
(2013) 02 KL CK 0105
In the High Court Of Kerala
Case No : W.A. No. 1124 of 2009

Prakashan

APPELLANT

Vs

Damodaran and Others

RESPONDENT

Date of Decision : 11-02-2013

Acts Referred:

Constitution of India, 1950 — Article 254, 300A, 31A(2)(a)
Kerala Restriction on Transfer by and Restoration of Lands to the Scheduled Tribes Act, 1999 — Section 2(b), 5, 5(2)
Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Act, 1975 — Section 4
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 31(i)

Citation : (2013) 2 ILR (Ker) 679 : (2013) 1 KHC 789 : (2013) 2 KLJ 150

Hon'ble Judges : Manjula Chellur, Acting C.J.; A.M. Shaffique, J

Bench : Division Bench

Advocate : Jolly John and Vineetha Susan Thomas, for the Appellant; N.N. Sugunapalan (Sr), S. Sujin, Catherine Paulson and P.K. Santhamma (GP), for the Respondent

Final Decision : Dismissed

Judgement

Manjula Chellur, Actg. C.J.

1. The entire dispute revolves round survey No. 58/16 and 19 of Panavally Village of Cherthala Taluk. The appellant claims to be a member of Ulladan Tribe coming in the list of Scheduled Tribe of Kerala State. One Smt. Thakamma, mother of appellant acquired in all 26 1/2 cents of land. She said to have sold 10 cents of this property to one Achamma Lekshmi and another bit of land to Damodaran and Achamma Lekshmi jointly. Subsequently, she filed application No. 8/87 on 30.11.1987 before the Revenue Divisional Officer (for short, "RDO") for restoration of 26 1/2 cents of land. Land came to be ordered to be returned by order of RDO dated 05.11.1990 subject to deposit of Rs. 3,700/- as compensation for the improvements carried on in the land and the same came to

be deposited. However, in the meanwhile, Mr. Damodaran filed appeal No. 2 of 1990 before the District Collector, Alappuzha challenging the order of RDO. Said appeal came to be rejected by order dated 31.08.1991. This came to be challenged in O.P. No. 12504 of 1991. The said Original Petition came to be dismissed by judgment dated 06.02.1997. This came to be challenged in W.A. No. 750 of 1997 wherein the matter came to be remanded by virtue of the judgment of Division Bench directing reconsideration of the matter after issuing notices to the parties.

2. The District Collector heard the appeal as per the order of remand and again remanded back the matter to RDO to dispose of the same within one month. This order came to be challenged by Mr. Damodaran in O.P. No. 1149 of 1997. Original Petition came to be disposed of with a direction to the District Collector to consider the matter within three months afresh with notice to the parties. The District Collector considered the matter on 16.02.1999 and dismissed the appeal. Aggrieved by the same, Mr. Damodaran filed O.P. No. 6844 of 1999 invoking the provisions, of Section 5(2) of the Kerala Restriction of Transfer by Restoration of land to Scheduled Tribe Act, 1999 (for short "the Act"). This order of the District Collector came to be quashed by the learned Single Judge in the Original Petition. Against the same, the present appeal is filed by one of the sons of late Thankamma.

3. According to the appellant, if the sale deeds under which respondents 1 and 2 purchased lands were held invalid, the direction to respondents 1 and 2 to restore possession of property to the writ petitioners was erroneous. The very contest by respondents 1 and 2 is on flimsy grounds invoking extraordinary jurisdiction of this Court on more than one occasion. Only in the third round of litigation in O.P. No. 6844 of 1999 the learned Judge quashed Ext.P6 erroneously applying the provisions of Act 12 of 1999 without considering the fact that the possession of the said property no more rests with respondents 1 and 2.

4. According to the appellant, the amended Act would not be applicable to those cases wherein possession has been effected. Without referring to this fact, the learned Single Judge, without even affording an opportunity of being heard to the appellant, disposed of the matter. Therefore, the present appeal is filed.

5. We have gone through the judgment of the learned Single Judge as well as the decisions relied upon by the parties. During the pendency of the appeal, a direction was given to the Government to verify the restoration proceedings and submit to the Court whether actual possession was handed over to the original owner-Thankamma or her legal representatives who belongs to Scheduled Tribe.

6. The land in question originally belongs to one Payippadu Narayanan Parameswara Kaimal. Late Thankamma secured this land by assignment scheme available to Scheduled Tribe. After the sale of property to Damodaran and Achamma Lakshmi in 1973 and 1974, she sought for restoration of the property. The statement of officials of Revenue Department, respondents 8 and 9 clearly

indicates though compensation of Rs. 3,700/- was deposited, mutation and possession could not be effected due to pendency of cases. As of now, no one is occupying the land and no land tax came to be received by the Village Officer in the absence of mutation. The Tahsildar could not proceed further in spite of appellant approaching the State Scheduled Caste and Scheduled Tribe Commission, as the matter was pending before the High Court. According to the learned counsel for the appellant, with the deposit of compensation money of Rs. 3,700/- what was required to be done on the part of the appellant was done, therefore there is no justification in any of the stand taken by respondents 1 and 2 and also the revenue officials.

7. The entire issue revolves round Sub-section (2) of Section 5 of the Act. In order to understand consequences of Section 5(2) of the Act, it would be appropriate to refer to Section 5. With the introduction of Act 12 of 1999, only certain provisions of the above mentioned Act came to be repealed and one has to understand the impact of the statutory provisions in the light of Act 12 of 1999. It is necessary to see whether the repeal is total or pro tanto in a given situation. It is needless to say, it mainly depends upon the intention in making such legislation. It is well settled that repeal of a Statute is not a matter of mere form, but one of substance. Section 5 of the Act reads as under:

5. Certain transfers to be invalid.--(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, or in any contract, custom or usage, or in any judgment, decree or order of any court, any transfer of land possessed, enjoyed or owned by a member of a Scheduled Tribe to a person other than a member of a Scheduled Tribe, effected on or after the 1st day of January, 1960, and before the commencement of this Act shall be deemed to be invalid;

Provided that nothing in this section shall render invalid any transfer of land possessed, enjoyed or owned by a member of a Scheduled Tribe to a person other than a member of a Scheduled Tribe effected during the aforesaid period and the extent of which does not exceed two hectares.

(2) Notwithstanding anything contained in sub-section(1) or in any judgment, decree or order of any court or other authority, in cases where the land involved in such transfer is used for agricultural purposes, the transferee thereof shall be entitled to retain in his possession the said land upto an extent of two hectares which shall be demarcated by the Revenue Divisional Officer by order and in the manner as may be prescribed.

(emphasis supplied)

8. One has to understand the facts of the present case as the judgment of the learned Single Judge favoured the writ petitioners, who are the party respondents before us. We have to see whether they are entitled for benefit of the above Act by virtue of exemption provided u/s 5(2) of the Act. In order to secure benefit of exemption as per the proviso, the transfer of land held by a

member of a Scheduled Tribe to a person other than a member of a Scheduled Tribe must be on or after the first day of January, 1960 and before the commencement of the above Act. Such transfers are deemed to be invalid if the case on hand does not attract the conditions enumerated under Sub-section (2) of Section 5 of the Act. The transferee is entitled to retain in his possession such land, provided the following conditions are complied with. Such land should not exceed measurement of 2 hectares and the land involved must be used for agricultural purposes. The learned Single Judge, opining that the land in question apparently is less than 2 hectares, held the transfer in question falls outside the purview of the Act by virtue of exemption provided u/s 5(2) of the Act.

9. Reading of Sub-section (2) of Section 5 of the Act clearly indicates, apart from the measurement of land, one has to see whether the land in question is used for agricultural purposes or not. As already stated above, the writ petitioners are entitled to hold the land in question, provided it is used for agricultural purposes. The proceedings of the District Collector at Exhibit P6 dated 16.2.1999, which was the subject matter of challenge, clearly indicates the entire property was in possession of the respondent, i.e., the transferee. The entire discussion at Exhibit P6 pertains to challenge with regard to the community status certificate brought on record by the present appellant, who is the legal representative of the transferor Mrs. Thankamma. According to the District Collector, the appellate authority under the Act at the instance of the writ petitioner transferees, the litigation was pending and the matter was sent from one authority to another authority. It was also noticed that though the Assistant Collector passed an order in the year 1990, the same could not be enforced till February, 1999. In the report submitted on behalf of respondents 8 and 9 revenue officials, it is stated that though compensation of Rs. 3,700/- was deposited in the year 1997, possession and mutation could not be effected. It is further stated that though the legal representatives of the transferor has approached the State Scheduled Tribe Commission, possession is not yet handed over till date to the transferor or the legal representatives of the transferor, as the matter was pending before this Court.

10. Then the question comes, when can a particular land be described as agricultural land. Reliance is placed on Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah, . In this case Their Lordships, while considering Statute on Wealth Tax, had an occasion to deal with the meaning of "agricultural lands". The issue was all the lands were not excluded from the definition of "assets". Only agricultural land could be exempted. Therefore, the question came up for consideration what exactly would mean "agricultural land". It was held that agricultural land is a species of land and must be a land which could said to be either actually used or ordinarily used or meant to be used for agricultural purposes. Therefore, the land must have a connection with agricultural user or purpose. Therefore, it was held that on account of nature of user, the meaning of "agricultural purpose" and "agriculture" becomes relevant. It was also held, absence of user of non agricultural purpose

is inconclusive to determine whether the land is agricultural land or not. The determination of character of land, according to the purpose for which it is meant or set apart and can be used is held a matter which ought to be determined on the facts of each particular case.

11. In the case of *The Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd., Birlakootam Mavoor, Kozhikode, Kerala and Others Vs. The State of Kerala*, the question that arose for consideration before the Full Bench of this Court was whether forest lands held in jenmam right fall within Sub-clause (i) of Article 31A(2)(a) of the Constitution of India. Their Lordships held, to record forest lands as agricultural lands, the qualifications held or let for purposes of agriculture should apply to forest lands as well. Therefore, it was held that all forest lands cannot automatically be recorded as so held or let. In the case of *The Malankara Rubber and Produce Co. and Others, etc., etc. Vs. The State of Kerala and Others, etc., etc.*, a Bench consisting of three Judges of the Apex Court, while considering when land comes under estates, had an occasion to refer to the meaning of "agricultural land".

12. On an earlier occasion in *Muhammed Basheer K.P. v. Deputy General Manger, Kannur District Coop. Bank Ltd.*, (2010 (2) KHC 385) this Court had an occasion to consider the term "agricultural land" for the purpose of Section 31(i) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act. After referring to various definitions of "agriculture land" and citations as well Their Lordships held as under:

"Agricultural land" is that species of land which could be said to be either used or ordinarily used for agricultural purposes. "Agricultural land" must have a connection with an agricultural user or purpose. It is on the nature of user that the meanings of "agricultural purpose" and "agriculture" become relevant. Popular and authoritative Dictionaries say that "agriculture" is the art or science relating to the practices of cultivating the land. Agriculture is the process by which human skill is expended upon land. Human labour, with or without the aid of implements, tools and machines, is employed utilising the art or science of cultivating the ground. In its good sense, it means farming, horticulture, forestry etc., including the allied pursuits, preparation of land or fields in large quantities, preparation of soil, planting of seeds, raising and; harvesting of crops etc. In certain shades, agriculture also includes management of livestock etc. But primarily, it is understood as the process of putting land to use in the growing of crops by employing human skill and labour upon land. As noted above from *Raja Benoy Kumar Sahas Roy* (supra), agriculture includes raising, on the land, of products which have some utility either for consumption or for trade and commerce. The term "agriculture" cannot be defined or understood" by the nature of the products cultivated. No such classification is conceivable unless specifically provided for, having regard to the specific need to make such classification. If such classification is to provide different consequences of a piece of statute law, including its applicability, we definitely think that such

classification should be found-explicit on the clear expressions in that particular statute.

13. The word "agriculture" is defined under different contexts. In corpus juris secundum the word "agriculture" defines as under:

(1) "Agriculture" is "a science that treats of the cultivation of the soil." - New Standard D., quoted in *Bucker v. American Fruit Growers Co.*, 163A. 33, 35, 107 Pa.Super. 399.

(2) "In its general sense "agriculture" is the" cultivation of the ground for the purpose of procuring vegetables and fruits for the, use of man and beast; or the act of preparing the soil, Sowing and planting seeds, dressing the plants, and removing the crops.""

Simons v. Lovell, 7 Heisk, (Tenn.)510 515,

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(6) ""Agriculture" is "the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, and the raising, feeding and management of live stock or poultry" - *Fleckles v. Hille*, 149 N.E. 915, 83 Ind. App. 715.

The Kerala High Court on Words and Phrases explained what "agricultural land" means asunder:

Agricultural land - The question what is an agricultural land has to be determined on the basis of the present connection of the land with an agricultural purpose and user and not the mere possibility of user in the uncertain future. The assessee had placed before the Tribunal relevant and cogent evidence to support his contention that the land acquired was agricultural property. The burden was upon the Department to adduce cogent evidence to support its case that the land acquired was not an agricultural property. The determination of the character of the land is a matter which has to be made on the facts of each particular, case.

Meaning of "agriculture" from Wikipedia is as under:

Agriculture also called farming or husbandry is the cultivation of animals, plants, fungi, and other life forms for food, fiber, and other products used to sustain life. Agriculture was the key development in the rise of sedentary human civilization, whereby farming of domesticated species created food surpluses that nurtured the development of civilization. The study of agriculture is known as agricultural science. Agriculture generally speaking refers to human activities, although it is also observed in certain species of ant and termite.

In *P. Ramanatha Aiyar's Law Lexicon*, "agriculture" means:

Agriculture connotes the raising of useful or valuable products which derive nutriment from the soil with the aid of human labour and skill, 43 MLJ 191. The term "agriculture" has a much wider import than the term "cultivation".

Consequently, a purpose may be, connected with the agriculture, such as, grazing on the lands of the holding but not necessarily ancillary to cultivation.

(Mad Act, 1908, S. 3(1))

The expression "agriculture" includes horticulture:"" (Board of Agriculture Act) Agriculture building. An agricultural holding refers only to land cultivated from profit some way and not to natural grass land. Stephern J. Controller of Estate Duty, Kerala Vs. V. Venugopala Varma Rajah, , 126 Estate Duty Act (24 of 53) Section 5, 34.)

14. In the case, of Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy, Their Lordships had an occasion to deal with the terms "agriculture" and "agricultural purpose", which read as under:

10. The terms "Agriculture" and "Agricultural Purpose" not having been defined in the Indian Income Tax Act, we must necessarily fall back upon the general sense in which they have been understood in common parlance. "Agriculture" in its root sense means ager, a field and culture, cultivation, cultivation of field which of course implies expenditure of human skill and labour upon land. The term has however acquired a wider significance and that is to be found in the various dictionary meanings ascribed to it.

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14.1 Ramesam J., in Pavadai Pathan and Another Vs. Ramaswami Chetty and Others, referred to the following connotation of "Agriculture".

Wharton's Law Lexicon adopts the definition of "Agriculture" in 8 Edw. VII.c.36, as including "Horticulture, forestry and the use of land for any purpose of husbandry etc. "In 10 Edw. VII, c.8 5.41, it was defined so as to include the use of land as "Meadow" or pasture land or orchard or osier or woodland, or for market gardens nursery grounds or allotments, etc. In 57 and 58. Vict. C. 30, S.22, the term "Agricultural property" was defined so as to include agricultural land, pasture and wood land, etc.

16. These are the various meanings ascribed to the term "Agriculture" in various dictionaries and it is significant to note that the term has been used both in the narrow sense of the cultivation of the field and the wider sense of comprising all activities in relation to the land including horticulture, forestry, breeding and rearing of livestock, dairying, butter and cheese-making, husbandry etc.

15. It is also relevant to understand whether there is any change in law so far as agricultural land is concerned subsequent to introduction of Act 12 of 1999. State of Kerala and Another Vs. Peoples Union for civil Liberties, Kerala State Unit and Others, deals with 1975 Act and also 1999 Act with reference to various controversies that came up for consideration. Ultimately, Their Lordships held, the 1999 Act did not contain any non obstante clause requiring it to be validation statute under Article 31-B to be placed under the Ninth Schedule of the

Constitution. It was further held, although Section 4 of the 1975 Act imposes restrictions on transfer of land by providing a non obstante clause, in terms of Sections 2(b) and 5 of 1999 Act, the term "land" would mean, "only agricultural land" and the application for restoration shall lie only in case where the extent of the land exceeds two hectares. Their Lordships held that the 1975 Act was implemented both in respect of those who had two hectares of land and also those who had more than two hectares. Admittedly, 1999 Act was made effective retrospectively from 24.1.1986 and the said Act contains repeal and saving clause as well. In order to understand the purport of 1975 Act and 1999 Act, it would be useful to refer to certain paragraphs of the said decision/Paragraphs 47, 48, 50, 55, 69, 77, 131, and 133 of the above decision read as under:

47. No material was placed before the High Court to establish that the 1999 Act was confiscatory in nature. It is one thing to say that a citizen of India having been conferred with a right on lands by reason of a statutory provision, has been deprived therefrom without payment of any compensation and, thus, the same would be violative of Article 300-A of the Constitution of India, but, it is another thing to say that on that ground alone the legislation should be held to be a colourable one.

48. We have adverted to the Statement of Objects and Reasons of the 1999 Act. The Legislature had a broad object in mind. Whether the Act stands the scrutiny of limitations of the State's power so as to achieve its object and purpose is one question, but, it is another question that while doing so it has adopted a device and a cloak to confiscate the property of the citizen taxed as was the case in *Kunnathath Thathunni Moopil Nair v. State of Kerala*.

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50. The High Court furthermore committed a serious error insofar as it made an incidental observation that the tribals who enjoy the protection of the Constitution of India and sought to be protected by the 1975 Act could not have been denied the benefits under the 1999 Act, which in our opinion, was not a relevant question. The provisions of the Constitution in this behalf are enabling in nature. When the constitutionality of an enactment comes to be questioned, the superior courts are required to pose unto themselves the right question. The question, in our opinion, should have been whether the statute is valid having been enacted to achieve the constitutional goal set out not only in Part III of the Constitution of India but also in Parts IV and IV-A thereof.

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55. The 1975 Act dealt with both agricultural and non-agricultural lands. Transfer of land comes within the purview of Entry 6 of List III of the Seventh Schedule of the Constitution of India. There exists a parliamentary Act in that behalf, as for example, the Transfer of Property Act. Only because the 1975 Act could be held to be in conflict with the provisions of the Transfer of Property Act, the Presidential assent was necessary having regard to clause (2) of Article 254 of

the Constitution of India but once the said statute is repealed and in its place a new Act is brought on the statute book, which comes strictly within the purview of Entry 49 of List II of the Seventh Schedule of the Constitution of India, no Presidential assent would be necessary. Presidential assent would be necessary for the purpose of amendment of the Act and not for enacting a separate statute which came within the purview of a different entry and a different List.

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69. The 1975 Act was implemented both in respect of those who had two acres of land and those who had more. The 1999 Act removes the basis for passing of the judgments so far as the applications for restoration filed by members of the Scheduled Tribes in regard to their lands which was less than 2 hectares is concerned. It provides that the term "land" would mean "only agricultural land" and the application for restoration shall lie only in case where the extent of the land exceeds two hectares. [See Sections 2(b) and 5 of the 1999 Act]

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77. The 1975 Act contemplated raising of loan from the Government by the members of the Scheduled Tribes, subject to the conditions laid down in the Rules. The procedure for grant of loan and consequent payment of compensation to the owners of land was a precondition for actual restoration thereof. When, thus, loans are raised and amount of compensation is paid to the transferees, in our opinion, only then the vested right for getting back possession of the lands gets accrued and not prior thereto. We say so because the 1975 Act itself provides for a statute depriving the landholders from a right of property, which is otherwise protected by reason of Article 300-A of the Constitution of India. It is also a human right. (See *Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel and Union of India v. Martin Lottery Agencies Ltd.*)

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131. Classification between agricultural and non-agricultural land is a valid one. It is, however, accepted that all forest areas comprise of the agricultural land.

132. The State has admittedly no legislative competence to enact a legislation in exercise of its power of Entry 49 of List II of the Seventh Schedule of the Constitution of India in relation to non-agricultural land. Such a power has been noticed hereinbefore. It exists only in terms of Entry 6 of List III of the Seventh Schedule of the Constitution of India.

133. While enacting the tribals and thereafter has come to own immovable property other than the agricultural land. The exploitation of the tribals has studied would indicate (sic) has always taken place by deprivation of the agricultural land of the tribals....

Once they have made an enactment, the legislative intent is clear and unambiguous viz. such exploitation was possible also insofar as non-agricultural

lands are concerned. Such a right conferred on the owners of the non-agricultural land, therefore, could not have been taken away without payment of compensation. We, therefore, are of the opinion that to that extent the 1975 Act would continue to be applied. The State has no legislative competence to repeal that portion of the 1975 Act.

16. As already stated above, Section 5(2) of the Act refers to the land used for agricultural purpose. There was no such provision in the earlier enactment u/s 5 of the Act. Proviso to Section 5 and also Sub-Section (2) to Section 5 of the Act are enacted in 1999 Act.

17. Then coming to property under the old Act, Section 2(b) refers to "immovable property", which includes standing crops and trees but does not include growing grass and the 1999 Act in the place of immovable property comes out with the definition of "land", which means, "any agricultural land". Their Lordships in the case of Peoples Union for Civil Liberties's case (Supra) at paragraphs 131 to 133 have held that while enacting 1999 Act, the State could not have deprived the persons, who were holding non agricultural land having enacted 1975 Act, but could not have repealed a portion thereof. Therefore, Their Lordships said, the right conferred on the owners of non agricultural land could not have been taken away by virtue of 1999 Act, therefore, to that extent 1975 Act would continue to be applied, as the State has no legislative competence to repeal that portion of 1975 Act while enacting 1999 Act.

18. With this it is very clear that nature of land would decide whether 1975 Act is applicable or 1999 Act is applicable to the facts of a particular case. In the present case it is not even in dispute that the land in question is not agricultural land, as the appellant, legal representative of the transferor categorically contends that the appellant along with respondents 3 to 7 is in possession and actual enjoyment of land cultivating short term crops like vegetables. If the land is one used for agricultural purpose, Sub-section (2) of Section 5 comes into play. Admittedly, in the present case, though there was a restoration order, no possession was handed over to the appellant in spite of payment of compensation and the fact remains, the land transferred is much less than 2 hectares. The land involved in the present case is 26 1/2 cents; It is much below the restricted extent of land u/s 5(2), i.e., 2 hectares of land, 1 hectare is 2.471 acres of land and the land in question is much below the area of 1 acre also. Therefore, the transferees are entitled to retain the possession. Then coming to the question of alternative land being given to the transferor or the legal representatives of transferor, if the land in question is non agricultural land whatever benefits that were available under 1975 Act would continue to apply and if it is agricultural land, if any benefit could be extended to the transferor under 1999 Act, the same has to be extended to him.

In view of the above discussion and reasoning, we are of the opinion, there is no ground which warrants interference with the judgment of the learned Single Judge. Hence, the Writ Appeal is dismissed.