extent of property put in the possession of the defendant (obviously referring to the 1st defendant) but it is now seen that the total extent (leased as per Ext. A1) was actually 870.42 acres. In paragraph 10B, it is alleged that 280.31 acres was vested with the Government under the Assignment Act. Thereafter, the 1st defendant was liable to pay rent at the above rate on 590.11 acres (870.42 - 280.31 acres). Paragraph 10C stated that the 1st defendant paid rent on 326.92 acres till February, 1972 and that the plaintiffs are entitled to get rent at the rate of Rs. 1.12 per acre on 543.50 acres (870.42 - 326.92 acres) till 1972 and at the same rate, on 590.11 acres during 1973-74.

13. The 2nd defendant filed additional written statement on 12.10.1979 answering the plaint amended as per order dated 02.08.1979 on I.A. No. 1961 of 1979. The 2nd defendant denied the allegation that the lease was of 870.42 acres and asserted that the lease (as per Ext. A1) was only of 326.92 acres. The said 326.92 acres is demarcated and shown in the plan attached to Ext. A1. Even according to the plaintiffs, what was allotted to them as per the final decree in O.S. No. 26 of 1945 was only 326.92 acres. The 2nd defendant further contended that the Advocate Commissioner has wrongly shown 870.42 acres in the plan produced along with Ext. C1, report. The 2nd defendant owns and possesses 1501.50 acres. The Advocate Commissioner has included in the plan (showing the total extent of property leased as 870.42 acres) property otherwise belonging to and possessed by the 2nd defendant as well. The 2nd defendant disputed identity of the property claimed by the plaintiffs.

14. The 2nd defendant filed I.A. No. 2972 of 1979 to remit Ext. C1, report dated 16.10.1978 and the plan produced along with it. In the affidavit in support of that application the 2nd defendant contended that the property described in the plaint schedule originally was only 326.19 acres but the Commissioner has reported extent of the property as 870.42 acres which is baseless, incorrect and unsustainable. The plaintiffs have no title over any property other than 326.92 acres. The plaintiffs have no right over the properties comprised in R.S. Nos. 1113 to 1119.

15. Learned Sub Judge allowed that application by order dated 12.10.1979. Learned Sub Judge observed in paragraph 8 of the said order that it would appear that the Advocate Commissioner has measured and plotted the lands falling outside the plaint schedule property as it originally described and that measurements noted by the Advocate Commissioner are more than double the measurements given in the plaint schedule. Even if at the time of (Ext. A1) lease, the properties were not correctly measured, there could not be such a big margin of difference in the extent. Learned Sub Judge remitted Exts. C1 and the plan to the Advocate Commissioner and directed him to identify the property obtained by the plaintiffs under the partition deed and assess compensation payable for improvements in that property.

16. Pursuant to the said order, the Advocate Commissioner again inspected the property and submitted Ext. C3, report dated 17.06.1980. The Advocate Commissioner marked the leased property within violet shaded boundary in the plan originally prepared by him. That plan is Ext. C2.

17. The plaintiffs again amended the plaint as per order on I.A. No. 5710 of 1999. Additional paragraphs were incorporated to paragraph 9. Apart from that, the plaint schedule was amended. 590.11 Acres shown in the plaint schedule as amended as per order dated 28.08.1979 on I.A. No. 1971 of 1979 was described as the plaint A schedule. Plaint B schedule items 1 and 2 were newly incorporated. Plaint B schedule item No. 1 is the Ripon Estate measuring 206.92 acres, bounded by the Palathur Estate on the east, properties comprised in Sy. Nos. 1159, 1160 and part of 1209 on the South and the Ripon Estate on the west and north. Item No. 2 is 120 acres, described as the second task of the Ripon Estate and bounded by rest of the property on all sides.

18. To that amended plaint, the 2nd defendant filed additional written statement dated 03.01.2000. There, again, identity of the property claimed by the plaintiffs was disputed.

19. Learned Sub Judge, accepting finding of the Tribunal held that the 2nd defendant is not entitled to fixity of tenure under the KLR Act. The 2nd defendant was denied compensation for improvements on the ground that the claim cannot be sustained as the period of lease as per Ext. A1 had expired and the suit is filed thereafter. The plaintiffs were allowed to recover possession of the plaint B schedule items. Though in the body of the judgment there was a mention that the plaintiffs are entitled to get mesne profits, the operative portion of the judgment and the decree did not provide for recovery of mesne profits.

20. Noticing that the operative portion of the judgment and the decree did not provide for recovery of mesne profits, the plaintiffs filed I.A. Nos. 6658 and 6685 of 2000 to amend the judgment and decree and incorporate relief of recovery of mesne profits. Those applications were allowed and the operative portion of the judgment and decree were amended allowing the plaintiffs to recover mesne profits from the date of the suit. The decree for recovery of possession is challenged by the 2nd defendant, in A.S. No. 528 of 2000. The plaintiffs have preferred Cross Objection as the unamended judgment and decree did not provide for recovery of mesne profits. The 2nd defendant has challenged the order allowing amendment of the judgment and decree in the Civil Revision.

21. The points raised for a decision are answered as under:

22. Point No. 1: The learned counsel for the 2nd defendant has contended that the leased property is not properly described in the plaint, nor identified by the Advocate Commissioner. Learned counsel has invited my attention to the plaint schedule as originally filed and amended as per orders on I.A. Nos. 1961 of 1979 and 5710 of 1999. Learned counsel has contended that the suit is not for recovery of the "leased property" but of some other property and hence the suit

is not maintainable. Though the plaint schedule was amended successively, the plaint averment that a portion of the leased property (326.92 Acres) is forest land still stands. Finding of the Advocate Commissioner that there is no forest land within the area marked in Ext. C2 within violet boundaries is unsustainable and against the plaint averments. Learned counsel has also invited my attention to the plan produced by the plaintiffs in the appeal along with I.A. No. 1559 of 2012 (under Rule 27 of Order XLI of the Code of Civil Procedure, for short, "the Code"). It is argued that if the plaint schedule descriptions are to be accepted, item No. 2 of the plaint B schedule must be situated towards south eastern portion of item No. 1 of the plaint B schedule but the boundary descriptions in Ext. A1 would not support that. It is also argued that if the eastern boundary of the property shown in the plan produced along with I.A. No. 1559 of 2012 is a straight line, Exhibit C2 shows the eastern boundary as zigzag with several curves. Learned counsel submitted that without properly describing and identifying the leased property, no decree for possession could be granted. There is no evidence to show that the Advocate Commissioner had obtained the assistance of a Surveyor for identification of the property. Learned Sub Judge has not passed any order appointing a Surveyor for the purpose. P.W. 1 stated in his evidence that the Advocate Commissioner was assisted by a private Surveyor but there is no mention of that in Ext. C1 or Ext. C3. It is argued that the question of fixity of tenure and compensation payable for improvements are dependent on a finding regarding the correct description and identification of the leased property. In the circumstances learned Sub Judge was not correct in granting a decree for recovery of possession.

23. The learned Senior Advocate for the plaintiffs contended that since the suit is filed on determination of the lease by efflux of time, a prayer for recovery of possession is not required. According to the learned Senior Advocate, u/s 108 of the Transfer of Property Act (for short, "TP Act") the lessee is bound, on determination of the lease to put the lessor in possession of the leased property. That being a statutory obligation of the lessee, it could be enforced by a decree for mandatory injunction u/s 38 of the Specific Relief Act, 1963. Reliance is placed on the decision in *Sant Lal Jain Vs. Avtar Singh*, - paragraph 6). Learned Senior Advocate argued, placing reliance on the decisions in *L. Janakirama Iyer and Others Vs. P.M. Nilakanta Iyer and Others*, *V. Gopinatha Pillai v. Mathevan Pillai*, 1989 (2) KLT 724 that the court must understand the substance of the pleadings.

24. It is further argued that in view of the obligation of the lessee under Sec. 108 of the TP Act, the lessee cannot dispute identity of the leased property. When the lease was created the lessee was put in possession of a definite extent and item of land with specific boundaries to the knowledge of the lessee. The lessee should be aware of identity of that property. If the lessee has mixed up the leased property with his property or interfered with its boundaries, he has to suffer and make good the loss if any, caused to the lessor. The lessee is estopped from disputing identity of the leased property as it is the responsibility of the

lessee to keep the leased property in tact to comply with his obligation under Sec. 108 of the TP Act. Reliance on the decisions in (1883) ILR 6 263 Ismail Khan Mahamod v. L.P.D. Broughton, CWN (5) 846 Ballaramgiri Ramachandragih Inamdar v. Vasudev Moreshvar Niphadkar, ILR (1896) 22 Bom 348, Banarsi Dass Vs. Faqir Chand and Others, , M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, and Vashu Deo Vs. Bal Kishan, . It is argued that the Advocate Commissioner has correctly identified the leased property as per Exts. C2 and C3. It is also argued that the leasehold right created in favour of the 1st defendant as per Ext. A1 having been assigned to the 2nd defendant as per Ext. A11, the latter is bound by the descriptions in Ext. A11 and at any rate, the plaintiffs are entitled to recover possession of the property covered by Ext. A11, assignment deed in favour of the 2nd defendant and it is within the power of this Court to mould the reliefs accordingly.

25. I am unable to accept contention of the learned Senior Advocate that on determination of the lease, the lessor could bring a suit for mandatory injunction under Sec. 38 of the Specific Relief Act. That argument would apply in a case of determination of licence, reason being that the licensee has no "possession" of the property and at any rate, his "possession" if any, is only for the limited purpose of enjoyment of the licence. The licence does not create any interest in immovable property in favour of the licensee. It only gives a personal privilege for enjoyment of the property. In that situation, on determination of the licence and before the licensee usurps "possession" of the property adverse to the interest of the licensor, it is open to the licensor to bring a suit for mandatory injunction. In the case of a lease, it is not a privilege to enjoy the property. A lease creates an interest in immovable property in favour of the lessee. The lessee is in de jure and de facto possession of the property. In that situation, on determination of the lease, the lessor should seek possession. This is clear from Sec. 43 of the Kerala Courts Fees and Suits Valuation Act as well. The plaintiffs have paid court fee under the said provision. The plaintiffs could not contend that they could have brought a suit for mandatory injunction.

26. A lease of immovable property, under Sec. 105 of the TP Act, is and can only be, with respect to a definite immovable property.

27. Section 108 of the TP Act says:

(q) On the determination of the lease, the lessee is bound to put the lessor into possession of the property.

The above obligation is subject to a contract or local usage to the contrary.

28. It follows that it is the responsibility of the lessee to keep identity of the leased property so that, on determination of the lease he could discharge the obligation cast on him under Sec. 108 of the TP Act, in the absence of a contract or local usage to the contrary. In such a situation the lessee cannot dispute identity of the leased property. If he has mixed up the leased property with his own property or interfered with its boundaries, he does so at his risk. That does

not absolve him of the responsibility to put the lessor in possession of the property on determination of the lease. The lessee cannot, under the law or in equity be allowed to take advantage of his own fault in not maintaining identity of the leased property or in disturbing its boundaries.

29. In *Dugappa Chotti v. Vidhia Purna Thirthasami and Another* (supra) it is held that the defendant, by reason of his relation as tenant was bound to preserve the boundaries of the lands he so held as tenant and not to permit them to be destroyed and especially when he owned other lands adjoining the leased property. He should not have permitted his own and his landlord's lands to have become so intermixed that the boundary of each could not be ascertained. The onus is thrown on the tenant of distinguishing his own property. In paragraph 9, reference is made to the observation of Lord Eldon, in *Attorney General v. Fullerton* (Vesey & B.264) which is as under:

It has long been settled law and is not now to be unhinged that a tenant contracts, among other obligations resulting from the relation, to keep distinct from his own property during his tenancy and to leave clearly distinct at the end of it his landlord's property not in any way confounded with his own. This is therefore, a common equity, that a tenant having put his landlord's property and his own together for his convenience in order to make the most of it during his tenancy is bound at the end of the term to render up specifically the landlord's land; and if he cannot, that a commission shall issue from a Court of Equity to ascertain what were the lands of the landlord.

In paragraph 13 of *Dugappa Chotti's* case it is held,

...The tenant is clearly bound to show where his landlord's land was situated, and if he fails to do so, a part of the property with which it was mixed equal to its annual value should be set out and made over to the landlord. If the boundaries can be ascertained, there will be no further difficulty. If they cannot, it would be desirable to set out the land claimed in some particular direction, so that the different plots included in each description of land may lie together as far as practicable.... For this purpose, the Subordinate Judge should depute a Commissioner to ascertain by local enquiry, as far as practicable, the relative position of the two estates....

30. In *Ismail Khan Mahamod v. L.P.D. Broughton* (supra) it is held that where owing to negligence of the tenant, the land demised becomes confounded with other lands, the tenant, unless he can ascertain the former, is bound to make good to the landlord the quantity of the land to which the latter is entitled. In *Ballaramgiri Ramachandragiri Inamdar v. Vasudev Moreshvar Niphadkar* (supra) it is held that a tenant giving up the demised land to his landlord is bound to give him vacant possession. These decisions support the argument of the learned Senior Advocate for the plaintiffs.

31. In the light of Sec. 108 of the TP Act, a lessee is bound to keep identity of the leased property in the same condition it was when it was put in his

possession and put the lessor in possession of the said property, on determination of the lease. If the lessee, by his own act, default or negligence has interfered with the boundaries or mixed up the leased property with his own land, he cannot dispute identity of the leased property and take advantage of his own act, default or negligence.

32. The question is whether that principle would apply to the facts of this case? The plaintiffs/lessors must have a definite case as regards the leased property. The suit is for recovery of possession of immovable property. Rule 3 of Order VII of the Code says that where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaintiff shall specify such boundaries or numbers. The decree also should contain such a description as Rule 9 of Order XX of the Code stipulates. Hence the plaintiffs were obliged to give a proper description of the leased property in the plaint sufficient to identify it and in case that property could be identified by boundaries or numbers in a record of settlement or survey, to specify such boundaries or numbers. When the leased property is properly described and that is in accordance with the descriptions in the document creating/evidencing the lease, the lessee cannot dispute identity of the leased property.

33. I stated a little above that the property as originally stated in the plaint schedule was 206.92 acres called as the "Ripon Estate" (item No. 1) and 120 acres (item No. 2). By amendment as per order on I.A. No. 1961 of 1979, that description was given a complete go-by and may be, basing on Ext. C1, report of the Advocate Commissioner, the plaint schedule was amended to state the leased property as 590.11 acres. The boundary descriptions given do not tally with the boundary description of item Nos. 1 and 2 as originally stated. The plaint schedule was again amended to state that the plaint B schedule item No. 1 is 206.92 acres and item No. 2 is the 2nd task of the Ripon Estate, measuring 120 acres.

34. In Ext. A1, 206.92 acres is described in part 1 as the Ripon Estate. The said property is described as comprised in Sy. No. 755/1 & 2 and 1166/1-3. Exhibit A1 does not give the boundary descriptions of the said item. There is also no plan appended to Ext. A1 concerning that item. Part II of Ext. A1 is 120 acres or thereabouts. There, the survey number is not given. Instead, that property is described as bounded by the Ripon Estate on the north and west, properties comprised in Sy. No. 1160 and 1159 and part of 1209 on the South and the Palathur Estate on the east.

35. Going by the boundary descriptions of the property in part II of Ext. A1, that property must be situated towards south- east of the property described in part I. But in the plaint B schedule as now seen, entirely different boundary descriptions are given. For the plaint B schedule item No. 1, (i.e., 206.92 acres) which is alleged to be part I of Ext. A1, boundary descriptions given are, the

Ripon Estate on the east, property comprised in Sy. Nos. 1159 and 1160 and part of 1209 on the south and Ripon Estate on the north and west. Boundaries of item No. 2 of the plaint B schedule (120 acres), stated to be Part II of Ext. A1 is given as rest of the property. These descriptions do not tally with the boundary descriptions in Ext. A1. It would appear that the boundary descriptions for Part II property in Ext. A1 is given for the plaint B schedule item No. 1 (which is stated to be part I of Ext. A1) and for the plaint B schedule item No. 2 (stated to be part II of Ext. A1), different boundary descriptions are given. Thus it is clear that the boundary descriptions of the plaint B schedule item Nos. 1 and 2 do not tally with the descriptions in Ext. A1. There is also no proper explanation for the difference in extent.

36. Learned Senior Advocate for the plaintiffs made heavy reliance on Exts. C1 to C3. It is argued that at least the eastern boundary description in Ext. C2 is correct and thus, the property could be located. On going through Ext. C3, I find that the boundary descriptions do not fully agree. A further fact I must notice is that though it is the case of the plaintiffs as averred in the plaint as it now stands that a portion of the 326.92 acres is Reserve Forest, the Advocate Commissioner, states in Ext. C3 that no portion of the property coming within the violet boundary is Reserve Forest. I must also notice the evidence of P.W.1 in that regard. He stated that 206.92 acres, as per Ext. A1, was tea estate and that rest of the property (shown in Ext. A1) was forest land. He further says that a portion of property referred to in Ext. A1 was tea plantation and that part II (of Ext. A1) was forest land. Going by the evidence of P.W.1, it would appear that a portion of the 326.92 Acres (referred to in Parts I and II of Ext. A1) is Reserve Forest. But the Advocate Commissioner says otherwise in Exts. C1 to C3.

37. I referred to I.A. No. 1559 of 2012 filed by the plaintiffs under Rule 27 of Order XLI of the Code and the plan appended to that. That plan, according to the plaintiffs is of the plaint B schedule item No. 2 (stated to be Part II of Ext. A1). As per that plan, eastern boundary of the plaint B schedule item No. 2 should be straight. But Ext. C2 shows the eastern boundary of the said property, not as straight but as zigzag and having several curves. The plaintiffs were not able to explain this discrepancy as well. The said plan was not produced in the trial court with opportunity to the 2nd defendant to challenge it. Nor has the Advocate Commissioner identified the properties with reference to that plan. Hence I am not inclined to allow I.A. No. 1559 of 2012.

38. It is not clear how the Advocate Commissioner has identified the leased property. In Ext. C1, the Advocate Commissioner stated that though the plaint schedule (amended by order dated 02.08.1979 on I.A. No. 1961 of 1979) stated the total extent as 326.92 Acres, on inspection the actual extent was found to be 870.42 acres a portion of which was forest land. I have referred to the evidence of P.W1 that a portion of 326.92 acres is Reserve Forest while as per Exts. C2 and C3, no portion of the said 326.92 acres is Reserve Forest. It is also not clear how the Advocate Commissioner carved out the 326.92 acres out of the 870.42

acres. Exhibit C2 gives the impression that the plot measuring 326.92 acres is larger than the remaining portion of 870.42 acres (Ext. C2, plan is not drawn as per scale).

39. There is no reference in Ext. C1 or C3 about the Advocate Commissioner obtaining the assistance of a Surveyor. Learned Senior Advocate would contend that it is not necessary that the assistance of a Government Surveyor should have been taken and that P.W 1 has referred to the presence of a private Surveyor to assist the Advocate Commissioner. But I do not find any mention of that in Ext. C1 or C3.

40. Dissatisfied with the extent of the leased property referred to in Ext. C1, the 2nd defendant filed I.A. No. 2972 of 1979 to remit that report. In the order dated 12.10.1979 on that application the learned Judge observed that prima facie, the Advocate Commissioner has measured and plotted also lands falling outside the suit property as it originally stated in the plaint schedule (326.92 acres) and that the measurements given by the Advocate Commissioner are more than double the measurements given in the plaint schedule. Learned Sub Judge, by order dated 12.10.1979 on I.A. No. 2972 of 1979 directed the Advocate Commissioner to identify the property with reference to the decree in O.S. No. 26 of 1945.

41. There is no reference in Ext. C3 that the Advocate Commissioner has identified the property with reference to the decree for partition in O.S. No. 26 of 1945. What could be seen from Ext. C3 is that the Advocate Commissioner was finding justification for the identification he made and referred to in Ext. C1 with which the learned Sub Judge was not satisfied as revealed from the order dated 12.10.1979. The Advocate Commissioner goes on to say in Ext. C3 that he prepared the plan of the suit property (Ext. C2) after identifying the same by survey numbers and boundaries (Ext. C2, plan was prepared by the Advocate Commissioner while preparing Ext. C1, report. It is only that after remission the Advocate Commissioner has marked the suit property within the violet colour boundaries in Ext. C2).

42. In Ext. A1 or Exts. A2 to A4, the boundaries are not given. Boundaries are stated as D stone. The property is described by the old and re-survey numbers. Hence identification of the leased property as per the final decree in O.S. No. 26 of 1945 alone was also not possible.

43. That the 2nd defendant has not examined the Advocate Commissioner in court is not a reason to accept Exts. C1 to C3 if it is otherwise not acceptable. Identification of the leased property and which the plaintiffs could seek possession, made as per Exts. C1 to C3 is not acceptable.

44. Learned Senior Advocate for the plaintiffs argued that if this Court is not inclined to accept and act upon Exts. C1 to C3, a remission of the suit of the year, 1975 be avoided and the trial court may be directed to collect evidence and enter a finding regarding the correct identity of the leased property, while the

appeal is retained by this Court. That suggestion cannot be accepted as a proper identification of the property has a direct bearing on assessment of compensation (if any payable) for improvements (if any effected) in the leased property.

45. Alternatively, the learned Senior Advocate argued that the plaintiffs may be given a decree for possession of the property covered by Ext. A11. That argument also cannot be accepted. It is not as if when it is found that description of the plaint schedule property is not acceptable, the plaintiffs could be given a decree for the property covered by Ext. A11. That property also has to be identified for determining compensation for improvements if any, effected by the 2nd defendant.

46. True, it is open to the executing court also to identify the property in case of dispute. But the decree must conclusively determine the right of the parties. It is no decision at all to leave the disputed questions to the executing court particularly as identity of the property will have a bearing on the compensation if any payable to the 2nd defendant. The executing court cannot be converted into a Forum to agitate disputes which are required to be settled on the trial side.

47. Though a lessee cannot dispute identity of the leased property in the circumstances above stated, the lessor is bound to correctly describe the leased property in the plaint in compliance with Rule 3 of Order VII of the Code and the decree also should correctly describe the property in view of Rule 9 of Order XX. The plaintiffs have not properly described in the plaint the leased property and which they are entitled to claim possession. The plaintiffs have to describe properly in the plaint the leased property over which they claim absolute right. If there is any difference in the extent/and or boundaries, etc., that has to be explained. Once the leased property is thus correctly described in the plaint with reference to Ext. A1 and other relevant documents, then the 2nd defendant as assignee of the lessee cannot dispute identity of the leased property. Having regard to the discrepancy in the extent (if any), a proper identification of the property with reference to the descriptions in Ext. A1 is necessary for which the plaintiffs also can move.

48. Learned counsel for the 2nd defendant has a contention that the suit is liable to be dismissed for want of proper description of the leased property. According to the learned counsel, cause of action alleged in the plaint must relate to the leased property and the suit must be for possession of that property but that is not the situation in this case. Reliance is placed on the observations in paragraph 10 of the decision in P. Chandrasekharan and Others Vs. S. Kanakarajan and Others,

49. I am not inclined to think that because there is no proper description of the leased property in the plaint and/or the discrepancy if any regarding the extent, boundaries, etc., is not properly explained, the suit must fail. The reason is that admittedly the property leased as per Ext. A1 and assigned as per Ext. A11 is in the possession of the 2nd defendant. The suit is with respect to the leased

property. It is not disputed that the period of lease as per Ext. A1 which binds the 2nd defendant also expired by 01.02.1974. As found above, under Sec. 108 of the TP Act the 2nd defendant, on determination of the lease is bound to put the lessor or his assignee in possession of the property (in case the contention raised by the 2nd defendant regarding fixity is not accepted). If that be so, the suit cannot be dismissed on account of the wrong description of the leased property or failure to explain the discrepancy if any, regarding the extent, boundaries, etc.

50. Point No. II (a) The 2nd defendant has raised a contention that it is entitled to fixity of tenure under the KLR Act. Learned Sub Judge raised an issue regarding that and the question was referred to the Tribunal for a finding. Before the Tribunal, the parties did not adduce any evidence except proving Ext. A1. The Tribunal, referring to Ext. A1 and the settlement register (not produced or relied on by either side) concluded that it was a lease of plantation granted to the 1st defendant as per Ext. A1 and hence the 2nd defendant cannot claim fixity of tenure under the KLR Act. That finding was accepted by the learned Sub Judge.

51. Learned counsel for the 2nd defendant assailed finding of the Tribunal. It is argued that since identity of the demised property is not established, there could be no finding regarding fixity. Identity of the property has to be first established and then the question of fixity has to be referred to the Tribunal for a finding. It is further argued that at any rate, the Tribunal was not legally or factually correct in referring to the settlement register which was not before it, nor produced or relied by either side and that too, without opportunity to the 2nd defendant to challenge contents of the said settlement register. It is also argued that finding of the Tribunal based on Ext. A1 that it was a lease of plantation is not correct. Reliance is made on Ext. B9, lease deed in favour of Colin Auley Meckenzi. It is argued that the property described as Part I of Ext. A1 is the property which was leased to Colin Auley Meckenzi as per Ext. B9. Even if it is assumed that the property described in Part I of Ext. A1 was developed into a plantation by the said Colin Auley Meckenzi, the 2nd defendant is entitled to claim fixity of tenure. It is submitted that Ext. B9 came to the notice of the 2nd defendant only after the Tribunal answered the reference. According to the learned counsel, Exts. A13 and A14 relied on by the plaintiffs do not show that the leased property were plantation as on the date of Ext. A1. Learned counsel has invited my attention to Sec. 2(44)(c) of the KLR Act to contend that finding of the Tribunal regarding fixity is not correct. It is further argued that right to cultivate tea or any other crop, erect building, effect quarrying, fell timber, etc., granted to the lessee under Ext. A1 indicates that what was granted as per Ext. A1 was a lease of land, later developed into a plantation by Colin Auley Meckenzi, the 1st defendant and the 2nd defendant. At any rate, even if it is assumed from the description in Ext. A1 that the property described as Part I of Ext. A1 was an "estate" and hence a plantation, that cannot be applied to the property described as Part II of Ext. A1. Learned counsel argued that though the lease is created by a single document (Ext. A1), it is essentially lease of two items of properties and hence has to be

separately construed.

52. Learned Senior Advocate for the plaintiffs contended that Ext. B9 cannot be taken into account. Exhibit B9 is not shown to be concerning the property dealt with as per Ext. A1. The boundary descriptions in Ext. B9 show that even as on the date of Ext. B9, the tarwad which created the lease as per Ext. B9 owned and possessed several acres of land adjoining the land referred to in Ext. B9. There is no evidence to show that the property leased as per Ext. B9 forms part of property leased as per Ext. A1. Learned Senior Advocate has invited my attention to the contentions raised by the 2nd defendant in paragraph 2 of the additional written statement dated 19.07.1991 to contend that even as per the version of 2nd defendant, what was leased to the 1st defendant as per Ext. A1 was a developed land. According to the Learned Senior Advocate, Ext. A1 would show that the lease in favour of Colin Auley Meckenzi was extinguished prior to the creation of lease as per Ext. A1. Hence the defendants could not claim any right under the said Colin Auley Meckenzi. In view of Sec. 51 of the KLR Act, surrender of lease to the lessor prior to 11.11.1966 was not prohibited. Exhibit A1 created lease of two items referred to therein. It is a single tenancy as revealed by the terms and conditions of Ext. A1. It is also argued that since it was a lease of plantation exceeding thirty (30) acres in extent, question of fixity of tenure does not arise in view of clauses (1) to (viii) of Sec. 3(1) of the KLR Act.

53. It is also argued that the Tribunal was correct in referring to the settlement register which is a public document. According to the learned Senior Advocate, it was within the power of the Tribunal/Court to take judicial notice of public records. Authorities are cited to support that proposition. Alternatively, it is argued that a copy of the settlement register referred to by the Tribunal is produced by the plaintiffs in the appeal along with I.A. No. 1561 of 2013 to receive that document as additional evidence under Rule 27 of Order XLI of the Code. Learned Senior Advocate has placed reliance on the decision in Jerome Fernandes Vs. The Be-Be-Rubber Estate Ltd., to contend that in respect of lease of plantation exceeding 30 acres no claim for fixity of tenure could be raised. Learned Senior Advocate contended that the burden to prove that the 2nd defendant is entitled to fixity of tenure was on it but that burden was not discharged by adducing any evidence. In the circumstances, there is no reason to interfere with the finding of the Tribunal regarding fixity, it is argued.

54. While answering point No. 1, I found that the plaintiffs have not properly described in the plaint the leased property with reference to Ext. A1 and other document relied on by them and that the discrepancy if any, in the extent/boundary, etc., is not properly explained. If the argument of the 2nd defendant were to be accepted, I must set aside the finding of the Tribunal regarding fixity and direct the trial court to decide the issue regarding identity and then refer the question of fixity to the Tribunal for a finding.

55. I found that a lessee cannot dispute identity of the leased property and that it is his statutory obligation to keep identity of the leased property to be put in

the possession of the lessor on determination of the lease. It is not disputed that the lease in favour of the 1st defendant (which right was later assigned to the 2nd defendant as per Ext. A11) was created as per Ext. A1. If, from Ext. A1 and other circumstances it is possible to say that lease was of a plantation and not of land for plantation, it is possible to decide the question of tenancy in this appeal itself. The prohibition against deciding question of I tenancy, etc., in view of sub-secs. 1 and 3 of Sec. 125 of the KLR Act is only on the trial court and not on the appellate court. The appellate court is entitled to take appropriate decision on the question based on the evidence on record. Hence I reject the contention raised by the learned counsel for the 2nd defendant that the question of tenancy has to be referred to the Tribunal for a decision after the trial court decides on the description/identity of the leased property.

56. Clause (viii) of Sec. 3(1) of the KLR Act exempts lease of plantation exceeding 30 Acres in extent from the application of Chapter II of the KLR Act. It follows that if the lease under Ext. A1 was of plantation exceeding 30 acres in extent, question of the 2nd defendant claiming fixity under the KLR Act does not "arise" for a decision by the Tribunal.

57. There is a dispute between the parties as to the burden of proof - whether it was for the plaintiffs to prove that lease was of a plantation exceeding 30 acres in extent to come within the mischief of Sec. 3(1)(viii) of the KLR Act or for the 2nd defendant to prove that it was a lease of land for plantation?

58. The 2nd defendant claims that he is not liable to be evicted from the leased property in spite of determination of the lease by efflux of time as he is entitled to fixity of tenure. The plaintiffs seek possession of the property on the determination of the lease. The 2nd defendant as assignee of the lessee has a statutory duty to put the plaintiffs in possession of the said property. It is not as if one must start with an initial presumption that there is a lease of land or lease of plantation not exceeding 30 acres and it is for the plaintiffs to rebut that presumption. If the 2nd defendant should avoid a decree for possession, it has to show that he is entitled to fixity. Burden lays on the 2nd defendant to show that notwithstanding determination of the lease, it is not liable to be evicted, be it on the ground that he is entitled to fixity of tenure.

59. Exhibit A1 is the only document the parties have produced in the Tribunal. The 2nd defendant did not examine in the Tribunal any person competent to say about condition of the leased property on the date of Ext. A1.

60. It is true that the leased property is described in two parts in Ext. A1. It is also true that the premium paid is Rs. 5,505/- (calculated at the rate of Rs. 15/- per Acre on 207 acres and at the rate of Rs. 20/- per acre on 120 acres leased as per Ext. A1). But the yearly rent is fixed for the entire properties as Rs. 360/- and anas 14, calculated at the rate of one rupee and 2 anas per acre of the "demised property" meaning thereby that the rent fixed is for the entire property mentioned in Parts I and II of Ext. A1. As per Ext. A1, same terms and conditions

are fixed for the property included in Parts I and II of Ext. A1. Hence it is difficult to accept the argument of the learned counsel for the 2nd defendant that though under the same deed, separate tenancy is created for the two items.

61. In Ext. A1, after describing the property in Parts I and II it is stated that the property described in Part I was in the possession of Colin Auley Meckenzi and that the tenancy in his favour was extinguished. Exhibit A1 states that the property described in Part II of Ext. A1 was in the possession of the lessor. The property referred to in Part I of Ext. A1 is described as the "Ripon Estate". True, mere description of the property as "Ripon Estate" would not, by itself lead to any inference that the said property was a plantation on the date of Ext. A1. But the further recitals in Ext. A1 are also to be looked into. What is stated in Ext. A1, referring to the property mentioned in Parts I and II of Ext. A1 is that,

Together with all buildings upon the said premises hereinbefore firstly and secondly described and all tea and other trees and cultivation and all ways waterways, water courses, privileges, easements, advantages and appurtenances whatsoever belonging or in anywise appertaining together with liberty for the lessee to plant and cultivate the whole or any part of the said premises with tea or other products and to cut down and convert to its own use all timber and either trees and undergrowth new or at any time hereafter during the term hereby granted growing upon the said demised premises or any part thereof and for that purpose to quarry stone and excavate clay and brick earth upon and from the said demised premises....

62. It is clear from Ext. A1 that even on the date of Ext. A1, the property referred to in Part I and II of Ext. A1 had tea and other cultivation in it. Though learned counsel for the 2nd defendant has made much stress on the power given to the lessee under Ext. A1 to plant and cultivate the whole or part of the property with tea or other crops and construct building to contend that it was a lease of land and not lease of plantation, I am not impressed by that contention. The said power conferred by Ext. A1 only enabled the lessee to remove the existing plantation and other crops and (re) plant the properties with tea or other crops.

63. It is also useful to refer to the contention raised by the 2nd defendant in paragraph 2 of the additional written statement (filed on 19.07.1991). There, it is contended that Ext. A1 is a renewal deed (of the lease granted to Colin Auley Meckenzi) and that the subject matter of the lease in favour of Colin Auley Meckenzi which took place years prior to Ext. A1 was not an Estate. It was land only and all the improvements therein were effected by the tenants and whose tenancy right ultimately vested with the 2nd defendant. It would appear from the above plea that according to the 2nd defendant, the lease in favour of Colin Auley Meckenzi was of land, he developed the land into a plantation and that right vested with the 2nd defendant by virtue of Exts. A1 and A11.

64. Exhibit A1 would show that whatever right was created in favour of Colin

Auley Meckenzi was extinguished before the execution of Ext. A1. Under Sec. 51 of the KLR Act, prohibition to surrender a lease in respect of the land held by the tenant to anybody other than the Government came into operation only on 11.11.1966 which meant that surrender of lease to the lessor before 11.11.1966 was legally permissible. Hence surrender of lease by Colin Auley Meckenzi to the lessor, stated in Ext. A1 was valid. Exhibit A1 does not show that it is a renewal of the lease created in favour of Colin Auley Meckenzi. Exhibit A1 created a fresh lease in favour of the 1st defendant on fresh terms and conditions after the lease in favour of Colin Auley Meckenzi was extinguished. In that situation, the defendants could not claim any right under Colin Auley Meckenzi. Thus even going by the contentions raised by the 2nd defendant in paragraph 2 of its additional written statement the property mentioned in Part I of Ext. A1 was a tea plantation at the time of Ext. A1.

65. Exhibits A13 and A14 refer to the property comprised in Part I of Ext. A1. There, the last but one column refers to the name of pattadar as per Sec. 14 of Act 3 of 1896.

66. There is a dispute between the parties as to whether Exts. A13 and A14 are of the year, prior to 1896. Learned counsel for the 2nd defendant argued that Exts. A13 and A14 are prepared during 1990-91. But since reference is made in Exts. A13 and A14 to the pattadar as per Act 3 of 1896, reason persuades me to think that contents of Exts. A13 and A14 refer to the period prior to 1896, Exhibits A13 and A14 also evidence that at least Part I of Ext. A1 was a plantation as on the date of Ext. A1. Indisputably, part I of Ext. A1 exceeds 30 acres in extent.

67. The plaintiffs rely on the document produced in the appeal as per I.A. No. 1561 of 2013. But the document produced is only a photocopy not duly attested. Hence that document cannot be relied. I.A. No. 1561 of 2013 is only to be dismissed. I do so.

68. Much was argued by the learned Senior Advocate for the plaintiffs on the power of the court to take judicial notice of public documents. Reliance was placed on various authorities.

69. There could be no dispute that the court has the power to take judicial notice of public records. Assuming that the settlement register referred to by the Tribunal is a public record, it is not as if the contents of the settlement register cannot be disputed. Parties should get opportunity to challenge correctness of the contents of the document. The 2nd defendant did not get that opportunity. Hence the Tribunal was not correct in relying on the settlement register as referred to in its order.

70. I stated that the burden lays on the 2nd defendant to prove that he is entitled to fixity of tenure. The 2nd defendant examined on its behalf D.W. 1 before the learned Sub Judge. But he was not competent to speak about nature and condition of the land as on the date of Ext. A1. D.W.1 came into the picture

only later. Exhibit A1 refers to the presence of tea plantation, buildings and roads on the land. Property described in Part I of Ext. A1 is described as an "estate". If the 1st defendant, after Ext. A1 developed the land into a plantation, there must be documents to support that. No documentary or oral evidence in that regard was produced in the Tribunal or in the trial court. The documents produced by the 2nd defendant in the trial court are not sufficient or capable of proving that the lease as per Ext. A1 was of land and that the land was later developed into a plantation. Even the reports submitted by the Advocate Commissioner would suggest that there was tea plantation in the leased property even prior to Ext. A1 (going by the estimated age of the plants given by the Advocate Commissioner). The 2nd defendant has not adduced reliable or acceptable evidence to show that the lease as per Ext. A1 was of land, later developed into a plantation.

71. Though the 1st defendant was served with summons and it appeared in the suit and Ext. A14 shows that it was very much available in the country, it did not file written statement resisting the prayer for eviction. The 2nd defendant comes into the picture only by Ext. A11. The 2nd defendant was not competent to state about the nature and condition of the property dealt with as per Ext. A1 at the time of creation of the lease. In short, the 2nd defendant was not able to show that it is entitled to fixity of tenure under the KLR Act. On the other hand, Exts. A1, A13 and A14 show that what was demised as per Ext. A1 was a tea plantation which exceeded 30 acres in extent.

72. Learned counsel for the 2nd defendant has invited my attention to Sec. 2(44)(c) of the KLR Act which states that "plantation" means, agricultural lands interspersed within the boundaries of the area cultivated by the person concerned with plantation crops not exceeding such extent as may be determined by the Land Board or the Taluk Land Board as the case may be as necessary for protection or management of such cultivation. According to the learned counsel, in view of the said clause the 2nd defendant is entitled to get fixity. It is argued that Secs. 53 to 72F of the said Act do not apply to lands coming within Sec. 2(44)(c) of the KLR Act which meant that in respect of such lands, though a tenant may not be entitled to fixity, he is not liable to be evicted.

73. The said contention of the learned counsel also cannot be accepted. Section 2(44)(c) cannot be read in isolation of Sec. 3(1)(viii) of the KLR Act. Reading the two provisions together, what can be discerned is only that if the tenant is entitled to fixity over the plantation (not being in excess of 30 acres), then, the land referred to in Sec. 2(44)(c) of the KLR Act should also be counted and the tenant shall not be evicted from that land though he is not entitled to fixity over such land. This view is supported by the decisions in *State of Kerala v. Amalgamated Tea Estates Co.*, 1980 KLT 728 and *State of Kerala v. Hope Plantations Ltd.*, 1985 KLT SN 4 (Case No. 6). If such an interpretation is not given, the result will be anomalous in that even if a person is liable to be evicted from the plantation, he can cling on to the land referred to in Sec. 2(44)(c) of the KLR Act though not entitled to fixity. The intention of the Legislature was only

to avoid eviction of the tenant from the land coming under Sec. 2(44)(c) which is necessary for the proper management of area of plantation over which he is entitled to fixity.

74. In view of the Full Bench decision in *Rt. Rev. Jerome Fernandez v. Be-Be Rubber Estate Ltd.* (supra) and clause (viii) of Sec. 3(1) of the KLR Act and in the circumstances stated above, the 2nd defendant could not claim fixity under the KLR Act.

75. Point No. II (b). Learned counsel for the 2nd defendant has argued that the defendants are entitled to fixity of tenure under the Tenancy Act. According to the learned counsel, rights vested on the tenants under the said Act are not affected by the KLR Act. Reliance is placed on the observations in *Rt. Rev. Jerome Fernandez v. Be-Be Rubber Estate Ltd.* (supra). It is further argued that the decision in *Ammukutty Amma v. Viswanatha Iyer*, 1986 KLT 905 that the Tenancy Act stood repealed by the Agrarian Relations Act, 1961 (Kerala) with effect from 21.01.1961 is per incuriam as it goes against the decisions in *Karimbil Kunhikoman Vs. State of Kerala*, and *Lakshmi and Others Vs. Narayana Iyer and Others*, Learned counsel argued that extinction of lease in favour of Colin Auley Meckenzi referred to in Ext. A1 would not affect right of the defendants for fixity under the Tenancy Act. According to the learned counsel, under Sec. 111 of the TP Act there could be a surrender of lease by mutual agreement and the statement in Ext. A1 that the lease in favour of Colin Auley Meckenzi was extinguished amounts to a surrender of lease by mutual agreement. Sections 21 and 53(1) of the Tenancy Act save the right claimed by the 2nd defendant notwithstanding surrender of lease by Colin Auley Meckenzi. Again reliance is placed on Ext. B9 to show that Colin Auley Meckenzi was given the right to cultivate the leased property.

76. Learned Senior Advocate for the plaintiffs contended that the observations in *Rt. Rev. Jerome Fernandez v. Be-Be Rubber Estate Ltd.* (supra) relied on by the 2nd defendant is obiter and is to be treated as sub silentio. According to the learned Senior Advocate, a Division Bench of this Court in *Ammukutty Amma v. Viswanatha Iyer* (supra) has specifically held that the Tenancy Act stood repealed by the Agrarian Relations Act, 1961 (Kerala). Reliance is placed on the decisions in *Raghavan and Another Vs. Sankaran Ezhuthassan*, , *Cholamarakkar Vs. Pathummamma and Another*, and *Valsamma and Others Vs. Abraham and Another*, It is argued that Sec. 132(2)(iii) of the KLR Act has repealed the Tenancy Act and what is saved is only the exemptions coming under Sec. 3(1)(i) to (viii) of the KLR Act. According to the learned Senior Advocate, those exemptions would not apply in the case of persons who are otherwise entitled to the protection of the Tenancy Act. It is argued that the Tenancy Act has no application since the lease under Ext. A1 was of plantation. According to the learned Senior Advocate, Ext. B9 is not proved to be with respect to the property leased as per Ext. A1 and at any rate, the right created in favour of Colin Auley Meckenzi stood extinguished at the time of Ext. A1 and the defendants are not

claiming under Colin Auley Meckenzi.

77. So far as Ext. B9 is concerned, there is no evidence to show that it is with respect to the property leased as per Ext. A1 as, Ext. B9 would show that adjoining the property referred to therein, the tarwad which created the lease in favour of Colin Auley Meckenzi as per Ext. B9 owned large extent of plantation. Hence Ext. B9 cannot be looked into.

78. In Ext. A1, it is stated that the right created in favour of Colin Auley Meckenzi stood extinguished. I found against the plea of the 2nd defendant that Ext. A1 is a renewal deed. A fresh lease is created as per Ext. A1 in favour of the 1st defendant who assigned its right to the 2nd defendant. Under Sec. 53(1) of the Tenancy Act, any document executed by a cultivating verumpattamdar (subject to sub-sec. [2]) after 28.07.1950 and before the commencement of the Malabar Tenancy (Amendment) Act, 1954 would not affect his right or status as a tenant. Section 21 of the Tenancy Act says that notwithstanding any contract to the contrary whether entered into before or after the commencement of the Tenancy Act, every cultivating verumpattadar, every customary verumpattadar, etc., shall have fixity of tenure in respect of his holding and shall not be evicted therefrom except as provided in the Act.

79. I am not inclined to think that the above provisions would enable the defendants to claim fixity tracing their right to Colin Auley Meckenzi. For, as aforesaid, whatever right was created in favour of Colin Auley Meckenzi stood extinguished. Exhibit A1 is not a renewal of any existing lease but a fresh lease. The defendants cannot claim under Col in Auley Meckenzi.

80. Section 2 of the Tenancy Act deals with exemption"s. Sub-sec. (1) states that the Tenancy Act shall not apply to lands transferred by a landlord for felling of timber, tea, coffee, rubber, zincona, etc., or any other special crop prescribed by a rule made by the State Government or erection of building or ancillary to cultivation of such crop or preparation of the same for the market or subject to Sec. 55, land let only for fugitive cultivation. The very object of the Tenancy Act was to give fixity to those tenants who, by their hard toil developed the land. If Sec. 2(1) of the Tenancy Act exempted lands transferred for planting tea, coffee, etc., from the purview of the said Act, it is hard to think that a lease of such plantation would come within the purview of the said Act so that, the tenant of such plantation is to enjoy the benefit of hard toil by the lessor. Obviously the intention of Legislature in enacting the exemption clauses in the Tenancy Act was to exempt lease of plantations. While deciding whether the defendants are entitled to fixity under the KLR Act, I found that Ext. A1 created a lease of plantation. It follows that the Tenancy Act has no application to the lease as per Ext. A1.

81. In *Ammukutty Amma v. Viswanatha Iyer* (supra) the question considered was whether the Tenancy Act stood repealed by the Agrarian Relations Act, 1961 (Kerala) with effect from 21.01.1961 when that Act received assent of the

President or whether repeal of the Tenancy Act was from the commencement of the KLR Act? The Division Bench referred to the decision in *Katheem Adamkutty and others Vs. K. Damodaran Nambudiri and others*, and other decisions and held that repeal of the Tenancy Act was effective from 21.01.1961.

82. Learned counsel for the 2nd defendant, placing reliance on the decisions in *Kunhikoman & Others v. State of Kerala* and *Lekshmi v. Narayana Iyer* argued that the decision in *Ammukutty Amma v. Viswanatha Iyer* is per incuriam. According to the learned counsel, the Division Bench while deciding *Ammukutty Amma v. Viswanatha Iyer* has not referred to the above cited decisions. It is argued that what was considered in *Katheem Adamkutty v. Damodaran Nambudiri* was only whether a pending application (claiming fixity under the Tenancy Act) could be considered notwithstanding repeal of the said Act.

83. In *Kunhikoman & Others v. State of Kerala* the Supreme Court (paragraph 22) struck down the Agrarian Relations Act, 1961 (Kerala) as violative of Article 14 of the Constitution so far as it applied to right of ryotwari lands in those areas of the State which were transferred to it from the State of Madras. In *Sukapuram Sabhayogam Vs. State of Kerala and Others*, a Full Bench of this Court, in paragraph 80 held that so far as lands situated in the (erstwhile) Malabar area are concerned, the entire Agrarian Relations Act, 1961 (Kerala) in its entirety was struck down. In *Lekshmi v. Narayana Iyer* it is held that there could have been no repeal of the Tenancy Act by the Agrarian Relations Act, 1961 (Kerala) and the result would be that tenancy continued to be in force in the Malabar area and will have application so far as ryotwari lands in that area are concerned.

84. Those decisions only concerned repeal of the Tenancy Act by the provisions of the Agrarian Relations Act, 1961 (Kerala). In my view it is not necessary to go into that question in this appeal since the claim made by the defendants under the Tenancy Act could be decided de hors the said question. In paragraph 6 of the decision in *Ammukutty Amma v. Viswanatha Iyer* the Division Bench has adverted to the alternative argument learned counsel for the respondents (therein) had raised as to the application of Sec. 43 of the Tenancy Act even if it is assumed that the said Act continued to be in force till the KLR Act came into force (with effect from 01.04.1964) as the Legislature had clearly expressed its intention that all rights created under the Tenancy Act were not to survive subsequent to the repeal of the said Act. That argument of the respondents therein was also accepted by the Division Bench in *Ammukutty Amma v. Viswanatha Iyer*.

85. It is useful to refer to Secs. 132(2)(iii) and 3(1)(i) to (viii) of the KLR Act. Section 132 deals with repeal and savings. Sub-sec. (2) deals with the enactments in force in any part of the State of Kerala which are repealed by the KLR Act. Clause (iii) refers to the Tenancy Act. Thus at any rate, there is a repeal of the Tenancy Act by the KLR Act with effect from 01.04.1964.

86. A proviso is provided after Sec. 3(1)(vii) of the KLR Act which says that

nothing in clauses (i) to (vii) of Sec. 3(1) of the KLR Act shall apply in the case of persons who were entitled to fixity of tenure immediately before 21.01.1961 under any law then in force or persons claiming under such persons. The said provision is really a proviso to clauses (i) to (vii) of Sec. 3(1) of the KLR Act. Reading Sec. 132(2)(iii) and the proviso to Sec. 3(1)(i) to (viii), it appears to me that the exemptions provided under clauses (i) to (viii) would not apply to persons otherwise entitled to the benefit of the Tenancy Act. Case of the 2nd defendant does not fall under any of clauses (i) to (vii) of Sec. 3(1) of the KLR Act. In other words, in other respects the Tenancy Act stood repealed at any rate, by Sec. 132(1)(iii) of the KLR Act.

87. The observations in *Rt. Rev. Jerome Fernandez v. Be-Be Rubber Estate Ltd.* relied on by the learned counsel for the 2nd defendant are only obiter since the question considered and decided in that case was not as to the repeal of the Tenancy Act either by the Agrarian Relations Act 1961 (Kerala) or the KLR Act. The question raised in that case could have been decided even without the observations relied on by the 2nd defendant. The principle of sub silentio stated in *Raghavan v. Sankaran* (supra) also should apply to the said observations. In the circumstances the claim of fixity raised by the 2nd defendant under the Tenancy Act cannot be accepted.

88. Point No. III. The next question is whether the 2nd defendant is entitled to get compensation for improvements (allegedly) effected by him in the leased property. To assess the compensation the 2nd defendant applied for the issue of a commission and consequently, Exts. C1 to C3, reports and plan are filed. The Advocate Commissioner has assessed compensation payable for the improvements based on identification of the property as shown in Ext. C2 which, while answering point No. I, I found, could not be accepted.

89. Learned Sub Judge has held that the 2nd defendant is not entitled to get compensation for improvements (allegedly) effected by him since the period of lease as per Ext. A1 has expired.

90. Learned Senior Advocate for the plaintiffs contended that since the period of lease as per Ext. A1 was to expire on 01.02.1974 and the 2nd defendant got assignment of the lease hold right as per Ext. A11 dated 11.01.1973, the 2nd defendant cannot be said to be in bona fide possession of the property after 01.02.1974. It is argued that there is no plea or evidence that the defendants have improved the property after Ext. A1. Reliance is placed on the observations in paragraph 1 of *Sarasamma Vs. Laisal Esther*, Reliance is also placed on the decision in *Kunjan Nair Sivaraman Nair Vs. Narayanan Nair and Others*, to contend that on the expiry of lease as per Ext. A1, the 2nd defendant cannot be said to continue in possession of the property in good faith as a lessee.

91. In response the learned counsel for the 2nd defendant has contended that in view of Sec. 17 of the Tenants Improvements Act, the 2nd defendant is entitled to claim and get compensation for the improvements effected not only by the 1st

defendant and himself, but by Colin Auley Meckenzi as well. It is argued that the 2nd defendant is a "tenant" as defined in Sec. 2(d)(i) of the Tenants Improvements Act. Learned counsel has argued that a tenant coming under the Tenants Improvements Act is entitled to continue in possession until payment of compensation and revised compensation (if any) after determination of the lease. Reliance is placed on the decisions in Ouseph Columbus v. Narayanan, 1954 KLT 518, Cherian Mathai and Others Vs. Narayana Pillai and Others, Varkey Paily of Parayamthadathil Mutholapuram Kara, Piravom Pakuthy Vs. Kurian Augusthy of Vattappallil Mutholapuram Kara Elanji and Another, and Parameswaran Govindan Vs. Krishnan Bhaskaran and others,

92. Section 2(d)(i) of the Tenants Improvements Act defines a "tenant". The said provision has two limbs - a person who as lessee, sub-lessee, mortgagee or sub mortgagee is in possession of the property and/or a person in good faith believing himself to be so being in possession of the property. The period of lease created as per Ext. A1 expired by 01.02.1974. But I cannot accept the proposition for the said reason, possession of the 2nd defendant after 01.02.1974 has become unlawful. For, if he is a "tenant" coming under Sec. 2(d) (i) of the Tenants Improvements Act, his status as a tenant under the TP Act changes into a tenant under the Tenants Improvements Act though for the limited purpose of claiming compensation under the said Act (See Ouseph Columbus v. Narayanan and Parameswaran Govindan v. Krishnan Bhaskaran). In Ouseph Columbus v. Narayanan a Division Bench of this Court held that determination of the lease will not ipso facto deprive the lessee of the benefit conferred under the Tenancy Act (XV) of 1113 Cochin), The only consequence on determination of the tenancy is that the tenant becomes liable to be evicted on payment of compensation due to him for the Improvements effected by him. That principle should apply to the provisions of the Tenants Improvements Act also. In Cherian Mathai v. Narayana Pillai and Varkey Paily v. Kurian Augusthy it is held that until payment of compensation the tenant is entitled to remain in possession. It follows that notwithstanding determination of the lease under Ext. A1, the 2nd defendant being an assignee of the lessee under Ext. A1 is entitled to remain in possession of the property lawfully as a tenant under the Tenants Improvements Act until it is paid compensation (if it is entitled to it). But a person to whom nothing is due on the determination of his contractual tenancy or the entire money due to him as determined by the decree for eviction (or revised as per the decree) has been paid into court, should surrender possession without waiting to be evicted in execution.

93. The argument of learned counsel that the 2nd defendant is entitled to get compensation for improvements effected by Colin Auley Meckenzi prior to Ext. A1, based on Sec. 17 of the Tenants Improvements Act cannot be accepted. For, Sec. 17 of the said Act only states that nothing in any contract entered into before or after commencement of that Act shall take away or limit the right of a tenant to make improvements and claim compensation for them in accordance with the provisions of the said Act. This is not a case where Ext. A1 imposed any

restriction or limitation on the lease under Ext. A1 to make improvements and claim compensation so that those restrictions and limitations are not valid under Sec. 17. Colin Auley Meckenzi has validly surrendered his tenancy right over the leased property to the lessor at a time when there was no prohibition for doing so. That surrender is not hit by Sec. 17 of the Act.

94. The Advocate Commissioner has assessed compensation payable for the improvements in Exts. C1 and C3. But since I found, while answering point No. 1 that description of the leased property is not correct and that identification as per Exts. C2 and C3 cannot be accepted, a fresh assessment of compensation (if any payable) is required.

95. Learned Senior Advocate has argued that there is no evidence to show that the defendants have effected improvements in the leased property after Ext. A1. I leave that matter to be decided by the learned Sub Judge after giving opportunity to the parties to adduce evidence. But I make it clear that the entitlement of 2nd defendant (if any) to get compensation is limited to the improvements if any effected in the leased property since Ext. A1.

96. I must bear in mind the observations in paragraph 6 of the decision (Varkey Paily v. Kurian Augusthy) that the tenancy is not determined by a decree for eviction and that there must be eviction in execution and, eviction means recovery of possession of land from a tenant. No doubt, it is observed in paragraph 10 that possession of the tenant thereafter is wrongful possession deliberately so, and that if he chooses to effect improvements while in such wrongful possession, it cannot be the foundation for any claim for compensation or any right to remain in possession to secure such a claim. A learned Judge of this Court had occasion to consider the decision of the Full Bench in Varkey Paily v. Kurian Augusthy (supra) and of the learned Single Judge in Columbus v. Narayanan, in Kalyani Amma v. Varghese, 1989 (2) KLT 408. That was a suit for redemption of mortgage and the decree was passed on 28.03.1981. The mortgage money was deposited on the same day (which means that the mortgagor-mortgagee relationship was snapped on the date of decree itself) and the value of improvements adjudged in the decree was deposited in court on 13.04.1981. The judgment debtor had adopted various methods to protract execution of the decree and he was successful in that, to some extent. The executing court ordered delivery on 19.01.1989 to be effected on 02.03.1989 and report fact of delivery on 03.03.1989. The judgment debtor challenged the order in this Court contending that his claim for compensation was adjudged in the decree as on 1979, he had effected improvements even thereafter and hence he is entitled to a re- assessment of the compensation until he is evicted. This Court considered the question as to what will happen if the process of re- assessment of compensation went on endlessly and the judgment debtor remained in possession. This Court referred to the decision of learned Single Judge in Columbus v. Narayanan where it was held:

The execution proceedings in eviction decrees may never come to an end in view

of the provision as it now exists in clause 3 of S. 5 of the Tenancy Act. If the statute is suitably amended so as to give a definiteness and certainty regarding the rights of the landlord and the tenant, much of the fruitless fight in execution can be avoided. This is a matter for the consideration of legislature. As the provision stands at present the only way in which courts could give some sort of finality to the disputes in execution of eviction decrees, would be by taking custody of the properties and entrusting the same to a receiver. By adopting such a course the possibility of the tenant putting forward claims for new items of improvements could be obviated.

97. Reference was also made to Full Bench decision in *Varkey Paily v. Kurian Augusthy* (supra) and the relevant portion is extracted in *Kalyani Amma v. Varghese* (supra). It reads,

Once an order for delivery is made in execution and the statutory tenancy determined there can be no question of the defendant being entitled to remain in possession as a tenant by effecting improvements thereafter (for which again compensation has to be determined and paid) and thus, by a repetition of the process, indefinitely postponing eviction. And should the defendant be disposed continually to effect fresh improvements after compensation has been assessed solely with a view to make reassessments and consequent variations of the decree necessary thus involving an indefinite postponement of the order for deliver, that would be an abuse of the process of the Court which the Court would probably meet by the appointment of a receiver or by the issue of an injunction.

In the facts and circumstances the possibility of the defendants or anybody claiming under them effecting further improvements in the leased property and claiming compensation under Sec. 4 or a reassessment of the compensation if any allowed by the decree under Sec. 5 of the Tenants Improvements Act, process of reassessment continuing and thus in case the learned Sub Judge passes a decree for eviction in favour of the plaintiffs, the defendants or anybody claiming under them clinging on to possession has to be avoided. This could be done either by appointing a Receiver for the leased properties (the limits of which the 2nd defendant is aware) or by restraining the defendants or anybody under them from effecting any further improvements in the leased properties.

98. Having regard to the facts and circumstances of the case I am persuaded to think in equity the defendants should be restrained from effecting further improvements in the leased properties (the limits of which the 2nd defendant is aware) since this day onwards.

99. The above discussion leads me to the conclusion that the 2nd defendant is entitled to claim compensation for the improvements if any effected in the leased property since Ext. A1 and till this day.

100. Point No. IV. Learned Sub Judge, by amendment of the judgment and decree allowed the plaintiffs to recover mesne profits. That is under challenge in

the Civil Revision. The failure to award mesne profits in the judgment and decree before amendment is challenged by the plaintiffs in the cross objection.

101. The learned counsel for the 2nd defendant has argued that the amendment was not permissible under Sec. 152 of the Code. It is argued that it was not due to a clerical or arithmetical mistake or error arising from accidental slip or omission that learned Sub Judge did not allow recovery of mesne profits. It is argued that though in the judgment there is an observation that the plaintiffs are entitled to get mesne profits, learned Sub Judge had not quantified the amount payable as mesne profits. Calculation of mesne profits made by the learned Sub Judge by allowing I.A. Nos. 6658 and 6685 of 2000 is without any basis. It is also argued that under Sec. 2(12) of the Code, "mesne profits" is payable only by a person in wrongful possession of the property whereas the 2nd defendant is entitled to possess the leased property until it is paid compensation for the improvements (if any) effected by him.

102. Learned Senior Advocate for the plaintiffs contended that possession of the 2nd defendant after 01.02.1974 is unlawful.

103. I found that the 2nd defendant is entitled to get compensation for the improvements if any effected in the leased property since Ext. A1 and till this day. I also found that the 2nd defendant is entitled to be in possession of the property until such payment (if any). Hence possession of the 2nd defendant in case it is found entitled to get compensation for the improvements effected, until its payment cannot be said to be unlawful (see Balakrishna Pillai v. Paranjothy -1965 KLT SN 13 and Narayana Bhatta v. Lakshmi Amma -1988 (1) KLT 171). In case it is found that the defendants have not effected improvements as understood in the Tenants Improvements Act since Ext. A1, then, possession of the 2nd defendant after 01.02.1974 would be unlawful and if that be so, the plaintiffs would be entitled to get mesne profits from the relevant day. In view of the decision I have taken, judgment and decree granting mesne profits is liable to be set aside and left open to be decided by the learned Sub Judge after the plaintiffs correctly describe the leased property in the plaint and explained the discrepancy in the extent, boundaries, etc., if any and based on the question whether the 2nd defendant is entitled to get compensation for improvements if any effected. In the light of the above (fairly long) discussion, the points raised for decision are answered as under:

(i) The plaintiffs have not correctly described in the plaint the leased property of which possession could be sought for, from the defendants. Plaintiffs have to describe in the plaint correctly the leased property and possession of which could be recovered on the strength of Ext. A1 and other relevant documents and explain the discrepancy in the extent, boundaries, etc., if any.

(ii) The claim of the 2nd defendant for fixity of tenure under the KLR Act and the Tenancy Act is rejected. Finding of the trial court and the Land Tribunal in that regard are to be confirmed.

(iii) Finding of the trial court that the 2nd defendant is not entitled to get compensation for improvements (if any) effected in the leased property under the Tenants Improvements Act as the lease is already determined is not correct. The 2nd defendant is entitled to get compensation for the improvements if any effected in the leased property as per Ext. A1 and which right is conveyed to the 2nd defendant as per Ext. A11, since the date of Ext. A1 and till this day.

(iv) The defendants and persons claiming under them are restrained by an order of injunction from effecting further improvements in the leased property from this day.

(v) Exhibits C1 to C3 are set aside. I.A. No. 4193 of 1977 is to be remitted to the court below. That court has to appoint an experienced lawyer as Commissioner to assess compensation if any payable to the 2nd defendant for the improvements (if any) effected in the leased property since the date of Ext. A1 and till this day.

(vi) The Advocate Commissioner shall prepare a plan of the leased property concerning which the assessment is made, with reference to the descriptions in Ext. A1 and other records as the learned Sub Judge finds, are relevant for the purpose.

(vii) The 2nd defendant shall bear the batta and other expenses payable to the Advocate Commissioner/Expert/Surveyor as the case may be and as may be directed by the learned Sub Judge. In case the 2nd defendant fails to do so, it shall not be eligible to claim compensation for the improvements if any effected as aforesaid.

(viii) If so advised, it is open to the plaintiffs also to take out a commission if they think that identification of the property at their instance is required.

(ix) Liability of the plaintiffs to pay mesne profits will depend on the entitlement of the defendants to get compensation for improvements as aforesaid.

(x) The order on I.A. Nos. 6658 and 6685 of 2000 is to be set aside.

In the result the appeal, the cross objection and the civil revision are disposed of as follows:

(I) A.S. No. 528 of 2000

The appeal is allowed by way of remand as under:

(a) Judgment and decree dated 29.06.2000 in O.S. No. 16 of 1975 of the Sub Court, Kozhikode are set aside.

(b) O.S. No. 16 of 1975 is remitted to the Sub Court, Kozhikode for fresh decision in the light of the observations and findings made above.

(c) The plaintiffs will have the opportunity to amend the plaint giving a correct description of the leased property which they are entitled to recover possession from the defendants and explaining the discrepancies in the extent, boundaries,

etc., if any of the said property.

(d) It is open to the defendants to take out a commission to assess compensation if any payable for the improvements if any effected in the leased property since Ext. A1 and till this day and prepare a plan of the leased properties regarding which the assessment is made and which they are bound to put in the possession of the property under Sec. 108 of the TP Act.

(e) If so advised and found necessary, the plaintiffs also can take out a commission for identification of the leased property.

(f) The defendants and persons claiming under them are restrained by an order of injunction from effecting further improvements in the property leased as per Ext. A1 (the limits of which they are aware) since this day.

(g) The question whether the plaintiffs are entitled to get mesne profits will depend on the finding regarding the entitlement of the defendants for compensation under the Tenants Improvements Act.

(h) The trial court is directed to dispose of the suit as early as possible and at any rate, within six months from this day giving it top priority.

(II) Cross Objection

The Cross Objection is dismissed.

(III) C.R.P. No. 3400 of 2001

(a) Order dated 28.11.2001 on I.A. Nos. 6658 and 6685 of 2000 in O.S. No. 16 of 1975 of the Sub Court, Kozhikode is set aside.

(b) I.A. Nos. 6658 and 6685 of 2000 will stand dismissed.

(IV) Parties are directed to suffer their costs in all the proceedings.

(V) Parties shall appear in the Sub Court, Kozhikode on 21.10.2013.

(VI) Registry shall transmit the lower court records and the documents produced in the appeal to the trial court forthwith.

(VII) The 2nd defendant shall be entitled to get refund of one half of the court fee paid by it on the memorandum of appeal.