P.K. VIJAYAN A

v.

KAMALAKSHI AMMA AND ORS.

MARCH 30, 1994

[K. RAMASWAMY AND B.L. HANSARIA, JJ.] B

Tenancy Laws—Kerala Buildings (Lease and Rent Control) Act, 1965/ Kerala Land Reforms Act—Section 11/Sections 72- B and 106—Eviction petition u/s 11—Denial of title of landlord—Claim allowed—Remedy of Section 72B availed—Civil Suit for eviction—Tenant's plea of tenancy u/s 106—Claim of fixity of tenancy—Maintainability—Applicability of Explanation IV to Section 11 C.P.C. C

The respondent landlord filed petition u/s 11 of the Kerala Buildings (Lease and Rent Control) Act, 1965, for eviction of the tenant. The Rent Controller accepted the tenant's plea of denial of title of the landlord and relegated the respondents to seek eviction by civil suit. Before its initiation, the appellant tenant availed remedy u/s 72B of the Kerala Land Reforms Act. The Learned Tribunal rejected the petition. The landlords filed civil suit for eviction of the appellant. In the suit the appellant, relying on Section 106 of the Land Reforms Act, claimed fixity of tenancy. He also claimed that the Civil Court shall have to refer the matter to the Land Tribunal u/s 125(3) of the Land Reforms Act and the Civil Court is devoid of jurisdiction to decided the question. The trial court held that the appellant is entitled to the reference u/s 125(3). Revision filed against the judgment was allowed by the High Court, holding that the Tribunal cannot decide the dispute in view of the earlier order under section 72B and also on the ground of res-judicata. D E F

In this appeal, appellant contends that section 106 of the Kerala Land Reforms Act creates a right in favour of the tenant having a commercial lease. The appellant having constructed the theatre on the land is entitled to fixity of tenancy. G

According to the respondents, the rent control proceedings u/s 11 of the Rent Control Act operates as res-judicata since the appellant had the opportunity to plead the right of Section 106, but he failed to do so. Secondly, the appellant having elected to pursue the proceedings u/s 72 B H

A **of the Land Reforms Act and having become unsuccessful, is estopped by his conduct to raise plea u/s 106 thereof to non suit the landloard in the civil suit.**

Dismissing the matter, this Court

B **HELD : 1.1. The appellant merely chose to deny the title of the landlords and did not raise the plea of Section 106 of the Land Reforms Act. The rule of "might and ought" envisaged in Explanation IV to Section 11 C.P.C. squarely applies to the facts of the case and, therefore, it is no longer open to the appellant to plead that, Civil Court has no jurisdiction to decide the matter and it shall be required to be referred to the Land Tribunal. That apart, the proceedings under Sec. 72 B were also decided against the tenant. [218-C-D]**

C

Narayanan **v.** *Kunchi Amma Parukutty Amma,* **(1986) KLT 1340, approved.**

D

Abdulrahiman **v.** *Abdulla Haji,* **(1991) 1 KLT 702, distinguished.**

1.2. The appellant having decided only to avail the remedy of Section 72 B and omitted to plead the remedy of Section 106, it is no longer open to him to contend that he is entitled to the benefit of Section 106 of the E **Land Reforms Act. [218-E-F]**

1.3. It would be fair and just that the parties raise all available relevant pleas in the suits or the proceedings when the action is initiated and the omission thereof does constitute constructive *res judicata* **to prevent raising of the same at a later point of time. Thus it must be deemed** F **that they are waived. [219-B-C]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2160 of 1994.

From the Judgment and Order dated 18.8.88 of the Kerala High G Court in C.R.P. No. 2220 of 1987-B.

N. Sudhakaran for the Appellant.

P.S. Poti, and E.M.S. Anam for the Respondent.

H The Judgment of the Court was delivered by

K. RAMASWAMY, J. Leave granted. A

2. This appeal by special leave arises from the order to the High Court of Kerala dated August 18, 1988 made in C.R.P. No. 2220 of 1987-B. The respondent-landlords filed R.C.P. No.19 of 1974 under Section 11 of Kerala Buildings (Lease and Rent Control) Act, 1965, for eviction of the appellant-tenant. Under the proviso thereto if the tenant denies the title of B the landlord or claims right of permanent tenancy, the Rent Controller shall decide whether the denial or claim is *bona fide*. Recording of such a finding positively in favour of the tenant will require the landlord to sue for eviction of the tenant in a civil court. The Rent Controller had accepted the plea of the tenant to be *bona fide* and relegated the respondents to C seek eviction by a civil suit. Before its initiation, the appellant filed OA No. 11730 of 1986 before the Land Tribunal under the Kerala Land Reforms Act claiming that the lease was of the agricultural land and as a cultivating tenant, he is entitled to get assignment of the title of the land under Section 72 B of the Land Reforms Act which postulates that the cultivating tenant of any holding or part of a holding, the right, title and interest in respect D of which have vested in the Government under Section 72, shall be entitled to assignment of such right, title and interest. The "cultivating tenant" is defined to mean a tenant who is in actual possession of, and is entitled to *cultivate the land* comprised in his holding. (emphasised supplied)

E

3. The Land Tribunal, by an order dated November 29, 1976, found that the lease was of commercial building and it is not an agricultural land. Therefore, the appellant was not entitled to the assignment of the right, title and interest in the holding and accordingly dismissed the petition.

4. The respondents filed OS No. 67 of 1987 for eviction of the F appellant. In the suit the appellant relying on Section 106 of the Land Reforms Act, claimed fixity of tenancy pleading that the land was demised for a commercial or industrial purpose and the appellant had constructed a building thereon for commercial purpose before May 20, 1967 and that, therefore, the appellant by operation of Section 106 of the Land Reforms G Act cannot be ejected. He also claimed that the Civil Court shall have to refer the matter to the Land Tribunal under Section 125(3) of the Land Reforms Act and the Civil Court is devoid of Jurisdiction to decide the question.

5. Section 106 of the Kerala Land Reforms Act provides thus : H

A "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 B 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 rent shall be liable to be varied every twelve years.

C Explanation : For the purposes of this section, -

(a) 'lessee' includes a legal representative or an assignee of that lessess; and

(b) 'building' means a permanent or a temporary builing and D includes a shed."

6. Sub-section (3) of Section 125 creates a bar of jurisdiction of the Civil Court. It reads :

"S. 125(3) If in any suit or other proceeding any question regarding E rights of a tenant or of a Kudikidappukaran (including a question as to whether a person is a tenant or a kudikidappukaran) arises, the Civil Court shall stay the suit or other proceedings and refer such question to the Land Tribunal having Jurisdiction over the area in which the land or part thereof is situated together with the relevant records for the decision of that question only."

F

7. The trial court held by its order dated August 3, 1987 that the appellant is entitled to the reference under Section 125(3). Feeling aggrieved, the respondents filed revision in the High Court. The High Court allowed the revision and held that the Land Reforms Tribunal cannot G decide the dispute in view of the earlier order under Section 72B and also on the ground of *res-judicata*. Calling in question the order of the High Court, the above appeal has been filed.

8. The contention of Sri Sudhakaran, the learned counsel for the appellant, is that Section 106 creates a right in favour of the tenant having H a commercial lease. The appellant had constructed the theatre on the land

demised by the respondents for commercial purpose, namely, to run cinema theatre and that, therefore, the appellant is entitled to fixity to tenancy. When that was disputed by the landlords-respondents, the only forum to decide the issue is the Land Tribunal and not the Civil Court and the High Court is not right in its contra conclusion. A

9. Sri P.S. Poti, the learned senior counsel for the respondents, on the other hand, raised three fold contentions. First, according to the learned counsel, the rent control proceedings under Section 11 of the aforesaid Rent Control Act operates as *res-judicata* since the appellant had the opportunity to plead the right of Section 106, but he failed to do so. In the rent control proceedings, the appellant denied the title drivings the landlords to file a suit, which was accepted by the rent controller. Accordingly the landlords laid the suit for eviction. Secondly, the appellant having elected to pursue the proceedings under Section 72 B and having become unsuccessful, he is estopped by his conduct to raise inconsistent or a different plea under Section 106 to non suit the landlords in the civil suit. It is finally contended that the jurisdiction of this Court under Article 136 is discretionery. The conduct of the appellent-tenant disentitles him of remedey and may not be exercised to interfere with the order of the High Court. B C D

10. Having given our anxious consideration to the respective contentions we find that there is force in the contentions of Sri P.S.Poti. It is seen that the appellant had the opportunity to raise the plea of the *bona fide* denial of title as well as the remedies of Section 72 B and Section 106 of the Land Reforms Act. He merely chose to deny the title of the landlords setting up the plea that he constructed the buildings and that the lease was only of open land. Whether or not the appellant or the landlords had constructed the building and leased out to run the cinema theatre or the question whether or not the appellant had taken the open site or constructed the super structure to run the theatre are acute disputed questions which for the purpose of the case, are not relevant for decision. Suffice it to say that Explanation IV to Section 11 of the Civil Procedure Code, 1908 postulates that any matter which might had ought to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit; and no court shall try any such suit or issue in which the matter directly and substantially in issue in former suit between the same parties or between the parties under E F G H

A whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court. Admittedly, in the former proceedings before the Rent Controller, the claim was ejectment of the appellant on the grounds envisaged in Section 11 of the Rent Control Act. The plea of entitlement under Section B 106 of the Land Reforms Act was available to the appellant in the eviction proceedings and if it would have been raised, the Rent Controller would have had no jurisdiction to proceed further but to refer the same to the Land Tribunal for decision under Section 125(3) of the Land Reforms Act.

C 11. However, the appellant merely chose to deny the title of the landlords and did not raise the plea of Section 106 of the Land Reforms Act. The rule of "might and ought" envisaged in Explanation IV to Section 11 C.P.C. squarely applies to the facts of the case and, therefore, it is no longer open to the appellant to plead that, Civil Court has no jurisdiction D to decide the matter and it shall be required to be referred to the Land Tribunal. That apart, in the proceedings under Section 72 B the appellant pleaded that it is a land governed by the provisions of the Land Reforms Act and that, therefore, he is entitled to the assignment of the right, title and interest therein. The Tribunal found that the lease being a commercial lease, the appellant is not entiled to the assignment of the right, title and E interest in the demised land which was not vested in the State under Section 72 since the lease was not of agricultural and demised to the appellant. In that view to the matter and the appellant having decided only to avail the remedy of Section 72 B and omitted to plead the remedy of Section 106, it is no longer open to him to contend that he is entitled to F the benefit of Section 106 of the Land Reforms Act.

12. In *Narayanan* v. *Kunchi Amma Parukutty Amma,* (1986) KLT 1340, a Division Bench of the High Court in para 9 therein held that it is true that the plea of tenancy under Section 106 of the Act now raised related to the different kind of tenancy; but on the principle contained in G Explanation IV to Section 11 of the Civil Procedure Code we are inclined to hold that this was a matter which might and ought to have been raised at the time of earlier reference and therefore, the matter does not arise for trial by the Civil Court or the Tribunal. We accept that the statement of law has been correctly decided. It is true that in *Abdulrahiman* v. *Abdulla* H *Haji,* (1991) 1 KLT 702, another Division Bench, without deciding the

question of *res-judicata* since it was not raised, held that the dismissal of an application under Section 72B does not disentitle the benefit of Section 106 on the plea of election in subsequent proceedings to claim the benefit under Section 106 of the Kerala's Land Reforms Act. A

13. We have already seen that the Land Reforms Act is a beneficial legislation and has conferred certain benefits on the tenants. The tenant is expected to raise all the pleas available under the statute at the relevant time. It is a 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. It would be fair and just that the parties raise all available relevant pleas in the suits or the proceedings when the action is initiated and the omission thereof does constitute constructive *res judicata* to prevent raising of the same at a later point of time thereby it must be deemed that they are waived. B C

14. Acordingly we hold that the High Court is right in rejecting the claim of the appellant and the appeal is accordingly dismissed but without costs. D

A.G. Appeal dismissed.