

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

WEDNESDAY, THE 12TH DAY OF AUGUST 2015/21ST SRAVANA, 1937

OP(C).No. 1025 of 2015 (O)

OS 52/1987 OF SUB COURT, TIRUR

PETITIONER(S):

UNNEEMA @ UNNIMAYA ANTHARJANAM,
W/O.NARAYANAN NAMBOOTHIRI,
THIRUMANGALATH PACHEERI MANA, PO.KOORADA,
THRIKKANAPURAM, MALAPPURAM DISTRICT.

BY ADVS.SRI.T.KRISHNAN UNNI (SR.)
SMT.MEENA.A.
SRI.VINOD RAVINDRANATH
SRI.SAJU.S.A
SRI.K.C.KIRAN
SRI.M.DEVESH

RESPONDENT(S):

1. CHERIYAMU HAJI,
S/O.MARAKKAR, PALATHINKAL CHOLAYIL,
PO.THRIKKANAPURAM, MALAPPURAM DISTRICT 679 573.
2. MUHAMMED @ BAVA, S/O.MOIDEENKUTTY, CHOLAYIL HOUSE,
THRIKKANAPURAM PO, MALAPPURAM DISTRICT 679 573.

R2 BY ADVS. SRI.P.CHANDRASEKHAR
SRI.S.PRASANTH
SRI.SOORAJ T.ELENJICKAL
SMT.UMA
SMT.P.M.MAZNA MANSOOR

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 12-08-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

PJ

OP(C).No. 1025 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

- P1- TRUE COPY OF THE PLAINT IN O.S.52/1987 ON THE FILE OF SUB COURT TIRUR DATED 7.7.1987**
- P2- TRUE COPY OF THE WRITTEN STATEMENT DATED 17.2.1988 FILED BY DEFENDANTS 8 TO 11**
- P3- THE TRUE COPY OF THE ORDER DATED 31.8.2011 IN R.P.610/2011 IN WP(C) 28366/2010**
- P4- TRUE COPY OF JUDGMENT DATED 8.7.2014 IN WP(C) 28366/2010**
- P5- TRUE COPY OF THE ORDER DATED 31.1.2015 IN O.S.52/1987 OF THE COURT OF THE SUBORDINATE JUDGE OF TIRUR**

RESPONDENT(S)' EXHIBITS

NIL.

/ TRUE COPY /

P.S. TO JUDGE

PJ

[CR]

B. KEMAL PASHA, J.

.....
O.P.(C) No.1025 of 2015
.....

Dated this the 12th day of August, 2015

J U D G M E N T

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Through Ext.P5 order, the court below has chosen to refer the question of tenancy in respect of property being claimed by the 9th defendant, to the Land Tribunal under Section 125(3) of the Kerala Land Reforms Act, 1963. The said order is under challenge.

2. The 8th defendant as well as the 9th defendant has pleaded tenancy in respect of the properties allotted to them through partition deed No.3470/1982. Originally, they claimed that the said properties covered by the partition deed were the subject matter of an oral lease in favour of their father, late Cholayil Marakkar. After the death of Cholayil Marakkar, the 8th and 9th defendants along with

other legal heirs executed partition deed No.3470/1982 in respect of the properties.

3. Subsequently, the 8th defendant obtained purchase certificate from the Land Tribunal in respect of the 1 acre and 56 cents of property allotted to him through the said partition deed. Through the very same partition deed, item No.2 property having an extent of 1.25 acres was allotted to the 9th defendant. The 9th defendant had never approached the Land Tribunal for purchase certificate.

4. Through the present suit, the petitioner has contended that the purchase certificate obtained by the 8th defendant in respect of the 1.56 acres of property, is a result of fraud and, therefore, the same is liable to be set aside. Vide judgment dated 12.11.2010 in W.P.(C) No.28366/2010, this Court had originally found that the said question as far as the tenancy right claimed by the 8th defendant as well as the validity of the purchase certificate obtained by the 8th defendant, has to be decided by the court below in the civil

suit. When fraud has been alleged, the said question has to be decided by the civil court, and not by the Land Tribunal. Through the said judgment, this Court had originally directed the court below to treat the case of the 9th defendant separately and to decide the question as to whether the matter relating to the 9th defendant has to be referred to the Land Tribunal or not.

5. The petitioner has approached this Court with R.P.No.610/2011 thereby pointing out the necessity of a review of the said judgment. This Court, through Ext.P3 order, reviewed the said judgment after having a detailed discussion with regard to the matters in controversy. The writ petition was again posted for hearing.

6. Through Ext.P4 judgment, this Court has disposed of the writ petition as follows:-

“The ninth defendant has however not obtained any certificate of purchase in relation to his property. Therefore the Court below has to consider whether the plea is merely 'raised'

or 'arises' for consideration. Whether the plea of tenancy is bonafide and is likely to be upheld eventually has to be looked into. The Court below shall decide the necessity to refer the question of tenancy to the Land Tribunal afresh and the impugned order as regards the ninth defendant alone is set aside. The Court below shall pass fresh orders on the question of reference under Section 125(3) of the Kerala Land Reforms Act. The needful shall be done within a period of two months from today."

7. Based on the aforesaid findings entered by this Court vide judgment dated 08.07.2014, the court below has decided the said question. The court below has taken the view that the purchase certificate was issued in favour of the 8th defendant only and, therefore, the Land Tribunal has to decide in respect of the tenancy with regard to the property claimed by the 9th defendant, for which the matter has necessarily to be referred to the Land Tribunal under Section 125(3) of the Kerala Land Reforms Act.

8. Heard learned Senior Counsel for the petitioner

and learned counsel for the 2nd respondent.

9. The learned Senior Counsel for the petitioner has pointed out that in case the question relating to the tenancy right being claimed by the 9th defendant is referred to the Land Tribunal under Section 125(3) of the Kerala Land Reforms Act, there is every possibility of conflicting decision in the matter, when the question of the tenancy right claimed by the 8th defendant and the validity of the purchase certificate granted to the 8th defendant will have to be decided by the court below. The decision that will be taken by the court below in respect of the validity of the purchase certificate obtained by the 8th defendant will, definitely operate as *res judicata* as far as the tenancy right being claimed by the 9th defendant is concerned.

10. The learned counsel for the 2nd respondent has argued that the 9th defendant is not one of the tenants in common, whereas, he is claiming separate right over a separate piece of land and, therefore, he has got a

legitimate legal right to get his tenancy right adjudicated by the proper forum and, therefore, Ext.P5 is not liable to be interfered with. Once a purchase certificate is issued, the person in whose name it is issued has to be considered as the person in possession of the property and such a purchase certificate is conclusive proof to the fact that the recipient is the cultivating tenant in respect of that property.

11. It is true that the 9th defendant is not in the position of a tenant in common in respect of the property as there is a partition deed. Originally, the 8th defendant as well as the 9th defendant were treated themselves as tenants in common and that was why they had executed a partition deed, thereby partitioning the property. Originally, their claim was that the property had devolved on their father Cholayil Marakkar through an oral lease, and that Cholayil Marakkar continued to be a cultivating tenant. It was based on that right, they had executed the partition deed and thereafter, the 8th defendant had approached the Land Tribunal for

purchase certificate. The learned counsel for the 2nd respondent has relied on the decision of the Division Bench of this Court in ***Ramakke and Others Vs. Gopi and Others*** [2011 (3) KLJ 514].

12. The direction that the court below has to adjudicate the question with regard to the validity of the purchase certificate obtained by the 8th defendant and the validity of the right being claimed by the 8th defendant as a cultivating tenant, is not open to any further challenge at present. That matter has become final on account of the original judgment passed by this Court in W.P.(C) No.28366/2010 vide judgment dated 12.11.2010, and Ext.P3 order dated 31.08.2011, as well as Ext.P4 judgment passed by this Court on 08.07.2014. Whether fraud is properly alleged or not is not a question to be decided at present. It is a matter that has to be decided by the court below. It is true that when a question arises under the Kerala Land Reforms Act, normally, that has to be referred to the Land

Tribunal under Section 125(3) of the Kerala Land Reforms Act.

13. At the same time, the situation at present is a peculiar situation wherein the court below has to decide the validity of the claim forwarded by the 8th defendant as cultivating tenant and the validity of the purchase certificate obtained by the 8th defendant from the Land Tribunal in respect of his property. Both the 8th defendant as well as the 9th defendant have claimed rights based on the properties presently being possessed by both of them as properties originally devolved on their father Cholayil Marakkar through an alleged oral lease. When the validity of the claim forwarded by the 8th defendant has to be decided by the court below, necessarily, the court below has to go into the question relating to the validity of the alleged tenancy right of Cholayil Marakkar over the properties.

14. In such a case, when the 9th defendant is claiming a piece of land, which was allegedly the subject matter of an

oral lease in favour of Cholayil Marakkar, the said question has also to be decided by the court below, while deciding the question relating to the tenancy right of the 8th defendant. In such a case, if the question of the tenancy right being claimed by the 9th defendant alone is referred to the Land Tribunal by leaving that matter to the decision of the Land Tribunal, as rightly pointed out by the learned Senior Counsel for the petitioner, there is every possibility of conflicting decision in the matter.

15. When fraud is alleged in respect of the proceedings by which purchase certificate was obtained by the 8th defendant, that contention cannot be adjudicated by the Land Tribunal. That question has to be decided by the civil court. In such case, if the question relating to the tenancy right being claimed by the 9th defendant alone is referred to the Land Tribunal, it will be as good as leaving the Land Tribunal to decide the validity of the oral lease claimed in favour of Cholayil Marakkar also. When the civil

court has to sit in judgment with regard to the same matter while dealing with the question of tenancy right of the 8th defendant in the suit, the matter relating to the 9th defendant alone cannot be referred to the Land Tribunal. The civil court has jurisdiction to decide the said question in this particular context.

16. The apprehension forwarded by the learned counsel for the 2nd respondent that in case the tenancy right of the 8th defendant is upheld by the court below, the 9th defendant will not get the same benefit in case the said matter is not referred to the Land Tribunal, is of no basis at all. In case the court below finds that the 8th defendant is the cultivating tenant and the said right was a continuation of the right of Cholayil Marakkar based on the alleged oral tenancy, the very same benefit will necessarily go to the 9th defendant also. In such case, of course, it may not be possible for the civil court to give him a purchase certificate. At the same time, it is open to him to approach the Land

Tribunal to obtain the purchase certificate. In case of a finding by the civil court that the 8th defendant is a cultivating tenant in continuation of the oral tenancy allegedly obtained by Cholayil Marakkar, no doubt, the 9th defendant will also be entitled to the same benefit.

In the result, this O.P.(Civil) is allowed, and Ext.P5 order is set aside. The court below shall go into the question relating to the tenancy right being claimed by the 8th defendant and the validity of the purchase certificate obtained by him, as well as the tenancy right being claimed by the 9th defendant in the suit itself and enter appropriate findings in accordance with law.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/12/08

// True Copy //

PA to Judge