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(1992) 01 KL CK 0033

High Court Of Kerala

Case No: C.M.A. No. 10 of 1991

T.R. Velayudhan	APPELLANT
Vs	
P.K. Kunhunni and Another	RESPONDENT

Date of Decision: Jan. 10, 1992

Acts Referred:
Kerala Land Reforms Act, 1963 â€" Section 125, 125(1), 125(3)

Citation: (1992) 01 KL CK 0033

Hon'ble Judges: P.K. Shamsuddin, J

Bench: Single Bench

Advocate: Philip Antony Chacko, for the Appellant; V. Chithambaresh, for the Respondent

Judgement

P.K. Shamsuddin, J.
This Civil Miscellaneous Appeal arise out of O.S. No. 279 of 1983 on the file of Munsiff''s Court, Palakkad. Plaintiff

is the Appellant. Suit was for recovery of possession.

2. It is the Plaintiff''s case that plaint schedule property belonged to the joint family of Plaintiff''s grandfather and his sons. As per partition deed No.

1076 of 1951, plaint schedule property along with other items was allotted to Plaintiff''s father T.V. Raman as B Schedule and subsequently as per

a partition deed No. 42 of 1962, B Schedule properties were partitioned between his father and brother. Item 17 in the B Schedule is the plaint

schedule property. On 2nd August 1983, when the Plaintiff''s father went to the property to look After cultivation, he found that the property was

fenced all around and black gram was sown, in the property. On enquiry, it was found that the Defendant trespassed into the property a few days

prior to his visit and got the property fenced and that black gram was sown.

3. In the written statement filed by Defendants, they denied title and possession of Plaintiff and set up a plea of tenancy, over 21 cents of land in

Sy. No. 43/A2 of plaint schedule.

4 The trial Court framed issue Nos. 9 and 10, namely (9) whether the 2nd Defendant is not a cultivating tenant entitled to fixity of tenure; and (10)

whether the claim of tenancy is not liable to be referred for adjudication by the concerned Land Tribunal. Issue Nos. 9 and 10 were considered

together and it was found that the tenancy set up by Defendant is not true and there was no necessity to refer the matter to the Tribunal. In that

view of the matter, the Court below granted a decree in favour of Plaintiff for recovery of possession of plaint schedule property.

5. Aggrieved by the judgment and decree of the trial Court, Defendants filed A.S. No. 101 of 1986. Learned Sub Judge remanded the matter,

directing the triad Court to refer the claim of tenancy raised by 2nd Appellant to the Land Tribunal for adjudication.

6. In this appeal, Plaintiff has challenged the order of remand made by the learned Sub Judge. Sri Philip Antony Chacko, learned Counsel for

Appellant, submitted that learned Sub Judge went wrong in setting aside the decree and judgment of trial Court and remanding the matter for

purpose of a reference by trial Court to the Land Tribunal, to decide the question of tenancy. He submitted that a mere averment in the plaint is not

sufficient to refer the matter to Land Tribunal u/s 125 of Land Reforms Act. Learned Counsel invited my attention to a Full Bench decision of this

Court in Kesava Bhat v. Subraya Bhat 1979 KLT 766 (F.B.). The Full Bench made the following observations:

Unless the question actually arises for consideration, there is no obligation u/s 125(3) to make a reference to the Land Tribunal. The mere

incorporation of an unnecessary or irrelevant plea of tenancy into the written statement which has no relation whatever to the material averments

and the reliefs sought in plaint, cannot attract the bar of Section 125(1) or the provisions of Section 125(3).

Relying on the above decision, I have held in Augustine and Co. v. Damodran 1991 (2) K.L .T S.N. 11 Case No. 16 that merely because there is

an averment that the Petitioners are entitled to benefit of fixity conferred by the Kerala Land Reforms Act, the court is not bound to refer the

matter to the tribunal unless the Petitioners make out a prima facie case. The same view has been expressed by Chettur Sankaran Nair, J. in

Sankaran v. Appu 1987 (1) KLT (S.N.) 50 Case No. 68.

7. On the other hand, learned Counsel for Respondents drew my attention to the decision of a Division Bench of this Court in Balakrishnan Nair v.

Radha Amma and Ors. 1987 (1) KLT 195 where this Court took the view that even inter se dispute between the Defendants as to the leasehold

right is liable to be referred to the Land Tribunal u/s 125. However, I do not find anything in the said judgment, which is contrary to what is

observed by the Full Bench in Kesava Bhat''s case.

8. In the light of the judgment referred to above, it is necessary that a prima facie case has to be made out before the question of tenancy is

referred to the Tribunal for decision u/s 125. In the instant case, the Defendants have not sought a reference to the Land Tribunal at any stage of

the proceedings. However, the court framed an issue on the question whether it is liable to be referred to the Land Tribunal, but found that the

Defendants were not able to make but a prima facie case to refer the matter to the Land Tribunal. Though an appeal was filed by Defendants, no

ground has been taken in the memorandum of appeal that by reason of failure on the part of trial Court to refer the question of tenancy to the Land

Tribunal, the finding of trial Court that the plea of tenancy set up by Defendants is not true is a nullity. I also do not find any ground taken that the

court went wrong in not referring the matter to the Land Tribunal. The only point taken in the memorandum of appeal was that the findings

regarding issues relating to tenancy is wrong.

9. The question that arises for consideration in this case is whether in such a situation, the lower Court was justified in setting aside the decree of an

old suit of 1983 and remanding the matter with a direction to refer the matter to the Land Tribunal. I am not satisfied that the trial Court went

wrong in not referring the matter to the Land Tribunal in the peculiar circumstances of this case. That apart, the lower appellate Court is not

justified in setting aside the judgment and decree of the trial Court and remanding the matter to the trial Court for the purpose of a reference to the

Land Tribunal. This Court had occasion to consider a similar situation in Kunjan v. Janaki 1980 K.L.T 796. The Division Bench observed as

follows:

In an appeal from a decree it is open to the appellate Court to go into the correctness of the finding entered into by the trial Court. If on a material

question there is no finding of the trial Court, if there is sufficient evidence, the appellate Court could itself enter a finding or call for a finding from

the trial Court. The finding on a question of tenancy by the trial Court without reference to the Land Tribunal is no finding at all as that court has not

followed the provisions of Section 125(3). So the appellate Court which is not inhibited by any of the restrictions of Section 125(3) can go into the

question of tenancy and if it does and enters a finding, it cannot be said that that finding was entered into without jurisdiction. The appellate decree

after such a finding will not have any of the defects which can be pointed in the case of a decree of the trial Court without complying with the

provisions of Section 125(3).

A similar question came before me in Narayani v. Sheshappayya 1989 (1) KLT (S.N.) 23 Case No. 39. I made the following observations in that

case:

It is true that a decision rendered by a civil Court in a matter, which required reference to a Land Tribunal is without jurisdiction. In the instant

case, the Defendants have not prayed for any reference to the Land Tribunal and were satisfied with an adjudication by the civil Court itself. It is

therefore clear that the judgment of the trial Court is vitiated on the ground that the question of tenancy was not referred to the Land Tribunal u/s

125(3) by the trial Court. Though, it has to be held that the rival claims made by the Plaintiffs and Defendants are required to be referred to the

Land Tribunal u/s 125(3), the failure to do so will not in any way vitiate the judgment of the lower appellate Court, which considered the question

of tenancy and the extent of the lands covered by the leases of the respective parties.

A similar question arose before Anr. Single Judge of this Court in Rosamma v. Narayana Pillai 1989 (2) KLT (S.N.) 35 Case No. 42. The court

said:

The decision of a court rendered without jurisdiction and as such void could be challenged in appeal in the same way as a decision rendered with

jurisdiction. In other words, a decision with jurisdiction and one without jurisdiction are equally appealable. Section 125 of the Land Reforms Act

only inhibits the powers of the trial Court by making it obligatory to refer the question of tenancy to the Land Tribunal and dispose of the case

accepting and incorporating its finding. Powers of the appellate Court is not only not limited or crippled, but it is required to treat the finding as that

of the trial Court and sit in judgment over it. That means, the power of the appellate Court under the CPC is not in any way affected or limited. It is

thus open to the appellate Court to go into the finding and assess its correctness irrespective of the question whether the finding is that of the trial

Court itself or that of the Land Tribunal accepted and incorporated by it...The finding of the trial Court on the question of tenancy without

reference to the Land Tribunal in violation of Section 125(1) and (3) is without jurisdiction and as such no finding at all. In such a situation, the

appellate Court can remand the case for reference to the Land Tribunal, or retain the appeal and call for a finding after reference to the Land

Tribunal or even dispose of the appeal after entering a finding of its own if it feels that materials on record are sufficient for that purpose. The

appellate Court, which is not inhibited by the provisions of Section 125, will be acting with jurisdiction under the CPC even if it goes into the

question of tenancy and enters a finding for the first time when there is no reference to the Land Tribunal. That finding cannot, in any way, be said

to be without jurisdiction. The appellate decree, after such a finding cannot have any of the defects which could be attributed to a decree of the trial

Court without complying with the provisions of Section 125(3).

A similar view was taken by Anr. Single Judge of this Court in Ponnammal v. Gomes 1991 (1) KLT 910.

10. Foregoing discussion would show that the circumstance that question of tenancy was not referred to the Land Tribunal need not deter the

appellate Court from deciding the question on merits without recourse to remittance of the case for enabling the trial Court to refer the question to

the Land Tribunal if there is evidence on record touching the question. In the circumstances, it was unnecessary for the lower appellate Court to

remand the matter to enable the trial Court to refer the matter to the Tribunal to decide the question, when parties had chosen to adduce evidence

touching the question of tenancy and those materials are available to the lower appellate Court to enter a finding even if the finding entered by the

trial Court is without jurisdiction for want of a reference u/s 125(1) of Land Reforms Act. That being the position, I feel that the lower Court was

not justified in reversing the decree of the trial Court and remanding the matter to decide the question of tenancy set up by Defendants. Since the

lower appellate Court did not decide the question on merits, I direct the lower appellate Court to dispose of the matter on merits on the basis of

the materials available on record. Parties will appear before the lower appellate Court on 5th February 1992. As the matter is very old, I direct the

lower Court to dispose of the matter as expeditiously as possible.

Civil Miscellaneous Appeal is disposed of as above. Parties will bear their respective costs. Issue carbon copy on usual terms.