

Victoria

Vs

K.V. Naik & Ors.

(K. Ramaswamy, D. P. Wadhwa JJ)

09.05.1997

ORDER

1. This special leave petition arises from the Order of the High Court of Kerala, made on 17.3.1997 in CRP No. 2587/96.

2. The respondent mortgagors had filed O.S. No. 285/79 for redemption of the mortgage. The petitioner mortgagee claimed fixity of the tenure in respect of the entire extent of the land under Section 4(1)(1)(b) and Section 13 of the Kerala Land Reforms Act; in the alternative, she claimed to be entitled to deemed Kudikidappu right over 3 cents of the total extent of 8 cents, by operation of Explanation IV to Section 2(25) of the Act. The Trial Court negatived the contention by decree dated July 31, 1980. Final decree was passed on September 30, 1992. The Court found that in a suit for redemption of mortgage, claim of Kudikidappu advanced by the petitioner arises for consideration only at the time of the execution; thus, in this case, prima facie, they are not entitled to reference under Section 125(3) of the Act. When the petitioner had carried the matter to the High Court, the High Court held that it operates as constructive res judicata. Since that question was raised at the time when the final decree had been passed, the petitioner raised this point in the execution. Thus, this petition by special leave.

3. The High Court has considered various decisions of that Court in reaching the conclusion; particularly, it relied upon a judgment of the Division Bench in Narayanan Vs. Kunchiyamma Parukkutty Amma [1996 K.L.T. 1340]. The High Court recorded the findings thus:

"In the light of this position now settled, it is clear that the judgment debtors are precluded from claiming that they are Kudikidappukars entitled to the protection of Explanation IV to Section 2(25) of the Act in view of their prior approach to the Land Tribunal on a claim that they are cultivating tenants entitled to an assignment of the right, title and interest of the land owner over the land in question. The present plea of Kudikidappu is, therefore, barred by res judicata. It is well settled in this Court that when a claim of tenancy of Kudikidappu is barred by res judicata, such a question does not arise for decision within the meaning of Section 125(3) of the Act. (see the decision of the Full Bench in Kesava Bhat Vs. Subraya Bhat, 1979 KLT 766). It is therefore, to be held in the present case that the claim of Kudikidappu sought to be put forward by the judgment debtors does not arise and consequently no reference is called for under Section 125(3) of the Act. Learned counsel for the judgment debtors contended that in the decree for redemption that has been passed, the claim of the judgment debtors for protection under Explanation IV to Section 2(25) of the Act has been left open to be decided in execution and under such

circumstances the question did arise and the same ought to be referred to the Land Tribunal under Section 125(3) of the Act. All that was done by the judgment in the case was to take note of the plea of the judgment debtors that they were entitled to protection as Kudikidappukars and without deciding that question at the stage of the decree leaving it to be decided in execution in the context of Explanation IV to Section 2(25) of the Act. That does not mean that there is any recognition of the right of the judgment debtors to protection under Explanation IV to Section 2(25) of the Act. Nor was there an adjudication that they were entitled to claim such a right. When the question of reference under Section 125(3) of the Act to the concerned Land Tribunal is mooted, the executing court has necessarily to decide the question whether the claim raised arises for decision. If the executing court were to come to the conclusion that the question does not arise for decision in view of the judgment debtor being barred by res judicata actual or constructive, it would not be open for the executing court to refer that question to the Land Tribunal. I am, therefore, not in a position to accept the contention that the executing court had no option but to refer the question to the Land Tribunal.

4. Thus by making a reference of the claim of the judgment debtors that they are Kudikidappukars, the executing court has overlooked the fact that the claim of the judgment debtors is barred by res judicata in the light of the decision of the Supreme Court referred to above. Thereby the executing Court has committed a jurisdictional error warranting correction by this Court in exercise of its revisional jurisdiction under Section 115 of the Code of Civil Procedure. Since it has to be held that a question of Kudikidappu does not arise for decision, the order of reference made by the executing Court is also one without jurisdiction."

5. Learned counsel for the petitioner contends relying upon the judgment of the Division Bench of the Kerala High Court in Balakrishnan Vs. Bhaskaran [1987 (2) K.L.T.] that a right of redemption is vested in the mortgagor under Section 60 of the Transfer of Property Act, can be extinguished either by an act of parties or by decree of court. Deposit of the mortgage money under Section 83 does not ipso facto extinguishes the mortgage where the mortgagee had refused to accept the deposit. To put it differently, if the deposit is not accepted, the mortgage does not get extinguished; that means the parties continue to have the relationship of mortgagor and mortgagee. When Sections 2(25) and 125(3) of the Land Reforms Act are to be considered in a suit of redemption claiming the right of Kudikidappu as found, is not barred by the principle of constructive res judicata in executing proceedings. We find that later part of the view taken therein is not correct for the reason that if the plea has not been raised, it operates as constructive res judicata on the principle of "might and ought". If it is taken and rejected, it operates as res judicata and the same cannot be raised in execution. Even if it is left open, in equity, justice and good conscience, it must not be extended to the mortgagee. After all, the mortgagee, money-lender comes into possession of the property as mortgagee and always remains as mortgagee unless limitation snaps off the link. He receives interest on the amount advanced. He cannot be permitted in good sense of law to eat away the cake as Kudikidappu. It would be abhorrence to good conscience and playing upon the property of indigent mortgagor's own property. Certainly, that is a matter gone into at the time of the execution. Since in the suit, the plea had been raised and negatived and a preliminary decree had been passed followed by a final decree, it was not open to the petitioner to raise the plea after the passing of the final decree that he was entitled to three cents of land as Kudikidappu.

6. The special leave petition is accordingly dismissed.