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High Court Of Kerala

Case No: C.R.P. No. 842 of 1979

Thomas Mathew		APPELLANT
	Vs	
Joseph Mani and another		RESPONDENT

Date of Decision: June 22, 1981

Acts Referred:

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

Citation: (1982) KLJ 478

Hon'ble Judges: K. Bhaskaran, J

Bench: Single Bench

Advocate: T.R. Raman Pillai, T. R. Ramachandran Nair and C.C. Thomas, for the Appellant; S. Parameswaran, R. Nithyanandan and Government Pleader, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

K. Bhaskaran, J.

By its judgment dated 28-12-1978 made in L.R.A.S. No. 939 of 1979 disposed of along with L.R.A.S. No. 1071 of 1976 the Appellate Authority (Land Reforms), Ernakulam, reversed the order of the Land Tribunal, Vaikom, dated 5-4-1976, made in O.A. No. 686 of 1976 (previously numbered as O.A. No. 6 of 1971) which was an application presented by the petitioner Sri Thomas Mathew for the purchase of the kudikidappu in his occupation in the land in the lawful possession of the 1st Respondent Sri Joseph Mani u/s 80B of the Kerala Land Reforms Act, Act 1 of 1964, as amended by Act 35 of 1969, hereinafter referred to as the Act. The revision is directed against the judgment of the Appellate Authority. The 1st Respondent in his written statement had stated, inter alia, that the petitioner was not a kudikidappukaran, the cost of construction of the building was more than Rs. 9000/-, and the entrustment of the building to the petitioner was on a monthly rent of Rs. 20|-. This was as against the contention of the petitioner that the cost of the structure at the time of its construction would not have exceeded Rs. 200/-. Ext.-C1

report of the Commissioner showed that the cost of the original construction was Rs. 373.71; the cost of modification and additions made to the structure subsequently, like cementing the floor, tiling the roof and the construction of the kitchen, was Rs. 193|-, bringing the total costs of construction to Rs. 566.71; and the rent it could have yielded at the time of construction was Rs. 2/- per month. Accepting the above date furnished by the Commissioner, the Land Tribunal on 3-8-1972 passed preliminary order allowing the petitioner to purchase the kudikidappu. The appeal L. R. A. S. No. 1386 of 1972 filed by the 1st respondent against the preliminary finding was dismissed by the Appellate Authority following the ruling in Sankaran v. Kochukutty (1974 KLT 563). It was thereafter that the Land Tribunal passed the final order dated 5-4-1976 allowing the petitioner to purchase 10 cents of land including the structure and the improvements thereon. The 1st respondent preferred L.R.A.S. No. 939 of 1976 aggrieved by the finding that the structure was a hut, and the petitioner was Kudikidappukaran; and the petitioner filed L.R.A.S. No. 1071 of 1976 as he felt aggrieved about the purchase price fixed. The appellate authority disposed of the two appeals as per its common judgment dated 28-12-1978; L.R.A.S. No. 939 of 1976 filed by the 1st Respondent was allowed resulting in the dismissal of the petitioner''s application O.A. No. 686 of 1976; and L.R.A.S. No. 1071 of 1976 was dismissed without considering the merits of the case in view of the dismissal of O.A. No. 686 of 1976.

2. Two questions of general importance arise for decision in this revision (1) in case where there had been additions and modifications made to the dwelling house after its original construction, what should be the method of valuing it to fix its cost at the time of the construction in terms of clause (a) (i) of Explanation II to Section 2(25) of the Act; and (2) what are the criteria for fixing the rent that the dwelling house could have yielded at the time of its construction in terms of clause (a)(ii) of Explanation II to section 2(25) of the Act in a case where there had been modification and additions to it after its original construction.

3. Sri T.R. Raman Pillai, the counsel for the Petitioner, submitted, purporting to place reliance on the decision in Lakshmi''s case (Lakshmi v. Kunhipperachan - 1978 KLT 1922) that it was only the cost of the construction of the original building that had to be taken into account for the purpose of fixing the cost in terms of section 2(25) (a)(i) of the Act. Sri S. Parameswaran, the counsel for the 1st Respondent, on the other hand, maintained, purporting to place reliance on the decision in Mammu''s case (Mammu v. Ali - 1978 KLT 629), that the cost had to be arrived at taking into account not only the cost of the original construction, but also that of all the additions and modifications to it, including those effected even after the person concerned was inducted into occupation.

4. The extreme stand taken either by the petitioner or the 1st respondent does not appear to represent the correct position in law on the point, as settled by the decision of the Full Bench of this Court in Cornel v. Rodrigues (1981 KLT 302 1981 (1)

ILR Kerala 669). The Full Bench did not find any conflict in the ratio of the decisions in Lakshmi''s case and Mammu''s case. Assuming that there appeared to exist some apparent conflict between the two decisions, the Full Bench has resolved it by making a reconciliatory approach and giving a harmonious construction to the relevant provisions of the section to give effect to the true intention of the legislature. In the light of the guideline given by the Full Bench, the cost of the dwelling house has to be assessed as at the time of its construction; if the construction had been at different stages prior to the granting of permission to occupy it, the cost of construction has to be reckoned with reference to the different periods of construction. This principle laid down by the full Bench with respect to construction at different stages could reasonably be presumed to extend to cases of modifications and additions to the structure effected before it was permitted to be occupied by another. In an attempt to convince me that for the purpose of clause (a)(ii) of Explanation II to Section 2 (25) of the Act, the structure has to be valued as on the date on which permission to occupy was granted, Sri Parameswaran drew my attention to the following passage in paragraph 5 of the Full Bench Decision at page 305 of the report:
The definition requires that the building permitted to the occupied must be a hut on the date of such permission. The crucial date with reference to which whether a building is a hut or not is to be decided is the date on which permission to occupy was granted.

I have not however, been persuaded to agree to the inference sought to be drawn by Sri Parameswaran. It has been held in paragraph 11 of the Judgment in Lakshmi''s case:

11. If a reasonable interpretation, bearing the legislative intent in mind, is given, the expression "cost at the time of construction" has to be construed to be the cost at the time of the original construction of the structure.

When the full Bench in paragraph''s of its judgment said:

We do not find any conflict in the ratio of the decisions aforesaid. (Lakshmi''s case - 1978 KLT 122 and Mammu''s case - 1978 KLT 629).

in the absence of anything contrary thereto mentioned, or at least indicated anywhere in the Judgment, it has to be taken that the Full Bench intended the cost of construction to mean the cost at the time of the original construction of the structure as laid down in Lakshmi''s case. The Full Bench, however, hastened to add:

If the construction in any particular case had been at different stages prior to the permission to occupy, the cost of construction is to be reckoned with reference to the different periods of construction.

Thus making the position clear that the cost of construction to be assessed is that of the structure that existed immediately prior to the permission to occupy it, and in

case the construction was at different stages, it has to be reckoned with reference to the different periods of construction. No doubt as Shri Parameswaran has repeatedly pointed out, the Full Bench should be presumed to have approved the view expressed in Mammu''s case:

The hut there must be understood to be the hut permitted to be occupied and this can be understood only to mean the structure as it is at the time of permission. If the structure at the time of permission is not a hut as per the definition of the word "hut" in Explanation II it is not possible to take a part of structure alone into consideration in finding out whether it is a hut or not.

There certainly is no conflict between this view on the one hand, and the guidelines given in paragraph 5 of the Full Bench decision on the other. The emphasis in the passage in Mamu''s case relied on by Sri Parameswaran is on the identity and description of the structure to be valued for the purpose of determining the cost of construction thereof; and the stress in the guideline in paragraph 5 of the Full Bench decision is on the point or points of time with reference to which the cost of the dwelling house at the time of its construction has to be reckoned. To take an illustration; on the construction of "dwelling house" the expenses incurred was Rs. 300/- in 1960, Rs. 400 in 1965 and Rs. 500/- in 1970, and it was permitted to be occupied by another in 1967; the cost of the dwelling house at the time of construction for the purpose of clause (a)(i) of Explanation II to Section 2(25) of the Act, in the light of the guideline given in paragraph 5 of the Full Bench decision is Rs. 700/-; and it being a "hut," the person permitted to occupy it is a kudikidappukaran. It may be noticed that the amount of Rs. 400/- spent at the second stage in 1965, before permission was granted in 1967, was included in the cost of the dwelling house; but the amount of Rs. 500/- spent at the third stage in 1970, -- after the grant of permission, is not included in it, Different consideration might have probably arisen if it was a case of complete reconstruction; the parties have no such case here.

5. The second question that arises for decision is the one relating to the point of time with reference to which the rent the dwelling house at the time of its construction could have yielded, where the construction had more stages than one. This does not call for much of a discussion, as in regard to such cases the Full Bench in paragraph 5 of the judgment has clearly laid down; "the rental yield is to be reckoned with reference to the time when the construction had been completed. "The completion, of course, has to be understood to mean the completion as it stood immediately prior to the granting of permission to occupy, 3 for, as already noticed construction after such permission is not relevant for determining the rent that the dwelling house could have yielded in terms of clause (a)(ii) of Explanation 11 to section 2(25) of the Act.

6. Now reverting to the facts of the case, the Appellate Authority is seen to have committed some basic errors while allowing the appeal and dismissing the original

application for purchase of kudikidappu in reversal of the order of the Land Tribunal, holding that the dwelling house was not a hut; in the first place it jumped to the conclusion, that the dwelling house was not a hut, merely for the reason that in the counter affidavit filed on 5-5-1971 the petitioner had stated that he occupied the dwelling house on 12-12-1965 agreeing to pay rent at Rs. 10/- per month, without ascertaining for itself what the cost of the dwelling house at the time of its construction was, if it were to differ from the finding of the Land Tribunal that it was inclusive of the additions and modifications made till the grant of permission to the Petitioner to occupy it, Rs. 566.71 Thus the Appellate Authority over looked the legal position that where the person permitted to occupy the dwelling house satisfied the requirements of the main part of sub-section (25) of Section 2of the Act, for claiming kudikidappu right, it would be sufficient for him to establish either that the cost of the dwelling house at the time of its construction did not exceed Rs. 750/- or that it could have yielded at the time of construction a monthly rent not exceeding Rs. 5/-. Evidently the Appellate Authority was under the erroneous impression that if one of these conditions was not satisfied, the dwelling house would not be a hut within the meaning of Explanation II to section 2(25) of the Act. In the second place, it took it for granted that the rent that was agreed to be paid or was being paid by the person permitted to occupy the dwelling house was the rent that the dwelling house could have yielded at the time of its construction. The relevant time in terms of clause (a)(ii) of Explanation II to Section 2(25) of the Act is the time of construction, not the time of occupation; and as clarified by the Full Bench that in cases where the construction had been at different stages prior to the permission to occupy the rental yield has to be reckoned with reference to the time when the construction had been completed. These are the only two paints of time with reference to which the rental yield of the dwelling house has to be reckoned, not the time of permission to occupy it, unless it coincides with the time of construction or completion of construction if it was in different stages.

7. Sri Parameswaran then submitted that the structure has been valued at a much higher figure in the Revenue Inspector''s report for fixation of compensation to be paid to the 1st Respondent, and therefore, that should be adopted as the cost of construction of the dwelling house to decide whether it was a hut or not. For one thing, the valuation for the purpose of payment of compensation is required to be made as on the date of the preparation of the record in that behalf, whereas the cost of dwelling house has to be ascertained for the purpose of deciding whether it was a hut or not with reference to the time of its construction. For another thing, we are in this revision concerned only with the order allowing the purchase, not with the records prepared for payment of compensation to the landowner in implementation of the order for purchase. This contention has, therefore, only to be rejected; and I do so. Sri Parameswaran lastly contended that in column 3 of the application submitted u/s 80Bof the Act the petitioner had shown (homestead) in answer to the question whether it was for purchasing a hut or a homestead thereby

making it appear that the application was one for the purchase of homestead, whereas no homestead, but only a hut belonging to the land owner, existed in the property. In support of his argument that the petitioner was not entitled to the relief when he had not in his application specifically shown that the application was for the purchase of a hut, he placed reliance on the decision in Bhagat Singh v. Jaswant Singh (1961(1) KLR 539). I cannot agree to this argument First of all it is a hyper technical argument raised only during the course of his argument by the counsel, without having been raised either before the Land Tribunal or the Appellate Authority. If the argument is that the party which did not plead is not entitled to a relief, that rule of procedure should be equally applicable in the case of the 1st respondent also in as much as his pleading did not contain anything with reference to the petitioner having shown the structure to be purchased as ''bhavanam''. That apart, no miscarriage of justice appears to have resulted from this misdescription, if I may call it so, in as much as both before the Land Tribunal and the Appellate Authority the parties hotely contested the matter on the basis that what was sought to be purchased was the hut built by another, permitted to be occupied by the Kudikidappukaran. This contention also should, therefore, fail.

The result, therefore, is that the revision is allowed, the judgment of the Appellate Authority is set aside and the matter is remanded to that authority for fresh disposal. The Appellate Authority should decide the question as to what the cost of the dwelling house was at the time of its construction and the rent it could have yielded at the time of construction in the light of the guideline given in this order, and after entering findings on these questions dispose of the matter according to law and in the light of the observations contained in this order. In the peculiar circumstances of the case there will be no order as to costs.