Thomas Antony vs Varkey Varkey on 15 November, 1999

Equivalent citations: AIR 2000 SUPREME COURT 1, 2000 (1) SCC 35, 1999 AIR SCW 4112, 2000 (1) SRJ 128, 1999 (7) SCALE 117, (1999) 9 JT 105 (SC), 2000 (2) LRI 154, 1999 (9) JT 105, (1999) REVDEC 796, (2000) 1 SCJ 280, (1999) 2 LACC 559, (1999) 9 SUPREME 274, (1999) 7 SCALE 117, 2000 (1) KLT SN 12 (SC)

Bench: K.T. Thomas, D.P. Mohapatra

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           CASE NO.:
Appeal (civil)  6136 of 1990

PETITIONER:
THOMAS ANTONY

RESPONDENT:
VARKEY VARKEY

DATE OF JUDGMENT: 15/11/1999

BENCH:
K.T. THOMAS & D.P. MOHAPATRA

JUDGMENT:
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JUDGMENT 1999 Supp(4) SCR 431 The Judgments of the Court were delivered by D.P. MOHAPATRA, J. In this appeal filed by special leave the defendant has assailed the judgment of the High Court of Kerala dated 25.1.1990 in A.S. No. 348/82 and the cross objection filed therein, confirming the judgment of the trial court decreeing the suit.

The relevant facts leading to the present proceeding, sans unnecessary details may be stated thus:

> The respondent instituted original suit No. 164/76 in the Court of Subordinate Judge, Alleppey for recovery of possession of the suit property on the strength of title and for mesne profits. The case of the plaintiff was that he got possession of the suit property on the basis of the decree in the suit O.S. No. 739/1124 on the file of the Munsif s Court Alleppey. Thereafter he engaged one Chellapan to look after cultivation of the property till 1972. From 1973-75 the plaintiff engaged the defendant to look after the cultivation work. The services of the defendant were terminated after the harvest of 1975. When the plaintiff made preparations for cultivation in 1976 the defendant created obstruction in the work, whereafter the plaintiff filed O.S. No. 624/75 in the Court of Munsiff, Alleppey for permanent prohibitory injunction restraining the appellant from trespassing upon the suit land. During pendency of the suit the defendant came upon the property and took possession of the same without any

manner of right, title or interest therein. Therefore the plaintiff is entitled to a decree for recovery of possession of the property and also to get damages for use and occupation at the rate of 400 standard paras of paddy per annum.

The defendant in his written statement pleaded that Chellapan was cultivating the property till 1970. Thereafter the plaintiff leased out the suit property by oral lease to him (defendant) on an annual pattam of 300 paras of paddy and he has been in cultivating possession of the property since 1971. The defendant is the tenant in possession of the property and that he is entitled to remain in the possession of the same. On the pleadings of the parties the Trial Court framed 8 issues in all including Issue No. 1-"Is the oral lease arrangement set up by the defendant true?"

and Issue No.8- "Whether the defendant is a tenant of the plaint schedule property?". The trial court by the order dated 26.6.1978 referred the said two issues to the Land Tribunal under section 125(3) of the Kerala Land Reforms Act, 1963 [hereinafter referred to as "the Act"]. The operative portion of the said order reads:

"In the result I pass an order in the following terms. An additional issue No.8 viz. "whether the defendant is a tenant of the plaint schedule property" is hereby raised and issue No. I which reads "Is the oral lease arrangement set up by the defendant true?" and the additional issue No.8 are and ordered to be referred to the Land Tribunal for decision on them under Section 125(3) of the Land Reforms Act. Further proceedings in the suit are also stayed till the decision of the Land Tribunal is obtained. Transmit the relevant records with a copy of this order."

It is relevant to note here that on behalf of the defendant the contention was raised before the trial court that the lease as claimed by him is not a tenancy falling within the ambit of the Act, as the lease was created after promulgation of the Act and Section 74 of the Act prohibits the creation of future tenancy, and as such a reference under Section 125(3) of the Act was unnecessary. The trial court brushed aside the contention with the observation that whether such a lease was hit by Section 74 of the Act was immaterial as far as a reference under Section 125 (3) was concerned.

The Land Tribunal on receipt of the reference order considered the two issues-Issue No. 1 & 8,-in the light of the evidence placed on record by the parties and by its order dated 30.7.79 came to the conclusion that the defendant was in possession of the land as a lessee.

The trial court on receipt of the order of the tribunal, considered the said two issues and did not accept the finding of the Tribunal. The Court observed that in the written statement there is no allegation that the defendant is a tenant entitled to the benefit of Act No.l of 1964; therefore the question that would arise in the case is whether the defendant is an agricultural lessee as per the provisions of the Transfer of Property Act The Court took note of Section 74 of the Act which prohibits creation of a future tenancy and held that since defendant's case is that the alleged lease was created after commencement of the Act i.e. in 1970 the lease is definitely hit by Section 74 of the Act; so it is clear that the defendant cannot claim any sort of benefit under the Land Reforms Act.

The trial court proceeded to consider the competence of the Tribunal to record a finding regarding the lease in the context of the facts and circumstances of the case and took the view that merely because the Land Tribunal has recorded certain findings in the proceeding the power of the Civil Court is not ousted and to incorporate and adopt any finding of the Land Tribunal in the Judgment of the Civil Court in this case would amount to failure to exercise the jurisdiction vested in the Civil Court.

On a fresh assessment of the evidence on record the Trial Court observed that none of the documents produced by the defendant would show that he was enjoying the property as a tenant. The Court recorded the finding that the oral lease set up by the defendant was completely false and the defendant was not a tenant of the suit property. In issue No.7 the Court recorded following findings:

> "It is found that the plaintiff has got title over the property and that the defendant is not an agricultural lessee of the property. The finding of the Land Tribunal that the defendant is a tenant does not affect the merits of the case since the dispute in this case is whether he is an agricultural lessee as per the provisions of the Transfer of Property Act . ! have already found that he is not an agricultural lessee and that he is only an agent of the plaintiff entrusted with the task of cultivation. The plaintiff has terminated the agency and therefore the defendant is liable to surrender possession to the plaintiff."

The trial court decreed the suit with costs and directed the defendant to surrender possession of the suit property to the plaintiff within one month and ordered that the plaintiff was entitled to get mesne profit from the defendant @400 paras of the paddy from the date of the suit was entertained.

On appeal by the defendant the High Court in the impugned Judgment, held, inter alia, that as a specific lease has been set up by the defendant and that has not been proved the trial Court was justified in holding that the plaintiff was entitled to recover the property from the defendant. Alternatively, the High Court held that even assuming that there was a lease as contended by the defendant, it is barred in law in view of section 74 of the Act which bars creation of future tenancies. Regarding the reference made to the Land Tribunal under Section 125(3) of the Act the Court observed: "There is sufficient justification in the contention of the plaintiff that no reference to the Land Tribunal under Section 125(3) of the Kerala Land Reforms Act was warranted in the case as the lease set up by the defendant is clearly prohibited under the Act. The reference was clearly unwarranted. As the reference itself was illegal, no weight can be attached to the findings of the Land Tribunal. Even otherwise on a consideration of the entire evidence it has been found that the lease set up by the defendant is totally false. The cross-objection is allowed."

The High Court dismissed the appeal with costs.

The main thrust of the contentions of the learned counsel for the appellant before us was that the trial Court had no jurisdiction to record a finding contrary to that recorded by the Land Tribunal in the reference made under Section 125(3) of the Act, Therefore, the finding of the trial court that the

defendant was not the lessee of the suit land was incompetent and unsustainable. The trial court should have dismissed the suit. It was the further contention of the learned counsel that the High Court erred in confirming the judgment based on such illegal finding.

The learned counsel for the respondent on the other hand contended that in view of the statutory bar against creation of any tenancy after commencement of the Act under Section 74 of the Act the position is inescapable that the alleged tenancy set up by the dependent created in 1971 after commencement of the Act has been rightly rejected by the Courts below.

Section 125 of the Act makes provision regarding bar of jurisdiction of Civil Courts. Sub-section(l) of the said section lays down 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 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 Government or an officer of the Government. The proviso to the said sub section makes an exception in case of proceedings pending in any court at the commencement of Kerala Land Reforms (Amendment) Act, 1969. In sub-section (2) of Section 125 it is laid down that no order of the Land Tribunal or the Appellate Authority or the Land Board or the Government or an officer of the Government made under this Act shall be questioned in any civil court, except as provided in this Act. Sub-section (3) which is relevant for the present purpose mandates that if in any suit or other proceedings any question regarding rights of a tenant or of a Kudikidappukaran (including the question as to whether a person is a tenant or 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. Under sub-section (4) provision is made that the Land Tribunal shall decide the question referred to it under sub-section (3) and return the records together with its decision to the civil court. In sub- section (5) it is laid down that the civil court shall then proceed to decide the suit or other proceedings accepting the decision of the Land Tribunal on the question referred to it. Sub-section (6) provides that the decision of the Land Tribunal on the question referred to it shall, for the purpose of appeal, be deemed to be part of the finding of the civil court. Sub-section (7) bars any civil court from granting injunction in any suit or other proceeding referred to in sub-section(3) restraining any person from entering into or occupying or cultivating any land or Kudikidappukaran or to appoint a receiver for any property in respect of which a question referred to in that sub-section has arisen, till such question is decided by the Land Tribunal, and any such injunction granted or appointment made before the commencement of the Kerala Land Reforms (Amendment) Act, 1969, or before such question has arisen, shall stand cancelled.

From the aforementioned provisions the statutory scheme is clear that when a question regarding status of a person as a tenant or as a Kudikidappukaran arises in any suit or proceeding before a civil court that Court shall refer the matter to the Land Tribunal for a decision on that question only. On receipt of the decision of the Tribunal on the question the trial court shall decide the suit or proceeding accepting the decision of the Tribunal on the question referred to it. While making a reference to the Tribunal mandatory the legislature cannot be said to have intended that even a patently frivolous, malafide and illegal plea of tenancy taken by a party merely to delay the proceeding and to remain in possession of the property is also to be referred to the Tribunal. The

statutory provisions in our considered view, envisage a case where a bonafide and legally sustainable plea of tenancy is taken by the party, that question shall be referred to the Tribunal. It is of significance that in sub-section (6) of Section 125 a provision is made that the decision of the Land Tribunal on the question referred to it shall for the purposes of appeal be deemed to be a part of the finding of the civil court. It follows that while the trial court is to accept the decision of the Tribunal and base its decision in the suit or proceeding on the same no such constraint is placed on the Appellate Court while deciding the appeal arising from the suit or proceeding. Before the Appellate Court is open to the parties to challenge the finding recorded by the trial court on the basis of the decision of the Tribunal as any other finding. The Tribunal has been created as a special forum for adjudication of the question of status of a person who claims to be a tenant or Kudikidappukaran. The legislative scheme appears to be that at the trial stage adjudication on the question should be confined to one forum i.e. the Tribunal and the civil court should not go into the very same question again after the decision of the Tribunal is received by it.

The position is manifest that in the present case the contrary finding recorded by the learned trial judge on the question of the claim of tenancy by the defendant is without jurisdiction and therefore unsustainable. But that is not the end of the tether. It cannot be disputed that the question could be examined by the Appellate Court, i.e. the High Court in this case.

We were at one stage inclined to accept the contention of the learned counsel for the appellant that the judgment of the trial court and Appellate Court should be set aside and the matter remitted to the trial court for a fresh decision. But on a closer look to the provisions of the statute, particularly section 74 of the Act, the language whereof is clear and unambiguous, and the undisputed factual position that the defendant claims to be a tenant from 1971, we are satisfied that remand of the case is unnecessary and any such order will only serve the purpose of procrastinating the litigation which commenced in 1976. In view of the absolute statutory bar for creation of tenancy in any land no Court can record a finding excepting the case of the appellant that he has been a tenant of the land since 1971. Section 74 of the Act which makes the provision regarding prohibition of future tenancies declares that after the commencement of this Act no tenancy shall be created in respect of any land and that any tenancy created in contravention of the provisions of sub- section (1) shall be invalid. Therefore the claim of tenancy since 1971 set up by the defendant being against the statutory bar is invalid. In all probability being conscious of this difficulty the defendant had urged before the trial court when it considered the question of making a reference to the Land Tribunal that such a reference was unnecessary because of the bar in section 74; but when the Tribunal gave a decision in his favour upholding the claim of tenancy he relied on the same and tried to persuade the trial court to decide the case on that basis.

Therefore while accepting the contention raised by the appellant that the trial court erred in not accepting the finding of the Tribunal and recording a finding country to that of the Tribunal, we hold that on the facts and circumstances of the case and in view of the legal position discussed in the foregoing paragraphs the courts below rightly decreed the suit. Since the Courts below have taken the correct decision, no interference is warranted by this Court in exercise of the jurisdiction under Article 136 of the Constitution.

In the result the appeal is dismissed but in the circumstances of the case without any order as to costs.

THOMAS, J. f am in full agreement with the conclusions as well as the reasoning adopted by my learned brother Mohapatra, J. I wish to add a few more lines in support of the above conclusion.

Section 125(3) of the Kerala Land Reforms Act (for short `the Act') requires that the civil court shall refer the question regarding the right of a tenant or a Kudikidappukaran (including the question whether a person is a tenant or a Kudikidappukaran) to the Land Tribunal having jurisdiction over the area concerned. The section makes it clear that a reference to the Land Tribunal need to be made only if such question "arises" in the suit or other proceedings concerned. It has been consistently held by the High Court of Kerala that unless such question legally arises there is no need to make the reference to the Land Tribunal under Section 125 (3) of the Act, [vide the larger Full Bench decision in Keshava Bhat v. Subraya Bhat, (1979) Kerala Law Times 766, and another Full Bench decision in Muhammad Haji v. Kunhuni Nair, (1993) 1 Kerala Law Times 227. Subsequently the High Court of Kerala has held that unless the question genuinely arises the civil court is not obliged to make the reference, Sundaram v. Mohammed Koya, (1995) 2 Kerala Law Times 115.

The civil court can consider whether the plea raised by the party that he is a tenant or a Kudikidappukaran is a bonafide contention. If there is not even a remote possibility of the said plea being upheld by the Land Tribunal the civil court can conclude that the question does not reasonably arise in the case. Such an unreasonable plea would be raised with the idea to procrastinate or prolong the litigation. Civil court cannot afford to aid such sinister tactics.

It has been contended before us that in the light of the decision of this Court in Sankaranarayanan Potti (dead) by L.Rs. v. K. Sreedevi and Ors., [1998] 3 SCC 751 the civil court has no other alternative than to refer the question if a party has raised the contention that he is a tenant or a Kudikidappukaran. A reading of the said decision does not show that this Court has taken such an extreme position. That apart the scope of the word "arises" in Section 125(3) of the Act was not a point which arose for consideration in the said decision. There is nothing in that decision to suggest anything contrary to the legal position adumbrated above. Hence we reiterate that a civil court is not obliged to make a reference to the Land Tribunal as per Section 125(3) of the Act merely because a party has raised a contention that he is a tenant or a Kudkidappukaran, and the civil court has power to consider whether such contention has been raised without any legal foundation or with the only intention to gain time by protracting the litigation. If the civil court is of opinion that there is not even a remote possibility of the plea being upheld the court can proceed to dispose of the suit without resorting to the circumlocuted route via the Land Tribunal.

In the present case appellant's claim that he is a tenant under the respondent was, on the face of it, untenable in view of Section 74 of the Act. Hence, the trial court was not obliged to refer the said contention to the Land Tribunal at all. At any rate, the High Court has rightly held it against the appellant.

I, therefore, agree that this appeal has to be dismissed.