

## **P.K. Vijayan vs Kamalakshi Amma And Others on 30 March, 1994**

**Equivalent citations: 1994 AIR 2145, 1994 SCC (4) 53, AIR 1994 SUPREME COURT 2145, 1994 (4) SCC 53, 1994 AIR SCW 1930, (1994) 3 SCR 213 (SC), 1994 (3) SCR 213, (1994) 3 JT 92 (SC), 1994 SCFBRC 183, 1994 (3) JT 92, 1995 HRR 52, (1994) 1 RENCJ 588, (1994) 2 APLJ 73, (1994) 3 ANDH LT 1, (1995) 1 MAD LJ 16, (1994) 1 RENCJ 744, (1994) 1 RENTLR 383, (1994) 1 KER LT 942**

**Author: K. Ramaswamy**

**Bench: K. Ramaswamy, B.L Hansaria**

PETITIONER:

P.K. VIJAYAN

Vs.

RESPONDENT:

KAMALAKSHI AMMA AND OTHERS

DATE OF JUDGMENT 30/03/1994

BENCH:

RAMASWAMY, K.

BENCH:

RAMASWAMY, K.

HANSARIA B.L. (J)

CITATION:

1994 AIR 2145

1994 SCC (4) 53

JT 1994 (3) 92

1994 SCALE (2) 369

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by K. RAMASWAMY, J.- Leave granted.

2. This appeal by special leave arises from the order of the High Court of Kerala dated August 18, 1988 made in CRP No. 2220 of 1987-B. The respondent-landlords filed RCP 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 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 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 Kerala Land Reforms Act which postulates that the cultivating tenant of any holding or part of a holding, the right, title and interest in respect 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.

(emphasis supplied)

3. The Land Tribunal, by an order dated November 29, 1986, 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 appellant. In the suit the appellant relying on Section 106 of the Kerala 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 Kerala Land Reforms 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 Kerala 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:

" 106. Special provisions relating to leases for commercial or industrial purposes.- (1) Notwithstanding anything contained in this Act or in any other law, or in any contract, or in any order or decree of court, where on any land leased for commercial or industrial purpose, the lessee has constructed buildings for such commercial or industrial purpose before the 20th May, 1967, he shall not be liable to be evicted from such land, but shall be liable to pay rent under the contract of tenancy, and such rent shall be liable to be varied every twelve years. Explanation.- For the purposes of this section,-

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

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

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

"125. (3) If in any suit or other proceeding any question regarding 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 proceeding 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."

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 decide the dispute in view of the earlier order under Section 72-B 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 Shri Sudhakaran, the learned counsel for the appellant, is that Section 106 creates a right in favour of the tenant having 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 of tenancy. When that was disputed by the landlord-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.

9. Shri P.S. Poti, the learned Senior Counsel for the respondents, on the other hand, raised threefold 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 driving 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 discretionary. The conduct of the appellant-tenant disentitles him of remedy and may not be exercised to interfere with the order of the High Court.

10. Having given our anxious consideration to the respective contentions we find that there is force in the contentions of Shri 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 Kerala 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 superstructure 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 and 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 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 ejection of the appellant on the grounds envisaged in Section 11 of the Rent Control Act. The plea of entitlement under Section 106 of the Kerala 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 Kerala Land Reforms Act.

11. However, the appellant merely chose to deny the title of the landlords and did not raise the plea of Section 106 of the Kerala Land Reforms Act. The rule of "might and ought" envisaged in Explanation IV to Section 11 CPC 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, in the proceedings under Section 72-B the appellant pleaded that it is a land governed by the provisions of the Kerala 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 entitled to the assignment of the right, title and interest in the demised land which was not vested in the State under Section 72 since the lease was not of agricultural land demised to the appellant. In that view of 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 the benefit of Section 106 of the Kerala Land Reforms Act.

12. In *Narayanan v. Kunchi Amma Parukutty Ammal* 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 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 Haji* another Division Bench, without deciding the question of res judicata since it was not raised, held that the dismissal of an application under Section 72-B does not disentitle to the benefit of Section 106 on the plea of election in subsequent proceedings to claim the benefit under Section 106 of the Kerala Land Reforms Act.

13. We have already seen that the Kerala 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.

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