

(2011) 11 KL CK 0031

In the High Court Of Kerala

Case No : Writ Petition (C) No. 23121 of 2010

Sujatha

APPELLANT

Vs

Mariayamma

RESPONDENT

Date of Decision : 23-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32, 11, 47
Constitution of India, 1950 — Article 227, 340
Kerala Land Reforms Act, 1963 — Section 125(3), 80B
Transfer of Property Act, 1882 — Section 52

Citation : (2012) 2 RCR(Rent) 359

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : S. Sanal Kumar, Bhavana Velayudhan, T.J. Seema and M.R. Arun Kumar, for the Appellant; Thomas Xavier (Party in Person) and Sajan Varghese, Advocate for the Amicus Curiae, for the Respondent

Final Decision : Allowed

Judgement

Thomas P. Joseph, J.—This petition under Art. 227 of the Constitution of India is in challenge of Ext. P10, order dated 10.03.2010 on E.A. No. 434 of 2009 in E.P. No. 208 of 2007 in O.S. No. 688 of 2005 of the Court of learned Additional Munsiff, Alappuzha. First respondent is no more and as the 6th respondent who is present in person states, respondents 2 to 6 are legal representatives of deceased 1st respondent. The 6th respondent also holds power of attorney of respondents 2 to 5. Since the 6th respondent appeared in person and the issue involves questions of law and fact, I sought the assistance of Shri Sajan Varghese, Advocate who was appointed Amicus Curiae for the purpose. I have heard learned counsel for petitioner, Shri Sanal Kumar and Shri Sajan Varghese.

2. Respondents sought execution of the decree in O.S. No. 688 of 2005 in E.P. No. 208 of 2007 for recovery of possession of the homestead occupied by petitioner and ten cents appurtenant to it. Petitioner claimed that she belongs to the Hindu Sambava Community which is recognized as a Scheduled Caste as per

Presidential Notification issued under Art. 340 of the Constitution, that she is entitled to kudikidappu over the homestead and land appurtenant and hence is not liable to be evicted from the said homestead and land in view of S. 3 of the Kerala Prevention of Eviction Act, 1966 (for short, "the Act"). Learned Munsiff negated the contention holding that petitioner has not obtained purchase certificate from the Land Tribunal (for short, "the Tribunal"), her application - O.A. No. 60 of 2008 dated 18/06/2008 is pending before the Tribunal, there is no evidence regarding right of kudikidappu claimed by petitioner and her earlier application for the purpose was dismissed by the Tribunal. The executing Court also found that there is no evidence to show that petitioner belongs to the Scheduled Caste. On the above findings objection raised by petitioner was overruled and E.A. No. 434 of 2009 filed by petitioner u/s 47 of the CPC (for short "the Code") was dismissed.

3. Shri Sanal Kumar, learned counsel for petitioner contended that under S. 3 of the Act there is a statutory ban on a landlord evicting a kudikidappukaran from his holding if he is a member of any Scheduled Caste or Scheduled Tribe. According to the learned counsel, the non obstante clause in S. 3 of the Act is sufficient to show that notwithstanding that respondents have obtained a decree for eviction in their favour, that decree cannot be executed as petitioner is a member of the Scheduled Caste and is a kudikidappukari. Learned counsel has invited my attention to Ext. P9, photocopy of certificate issued by the Tahsildar, Kuttanadu where it is certified that petitioner belongs to the Hindu Sambava Community which is recognized as Scheduled Caste (as per the Presidential Notification issued under Art. 340 of the Constitution). Learned counsel also invited my attention to the previous proceedings in the present suit and other litigations where according to the petitioner, the Tribunal found that the predecessor-in-interest of petitioner is a kudikidappukaran, that finding was accepted by the Civil Court and it has become final. On account of that finality, respondents cannot contend that petitioner is not a kudikidappukari in respect of the homestead and the land appurtenant to it. In that view of the matter, the executing Court ought to have allowed the objection raised by petitioner under S. 3 of the Act.

4. Shri Sajan Varghese, learned counsel pointed out that so far as S. 3 of the Act is concerned, that is subject to the public policy contained u/s 52 of the Transfer of Property Act (for short, "the T.P. Act") and Section 11 of the Code. According to the learned counsel, in the previous litigations, claim of kudikidappu raised by petitioner or her predecessor-in-interest having been negated and that having become final, the present contention is hit by the said finding. It is contended that at any rate, claim of petitioner that she is entitled to the protection under S. 3 of the Act ought to have been raised on the trial side in O.S. No. 688 of 2005. Instead, a decree was passed ex-parte in the suit and the attempt of petitioner to get the ex parte decree set aside having failed, petitioner cannot contend in the executing Court that she is a kudikidappukari entitled to the protection of S. 3 of the Act. Learned counsel pointed out that in such situations the rule of

constructive res judicata based on "might and ought", theory under Explanation IV to Section 11 of the Code should apply. Learned counsel has placed reliance on the decisions in Joseph John Pillai Vs. Pappu Kunju and Others, , Mohamed Mytheen Sreedharan (1976 KLT 919), Sudheer Kumar @ Sudheer Vs. Manakkandi M.K. Kunhiraman and Another, : Sudheer Kumar @ Sudheer Vs. Manakkandi M.K. Kunhiraman and Another, : Sudheer Kumar @ Sudheer Vs. Manakkandi M.K. Kunhiraman and Another, and Kaipadath Property Development Company (P) Ltd v. State of Kerala, 2011(1) KLT 526 to support the contention that a non-obstante clause is not intended to override any or all provisions of the same Statute or any other law. According to the learned counsel, it is only such of the provisions which directly come in conflict with S. 3 of the Act to which the non-obstante clause provided therein would apply.

5. The litigation, though not involving petitioner or her predecessor-in-interest started in the year, 1967 with the institution of O.S. No. 587 of 1967 for redemption of mortgage. That was based on a mortgage created in favour of one Kesava Pillai in the year, 1950 and the equity of redemption being purchased by one Ouseph Thoma. Respondents filed O.S. No. 587 of 1967 against the said Ouseph Thoma for redemption of mortgage and obtained a decree in their favour (Ext. R6(b)) on 14.07.1970. Though Ouseph Thoma, the defendant in O.S. No. 587 of 1967 filed AS No. 63 of 1971 before learned Principal Sub Judge, Alappuzha, that appeal was dismissed. That was followed by a final decree in the suit - Ext. R6(c). Thereafter respondents filed E.P. No. 33 of 1973. In that execution, property excluding the homestead and the land appurtenant to it (which is the subject matter of O.S. No. 688 of 2005) was delivered to the respondents. Ext. R6(d) is the delivery report dated 25.6.1974 stating that of the total extent of 34.125 cents, excluding the homestead and the land appurtenant the rest of property is delivered to the respondents. In Ext. R6(d) it is stated that since there was dispute over the homestead and land appurtenant to it, that part of the property could not be delivered to the respondents.

6. Respondents filed O.S. No. 379 of 1974 against petitioner and others for recovery of possession of the said homestead and the land appurtenant to it (which is the subject matter of O.S. No. 688 of 2005) and for a decree for prohibitory injunction regarding other property. Petitioner and others claimed as legal heirs of the original kudikidappukaran that they are entitled to the protection of kudikidappu under the Kerala Land Reforms Act (for short, "the KLR Act"). That claim of petitioner and others was referred to the Tribunal for a finding u/s 125(3) of the KLR Act and the Tribunal took the reference on file as O.A. No. 96 of 1975. In the meantime, petitioner and others had filed O.A. No. 545 of 1972 before the Tribunal, for purchase of kudikidappu under S. 80B of the KLR Act. It is while that application was pending before the Tribunal, that the Civil Court in O.S. No. 379 of 1974 made reference to the Tribunal which the Tribunal took on file as O.A. No. 96 of 1975. The Tribunal disposed of O.A. Nos. 545 of 1972 and 96 of 1975 by a common order answering the reference in favour of petitioner and others and holding that they are kudikidappukars in the

homestead in question. Learned Munsiff accepting that finding dismissed the suit for recovery of possession of the homestead and land appurtenant but granted a decree for prohibitory injunction against taking yield from the remaining property. Respondents filed A.S. No. 203 of 1977 but without success. I am told that S.A. No. 42 of 1981 preferred by the respondents also met with the same result.

7. In the meantime, it would appear that from the order on O.A. No. 545 of 1972 (which was tagged on with O.A. No. 96 of 1975 and answered in favour of petitioner and others by the Tribunal while answering the reference), respondents filed appeal before the Appellate Authority as A.A. No. 824 of 1977. The Appellate Authority allowed that appeal by way of remand. Thereafter, there was an ex parte order passed by the Tribunal in O.A. No. 545 of 1972 again in favour of petitioner and others. Respondents challenged that order before the Appellate Authority in A.A. No. 91 of 1997. By order dated 05.10.2003, the order of the Tribunal on O.A. No. 545 of 1972 was set aside and the matter was remitted to the Tribunal on the ground that all the legal heirs of deceased landlord were not made parties to O.A. No. 545 of 1972. The Tribunal re-filed O.A. No. 545 of 1972 as O.A. No. 20 of 2007 was dismissed on 26.08.2007 for the reason that all the legal heirs of the deceased landlord were not impleaded in that O.A.

8. Next stage of the litigation is O.S. No. 1086 of 1986 filed by the respondents against petitioner and others. That suit was for a declaration that the order of the Tribunal on O.A. No. 545 of 1972 and the judgment in O.S. No. 379 of 1974 are null and void, having been obtained by fraud. That suit was dismissed and the appeal and Second Appeal arising there from also were dismissed.

9. Respondents then filed E.P. No. 270 of 1995 in O.S. No. 379 of 1974 (where decree for prohibitory injunction concerning the land other than the homestead and land appurtenant was granted in favour of respondents) u/O. XXI, R. 32 of the Code alleging violation of decree for prohibitory injunction (regarding rest of the property). Execution petition was dismissed against which respondents filed C.R.P. No. 2516 of 1998. Civil revision was dismissed by Ext. R6(f), order dated 5.1.2000 observing that dismissal of the civil revision is without prejudice to the right of decree holder in E.P. No. 270 of 1997 to pursue his remedies against item No. 2, homestead and the land appurtenant (in respect of which the Tribunal in O.A. No. 96 of 1975 found that petitioner and others are kudikidappukars).

10. Taking a clue from the observation made in Ext. R6(f), order dated 5.1.2000 in C.R.P. No. 2516 of 1998, respondents filed the present suit O.S. No. 688 of 2005, for recovery of possession of the homestead and the land appurtenant thereto. It is in that proceeding that petitioner and others remained absent and an ex parte decree was passed. Later, petitioner filed I.A. No. 3309 of 2006 (Ext. R6(i)) to set aside the ex parte decree to which respondents preferred Ext. R60), objection. Learned Munsiff dismissed I.A. No. 3309 of 2006 by Ext. R6(k), order.

I am told that in the meantime, petitioner filed O.A. No. 60 of 2008 before the Tribunal for purchase of kudikidappu under S. 80B of the KLR Act which is pending.

11. It is in the above backdrop that respondents sought execution of the ex parte decree for recovery of possession in O.S. No. 688 of 2005 by filing Ext. P5, E.P. No. 208 of 2007 where petitioner filed E.A. No. 235 of 2008 for stay of execution followed by E.A. No. 434 of 2009 u/s 47 of the Code objecting to executability of the decree in view of S. 3 of the Act.

12. Now that the factual situation in the matter is described, question is whether petitioner is entitled to the protection of S. 3 of the Act. Learned counsel for petitioner contended that the finding of the Tribunal in the reference (O.A. No. 96 of 1975) in O.S. No. 379 of 1974 having been accepted by the Trial Court and dismissing O.S. No. 379 of 1974 followed by the dismissal of A.S. No. 203 of 1977 and S.A. No. 42 of 1981, finding of the Tribunal as accepted by the Civil Court has attained finality. That finding remains effective for all purpose whatsoever. It is contended that though an independent application - O.A. No. 545 of 1972 filed by petitioner and others was dismissed as above stated, it has no value in the eye of law since O.A. No. 545 of 1972 was tagged on with O.A. No. 96 of 1975 (reference) and was allowed. Later, respondents filed appeal against the finding in O.A. No. 545 of 1972 and which was remanded by the Appellate Authority to the Tribunal, Tribunal re-numbered the same as O.A. No. 20 of 2007 and was later dismissed by Ext. P2, order. According to the learned counsel Ext. P2, order has no effect in the eye of law since the original decision in O.A. No. 545 of 1972 became part of the finding of the Tribunal in the reference proceeding - O.A. No. 96 of 1975 and that finding of the Tribunal became part of the decision of the Civil Court. Hence the Appellate Authority had no jurisdiction to entertain an appeal against the finding in O.A. No. 545 of 1972. That appeal, the order thereon and subsequent proceedings are non est. In that view of the matter, it is contended that finding in O.A. No. 96 of 1975 that petitioner and others are entitled to kudikidappu in respect of the homestead having attained finality, O.A. No. 60 of 2008 can only be treated as an application filed by petitioner for issue of purchase certificate pursuant to the finding entered in OA No. 96 of 1975 as confirmed in A.S. No. 203 of 1977 and S.A. No. 42 of 1981. Learned counsel therefore, contended that the finding that petitioner is a kudikidappukari stands.

13. I have referred to the contentions which learned counsel, Shri Sajan Varghese has addressed. Main thrust of the submission is concerning the observation in Ext. R6(f), order dated 5.1.2000 in C.R.P. No. 2516 of 1998 and dismissal of O.A. No. 20 of 2007 (re-filed from O.A. No. 545 of 1972). According to the learned counsel, so far as the decree in O.S. No. 688 of 2005 stands, petitioner cannot be allowed to raise a contention that she is a kudikidappukari in respect of the homestead and land upper-tenant to it.

14. Before going into the question of application of S. 3 of the Act, I have to

consider the effect of A.A. No. 824 of 1977, the order passed thereon and subsequent proceedings in the said proceeding. As aforesaid, O.A. No. 545 of 1972 was tagged on to O.A. No. 96 of 1975 and the Tribunal answered the reference in favour of petitioner and others. Hence the decision in O.A. No. 545 of 1972 became part of the finding on the reference - O.A. No. 96 of 1975 and thereby, part of decision of the Civil Court. When O.A. No. 545 of 1972 was tagged on to O.A. No. 96 of 1975 (reference from the Civil Court in O.S. No. 379 of 1974), the decision in O.A. No. 545 of 1972 became subject to the ultimate decision of the Civil Court. Therefore, there was no independent existence for the finding in O.A. No. 545 of 1972.

15. As aforesaid, the finding in O.A. Nos. 545 of 1972 and 96 of 1975 was accepted by the learned Munsiff in O.S. No. 379 of 1974. The suit for recovery of possession was dismissed based on that finding. That was confirmed by the Appellate Court in A.S. No. 203 of 1977 and by this Court in S.A. No. 42 of 1981. In other words, finding of the Tribunal in O.A. Nos. 545 of 1972 and 96 of 1975 that petitioner and others are kudikidappukars attained finality by the dismissal of S.A. No. 42 of 1981. In that view of the matter, A.A. No. 824 of 1977 filed by the respondents from the finding in O.A. No. 545 of 1972 was absolutely incompetent and not maintainable. If that be so, the order passed by the Appellate Authority in A.A. No. 824 of 1977 and what followed thereafter in that proceeding are without jurisdiction, non est and only to be ignored. Therefore, respondents cannot take shelter under the ultimate dismissal of O.A. No. 545 of 1972 re-numbered as O.A. No. 20 of 2007 by Ext. P2, order dated 26.08.2007.

16. I shall refer to the observations which learned Judge of this Court made in Ext. R6(f), order dated 05.01.2000 in C.R.P. No. 2516 of 1998. In that order, it is seen from paragraph 2 that a contention was raised on behalf of respondents/decree holders (arising from O.S. No. 379 of 1974) that there was no certificate of purchase issued by the Tribunal in favour of petitioner and others and that "the proceedings are still pending". This Court observed:

...If that be so the remedy of the decree holder would be to file a suit for recovery of possession of the building after the proceedings in the Land Tribunal come to an end and if the decision is in his favour....Dismissal of execution petition in O.S. No. 379 of 1974 was confirmed by this Court in C.R.P. No. 2516 of 1998 for the reason that with respect to the land appurtenant and the homestead there was no decree for injunction granted in favour of the respondents or against petitioner and others.

17. The observation made by this Court in Ext. R6(f) order dated 5.1.2000 in C.R.P. No. 2516 of 1998 can only be understood as a response to the argument advanced on behalf of the decree holder on the premise that no purchase certificate was issued in favour of petitioner and others and that proceedings are still pending. The contention raised by respondents with respect to the pendency of proceedings before the Tribunal was with reference to the proceedings that followed the order in A.A. No. 824 of 1977 remanding O.A. No. 545 of 1972 to

the Tribunal where it was re-numbered as O.A. No. 20 of 2007, dismissed by Ext. P2, order on 26.08.2007, which I said, has no legal effect. Hence respondents cannot claim shelter under the observations in Ext. R6(f), order dated 5.1.2000 in C.R.P. No. 2516 of 1998.

18. I stated that the finding that petitioner and others are kudikidappukars in the homestead in question has become final by the finding of the Tribunal in O.A. No. 96 of 1975 tagged on with O.A. No. 545 of 1972, that finding was accepted by the Civil Court and was confirmed by the first and second Appellate Courts in A.S. No. 203 of 1977 and SA No. 42 of 1981. That finding stands. Therefore, as earlier observed proceedings now pending before the Tribunal at the instance of petitioner and others (for purchase of kudikidappu) can only be taken as a request to the Tribunal to issue purchase certificate pursuant to the finding that has already become final. In that view of the matter the executing Court was not right in observing that application for purchase of kudikidappu is still pending before the Tribunal and hence the claim of petitioner cannot be accepted.

19. On the question whether petitioner belongs to the Hindu Sambava Community which is recognized as a Scheduled Caste, Ext. P9, certificate is proved the same which I find no reason to discard.

20. Now I shall come to the question whether S. 3 of the Act is applicable? The said provision reads:

Prevention of eviction.- Notwithstanding anything to the contrary contained in any other law or in any contract, custom or usage, or in any judgment, decree or order of Court, no person shall evict or attempt to evict a cultivating tenant or holder of a kudiyruppu or kudikidappukaran from his holding, kudiyruppu or kudikidappu if such tenant or holder is a member of any Scheduled Caste or Scheduled Tribe:

Provided that nothing in this section shall apply to-

(i) lands or buildings or both belonging to or vested in the Government of Kerala or the Government of any other State in India or the Government of India or a local authority or a corporation owned or controlled by the Government of Kerala or the Government of any other State in India or the Government of India;

(ii) any lease of land or building or both granted by the Administrative General, Official Trustee or Official Receiver.

Going by the plain meaning of S. 3 of the Act it appears to me that notwithstanding anything contained in the decree in favour of respondents/ landlords, they are interdicted from evicting petitioner from the homestead and land appurtenant as petitioner is a kudikidappukari and is a member of the Scheduled Caste.

21. Now I shall come to the argument advanced by the learned counsel Shri Sajan Varghese. The decisions in John Pillai v. Pappu Kunju, Mohamed Mytheen

v. Sreedharan, Sudheer Kumar v. Kunhiraman and Kaipadath Property Development (P.) Ltd. v. State of Kerala, referred supra concern applicability of non-obstante clause either to the principle u/s 52 of the T.P. Act or public policy enacted by the Statute. It is held that the non-obstante clause will apply only so far as other provisions of the same Statute or any Statute are inconsistent with the object sought to be achieved by the non-obstante clause. That is the principle laid down in the decisions referred to above. True that the decision in John Pillai v. Pappu Kunju relates to agrarian reforms and, it is held that, non obstante clause in the Act referred to therein is subject to Section 52 of the T.P. Act.

22. But, to apply the provisions of Section 11 of the Code the plea must have been available to the petitioner on the trial side in O.S. No. 688 of 2005. Explanation IV to Section 11 of the Code can apply only if the plea was available but, it was not raised. So far as S. 3 of the Act is concerned, it is clear that when the said provision says that notwithstanding anything contained in any decree or order of Court, no person shall evict or attempt to evict a cultivating tenant or holder of a kudiyruppu or kudikidappukaran from his holding, kudiyruppu or kudikidappu if such tenant or holder is a member of any Scheduled Caste or Scheduled Tribe, the question whether the person who seeks protection of S. 3 of the Act comes within the mischief of that provision arises only when pursuant to a decree the landlord seeks eviction of the person concerned. What I can understand is that whatever be the decision in the suit and the decree, so far as persons coming within the mischief of the said provision is concerned, the landlord is not entitled to evict such person. If that be so, it appears to me that the plea that petitioner is a member of the Scheduled Caste and is a kudikidappukari in respect of the homestead and land appurtenant could be raised only when respondents sought to execute the decree. Viewed in that line, contention of learned counsel that petitioner having failed to raise that question on the trial side in O.S. No. 688 of 2005 is precluded by the rule of constructive resjudicata in raising the question cannot stand.

23. In holding so, I draw support from S. 6 of the Act as well S. 6 of the Act contains a non obstante clause but, a "decree" is not included in the non obstante clause in S. 6. That means, if a person claims protection under S. 6 of the Act, necessarily the claim has to be raised before the decree is passed.

24. Section 3 of the Act does not affect the jurisdiction of the Court to pass a decree, the interdiction is only against the landlord executing the decree as against a member of the Scheduled Caste or Scheduled Tribe if he/she is a kudikidappukaran/kudikidappukari or falls within any of other categories referred to in S. 3 of the Act. Viewed in that line. I am unable to accept the contention that since the plea under S. 3 of the Act was not raised on the trial side in O.S. No. 688 of 2005, the plea is barred by constructive res judicata.

25. Having heard counsel on both sides I am to hold that so far as S. 3 of the Act remains in force the decree obtained by respondents in O.S. No. 688 of 2005

cannot be executed against petitioner who otherwise has satisfied the requirements of S. 3 of the Act. Viewed in that line the executing Court ought to have allowed E.A. No. 434 of 2009 and held that the decree cannot be enforced against petitioner.

26. It follows from my above finding that Ext. P 10, order is liable to be set aside and E.A. No. 434 of 2009 is to be allowed. I place on record my appreciation for the effective assistance rendered to me by the learned counsel for petitioner, Shri S. Sanal Kumar and the learned counsel, Shri Sajan Varghese who acted as Amicus Curiae.

Resultantly this petition is allowed as follows:

- i. Ext. P 10, order dismissing E.A. No. 434 of 2009 in E.P. No. 208 of 2007 in O.S. No. 688 of 2005 of the Court of learned Additional Munsiff, Alappuzha is set aside.
- ii. E.A. No. 434 of 2009 will stand allowed.
- iii. It is declared that so far as S. 3 of the Act remains in force respondents cannot evict petitioner from the homestead and the ten cents appurtenant to it pursuant to the decree in O.S. No. 688 of 2005 of the Court of learned Additional Munsiff, Alappuzha.