Othayath Lekshmy Amma and Another

Vs

Neelachinkuniyil Govindan Nair and Others

Civil Appeal No. 1924 of 1990

(B. C. Ray, S. Ratnavel Pandian JJ)

19.04.1990

JUDGMENT

S. RATNAVEL PANDIAN, J. -

1. Special leave granted.

2. The unsuccessful appellants herein have preferred this appeal against the judgment of the High Court of Kerala dated August 6, 1986 passed in E.S.A. (Execution Second Appeal) No. 15 of 1979 whereby the High Court dismissed the said appeal filed by the appellants. The relevant facts giving rise to this appeal are necessary to be recapitulated and they are as follows :

> Othayoth Gopalan Nambiar (since dead) and Othayoth Lekshmy Amma (who is appellant 1 herein) filed on Execution Application No. 556 of 1970 in Original Suit No. 817 of 1943 in the Court of the Munsiff of Badagara under Section 13-B of the Land Reforms Act, as amended by the Amending Act 35 of 1969 (hereinafter referred to as the 'Act') for restoration of possession of the properties mentioned in the schedule of the application which were sold in court auction for arrears of rent in pursuance of the decree made in O.S. No. 817 of 1943. It seems that during the pendency of the proceedings before the Munsiff, Othayoth Gopalan Nambiar died and thereafter appellant 1's son claiming to be the Karnavan of the tavazhi got himself impleaded as petitioner 3 in the said execution application, who is figuring as appellant 2 herein.

3. In order to decide the question that arise for consideration, certain salient and material facts may be recapitulated. The suit, O.S. No. 817 of 1943 was filed for recovery of arrears of rent of Rs. 815 for the Malayalam years, 1116 to 1118, corresponding to English era 1941 to 1943. There were 11 defendants to whom Othayoth Gopalan Nambiar and appellant 1 were the defendants 2 and 3. A preliminary decree was passed on May 26, 1944 followed by the final decree on November 29, 1944. The decree-holder assigned the decree to another member of his family, who in turn assigned it to one Kunhikannan. The rights of Kunhikannan devolved on respondents 2 to 4 in the execution application who are respondents 4 to 6 in this appeal and who brought the property to sale. The sale took place on November 26, 1962. One Thekkjayil Kanaran who was respondent 1 in the execution application, i.e. respondent 3 herein purchased the property in the court auction held on November 26, 1962, which sale was confirmed on August 14, 1964 and consequently obtained delivery of the disputed scheduled property extending to 8.70 acres of double crop wet land through court on January 9, 1965 from the possession of the appellants. Ex. C-3 is the delivery account and report submitted by the Amin. The remaining extent of the property was in the possession of the sub-

tenants in respect of which there was resistance with which we are not concerned here.

4. After the delivery had been effected, Gopalan Nambiar and appellant 1 herein trespassed into the suit property. Therefore, the court auction purchaser filed O.S. No. 6 of 1966 in the Court of the Subordinate Judge of Badagara for recovery of possession. The suit was decreed as per the judgment Ex. B-16 dated July 27, 1966. Ex. B-15 is the decree. Ex. B-49 dated August 25, 1966 and Ex. B-50 dated August 22, 1966 are the respective certified copies of the delivery account submitted by the Amin and the delivery warrant issued to Amin in O.S. No. 6 of 1966. The auction purchaser, i.e. respondent 3 in this appeal assigned portions of the property under sale deeds Exs. A-2 and A-3 dated December 5, 1966 to respondents 5 and 6 in the execution application, who are respondents 1 and 2 this appeal. It is stated that while respondent 1 is stranger, respondent 2 is none other than the wife of respondent 4. As we have pointed out earlier respondent 4 is among the three respondents on whom the rights of Kunhikannan devolved.

5. While it is so, Act 9 of 1967 came into force. So Gopalan Nambiar and appellant 1 filed Execution Application No. 1711 of 1967 for restoration of possession under the said amended Act after making the necessary deposit. While this E-A was pending, Act 35 of 1969 came into force (Kerala Land Reforms Amendment Act) repealing Act 9 of 1967. So the appellants filed E.A. No. 556 of 1970 under Section 13-B of the Act for restoration of possessions with a prayer that earlier deposit made under Act 9 of 1967 be treated as a deposit under Act 35 of 1969 and also undertook to pay the balance, if any as would be found by the court. Respondent 3 (court auction purchaser) and his assignees respondent 1 and 2 contended that the appellants have no interest in the properties and the delivery of the property had already been taken. The appellants attacked the validity of the Exs. A-2 and A-3 contending that the assignments in favour of respondents 1 and 2 were made without consideration and bona fides and that auction purchaser Thekkjayil Kanaran, respondent 3 was only a benamidar of the decree-holder in the matter of the court auction purchase. This application (E.A. No. 556 of 1970) was stoutly opposed by the respondent inter alia contending that the properties did not belong to the tavazhi of the appellants and the appellants have no right to the suit properties and are not entitled to apply for restoration of possession. According to the respondents, there is no valid deposit and after the delivery of the property had been effected, Gopalan Nambiar trespassed into the properties and he was ejected by recourse to a suit and thereafter the properties were assigned to respondents 1 and 2 for proper consideration and bona fides and they are in possession of the properties on the strength of the said sale deeds. The trial court held that the appellants were the tenants of the properties when they were dispossessed and the deposit made by the appellants was sufficient and respondents 1 and 2 are not bona fide purchasers for consideration. On the said finding it allowed E.A. No. 556 of 1970 and set aside the sale.

6. Aggrieved by the order of the trial court, respondents 1 and 2 filed A.S. No. 49 of 1974 before the Sub-Court, Badagara, which for deciding the appeal posed the following four points for its consideration namely :

1. Are the petitioners entitled to maintain the application ?

2. Is the deposit sufficient ?

3. Are the appellants bona fide purchasers for consideration ?

4. Whether the court sale is liable to be set aside and the restoration of possession claimed allowable ? If so, are the petitioners liable to pay anything by way of value

of improvements ?

The learned Judge answered the first point

> "that the petitioners are competent to maintain the application."

and the second point holding

> "... that the deposit when it was made is sufficient. However the interest accrued till date of the present application will be directed to be deposited in case the petitioners are found entitled to restoration of possession."

Coming to the third point it has been held thus :

> "Respondent 1 (respondent 3 in SLP) had absolutely no necessity to execute any sham documents. The fact that respondents 5 and 6 (respondents 1 and 2 in the SLP) came into possession and exercised their rights under Exs. A-2 and A-3 by payment of rent and revenue and payment of consideration spoken to by both the vendor and vendee are sufficient to hold that they are bona fide purchasers for consideration."

Under the fourth point, the relief claimed by the appellants was held to be rejected. In the result, the order of the trial court was set aside and the appeal was allowed dismissing E.A. 556 of 1970.

7. The learned Subordinate Judge has also expressed his opinion in his judgment that in summary proceedings under Section 13-B of the Act, the plea of the appellants that respondent 3 was a benamidar of respondent 4 cannot be allowed to be raised in the light of Section 66 of the Civil Procedure Code.

8. On being dissatisfied with the judgment of the Subordinate Judge, the appellants preferred E.S.A. No. 15 of 1979. The respondents filed their cross-objections. Though the High Court admitted the appeal on being satisfied that the appeal involves as many as 11 substantial questions of law, if disposed the appeal on a short ground that the documents and the evidence adduced by respondents 1 and 2 (Govindan Nair and Ambrolil Ammalu) clearly show that respondents 1 and 2 are bona fide purchasers of the properties in question for consideration and the plea of benami put forth by the appellants has to be negatived. The contentions in the cross-objections were that for filing an application under Section 13-B(1) of the Act, a deposit of the purchase money together with the interest at the rate of 6 per cent per annum in the court is a condition precedent and that the finding of the lower appellate court that the earlier deposit made under Act 9 of 1967 was sufficient and the interest accrued till the date of the execution application under Act 35 of 1969 would be directed to be deposited in case the appellants were found entitled to restoration of possession of the property is erroneous. The High Court disposed the contentions in the main appeal observing thus :

> "It is not necessary for me to examine this question and finally adjudicate it, since I have upheld the decision of the lower appellate court on other grounds. I only indicate that the respondents' counsel sought to sustain the conclusion of the lower appellate court on other grounds as well."

In the result, the High Court, affirmed the decree of the lower appellate court and dismissed the second appeal with costs.

9. So far as the cross-objections are concerned, the High Court passed the following order :

> "There is no need to dispose of the cross-objections on the merits. It is ordered accordingly."

Hence the appellants by this appeal are impugning the judgment of the High Court.

10. Mr. K. K. Venugopal, Senior counsel appearing on behalf of the appellants, Mr. T. S. Krishnamoorthy Iyer, Senior counsel and Mr. P. S. Poti, Senior counsel appearing on behalf of respondents 1 and 2 respectively took us very meticulously and scrupulously through the judgments of all the three courts and put forth the case of their respective parties.

11. Having heard the learned counsel on either side for a considerable length of time, we are clearly of the view on a conspectus of the relevant Section 13-B of the Act and on the factual matrix of the case that the result of the case would depend upon the decision of two substantial questions involved, they being -

> (1) Whether respondents 1 and 2 are bona fide purchasers of the scheduled land in dispute for adequate consideration entitled to the benefit of the proviso of Section 13-B (1) ?
>
> (2) Whether the appellants are entitled to the benefit of sub-section (1) of Section 13-B of the Act ?

12. Before making a more detailed and searching analysis on different aspects of the case, it would be necessary for proper understanding of the issues involved to produce the relevant provisions of Section 13-B(1) of the Act, on the pivot of which both the questions revolve :

> "13-B. There is no requirement in any of the clauses that an offer of readiness to comply with any order for deposit of costs must be expressed in any judgment, decree of order of court, where any holding has been sold in execution of any decree for arrears of rent and the tenant has been dispossessed of the holding after the 1st day of April, 1964 and before the commencement of the Kerala Land Reforms (Amendment) Act, 1969, such sale shall stand set aside and such tenant shall be entitled to restoration of possessor of the holding, subject to the provisions of this section :
>
> Provided that nothing in this sub-section shall apply in any case whether the holding has been sold to a bona fide purchaser for consideration after the date of such dispossession and before the date of publication of the Kerala Land Reforms (Amendment) bill, 1968 in the gazette."

13. If the answer to the first question is in the affirmative, then there no need to consider the second question as it would be only academic. We therefore, shall now address ourselves in the first instance whether the concurrent finding of facts by both the appellate courts relating to the first question warrant interference.

14. Before the trial court whilst the appellants examined PWs 1 to 4 and filed Exs. A-1 to A-22, the respondents examined RWs 1 to 4 and marked Exs. B-1 to B-58. Besides, Exs. X-1, X-2, X-3, X-5 and X-6 and C-1 to C-4 were also exhibited.

15. Respondents 4 to 6 admittedly are brothers. Though at the initial stage Mr. Krishnamoorthy Iyer did not accept the relationship of respondent 3 with respondents 4 to 6 on the ground of lack of evidence subsequently no serious dispute was raised about the said relationship. The trial court has proceeded on the ground that respondent 3 to 6 are brothers being the sons of Kunhikannan in whose favour the decree had been assigned. However it is admitted during the course of hearing of this appeal that respondent 3 is not a direct brother of respondent 4 to 6, but son of the stepmother of respondents 4 to 6. The respondent 2 Ambrolil Ammalu is admittedly the wife of respondent 4 Krishnan. Respondent 1 Govindan Nair is a stranger. Respondent 3, the court auction purchaser sold the property extending 4.35 acres in favour of respondent 1 and the remaining half in favour of respondent 2 under sale deeds Exs. A-2 and A-3 dated December 5, 1966. Consideration mentioned in each of the sale deeds Exs. A-2 and A-3 is Rs. 3000. Out of Rs. 3000 shown as consideration for A-2 a sum of Rs. 2500 is said to have been left with respondent 1 for payment of arrears or rent. In Ex. A-3 it is recited that respondent 3 is said to have already received Rs. 2000 on a promissory note from respondent 2 for meeting the expenses incurred by him for conducting O.S. No. 6 of 1966. The said sum of Rs. 2000 is stated to have been adjusted towards the consideration under Ex. A-3.

16. Respondent 1 has produced a receipt (Ex. B-28) showing that out of the amount of Rs. 2500 left with him he had paid a sum of Rs. 100. There is no other document evidencing the discharge of the entire alleged arrears of rent out of Rs. 2400. When Respondent 3 was questioned about the promissory note on the strength of which he is stated to have borrowed a sum of Rs. 2000 he has stated that he had returned the promissory note. This evidence as rightly pointed out by Mr. Venugopal is highly unacceptable because in usual practice whenever a debt, borrowed on a promissory note is discharged that promissory note is returned to the borrower and never left with the lender. Moreover, the evidence of respondent 3 is contradicted by RW 3 the son of respondent 2. Accordingly to RW 3 when Ex. A-3 was executed, the promissory note was returned to respondent 3. According to Mr. Venugopal, this contradictory version betwixt the evidence of respondent 1 and RW 3 clearly shows that the recital regarding payment of consideration to the extent of Rs. 2000 in Ex. A-3 is not genuine and acceptable and that Ex. A-3 is not fully supported by consideration. As per the recitals of consideration under Exs. A-2 and A-3 the total cash consideration received by respondent 3 was only Rs. 1500 i.e. Rs. 500 from respondent 1 and Rs. 1000 from respondent 2. It is vehemently urged on behalf of the appellants that respondent 3 after purchasing the property for Rs. 815 in 1962 would not have parted with it after fighting several litigations for a cash consideration of Rs. 1500 only. The evidence of respondent 3 that he left a sum of Rs. 2500 with respondent 1 for discharging arrears of rent and earlier received a sum of Rs. 2000 from respondent 2 on a promissory note is not creditworthy in the absence of any supporting contemporary documentary evidence. His assertion that he paid the amount for the court auction purchase in the year 1962 out of the money in his possession as well as from borrowings shows that he was a man of slender means. When he was confronted from whom he borrowed that amount, his answer was that he did not remember from whom and how much he borrowed. The trial court has rightly pointed out in paragraph 19 of its order that respondent 3 did not leave any impression that he was conversant with the various pending litigations regarding the present property.

17. Mr. Venugopal drew out attention to another piece of evidence of RW 3, deposing that his father was never consulted with regard to Ex. A-3 and assailed his evidence as incredible and bereft of truthfulness and trustworthiness. Coming to the sale deed, Ex. A-2 it is stated that respondent 1 is residing about 11 miles away from Played Amson where the property is situated. He has no other property in Amson. The reason given by him for purchasing this property which was already riddled with litigation is not at all convincing.

18. The first appellate court while perfunctorily rejecting the reasoning of the trial court with regard to the consideration part of Exs. A-2 and A-3 disposed of that contention in a summary manner holding :

> "The apparent inadequacy is no ground to think that there is no consideration ... I don't think that the recitals in Exs. A-2 and A-3 can be overlooked for this or the other reasons stated by the learned Munsiff."

19. Then relying on Exs. B-17, B-28, B-31, B-41, and B-45, other documents is concluded -

> "... that respondents 1 and 2 came into possession of the properties and exercised their rights under Exs. A-2 and A-3 by payment of rent and revenue and payment of consideration spoken to by both the vendor and vendee and as such they are bona fide purchasers for consideration."

20. The High Court accepting the reasons given by the Sub-Judge held thus :

> "Most of these document are public records or registers kept in the respective village office and proceedings in courts. There is no error of law in placing reliance on such documents. The finding entered by the learned Subordinate Judge that respondents 5 and 6 are bona fide purchasers for consideration is based on substantial evidence. It cannot be said to be arbitrary or unreasonable or perverse."

21. But both the appellate courts have conveniently ignored even the relationship of the parties which assumes much importance and significance in evaluating the evidence in the light of the facts and circumstances of the case for reaching a satisfactory conclusion and seem to have summarily disposed of the case of the appellants.

22. The question is not the mere inadequacy of consideration as pointed out by the lower appellate court, but lack of evidence in substantiating the recitals of both the documents. The next contention advanced by Mr. Venugopal is that though the High Court has formulated as many as 11 substantial questions of law, it has not dealt with any of them enumerated as (a) to (e) and examined the question No. (f) in the proper perspective. Further the important question No. (g) reading "Is not the admitted fact that respondent 6 is the wife of respondent 2 prima facie proof that she is not a bona fide purchaser for value" is not at all dealt with. It may be noted in this connection that respondent 6 and 2 referred to in that question are Ambrolil Ammalu (respondent 2 herein) and Krishnan (respondent 4 herein). As pointed out supra the High Court itself has expressed that it was inclined to dispose of the appeal 'on a short ground'.

23. The bone of contention of Mr. Krishnamoorthy Iyer and Mr. Poti is that it is not open to the appellants to reagitate the matter and request this Court to disturb the concurrent finding of facts arrived at by both the appellate courts which had rendered their findings on the proper evaluation of the evidence and there can be no justification to review or re-appreciate the evidence to take a contrary view in the absence of any contemporaneous document in support of the plea of the appellants. In addition to the above. Mr. Poti urged that the appellants have not properly and satisfactorily discharged the onus of proof cast upon them and the concurrent findings based on voluminous documents, the copies of which are not annexed to the SLP for perusal of this Court, do not call for interference.

24. In reply to the above arguments, Mr. Venugopal has pointed out that none of the documents

referred to in the judgments of the appellate courts would either improve the case of the respondent or deny the claims of the appellants. Of the documents relied upon by the appellate courts, Exs. B-17 and B-31 are the true extracts showing payment of tax in the Village Officer Day Book. Ex. B-28 is rent receipt dated February 23, 1969 issued by the receiver appointed in O.S. No. 1 of 1964 on the file of the Sub-Court (lower appellate court). B-42 is a true extract from the Foodgrains Cultivation Register and B-46 is a true extract from the Peringathor Village Account. Exs. B-41 to B-45 are the levy notices and revenue receipts for the years 1967, 1968, 1969 and 1973. Exs. B-55 to B-59 are copies of orders in M.C. No. 3 of 1971. As rightly pointed out by Mr. Venugopal it is but natural that the receipt for the payment of tax, rent receipt revenue receipt etc. are in the names of the persons in whose names the properties stand and therefore those documents cannot be themselves dispel the claim of the appellants. Besides, urging with all emphasis that Exs. A-2 and A-3 are only sham and nominal documents, it has been incidentally urged by Mr. Venugopal that the transaction under these two sale deeds is benami in nature. This argument was stoutly resisted by Mr. Krishnamoorthy Iyer stating that in the teeth of Section 66 of the Code of Civil Procedure and in the absence of any proceedings to set aside the sale in favour of respondents 5 and 6 on the ground of fraud etc. the plea of benami transaction cannot be countenanced. He also cited the decision in Mithilesh Kumari v. Prem Behari Khare ((1989) 2 SCC 95). But Mr. Venugopal explained his argument that he has not advanced that argument to set aside the sale deeds on the ground of benami transaction, but only for scrutinising the circumstances of the transaction in examining the validity of the sale deeds. However, as the plea of the benami transaction is not pressed into service, service, it need not detain us any more.

25. We shall now examine whether this Court would be justified in interfering with the concurrent finding of facts in exercise of its discretionary powers under Articles 136 of the Constitution of India. In a recent decision in Dipak Banerjee v. Lilabati Chakraborty ((1987) 4 SCC 161) it has been observed thus : (SCC p. 169, para 13)

> "That jurisdiction (under Article 136 of the Constitution of India) has to be exercised sparingly. But, that cannot mean that injustice must be perpetuated because it has been done two or three times in a case. The burden of showing that a concurrent decision of two or more courts or tribunals is manifestly unjust lies on the appellant. But once that burden is discharged, it is not only the right but the duty of the Supreme Court to remedy the injustice."

26. No doubt, this discretionary power has to be exercised sparingly : but when there are exceptional and special circumstances justifying the exercise of the discretionary powers and where manifest injustice or grave miscarriage of justice has resulted by overlooking or ignoring or excluding material evidence resulting in unduly excessive hardships this Court will be justified in stepping in and interfering with the concurrent finding of facts in the interest of justice and it is also the duty of this Court to remedy the injustice, so resulted. Vide Basudev Hazra v. Matiar Rahaman Mandal ((1971) 1 SCC 433 : 1971 SCC (Cri) 189 : (1971) 3 SCR 478) and Bhanu Kumar Shastri v. Mohan Lal Sukhadia ((1971) 1 SCC 370, 385-86 : (1971) 3 SCR 522).

27. The present case, in our view, suffers from the infirmity of excluding, ignoring and overlooking the abundant materials and the evidence, which if considered in the proper perspective would have led go a conclusion contrary to the one taken by both the appellate courts. The relationship of the parties inter se has been completely and conveniently ignored and excluded from consideration. In fact, the High Court has not rendered any finding on question No. (g) which is one of the eleven substantial questions of law formulated in paragraph 3 of its judgment. The lack of evidence in

support of the recital in regard to the consideration is completely overlooked. Therefore, in view of the above exceptional and special circumstances appearing in this case, this Court will be justified in refusing to exercise its discretionary powers merely on the ground that the conclusion of both the courts is concurrent.

28. From the discussion made above, we are of the view that the conclusion arrived at by both the appellate courts is only backed by assertions rather than by acceptable reasoning based on the proper evaluation of evidence and so we are unable to subscribe to the concurrent finding that respondents 1 and 2 are bona fide purchasers of the properties in dispute for consideration. On the other hand, we hold that the evidence and circumstances of the case coupled with the evidence on record do establish that respondents 1 and 2 are not bona fide purchasers for consideration.

29. In the result, we hold that respondents, 1 and 2 are not entitled to the benefit of the proviso to sub-section (1) of the Section 13-B of the Act and answer the first question against the respondents and in favour of the appellants.

30. We shall now pass on to the next question whether the appellants are entitled to the benefit of Section 13-B(1) of the Act.

31. The Kerala Land Reforms Act of 1963 came into force on April 1, 1964. Amended Act 9 of 1967 was a temporary enactment which remained in force till December 31, 1969. Thereafter Act 35 of the 1969 came into force from January 1, 1970 containing Section 13-B which is substantially in the same terms as Section 6 of Act 9 of 1967 with a proviso superadded. To invoke this benevolent provision, the satisfaction of two primary conditions are sine qua non. Those conditions are :

> (1) Any "holding" to which a tenant is entitled to restoration of possession should have been sold in execution of any decree for arrears of rent.
>
> (2) The tenant should have been dispossessed of the "holding" after the first day of April 1964 and before the commencement of the Kerala Land Reforms (Amendment) Act, 1969.

32. If these two essential conditions are fulfilled then the sale in execution of any decree for arrears of sent shall stand set aside notwithstanding anything to the contrary contained in any law or in any judgment, decree or order of court and the tenant shall be entitled to restoration of possession of such holding but subject to the provisions of this Section 13-B. The only bar for the restoration of possession under this Section 13-B(1) is the sale of the holding to a bona fide purchaser for consideration after the date of such dispossession and before the date of publication of the Kerala Land Reforms (Amendment) Bill, 1968 in the gazette. For invoking the benefit of sub-section (1) of Section 13-B the person entitled to restoration of possession of his holding should within a period of 6 months from the commencement of the Kerala Land Reforms (Amendment) Act, 1969 deposit the purchase money together with interest at the rate of 6 per cent per annum in the court and apply to the court for setting aside the sale and for restoration of possession of his holding. Once these legal formalities are satisfactorily complied with then the court by holding a summary enquiry shall set aside the sale and restore the applicant to possession of his holding. The explanation to that section says that the term 'holding' includes a part of holding. The expression "holding" is defined in Section 2(17) of the Act.

33. The language of Section 13-B is plain, clear and unambiguous representing the real intention of the legislature as reflected not only from the clear words deployed but also from the very purpose of the vesting of rights on the displaced tenants. To construe the provisions of a statute especially of a benevolent provision like one in question, we have to take into consideration the dominant purpose of the statute, the intention of the legislature and the policy underlying. Vide P. Rami Reddy v. State of Andhra Pradesh ((1988) 3 SCC 433), Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan ((1987) 2 SCC 654) and Doypack Systems Pvt. Ltd. v. Union of India ((1988) 2 SCC 299).

34. Admittedly, respondent 3 obtained delivery of the property in question through court on January 29, 1965 from the possession of the appellants, who were the tenants of the said property which was sold for arrears of rent and thereafter the appellants preferred a petition for restoration of possession of their holdings in Execution Application No. 1711 of 1967 under Section 6 of Act 9 of 1967 after depositing the sale amount of Rs. 815 and the interest of Rs. 255. Thus the appellants have satisfied the conditions for entitlement of the possession of the property. While this proceeding was pending, Act 35 of 1969 came into force repealing Act of 9 of 1967. Therefore, the appellants filed the Execution Application No. 566 of 1970 in O.S. No. 817 of 1943 praying that the present application should be treated as a proceeding in continuation of the earlier execution application and the amount deposited already in the previous execution application should be treated as deposit for the present application with an undertaking to deposit the balance, if any. Though it has been contended by the respondents that the appellants have failed to establish that they were tenants at the time of the dispossession, both the trial court as well as the first appellate court have concurrently found that the appellants were holding the property as tenants and they were dispossessed. Before the High Court, it was contended that at the time of dispossession of the holding, the appellants were not tenants but only trespassers, that the dispossession was only pursuant to the decree in O.S. No. 6 of 1966 and that both the lower courts have not applied their minds to these salient and vital facts. The learned Judge of the High Court has answered this contention in the penultimate paragraph of his judgment observing thus :

> "This is a serious legal error. It is not necessary for me to examine this question and finally adjudicate it, since I have upheld the decision of the lower appellate court on other grounds."

Suffice to mention here that the High Court has not specifically dislodged the findings of the lower courts that the appellants were tenants at the time of the dispossession. However, we will deal with this question presently.

35. The main thrust of the argument of Mr. Krishnamoorthy Iyer is that the appellants are not entitled to restoration of the possession of their 'holding' because of an intervening cause, that being, that the respondent 3 got the possession of property which is now sought to be disturbed not in execution of the decree for arrears of rent, but by filing a suit subsequent to the court auction purchase. That intervening cause is explained by the learned counsel stating that after the property was delivered over to the respondent 3 on January 29, 1965, Gopalan Nambiar (since dead) and the appellant 1 trespassed into the land which necessitated the respondent 3 to institute a suit - O.S. No. 6 of 1966 in the Sub-Court of Badagara which was decreed on July 27, 1966 as evidenced by the judgment (Ex. B-16). He continues to state that the respondent 3, only in pursuance of the execution of this decree in O.S. No. 6 of 1966 obtained possession of the property on August 23, 1966 and therefore Section 13-B(1) in view of the said intervening cause cannot be availed of since the respondent 3 though got possession earlier by the auction purchase was dispossessed by the subsequent event of trespass by the appellants and got possession by instituting the suit O.S. No. 6

of 1966. One other argument of the learned counsel is that as the sales under Exs. A-2 and A-3 are only subsequent to the decree in O.S. No. 6 of 1966, these transactions cannot be brought into the dragnet of Section 13-B and the said provision will have no application to the facts of the present case. We are afraid, we cannot permit this inconceivable argument to be advanced. Admittedly, the respondent 3 purchased the property in court auction sale in pursuance of the decree for arrears of rent in O.S. No. 817 of 1943 and obtained the possession by dispossessing the tenants, namely, the appellants. It was only thereafter there was trespass by the appellants. Therefore, the subsequent event of obtaining possession of the property in pursuance of the decree in O.S. No. 6 of 1966 will not in any way alter the position that the appellants had been dispossessed in pursuance of the decree for arrears of rent. The decree in O.S. No. 6 of 1966 for obtaining possession from the trespassers does not confer any new right or title over the property in favour of the respondent 3. Mr. Venugopal countered this argument stating that this new plea should not be allowed to be raised because this plea was never taken both before the trial and the first appellate courts. The reply given by Mr. Krishnamoorthy Iyer is that since it is a question of law, it is permissible to raise this question even at this stage. As we have said earlier, even assuming that this plea could be raised, it has no substance in any way affecting the claim of the appellants for the reasons stated supra.

36. Mr. Poti after giving a brief note about the legislative history that Act 4 of 1961 was declared as void on December 5, 1961 in respect of certain provisions and that thereafter Act 1 of 1964 was enacted which came into force on April 1, 1964 repealing earlier Act 4 of 1961 advanced a hesitant argument that the application is liable to be dismissed as the entire amount has not been deposited in compliance with sub-section (2) of Section 13-B which is a condition precedent to claim the restoration of the possession of the property. Admittedly the appellants filed an application in the year 1967 for restoration of the possession of the property under Section 6 of Act 9 of 1967 and during the pendency of that application, Act 35 of 1969 came into force. The applicant who had already deposited the purchase amount together with interest has made to treat that application as the one in continuation of the later proceeding and undertook to pay the deficiency of the amount, if any. The lower appellate court in paragraph 6 of its judgment found that the deposit already made was sufficient and that the interest accrued thereafter would be directed to be deposited in case the appellants were found entitled to restoration of possession. This finding of the first appellate court concurring with the trial court has not been dislodged by the High Court. It may not be out of place to mention that on account of certain divergent views expressed by judges of the Kerala High Court on this point the question was referred to a Division Bench of that court which drawing strength on the ratio laid down by this Court in State of Punjab v. Mohar Singh ((1955) 1 SCR 893 : AIR 1955 SC 84 : 1955 Cri LJ 254) observing : (SCR p. 900)

> "The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them."

and agreeing with the view expressed by Krishnamoorthy Iyer, J. (as he then was and who is now appearing before us for the first respondent in different capacity) in Civil Revision Petition Nos. 1090 and 1091 of 1972 wherein this precise question came up for consideration held that the application filed under Section 6 of Act 9 of 1967 which was pending on the date of the commencement of Act 35 of 1969 was liable to be continued and dealt with under the provisions of the earlier Act, untrammelled by the provisions of the later Act. We approve the view taken in the above Parameswaran Nambudiri case (Parameswaran Nambudiri v. Kalyani, 1974 KLT 67 (Ed.: But this decision has been overruled in Govinda Menon v. Varkey, 1985 KLT 654 (FB) as per the headnote) and hold that the deposit made in the earlier application under Section 6 of Act 9 of 1967 which was pending on the date of commencement of Act 35 of 1969 was liable to be continued

unaffected by the provisions of the later Act.

In Summation

37. We, for the aforementioned discussion, disagree with the findings of the High Court, set aside the impugned judgment and restore the judgment of the trial court holding that the sale of the 'holdings' of the appellants was in execution of the decree in O.S. No. 817 of 1943 for arrears of rent and the appellants who are tenants were dispossessed of the holdings after April 1, 1964 and before the commencement of the Kerala Land Reforms (Amendment) Act, 1969 and respondents 1 and 2 are not bona fide purchaser for consideration. In view of our above conclusion the appellants are entitled to recover possession of the properties in dispute, but, without prejudice to the rights, if any, of respondents 7 to 10 who are the wife and children of Gopalan Nambiar and who have got themselves impleaded as parties to the present proceedings. The amount under deposit made by the appellants is permitted to be withdrawn by respondents 1 to 3.

38. In the result, the appeal is allowed with costs.

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