(1993) 06 KL CK 0061

High Court Of Kerala

Case No: S.A. No. 90 of 1993-B

Ganapathy Acharya and Another		APPELLANT
	Vs	
Bhaskara and Others		RESPONDENT

Date of Decision: June 2, 1993

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11
- Kerala Buildings (Lease and Rent Control) Act, 1965 - Section 11(2), 11(3), 2(57)
- Kerala Land Reforms Act, 1963 - Section 108A, 125(3), 2(8), 72, 72B

Citation: (1993) 2 KLJ 540

Hon'ble Judges: T.L. Viswanatha Iyer, J

Bench: Single Bench

Advocate: T.P. Kelu Nambiar, P.G. Rajagopalan and P.C. Sasidharan, for the Appellant; K.G. Gowrishankar Rai, for the Respondent

Final Decision: Dismissed

Judgement

T.L. Viswanatha Iyer, J.

The Plaintiffs are the Appellants. The suit was one for declaration of title and for consequential injunction restraining the Defendants from interferring with the Plaintiffs-possession of the plaint A schedule property.

2. The property, which is a garden land with an extent of about eighty cents, and a building therein, in which the Plaintiffs are residing, admittedly belonged to one Sivaramayya, the father of Defendants 1 to 3. The property including the building was in the possession of the plaintifts under a Chalgeni lease. The lease was terminated and a suit O.S. No. 52 of 1955 on the file of the Munsiff''s Court, Kasargod, was filed by Sivaramayya for recovery of possession of the property. The suit was decreed as prayed for on 9th June 1955, copies of the decree and the judgment being Exts. A-4 and A-5. It is in relation to what happened subsequently that the dispute between the parties lies.

3. The Plaintiffs claim that there was a fresh lease of the entire property including the garden land and the building on 5th June 1957, which was actually a renewal of the earlier Chalgeni lease, and that they continued in possession thereunder. On the other hand, the case of the fourth Defendant who is an assignee of the rights of Sivaramayya from Defendants 1 to 3 is that when steps to execute the decree in O.S. No. 52 of 1955 were taken, the parties settled the matter between them, by which the building was leased to the Plaintiffs and they are in possession thereof under the new arrangement. The garden land was surrendered and was in the possession of Defendants 1 to 3, and the 4th Defendant, after the assignment in his favour. Defendants 1 to 3 filed R.C.P. No. 61 of 1974 in the Rent Control Court, Kasargod u/s 11(2) and (3) of the Kerala Buildings (Lease and Rent Control) Act, 1965 (the Rent Control Act) for a direction to the Plaintiffs to put them in possession of the building. The Plaintiffs contended in the first instance that they were in possession, not merely of the building, but also of the adjacent land under the Chalgeni lease of 1957. The question was referred to the Land Tribunal for decision u/s 125(3) of the Land Reforms Act (hereinafter referred to as the K.L.R. Act) and the Plaintiffs'' case was found against After this, finding was returned, the Plaintiffs'' raised a further plea that they were kudkidappukars in respect of the building, and therefore entitled to purchase the same u/s 80B of the said Act. That question was also found against the Plaintiffs on reference u/s 125(3). The Rent Control Cour thereafter ordered eviction u/s 11(2) on the ground of wilful default in payment of the rent, a copy of the order being Ext. B-4 dated 28th November 1981. This order was affirmed in appeal by the appellate authority by the order Ext. B-5 dated 25th February 1983 and by the revisional court by the order Ext. B-6 dated 21st July 1987. The Defendants'' claim for eviction on the ground of bona fide need for own occupation was not accepted by the Rent Control Court and this decision was not challenged by them in further appeal or revision. The Plaintiffs thereupon deposited the arrears of rent due and got the order of eviction vacated u/s 11(2)(c) of the Rent Control Act. A copy of this order is Ext. B-7. The effect of these proceedings is that the Land-Tribunal had found against the Plaintiffs regarding the chalgeni lease of the entire property and the kudikidappu rights set up by them.

4. The Plaintiffs had started parallel proceedings u/s 72-B of the K.L.R. Act for purchase of the landlord''s rights over the entire property by filing O.A. No. 2444 of 1976 before the Land Tribunal. Defendants 1 to 3 contested the application putting forward the settlement of the year 1957 and their being in possession of the property by virtue thereof, confining the lease to the building alone. This was accepted by the Land Tribunal by the order Ext. B-1 dated 9th May 1978 whieh was affirmed in appeal by the order Ext. B-2 dated 7th September 1983. It was confirmed in revision by this Court by the order Ext. B-3 dated 18th June 1987. It was observed by this Court that there was evidence in the case to show that the Defendants were in possession of the property after 1957, and that in all probability, the Plaintiffs might have surrendered the property to them "without understanding their

valuable rights in the property". The position as it emanates from these proceedings before the Land Tribunal under the K.L.R. Act is that the Plaintiffs were held to be not in possession of the suit, property their possession being confined to the house alone.

5. In the present suit, which the Plaintiffs have filed on the allegation of an attempt at trespass into the property by Defendants 1 to 3, and the purchaser from them, namely the 4th Defendant they have set up two alternate contentions. The first contention is that they are in possession under a fresh lease dated 5th June 1957 granted by Sivaramayya. The other contention is that they have perfected title to the property by adverse possession, and therefore their title thereto has to be declared, with consequential injunction protecting their possession.

6. The 4th Defendant who filed written statement in the suit, Defendants 1 to 3 having sold away their rights, contested with the plea that these questions of tenancy and possession had been the subject of decision in the proceedings before the Land Tribunal as also in the Rent Control proceedings and therefore, were not open for fresh consideration in the present suit. They claimed that the orders Exts. B-1 to B-3 in the proceedings under the K.L.R. Act and Exts. B-4 to B-6 in the proceedings for eviction of the building under the Rent Control Act constituted res judicata to the present suit. These documents had already been produced in response to the application for temporary injunction, and the 4th Defendant prayed that they may be treated and read as part of the written statement itself.

7. The trial court held that the orders under the Rent Control Act did not constitute res judicata, as according to it, they were concerned only with the relationship of landlord and tenant in respect of the building. The court also held that the finding entered in the proceedings under the K.L.R. Act did not also constitute res judicata inasmuch as the question of possession of the property was not, according to it, directly and substantially in issue in those, proceedings. The court took the view that the 4th Defendant had no case that possession of the property had been taken by the Defendants either under the settlement of 1957 or otherwise, and that the possession of the Plaintiffs for twelve years from the date of the decree ripened into full title by adverse possession. The suit was accordingly decreed.

8. The lower appellate court however took a different view of Exts. B-1 to B-3, though it concurred with the trial court on the effect of Exts. B-4 to B-6. He held that the question of possession was very much in issue in the pro-ceedings under the K.L.R. Act, and therefore the finding therein that the Plaintiffs were not in possession of the garden portion of the land, constituted res judicata and precluded them from claiming prescription of title by adverse possession. The suit was accordingly dismissed in reversal of the decree of the trial court. It is this decree and judgment that is challenged in the Second Appeal by the Plaintiffs.

9. Counsel for the Appellants submitted that possession of the property had not been taken in execution of the decree in O.S. No. 52 of 1955. The 4th Defendant had not set up any plea, nor adduced any evidence, as to how Sivaramayya or his successors came into possession of the property after the decree in O.S. No. 52 of 1955. The Land Tribunal was only concerned with the question of tenancy, and any finding regarding possession cannot constitute res judicata, for which he placed reliance on the decision of Padmanabhan, J. in Mohammed v. Pathumma 1989 (2) KLT 426. As such, it was his contention that the Plaintiffs'' title to the property had become perfected by adverse possession on the expiry of twelve years from the date of the decree in O.S. No. 52 of 1955 and therefore they are entitled to the declaration and consequential injunction sought.

10. Sri. Gowrishankar Rai for the Respondents however-pointed out that the Plaintiffs had all along admitted the title of the Defendants and claimed right only as tenant under the Defendants. The question of the Plaintiffs pres-cribing for an absolute ownership right on the property did not therefore arise. He also pointed out that the question of possession was very much in issue before the Land Tribunal for the reason that only a cultivating tenant, namely a person in actual possession of, and entitled to cultivate the land, could purchase the landlord''s rights u/s 72B of the K.L.R. Act, and therefore a finding on the question of possession of the person claiming to be a cultivating tenant was essenltial while dealing with an application for purchase. The question of possession was thus directly and substantially in issue in Exts. B-1 to B-3. The finding therein against the Plaintiffs precludes them from agitating the same question over again in the present suit.

11. Sri. Rai submitted further that the Plaintiffs had obtained orders of temporary injunction from the trial court as well as from this Court, restraining the Defendants from entering the plaint schedule property. They were thereby prevented from enjoying the usufructs eversince the date of filing of the suit. He prays that the profits due to the 4th Defendant which he was prevented, from enjoying by the orders of injunction obtained on wrong premises, should be directed to be quantified and paid over to the 4th Defendant in exercise of the inherent powers of this Court.

12. What the trial court did was to hold that the proceedings under the Rent Control Act evidenced by Exts. B-4 to B-6 did not constitute res judicata inasmuch as the only question concerned was regarding the tenancy of the building. The further question as to whether the land was also included in the tenancy was not directly and substantially in issue in those proceedings, but considered incidentally, and therefore these orders will not constitute res judicata. This was accepted by the lower appellate court also. But that court held, in reversal of the trial court that the order in O. A. No. 2444 of 1976 namely Ext. B-1 and the confirmation thereof by the appellate authority and by this Court by Exts. B-2 and B-3 constituted res judicata. The finding therein that the Plaintiffs were not in possession of the property after

1957 barred consideration of the question .of tenancy, and of adverse possession based on possession, set up by the Plaintiffs.

13. The contention of Sri. Rajagopal for the Appellants Plaintiffs that Exts. B-1 to B-3 do not constitute res judicata on the question of possession is based on the decision of this Court in Mdhammed v. Pathumma 1989 (2) KLT 426. That was a case where a question of title was involved. In sup motu proceedings for assignment of the landlord''s rights the Appellant before this Court was shown as the cultivating tenant and the Respondent-Plaintiff as the land owner. The Appellant could not establish his tenancy and the suo motu proceedings were decided against him. The Plaintiff''s name happened to find a place in fhe suo motu proceedings as the land owner. Taking advantage of this position, she filed suit for recovery of possession of the property on the strength of her title alleging trespass by the Appellant. The question arose whether the description of the Respondent as the land owner in the Land Tribunal proceedings constituted res judicata. This Court answered the question in the negative for the reason that the only issue before the Land Tribunal was whether the Appellant was a cultivating tenant or not. As to who was the land owner was never an issue before the Land Tribunal. The rejection of an application for purchase cannot operate to establish the title of the person shown as the land owner therein either u/s 11 of the CPC or Section 108A of the K.L.R. Act. The order of the Land Tribunal in that case was therefore held not to constitute res judicata on the question of titje in the subsequent suit.

14. This Court was not really concerned in that case with the question whether a finding regarding possession of the property will constitute res judicata. Actually the question considered was whether the incidental appearance of the name of a person as the land owner will constitute res judicata on the question of title when the application itself stood dismissed because the alleged tenant was not able to establish his tenancy and the question of title was not gone into at all. The decision was concerned only with a situation where the tenancy was never established, leading to the dismissal of the application on that limited ground. Here the position is different. The Plaintiffs'' application was dismissed, with a definite finding that they were not in possession of the property at all after 1957.

15. It has been held by a Full Bench of this Court that a decision of the Land Tribunal rendered in proceedings under the K.L.R. Act constitutes res judicata in proceedings before the Civil Court where the same point is in issue Govindan Gopalan v. Raman Gopalan 1978 KLT 315. Before a person claiming to be a tenant can get assignment of landlord''s rights, he has to establish that he was a cultivating tenant in respect of the property. Cultivating tenant is defined in Section 2(8) of the K.L.R. Act as meaning a tenant who is in actual possession of, and is entitled to cultivate, land comprised in the holding. Actual possession of the holding is thus a sine qua non for being a cultivating tenant. u/s 72B, only a cultivating tenant is entitled to assignment of the right, title and interest of the landlord which have vested in the Government

u/s 72. Such right can vesit in the Government only if a person other than the land owner is in possession of the property, and that person, is a "tenant" as defined in Section 2(57) of the Act. If there is dispute on any of these points, necessarily the Land Tribunal has to go into the question of possession and the alleged tenancy. The application cannot be disposed of without a finding on these points. If they are found in favour of the applicant, naturally the further question will arise as to who is the landowner entitled to receive the compensation. If on the other hand, they are found against the applicant, the question as to who is the landowner does not arise for consideration. That was the position in Mohammed''s case 1989 (2) KLT 426 and that was why Padmanabhan, J. held that the question of ownership did not constitute res judicata on the facts of that case. But in either case, the questions of possession and tenancy directly and substantially arise for consideration and without any finding thereon it is not possible to proceed with the application for purchase. Such a finding is not incidental to the question of purchase. It forms the basic foundation on which alone an application for purchase u/s 72 B can lie and be disposed of. The question of tenancy as also the question of possession are therefore prime points for consideration in such an application and any finding thereon necessarily forms the crux of the matter. I cannot therefore agree with counsel for the Appellants that such a finding is only an incidental question, inasmuch as without such a finding being entered, the Land Tribunal cannot proceed with the application at all. Therefore, the question of possession which was raised in Ext. B-1 proceedings and which was necessary for being adjudicated upon, directly and substantially arose for consideration in those proceedings, and the finding thereon constitutes res judicata to the present suit. It must be remembered that the Land Tribunal, the appellate authority as well as this Court went into this question in detail in view of the contention raised by Sivaramayya, that there was a fresh arrangement entered into between the parties in June, 1957 by which the leasehold was confined to the building, and the Appellants were allowed to continue to reside therein as tenants, while putting an end to their possession of the surrounding garden portion. All the authorities have addressed themselves to the question of the Appellants'' possession and found against them on the point. The facti remains that the finding in Exts. B-1 to B-3, is thati the Plaintiffs-Appellants were not in possession of the suit property after June, 1957. If they were not in possession, the question of their prescribing title to the property by adverse possession does not arise. The lower appellate court was justified in holding that the Appellants are precluded by Exts. B-1 to B-3 from contending that they were in possession of the property and consequently in dismissing the suit

16. So far as the claim of tenancy raised by the Plaintiffs is concerned, it is squarely hit by the findings in Ext. B-1 to B-3.

17. I may also observe, though I am not basing my decision on this point, that the very claim made by the Appellants for kudikidappu rights over the building strikes at their case of possession over the compound. A kudikidappu right can be maintained

only if the claimant has no other land in his possession exceeding 10 cents in extent in a Panchayat area, on which he could erect a homestead. When the Appellants made their claim for kudikidappu right over the building, it implied that they are not in possession of any other land on which they could erect a homestead. That means they were not in possession of the surrounding compound. This is a pointer to the fact that the Appellants were not in possession of the surrounding compound. But I am not expressing any final opinion on the merits of this point nor basing my decision thereon, inasmuch as the courts below have not themselves gone into this aspect of the matter.

18. The judgment of the trial court has been rendered without a proper understanding of the scope of Exts. B-1 to B-3. I am not expressing any opinion on the question whether Exts- B-4 to B-6 could also constitute res judicata inasmuch as it is unnecessary for the purpose of this case in view of my finding regarding Exts. B-1 to B-3. The trial court''s finding that Exts. B-1 to B-3 do not constitute res judicata is based on a misunderstanding of the true legal position regarding their effect and the decision of this Court in Mohammed''s case 1989 (2) KLT 426. The decree and the judgment of the trial court were rightly reversed by the lower appellate court.

19. Though Sri. Rai has raised a contention that the Appellants may be directed to pay the mesne profits due to the fourth Defendant, I do not wish to express any opinion on this point at this juncture. I leave the said Respondent to pursue the remedy available to him for getting relief on this point.

The Second Appeal therefore fails. It is accordingly dismissed. There will be no, order as to costs.