

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE A.HARIPRASAD**

**MONDAY, THE 27TH DAY OF JULY 2015/5TH SRAVANA, 1937**

**RSA.No. 339 of 2015 (F)**

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**AGAINST THE JUDGMENT AND DECREE IN AS 77/1998 of ADDL. DISTRICT & SESSIONS COURT-1, KASARAGOD DATED 30-01-2015.**

**AGAINST THE JUDGMENT AND DECREE IN OS NO.193/1995 OF SUB COURT, KASARAGOD DATED 16-02-1998.**

**APPELLANT IN RSA/APPELLANT IN A.S.- DEFENDANT IN SUIT.:**

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**K.HARISCHANDRA HOLLA, AGED 68 YEARS,  
S/O.NARAYANA HOLLA, PROPRIETOR,  
SUDHA ENGINEERING WORKS, UPPALA,  
RESIDING AT UPPALA VILLAGE AND POST  
KASARAGOD TALUK AND DISTRICT, PIN 671 322.**

**BY ADVS.SRI.S.V.BALAKRISHNA IYER (SENIOR)  
SRI.P.B.KRISHNAN.  
SRI.P.M.NEELAKANDAN.  
SRI.P.B.SUBRAMANYAN.  
SRI.SABU GEORGE.  
SRI.S.NITHIN (ANCHAL).**

**RESPONDENT(S) IN RSA /RESPONDENTS 2 TO 7 IN A.S.-  
PLAINTIFFS 2 TO 4 & L.RS OF PLAINTIFF NO.1 IN SUIT.:**

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- 1. P.BEERANNA BHANDARY, AGED 82 YEARS,  
S/O.LATE K.KOCHANNA BHANDARY, EX-COMPANY EXECUTIVE,  
RESIDING AT NO.119, R.M.V.EXTENSION, BANGALORE-560 080.**
  - 2. PRATNAKARA BHANDARY, AGED 72 YEARS,  
S/O.LATE K.KOCHANNA BHANDARY, COMPANY EXECUTIVE,  
RESIDING AT TARANGINI APARTMENTS, VEER SAVARKAR MARG,  
PRABHADEVI, MUMBAI-400 025.**
  - 3. P.SRIMATHI ALVA, AGED 75 YEARS,  
D/O.LATE K.KOCHANNA BHANDARY, RESIDING AT NO.7,CHURCH ROAD,  
SHANTHI NAGAR, BANGALORE-560 027, KARNATAKA STATE.**
  - 4. UMA R.BHANDARY, AGED 75 YEARS,  
W/O.LATE P.RAMANANDA BHANDARY,  
RESIDING AT SOMESHWARA VILLAGE, MANGALORE TALUK,  
D.K.DISTRICT, P.O.KOTEKAR, KARNATAKA STATE, PIN 574 152.**
  - 5. NAGINA, AGED 55 YEARS, D/O.LATE P.RAMANANDA BHANDARY,  
RESIDING AT SOMESHWARA VILLAGE, MANGALORE TALUK,  
D.K.DISTRICT, P.O.KOTEKAR, KARNATAKA STATE, PIN 574 152.**
  - 6. THARUNYA SHETTY, AGED 53 YEARS, S/O.LATE P.RAMANANDA BHANDARY,  
RESIDING AT SOMESHWARA VILLAGE, MANGALORE TALUK,  
D.K.DISTRICT, P.O.KOTEKAR, KARNATAKA STATE, PIN 574 152.**

**BY ADV. SRI.K.G.GOURI SANKAR RAI.**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON  
27-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**A.HARIPRASAD, J.**

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**R.S.A No.339 of 2015**

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**Dated this the 27<sup>th</sup> day of July, 2015.**

**J U D G M E N T**

Appeal by the defendant in O.S No.193 of 1995 on the file of the Court of Subordinate Judge, Kasaragod, a suit for recovery of possession after removing the illegal constructions.

2.     Plaint averments in brief are thus :

Property described in plaint A schedule along with other items were allotted to the plaintiffs (respondents herein) as per the final decree passed in O.S No.49/1957 on the file of the Court of Subordinate Judge, Kasaragod. Plaintiffs took delivery of the properties allotted to them including plaint A schedule property. Eversince the passing of final decree and delivery of property, the plaintiffs have been in possession and enjoyment of the properties. The defendant on the strength of some concocted documents trespassed into plaint A schedule property.

He put up a shed in the property. In the year 1971, he filed an application before the Land Tribunal contending that he was a cultivating tenant entitled to fixity of tenure. Ramappa Alva, who is a member of the family of the plaintiffs, was shown as the land owner. The plaintiffs, when came to know about the proceedings, preferred an appeal as A.A No.375/1979 before the Appellate Authority (Land Reforms), Kasaragod. The appeal was allowed and order passed by the Land Tribunal allowing the purchase of the property trespassed upon by the defendant was set aside. The order passed by the Appellate Authority has become final. Defendant is a stranger to the property and he has no right, title or interest over the plaint A schedule property. As he is in illegal occupation, he is liable to be evicted.

3. Defendant filed a written statement contending that the plaintiffs did not get the properties as per the final decree in

O.S No.49/1957. Contention in the plaint that they obtained delivery of plaint A schedule property is also incorrect. According to the defendant, plaint A schedule property along with other items was in the possession and enjoyment of Ramappa Alva as a cultivating tenant prior to 1960. While Ramappa Alva was in possession of the property as cultivating tenant, one Paulson obtained the property on a permanent lease from Ramappa Alva. The defendant obtained assignment of Paulson's rights for valid consideration through an assignment deed. Paulson had obtained the property on oral lease in or about 1963. Paulson had converted the roof of the shed in the property into a tiled one. The plaintiffs are aware of the fact that the defendant had improved the building in the property and is running an industry ever since 1971. The defendant and his predecessors-in-title have been in possession and enjoyment of

plaint A schedule property openly, continuously and adversely without interruption from the plaintiffs and to the knowledge of the plaintiffs ever since 1963. Therefore, the defendant had perfected a tenancy right over plaint A schedule property by adverse possession. The suit is barred by limitation and is liable to be dismissed.

4. The trial court after a full fledged trial decreed the suit directing the defendant to surrender vacant possession of plaint A schedule property to the plaintiffs after removing the structures thereon. No oral evidence was adduced by the parties before the trial court. On the side of the plaintiffs, Exts.A1 to A4 were marked. No document was produced on the side of the defendant.

5. Feeling aggrieved by the decree of the trial court, the defendant preferred an appeal before the District Court,

Kasaragod as A.S No.77/1998. Learned Additional District Judge allowed the appeal and set aside the judgment and decree of the trial court and the suit was dismissed. Against that judgment and decree, the plaintiffs preferred a second appeal before this Court as R.S.A No.337/2008. Learned Single Judge considered the matter at length and allowed the appeal. The impugned judgment and decree of the lower appellate court was set aside and the matter was remitted back to the lower appellate court for a fresh consideration. One of the main reasons for setting aside the judgment and decree of the lower appellate court was on the premise that the lower appellate court without establishing any legal ground allowed the defendant to produce documents under Order XLI Rule 27 C.P.C and those documents were marked in the proceedings without proper proof. This Court found that the lower appellate court erred in receiving the

documents without fulfilling the mandates in the provision. Also that the reasons stated by the lower appellate court for allowing the appeal were legally unsustainable. In spite of allowing the parties to adduce evidence as per the terms of the remand order, the defendant did not prove the documents produced to substantiate his contention. Again the lower appellate court reconsidered the whole issue and dismissed the appeal filed by the defendant confirming the decree and judgment of the trial court. Against that judgment and decree, this appeal has been preferred.

6. Heard the learned Senior Counsel Sri.S.V.Balakrishna Iyer for the appellant and the learned counsel Sri.K.G.Gouri Sankar Rai for the plaintiffs/contesting respondents.

7. According to the learned Senior Counsel for the

appellant, serious questions of law arise in the appeal. Per contra, learned counsel for the plaintiffs contended that all the factual questions have been settled by the court below and no substantial question of law arises in this second appeal warranting determination by this Court. It is the submission of the learned Senior Counsel for the appellant that the question of limitation for the suit is a pertinent question to be decided. I shall examine that contention carefully.

8. It is the contention of the defendant that there are certain facts admitted. Ext.A1 is the order dated 08-02-1967 passed in the final decree proceedings. Ext.A2 is the notice issued by the counsel for the plaintiffs to the defendant directing him to vacate from plaint A schedule property. Ext.A3 is the acknowledgement card. Ext.A4 is the order passed by the Appellate Authority whereby the purchase certificate issued in

favour of the defendant in respect of plaint A schedule property in O.A No.2026/1971 before the Land Tribunal, Kasaragod was set aside. This order of the Appellate Authority has become final.

9. Learned counsel for the plaintiffs drew my attention to paragraph III(2) of the plaint wherein the plaintiffs have specifically contended that the defendant on the strength of some concocted and fabricated documents had trespassed into plaint A schedule property, which is a portion of the immovable properties allotted to the plaintiffs. It is further contended that the defendant reduced the said property into his unlawful possession claiming falsely that he is a cultivating tenant.

10. Averments in the written statement filed by the defendant is also relevant in this context. In paragraph 6, it is the case of the defendant that he obtained the assignment of lease

from Paulson, who in turn obtained a lease from Ramappa Alva in the year 1963. Ramappa Alva is a member of the plaintiffs' family and he was the eldest in the family. The plaintiffs even challenged his authority to create a lease in respect of a property belonged to the joint family. In paragraph 8 of the written statement, it is mentioned that ever since the purchase by the defendant, he is in possession and enjoyment of plaint A schedule property along with the building thereon. It is specifically pleaded by him that the lease in question is legally valid and the suit is hit by the provisions of the Kerala Land Reforms Act, 1963 (for short K.L.R Act'). It is further contended in paragraph 9 that the plaintiffs are well aware of the fact that the defendant is not a trespasser. In paragraph 14, it is mentioned that the defendant has perfected tenancy title to plaint A schedule property by adverse possession and the suit is barred

by limitation.

11. On the basis of the said pleadings, it is contended by the learned counsel for the plaintiffs that the whole case of the defendant rests on factual aspects and that there is no substantial question of law arising in this case. It is the contention of the learned counsel for the plaintiffs that the plea raised by the defendant is inconsistent and incongruous. Exts.B1 and B2 relied on by the defendant himself will cut at the root of his case, contended the learned counsel for the plaintiffs. Ext.B1 is the copy of a document executed by Ramappa Alva in favour of Paulson purported to be a permanent lease agreement. It is dated 08-07-1969. As per the recitals in Ext.B1 (English translation of the document is submitted for perusal) it can be seen that said Paulson was in possession of the property even prior to execution of Ext.B1. But the fact as to when this tenancy

commenced has not been spelt out from Ext.B1. Learned counsel for the plaintiffs relied on a recital in Ext.B1 that 7 cents of land said to have been leased out by Ramappa Alva to Paulson was a vacant plot. So, it is evident that there was no building thereon till 1969.

12. Ext.B2 is the copy of assignment deed executed by Paulson in favour of the defendant. That is dated 18-12-1970.

13. Now, I shall examine the veracity and acceptability of the case pleaded by the defendant. As mentioned above, his definite case is that he is a cultivating tenant of the property entitled to get a purchase under the provisions of the K.L.R Act. Facts that the purchase certificate issued in his favour by the Land Tribunal has been set aside by the Appellate Authority and the order of the authority has become final are undisputed. In the absence of any evidence - either oral or documentary - to show

that Ramappa Alva was competent to create a lease, that Paulson obtained a leasehold right in the land prior to 01-04-1964 and that 7 cents of property described in the plaint schedule was let out for agricultural purposes, the contention of the defendant that he is a cultivating tenant cannot be accepted. To crown all these things, the order setting aside his purchase certificate has become final. By no stretch of reasoning therefore, it can be held that the defendant is a cultivating tenant entitled to fixity under the provisions of K.L.R Act.

14. Learned Senior Counsel for the appellant contended that even if the order by which the defendant purchased the right title and interest over plaint A schedule property is set aside, by long and continuous possession the tenant has perfected a title to tenancy by adverse possession and limitation. This contention was specifically dealt with by the learned Single Judge of this

Court in the earlier round of litigation. Documents in this case clearly show that the tenancy set up by the defendant is prohibited by the provisions of Section 74 of the K.L.R Act as it was commenced, by the showing of the defendant himself, only in the year 1969.

15. Another contention put forward on behalf of the appellant/defendant is that the defendant has perfected a title for tenancy under Section 106 of the K.L.R Act. Learned Senior Counsel contended that the authorities under the K.L.R Act and the courts below misunderstood the scope of the claim of tenancy raised by the defendant. According to him, the tenancy set up by the defendant is only for commercial or industrial purpose. In this context, Section 106 of K.L.R Act is relevant. It is quoted hereunder :

***“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 20<sup>th</sup> 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.*

*(1A) The lessor or the lessee may apply to such authority as may be prescribed for varying*

*the rent referred to in sub-section (1), and thereupon such authority may, after taking into consideration such matters as may be prescribed and after giving the lessor and the lessee an opportunity of being heard, pass such orders on the application as it deems fit.*

*(2) If, between the 18<sup>th</sup> December, 1957 and the date of commencement of this Act, any decree or order of Court has been executed and any person dispossessed by delivery, such person shall, on application before the Land Tribunal, be entitled to restoration of possession :*

*Provided that, before restoration, such person shall be liable to pay -*

*(i) the compensation paid by the landlord for any improvements in the land and, subsisting at the time of restoration;*

*(ii) the compensation for any improvements effected subsequent to the delivery :*

*Provided further that he shall not be entitled to restoration if the property has passed on to the possession of a bona fide transferee for value.*

*(3) Nothing contained in sub-section (1), sub-section (1A) and sub-section (2) shall apply to lands owned or held by the Government of Kerala or a local authority.*

***Explanation.-*** *For the purposes of this sub-section, “local authority” includes the Cochin Port Trust and any University established by an Act of the Kerala State Legislature.”*

16. On a close scrutiny of the said provision, will be clear that if a lessee has constructed buildings for commercial or industrial purpose before 20<sup>th</sup> May, 1967, then he shall not be

liable to be evicted from such land. But he shall be liable to pay rent subject to the periodical revisions. In order to establish his right, there must be some reliable material to show that the lease was created before 20<sup>th</sup> May, 1967 and a building usable for commercial or industrial purpose was constructed thereon. Even going by Exts. B1 and B2, the lease created by Ramappa Alva, even if it is valid, was commenced only in the year 1969. For this reason alone, the claim of the defendant has to fail.

17. The contention raised by the defendant that he prescribed a lease under Section 106 of the K.L.R Act is unacceptable. In the absence of any evidence to show that he started occupation of the land before the date stipulated in the statute is a reason to negative that plea. The purchase certificate issued in his favour was set aside by the order of the Land Tribunal only on 28-02-1984. Till then, he kept the property in

possession on a legal premise that he is a tenant entitled to fixity of tenure. From the moment the order passed by the Land Tribunal is reversed by the Appellate Authority, the defendant could have started a prescribing lease. But whether it can be one under Section 106 of the K.L.R Act is very much doubtful. For the above said reason, the question of lease under Section 106 of the K.L.R Act does not arise. Further, the suit was filed within 12 years from the date of the order passed by the Appellate Authority on 28-02-1984. Therefore, the statutory required period of 12 years for prescribing a leasehold right was interrupted by the filing of the suit. For that reason also, the prescriptive title of tenancy claimed cannot be accepted.

18. Learned counsel for the plaintiffs contended on the basis of *V.G.Panickan v. Velumpi Kunji (A.I.R 1958 Kerala 178) (F.B)* that a party cannot be allowed to rake up a contention

which was consciously and willingly given up before the trial court. In this case, no plea of commercial lease falling within Section 106 of the K.L.R Act was raised in the written statement and no evidence - either oral or documentary - was produced to substantiate that. Therefore, the contention of the defendant is not sustainable. In spite of giving opportunity to both sides to adduce evidence by this Court in the order of remand, the defendant did not choose to substantiate his contention.

19. Learned counsel for the plaintiffs relying on ***Kochu Ouseph v. Joseph & Others (1976 K.L.T 512) (F.B)*** contended that the plaintiffs have no burden in this case to prove title as the defendant himself has admitted the title of the plaintiffs by setting up a derivative title. The principle of law stated therein reads as follows :

*“ 13. The position will be different where the plaintiff does not admit the defendant to*

*be a tenant of his and sues as a proprietor to recover the land and the defendant sets up a tenancy right under the plaintiff. In such a case the plaintiff has not to prove anything, because the admitted paramount title carries with it a presumption that the plaintiff is entitled to hold and possess the land and therefore the person seeking to defeat that right and claiming to hold under him must establish the right so asserted by him see AIR. 1958 Pat. 386 F B. Jaldhari Mahto v. Rajendra Singh.*

*As the Patna High Court points out this presumption of law was re-cognised by the Privy Council in the case of Lakshmana v. Venkiteswaralu AIR. 1949 PC. 278) as will appear from the following observations:*

*“Their Lordships may here observe that in shifting the burden from one side to the other by adducing evidence, parties*

*may rely on presumption in law, which are really inferences of fact, in place of actual facts. If there was a presumption in law that an inamdar was the owner of both kudivaram and melvaram interest, in the land then he could rely on that presumption to discharge the initial burden of proof that lay on him to prove his title to eject. In this sense the presumptions arising from law are connected with the question of onus of proof.”*

20. It is beyond any possible dispute that the burden of proving a derivative title is purely on the defendant, which according to me, he has miserably failed to establish.

21. The question of limitation raised by the learned Senior Counsel for the appellant/defendant also does not arise in this case. As mentioned above, the starting point of

prescriptive lease could only be after the disposal of the appeal by the Appellate Authority. As stated above, since 12 years have not elapsed before the date of suit, the question of prescription does not arise in this case. Learned counsel for the respondents relying on various decisions in *Joseph v. Gouri Amma (1959 K.L.T 291, K.Sudaly v. A.Panicker (AIR 1959 Kerala 172), R.Chandavarappa v. State of Karnataka ((1995)6 SCC 309), Roop Singh v. Ram Singh (AIR 2000 SC 1485)* contended that no party cannot be permitted to prove a fact which is not pleaded and the court cannot make out a new case which is not pleaded. This proposition is well settled.

22. Learned Senior Counsel for the defendant contended that the Amin's report makes it clear that there was a resistance offered by the defendant at the time when delivery of the property was taken. It is seen from Ext.B8 that except the

building claimed by the defendant, rest of the property had been delivered. According to the learned Senior Counsel, the plaintiffs should have taken steps under Order XXI Rule 97 C.P.C to remove obstruction within a period of 30 days as provided in the Limitation Act. Having failed to do so, a suit on title is barred by law of limitation. I am afraid, I cannot accept that contention for the reason that there are other courses open to the plaintiffs in such an eventuality. The plaintiffs could have filed another E.P within the period of limitation. They could have also filed a suit for recovery of property on the strength of title as there was no adjudication of title in any proceeding on the execution side. Order XXI Rule 103 C.P.C as it stood before the amendment in 1976 permitted a suit only against an order passed under Rule 98, 99 and 101 of the unamended C.P.C. Since that course was not adopted in this case and the said

provision has been changed by the amendment to C.P.C by Act 104 of 1976, the suit on title cannot be said to be barred. The suit is admittedly within a period of 12 years from the date of Ext.A4 order which caused effacing the tenancy right set up by the defendant. Therefore, the question of limitation can only be decided in favour of the plaintiffs/respondents.

From the above discussion, I find no merit in the second appeal. Hence, it is dismissed.

All pending interlocutory applications will stand dismissed.

**A.HARIPRASAD,  
JUDGE.**

amk