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Court : Kerala

Decided On : Oct-04-1982

Reported in : AIR1983Ker21

Judge : P. Subramanian Poti, Ag. C.J.,; George Vadakkal and; T. Chandrasekhara Menon, JJ.

Acts : Kerala Land Reforms Act, 1964 - Sections 2(25); Kerala Land Reforms (Amendment) Act, 1972

Appeal No. : S.A. No. 967 of 1977

Appellant : Xavier and anr.

Respondent : Antony

Advocate for Def. : T.S. Venkiteswara Iyer and; P.K. Balasubramoniam, Adv.

Advocate for Pet/Ap. : V.O. John,; T.C. George and; P.L. Norbert, Adv.

Disposition : Appeal allowed

Judgement :

George Vadakkal, J.

1. This is an appeal by defendants 3 and 5 against the decree allowing their eviction from their dwelling house and the site thereof having an extent of 31/2

cents and situate, at the time the suit was filed on 25-6-1964, within the Mattancherry Municipal limits, and now, within the bounds of the Cochin Corporation. The question raised is whether the 1st defendant, their father was a kudikidappukaran in respect of this house and on his death, defendants 3 and 5, are kudikidappukars thereof. The lower Courts answered the above question in 'he negative. The reason therefor is; at the time the suit was filed the 1st defendant had 5 cents of land fit for erecting a homestead within the Mattancherry Municipal limits, though after the institution of the suit, in 1966 he sold the said property and since, then he had no other land fit for erecting a homestead, nor have defendants 3 and 5 any other land.

2. Defendants 3 and 5 contend that they are Kudikidappukars falling within Explanation II-A to Section 2 (25) of the Kerala Land Reforms Act, 1963 (hereinafter, too Act). The argument is that as on 1-1-1970 with effect from which date the said Explanation was introduced into the Act as pet the Kerala Land Reforms (Amendment) Act, 1972 (Act 17 of 1972), they satisfy the requirements of the said Explanation, and that therefore, they have to be deemed to be kudikidappukars. It is not disputed that it is so but for the fact that, according to the respondent's learned counsel, this is a case falling within Clause (b) of the Proviso to Explanation II-A. The only question therefore, that arises for consideration is as to whether it is so.

3. Explanation II-A reads :--

'Explanation II-A-- Notwithstanding any judgment, decree or order of any Court, a person, who, on the 16th day of August, 1968, was in occupation of any land and the dwelling house thereon (whether constructed by him or by any of his predecessors-in-interest or belonging to any other person) and continued to be in such occupation till the 1st day of January, 1970, shall be deemed to be a kudikidappukaran;

Provided that no such person shall be deemed to be a kudikidappukaran--

(a) in cases where the dwelling house has not been constructed by such person or by any of his predecessors-in-interest, if- --

(i) such dwelling house was constructed at a cost, at the time of construction, exceeding seven hundred and fifty rupees; or

(ii) such dwelling house could have, at the time of construction, yielded a monthly rent exceeding five rupees; or

(b) if he has a building or is in possession of any land exceeding in extent three cents in any city or major municipality or five cents in any other municipality or ten cents in any panchayat area or township, either as owner or as tenant, on which he could erect a building.'

4. The submission is: on 25-6-1964 when the suit was filed the 1st defendant had ownership over and possession of 5 cents of land on which he could erect a building within the Mattancherry Municipality; we should ignore the fact that he sold away the said land in 1966 because it is a pendente lite sale; so ignored, he had and on his death, defendants 3 and 5 have, 5 cents of land on which he could have erected, and on his death, they could erect a homestead; hence, the case on hand is squarely within the ambit of Clause (b) of the Proviso and therefore, outside the ambit of Explanation II-A.

5. Explanation II-A was introduced into the Act, as already stated, with effect from 1-1-1970. A Full Bench of this Court considered its scope in Velayudhan v. Aishabi, 1981 Ker LT 529 : (AIR 1981 Ker 185). It was held therein that under the Act there are two classes of kudikidappukars, namely, (i) 'those who fall within the ambit of the main clause' of Section 2 (25) and (ii) those who 'come under the Explanation' i.e. Explanation II-A. See Velayudhan's case, para 36 at p. 541 (of Ker LT) : (at pp. 195, 196 of AIR). The relevant date for applying the tests stated in Explanation II-A for the purpose of determining whether a person is or is not a deemed kudikidappukaran coming under Explanation II-A is 1-1-1970. Any person who satisfies the requirements mentioned in the body of Explanation II-A and does not come within the purview of the Proviso thereto as on 1-1-1970 is a kudikidappukaran, no matter whether he can claim to be kudikidappukaran as defined in the main clause of Section 2 (25) even prior thereto or not. There is no case that as on 1-1-1970, the 1st defendant or defendants 3 and 5 had any other land fit for erecting a homestead. It is not possible to ignore the sale by the 1st

defendant in 1966 of the 5 cents of land he had, though that sale was subsequent to the filing of the suit. This is simply because the question for consideration is as to whether as on 1-1-1970 one satisfies the requirements of Explanation II-A.

6. It is not contended that if the suit had not been filed in 1964, the relevant date with reference to which the question of application of Explan. II-A is to be determined is 1-1-1970 when it came into force. The argument is that the suit having been instituted in 1964, that suit should be tried and decided with reference to and taking notice of the facts obtained on the date of its institution and ignoring the subsequent events. It is not an invariable rule that subsequent events shall not affect the decision of a case. Very often reliefs have to be moulded and some times denied because of subsequent events. For example it is idle to contend that a suit for injunction simpliciter restraining trespass on land should be decided with reference to the date of its institution and ignoring subsequent trespass -- if the suit is not amended it will fail. Whatever that be, so far as this case is concerned, what is to be noticed is the defendants could claim the benefit of subsequent legislation, Explanation II-A, only from and after 1-1-1970 when it came into force, and the availability thereof is to be determined with reference to that date and no other date. In other words, the facts obtained on 1-1-1970 govern the application of Explanation II-A, as stated in the preceding paragraph.

7. We will now advert to another contention advanced by the learned counsel for the plaintiff-respondent. The argument is: under Clause (b) of the Proviso to Explanation II-A a person in possession of a building or of land exceeding the extent specified therein on which he could erect a building (here 5 cents) is not a kudikidappukaran; the same is the position under Section 2 (25), where under a person who has a homestead or land exceeding the extent specified therein (such specification is the same) on which he could erect a homestead is not a kudikidappukaran; the defendants could not invoke Section 2 (25) because the 1st defendant had 5 cents of land fit for erecting a homestead; therefore, they are not entitled to claim a kudikidappu right under Explanation II-A. The argument in short is that the Proviso to Explanation II-A and, at any rate, Clause (b) thereof only reiterates the conditions of exclusion contained in Section 2 (25) and is, in fact, redundant. According to the learned counsel for the respondent, the object of

Explanation II-A is only to dispense with proof of permission envisaged by Clauses (a) and (b) of Section 2 (25) of the Act. In other words, according to him, the requirement mentioned in the opening portion of Section 2 (25), namely, that the person claiming to be kudikidappukaran should neither have any homestead nor any land (exceeding the limits mentioned therein) on which he could erect a homestead, has not only been not dispensed with by Explanation II-A, but reiterated. Therefore, according to him, in the case of one who claims to be a kudikidappukaran under Explanation II-A also, unless this condition is obtained when the action commences (herein, suit was instituted on 25-6-1964) he would not be a kudikidappukaran.

8. We do not think that there is any merit in the above contention. In Velayudhan's case (AIR 1981 Ker 185) (FB) this Court examined the legislative history of Explanation II-A in detail. In view of what is said there, it has to be held that Explanation II-A is a self contained provision, that it stands by itself, and that kudikidappukars coming thereunder constitute a class by themselves. Moreover, we should presume that the legislature is not guilty of redundancy.

9. Before the learned single Judge and before the Division Bench there appears to have been some arguments invoking the doctrine of *Ms pendens*. It seems that the decision in Mohamed Mytheen v. Sreedharan (1976 Ker LT 919) (FB) was relied on in support thereof. This necessitated the reference, as is seen from the reference orders.

10. We may at once say that on the facts of this case, there is no scope for invoking the doctrine of *lis pendens* or for applying the principle stated in Mohamed Mytheen's case (1976 Ker LT 919) (FB), for the subject matter of the suit the dwelling house and its site, have not been *pendente lite*, transferred or sold by the 1st defendant or his legal representatives, defendants 3 and 5, on whom the 1st defendant's rights devolved, to anyone. It is essential for the application of the doctrine of *lis pendens*, that the property that is transferred should not only be an immovable property but also one, any right to which is directly and specifically in question in the suit, during the pendency of which the transfer is effected. No right to the 5 cents of land which the 1st defendant sold in

1966 was directly and specifically in question in this suit, and the immovable property the right to which is in question in this suit has not been transferred. Therefore, the doctrine of lis pendens has no application to this case.

11. In Mobamed Mytheen's case, the defendants-appellants who claimed kudikidappu rights were found to have been inducted into the suit property during the pendency of a partition-suit concerning that property therefore the transfer of possession of the land to the defendants-appellants was held to be subject to the decree in the partition-suit, and that that decree was stated to be one which would bind the defendants-appellants. The Full Bench, there, approvingly noticed that this Court has consistently taken the view that the Act has not abrogated the doctrine of lis pendens. It was held therein that the transfers in favour of the defendants-appellants therein who claimed kudikidappu rights under Explanation II-A, being transfers pendente lite, i. e., during the pendency of the partition-suit, are vitiated by lis pendens. The Full Bench in Velayudhan v. Aishabi, (1981 Ker LT 529) : (AIR 1981 Ker 85) refrained from expressing any definite opinion on this point. We do not think it necessary to examine this aspect in this case either, as that question is not germane here.

12. We allow this second appeal, but in the circumstances of the case, without any order as to costs.

13. Counsel for the respondent made an oral application for leave to appeal under Article 134-A. We see no substantial question of law of general importance which needs to be decided by the Supreme Court arising in this case. Hence leave declined.