IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT;-

THE HONOURABLE MR.JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 28TH MARCH,2007/7TH CHAITHRA 1929

S.A.NO.311 OF 1988

(A.S.NO.111/1986 ON THE FILE OF DISTRICT COURT, PARUR.
O.S.NO.129/1980 ON THE FILE OF PRL.SUB COURT, PARUR.)

APPELLANT;- 9TH DEFENDANT (APPELLANT IN AS)

THE STATE BANK OF TRAVANCORE, ALWAYE BRANCH
REPRESENTED BY ITS BRANCH MANAGER.

BY ADV.SATHISH NINAN

RESOPONDENTS (RESPONDENTS -PLAINTIFFS 1 TO 5 AND DEFENDANTS 1 TO 8 AND 10)

1. THACHIL, WIFE OF KUNJALI, CHERAIKATTU HOUSE, NORTH EZHIPRAM.
2. C.A.SULAIMAN, SON OF KUNJALI, DO. DO.
3. AISHA, D/O.KUNJALI, OF -DO- -DO- AND W/O.KOCHAMMAD, RESIDING AT KALADI, ALWAYE TALUK.
4. PATHU, D/O.KUNJALI, OF -DO- AND W/O.KADIRKUTTY RESIDING AT NEDUVANNOOT, NEDUMBASSERI, ALWAYE TALUK.
5. HOWA, D/O.KUNJALI, -DO- -DO- AND WIFE OF MOHAMMED RESIDING AT EDATHALA, ALWAYE TALUK.
6. MARIYUMMA, WIFE OF MAKKAR SAHIB, PARILONATHODATHU HOUSE RESIDING AT HAYATHU VILLA, ALWAYE VILLAGE -DO- KARA.
7. KOCHU PATHU, D/O. MAKKAR SAHIB, -DO- -DO-
8. ABDUL KADIR, SON OF MAKKAR SAHIB OF -DO-
9. FATHIMA BEEVI, W/O.MAYANKUTTY METHAR, KAKKANATTU PARAMBIL, CHOWARA VILLAGE.
10. AMINA BEEVI, D/O.ABDULLA METHAR, KAKKATTU PARAMBIL OF -DO- -DO-
11. AISU, WIFE OF MOHAMMAD PILLAI, MANADATHUPARAMBIL THAYIKATTUKARA, ALWAYE VILLAGE.
12. V.K. KESAVAN, SON OF KUNHARAKKAN, VELLIKATTIL VENGOLA KARA, SOUTH VAZHAKULAM.
13. JANAKI, WIFE OF KESAVAN OF -DO- -DO-
14. M.A.KARIM, BLOCK NO.6, HUSSAIN D' SILVA, MARKOZ FLAT NO.24, ARAMBHA, KARACHI, PAKISTAN. (STRUCK OFF)

(THE NAME OF THE 14TH RESPONDENT HAS BEEN STRUCK OFF

FROM THE PARTY ARRAY AT THE APPELLANTS RISK AS PER ORDER DATED 6.1.92 ON C.M.P.NO.1868/91.)

BY ADVS.SRI.V.GIRI FOR R3
"P.N.KRISHNANKUTTY ACHAN,
"SIRAJ KAROLI &
SREEKUMAR FOR R2
" K.A.JALEEL FOR R8
SMT. N.N. GIRIJA FOR R12 & R13

THIS S.A. HAVING BEEN FINALLY HEARD ON 12/3/07 ALONG WITH S.A.NOS.517/88 & 885/88, THE COURT ON 28/3/07 DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A.NO.311/88,517/88&885/88

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Dated this the 28th day of March 2007

JUDGMENT

These appeals are filed challenging concurrent decree and judgment in O.S.129/1980 on the file of Sub Court, Parur. 9th defendant who is the appellant in A.S.111/1986 is the appellant in S.A.311/1988. 5th defendant the appellant in A.S.117/1986 is the appellant in S.A.517/1988. Defendants 7 and 8 the appellants in A.S.121/1986 are the appellants in S.A.885/1988. Respondents 1 to 5 in the appeals are the plaintiffs and other respondents, the other defendants in the suit. Plaint schedule properties consist of 3.30 acres in survey No.260/4C2, 2.20 acres in survey No.309/2B and 4.34 acres in survey No.309/2C of Vazhakulam village. The total extent is 9.84 acres. Suit was filed seeking a decree for declaration of lease hold right of respondents 1 to 5 and 14th respondent (10th defendant in the suit) over plaint schedule

properties and for recovery of possession from defendants 4 to 6 and 9, which is approximately shown as six acres of land forming western portion of the plaint schedule property, with future mesne profits. Admittedly plaint schedule properties originally belonged to late Makkar Sahib. Makkar Sahib died in 1967. Fifth respondent is the widow and respondents 6 and 7 are the children of Makkar Sahib. First respondent/first respondent is the widow and respondents 2 to 5 and respondent No.14, plaintiffs 2 to 5 and 10th defendant are the children of Kochunni Kunjali. Kunjali died on 24-12-1978. According to plaintiffs, 14th respondent secured Pakistan citizenship and is permanently settled in Pakisthan. Plaintiffs contended that plaint schedule properties are portions of a larger plot measuring approximately 13.95 acres which originally belonged to Makkar Sahib and the entire property was taken on lease by Kunjali on an annual rent of Rs.150/- from Makkar Sahib in 1120 M.E. Pursuant to the oral lease when Kunjali took

possession of the plaint schedule properties it was found out that taking advantage of absence of Makkar Sahib, who was residing away at Alwaye, Moosan Hydrose and Kochunni Kunju reduced possession of about four acres of the lease hold property. Therefore Kochunni could take possession of only the plaint schedule properties excluding the properties in the possession of Hydrose and kunjali and Kunjali has been in exclusive possession and enjoyment of the plaint schedule properties as a lessee paying rent. It was contended that defendants 1 to 3 as legal heirs of Makkar Sahib sold the jenm right in respect of three acres to defendants 4 and 5 and another three acres to 6th defendant under Ext.A1 and A2 assignment deeds dated 24.7.1968. But defendants 4 to 6 could not get possession of the properties purchased as the property was in the possession of Kunjali as a tenant. It was contended that when the assignees tried to take possession, Kunjali resisted and third defendant thereafter approached

Kunjali and because of the good relationship Kunjali had with late Makkar Sahib and due to the moral pressurisation Kunjali was persuaded to surrender the leasehold right Ext.A3 in respect of 4.92 acres of the plaint schedule properties styled as assignment of leasehold right in consideration for the jenm right of 75 cents of the remaining property assigned by defendants 1 to 3 to Kunjali under Ext.A4 assignment deed. Plaintiffs also contended that though Ext.A3 is styled as assignment of the lease hold right, it was in fact surrender of the lease hold right in respect of 4.92 acres which is in violation of Section 51 of Kerala Land Reforms Act (hereinafter referred to as the Act) and therefore it is invalid and no right under Ext.A2 could be claimed by the assignees. It was further contended that under the cover of Exts.A3 and A4, defendants 4 and 5 assumed possession of three acres of land and 6th respondent assumed possession of 3 acres of land and the assumption of possession of land is illegal and

unauthorised. It was also contended by plaintiffs that being successors in interest of Kunjali, they are entitled to recover possession of portion of the plaint schedule properties, which is in the possession of defendants 4 to 6 and 9 on the strength of their leasehold right and fixity of tenure. It was contended that third defendant on 27.9.1974 executed Ext.A5 assignment deed in favour of 7th defendant assigning of 5.22 acres out of 7.20 acres allegedly obtained pursuant to Ext.A3 (document No.2648/68) and Ext.A5 is a fraudulent, collusive and invalid transaction. It was contended that even if the third defendant obtained right as per Ext.A3 assignment deed, it is only 4.92 acres and as per Exts.A1 and A2, they have already alienated six acres and therefore third defendant had no property left to be assigned to 7th defendant and it is an outright fraudulent document and no title was passed. It was also contended that as per Ext.A6 assignment deed dated 27.9.1974 defendants 1 to 3 assigned 7.20 acres of property

to 8th defendant, the wife of 7th defendant, and Ext.A6 is also ipso facto invalid and the document did not confer any right, title or interest. It was further contended that the assignors who had only jenm right over plaint schedule property executed conveyance for 11 acres 97 cents and no right was obtained therein and defendants did not derive any right or title thereunder. It was also contended that 7th defendant and second respondent/second plaintiff were working in the same school and maintaining very cordial relationship and second respondent had absolute faith in 7th defendant and betraying the confidence and implicit faith reposed by second respondent, 7th defendant made second respondent to join in execution of some bonds in favour of N.E.S. Block, Vazhakulam along with 8th defendant and second respondent without knowing the contents or implication of the document and without receiving any consideration executed the same. Second respondent came to know about the fraud practised

only later. Contending that some documents were executed by defendants 4 to 6 whereunder 9th defendant is in occupation of portion of plaint schedule properties and contending that the transaction in favour of 9th defendant without the junction and intervention of legal heirs of Kunjali are invalid, the suit was filed seeking a decree for declaration of leasehold right and recovery possession of western six acres of plaint schedule property from the possession of defendants 4 to 6 and 9.

2. 5th defendant/appellant in S.A.517/1988 filed a written statement denying the plaint allegations and contending that after the death of Makkar Sahib , his legal heirs were in possession of the property and there was no lease arrangement between Makkar Sahib and Kunjali and one acre of plaint schedule property was sold by respondents 1 and 3 as per Ext.A2 assignment deed and under same documents, 2 acres of plaint schedule property was sold to 4th defendant and from the date of Ext.A2

the said properties are in their possession and while so, they created an equitable mortgage in favour of 9th defendant in respect of the property for the loan obtained by defendants 4 to 6 and husband of the 4th defendant and when the amount was not repaid, 9th defendant instituted O.S.131/1974 and the suit was decreed ex parte and 5th defendant was not aware of the suit and coming to know about the decree, she filed O.S.140/1979 before Munsiff Court, perumbavoor and that suit is pending and respondents 1 to 5 are not entitled to get any relief in the suit.

3.Defendants 7 and 8 appellants in S.A.885/1988 filed a written statement contending that 7th defendant purchased 5.22 acres as per Ext.A5 assignment deed and he has been in exclusive possession of the property and defendants 1 to 3 also executed Ext.A6 assignment deed in favour of 8th defendant his wife in respect of 11.88 acres and thus they are in possession of the said properties as absolute owners. It was contended

that 75 cents lying on the eastern side of that property was purchased by 8th defendant from Kunjali as per an agreement dated 27.1.1975 and 8th defendant was put in possession of that property, but on account of his death, no sale deed could be executed and an attempt was made by second defendant and others to trespass into the property and thereafter proceedings under section 145 of the Code of Criminal Procedure was initiated by Police and neither Hydrose nor Kochunni was in possession of 4 acres as stated in the plaint and the documents executed by defendants 1 to 5 being the legal heirs of Makkar Sahib are valid and binding and the case of the plaintiffs that they are in possession of four acres is not correct and they are not entitled to the decree sought for.

4. 9th defendant the appellant in S.A.311/1988 filed a written statement contending that 9th defendant got delivery of possession of six acres of the property mentioned in the plaint as per delivery report, in court auction sale in

O.S.131/1974 and that an equitable mortgage in favour of the bank over that property was created by defendants 4 to 6 its owners who purchased the said property from defendants 1 to 3 the legal heirs of original owner Makkar Sahib and plaintiffs and 10th defendant have no right over the property and they are not entitled to the decree sought for. They also contended that Kunjali was not in possession of six acres and even if Kunjali had any lease hold right, it was confined and limited to the extent of the property described under the deed and nothing more and therefore plaintiffs are not entitled to the decree sought for.

5. The trial court framed necessary issues. As is bound to, issue regarding the lease claimed by plaintiffs was referred to Land Tribunal, Perumbavoor under section 125(3) of the Act. Before the Land Tribunal, six witnesses were examined on the side of plaintiffs,and four witnesses were examined on the side of defendants. Exts.A1 to A12 and R1 to R24 and C1 were also

marked. Land Tribunal as per finding dated 30.11.1984 upheld the lease hold right claimed by plaintiffs. After receipt of the findings, trial court examined PW1 and marked Ext.A1 to A6 and C1 to C1(b). As is bound to, the findings of the Land Tribunal was upheld and it was found that plaintiffs have the lease hold right claimed. The suit was decreed. 5th defendant, defendants 7 and 8 together and 9th defendant respectively filed A.S.117/1986, 121/1986, and A.S.111/1986 challenging the decree and judgment passed by learned Sub Judge before District Court, Parur. Learned Additional District Judge on reappreciation of evidence confirmed the findings of the Land Tribunal and upheld the tenancy claimed by plaintiffs. Confirming the judgment and decree passed by learned Sub Judge all the appeals were dismissed. It is challenging the dismissal of the appeal and concurrent judgment these appeals are filed.

6. The appeals were originally allowed and the

decree and judgment passed by courts below were set aside. It was challenged before the Supreme Court.As this court did not formulate substantial questions of law, as per judgment in Civil Appeals 4241-4243 of 2000 dated 25.7.06, the judgment of this court was set aside and Second Appeals were remitted, with a direction to dispose them after formulating substantial questions of law.

7. On hearing learned counsel appearing for appellants and learned senior counsel appearing for respondents, the following substantial questions of law are formulated.

1) Whether Ext.A3 surrender deed is invalid in view of Section 51 of Kerala Land Reforms Act and if so, whether the suit for recovery of possession is barred by virtue of Section 51, Section 13A(2) read with section 125(1)of Kerala Land Reforms Act?

2) Whether defendants 4 to 6 and 9 are bona fide purchasers for valuable consideration and if so whether they are entitled to the protection provided under proviso to Section 13A(1)of the Act.

3) Whether courts below erred in construing Ext.A3 as a surrender deed when the document shows that it was an assignment of tenancy right.

4) Whether the courts below failed to consider material evidence while considering the claim for tenancy raised by the plaintiffs.

5) Whether plaintiffs are entitled to the recovery of possession of the plaint schedule properties without challenging the redelivery ordered in favour of fifth defendant.

6) Whether courts below were correct in granting a decree for recovery of possession as against defendants 7 and 8 when no such relief was claimed in the plaint.

8. The jenm right of deceased Makkar Sahib over the plaint schedule properties is admitted by all the parties. When the plaintiffs contend that there was an oral lease in favour of Kunjali in respect of the entire properties including the plaint schedule properties but 4 and odd acres were in the possession of Hydrose and Kunju and

only the balance of 9 and odd acres could be obtained possession under the lease by Kunjali and he continued to be a lessee under Makkar Sahib, defendants contended that Kunjali was not a lessee at all, though at the time of evidence it was contended that he was a lessee of 4.92 acres which was subsequently surrendered by Kunjali under Ext.A3 dated 29.7.1968. On the death of Makkar Sahib, his rights admittedly devolved on his legal heirs the widow and children defendants 1 to 3. Under Ext.A1 sale deed dated 24.7.1968 defendants 1 to 3 assigned 3 acres of plaint schedule property in favour of 6th defendant. On the same day defendants 1 to 3 also assigned 3 acres under Ext.A2 sale deed in favour of defendants 4 and 5. It was thereafter on 29.7.1968 Kunjali surrendered his lease hold right under Ext.A3 in favour of defendants 1 to 3 in respect of 4.92 acres and defendants 1 to 3 in turn conveyed jenm right over 75 cents of the property in favour of Kunjali under Ext.A4 sale deed on the same day. In the plaint

itself it was admitted that pursuant to Ext.A3, 4.92 acres of land was taken possession by defendants 1 to 3, though it was contended that the surrender under Ext.A3 was invalid in view of the provisions of Section 51 of the Act and thereby defendants 1 to 3 did not derive any right over the property surrendered under Ext.A3. Subsequent to Exts.A1 and A2, defendants 4 to 6 obtained a loan, after creating an equitable mortgage, from 9th defendant bank. 9th defendant bank, for realisation of the amount due under the equitable mortgage instituted O.S.131/1974 before Sub Court, Perumbavoor and obtained a decree against defendants 4 to 6 and thereafter the mortgaged properties were sold in court auction sale and purchased and taken delivery by 9th defendant.

9.The suit was infact filed for declaration of the lease hold right of plaintiffs over the plaint schedule properties and for recovery possession of six acres of land forming the western portion of the plaint schedule properties. The Commissioner

identified the properties and submitted Ext.C1 report and C1(a) and C1(b) plans. In Ext.C1(a) plan, Commissioner has demarcated the properties covered under Ext.A1 to A4. The 75 cents covered under Ext.A4, the jenm right over which was assigned by defendants 1 to 3 in favour of Kunjali was demarcated by the Commissioner in green colour as the north eastern plot shown as the property covered under document No.2649/1968. The 3 acres covered under Ext.A1 is the brown coloured plot comprised in 309/2B and 309/1C which is the southern plot shown by the Commissioner, as the property covered by document No.2621/1968. To its north is the 3 acres shown in blue coloured plot as the property covered under Ext.A2 sale deed. It was shown by the Commissioner as the property covered by document No.2620/1968. The 4.92 acres covered under Ext.A3 was shown by the Commissioner in red colour, to the south of the plot covered under Ext.A4 and to the east of the properties covered under Exts.A1 and A2.

10. Case of plaintiffs was that Kunjali had lease hold right over the entire plaint schedule properties inspite of Ext.A3 surrender as Ext.A3 was invalid being in violation of Section 51 of the Act. The Senior Counsel appearing for plaintiffs vehemently argued that under section 51 of the Act, there is an absolute prohibition against any surrender of a tenancy except, to the Government and that too as provided in the section and therefore Ext.A3 is invalid and the right of the tenant is not lost by execution of Ext.A3 and Kunjali continued to be the tenant and courts below rightly found that Ext.A3 is invalid. Learned counsel appearing for the defendants contended that Ext.A3 is not in fact surrender of the lease hold right and instead only assignment of the tenancy right in favour of one of the landlords and that too after the jenm right was assigned by defendants 1 to 3 under Ext.A1 and A2 in favour of defendants 4 to 6 and therefore Ext.A3 is not a surrender at all and the bar under section 51 of

the Act does not apply. It was further argued that even if Section 51 applies, the remedy of the tenant is only as provided under section 13A of the Act to seek restoration of possession of the dispossessed property and in view of Section 125 of the Act, a suit for declaration and recovery of possession is not sustainable. Learned counsel appearing for the appellant bank (9th defendant) argued that the property covered under Ext.A3 and property covered under Exts.A1 and A2 are entirely different properties and therefore on the ground of invalidity of Ext.A3, plaintiffs are not entitled to seek recovery possession of the property covered under Exts.A1 and A2. It was also argued that when the properties covered under Exts.A3 and A4 are the eastern portion of the whole properties, the properties covered under Exts.A1 and A2 are the western plots and therefore the invalidity of Ext.A3 is not at all relevant in considering the lease hold right claimed in respect of the properties covered under Exts.A1 and A2. Learned

counsel also argued that a reading of Ext.A3 and A4 make it absolutely clear that Kunjali was only a tenant of eastern portion of plaint schedule property and he had no tenancy right over the western plots covered under Exts.A1 and A2 and therefore plaintiffs cannot claim lease hold right over Exts.A1 and A2 properties. Learned Senior counsel argued that defendants had not raised such a case either before the trial court or the first Appellate Court and therefore they are not entitled to raise a new case in the Second Appeal on the identity of the properties covered under Exts.A1 and A2. It was argued that defendants have no case that Kunjali was a tenant of only the eastern portion of the plaint schedule properties. Instead when in the plaint plaintiffs set up an oral lease in respect of the entire properties, the case of defendants was not that Kunjali had lease hold right over a portion of the plaint schedule properties but denial of the very lease in favour of Kunjali. It was argued that learned Sub Judge

and learned District Judge rightly found that when the very lease was disputed and evidence establish that Kunjali was a lessee, the lease could only be for the entire properties and therefore the case advanced by appellants at the second appellate stage is to be rejected. The question whether Kunjali had lease hold right over only the eastern portion of the plaint schedule properties and whether Kunjali was a lessee of the properties covered under Exts.A1 and A2 could be decided a little later. As the very maintainability of the suit was disputed relying on Section 51, 13A and Section 125 of the Act, that question has to be decided first.

11. Section 51 of the Act prohibits surrender of tenancy right in respect of any land held by the tenant in favour of the landlord after coming into force of Amendment Act 12 of 1966 published in the Gazette on 11/11/1966. Under section 51, a tenant could surrender his tenancy right only in favour of the Government and that too as provided

under section 51. Section 51A provides that no landlord shall enter on any land which has been abandoned by a tenant and if a tenant abandons his holding and ceases to cultivate the holding, after notice to the tenant and landlord and after hearing objections Government may take possession of the land so abandoned by the tenant. It further provides that in that event Government shall pay to the landlord fair rent for the land taken possession of by them from the date on which they take possession of the land. Section 51B mandates that even if tenant surrenders land in violation of the provisions of Section 51 and, if any landlord enters into the possession of any abandoned land, or any land which has not been surrendered in accordance with the provisions of Section 51, he shall be deemed to have contravened the provisions of Section 6 of the Kerala Prevention of Eviction Act, 1966 and shall be punished accordingly. A combined reading of Section 51A and 51B establish that a tenant is not

entitled to surrender his tenancy right in respect of any land to the landlord and even if he surrenders the land in contravention of the provisions of Section 51, a landlord is not entitled to enter possession of the land so surrendered.

12. Section 51 reads:-

> "(1) Notwithstanding anything contained in this Act, a tenant may terminate the tenancy in respect of any land held by him at any time by surrender of his interest therein:
>
> Provided that no such surrender shall be made in favour of any person other than the Government.
>
> Provided further that such surrender shall not be effective unless it is made

in writing and is admitted by the tenant before the Land Tribunal and is registered in the office of the Land Tribunal in the prescribed manner:

(2) The Government shall pay to the landlord fair rent of the tenancy surrendered to it under sub -section (1).

(3) The Government may let any land surrendered to it under sub section (1) to any person, as far as may be, in accordance with such rules as may be made under this Act.

(4) The tenant to whom any land is let under sub-section (3) shall pay the

> fair rent thereof directly to the landlord and the Government's liability under sub section (2) with regard to the payment of the rent of that land shall, on and from the date of induction of the tenant on such land, cease."

13. Section 13A provides for restoration of possession of persons dispossessed on or after 1.4.1964. Section 13 provides the right of fixity of tenure to a tenant. Sub section (1) of Section 13 provides that notwithstanding anything to the contrary contained in any law, custom, usage, or contract, or in any decree or order of Court, every tenant shall have fixity of tenure in respect of his holding and no land from the holding shall be resumed except as provided under sections 14 to 22. Therefore as on 1.4.1964 a tenant has a right of fixity of tenure over the leasehold property. Sub

section (1) of Section 13A mandates that notwithstanding anything to the contrary contained in any law, or in any contract, custom or usage, or in any judgment, decree or order of court, where any person has been dispossessed of the land in his occupation on or after 1.4.1964, such person shall, if he would have been a tenant under the Act as amended by the Kerala Land Reforms (Amendment) Act, 1969, at the time of such dispossession, be entitled subject to the provisions of the said section to restoration of possession of the land. Sub section (2)of Section 13A provides that any person entitled to restoration of possession under sub section (1) may, within a period of six months from commencement of Kerala Land Reforms (Amendment) Act, 1969 apply to the Land Tribunal for the restoration of possession of the land. Sub section (3) provides that after such inquiry as it deems fit, Land Tribunal may pass an order allowing application for restoration and directing the applicant to deposit the compensation, if any,

received by the applicant under any decree or order of Court towards value of improvements or otherwise and the value of improvements, if any, effected on the land after dispossession as may be determined by the Land Tribunal, within such period as may be specified in the order.

14. The arguments of learned counsel appearing for appellants were that therefore a tenant who is dispossessed by a surrender under section 51 in contravention of the provisions of Section 51, has the remedy to apply under section 13A and no separate suit will lie in view of the bar provided under section 125(1) of the Act.

15.Section 125(1) of the Act reads:-

> "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."

Sub section (1) of Section 125 mandates that no civil court shall have jurisdiction to settle, decide or deal with any question or to determine any matter which is by or under the Act required to be settled, decided or dealt with or to be determined by the Land Tribunal.

15. The question then is whether a surrender made by the tenant is in violation of the provisions of Section 51 or not and if it is in contravention of Section 51 whether the Act provides for a remedy to the tenant to recover possession of the property so surrendered and if not, whether the suit is maintainable.

16. No doubt sub section (1) of Section 13A

enables a tenant to apply for restoration of possession within a period of six months from 1.1.1970, the date of commencement of Kerala Land Reforms (Amendment) Act, 1969, for restoration of possession of the land if he has been dispossessed of the land in his occupation on or after 1.4.1964. Relying on the decision of a Division Bench of this Court in **Assain v. Ahammedkutty (1986 KLT 1223)** it was argued that a voluntary surrender in violation of Section 51 would also amount to dispossession as contemplated under section 13A of the Act and therefore a tenant who is dispossessed by a surrender in violation of Section 51 is entitled to apply for restoration of possession under sub section (2) of Section 13A and hence tenant is provided with a remedy for restoration of possession, and so he is only entitled to seek the remedy as provided under section 13A and no independent suit will lie.

17. A Division Bench in **Assain's case (supra)**

over -ruled the decision of a learned single Judge in **Vaisyan Sebastian v. Augusteenju Marsal (1973 K.L.T. 475)** and held that voluntary surrender also would amount to dispossession. Their Lordships held that dispossession contemplated under section 13A means discontinuance or loss of possession as well and the provision under section 51 that surrender of lands should only be to the Government and it should be in writing admitted by the tenant and registered in the Land Tribunal and that Government shall pay fair rent of the tenancy to the landlord and prohibition in Section 51B that landlord should not enter on surrendered or abandoned land except on pain of prosecution for contravention of Section 6 of Kerala Prevention of Eviction Act, 1966 are definite pointers indicating that even in the case of voluntary surrender of any interest in tenancy by the tenant, in any other manner or to any person other than the Government is expressly prohibited and therefore the surrender

amounts to dispossession. Their Lordships held:-

> "Surrender of any interest in tenancy by the tenant in any other manner or to any person other than the Government is expressly prohibited. In the context of the provisions referred to above viz,S.51, S.51A and S.51B of the Act,we are of the opinion that dispossession in S.13A of the Act and surrender under S.51 of the Act are put on the same footing; both result in the same consequences effect as far as the landlord is concerned. The land is liable to be restored to the tenant in the former and the landlord is precluded from entering into possession of

the land even on surrender by the tenant in the latter. The consent given by the tenant is immaterial in either case. We, are, therefore, of the opinion that the surrender in contravention of S.51 of the Act is liable to be treated as the same as dispossession under S.13A of the Act. We are, therefore, of the opinion that Vaisyan Sebastian v. Augusteenju Marsal, 1973 KLT 475, to the effect that voluntary surrender would not be dispossession under S.13A of the Act was not correctly decided."

18. Learned Senior counsel appearing for the

plaintiffs pointed out that another Division Bench of this Court has considered this question earlier in **Sankaran Sarngadharan v. J.Sarada Pillai (ILR 1980(1) Kerala 512)**and held that a voluntary surrender is not dispossession attracting Section 13A and this was not considered by the later Division Bench. It is seen that the earlier Division Bench decision in **Sarada's case was** also referred to in Assain's case, though only the Short Note Case. Considering the earlier Division Bench decision their Lordships in **Assain's case** held:

> "The decision in C.R.P.2975/76 by a Division Bench reported in Sankaran v. Sarada, 1980 K.L.T. (S.N.)6, also did not consider the question of surrender in the light of S.51 of the Act."

Evidently the full text of the judgment in **Sankaran v. Sarada (1980 KLT SN 6)** was not placed before the later Division Bench. In **Sankaran Sarngadharan v. Sarada Pillai** the Division Bench was considering an order dismissing an application filed by a tenant under section 13A of the Act praying for restoration of possession of the properties. The said property was outstanding with the revision petitioner under ottikuzhikanam transaction. Respondent in whom the equity of redemption vested filed a suit for redemption of the mortgage and recovery of possession of the property. After passing of the preliminary decree for redemption, there was a compromise between the parties out of court and revision petitioner surrendered possession of the property to the respondent on 19.3.1969 and a memorandum of statement setting out the terms of the compromise and the factum of surrender was jointly filed in court. After coming into force of Kerala Act 35 of

1969, a petition was filed before the Land Tribunal under section 13A contending that the surrender is to be treated as dispossession of the land as provided under section 13A. The Division Bench relying on the Full Bench decision of this court in **Pappy Amma v. Prabhakaran Nair (1971 KLT 431)** held:

> "A Full Bench of this Court had occasion to consider the meaning of the expression "dispossession" occurring in Article 142 of the Limitation Act (1908). It was held that 'dispossession' implies taking possession without the consent of the person in possession and that it imports the driving out the person in possession against his will. This construction of the expression 'dispossession' was applied by Gopalan Nambiyar, J. as he then was, in

interpreting the words 'dispossessed of the lands' occurring in Section 13A of the Act in Vaisyan Sebastian v. Augusteenju Marsal and others and it was held that a voluntary surrender of the land by the person in possession will not constitute 'dispossession' for the purpose of the section; in other words the person who has voluntarily surrendered possession of the property in favour of another cannot be heard to say that he was dispossessed of the land by such other person and section 13A cannot be attracted to such a case.

In the case before us the compromise was entered

into between the parties at a time when only a preliminary decree for redemption was passed. It cannot be said that the surrender of the property by the revision petitioner to the respondent was effected otherwise than in a purely voluntary fashion based on the mutual agreement reached between the parties."

19. But in view of the decision of the later Division Bench which had occasion to consider the decision of the former Division Bench, the decision of the later Division Bench in **Assain's case (supra)** shall prevail and it can only be held that even a voluntary surrender in contravention of provision of Section 51, would also come within

the ambit of Section 51 provided under section 13A of the Act. Therefore a tenant has a remedy under sub section (2) of Section 13A to apply for restoration of possession of the property surrendered in violation of the mandatory provisions of Section 51 of the Act. The question then is whether it would bar an institution of the suit.

20. The right given to a tenant under sub section (2) of Section 13A is to apply for restoration of possession within a period of six months from the commencement of the Kerala Land Reforms Amendment Act, 1969. It cannot take away the right of the tenant to institute the suit for declaration of his right or for recovery of possession under the ordinary law of the land. When a surrender is made in contravention of provision of Section 51, the surrender and the transfer of possession could only be treated as invalid. If a surrender in contravention of the provision of Section 51 of the Act is invalid and

if the tenant has fixity of tenure as provided under section 13 of the Act and so long as his remedy to seek declaration of the tenancy right and recovery of possession is not barred under any of the provisions of the Act or any other law. for the reason that a tenant is provided with a remedy to apply to the Land Tribunal within a period of six months, will not bar institution of a suit inspite of the limited remedy provided to a tenant within a period of six months from the date of commencement of the Act. A tenant is entitled to institute a suit for declaration of his title on the ground that the transfer is invalid and hence his tenancy right subsists. Therefore the objection raised by the appellants that the suit is not maintainable can only be rejected.

21. Ext.A3 is styled as an assignment of the leasehold right. A reading of Ext.A3 reveals that as per an oral lease the properties covered thereunder was in the possession of Kunjali and accepting the consideration for the assignment of

jenm right in respect of 75 cents transferred by Makkar Sahib in favour of Kunjali, (under Ext.A4) the entire lease hold right of Kunjali over the properties is released in favour of Makkar Sahib. The schedule to the document makes it clear that what was transferred under the document is the lease hold right of Kunjali over 4.92 acres, which consists of 58 cents in survey No.260/4C and 4.34 acres in survey No.309/2C. The description further reveals that 58 cents in survey No.260/4C is excluding the 75 cents jenm right of which was tranferred in favour of Kunjali under Ext.A4, which is the north eastern plot of the eastern 1.33 acres in 3.30 acres in survey No.260/4C. The 4.34 acres in survey No.309/2C is the eastern portion of 5.52 acres. Ext.A3 establishes that though it was styled as assignment of lease hold right it was infact surrender of the lease hold right by the lessee in favour of landlord. The consideration of the leasehold right was the assignment of jenm right over 75 cents of property which is the north

eastern plot of the eastern 1.33 acres of 3.33 acres plot in survey No.260/4C. No other consideration was passed for the surrender of the lease hold right by the tenant to the landlord. On the date of execution of Ext.A3, in view of Section 13 of the Act, the tenant who surrendered his lease hold right over 4.92 acres had fixity of tenure over the property. Though learned counsel appearing for appellants argued that Ext.A3 was not a surrender but an assignment of lease hold right, courts below rightly found that in effect Ext.A3 is only a surrender of the lease hold right by the tenant to the landlord. The question is how far the surrender is valid?

22.Ext.A3 surrender was on 29.7.1968 after coming into force of Section 51 of the Act prohibiting termination of any tenancy in respect of any land held by a tenant and surrender of the interest of the tenant except to the Government and that too in accordance with the provisions of Section 51. True, Section 51 does not provide that

any surrender in contravention of provision of Section 51 is invalid, as is the case with Section 74 of the Act.When sub section (1) of Section 74 mandates that after the commmencement of the Act on 1.4.1964, no tenancy shall be created in respect of any land, sub section (2) of Section 74 declares that any such tenancy created after 1.4.1964 is invalid. Sub section (2) of Section 74 reads:-

> "Any tenancy created in contravention of the provisions of sub section (1) shall be invalid."

But the question is whether for the absence of a similar provision like sub section (2) of Section 74, it could be said that a surrender made by a tenant in contravention of the provision of Section 51 is not invalid. When section 13 of the Act provide fixity of tenure to a tenant in respect of his holding and mandates that no land from the holding shall be resumed except as provided under section 14 to 22 of the Act, Section 51 mandates that there shall be no surrender of the interest of

the tenant in respect of a lease hold property held by him except to the Government and that too as provided under the said Section. So also Section 51B provides that if any landlord enters into possession of any abandoned land, which has not been surrendered in accordance with the provisions of Section 51, landlord shall be deemed to have contravened the provisions of Section 6 of the Kerala Prevention of Eviction Act, 1966 and shall be punished accordingly. Therefore by virtue of the prohibition against the surrender under section 51, any surrender made by a tenant in contravention of the said provisions and that too in favour of the landlord can only be treated as invalid in the eye of law. Even if the surrender deed is styled as an assignment of the leasehold right, when such assignment of lease hold right is in favour of the landlord, it could only be treated as the surrender of the leasehold right and when such surrender is made after coming into force of Section 51 the surrender is invalid. The courts below rightly

held that Ext.A3 surrender is invalid as it contravenes the provisions of Section 51. The fact that Ext.A3 surrender was only in favour of third defendant who is only one of the legal heirs of the original landlord Makkar Sahib will not improve the situation. It continues to be a surrender of the lease hold right in favour of the landlord, which is prohibited under section 51. Therefore neither third defendant nor defendants 7 and 8 being the assignees of defendants 1 to 3 could claim any right on the strength of Ext.A3. Similarly defendants 4 to 6 are also not entitled to built up a case basing on Section 43 of the Transfer of Property Act that by virtue of subsequent surrender of the tenancy right by Kunjali, in favour of their assignor the rights so obtained by them after Exts.A1 and A2 shall enure to their benefits. It is more so, when their case was that the surrender of Ext.A3 is in respect of the eastern plots and Exts.A1 and A2 are in respects of the western plots. Appellants are not

entitled to claim title or interest to the property by virtue of Ext.A3 surrender.

23. Then the crucial question is whether Kunjali had tenancy right over the entire plaint schedule properties. According to plaintiffs, Kunjali was the tenant of the entire properties. What was contended in the plaint was that Makkar Sahib had jenm right over approximately 13.95 acres which was granted on lease in 1120 M.E in favour of Kunjali but four acres were outstanding in the possession of Hydrose and Kunjali and therefore Kunjali could get possession of only plaint schedule properties having an extent of 9.84 acres. None of the defendants had a case that there was an oral lease in favour of Kunjali. Instead the existence of oral lease itself was denied. There was no case that Kunjali was not a tenant of the entire plaint schedule properties but he had tenancy right only over a portion of the properties. As the question of tenancy necessarily arises for consideration and the question of

tenancy could only be decided as provided under section 125 of the Act, learned Sub Judge referred the question of tenancy to the Land Tribunal, Perumbavoor under section 125(3) of the Act. Before the Land Tribunal, evidence was tendered by both plaintiffs and defendants. Six witnesses were examined on the side of plaintiffs including second plaintiff. On the side of defendants, defendants 3,7 and 8 and the husband of the 5th defendant were examined. 24 exhibits were also marked on their side. On the side of plaintiffs 12 exhibits were marked. The Land Tribunal elaborately considered the oral and documentary evidence. The Land Tribunal rightly interpreted Ext.A3 in the light of Section 51 of the Act and held the surrender invalid. The Tribunal also took note of the denial of existence of tenancy right which was proved to be incorrect in view of Ext.A3 surrender of the lease hold right by Kunjali where existence of the oral lease was specifically stated and the leasehold right obtained under that oral lease was

taken note of. The Land Tribunal on the evidence found that the entire plaint schedule properties were being enjoyed as a compact plot and upheld the tenancy claimed by plaintiffs for the entire properties. After accepting the finding, which is binding on the trial court, suit was decreed. When the decree and judgment of the trial court was challenged before District Court, learned Additional District Judge elaborately reappreciated the evidence both tendered before the trial court and before the Land Tribunal. The learned District Judge upheld the finding of the Land Tribunal giving valid reasons. Learned counsel appearing for appellants argued that Ext.A3 only establishes an oral lease in respect of the property covered under Ext.A3 surrender and it will not establish tenancy in respect of the remaining portion of the plaint schedule properties. Advocate Mr.Sathish Ninan, learned counsel appearing for appellant in S.A.311/1988 relying on the description of the properties in Exts.A1 and A2 on the one hand and

Ext.A3 on the other argued that the properties covered under Exts.A1 and A2 are the western portion of the plaint schedule properties while the leasehold right surrendered under Ext.A3 is the eastern plot and therefore existence of leasehold right over the eastern portion of the properties will not entitle plaintiffs to get a declaration of the leasehold right over the western plot without sufficient evidence and therefore the finding of the Land Tribunal and the trial court accepting that finding and the findings of the District Judge are not correct. Advocate Mr. Dinesh R.Shenoy, learned counsel appearing for appellant in S.A.517/1988 also argued that there is no evidence to prove that Kunjali or plaintiffs, his legal heirs, had tenancy right over the properties covered under Exts.A1 and A2 and therefore the finding of the Land Tribunal and that of the courts below are unsustainable. Advocate Sri.Rajan Babu, learned counsel appearing for appellants in S.A.885/1988 argued that Ext.R1

marked before the Land Tribunal in the reference proceedings, a registered document of 1955 establish that the leasehold right claimed by Kunjali is absolutely incorrect and therefore courts below should not have accepted the tenancy set up by plaintiffs. The appellants in S.A.885/1988 filed I.A.531/07, an application under Order VI Rule 17 to amend the appeal memorandum incorporating the contention that the said Ext.R1 would disprove the tenancy right claimed by plaintiffs.

24. Learned Senior Counsel Sri.Krishnankutty Achan argued that defendants who denied existence of the very leasehold right in favour of Kunjali are not entitled to contend that tenancy right was only in respect of a portion of the properties. Learned Senior counsel relying on the decision of the Apex Court in **Syed and Company and Others v. State of Jammu & Kashmir and Others (1995 Suppl.(4) SCC 422)** argued that it is settled law that no

evidence can be let in without the pleading and when there is no pleading for the defendants that the tenancy was only in respect of a portion of the properties, appellants cannot be heard to contend otherwise and therefore the said contention has only to be rejected. Learned Senior counsel also argued that when the Land Tribunal elaborately considered the question and on appreciation of evidence, in the proper perspective, found that the tenancy set up by plaintiffs is correct and first Appellate Court on reappreciation of evidence confirmed that finding, this court cannot reappreciate the evidence in exercise of the powers under section 100 of the Code of Civil Procedure and the factual finding cannot be interfered and for that reason alone the challenge against the tenancy claimed by the plaintiffs are to be rejected. The learned Senior counsel also argued that the evidence establish that Kunjali was the tenant of the entire properties and there is no reason to interfere with the findings of the courts

below.

25. Both the Land Tribunal and the first Appellate Court considered the question of tenancy in the proper perspective. None of the defendants had a case that there was an oral lease in favour of Kunjali or that was only in respect of the properties covered under Ext.A3. In the light of Ext.A3, appellants cannot be heard to contend that there was no lease. Ext.A4 was executed by the third defendant, one of the legal heirs of the original landlord Makkar Sahib. The consideration for Ext.A3 is the consideration for the surrender of the leasehold right under Ext.A3. Ext.A3 establishes that there was an oral lease in favour of Kunjali, by Makkar Sahib and Kunjali was in possession of the leasehold properties. Therefore that fact cannot be denied.

26. The question then is whether the tenancy right was only in respect of a portion of the properties or the whole property as claimed by plaintiffs and upheld by the courts below What was

transferred under Ext.A3 is the leasehold right of Kunjali over 4.92 acres in survey No.260/4C and 309/2C. When Ext.A3 is read along with Ext.A4 it proves that Kunjali had tenancy right not only over 4.92 acres but 5.67 acres, including the 75 cents covered under Ext.A4. A combined reading of Ext.A3 and A4 establish the leasehold right of Kunjali over eastern 4.34 acres of 5.52 acres in survey No.309/2C and the eastern 1.33 acres of 3.3 acres in R.S. No.260/4C. Therefore in the light of Exts.A3 and A4 appellants cannot dispute existence of the leasehold right of Kunjali atleast in respect of 5.67 acres comprised in survey No.260/4C and survey No.309/2C and covered under Exts.A3 and A4.

27. Ext.A1 is in respect of 1.18 acres in survey No.309/2C and 1.82 acres in survey No.309/2B. It was a jenm assignment deed in respect of 3 acres in favour of sixth defendant. Ext.A2 was executed by defendants 1 to 3 in favour of defendants 4 and 5. It is in respect of 1.67

acres in survey No.260/2C2 and 33 cents in survey No.309/2 which together form 2 acres and 1 acre in survey No.309/2B the total extent being 3 acres. The description of the properties in Ext.A1 shows that 1.18 acres in survey No.309/2C is the western portion of 5.52 acres in survey No.309/2C and 1.82 acres in survey No.309/2B is the eastern portion of 4.22 acres in survey No.309/2B. When Ext.A1 is read along with Ext.A3, it makes it clear that out of 5.52 acres in survey No.309/2C the eastern 4.34 acres is covered by Ext.A3 and the remaining 1.18 acres is covered by Ext.A1. Therefore a combined reading of Exts.A1 and A3 establish that eastern 4.34 acres in survey No.309/2C is the leasehold property covered under Ext.A3 and the western 1.18 acres is the property covered under Ext.A1. Similarly a reading of Exts.A3 and A4 establish that the 75 cents jenm right of which was transferred under Ext.A4, is the northern 75 cents of the eastern 1.33 acres in survey No.260/4C which is having a total extent of 3.30 Acres and 58

cents covered under Ext.A3 is the remaining extent in the eastern 1.33 acres. So also a reading of Exts.A3, A4 and A2 make it clear that 1.67 acres in survey No.260/2C2 transferred thereunder is the western portion of 3.30 acres in that survey number and the remaining eastern 1.33 acres is the property covered under Exts.A3 and A4. Therefore it is clear from Exts.A1 to A4 that properties covered under Exts.A3 and A4 are not the same properties covered under Ext.A1 and A2. Learned counsel relying on Exts.C1 report and Exts.C1(a) and C1(b) plans argued that when Exts.A1 and A2 relate to the western portion of the property, Exts.A3 and A4 relate to the eastern plot and existence of the lease on the eastern plot will not enable plaintiffs to get a decree in respect of the western plot. But the crucial question is whether the oral lease which was in existence and granted by Makkar Sahib in favour of Kunjali was only in respect of the eastern portion of the properties covered under Exts. A3 and A4 as

claimed by the appellants or in respect of the western property also.

28. As stated earlier, before Ext.A3 surrender and Ext.A4 assignment of jenm right on 29.7.1968 under Exts.A1 and A2, defendants 1 to 3 being the legal heirs of deceased Makkar Sahib assigned 6 acres of the property in favour of defendants 4 to 6. In fact Ext.A3 and A4 were executed five days after the execution of Exts.A1 and A2. It was thereafter on 27.9.1974 defendants 1 to 3 executed Ext.A5 in favour of 7th defendant and Ext.A6 in favour of 8th defendant, the wife of 7th defendant. Both were executed on the same day. The property transferred under Ext.A5 is 10.45 acres. A reading of Ext.A5 shows that the property transferred thereunder was in the possession of Kunjali, as per an oral lease and defendants 1 to 3 the assignors thereunder obtained the rights of Kunjali as per document No.2648/68 (it is Ext.A3) and the rights so obtained was transferred to 7th defendant thereunder for a consideration of Rs.300/-. A

reading of Ext.A5 shows that the property transferred thereunder is the eastern 5.22 cents of the eastern 7 acre 20 cents out of 13.95 acres and the said 13 acres 95 cents is comprised in eastern 1.11 acres in survey No.260/4C/1 having a total extent of 4.28 acres, 3.30 acres in survey No.260/4C/2, 4.02 acres in survey No.309/2B, 5.52 acres in survey No.309/D. In addition 88 cents in survey No.260/4C/2 and 4.34 acres of survey No.309/2C having a total extent of 5.52 acres were also transferred thereunder. The total extent covered under Ext.A5 is 10.44 acres. The question is what is the effect of the recitals in Ext.A5 on the claim of oral tenancy set up by the plaintiffs in respect of the plaint schedule properties. As stated earlier, the right transferred under Ext.A5 is the tenancy right which was surrendered by Kunjali. Ext.A5 therefore conclusively prove that defendants 1 to 3 are admitting the oral tenancy in respect of the properties covered thereunder. It is that right, which was with Kunjali, that was

assigned under Ext.A5 to the 7th defendant thereunder. If that be so, Ext.A5 does not confine to the properties covered under Exts.A3 and A4; instead it covers the entire plaint schedule properties. If that be so, in the light of Ext.A5 defendants 1 to 3 the legal heirs of Makkar Sahib cannot dispute the leasehold right in favour of Kunjali in respect of the entire properties covered under Ext.A5. It definitely supports the case of plaintiffs that the oral tenancy was not in respect of Exts.A3 and A4 property alone but in respect of the entire properties. It is pertinent to note that on the very same day of execution of Ext.A5, defendants 1 to 3 executed Ext.A6 in favour of 8th defendant the wife of the assignee under Ext.A5. When Ext.A5 was registered as document No.3337/68, Ext.A6 was registered as document No.3338/74. A reading of Ext.A6 shows that the jenm right over the said properties was assigned by defendants 1 to 3 in favour of 8th defendant, for a consideration of Rs.5000/-. The properties

covered under Ext.A6 is the same property covered under Ext.A5. Therefore when Exts.A5 and A6 are appreciated together, it is clear that under Ext.A5 the leasehold right over the property was transferred by landlords in favour of husband, while the jenm right over the same properties were assigned in favour of the wife under Ext.A6. The leasehold right transferred under Ext.A5, as seen from the document, is the leasehold right which was with Kunjali, which as per the recitals in Ext.A5 was surrendered under Ext.A3 in favour of the third defendant, while under Ext.A5 the jenm right of that properties was transferred in favour of the wife of the assignee under Ext.A5. True, Ext.A3 shows that leasehold right surrendered under Ext.A3 is only 4.92 acres. But the leasehold right transferred under Ext.A5 is over 10.44 acres. It is clear that the non-mentioning of the tenancy right of Kunjali over balance extent of the property in Ext.A3 or Ext.A4, is not much relevance in the light of recitals in Exts.A5 and

A6. Though learned counsel appearing for appellant in S.A.311/1988 relying on the western boundary in Ext.A5 and A6 argued that the properties covered thereunder are only the properties which lies to the east of the property under Exts.A1 and A2 and therefore the leasehold right over the entire properties is not established, in the nature of the evidence on record, Land Tribunal and the courts below rightly found that the oral tenancy in favour of Kunjali, which cannot be disputed, was not restricted to the eastern portion covered under Ext.A3 and A4 but to the whole properties. The Land Tribunal as well as the District Judge appreciating the evidence found that evidence establish that the entire plaint schedule properties were being enjoyed as a compact plot by the same person and evidence also establish that the leasehold right is in respect of the entire plaint schedule properties. Though the learned counsel appearing for the appellants in S.A.885/1988 relying on Ext.R1, a registration copy

of which was also filed along with I.A.531/07, argued that 11.52 acres was outstanding in the possession of tenants Seethi and Muhammad and it was surrendered to Makkar only on 25.1.1955 and therefore the oral lease of 1120 M.E. set up by plaintiffs cannot be accepted, I cannot agree with the argument that Ext.R1 marked before the Land Tribunal is sufficient to disallow the claim of tenancy set up by the plaintiffs. Ext.R1 does not establish that there was no oral tenancy as claimed by the plaintiffs. On the otherhand, Ext.A3 establishes that there was an oral tenancy and recognizing the tenancy right surrender of the tenancy right over 4.92 acres were obtained by third defendant as legal heir of landlord Makkar Sahib. Appellants in S.A.885/1988 obtained Exts.A5 and A6 from defendants 1 to 3 and Ext.A5 reiterates existence of the oral lease in favour of Kunjali. Under Ext.A5 the rights tranferred by defendants 1 to 3 are the leasehold right available to Kunjali in respect of the entire properties

covered therein. Therefore appellants in S.A.885/1988 relying on Ext.R1 marked before the Land Tribunal, are not entitled to dispute the oral tenancy recognised by the landlord in Ext.A3 and Ext.A5 which is binding on them. Therefore on the evidence courts below rightly found that plaintiffs have leasehold right over the entire plaint schedule properties.

29. Learned counsel appearing for the appellants in S.A.311/1988 argued that the decree for recovery of possession sought for is only the western 6 acres of the plaint schedule properties and the basis is the invalidity of Ext.A3 surrender in violation of the provisions of Section 51 of the Act and when the surrender under Ext.A3 is only in respect of the eastern portion of the properties, a decree for recovery of possession of the western portion of the plaint schedule properties cannot be granted. Eventhough Ext.A3 relates to only the eastern portion of the plaint schedule properties as stated earlier and the six acres transferred

under Ext.A1 and A2 relate to the western portion of the properties, the plaintiffs have successfully established that they have leasehold right over the entire plaint schedule properties. When plaintiffs are entitled to get a decree for a declaration of the leasehold right and defendants have no better title to the western portion of plaint schedule properties and their title is not perfected by adverse possession, plaintiffs are entitled to the decree for recovery of possession of western portion of the plaint schedule properties on the strength of their title. Therefore the decree for declaration or recovery of possession cannot be interfered on this ground.

30. Learned counsel appearing for the appellant in S.A.517/1988 argued that out of six acres delivered to the 9th defendant Bankpursuant to the decree for realisation of the amount due under the equitable mortgage, 1 acre was redelivered to the 5th defendant by the executing court and as the redelivery was not challenged,

plaintiffs are not entitled to get a decree in respect of the one acre belonging to 5th defendant. It was also argued that the redelivery was on 28.7.1980 and as the suit was not filed within 12 years from that date, the suit is barred by time and therefore the decree in respect of one acre plot is unsustainable. What was contended by 5th defendant in her written statement was that she along with the 4th defendant obtained 3 acres from defendants 1 to 3 under Ext.A2 sale deed 2648/68 and out of the three acres, she is in possession of one acre and 4th defendant is in possession of two acres. It was further contended that as 5th defendant was residing far away from plaint schedule properties, defendants 4 and 6 and husband of 4th defendant in collusion with 9th defendant created an equitable mortgage and obtained loan by mortgaging the properties under Ext.A2, including the one acre belonging to 5th defendant and obtained an ex parte decree in O.S.131/1974 and getting information of the

decree, impleading defendants 4, 6 and 9 and husband of 4th defendant, 5th defendant filed O.S.140/1979 before Munsiff Court, Perumbavoor and the said suit is pending. That written statement was filed on 27.7.1981. Therefore it is clear from the written statement that the suit filed by 5th defendant was pending before Munsiff Court, Perumbavoor, when she filed the written statement. There is no contention in the written statement that she had obtained possession of one acre as per an order for redelivery from the court, as is now being contended. What was pleaded in the appeal memorandum in S.A.517/1988 was that in the suit filed by 5th defendant redelivery was ordered in favour of 5th defendant and one acre was redelivered in favour of 5th defendant and plaintiffs have no case that the property was not delivered from their possession or was not delivered back and they did not obstruct the redelivery and therefore plaintiffs were not in possession of the property as lessee when the

delivery and redelivery were effected. But no evidence was adduced before courts below to establish the redelivery. Moreover, as per the appeal memorandum, redelivery was pursuant to the suit filed by 5th defendant. The written statement of 5th defendant shows that the suit O.S.140/1979 was pending when the written statement was filed on 24.7.1981. Therefore case of appellant in S.A.517/1988 that the suit is not maintainable because of the redelivery or that the suit is barred by virtue of the redelivery is not sustainable because written statement shows that property was not redelivered even on the date of filing of the written statement.

31. Learned counsel appearing for appellants in S.A.885/1988 argued that in the suit no decree for recovery of possession was claimed from 7th defendant and instead, a decree for recovery possession was claimed only from defendants 4 to 6 and 9 and therefore the decree for recovery possession granted as against the 7th defendant by

the first Appellate Court is not sustainable. There is force in the submission.

32. The decree for declaration and recovery of possession sought for in the plaint reads:-

> "A) Declaring the leaseholdright of plaintiffs and 10th defendant over plaint item and allowing recovery of possession of that portion of plaint item in the possession of defendants 4 to 6 and 9 which is approximately 6 acres of land forming western portion of the plaint item."

Therefore recovery of possession was sought only from defendants 4 to 6 and 9 and not from the 7th defendant. The decree granted by learned Sub Judge is recovery of possession from defendants. First Appellate Court while dismissing the appeal filed

by defendants confirmed the decree holding that plaintiffs are entitled to the declaration and recovery of possession as prayed for in the plaint. Written statement of defendants 7 and 8 establish that they are claiming right under Ext.A5 and A6. As stated earlier under Ext.A5, the lease hold right was obtained by 7th defendant and under Ext.A6 the jenm right was assigned in favour of his wife 8th defendant. The case of appellants in S.A.885/1988 was that there was no tenancy right at all and the property was in the possession of Makkar Sahib and they were transferred under Exts.A5 and A6. If that be the case, 7th defendant could not claim any right as what was transferred thereunder was only the leasehold right and the right if at all could only be with the 8th defendant under Ext.A6. When it is found that the properties are outstanding in the possession of the lessee Kunjali and on his death, on his legal heirs what could have been transferred by defendants 1 to 3 the legal heirs of

the landlord is only the jenm right. It was that right which was obtained by 8th defendant under Ext.A6. Therefore appellants in S.A.885/1988 have no better title to the plaint schedule properties than plaintiffs and courts below rightly granted the decree for recovery possession. The decree for recovery possession so granted is as prayed for in the plaint. Learned District Judge also stated that the decree confirmed is the decree for recovery possession as prayed for. Therefore the decree granted by the courts below is only the decree sought for by the plaintiffs in the plaint as against defendants 4 to 6 and 9. In such circumstance, no modification of the decree is warranted. There is no merit in the appeals and all the appeals are dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NOS.311/88,517/88
&885/88

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JUDGMENT

March, 2007

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006