

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

FRIDAY, THE 11TH DAY OF DECEMBER 2015/20TH AGRAHAYANA, 1937

OP(C).No. 2125 of 2015 (O)

E.A.NO.411 OF 2014 IN EP NO.7 OF 2008 IN O.S.NO.1 OF 1964 OF DISTRICT COURT,
PALAKKAD.

PETITIONERS:

1. ASGAR, AGED 45 YEARS
S/O.MUHAMMED HANEEFA, FARM HOUSE, PARASUVAKKAL
NEYYATTINKARA, THIRUVANANTHAPURAM.
2. MEERA SAHIB, S/O.MOHAMMED KANNU, AGED 56 YEARS
THUNDUVILAKATHU, T.B.JUNCTION, NEYYATTINKARA
THIRUVANANTHAPURAM
3. BIYATHIKANNU, D/O.PODIPILLAI, HAZAR MANZIL, AGED 84 YEARS
AMARAVILA, CHENGAL VILLAGE, NEYYATTINKARA
THIRUVANANTHAPURAM.
4. SHAJAHAN, AGED 52 YEARS
PULIMOOTTIL HOUSE, T.B.HOUSE, NEYYATTINKARA
THIRUVANANTHAPURAM.
5. P.BEEPATHIMA, D/O. MOHAMMED KANNU HAJIYAR, AGED 80 YEARS
KALPADI HOUSE, THANGAPATTAM PAINKULAM VILLAGE
VILAVINKODE TALUK, KANYAKUMARI DISTRICT.
6. VIJAYAN NAIR, AGED 60 YEARS
S/O.SUKUMARAN NAIR, KRISHNA VILASAM, CHENGAL VILLAGE
NEYYATTINKARA, THIRUVANANTHAPURAM.
7. LIYAKATH ALI KHAN, AGED 58 YEARS
S/O.MEHABOOB ALI KHAN, NOOR MAHAL, NCC JUNCTION
CHETTIVILAKOM VILLAGE, THIRUVANANTHAPURAM.
8. REHMATH BEEVI, AGED 69 YEARS
D/O.EBRAHIM KANNU, FARM HOUSE, PARASUVAIKAL
NEYYATTINKARA, THIRUVANANTHAPURAM.
9. ANIL AGED 56 YEARS
S/O.MOHAMMED HANEEF, FARM HOUSE, PARAMAKALAL
NEYYATTINKARA
THIRUVANANTHAPURAM.
(PETITIONERS 2 TO 9 ARE REPRESENTED BY POWER OF ATTORNEY HOLDER
1ST PETITIONER)

BY ADVS.SRI.G.P.SHINOD
SRI.RAM MOHAN.G.
SRI.MANU V.
SRI.GOVIND PADMANAABHAN
SRI.AJIT G.ANJARLEKAR
SRI.T.KRISHNANUNNI (SR.)

RESPONDENTS:

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1. VASUDEVA MENON
S/O.LATE VENUGOPALA VARMA RAJA, "NARAYANI"
KOZHISSEERI HOUSE, PAYYALLUR, KOLLENGODE
CHITTUR TALUK, PALAKKAD (DIED)
 2. MOHAN VARMA, S/O.LATE VENUGOPALA VARMA RAJA
KOZHISSEERI HOUSE, PAYYALLUR, KOLLENGODE
CHITTUR TALUK, PALAKKAD 678 101.
 3. PUSHPA BALASUBRAMANIAN, D/O.LATE VENUGOPALA VARMA RAJA
KOZHISSEERI HOUSE, PAYYALLUR, KOLLENGODE
CHITTUR TALUK, PALAKKAD 678 101.
 4. ANURADHA VARMA
W/O.LATE SANTHARAM VARMA, KILPAUK, MADRAS(CHENNAI)
TAMIL NADU 600010.
 5. SUMANGALA VARMA, D/O.LATE SANTHARAM VARMA
KILPAUK, MADRAS (CHENNAI), TAMIL NADU-600010.
 6. AJATHA SATHRU VARMA, S/O.LATE SANTHARAM VARMA,
KILPAUK, MADRAS (CHENNAI), TAMIL NADU- 600010.

R2-R6 BY ADV. SRI.H.BADARUDDIN
R2-R6 BY ADV. SMT.B.SHAMEERA
R2-R6 BY ADV. SMT.LAYA SIMON

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 5.10.2015, THE COURT
ON 11-12-2015 DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS

P1- A TRUE COPY OF THE E.A.NO.411 OF 2014 IN EP NO.7 OF 2008 IN OS NO.1 OF 1964 FILED BY THE EPETITONERS BEFORE THE DISTRICT COURT, PALAKKAD DATED 24.10.2014

P2- A TRUE COPY OF THE PREPLY FILED BY THE RESPONDENTS IN EA NO.411 OF 2014 IN EP NO.7 OF 2008 IN OS NO.1 OF 1964 BEFORE THE DISTRICT COURT, PALAKKAD DATED 27.10.2014

P3- A TRUE COPY OF THE ORDER DATED 26.6.2015 IN EA NO.411 OF 2014 IN EP NO. 7 OF 2008 IN OS NO.1 OF 1964 PASSED BY THE DISTRICT COURT, PALAKKAD

RESPONDENTS' EXHIBITS

EXT R2(A): COPY OF JUDGMENT REPORTED IN 2012 KHC 503 VASUDEVA MENON & OTHERS V. M/S.K.J.PLANTATION & OTHERS.

EXT R2(B): COPY OF THE ORDER DATED 25.7.2014 RENDERED BY HON'BLE SUPREME COURT OF INDIA IN SLP(CIVIL) 27122/2012, SLP(CIVIL)27268/2012 AND SLP(CIVIL) 34754/2012.

EXT R2(C): COPY OF E.A.NO.38 OF 2009 IN EP NO.7 OF 2008 FILED BY THE PETITIONERS BEFORE THE COURT BELOW.

EXT R2(D): COPY OF E.P.7/2008 FILED BEFORE THE COURT OF DISTRICT JUDGE, PALAKKAD.

/TRUE COPY/

P.S.TO JUDGE

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K.ABRAHAM MATHEW J.

O.P.(C)No.2125 of 2015

Dated this the 11th day of December, 2015

JUDGMENT

The plaint schedule property was part of the property which belonged to Vengunadu Kovilakam. In 1897 it leased out 909 acres to a foreigner for 75 years. The foreigner assigned it to a limited company. The Kovilakam leased out another 5 acres also to the company for 43 years, in 1945 the company assigned the property to another company, which assigned different parcels of the property to various persons including M/s.K.J.Plantations. In 1978 M/s.K.J.Plantations assigned the plaint schedule property to the petitioners by registered documents. Meanwhile, district court, Palakkad passed a final decree for partition in O.S.No.1 of 1964 filed by some members of the Kovilakam in respect of its properties including the properties involved in this proceeding. Respondents 16 to 21 who were allotted the property in the final decree filed E.P.No.7 of 2008 for delivery of their property. Claiming that the petitioners are lessees of those properties they filed E.A.No.38 of 2009 to obstruct the delivery. The application was allowed by the executing court in Ex.F.A.No.12 of 2010. This court set aside the order finding that they had not obtained any right in the property. SLP No.27122 of 2012 filed by them was dismissed by the Supreme

Court. Later, the petitioners filed E.A.No.411 of 2014 in the executing court claiming that under Section 4(1) of the Kerala Compensation of Tenants Improvement Act 1958 and under Section 51 Transfer of property Act they are entitled to the value of the improvements they have effected in the property. The respondents denied the claim and also contended that their claim was barred by the principle of constructive res judicata in as much as they failed to raise the claim in their earlier execution application, No.38 of 2009 filed under Order 21 Rule 97 of the Code of Civil Procedure. The executing court held that their claim is not hit by the principle of res judicata. It recorded that they gave up the claim made under Section 4(1) of the Kerala Compensation of Tenants Improvement Act . It entered a finding that they are not transferees and hence not entitled to the benefit of Section 51 of the Transfer of Property Act. This is challenged in this Original Petition.

2. Heard the learned senior counsel Sri.T.Krishnanunni appearing for the petitioners, and learned counsel Sri.Badruddin appearing for the respondents.

3. It is seen from the execution application filed by the petitioners that they claimed value of improvements under Section 4 (1) of the Compensation for Tenants Improvements Act and Section 51 of the Transfer of Property Act. But the executing court has not entered a finding on the claim made

under Section 4 (1) of the Compensation for Tenants Improvements Act stating that it was not pressed at the hearing by their learned counsel. It is not disputed before me that such a submission was made by the learned counsel. But the argument is that the counsel had no authority to relinquish the claim. But in view of the finding I propose to enter on the essential question of applicability of the principle of constructive res judicata, I am not examining the petitioners' entitlement to compensation under Section 4(1) of the Compensation for Tenants Improvements Act on the facts of the case.

4. When the property was sought to be delivered to the respondents, the petitioners filed E.A.No.38 of 2009 in E.P.No.7 of 2008 claiming that they were lessees of the properties and delivery shall not be effected, and at best only symbolical delivery could be effected. Though the executing court allowed it, a division bench of this court rejected it, which has become final by the dismissal of the Special Leave Petition filed by the petitioners. The Division Bench, the judgment of which is reported in **Vasudeva Menon and others v. M/s.K.J.Plantations and others (2012 KHC 503= 2012 (3) KLT 730)** took the view that there was no estate or property which could have been transferred either by M/s.K.J.Plantations or the

subsequent assignors. It held that the petitioners in this Original Petition cannot claim as tenants by holding over and nor can they claim any right as tenants at sufferance and their possession was unaccompanied by any right(paragraph 59).

5. The argument of the learned counsel for the respondents that the petitioners' claim for value of improvements is hit by the principle of constructive res judicata as they failed to make the claim in Execution Application No.38 of 2009 may be considered first. They are entitled to support the lower courts' order and at the same attack its finding unfavourable to them on any point.

6. Section 11 of the Code of Civil Procedure is extracted below:

"11.Res judicata- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between 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."

Two Explanations to the Section are relevant:

Explanation IV

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation VII

The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

7. Order 21 Rule 101 of the Code of Civil Procedure which was applicable to the earlier application filed by the petitioners in the execution proceedings provides that all questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding in an application under Rule 97 and relevant to the adjudication of the application shall be determined by the court dealing with the application and not by a separate suit. The order on an application filed under Rule 97 is passed under Rule 98. The order passed under Rule 98 is a deemed decree as provided in Rule 103.

8. There cannot be any doubt that a matter which might and ought to have been pleaded in a proceedings under Rule 97 cannot be raised again in a subsequent proceedings. Now the question is whether the petitioners might and ought to have raised the claim for the value of the improvements allegedly effected by them in their application filed under Rule 97. There is no restriction with regard to the right that may be claimed in a proceedings under rule 97. But unless the petitioners in this O.P had the right to make the

claim before their obstruction petition against delivery was rejected, they could not have raised it. This necessitates examination as to when a tenant/transferee could claim the right under the statutes under which they raised the claim.

9. Section 2(d) of the Kerala Compensation for Tenants Improvements Act defines tenant:

2. In this Act, unless the context otherwise requires,

xxx xxx xxx

(d) 'tenant' with its grammatical variations and cognate expressions includes-

(i) a person who, as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee of land, is in possession thereof;

(ii) a person who with the bona fide intention of attorning and paying a reasonable rent to the person entitled to cultivate or let waste-land, but without the permission of such person, brings such land, under cultivation and is in occupation thereof as cultivator; and

(iii) a person who comes into possession of land belonging to another person and makes improvement thereon in the bona fide belief that he is entitled to make such improvements.

A tenant's entitlement to compensation for the improvements effected by him is given in Section 4 of the Act.

4. Tenant entitled to compensation for improvements-(1) Every tenant shall, on eviction, be entitled to compensation for improvements which were made by him, his predecessor-in-interest or by any person not in occupation at the time of the eviction who derived title from either of them and for which compensation had not already been paid; and every tenant to whom compensation is so due shall, notwithstanding the

determination of the tenancy or the payment or tender of the mortgage money or premium, if any, be entitled to remain in possession until eviction in execution of a decree or order of court:

Provided that nothing herein contained shall be construed as affecting the provisions of the Kerala Land Conservancy Act, 1957:

Provided further that this section shall not apply to tenants holding lands under the Government.

2) A tenant so continuing in possession shall during such continuance, hold as a tenant subject to the terms of his lease or mortgage, if any.

10. A person who is a tenant as defined in Section 2(d) of the above Act gets the right to get compensation only when he loses his right to be in possession of the property. This does not mean that his right to claim compensation arises on eviction. Right to claim compensation and right to get compensation are different.

11. Section 5 of the Act throws light on the matter under consideration. Section 5(1) directs that the court shall ascertain the amount of compensation payable to the tenant and shall pass a decree declaring the amount so found due and ordering that on payment by the plaintiff into the court of the amount so found due the defendant shall put the plaintiff in possession of the land with the improvements thereon. It is crystal clear from this provision that determination of compensation should take place before the decree is passed. Section 5(3) of the Act provides that if any improvements are made subsequent to the date up to which compensation for the improvements has been

adjudged in the decree, a revaluation may be made, if necessary, by the executing court. Unless the claim is made before the decree is passed, how can the court declare the amount in the decree.

12. In **Yohannan v. Geevarghese (1962 KLJ 1272); Abdur Rehuman Vaidyan v. Abubaker Kunju (1963 KLJ 1093), Chellappan v. Padmanabhan Nair (1984 KLN 228) and Kumba v. Mammunhi Beary (1988(1) KLT S.N. Page 24 (Case No. 45))** this court has held that claim for compensation under Section 4 of the Compensation for Tenants Improvements Act should be raised before the decree is passed and it cannot be allowed to be raised in the execution proceedings.

13. A distinction has to be made between a case in which the trial court finds that the party claiming right to be in possession has no such right and a case where there is a statutory declaration that notwithstanding the decree for eviction he is entitled to be in possession till a subsequent event happens. In the former case he must raise his claim for the value of improvements (if any) before the decree is passed and in the latter case when the event happens. The best example for the latter case is mortgage suits, where the decree does not snap mortgagor- mortgagee relationship between the parties. It will continue till the money is paid, which may happen

in execution proceedings and till then the mortgagee's right to be in possession is protected.

14. The petitioners have not obtained any right subsequent to the passing of the order passed on the application filed by them under Order 21 Rule 97 of the Code of Civil Procedure. In view of the provision in Rule 101 of the Code they had every right to raise the claim for value of improvements, if any, in the application filed under Rule 97. Their failure to raise the claim is hit by the principle of constructive res judicata as embodied in Section 11 Explanation VII of the Code.

15. All what is said about the claim under Section 4(1) of the Compensation for Tenants Improvements Act is applicable to a claim under Section 51 of the Transfer of Property Act. The claim under Section 51 of the Transfer of Property Act also is barred by the principle of constructive res judicata. In **Sarasamma v. Laisal Esther (1993(1) KLT 37)** this court held:

“The right to claim value of improvements conferred under S.51 of the T.P. Act could and should have been put forward in the suit itself in answer to the claim for recovery of possession at least as an alternate plea. The fact that as per S.51 of the T.P. Act a person sought to be evicted is entitled to be paid value of improvements before eviction as estimated at the time of eviction is no reason to hold that it is a right which cannot be claimed in the suit

or that the proper time for putting forward the right is at the time when eviction is sought for in the execution proceedings. It was up to the petitioner to have put forward such a claim in the suit itself for adjudication and get appropriate reliefs regarding the same in the decree itself or to get appropriate directions to get it adjudicated in the execution proceedings. Normally Execution Court is bound to execute the decree as it stands and cannot grant any other relief other than what is granted as per the decree, unless there is any provision of law specifically empowering the Executing Court to do so as in the case of the provision contained in S.5(3) of the Kerala Compensation for Tenants Improvements Act 29 of 1958. The fact that the value of improvements to be paid is to be estimated at a date as near as possible to the date of actual eviction cannot make the right conferred by the Section one enforceable only in execution. It cannot also cloth the Execution Court with jurisdiction to adjudicate for the first time a claim put forward for value of improvements and give necessary relief in that regard in execution unless the decree contains a provision regarding such ascertainment of the right in execution either wholly or in part."

16. The executing court has found that the petitioners are not transferees and they cannot maintain a claim under Section 51 of the Transfer of Property Act.

17. Section 51 of the Act reads thus:

51. Improvements made by bona fide holders under defective titles- When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he subsequently evicted therefrom by any person

having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

18. To attract the section there should be a transferee of the immovable property. As noted earlier, the division bench in Ex.F.A.No.12 of 2010 has held that there was no transfer of any right by the document under which the petitioners have raised their claim.

19. Learned senior counsel Sri.Krishnanunni submits that the High Court in its judgment in Ex.F.A.No.12 of 2010 and the Supreme Court in its order in the Special Leave Petition have given the petitioners the liberty to raise their claim for the value of improvements. With regard to their claim the division bench has observed: "We feel that we need not go into this question as it is not a question which arises from the order on the claim petitions." It only means that it was a question the division bench was not called upon to answer. The relevant observation in the order in the Special Leave Petition is this: "In so far as the question of compensation of

improvements made by the petitioners is concerned petitioners are free to pursue appropriate remedy for redressal of their grievance in accordance with law". This should not be understood as granting liberty to the petitioners to raise their claim in a subsequent proceedings. It only means that if they are entitled to raise such a claim under any law, they may do so. I have already held that they are not entitled to raise that claim under the relevant statutes.

20. The executing court was wrong in holding that the claim of the petitioners for the value of the improvements allegedly effected by them is not barred by the principle of constructive res judicata, but right in finding that they are not entitled to claim compensation under Section 51 of the Transfer of Property Act. This petition is liable to be dismissed.

In the result, this Original Petition is dismissed.

Sd/-

K.ABRAHAM MATHEW
JUDGE

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/True copy/

P.S.to Judge