

KERALA HIGH COURT

Chellappan Pillai

Vs

Parameswaran Pillai

(Govinda Menon J.)

05.11.1979

JUDGEMENT

Govinda Menon J.

(1.) The suit out of which the appeal arises was instituted by the respondent as purchaser of the equity of redemption. He had redeemed the mortgage Ext. A2 of 1073 on the property and by the plaint he asked for redemption of the sub-mortgage Ext. A3 of 1077 created by the mortgagee and now vesting in the first defendant-appellant. THE appellant denied the respondent's title and asserted that he was the full owner, repudiating the sub-mortgage. He raised an alternative defence that he was a deemed tenant within S. 4a (1) (a) of the Land Reforms Act and was therefore entitled to protection from eviction. THE trial court overruled these defences and passed a preliminary decree for redemption in favour of the respondent. On appeal the appellant repeated and that claim alone is relevant now that he was a deemed tenant. That claim failed and the appellate judge confirmed the decision of the trial court. (1) Notwithstanding anything to the contrary contained in any law or in any contract, custom or usage, or S. 4a (1) (a) reads as follows: "4a. Certain mortgagees and lessees of mortgagees to be deemed tenants 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 a 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" THE mortgage was a mortgage with possession both the head mortgage and the sub-mortgage and both are over fifty years old, the period required by clause (a). THE mortgage holding is also not of the category of lands exempted by sub-section (1). THE question then is whether the appellant is a mortgagee, for if he is one he must fall within the sub-section and qualify for protection.

(2.) A sub-mortgage is created by partially transferring the mortgage and the sub-mortgagee is thus a derivative mortgagee, owning part of the mortgage. He is to a limited extent an assignee of the mortgage and although the assignment has been made by the mortgagee and can be redeemed

by him, he is liable to redemption by the mortgagor who created the head mortgage as he is a partial or limited assignee of that mortgage. They are bound by privity of estate, each having correlated rights of the mortgagor and mortgagee in the same property, the rights being modified by the existence of the head mortgage so long as it lasts. In the present case the head mortgage had been redeemed and the suit is by the owner of the equity of redemption to redeem the outstanding sub-mortgage. The appellant is a mortgagee even in relation to the respondent, albeit it is by virtue of a partial or limited transfer of the original mortgage. The other conditions of the sub-section being satisfied the case must therefore fall within its terms, unless it is excluded by any other provision or principle of law. The lower appellate court rejected the appellant's claim in the view that while S. 4a (1) (a) would have applied if the suit was by the mortgagee to redeem the sub-mortgage it does not or cannot apply as the suit is by the mortgagor to redeem the sub-mortgage, which alone is outstanding. This view cannot be accepted as correct for it overlooks the position or status of the sub-mortgagee vis-a-vis the mortgagor, as explained above. Counsel for the respondent contended that the provisions of S. 3 (1) (v) are sufficient to exclude the transaction from the protective sweep of S. 4a and S. 13 which confers fixity of tenure on tenants who include by virtue of the inclusive definition in S. 2 (57) deemed tenants under s. 4a, among other sections. S. 3 enumerates several classes of tenancies and provides that the provisions of Chapter II which covers S. 3 to 80c will not apply to these leases. The transactions excluded by S. 3 (1) (v) are "tenancies in respect of land or of buildings or of both created by mortgagees in possession or by persons deriving title from such mortgagees. " The respondent contended that assuming that the sub-mortgage is a tenancy within, S. 4a (1) (a), it must still stand excluded from Chapter H as it was created by the mortgagee and is therefore hit by S. 3 (1) (v). Whatever force this contention might have had, it must fail in view of sub-clause (iii) of the proviso to S. 3 (1) (v) which excludes certain tenancies from its terms. Sub-clause (iii) deals with tenancies "created before the commencement of this Act, where the lessee is entitled to fixity of tenure under S. 4a" As the appellant is a deemed tenant entitled to fixity of tenure under S. 4a (1) (a) and as the tenancy originated before the Act it is unaffected by S. 3 (1) (v). The contention fails.

(3.) THE respondent finally argued that having set up title in himself the appellant should not be allowed, when faced with the failure of the claim, to enlist protection by setting up a tenancy. In support of this contention he relied on Kaliyannan v. Narasimha Iyer 1974 KLT. 286 where it was held following 1973 KLT. 1048 that a person who has set up a specific lease and failed to establish that plea cannot turn round and contend that he should be treated as a deemed tenant under S. 7. THE facts here are entirely different from the case in 1974 KLT. 286 where, it might also be mentioned, the last ditch plea was raised in execution after the earlier plea had been thrown out at the trial. What the appellant did in the present case was to raise two alternate, although inconsistent, defences of which the defence of deemed tenancy was based on the respondent plaintiff's case. THERE is nothing in 1974 KLT. 286 to discountenance such a defence. I reject the contention. THE decisions of the court below are reversed and the appellant is declared to be a deemed tenant entitled to fixity of tenure. THE appeal is allowed in these terms but without costs. Allowed. . . ;

