

K. T. Suresh Kumar

Vs

P. Kunhappa Nair and Others

Civil Appeal No. 3173 of 1984

K. T. Thomas, D. P. Wadhwa, S. M. Guadri, P. Kunhappa Nair JJ)

21.01.1999

### ORDER

1. The appellant is a landowner and Respondents 1 and 2 enjoyed kudikidappu right under the appellant. The appellant moved an application before the Land Tribunal concerned under Section 75(2) of the Kerala Land Reforms Act, 1963 ("the Act" for short) for shifting the kudikidappu to an alternative site. While that application was pending, the appellant realised the futility of the said application because the alternative site did not belong to him then. During the pendency of the said application, the appellant got the alternative site gifted to him by its erstwhile owner and filed a second application under Section 75(2) of the Act for shifting the kudikidappu thereto. Both applications were ordered to be jointly tried. However, the Land Tribunal took up the first application and dismissed it as not maintainable. But when it took up the second application, that too was dismissed on the ground that a second application for shifting would not lie. The appellant challenged the order of the Land Tribunal before the appellate authority. That appellate authority set aside the order and remanded the matter to the Land Tribunal for disposal of the second application afresh. After remand, the Land Tribunal found that the kudikidappu is liable to be shifted to the alternative site and as a corollary, the application filed under Section 75(2) of the Act was ordered. The contesting respondents challenged the said order before the appellate authority but that appeal was dismissed. The contesting respondents then filed a revision before the High Court of Kerala under Section 103 of the Act on a question of law that a second application is not maintainable as barred by the principles of constructive res judicata.

2. By the impugned order a learned Single Judge of the High Court set aside the Land Tribunal's order by upholding the contention that the second application was barred by the principles of constructive res judicata. Hence this appeal by special leave.

3. We heard learned counsel for the appellant and also learned counsel for the respondents. There is absolutely no scope, on the facts and circumstances of this case, for upholding that the second application was barred by res judicata. The first application was admittedly dismissed on the ground that it was not maintainable. It is not disputed before us that an application for shifting kudikidappu cannot be maintained unless the landowner would require the kudikidappukaran to shift to an alternative site belonging to the landowner. It is also admitted before us that the alternative site which was indicated in the first application did not then belong to the landowner. The only consequence in such a situation was that the landowner was disabled from filing the application under Section 75(2). That would not amount to a bar of res judicata when the landowner files a fresh application showing an alternative site belonging to him. There is no dispute that when the second application was filed, the alternative site shown by him really belonged to the landowner.

4. Even that apart, when the appellate authority has remanded the matter by order dated 28-3-1979, a definite finding was made that the first order of the Land Tribunal dismissing the second application cannot be sustained because the dismissal of the first application was only on the ground that it was not maintainable. The said order of remand dated 28-3-1979 has become final since the same was not challenged before any superior court. Hence, the finding in the remand order is binding on the parties. This is another ground for our conclusion that the second application is not barred by the principle of res judicata.

5. In the result, we allow this appeal and set aside the impugned order of the High Court and restore that of the Land Reforms Appellate Tribunal dated 30-8-1980.