(1964) 08 KL CK 0023

High Court Of Kerala

Case No: S.A. No. 25 of 1960

Ummar		APPELLANT
	Vs	
Meenakashi Neithiar Amma and Another		RESPONDENT

Date of Decision: Aug. 31, 1964

Acts Referred:

- General Clauses Act, 1897 - Section 3(25)
- Kerala Land Reforms Act, 1963 - Section 7

Citation: (1964) KLJ 967

Hon'ble Judges: S. Velu Pillai, J

Bench: Single Bench

Advocate: T.S. Venkiteswara Iyer, for the Appellant; V.P. Gopalan Nambiar, K.P. Madhava Menon, for the Respondent

Final Decision: Dismissed

Judgement

Velu Pillai, J

1. The plaintiffs, as representing their tavazhy which owned the jenmom right of the suit properties, sued in O.S. 355 of 1941, for redemption of the kanom with respect to them, impleading defendants 1 to 4 therein as the kanomdars, defendants 5 and 6 as the usufructuary mortgagees of the kanomdars, and the 7th defendant who is the sole defendant in this suit, as the lessee of defendants 5 and 6. That suit was decreed on a petition of compromise, Ext. A3 dated the 19th November, 1941, by which all the defendants surrendered their rights, including possession of the properties, to the plaintiffs. While the plaintiffs were thus in possession, it is their case, that they granted to the defendant in certain years, a right by way of licence, to raise paddy seedlings for cultivating other lands and that he trespassed upon the properties on the 3rd June, 1952, corresponding to the 21st Edavom, 1127. So this suit was instituted at first for injunction to restrain the defendant from disturbing

the plaintiffs'' possession and it was afterwards amended as for recovery of possession of the properties with mesne profits. The defendant contended that the properties, inclusive of the kuzhikoors thereon, have been leased to him, and that he is not a licensee for raising seedlings as alleged. The Munsiff held that he is a lessee of the land but not of the kuzhikoors as contended, and directed the defendant to surrender the kuzhikoors with mesne profits, but in appeal the District Judge gave the plaintiffs a decree for possession of the properties, inclusive of the kuzhikoors, with mesne profits. The suit being on title which was admitted, and having been laid within 12 years of Ext. A3, the petition of compromise, the plaintiffs are entitled to a decree for possession, unless the defendant can sustain his defence, that he is a lessee of the properties. The kuzhikoors consisted of about 110 palmyrah trees, besides other trees and bamboo clusters. The defendant attempted a theory, that even the original lease to him by the mortgagees comprised the kuzhikoors. The District Judge rightly held that Ext. A7, the prior lease deed, did not comprise the kuzhikoors, and that whatever right the defendant had under it, was surrendered to the plaintiffs by Ext. A3. There is no truth in the several explanations offered by the defendant either as to his participation in Ext. A3 or as to its effect. The Munsiff misunderstood altogether the scope of Ext. A3 itself. It is quite improbable to think, that as contended, a fresh lease was given to the defendant on the date of Ext. A3 and that too not only of the land but also of the kuzhikoors. The defendant persisted in his plea of a lease of the land and the kuzhikoors from the date of Ext. A3 and even examined witnesses to speak in support of it. Though at one stage, the defendant admitted as D.W. 1 that he had no possession of the kuzhikoors, in other parts of his testimony he adhered to his plea; a substantial part of the oral evidence he adduced, that he enjoyed the kuzhikoors by collecting fronds from palmyrah trees and cutting thorns from bamboo clusters, stands discredited even by the Munsiff who partially gave him a decree. There was no warrant for the Munsiff to find an intermediate case for the defendant, of a lease of the properties without the kuzhikoors. It is unnecessary to deal in particular with the evidence of the defendant''s witnesses, who on the issue of lease have been discredited by the Judge, except to state, that D.W. 2 was contradicted by the affidavit which he had filed, D.W. 3 has been a friend of the defendant from boyhood and D.W. 4 was under obligations to the defendant on a promissory note for Rs. 600/- I agree with the District Judge in holding, that the defendant has not proved a lease of the land.

2. The defence raised to the suit being unsuccessful, permission was sought by C.M.P. 673 of 1964 to take an additional point u/s 7 of the Kerala Land Reforms Act, 1963 (Act I of 1964), which is in the following terms:

Notwithstanding anything to the contrary contained in any law, or in any contract, custom or usage, or in any judgment, decree or order of court, any person who, on the 11th day of April, 1957, was continuously in occupation of the land of another situate in Malabar, for not less than two years, honestly believing himself to be a tenant and continued to be in occupation of such land at the commencement of this

Act, shall be deemed to be a tenant.

This section can apply only if, apart from other conditions, the defendant had been continuously in occupation of the land for not less than two years on the 11th day of April, 1957, honestly believing himself to be a tenant. Learned counsel invoked this provision by contending, that even if no lease of the land is proved, the defendant had been permitted to raise seedlings in the potta of the properties year after year from the date of Ext. A3, and not intermittently and in certain years only, as alleged by the plaintiffs. It must at once be stated, that a licence to raise seedlings, whether continuous or not, was no part of the defence nor is a licence implied in a lease; the two are different concepts in law. The plaintiffs adduced evidence to prove their case; P.W. 1 the second plaintiff, and P.W. 2 his father and P.W. 4 the amsom menon swore to it. P.W. 2 is an advocate of about 30 years'' standing, and has held responsible positions in public life. Both P.Ws. 1 and 2 denied having given a lease to the defendant as contended and testified to his having raised - seedlings in certain years under permission obtained for the purpose. P.W. 4 testified to the permission granted on one such occasion. There is no justifiable reason to differ from the Judge in his appreciation of the evidence. Their evidence is not to be discarded on the ground, that the years for which, according to the plaintiffs, licences were granted were not specified in the plaint, or that there was some discrepancy in the evidence of P.W. 1 and of P.W. 2 as to whether the pottas in these lands were necessary or not for the defendant to cultivate his wife''s lands. Moreover, as observed, the subsisting title of the plaintiffs being not in dispute, it was up to the defendant to make out his defence. For him, the foundation for the theory of an yearly licence, if it may be so called, was but the theory of lease to which his witnesses have testified.

3. That a licence of this kind, whether yearly or not, does not spell continuous occupation or possession of the land is established even by the defendant''s evidence. D.W. 3 who supported the case of a lease of the land and kuzhikoors through and through, also testified to the incidents of an arrangement by which paddy seedlings are raised on land of another. He said, that permission is taken from the owner of the land, for raising paddy seedlings for transplantation within twenty eight days to two months after the seeds are sown, that ''nhattupattom'' is the consideration paid for such user, and that the person raising the seedlings has no right in the land after they are removed. The defendant too admitted, that ''nhattupattom'' is consideration paid for being permitted to raise paddy seedlings and that he himself had paid ''nhattupattom'' as directed by the plaintiffs, in Ext. B1, though the year of such payment was not proved. On this evidence, it is clear that even if the defendant had been permitted to raise seedlings in the pottas of the suit properties year after year, it was nothing more than a licence to use the land for a period of two months at the most in the year; this does not connote possession or occupation of the land, much less continuous possession or occupation, within the meaning of Section 7.

4. It has been ruled in more than one case by the Supreme Court, that to distinguish a lease from a licence, "the real test is the intention of the parties-whether they intended to create a lease or a licence; if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence". Associated Hotels of India Ltd. Vs. R.N. Kapoor, . See also Mrs. M.N. Clubwala v. Fida Hussain Saheb (Civil Appeal No. 151 of 1963). Judged by these tests I see little difficulty in holding, that the arrangements by which the defendant raised paddy seedlings were in the nature of a licence and not of lease. His learned counsel drew largely on P. Venugopala Pillai v. Thirunayukkarasu (AIR 1949 Madras 148), which concerned the right to collect the toddy yield of coconut trees for a term of 3 years and the right to enter the land for that purpose. While the latter right was held to be a licence, the former was held to be in the nature of a leasehold, being a benefit to arise out of land and therefore immovable property as defined in Section 3 (25) of General Clauses Act (1897). The following passage from the notes of Sir Edward Vaughan Williams to the case of Duppa v. Mayo (Wms. Saunders, 1871 edition, page 394) as extracted in Marshall v. Green ((1875) I.C.P.D. 35 (45 L.J.C.P. 153)) was quoted:

The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall he immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods.

Basing on this it was contended before me, that as the seedlings drew their nourishment from the soil, an interest in the land was created. The right to enjoy coconut trees which have a fairly long duration of life, whether by collecting their nuts or their toddy juice, spread over a term of years, has no analogy with the right to sow paddy and raise and remove seedlings within a maximum period of two months in the year, all for the sake of transplanting them in pucca paddy fields. In the former, the right is to the usufruct of the trees for the period of the contract and in the latter, the right is to carry on an operation on land for a specified purpose which exhausts itself; the former may well be regarded as covered by the first part of the passage extracted above and the latter by the second part, the land being considered as a temporary warehouse of the seedlings and the contract being to remove them. The right in the present case is not so much in the seedlings themselves, as in the right to use the land to grow them and afterwards to remove them for transplantation. The right to cut, gather, and carry away, produce in the shape of tender leaves, or lac, or timber, or wood, was held to be a licence in Firm Chhotabhai Jethabai Patel and Co. and Others Vs. The State of Madhya Pradesh, by the Supreme Court and in Mohanlal Hargovind v. Commissioner of income tax (ILR

(1949) Nagpur 892) by the Privy Council. In the latter the Privy Council said:

The small right of cultivation given...is merely ancillary...The contracts are short-term contracts.

In the words of D.W. 3, the licensee has no more right in the land, once the seedlings are taken. It thus seems impossible to hold, that any interest in land was created by the mere licence to raise seedlings, whether it was yearly or intermittent. On these considerations I am of the view, that no case of continuous occupation of the land within the meaning of Section 7 of Act I of 1964 has been made out, so as to merit further enquiry. Even according to the Munsiff, the defendant took possession of the kuzhikoors only in the year 1128 and mesne profits have been allowed by the two courts therefor. The plaintiffs'' application for temporary injunction against disturbance of possession was dismissed and the defendant has been subsequently in possession. His possession during the pendency of this litigation is of no avail as it has been that of a trespasser in view of the above findings. For the above reasons the second appeal is dismissed with costs.