

John Decruz Vs. Richard

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Court : Kerala

Decided On : Jun-09-2005

Reported in : 2005(3)KLT702

Judge : R. Bhaskaran and; K.R. Udayabhanu, JJ.

Acts : Kerala Buildings (Lease and Rent Control) Act - Sections 5, 11(4), 14, 17(2) and 72B; Kerala Land Reforms Act, 1964 - Sections 13, 72, 72B, 75, 80A, 80B, 106 and 125(3); Transfer of Property Act - Sections 52; Code of Civil Procedure (CPC) - Sections 11 and 47

Appeal No. : W.P. (C) No. 32905 of 2004

Appellant : John Decruz

Respondent : Richard

Advocate for Def. : V. Ramkumar Nambiar, Adv.

Advocate for Pet/Ap. : E.V. Nayanar, Adv.

Disposition : Petition dismissed

Judgement :

K.R. Udayabhanu, J.

1. The writ petitioner was the respondent in RCP 345/1999 whose application in the execution proceedings to recall the warrant of delivery on the basis that he obtained purchase certificate of the premises in the meantime, was turned down concurrently by the courts below. The issuance of a writ of certiorari to quash the above orders is the relief sought for. During the pendency of the post adjudication proceedings in the Rent Control Court, the tenant/writ petitioner had independently initiated proceedings before the Land Tribunal and obtained purchase certificate contending that he is a hutment dweller (kudikidappukaran). The validity and legitimacy of the above detached and independent proceedings before the Land Tribunal after squarely the issue of the right to eject him from the premises was held against him in the Rent Control proceedings is the point put forward for consideration of this Court right now. Aside from the above question, the reliance placed by the writ petitioner on the decision of Division Bench of this Court in *Abdulrahiman v. Abdulla Haji* (1991 (1) KLT 702) that overruled *Kamalakshi Amma v. Vijayan* (1988 (2) KLT 498) and *Kumaran Nair v. Damodaran Nair* (1986 KLT 461) calls for the examination of the binding nature of the dicta in *Abdulrahiman's* case (op.cit) in the light of the state of affairs of the Supreme Court upholding and affirming the ratio of *Kamalakshi Amma's* case (op.cit) later in appeal in *P.K. Vijayan v. Kamalakshi Amma* : [1994]3SCR213 . (Incidentally, the Land Tribunal also relied on the decision in *Abdulrahiman's* case (supra) to avoid and bypass the orders of the Rent Control Court, Rent Control Appellate Authority and that of the High Court in revision).

2. RCP 345/99 was filed seeking eviction under Sections 11(4)(ii), 11(4)(iii) and 11(4)(v) of the Kerala Buildings (Lease and Rent Control) Act also alleging that the rent is in arrears since June 1997. It was contended that the respondent has ceased to occupy the petition schedule building continuously for the last more than two years and that he caused damage to the building on account of neglect, carelessness and non occupation. That he is residing in a separate house and another house that he is having has been let out are facts alleged in support. On the other hand, the respondent (the writ petitioner herein) denied rental arrears and the cause for the deterioration of the state of the building was attributed to the landlord as he failed to effect timely repairs. He contended that he was compelled to shift his residence on account of the above attitude of the landlord and claimed

that he is still in possession. The matter was stiffly contested and the Rent Control Court allowed the application under Section 11(4)(ii) and 11(4)(v) of the Act. The appeal filed was dismissed at the threshold itself, at the time of admission. In revision, the High Court confirmed the finding under Section 11(4)(v). The revision petitioner had raised the contention before the revisional court that his right to purchase kudikidappu right is under adjudication by the Land Tribunal and the Revenue-Inspector who inspected the premises has recommended in his favour. This Court in revision did not entertain the above contention observing that the question of kudikidappu was never raised by the revision petitioner before the Rent Control Court or before the Rent Control Appellate Authority. It is thereafter that the landlord filed E.P.323/2001 for execution of the eviction order and the revision petitioner filed E.A.385/2004 in order to stall the execution proceedings armed with the purchase certificate obtained as per the order of the Land Tribunal pronounced subsequent to the order of the High Court in the rent control proceedings in revision. The Execution Court turned down the application. In revision on the above order, the District Court also declined to interfere.

3. It is the contention of the writ petitioner that the Land Tribunal, Kuthuparamba has allowed O.A. No. 8/2001 filed by him as per order dated 4-2-2004 upholding his case that he is a kudikidappukaran and that the building in the premises is a hut as defined in the Kerala Land Reforms Act and allowed the purchase of kudikidappu under Section 80(B). The purchase certificate was also issued with respect to the tenanted premises. The matter was contested in the Land Tribunal. The writ petitioner has placed reliance on the decision of the Division Bench of this Court in *Abdulrahiman v. Abdulla Haji* (1991 (1) KIT 702). It is stressed by the counsel for the respondent/ landlord, Mr. Ramkumar Nambiar that the tenant having not opted to raise a plea of kudikidappu in the rent control proceedings is barred by the principle of constructive res judicata and also by the principle of waiver to take up such a contention to circumvent the rent control proceedings and move the Land Tribunal; and the Land Tribunal has gone terribly astray in considering the matter after being fully aware of the finality of the proceedings in revision before the High Court. The issuance of purchase certificate vide, the order of the Land Tribunal, it is pointed out, is nothing but an abuse of the process of court and such practice has been roundly indicted by the Supreme Court in *P.K.*

Vijayan v. Kamalakshi Amma : [1994]3SCR213 , affirming the stand taken by this Court, in Kamalakshi Amma v. Vijayan (1988 (2) KLT 498). The decision reported in Abdulrahiman's case, (op.cit) has been upset by the decision in P.K. Vijayan's case (supra) is the contention.

4. We find that as rightly pointed out by the counsel that it is after the disposal order of RCP 345/99 by the Rent Control Court on 25-3-2001 that the petitioner herein filed O.A. 8/2001 on 1.10.2001 under Section 80B of the KLR Act. After the appellate and revisional proceedings that ended with an order of the High Court in CRP 1047/2002, he obtained an order from the Land Tribunal for the purchase of kudikidappu right and also secured the purchase certificate. This Court, in Kolappan Achari v. Haneefa (1979 KLT 674) had declined to interfere in a somewhat similar situation and observed that a combined operation of Sections 47 and 11 of the CPC makes orders on the execution side final and it cannot thereafter be reopened on the pleading of other parallel proceedings under other Acts, except for reasons of fraud or other vitiating circumstances as Section 14 of the Rent Control Act, by a deeming provision has made order of the Rent Control Court a decree for all purposes. The practice of resorting to parallel proceedings while substantial issue of the same nature is under adjudication in a competent forum was also deprecated. The Division Bench of this Court in Parameswaran Thampi v. Podiyan Thomas (1984 KLT 397) had also denounced the practice of bypassing the proceedings of a court and seeking redress from the Tribunal by filing petition under Section 72B of the Act. The court has observed that the doctrine of lis pendens is applicable in such a case. In the above case, defendant independently initiated S.M. proceedings when the civil suit was pending; and the reference made under Section 125(3) of the K.L.R. Act was answered quoting the order in the S.M. Proceedings. The Supreme Court in appeal over Parameswaran Thampi's case, in Mathevan Padmanabhan v. Parameswaran Thampi (1995 Supp. (1) SCC 479) upheld the above part of the observation of this Court. The Full Bench of this Court in A.K. Venkitarama Iyer v. Vesu Amma (1995 (2) KLT 295 : 1995 (2) KLJ 656) specifically laid down that the initiation of suo motu proceedings before the Land Tribunal by the defendant while the suit for recovery of possession is pending is hit by Section 52 of the T.P. Act relying on the decision of this Court in Parameswaran Thampi's case (1984 KLT 397), and the decision of

the Supreme Court in appeal in Mathevan Padmanabhan's case (op.cit). But the decision in Abdulrahiman v. Abdulla Haji (1991 (1) KLT 702) was not considered in A.K. Venkitarama Iyer's case. Of course, the fact situation was not exactly similar, and the plea of waiver or constructive res judicata was not raised therein.

5. The writ petitioner has strongly relied on the decision of the Division Bench in Abdulrahiman's case, (op.cit) in support of his contention that the tenant is not precluded from raising the plea of kudikidappu despite his not taking such a plea in the rent control proceedings. In the above case, the contention based on the decisions reported in Kamalakshi Amma v. Vijayan (1988 (2) KLT 498) and Kumaran Nair v. Damodaran Nair (1986 KLT 461) was rejected and the above decisions were overruled. It was a case where the defendant had filed application before the Land Tribunal for the purchase of the right of the cultivating tenant under Section 72B. The Land Tribunal had rejected the same holding that the land in question was leased out to him for commercial purposes. The same was upheld in appeal as well as in revision. Thereafter in the civil suit filed for eviction, the matter was sought to be referred to the Land Tribunal under Section 125(3) of the KLR Act claiming right under Section 106. In Kamalakshi Amma's case, this court held that such contention is barred by the doctrine of election and that he cannot approbate and reprobate on the same issue. In Kumaran Nair's case this Court held that the claim of kudikidappu in the proceedings in the RCP is not available as he waived the said right as he had earlier initiated proceedings under Section 5 and 17(2) of Act 2/65, before the Accommodation Controller. Both the above decisions were expressly overruled in Abdulrahiman's case (op.cit). The court held that as the provisions involved in the KLR Act i.e.; Sections 13, 72, 72B, 75, 80A, 80B and 106 are based on public policy to protect weaker sections, such right cannot be treated as waived and allowed the plea of the tenant to have the matter referred to the Land Tribunal. We find that subsequently, the Supreme Court in P.K. Vijayan v. Kamalakshi Amma (op.cit) in appeals over the decision in Kamalakshi Amma v. Vijayan (1988 (2) KLT 498) has affirmed the decision in Kamalakshi Amma's case. Abdulrahiman's case was also referred to by the Supreme Court in P.K. Vijayan's case (op.cit). As noted above the decision in Kamalakshi Amma's case (op.cit) had had been earlier overruled by the Division Bench of this Court in Abdulrahiman's case (op.cit). The Supreme Court

specifically held that the tenant is expected to raise all pleas available in the statute at the relevant time, despite, taking note of the fact that the statute is particularly designed to uplift the weaker sections of the society. The court, in fact, harshly censured the appellant that it is sheer abuse of the process of the court to raise at each successive stages different pleas to protract the proceedings or to drive the party to multiplicity of proceedings. The Supreme Court held that the omission thereof does constitute constructive res judicata so as to prevent raising of the same at a later point of time and hence that it must be deemed that the same is waived. We find that in effect, the decision of this Court in *Abdulrahiman v. Abdulla Haji* (1991 (1) KLT 702) stands disapproved by the decision in *P.K. Vijayan v. Kamalakshi Amma* : [1994]3SCR213 and hence the same is no longer a binding precedent. Approval of diversionary proceedings to shortchange judicial process aimed at to tire out the other side, flouting the canons of fairplay would only result in endless litigation and exasperating delays in dispute resolution.

6. We find that the order of the Land Tribunal disregarding the findings in the rent control proceedings is liable to be discarded and the order of the Court below dismissing the E.A.385/2004 filed in F.P.323/2001 is to be upheld. Consequently, the Writ Petition filed is dismissed.

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