

**(1994) 12 KL CK 0023**

**High Court Of Kerala**

**Case No:** SA No. 415 and 274 of 1991

Gopalakrishnan Nair

APPELLANT

Vs

Koshy Sosamma and Others

RESPONDENT

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**Date of Decision:** Dec. 20, 1994

**Acts Referred:**

- Kerala Land Reforms Act, 1963 - Section 125(3), 2(25)

**Citation:** (1995) 1 KLJ 51

**Hon'ble Judges:** M.M. Pareed Pillay, Acting C.J.; T.V. Ramakrishnan, J; P. Shanmugam, J

**Bench:** Full Bench

**Advocate:** V.N. Achutha Kurup, for the Appellant; K.C. John (Sr. Advocate) and K.K. John, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Pareed Pillay, AG. C.J.

1. Appellant's claim of kudikidappu though allowed by the Land Tribunal in reference u/s 125 (3) of the Kerala Land Reforms Act was reversed by the District Judge, Pathanamthitta. One of the questions raised before us is as to whether fractional interest of the appellant in other properties can disentitle him from claiming kudikidappu right in the schedule property. His contention is that the District Judge went wrong in rejecting the plea of kudikidappu of the appellant on the ground that he has interest in other properties evidenced by Exts. B-16 and B-17. Appellant's contention is that he has only co-ownership right over the properties covered by Exts. B-16 and B-17 and that being the position his claim of kudikidappu cannot be defeated.

2. In Ramakrishnan & Others V. Kumaran & Others (1980 K.L.N. 19) a Division Bench of this Court held that the mere fact that the defendants have an undivided fractional interest in some property owned by them in common with others and over which they have absolutely no manner of actual possession or control will not

disqualify them from claiming the status of kudikidappukars u/s 2 (25) of the Kerala Land Reforms Act. In *Vasistha Vadhyar V. Mohini Bai* (1975 KLT 365) a Division Bench of this Court held that since a member of a joint family has no ownership or possession exclusively on any portion of the property belonging to the joint family the fact that the person owns land with others as joint tenant cannot disentitle him from the protection extended u/s 2 (25) of the Act. In *Chakkara Ramakrishnan's* case (1980 K.L.N 19) *Vasistha Vadhyar's* case was approved.

3. The position cannot be much different in the case of co-owners also. A co-owner has only a share in the common property. He has no right to exclude other co-owners from possession. As a co-owner has right to be in possession of every part and parcel of the common property one of the co-owners cannot get exclusive possession of the property either in part or whole except on agreement among them or by recourse to proceedings like partition suit. It may not always be possible for a co-owner on his own to go on construction in the property held by him in co-ownership along with others.

4. From the definition of "Kudikidappukaran" under the Act, it can be discerned that a person will not be a kudikidappukaran only if he has a homestead or any land exceeding the area specified therein. To hold that a person is outside the ambit of the above provision four things will have to be established.

They are :

- (i) he has a homestead, or has land in excess of the area specified therein;
- (ii) he possesses it;
- (iii) he has it and he possesses it either as owner or as a tenant; and
- (iv) he can erect a homestead thereon.

Contention of the respondent that it would certainly be possible for the appellant to erect a homestead in the co-ownership property as he has every legal right in it is not tenable as his right to the same is not exclusive or absolute. As it would not be possible for one of the co-owners to erect a homestead in the co-ownership property with impunity, we cannot hold that mere interest in co-ownership property would disentitle the person to claim kudikidappu right on his land-lord's property. As a co-owner has only a co-ordinate interest along with other co-owners in the co-ownership property, he has no right to exclude the other co-owners from possession of the same. As co-owners' right to the property applies to every part and parcel of the common property it would not be possible for one of them in normal circumstances to erect a homestead unilaterally and against the opposition by other co-owners. That being the position, we hold that merely because a person has co-ownership right in other property exceeding the limit prescribed u/s 2 (25) of the Act it will not disentitle him from claiming kudikidappu right in his land-lord's property. The building in this case was rented out to the appellant on 23-1-1963 as

per Ext. B-5. The building alone was let out for a monthly rent of Rs. 2/- for the purpose of conducting tea-shop. Ext. B-5 has been found to be genuine by all the Courts including this Court in S.A. Nos. 308 and 318 of 1981. Ext. B-15 shows that 20 cents of property belonging to the appellant and his wife was assigned to their son during the pendency of the suit. Ext. B-16 shows that it is a partition deed between the appellant, his brother, appellant's wife and son. It takes in an extent of 55 cents of property. Appellant, his wife and son got  $27\frac{1}{2}$  cents of property as per Ext. B. 16. The twenty cents of property and building mentioned in Ext. B-15 is on the northern side of the  $27\frac{1}{2}$  cents covered by Ext. B-16. Both the plots lie contiguous. There is no pleading that the said plots are not fit enough to construct any homestead. As there is cogent evidence in the case to hold that the appellant is having properties in his possession more than what has been stipulated u/s 2.(25) of the Act we hold that he is not entitled to kudikidappu right in the property in question.

We see no merit in the Second Appeals. Both the Second Appeals are dismissed with costs.