

SUPREME COURT OF INDIA

Chandy Varghese

Vs.

K.Abdul Khader

(Shivaraj V.Patil and D.M. Dharmadhikari JJ.)

08.08.2003

JUDGMENT

DHARMADHIKARI J.

This appeal under Article 136 of the Constitution of India has been preferred by the successors-in-interest of contesting Defendant No. 1 – Chandy against the judgment dated 07.12.1998 passed by the High Court of Kerala confirming the decree of injunction and recovery of possession passed by the courts below in favour of the respondents who are the Legal Representatives of the original plaintiff – Kochunni.

The principal question which falls for consideration in this appeal is whether the contesting defendants are entitled to protection against eviction from the suit property under Section 106 of the Kerala Land Reforms Act, 1963 [for short 'the Act']. Section 106 of the Act protects the lessee against eviction from a land obtained by him for commercial or industrial purposes and over which he has constructed a building for commercial and industrial purposes before 20.5.1967.

The relevant sub-section (1) of Section 106 of the Act with explanation therein reads thus :- "106. Special provisions relating to leases for commercial or industrial purposes. – (1) Notwithstanding

anything contained in this Act, or in any other law, or in any contract, or in any order or decree of court, where on any land leased for commercial or industrial purpose, the lessee has constructed buildings for such commercial or industrial purpose before the 20th May, 1967, he shall not be liable to be evicted from such land, but shall be liable to pay rent under the contract or tenancy, and such rent shall be liable to be varied every twelve years.

Explanation :- For the purpose of this section, - (a) 'lessee' includes a legal representative or an assignee of the lessee; and (b) "Building" means a permanent or a temporary building and includes a shed.

Before stating the facts and the findings of the courts below, it may be stated that the provisions of Section 106 of the Act were considered by the High Court of Kerala in Abdul Rahiman vs. Type [1965 K.L.T. 247]. The law laid down by the Division Bench in that case has held the field in application of the provisions to cases arising under the Act. Placing interpretation on section 106 read with section 3 (1) (iii) of the Act, the Division Bench held that within the purview of the section, are covered only 'leases relating to lands on which after grant of lease, building for industrial or commercial purposes was constructed by the lessee before 20.5.1967'. It is held that the other two types of leases viz., 'leases of building' and 'leases of building together with land' are not entitled to protection against eviction under section 106 of the Act. The legal result was that unless it is shown that the subject matter of lease for commercial or industrial purposes was the land alone, section 106 of the Act would have no application.

On the principle of stare decisis, this interpretation of the provisions of Section 106 of the Act which has held the field in Kerala for the last more than 35 years, the question raised before us has to be decided on the facts found.

It is not disputed that the suit land to the extent of 32 cents was owned by the predecessors-in-title of the plaintiffs by name Kochunni. The documents produced in the court showed that one K.S.

Sankara Narayana Iyyer was running a Saw Mill in a shed standing on the suit land. None of the documents including additional documents produced establish that K.S. Sankara Narayana Iyyer had been granted the lease of land by Kochunni for a commercial or industrial purpose and lessee had put up a building on it before 20.5.1967 as to be entitled to seek protection of Section 106 of the Act. Some additional documents were filed in the High Court by the appellant to show that the Sankara Narayana Iyyer had transferred his rights to his brother Janardana Iyyer and the latter on 30.12.1958 gifted back his rights in the property to Sankara Narayana Iyyer. Thereafter Sankara Narayana Iyyer sold the super-structures and machineries but not any right over the land to Sainaba - wife of Kochunni and their children. The document of that sale deed dated 29.8.1960 is marked in trial court as Ex.A-15 and is included in the paper-book as Annexure-P.3. The plaintiff filed the suit pleading inter alia that the contesting defendants acquired only rights of a licensee from their

predecessors-in-interest and they are liable to be evicted on revocation of licence in their favour.

The suit was contested on the ground that appellant's predecessors-in-interest had obtained a lease of the land and having constructed a shed for running Saw Mill on the same prior to appointed day i.e. 20.5.1967, they were entitled to protection against eviction under Section 106 of the Act. The case of the defendants rests on document [Ex.A-3] dated 03.7.1965 [Annexure.P-10 in the paper-book]. It is an agreement entered into with Kochuvareed, who, it is pleaded, obtained leasehold right to land with shed and machineries of the Saw Mill from Sainaba and others.

Without going into the question whether document [Ex.A-3] dated 03.7.1965 executed by Kochuvareed in favour of first defendant Chandy is bad for want of registration, as has been held by the High Court, we have examined the said document to ascertain the correctness of the concurrent findings of the courts below that the document is ineffectual to create a leasehold right on the land in favour of the contesting defendant so to sustain claim of protection under Section 106 of the Act. It cannot be disputed in law that contesting defendant-Chandy could not have acquired better rights than what his transferor - Kochuvareed possessed. If Kochuvareed is held to be only a licensee on the land, the contesting defendant - Chandy cannot claim leasehold right under the document of transfer of rights made in in his favour by the former.

Learned senior counsel Shri Rajinder Sachar appearing for the successors-in-interest of the defendant as appellants before us took pains to take us through the various documents and transactions entered between the parties. He has strenuously urged that there was a transfer of leasehold rights of the original lessee of the land in favour of contesting defendant and the courts were wrong in not extending benefit of protection under Section 106 of the Act. The appellants trace title in favour of their predecessor as lessee of the land from transferor - Kochuvareed. Kochuvareed had himself obtained title to the suit property from Sainaba and others, who are legal representatives of Kochunni, under sale deed dated 05.2.1964 [Ex.A-2]. The relevant recitals of the sale deed read thus :- "Where as the above mentioned parties named 1 & 2 has purchased M/s Allied Saw Mill machineries such as 154 H.P. Electric Motor, Circular Saw etc., belonging to the establishment installed in a shed in the property in Ward No. 17, Alwaye Municipal Town, belonging to Thandanaparambil Abdul Rehiman Kochunni from Subramonian Sankara Narayana Iyyer.....

And where as after apportioning the profits among partners, it is decided to sell 15 H.P. Electric Motor, Circular Saw, new installed Re- Saw machine, Counter Shafts and fittings, other accessories and electric fittings, installed in the above mentioned land including the shed for a consideration of Rs.4,000/- and the sale consideration is received in the presence of Sub-Registrar by Smt. Sainaba." From the above recitals, it is not possible to infer that there was any transfer of interest in the land granted to Kochuvareed on which the shed and machinery of Saw-Mill were installed.

The other document described as Rent Deed is alleged to have been executed on the same day i.e., 05.2.1964. Under the said Rent Deed, Kochuvareed took possession of the land in Ward No. 17 from Kochunni on a monthly rent of Rs. 150/- for carrying on business of M/s Allied Saw Mill which was earlier run by Smt. Sainaba and others.

The above Rent Deed thus, shows that Kochuvareed obtained possession of the land with the Saw-Mill and its machineries installed on it but in the absence of clear words of granting any leasehold right in the land, it cannot be inferred that the parties intended by the said document to create a lease of land. Further recitals in the Rent Deed indicate that Kochunni had merely granted permission or licence to Kochuvareed to use part of his land for the purpose of carrying on the Saw-Mill business :- "I have taken the land to do timber business and to conduct Saw Mill Industry. I do not have right to enter into other properties within the boundaries of your properties, except in the schedule property.

I will not claim compensation in the event of voluntary vacating or eviction. I am not entitled to transfer this right or to part with possession. If any loss is sustained to you on account of my acts, I will be responsible for the same. Contrary to this agreement, at the time of surrendering/vacating the property or being evicted if arrears of rent is outstanding, I am not entitled to remove the sheds etc., from the land before the entire arrears with interest are paid." [Emphasis added] In the schedule of the document, the description of property is as under :- "Description of Property :- The entire land comprised in SY.No.256/2B, 50 cents except the building and 6 feet courtyard in front of the building which is located in the Western side and constructed in North-South direction extended towards east from north." The contesting defendant Chandy claims to have derived leasehold rights to the land in suit under agreement dated 03.7.1965 executed by Kochuvareed in his favour. The agreement is dated 03.7.1965 and the relevant recitals read thus :- "Whereas it is mutually agreed between the parties that the first party shall purchase and the second party shall convey his absolute rights over the buildings constructed at his expense in the land situated in Ward No. 17, Always Municipality belonging to Thandanaparambil Kochunni S/o Abdul Rehiman and in the Saw Mill and other machineries installed in the building and rental rights for a consideration of Rs. 43,000/- and this deed is executed and signed." The further relevant recital reads as under :- "The second party hereby undertake to pay the rent for the land to Kochunni out of the amounts given by the first party.

Sub-section (3) of section 125 of the Act requires that if in any suit or proceeding, a question arises regarding rights of a tenant, the civil court shall refer such question to the Land Tribunal having jurisdiction over the area in which the land or part thereof is situate, for the decision of that question. Sub-section (4) of the said section requires that the Land Tribunal shall decide the said question and return its findings to the civil court whereupon the civil court shall decide the suit by accepting the decision of the Land Tribunal on the question referred. Under sub-section (6) of section 125, the decision of the Land Tribunal on the question referred to it, shall be deemed to be part of the findings of the civil court for the purpose of the appeal.

The relevant sub-sections (1) to (6) of section 125 read thus:-

"125. Bar of jurisdiction of civil courts.-(1) No. civil court shall have jurisdiction to settle, decide or deal with any question or to determine any matter which is by or under this Act required to be settled, decided or dealt with or to be determined by the Land Tribunal or the appellate authority or the Land Board [or the Taluk Land Board] or the Government or an officer of the Government:

Provided that nothing contained in this sub-section shall apply to proceedings pending in any court at the commencement of the Kerala Land Reforms (Amendment) Act, 1969.

(2) No order of the Land Tribunal or the appellate authority or the Land Board [or the Taluk Land Board] or the Government or an officer of the Government made under this Act shall be questioned in any civil court, except as provided in this Act.

(3) If in any suit or other proceeding any question regarding rights of a tenant or of a kudikidappukaran [including a question as to whether a person is a tenant or a kudikidappukaran] arises, the civil court shall stay the suit or other proceeding and refer such question to the Land Tribunal having jurisdiction over the area in which the land or part thereof is situate together with the relevant records for the decision of that question only.

(4) The Land Tribunal shall decide the question referred to it under sub-section (3) and return the records together with its decision to the civil court.

(5) The civil court shall then proceed to decide the suit or other proceedings accepting the decision of Land Tribunal on the question on the question referred to it.

(6) The decision of the Land Tribunal on the question referred to it shall, for the purposes of appeal be deemed to be part of the finding of the civil court.

(7) The above provisions of section 125 of the Act show that the finding of the Land Tribunal on the claim of tenancy over land-in-suit is entitled to great weight being a subject matter in its exclusive jurisdiction. It has binding effect on the civil court. Such finding is deemed to be finding of the civil court under sub-section (6) fictionally for the purposes of appeal. The finding of the Land Tribunal which has exclusive jurisdiction over the subject can be

scrutinized in appeal but can be held liable to be upset only on strong and cogent grounds.

The Land Tribunal in its order dated 28.12.1988, came to the following conclusions after scrutiny of documents and other evidence of the parties :- "From this citation the Vendors have purchased the Mill and machineries of M/s Allied Saw Mill from Sankara Narayana Iyer and these things were sold to Kochvareed. Moreover, there is no reason to believe that the land was taken on lease from Kochunni as the three partners of the Allied Saw Mill were the children of Kochunni and the three others were subsequently inducted in the business.

Therefore, I can come to a conclusion that Sainaba and others have not taken the Land on lease from Kochunni." The Land Tribunal also considered the document conveying rights in favour of the contesting defendant-Chandy and came to the following conclusions :- "Here in the document, Kochuvareed has taken shed and premises for conducting a Timber business and Saw Mill on rent with a condition to conduct the business only for a period of 3 years and after 3 years, he has to vacate the land and shed if any, constructed by him.

Moreover, if the owner of the land demands the possession of the land, the rentee has to vacate the land without any compensation and also he has no authority to give possession of the plaint schedule property to a third person. These conditions will not confer a lease arrangement. The interest of the grantee is limited.

Therefore, he cannot be treated as a lessee but only a licensee.

Moreover, the AW-1 in his cross-examination has stated that his father Chandy and C.P. Kochuvareed were conducting the business on licence.

"His deposition is given below :- My father and Kochuvareed were conducting the industry as per the licence.

Therefore, I find that C.P. Kochuvareed is not lessee on the property.

The issue is found accordingly." [Underlining to add emphasis] The first appellate court confirmed the finding of the Land Tribunal which was accepted by the trial court that none of the documents is sufficient to conclusively indicate that there was any transfer of any right over the land in favour of

the contesting defendant. The concurrent finding is that the contesting defendant only obtained an assignment of the super-structure and machineries standing on the land. It is held that Kochuvareed and thereafter the contesting defendant were only licensees in the land. In any case, it was not the case of grant of a lease of land for commercial and industrial purposes whereon any building or super-structure was constructed before the appointed date i.e. 20.5.1967. The High Court confirmed these findings after re-examining the documents and interpreting them for itself.

We have heard in reply learned senior counsel Shri K. Parasaran appearing for the respondents [plaintiffs' successors-in-interest]. On behalf of the respondents, the concurrent findings of the courts below are supported and it is contended that there is no ground for this Court to interfere under Article 136 of the Constitution of India in the concurrent findings of all courts below.

Whether a particular document or transaction creates a 'lease' or 'licence' is not an easy task for the court to decide but the well established test laid down by the decision of this Court and as has been followed consistently, beginning from the decision of *Associated Hotels of India Ltd., vs. R.N. Kapoor* [AIR 1959 SC 1264] is that 'it is not the form but substance of the document has to be seen to gather the intention of the parties for determining whether the document/transaction is a lease or licence'. It is further held as under:- "The following propositions may be taken as well established :- (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence, and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease." Section 105 of the Transfer of Property Act defines a lease of immovable property as 'transfer of a right to enjoy such property made for a certain time in consideration for price paid or promised'.

Under section 108 of this Act, the lessee is entitled to be put in possession of the property. A 'lease' is, therefore, 'a transfer of interest in land'. Whereas section 52 of the Easement Act defines a 'licence' to mean 'a right granted to another person over immovable property to do or continue to do some act which would in the absence of such right be unlawful'. When such right does not amount to an easement or creates any interest in the property, the right is called a 'licence'. In all cases where the dispute is about the nature of the document to be a lease or licence, the question that has to be addressed by the Court to itself is what is the intention disclosed by the parties from the terms of the document or the transaction. Where the conclusion is that circumstance or conduct of the parties shows that all that was intended was that the occupier should have a personal privilege with no interest in the land, the transaction would be licence and not a lease. In *Board of Revenue vs. A.M. Ansari* [1976 (3) SCC 512], this Court observes :- "It is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is, in other words, transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties which is to be inferred from the

circumstances of each case.

For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential therefore, to look to the substance and essence of the agreement and not to its form.

In order that an agreement can be said to partake of the character of lease, it is necessary that the grantee should have obtained an interest in and possession of land. If the contract does not create an interest in land then the land would be considered as a mere warehouse of the thing sold and the contract would be a contract for goods." [Emphasis added] In the case in hand, all the courts including the High Court after examining the documents and the terms mentioned therein, came to the conclusion that the transferee of the shed and the machineries had only a licence to maintain them in the land and no right in land was intended to be created by the parties.

The concurrent finding of all the courts is that original owner viz., Kuchunni, never intended to transfer any interest in land to Shankara Narayan Iyyer. The above named transferee was found to be merely licensee for running Saw-Mill in the shed erected on the land. The said transferee being himself a licensee could not and was not found to have transferred any right in the land to original owner's wife – Sainaba and her children. Kuchvareed from whom the contesting defendant – Chandy is said to have acquired title, obtained right to the shed and Saw-Mill from Sainaba and her children.

Kochuvareed acquired only right to shed and Saw-Mill as a licensee and he could not have, therefore, conferred any leasehold rights in the land to contesting defendant – Chandy. He was rightly held to have acquired only right to the shed and machineries of the Saw-Mill with a licence to enter upon the land for use of shed and the machineries.

The concurrent finding reached by the Land Tribunal and the courts below is supported by cogent reasons based on proper interpretation of the documents made in the light of oral evidence on record. The inference in law thus derived by the courts from the oral and documentary evidence, does not appear to be erroneous to justify interference by this Court in its discretionary jurisdiction under Article 136 of the Constitution of India.

In addition, the consistent legal position which held the field in Kerala for more than 35 years is that for seeking protection against eviction under section 106 of the Act, a person in occupation of the land has to prove that he had been granted lease of the land for commercial or industrial purposes and after grant of such lease, he had raised a building or structure thereon for industrial or commercial purpose prior to the appointed date i.e. 20.5.1967. We do not find from any of the documents on record that the necessary ingredients to invoke provisions of section 106 of the Act

have been proved by the contesting defendant. The object of the section is to protect tenants, who have constructed building before the appointed day, on other's land to carry on their trade or business, from being dislocated and disturbed.

For the aforesaid reasons, we find no merit in this appeal and it is, accordingly, dismissed.

In the circumstances, the respondents (plaintiff's successors) will be entitled to costs as incurred in this Court.