

(1980) 02 KL CK 0022

High Court Of Kerala

Case No: S. A. 1103 of 1976

Parameswaran Subramonian

APPELLANT

Vs

Krishnan Ananthan

RESPONDENT

Date of Decision: Feb. 13, 1980**Acts Referred:**

- Kerala Land Reforms Act, 1963 - Section 4A, 4A(1)

Hon'ble Judges: Subramonian Poti, J; Janaki Amma, J**Bench:** Division Bench**Advocate:** S.A. Nagendran, N.N.D. Pillai and K.P. Subhagamoni, for the Appellant; P. Sukumaran Nair and A.K. Chinnan, for the Respondent**Final Decision:** Allowed

Judgement

Subramonian Poti, J.

Our learned brother Bhaskaran, J. has referred this appeal to the Division Bench in view of the importance of the question which calls for decision in this case. That is concerned with the scope of Section 4A of the Kerala Land Reforms Act 1 of 1964. Under that provision a mortgagee with possession of land or the lessee of a mortgagee of such land shall be deemed to be a tenant if such mortgagee or lessee was holding the land comprised in the mortgage for a continuous period of not less than 50 years immediately preceding the commencement of the Kerala Land Reforms (Amendment) Act, 1969. This Court has held that the provision will apply only to the case of mortgagees or lessees who were in possession on 1st January 1970. If they are in such possession and it is further shown that they have been holding the land continuously for more than 50 years, it would appear from the Section that they must be deemed to be tenants. In the case before us the question concerns the claim by a mortgagee in possession under a mortgage of 1094 who took a fresh mortgage from the mortgagor in 1098 under the terms of which the earlier mortgage was extinguished. If he and his predecessor-in-interest are taken to be holding the property even under the mortgage of 1094, he may be considered

to be in possession continuously for more than 50 years. If, on the other hand, the possession under the mortgage of 1098 alone is to be taken note of, then Section 4A would not apply as the period would be less than 50 years. In that event the Defendant in the suit who is the Appellant here must succeed in his contention that no final decree for redemption should be passed in the suit since the Defendant might be found to be a tenant entitled to fixity of tenure.

2. Ext. P-2 is the mortgage of 1098 M.E. taken by the predecessor-in-interest of the Defendant in the redemption suit here. That mortgage mentions demise of the same property under the earlier mortgage of 1094 the mortgage amount whereunder was a sum of fanams 700 and further mentions the mortgage of 1098 having been executed for 1400 fanams. The mortgage also shows that the person who took it was in possession under the mortgage of 1094 and half of the consideration of the mortgage was towards the discharge of the mortgage debt of 1094. Evidently therefore what happened was that the mortgage of the property mortgaged in 1094 for a sum of fanams 700, while in possession, took a fresh mortgage Ext. P-2 for 1400 fanams part of the consideration for which went in satisfaction of his earlier mortgage and he continued in possession under Ext. P-2 mortgage. In these circumstances, if the earlier mortgage could be taken into account, Section 4A will be available to the Defendant to claim that he is a deemed tenant and therefore not liable to be redeemed. If, on the other hand, he cannot be taken to be in possession under the earlier mortgage in view of a fresh mortgage having been taken in 1098 from the same mortgagor, Section 4A would not be available.

3. We may extract Section 4A which reads as under:

4A. Certain mortgagees and lessees of mortgagees to be deemed tenants.--(1) 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, a mortgagee with possession of land, other than land principally planted with rubber, coffee, tea or cardamom, or the lessee of a mortgagee of such land shall be deemed to be a tenant if--

(a) the mortgagee or lessee was holding the land comprised in the mortgage for a continuous period of not less than fifty years immediately preceding the commencement of the Kerala Land Reforms (Amendment) Act, 1969; or

(b) the mortgagee or lessee has constructed a building for his own residence in the land comprised in the mortgage and he was occupying such, building for such purpose for a continuous period of not less than twenty years immediately preceding such commencement:

Provided that a mortgagee or lessee falling under this Clause shall not be deemed to be a tenant if he, or, where he is a member of a family, such family was holding any other land exceeding two acres in extent on the date of publication of the Kerala

Land Reforms (Amendment) Bill, 1958, in the Gazette; or

(c) the land comprised in the mortgage was waste land at the time of mortgage or land to which the Madras Preservation of Private Forests Act, 1949, would have applied if that Act had been in force at the time of mortgage, and--

(i) the mortgagee or lessee was holding such land for a continuous period of not less than thirty years immediately preceding the commencement of the Kerala Land Reforms (Amendment) Act, 1969; and

(ii) the mortgagee or lessee has effected substantial improvements on such land before such commencement.

Explanation I.--For the purposes of this sub-section, in computing the period of continuous possession or occupation by a lessee, the period during which the mortgagee was in possession or occupation, as the case may be, shall also be taken into account.

Explanation II.--In computing the period of fifty years referred to in Clause (a) or the period of thirty years referred to in Clause (c), the period during which the predecessor-in-interest or predecessors-in-interest of the mortgagee or lessee was or were holding the property shall also be taken into account.

Explanation III.--For the purposes of Clause (6),--

(i) "mortgagee" or "lessee" shall include a predecessor-in-interest of the mortgagee or lessee, as the case may be:

(ii) "building" includes a hut.

Explanation IV.--In computing the period of twenty years referred to in Clause (b), occupation of the building by any member of the family of the mortgagee or lessee for residential purpose shall be deemed to be occupation by the mortgagee or lessee, as the case may be, for such purpose.

Explanation V.--In calculating the extent of land held by a family for the purposes of Clause (b), all the lands held individually by the members of the family or jointly by some or all of the members of such family shall be deemed to be held by the family.

Explanation VI.--For the purposes of Sub-clause (ii) of Clause (c),--

(i) improvements made by the mortgagee shall be deemed to be improvements made by the lessee;

(ii) "mortgagee" or "lessee" shall include a predecessor-in-interest of the mortgagee or lessee, as the case may be,

Explanation VII.--For the purposes of Clause (c),

(i) improvements shall be deemed to be substantial improvements if the value thereof on the date of commencement of the Kerala Land Reforms (Amendment) Act, 1969, is not less than twenty-five per cent of the market value of the land on that date;

(ii) a land shall be deemed to be waste land notwithstanding the existence of scattered trees thereon.

(2) Nothing contained in Sub-section (1) shall apply to a lessee if the lease was granted on or after the commencement of this Act.

The Section indicates that the requirements (leaving out matters which are not relevant for the purpose of this case) are (1) the mortgage with possession must be alive on 1st January 1970 in the sense that the mortgagee must be in possession as mortgagee on that date; (2) the mortgagee must have been holding the land comprised in the mortgage; (3) it should have been so held for a continuous period of not less than 50 years immediately preceding 1st January 1970. In the case before us there is a mortgagee with possession evidenced by Ext. P-2. That mortgagee was in possession as mortgagee on 1st January 1970. He and his predecessor-in-interest were in continuous possession for more than 50 years though such possession for the entire period of 50 years was not under Ext. P-2 mortgage but an earlier mortgage. The question is whether the fact that the possession for the entire period of 50 years was not necessarily under the mortgage under which possession was held on 1st January 1970 would make any difference. According to us, it would not, for, the Section does not require possession under the same mortgage for a continuous period of 50 years. It appears to us that it will be against the spirit of the legislation to say otherwise. What is protected is the right of a mortgagee provided he satisfies certain conditions. One of them is continuous holding for more than 50 years as on 1st January 1970. A person who has taken mortgage of the property and who later advances a further amount and takes a fresh mortgage from the same mortgagor adjusting the mortgage amount under the original mortgage, continues as a mortgagee. One sees no reason why such a person should be excluded from the benefit of Section 4A. It is difficult to envisage such a situation as falling outside the scheme of Section 4A. Therefore, neither the plain language nor the apparent purpose of the provision compels us to adopt the interpretation which the learned Counsel for the Respondents, Sri Sukumaran Nair urges before us. We are of the view that when the Defendant has been in possession under mortgage all along for more than 50 years, he is entitled to the benefit of Section 4A.

4. Our attention has been drawn by learned Counsel to an unreported judgment of the Full Bench of this Court in S.A. No. 963 of 1973 and 1228 of 1974 Now Reported in ILR 1980 (1) Ker 667 . The main judgment in that case is in S.A. No. 963 of 1973. The question which arose for decision by the Full Bench is considered in that judgment. The question there was whether a person who seeks the benefit of Section 4A must have been in possession on 1st January 1970 as a mortgagee with

possession. It was contended in that case, relying on a decision of the Supreme Court in [Prithi Nath Singh and Others Vs. Suraj Ahir and Others,](#) , that when the mortgage money is validly tendered or deposited in Court pursuant to a decree for redemption the mortgage comes to an end, the right of the mortgagee also ceases and therefore when such an event has happened in a case the possession of the person in possession thereafter cannot be of that of a mortgagee in possession. Therefore even though he may continue in possession under the mortgage whether he would be entitled to the benefit of Section 4A was the question that arose there. This Court held that the character of his possession having been changed by a valid tender or a deposit of the mortgage amount pursuant to a decree even though he was a mortgagee with possession all along, he ceased to possess that character on such tender or deposit. Consequently he would not be a person entitled to the benefit of Section 4A. That of course has no application to the facts of this case. This rule was applied in the judgment in S.A. 1228 of 1974 disposed of along with S.A. 963 of 1973. But the learned Counsel for the Respondents pointing to the facts in S.A. 1228 of 1974 contends that on the facts the rule laid down in that case must be found to be of application here too. According to Counsel that was a case where there was an earlier mortgage, that mortgage was extinguished, a fresh mortgage came into existence, the mortgagee in possession under the fresh mortgage claimed the benefit of Section 4A and that was denied to him. We may say in this context that both of us were parties to the Full Bench decision. In order to understand the facts in S.A. 1228 of 1974 we called for the records of that appeal available in this Court, for, the facts are not quite clear from the judgment. The question which is before us was not as such dealt with in that case. On an observation in that judgment reliance has been placed by the Counsel for the Respondents. What is said in that case after referring to a partition deed Ext. P-1 is this: "The possession under the new mortgage had come into existence within 50 years of 1st January 1970. Section 4A is therefore not attracted." That was a case where one Krishnan Narayanan was a mortgagee of a property. The jenmam right belonged to his tarwad. His heirs were his sons and nephews--Makkathayam and Marumakkathayam heirs. A partition was entered into in 1102 between the heirs of Krishnan Narayanan. Ext. P-1 was the partition in that case. Since the tarwad owned the jenmam right also, it appears that" the jenmam right also was partitioned between the heirs. The mortgage right over the property was also taken into account in determining the rights of parties. To some of the Makkathayam heirs the mortgage rights were allotted giving the right to redeem such mortgage to the Marumakkathayam heirs. The suit in that case was by the purchaser of the janmam right from the Marumakkathayam heirs. There was no question in that case as to whether the predecessor-in-interest of the Makkathayam heirs could be said to have been in possession under an earlier mortgage. The earlier mortgage was not necessarily held by the predecessor-in-interest of the Makkathayam heirs only for, Krishnan Narayanan was the predecessor-in-interest of the Marumakkathayam heirs also. The question which had arisen before us here did not arise in that form in

the Full Bench case and the Full Bench did not purport to deal with it. In these circumstances we see no principle laid down in the Full Bench decision which would persuade us to take a different view here. In the circumstances the claim of the Appellant here that he is a deemed tenant must be accepted. In that view the suit has to be dismissed. The appeal is allowed. Parties will suffer costs in this appeal.