KERALA HIGH COURT

Abdulrahiman

Vs

Abdulla Haji

C.R.P. No. 557 of 1989

(Sukumaran and Manoharan, JJ.)

11.03.1991

ORDER

Manoharan, J.

1. Revision Petitioner is the defendant in O.S. No. 17 of 1988; a suit for possession. He claimed that he is entitled to the protection under S. 106 of the Kerala Land Reforms Act (Act 1/64) (for short 'the Act') on the ground that the land in question was leased to him for commercial purpose and that he has constructed a building for such purpose before 20-5-1967. Issue No. 2 was framed by the court with respect to the said contention. The revision petitioner thereupon wanted the suit to be stayed and the said question referred to the Land Tribunal for adjudication as per S. 125(3) of the Act. But the prayer was rejected as according to the lower court since he has applied under S. 72-B of the Act for assignment of the land lord's right, he is not entitled to maintain that he is entitled to the protection under S. 106 of the Act. According to the lower court he is barred by the doctrine of election from making such a claim. Reliance was placed on the decision in *Kamalakshmi Amma v. Vijayan*[1]*,*).

2. When the matter came up for hearing before the Chief Justice, His Lordship doubted the correctness of the decision in *Kamalakshi Amma's*[2]*,*) and adjourned the case for consideration by a Division Bench.

3. In the circumstances, advertance to the allegation in the plaint as to this aspect is necessary. In paragraph 7 of the plaint the plaintiff alleges that, the first defendant filed O.A. 3774176 for purchase of jenm right, that the Land Tribunal on enquiry found that the lease was for industrial and commercial purpose falling under the exception as per S. 3(1)(iii) of the Act, and that the petitioner hence is not entitled to maintain the petition. An appeal and a revision by the revision petitioner from the said order were also dismissed

4. As has been noticed, according to the respondents, since the petitioner has maintained that he is a cultivating tenant and filed an application under S. 72-B of the Act, he is barred by doctrine of election in claiming the protection under S. 106 of the

[1]1988 (2) KLT 498

[2]1988 (2) KLT 498

Act. The decision in Kamalakshi Amma's case (1988 (2) KLT 498) supports the said contention. There it is held that a person who has filed an application under S. 72-B of the Act for assignment and lost is barred from claiming the protection under S. 106 of the Act on account of the operation of the doctrine of election.

5. For the proper appreciation of the rival contentions brief advertence to the relevant provisions in the Act is necessary. Chapter II of the Act deals with deemed tenants, fixity of tenure for tenants and kudikidappukars, right of tenant to purchase land-lord's right, right of kudikidappukaran to purchase the kudikidappu etc. S. 3 of that Chapter states that the provisions in the said Chapter would not apply to leases and tenancies mentioned therein. S.3(1)(iii) exempts leases of land or buildings or both for the industrial or commercial purpose. Thus a lessee falling under S.106 of the Act since is exempted from the purview of Chapter II, he is not entitled to purchase land-lord's right under S. 72-B of the Act. Immunity from eviction is by the reason of S. 106 itself. S. 106 of the Act reads:

> *"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 of tenancy, and such rent shall be liable to be varied every twelve years.
>
> Explanation:--For the purposes 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.
>
> (1A) The lessor or the-lessee may apply to such authority as may be prescribed for varying the rent referred 'to in sub-section (1), and thereupon such authority may, after taking into consideration such matters as may be prescribed and after giving the lessor and the lessee an opportunity of being heard, pass such orders on the application as it deems fit.
>
> (2) If, between the 18th December, 1957 and the date of commencement of this Act, any decree or order of court has been executed and any person dispossessed by delivery, such person shall, on application before the Land Tribunal, be entitled to restoration of possession:
>
> Provided .that, before restoration, such person shall be liable to pay --
>
> (i) the compensation paid by the landlord for any improvements in the land and subsisting at the time of restoration;
>
> (ii) the compensation for any improvements effected subsequent to the delivery:
>
> (3) Nothing contained in sub-section (1), sub-section (A) and sub-section (2) shall apply to lands owned or held by the Government of Kerala or a local authority).
>
> Explanation.--For the purposes of this sub-section, "local authority" includes the Cochin

Port Trust and any university established by an Act of the Kerala State Legislature".

Only a cultivating tenant is entitled to purchase the right, title and interest of the land-lord or intermediaries. Therefore the right of the cultivating tenant and that of a tenant of lease for commercial or industrial purpose are mutually exclusive. It is because of the said inconsistent character of the said two types of leases the plaintiff contended, a person who has opted to move under S.72-B of the Act to purchase land-lord's right cannot later maintain that the lease is for commercial purpose. Plaintiff seeks to maintain, he is barred from contending so because of doctrine of election.

6. S.125(1) of the Act ousts the jurisdiction of the civil court to deal with any question which is required under the Act to be settled; decided or dealt with or to be determined by the Land Tribunal, the appellate authority, the Land Board, the Taluk Land Board or the Government. As per S.125(3) when in a suit or a proceeding the question regarding the right of a tenant or a kudikidappukaran arises the civil court has to stay the suit and refer the said question to the Land Tribunal for adjudication. Thus when such question arises, since the same is to be adjudicated by the Land Tribunal, the Civil Court will not have jurisdiction to adjudicate the same. Since the claim made by the revision petitioner that he is entitled to the benefit under S.106 of the Act is such a question that arises within the meaning of S.125(3) of the Act, the forum which could adjudicate the same as per the said sub-section is the Land Tribunal. In paragraphs 7 and 8 of the plaint, the plaintiff alleged that the defendant is not entitled to the benefit under S.106 of the Act, whereas the revision petitioner claimed that he is entitled to such benefit. Therefore, as per the pleadings such question arises for determination.

7. In the decision in *Sankaran v. Appu*[3]*,*) it was held that such question would arise only if it emanates from the pleadings or the material on record. But in the decision in *Lissy v. Kuttan*[4]*,*) it is held that prima facie satisfaction of the civil court is not necessary. Whenever a question of right as the one mentioned in sub-section (3) of S.125 arises the suit has to be stayed and for that purpose what will have to be examined are the pleadings and nothing else. It is held: "This, the court will have to examine and for this purpose what will have to be examined are the pleadings and nothing else. Whether the plea is frivolous or sustainable or prima facie true or not are all foreign to the scope of the enquiry before court". This decision also held that whether a particular exemption under S.3 applied also has to be referred to the Land Tribunal for adjudication. Now having understood that there is no dispute that there is an allegation and denial as to the claim of right under S.106 of the Act and an issue having been raised with respect to the same, in view of the decision in *Lissy's, 1976 KLT 571 FB*) normally the said question has to be referred to the Land Tribunal for adjudication.

8. True, if such question has already been adjudicated and found against the claim would be barred by res judicata, then certainly such question cannot be treated as one that would "arise" within the meaning of S.125(3) of the Act.

9. As has been already noted, it is not the case of the respondent that the said claim under S.106 is barred by res judicata on account of any finding in the order dismissing

[3]1987 (1) KLT SN 50

[4]1976 KLT 571 FB

the application under S.72-B of the Act, it is only that the petitioner is barred from claiming the benefit under S.106 of the Act on account of the doctrine of election.

10. In paragraph 7 of the plaint itself it is alleged that the tribunal dismissed the application holding that the land was specifically granted for industrial and commercial purpose, and that it is exempted under S.3(1)(iii) of the Act. The claim of the petitioner is that he is entitled to the benefit under S.106 of the Act. As per the allegation in paragraph 7 of the plaint the said claim of the petitioner is not inconsistent with the finding rendered by the Land Tribunal and confirmed by the appellate as well as the revisional authority. Therefore, not only the contention is not barred by res judicata, but the finding supports the revision petitioner's contention in as much as the finding is to the effect that the lease was for commercial purpose. All that the revision petitioner has to prove is the other ingredients in S.106 of the Act. In as much as the plaintiff himself relies on the said finding in paragraph 7 of the plaint, the plaintiff cannot also go behind the said finding. The point to be noted is, there is no finding that would prevent the revision petitioner from raising such a contention. In other words, the present contention raised by the revision petitioner is not barred by res judicata and therefore on that ground it cannot be said that the said contention does not arise within the meaning of S.125(3) of the Act. The effect of res judicata has to be kept in view so as to see the difference between the estoppel by judgment and other forms of estoppel.

11. Estoppel by judgment is founded on public policy. Res judicata bars adjudication, whereas estoppel prevents a party from proving a particular fact. When a particular question has already been adjudicated and further adjudication is barred by res judicata, such question cannot arise; consequently a question which is barred by res judicata cannot be treated as one that would "arise" under S. 125(3) and therefore the same need not be referred to the Land Tribunal. But as has already noted, with respect to estoppel the same being a rule of evidence, its application and relevance can only be at trial. Estoppel does not even bar trial; it only prevents the party from proving a particular fact. Then estoppel cannot arrest the question from "Arising". It would then follow that the civil court will be incompetent to go into the question whether the claim is barred by estoppel for such question whether the same is barred by the doctrine of election or by waiver is a matter which will have to be adjudicated by the Land Tribunal which alone has the jurisdiction to decide the same question.

12. The question whether the revision petitioner is barred by doctrine of election or waiver from taking such contention can also be examined. In *Kamalakshy Amma's*[5],) it is held that he would be barred by the doctrine of election from claiming benefit under S.106 of the Act. In the decision in *Kumaran Nair v. Damodaran Nair*[6],) in a petition for eviction under S.11 of the Kerala Buildings (Lease and Reig Control) Act, Act 2 of 1965 the respondent claimed kudikidappu right. It was held that he has waived the said right in view of the fact that he had initiated proceedings under Ss.5 and 17(2) of the Act 2/1965. It was held, since as per S.79 of the Act the cost of maintenance and repairs has to be met by the kudikidappukaran himself and in as much as he has applied under S.17(2) of the Act 2/1965 he must be taken to have

[5]1988 (2) KLT 498

[6] 1986 KLT 461: 1986 KLJ 210

waived his right as a kudikidappukaran. As per S.79of the Act kudikidappukaran has the right to maintain and repair the kudikidappu. But a tenant under Act 2/1965 has to apply under S.17(2) of the said Act to the accommodation controller for direction to attend the repairs and maintenance of the building by him and to deduct the said charges from the rent. On the other hand, in the decision in *Subbayya Chettiyar v. Ayyappan Pillai*[7],) it is held that, the fact that the tenant has

filed the application under S.13 of the Act 2 of 1965 cannot constitute an estoppel against his moving under S.80-B of the Act. S.13 of Act 2 of 1965 enables the tenant under the said Act to apply for restoration of amenities. The court took the view that a person cannot be estopped for wrong representation on a point of law and held that it cannot constitute an estoppel.

13. The principle of estoppel by election can arise only in cases where two courses of action available are mutually exclusive and the opposite party on the faith of the representation by conduct or otherwise has acted to his detriment or has adopted a course of action which otherwise he would not have resorted to. hi the decision in *Nagubai v. B. Shama Rao*[8]*,*) it is held that the maxim that a person cannot approbate and reprobate is only one application of the doctrine of election. The observation in paragraph 23 of the judgment would show that if the party has not obtained an advantage against the other by such representation, he cannot be held to be barred by doctrine of election from claiming the benefit. It is observed:

> "The plaintiff obtained no advantage against the appellants by pleading in O.S. No. 92 of 1938-39 that the proceedings in O.S. No. 100 of 1919-20 were collusive; nor did they acting on those pleadings acquire rights to the suit properties. Nor is there any question of election, because the only relief which the plaintiff claimed in O.S. No. 92 of 1938-39 and which he now claims is that he is entitled to the suit properties. Only, the ground on which that relief is claimed is different and, it is true, inconsistent. But the principle of election does not forbid it,and there being no question of estoppel, the plea that the proceedings in O.S. No. 100 of 1919-20 are not collusive is open to the plaintiff."

It is not the case of the plaintiff that by filing the petition under S.72-B of the Act, the petitioner obtained any benefit. There is also a contention to the effect that by the filing of petition under S.72-B of the Act, the petitioner has waived his right if any under S.106 of the Act.

14. As regards waiver in relation to the doctrine of election it is stated at page No. 319-320 of Estoppel by Representation by Spencer Bower and Turner - Third Edition:

> "The truth is, perhaps, that whereas a fairly successful attempt may be made to state with precision what is meant by "estoppel" and by "election", the term "waiver" when used in a similar connotation is not capable of exact definition in the light of the authorities. Possibly it may be regarded as usefully describing an end-result; but its application to the process by which that result

[7]1989 (1) KLT 917

[8] AIR 1956 SC 593

> is brought about is almost invariably attended with ambiguity as to the essential nature of that process".

When two remedies are open to a particular party and he opts for one of them, in a given circumstance it could be deemed that he has waived the other remedy. In such circumstance the end result of the operation of election is waiver of the other remedy.

15. The question for consideration now is whether in such circumstance estoppel by election or

waiver can be invoked against the claim of benefit under the Act. This will depend upon the question whether the provisions containing such benefits are based on public policy; whether the protection or the right is created not only for the interest of the individual but also is intended to protect the interest of the community in general.

16. In the decision in *Kumaran Nair v. Damodaran Nair*[9],) with reference to S.11 of the Kerala Buildings (Lease and Rent Control) Act and the right of Kudikidappukaran under the Act it is observed:

> "These rights and privileges rest in the individual and they are intended for his sole benefit. The provisions in the Rent Control Act and the K.L.R. Act are made for the benefit and protection of private rights and therefore the person for whose benefit these provisions are enacted, can waive the said rights".

(emphasis supplied)

17. We shall consider the correctness of the above dictum. At page 143 of the Estoppel by representation referred to early it is stated:--

> "If the public, or a class or section of the community, are interested, as well as himself, in the general observance of the conditions prescribed by the statute, it has always been held on the ground of public policy that there can be no waiver, even by express contract or consent,of the right to such observance by any individual party; but where, on the other hand, no public interest, and no interest intended to be promoted or protected by the statute, is in the least affected by the contract or consent to waive, and the matter is one which concerns the parties alone, such contract or consent has never been interfered with, but on the contrary has always been enforced. So also, in cases of waiver by conduct which give rise to an estoppel, the same essential distinction has always been observed. On the one side of the line are the case where the estoppel or waiver, if allowed would defeat the objects of the statute, and injure the interests of the public, or of persons other than the immediate parties, and where therefore the affirmative answer of illegality has prevailed, and the estoppel has been defeated".

18. Thus it becomes necessary to see whether S.106 of the Act is intended to deal with private rights only or whether the same is intended as a matter of public policy to have more extensive operation.

9*1986 KLT 461*

19. In *Murlidhar Aggarwal v. State of U.P*[10].,) a similar question arose for consideration, whether a provision in the lease deed to the effect that the parties would not claim benefit of the provisions in U.P. (Temporary) Control of Rent and Eviction Act, 1947 is capable of waiving the right of the tenant for protection under S.3 of the said Act. As per S.3 of the said Act no suit without the permission of the District Magistrate could be filed in a Civil Court against the tenant for his eviction except on any one or more of grounds mentioned in the said Section. After adverting to S.23 of the Indian Contract Act the question as to whether the said Section was

enacted only for the benefit of the tenant or whether there is a public policy underlying it which precludes a tenant from waiving the said benefit was considered. It is observed in paragraph 26 and 27:

> "26. In the Nineteenth Century the doctrine of laissez faire capitalism were accepted as part of the natural order of things and the doctrine was re-inforced by the idea of the early Utilitarians that to achieve social justice, it would suffice to produce formal equality before the idea that freedom of contract was the supreme article of public policy, a notion which ignored utterly those cases where there was no genuine equality of bargaining power as for example between master and servant or between landlord and tenant.
> 27. There can be no doubt about the policy of the law, namely, the protection of a weaker class in the community from harassment of frivolous suits. But the question is, is there a public policy behind it which precludes a tenant from waiving it."
> Then observing that public policy does not remain static, and that it may vary from generation to generation or even in the same generation, and that S.3 of the said Act is intended to protect the weaker section of the community with a view to ultimately protect the interest of the community in general by creating equality of bargaining power; the Supreme Court held: "Although the Section is primarily intended for the protection of tenants only, that protection is based on public policy. The respondent could not have waived the benefit of the provision".

20. Social compulsions would be the forerunner of the evolution of a public policy at a given time; and when statute makes provisions in accordance with the same that would not only be in the interest of individual but would be in the interest of the community in general also. When public policy is the basis of a provision of law the same would be aimed to protect not only the interest of the individual but would be in the interest of the community in general. Social and historical causes would be the propelling force that would compel such public policy. In the light of what is held in *Murlidhar Aggarwal's*[11]*,*) the question that calls for consideration is whether S.106 of the Act is based on public policy. Is the statutory scheme in general and the Section in the Act primarily intended to protect the weaker section of the community with a view to ultimately protect the interest of the community in general.

21. The effect of S.106 of the Act cannot be examined in isolation; the Section is only part of the whole scheme of the Act. S.13 of the Act gives fixity of tenure to

[10]1974 (2) SCC 472
[11]1974 (2) SCC 472

cultivating tenant, S.72 enjoins that the whole right of the land-owner and intermediaries would vest in the Government on the notified date; S.74 prohibits creation of future tenancies. Thus there would be no landlord or the intermediary after the said date. Then the tenant is given right under S.72-B to apply for assignment of the right vested under S.72 of the Act. S.75 of the Act gives fixity to Kudikidappukars and S.80-A gives them the right to purchase the kudikidappu. The provisions in Chapter III deal with ceiling area and the assignment of excess land. The Sections thus pilot a social change, the beneficiaries of which are the weaker Section of the society. The legislative history of the Act itself would show that the same was intended to give protection to the weaker Section of the community. The Act undoubtedly ushered in a new era

which brought security, dignity and sense of belonging to a large section of the community who till then was kept away from them. The legislation is the attainment of one of cherished goals envisaged in the constitution itself. Certainly one of the objectives of the Act is distribution of landed property to the landless.

22. The very preamble to the Constitution declares the resolve to constitute India into a sovereign, socialist, secular democratic republic. The word 'socialist' was incorporated in the preamble to the Constitution by the Constitution 42nd Amendment. The very idea of socialism declared in the preamble gets more emphasis from Articles 21, 38 and 39 of the Constitution. Art. 38 enjoins that, the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Art. 21 protects the right of every citizen to live with dignity.

23. In the decision in *Bandhua Mukti Morcha v. Union of India*[12],) adverting to Arts. 21, 39(e) and (f), 41 and 42 it is observed in paragraph 10 at page 183:

> "It is the fundamental right of everyone in this country, assured under the interpretation given to Art.21 by this Court in Francis Mullin's case, to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Art.21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Art.39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and human conditions of work and maternity relief".

24. The effect, purpose and scope of Ss. 13, 72-B, 75, 80-A, 80-B and 106 have to be interpreted and understood in the back-drop of the said constitutional provisions. When so understood, particularly in view of the principles laid down in *Murlidhar Aggarwal's*[13],), we have no doubt in our mind that these provisions in the Act are enacted as an endeavour to implement the said provisions in the constitution. The said Sections in the Act are enacted consistent with the philosophy underlying the said

[12]1984 (3) SCC 161

[13]1974 (2) SCC 472

provisions in the Constitution. They are intended to achieve the transformation of the society to one constituted by members who are free from exploitation. It is not of little importance in this context to note that the Act and the amending Acts are included in Schedule IX of the COnstitution. Thus fixity under S.13, the right to purchase under S.72-B, fixity of Kudikidappukaran under S.75, his right to purchase the kudikidappu under S.80-A, the protection against eviction under S.106 are all intended to protect the weaker section of the community with the intention of ultimately protecting the interest of the community in general.

25. As has already noted the said Ss. 13, 72, 72-B, 75, 80-A, 80-B and 106 being based on public policy intended to protect the weaker section of the community, the right thereunder conferred on such weaker section cannot be waived. Since the right under S. 106 cannot be waived, the same

cannot be barred by the doctrine of election from claiming and proving the same as a right which cannot be waived cannot be barred by the doctrine of election. As has noticed the end result of election is waiver. Therefore, that which cannot be waived cannot be barred by the doctrine of election. In the light of the above discussion, we hold that, *Kamalakshy Amma's*[14]*,*) and *Kumaran Nair's*[15]*,*) do not lay down the correct law.

26. When such is the position it has to be found that, the question that has been raised in issue No.2 is a matter to be referred to the Land Tribunal for adjudication as per S.125(3) of the Act. In that view the C.R.P. has to be allowed. In the result the C.R.P. is allowed. In the circumstance, there will be no order as to costs.

Allowed.

[14]1988 (2) KLT 498

[15]1986 KLT 461