

Parameswaran Govindan

Vs

Krishnan Bhaskaran and others

Civil Appeal No. 2354 of 1979

(K. Ramaswamy, K. Jayachandra Reddy JJ)

06.02.1992

JUDGEMENT

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K. RAMASWAMY, J.:-

1. This appeal by special leave arises against the order dated November 17, 1977 made in C.R.P. No. 2341 of 1977\* of the Kerala High Court which granted the decree that the respondent is a tenant under S.4A of the Kerala Land Reforms Act, 1963 (1 of 1964), for short 'the Act' and is not liable to ejection pursuant to the decree in O.S. No. 6/64 on the file of the Munsif Magistrate, Attingal. The facts relevant are as under:

The appellant is the mortgagor. The respondent is one of the mortgagees/4th defendant. The appellant's suit for redemption of the mortgage was decreed on December 23, 1965 (sic). The decree provides payment of Rs. 500/-, and Rs. 943/9.2 towards improvements as a condition for redemption. On appeal, the appellate Court enhanced the improvements by Rs. 256/8.4. In the execution application filed by the appellant the respondent filed another application under the Kerala Compensation for Tenants Improvements Act, 1958 (Act 29 of 1958), for short 'the Improvements Act' claiming a further sum for improvements. Pending application, the appellant deposited on June 21, 1961 the decretal amount including the sum decreed by the appellate Court. Under the Improvements Act, in 1975 the respondents' application was allowed and total amount of Rs. 4,149.66 paise inclusive of decretal amount was directed to be paid, which became final. Then the respondents filed yet another I.A. No. 2340/ 75 to reopen the decree under S. 132(3) of the Act, contending that he is a tenant under S. 4A of the Act, having been continuously in possession for over 50 years and that, therefore, the decree of eviction cannot be executed against the respondents, The executing Court dismissed it, but on revision, the High Court declared that the respondent is a 'deemed tenant' under S. 4A. Assailing the legality thereof this appeal has been filed.

2. Section 132 is a repealing and saving section under the Act and sub-sec. 3(a) postulates thus:

"Notwithstanding the repeal of the enactments mentioned in sub-sec. (2),

(a) any decree passed before the commencement of this Act for the eviction of a tenant from his holding, pursuant to which, eviction has not been effected, may, on

the application of the tenant or the landlord, be reopened and the matter may be disposed of in accordance with the provisions of the this Act."

The other sub-sections are not relevant. Hence omitted. Sub-sec. (2) thereto provides that

"The following enactments as in force in any part of the State of Kerala are hereby repealed, namely:

(i) The Cochin Verumpattamdars Act, VII of 1118.

(ii) The Travancore-Cochin Prevention of Eviction of Kudikidappukars Act, 1955.

(iii) The Malabar Tenancy Act, 1929.

(iv) The Madras Cultivating , Tenants (Payment of Fair Rent) Act, 1956."

A bare reading of both sub-sections would demonstrate that, if there is a decree passed in one of the four Acts enumerated in subsec. (2) of S. 132 -and the decree remained unexecuted and pursuant to which possession was not effected, then on the commencement of the Act a tenant or landlord may make an application upon which the decree would be reopened and be disposed of in accordance with the provisions of the Act. Undoubtedly decree in question is only a redemption decree pursuant to which the mortgagor is entitled to possession, on redemption of mortgage, under S. 60 of T.P. Act. Therefore, the very application to reopen the decree itself is misconceived, without, jurisdiction and authority of law. But this question was not gone into by either of the courts. Therefore, we do not propose to allow the appeal on this short ground.

3. The controversy is whether the respondent is a tenant under the Act. S. 2(57) of rs the Act defined 'tenant' means any person who has paid or has agreed to pay rent or other consideration for his being allowed to possess and enjoy any land by a person entitled to lease that land. A reading would indicate that there should exist jural relationship of landlord and tenant and pursuant to a lease for consideration possession was given and the lessee remained in possession enjoying the land on payment of rent or other consideration. Therefore, the main part of S. 2(57) does not apply to a mortgagor and mortgagee and the mortgagee cannot be treated to be a tenant. But by Amending Act 35 of 1969, S. 4A was introduced on the statute. Admittedly, it is prospective in operation. It reads thus:

"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 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 Other clauses are not necessary. Hence omitted. It would manifest that the mortgagee in possession of the hypotheca for a continuous period of not less than 50 years' immediately preceding the commencement of the Amending Act 35 of 1969 is deemed to be a tenant under the Act. Admittedly the respondents had not had

continuous minimum of 50 years possession immediately preceding Act 35/69 came into force. The mortgage amount of Rs. 500/- together with the improvements determined in the said appeal were admittedly deposited on June 21, 1961. A conjoint reading of S. 60, S. 76(h) read with S. 83 of Transfer of Property Act, would amplify that on deposit of the mortgage amount, the contractual relationship of mortgagor and mortgagee ceases. This Court in Prithi Nath Singh v. Suraj Ahir, (1963) 3 SCR 302: (AIR 1963 SC 1041) held that when the mortgage money is paid by the mortgagor to the mortgagee, there does not remain any debt from the mortgagor to the mortgagee and, therefore, the mortgage can no longer continue after the mortgage money is paid. Therefore, on the payment of mortgage money or deposited thereof in the Court by the mortgagor, the mortgage comes to an end and the right of the mortgagee to remain in possession also terminates. Thereafter, the mortgagee continues in unlawful possession.

4. The Improvements Act defines 'tenant' under S. 2(d) thus:

" 'tenant' with its grammatical variations and cognate expressions includes-

(i) a person who, as lessee, sub-lessee, mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee, or submortgagee of land, is in possession thereof;

Clauses (ii) and (iii) are not relevant. Hence omitted. S. 2(a) defines eviction thus:

" eviction' means the recovery of possession of land from a tenant".

Section 4 reads thus:

"4. Tenant "entitled to compensation" for improvements:

(1) Every tenant shall, on eviction, be entitled to compensation for improvements which were made by him, his predecessor-in-interest or by any person not in occupation at the time of the eviction who derived title from either of them and for which compensation had not been paid, and every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy of the payment of the mortgage money or premium, if any, be entitled to remain in possession until eviction in execution of a decree or order of Court;

Provided that nothing herein contained shall be construed as affecting the provisions of the Kerala Land Conservancy Act, 1957;

Provided further that this section shall not apply to tenants holding lands under the Government.

(2) A tenant so continuing in possession shall, during such continuance, hold as a tenant subject to the terms of his lease or mortgage, if any.

Section 5 grants payment of compensation as a condition precedent to enforce a decree of eviction which reads thus:

"5. Decree in eviction to be conditional on payment of compensation :-

(1) In a suit for eviction instituted against a tenant in which the plaintiff succeeds and the defendant establishes a claim for compensation due under S. 4 for improvements, the Court shall ascertain as provided in Ss. 7 to 16, the amount of the compensation and shall pass a decree declaring the amount so found due and ordering that on payment by the plaintiff into the Court of the amount so found due and also the mortgage money or the premium, as the case may be, the defendant shall put the plaintiff into possession of the land with the improvements thereon."

Sub-sections (2) and (3) are not relevant and hence omitted.

5. Sections 7 to 16 provides the mode to ascertain improvements and computation thereof, the details of which are not necessary.

6. A conjoint reading of Ss. 4 and 5 clearly postulates that a decree of eviction passed against tenant namely recovery of possession of land from the tenant cannot be enforced until the compensation determined under the Improvements Act is paid. S. 4 gives substantive right to payment of compensation for improvements made by him or his predecessors in interest, etc. Until such payment is made, the tenant shall be entitled to remain in possession and the decree of eviction shall not be executed. Payment is a condition precedent under S. 4 and S. 5 provides the procedure by which the right secured under the Act is to be enforced. The right to 'compensation given under S. 4 is a right to the improvements made by a tenant while in possession and enjoyment of the land before decree of ejection was passed against him. S. 4(1) begins by saying that every tenant shall, on eviction, is entitled to compensation for improvements which were made by him. Therefore, the right to compensation springs into existence from his continuance in possession as a tenant before decree of eviction was passed and until the compensation is paid he is entitled to remain in possession. For the purpose of improvements, the mortgagee has been treated by fiction of law to be a tenant. The object of the Improvements Act is "to make provision for payment of compensation for improvement made by tenants". Subsec. (2) of S. 4 preserves the pre-existing contract; the right and liabilities thereunder. Thus it is clear that right to possession under S. 60 of the Transfer of Property Act, on redemption kept Unaffected.

7. The Improvements Act only hedges the right to eviction and gives right to remain as a mortgagee till the payment for improvements are made or deposited so that the mortgagee/ tenant is not driven to a separate suit. Ss. 7 to 16 prescribes procedure for computation and S. 5 prohibits eviction till date of payment or deposit. Thus, for and no further. His continuance in possession is by virtue of contractual relationship, but by operation of statute, his possession after redemption remained lawful. His deeming tenancy under the Improvements Act is only to enable him to recover the improvements determined under the Improvements Act. It confers no other higher rights. It does not clothe with any right to statutory protection qua the mortgage. From June 21, 1961, but for the Improvements Act, his possession would be unlawful. S. 4A of the Act would not denude the right to repossession of the mortgagor under S. 60 of the Transfer of Property Act without assent of the President of India. Therefore, merely, the respondents remained in possession as mortgagee, they cannot acquire the status as deemed tenant under S. 4A tagging the period from June 21, 1961 till date the Amending Act came into force and thereafter to compute continuous possession as mortgagee for not less than 50 years immediately preceding Amendment Act 35 of 1969 to the Act.

8. Admittedly, the respondents did not complete 50 years of possession as a mortgagee preceding June 22, 1961. The High Court assumed that his possession under the Improvements Act as a statutory mortgagee and that he was in possession on the date. S. 4A of the Act came into force and

that, therefore, he is entitled to the protection from ejection and the decree is liable to be reopened under S. 132(3) of the Act. In our considered view, the assumption of the High Court is clearly wrong. The entitlement to remain in possession as a condition for payment is different from the entitlement as of statutory tenancy under S.4A of the Act. It is necessary to remember that there is no non obstante clause in S.4 of the Improvements Act, unlike S. 4A of the Act which engrafts non obstante clause. The latter is of little assistance to the respondent, as he did not complete 50 years of continuous possession on the date when the Amending Act 35 of 1969 came into force. Thus we are of the considered view that the High Court is in error in holding that the respondent is a deemed tenant under S. 4A.

9. It is next contended by the learned counsel for the respondents that under S. 72 of the Act the appellant no longer is the holder of the land and the land stood vested in the State. The landholder's all rights, title and interest in respect of holdings held by cultivating tenant for fixity of tenure under S. 13 and in respect of which certificates of purchase under S. 54(2) have not been issued, shall subject to the provisions of the Act, vest in the Government, free from all encumbrances created by the land owners etc. Therefore, it pertains to only lands held by tenants cultivating land under fixity of tenure under S. 13. The respondent is not a cultivating tenant under fixity of tenure. Therefore, the land does not vest in the Government.

10. The learned counsel also invited our attention to a decision of the Kerala High Court in *Raghavan v. Velayudhan*, 1984 Ker LT 713. In that case also the Division Bench proceeded on the same premise as in the impugned order. Practically they followed this judgment. Therefore, for the same reasons, the ratio therein is not a good law.

11. The appeal is accordingly allowed. The C.R.P. is dismissed and that the order of the executing Court is restored. No costs. Order accordingly.

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