

Krishnan Nadar Kunjan Nadar

Vs

Lakshmanan Nadar Sukumaran Nadar and Others

Civil Appeals Nos. 3977-78 of 1987

(Ranganath Misra, G. L. Oza JJ)

15.12.1987

JUDGMENT

OZA, J. -

1. Leave granted.

2. These appeals arise out of a judgment passed by High Court of Kerala in Second Appeal No. 720/80 and Civil Miscellaneous Appeal Nos. 203/04/80 which were heard together and disposed of by a common judgment wherein the High Court set aside the judgment of the lower appellate court wherein the lower appellate court had directed the remand of the matter to the trial court.

3. The facts necessary for disposal of these appeals are the Kochu Kunju Narayanan was the owner of the two items of property mentioned in Schedules A and B. He mortgaged all these properties. By Ex. D-9 of the year 1082 which is an assignment of the mortgage right regarding a portion of the property namely properties mentioned in Schedule A, the predecessor-in-interest of the first defendant got assignment. Defendant 1 in Original Suit No. 412/65 inherited the mortgage right from his father Raman Nadar who was the assignee mortgagee. By Ex. P-2 sub-mortgage deed dated January 17, 1953 the plaintiff in Original Suit No. 404/65 came into possession of the said property. Thus the first defendant in Original Suit No. 404/65 is the mortgagee and the plaintiff therein is the sub-mortgagee, owner of the two-third share of the equity of redemption. First respondent in that case who is defendant 2 in Original Suit No. 412/65 is the mortgagee. Second defendant in that case is the plaintiff in Original Suit No. 412/65 who is the owner of the one-third of the equity of redemption as stated above. Original Suit No. 404/65 was also filed by him defendant 1 in Original Suit No. 412/65. It was for redemption of Ex. P-2 sub-mortgage in favour of the plaintiff in Original Suit No. 412/65. Plaintiff in original Suit No. 412/65 is the sole defendant in that case.

4. All the three cases were tried together and Original Suit No. 412/65 was tried as the main case in which all the evidence was recorded. A common preliminary decree was passed in all the three cases on September 28, 1968. A and B Schedule properties were allowed to be portioned, plaintiff in Original Suit No. 412/65 getting one-third share and defendant 1 in that case getting two-third share. Plaintiff was directed to pay one-third of the mortgage amount and value of improvement from the year 1085 to January 17, 1953 which is the date of the sub-mortgage. First defendant was directed to pay Rs. 2500 which is the sub-mortgage amount plus value of improvements in respect of the two-third share from January 17, 1953 to redemption. Regarding B schedule property the plaintiff was directed to pay one-third of the mortgage amount and value of improvements regarding one-third share to the second defendant in Original Suit No. 412/65 who is also the first defendant in Original Suit No. 403/65. Plaintiff and defendant 1 were found entitled to get damages regarding

plaint B schedule property.

5. Second defendant in Original Suit No. 412/65 died and additional defendants 3 to 12 were impleaded as legal representatives. Additional defendant 4 in Original Suit No. 412/65 who is one of the legal representatives of the deceased second defendant filed A.S. Nos. 31 and 33 of 1969. He claimed fixity of tenure under Section 4-A(1)(a) of the Kerala Land Reforms Act as amended by Act 35 of 1969. The appeal was allowed and the case was remanded with a direction to consider the claim of tenancy also. The only question that was directed to be considered was the claim of tenancy under Section 4-A(1)(a). The preliminary decree was kept intact in other respects. In the final decree proceedings the trial court considered the claim of tenancy and found that legal representatives of defendant 2 in Original Suit No. 412/65 are not entitled to the benefits of Section 4-A(1)(a) and as such fixity of tenure. From that decision A.S. 68/78 was filed by the legal representatives of defendant 2 in Original Suit No. A.S. Nos. 77 and 78 of 1978 were filed by the plaintiff in Original Suit No. 412/65 and 404/65. A.S. No. 77 was directed against Original Suit No. 412/65 and A.S. No. 78 was against Original Suit No. 404/65. In A.S. 68/78 it was found basing on the decision in *Chellappan Pillai v. Parameswaran Pillai* (ILR 1980 (1) Ker 26) that the legal representatives of defendant 2 are entitled to fixity of tenure under Section 4-A(1)(a). Plaintiff in Original Suit No. 412/65 who was the appellant in A.S. Nos. 77 and 78 of 1978, just before these two appeals were disposed of, filed I.A. 151/80 claiming that he is also entitled to fixity of tenure in his capacity as a tenant under the provision contained in Section 4-A(1)(a). That claim was accepted by the appellate court and both the cases were remanded for consideration of the claim under Section 4-A(1)(a).

6. Second Appeal No. 720/80 was filed against the decision in A.S. No. 68/78. In the common final decree in the three cases the finding is that Ex. D-1 is only a sub-mortgage and the junction of the husband of the mortgagee who is also owner of the equity of redemption will not change the character of the document. The main contention raised by the appellant in the second appeal is that on the ground of res judicata as it is clear that the three suits involving the same properties having common issues were tried and decided by a common judgment with specific findings on issues involved in all the three cases. The appeal was only filed against the decision in Original Suit No. 412/65 and the decision in the other two cases were not appealed against and it was on this basis that before the High Court the question of res judicata was raised and it was accepted. The other question raised was the fixity of tenure under Section 4-A(1)(a) or the Kerala Land Reforms Act.

7. The High Court apart from the question of res judicata also held that the question of remand is of no consequence as on the facts as stated on the basis of sub-mortgage no advantage could be derived under Section 4-A(1)(a) and even by applying the principles decided in the case referred to above.

8. Before us these two questions only were raised. As regards the question of fixity of tenure on the basis of Section A(1)(a) the High Court came to the conclusion that the plaintiff in Original Suit No. 412/65 is only a sub-mortgagee and the sub-mortgage deed in his favour is Ex. P-2 dated January 17, 1953. He is therefore not a deemed tenant under the provisions of Section 4-A(1)(a) of the Kerala Land Reforms Act as amended. Section 4-A(1)(a) reads as under :

4-A. 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

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(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

In view of this provision it appears that the High Court was right in coming to the conclusion that as the sub-mortgage itself is Ex. P-2 dated January 17, 1953 he cannot be treated to be a deemed tenant under this provision and in this view of the matter the High Court came to the conclusion that no useful purpose will be served by remanding the matter as had been done by the appellate court and therefore High Court set aside that judgment of the appellate court. In our opinion, the High Court was right in doing so as in view of the facts found by the High Court stated above the question does not arise.

9. In this view of the matter therefore it is not necessary for us to go into the question of res judicata also. These appeals are therefore dismissed. In the circumstances of the case parties are directed to bear their own costs.

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