(1969) KLJ 833

High Court Of Kerala

Case No: A.S. 281 of 1964

N.N. Ismalu — APPELLANT

Vs

Thithirikutty Umma — RESPONDENT

Date of Decision: Sept. 29, 1969

Acts Referred:

- Kerala High Court Act, 1958 - Section 5
- Kerala Land Reforms Act, 1963 - Section 2(25), 2(vii)

Citation: (1969) KLJ 833

Hon'ble Judges: V.P. Gopalan Nambiyar, J; T.S. Krishnamoorthy Iyer, J

Bench: Division Bench

Advocate: B. Moosakutty, for the Appellant; K. Mohammed Naha and M. Narayana Menon, for the Respondent

Final Decision: Dismissed

Judgement

V.P. Gopalan Nambiyar, J.

This appeal, u/s 5 of the Kerala High Court''s Act, is against the judgment of a learned Judge of this Court in Second Appeal No.269 of 1960. The matter arises out of 9 proceedings in execution of the decree in O.S. No.56 of 1967 on the file of the Munsiff''s Court, Parappanangadi. The appellant before us was the 6th Defendant in the suit which was one for redemption of a mortgage. He was one of the persons who had been permitted by the mortgages to occupy a hut in the mortgaged property. It has been found,--and the finding is not now open to question--that the hut belongs to the mortgagor. The appellant contended that he was a ''kudikidappukaran'' entitled to protection under the Kerala Act VII/1963. The contention was rejected by the learned Judge against whose judgment this Appeal has been preferred. The same contention has been repeated before us with respect also to the provisions of the Kerala Act 1/1964 and of Act V/1969. We agree with the learned Judge that under the definition of the term ''kudikidappukaran'' under Act VII/1963, while permission to occupy the hut may be granted even by a person in lawful possession of any land and therefore by the

mortgagee--it is necessary that the hut must "belong" to the person who granted the permission. The appellant, therefore, was rightly held by the learned Judge not to satisfy the definition of the term "kudikidappukaran" under the Kerala Act VII/1963. Explanation I to the said definition enacts a rule of presumption as to lawful permission arising from continuous occupation from and after a specified date for a specified period, but it does not dispense with the requirement that the hut must "belong" to the person permitting occupation.

2. The position has in no wise has been altered by the statutory enactments which have since followed. Section 2(25) of Act 1/1964, in so far as it is relevant reads:

2(25) "kudikidappukaran" means a person who has neither a homestead nor any land, either as owner or as tenant in possession, on which he could erect a homestead and

(i) who has been permitted with or without an obligation to pay rent by a person in lawful possession of any land to have the use and occupation of a portion of such land for the purpose of erecting a homestead; or

(ii) who has been permitted by a person in lawful possession of any land to occupy with or without an obligation to pay rent a hut belonging to such person and situate in the said land", but otherwise has no interest in the land; and "kudikidappu" means the land and the homestead or the hut so permitted to be erected or occupied together with the easements attached thereto:

* * * *

The requirement that the hut must "belong" to the person who permitted occupation is not dispensed with; and Explanation II to the section, which is practically in the same terms as the Explanation to the definition in Act VII/1963, does not improve the position.

3. It was said that Act V/1969 has effected a change. We are clear that it has not. Section 2(vii) of the said Act, defines "kudikidappukaran". As the definition is unduly long, we are reproducing only the material part of it.

2 (vii) "kudikidappukaran" means a person who has neither a homestead nor any land exceeding five cents in extent, either as owner or as tenant in possession on which he could erect a homestead, and--

(a) who has been permitted with or without an obligation to pay rent by a person in lawful possession of any land to have the use and occupation of a portion of such land for the purpose of erecting a homestead; or

(b) who has been permitted by a person in lawful occupation of land to occupy, with or without an obligation to pay rent, a hut belonging to such person and situate in the said land, but otherwise has no interest in the land, and "kudikidappu" means the land and the

homestead or the hut so permitted to be erected or occupied together with the easements attached thereto:

Provided that a person who, on the 1st day of April 1967, was inoccupation of any land and the homestead thereon, or in occupation of a hut belonging to any other person, and who continued to be in such occupation on the date of publication of the Kerala Land Reforms (Amendment) Bill, 1968, in the Gazette shall be deemed to be in occupation of such land and homestead, or hut as the case may be, with permission so required under this clause.

* * * *

Clause (b) above,--which is the relevant clause having application--repeats the requirement that the hut must belong to the person who permitted its occupation, and the proviso thereto is only germane to the question of permission for the occupation, and not to the right to the hut. We cannot read, as Counsel for the appellant would have us read, the proviso as destructive of, or as abridging the requirement as to the right to the hut. The claim of the appellant that he is a ''kudikidappukaran'' has no force.

4. We dismiss this appeal with costs. We have dealt with this matter on the assumption that the proceedings are governed by Act V/1969 and shall not be understood as having expressed the opinion that the said Act has retrospective operation so as to govern the proceedings initiated before its commencement.