KOCHUNJU NAIR

v.

KOSHY ALEXANDER AND ORS.

MARCH 24, 1999

[K.T. THOMAS AND D.P. MOHAPATRA, JJ.]

Kerala Land Reforms Act, 1963

S. 2 (25)—Person in possession of land held in co-ownership with others in excess of limits prescribed under S.2 (25)—Whether such person would be entitled to claim the rights of 'Kudikidappu' under the provisions of the Act—Held : such a person would not be entitled to claim the rights of Kudikidappu.

Words & Phrases—'Kudikidappu', 'Co-owner', 'Homestead', 'Person', 'Family'—Meaning of in the context of Kerala Land Reforms Act, 1963.

The predecessor of the respondent was the owner of a building which he rented out to the appellant for conducting a tea-shop. In the family settlement of the predecessor of the respondent, the said building and the land on which it was situated was allotted to the share of the first respondent. Two suits were filed in respect of the building, one by the appellant for a declaration that he is the owner of the building and the other by the first respondent together with his predecessor for recovery of possession of the building. The appellant claimed that he was a Kudikidappukaran and was entitled to the rights thereof under the provisions of the Kerala Land Reforms Act, 1963.

The suit filed by the respondent was dismissed by the trial court after a finding by the Land Tribunal under Section 125 (3) of the Act that the appellant is a Kudikidappukaran pursuant to a reference made to it by the trial court on the direction of the Kerala High Court. The respondents filed appeal against the order of the trial court before the first appellate court. The first appellate court allowed the appeal and decreed the suit of the respondents for possession of the premises, on the premise that the appellant had in his possession land in excess of ten cents in the area i.e., in excess of the limit prescribed under Section 2 (25) of the Act. Aggrieved by the

A judgement of the first appellate court, the appellant preferred Second Appeal before the Kerala High Court. The contention of the appellant before the High Court was that since the land was held by him in co-ownership with his wife and son it cannot be taken into consideration while deciding whether he has the right of Kudikidappukaran. The Division Bench which heard the Second Appeal differed with an earlier decision of another Division Bench B as it was of the view that such possession would dis-entitle him from claiming the benefits of Kudikidappukaran under the Act and placed the matter before a Full Bench.

The Full Bench concurred with the view taken in the earlier decision C and held that when a person has land in co-ownership with another, whatever be its extent, it would not disentitle him to claim the rights of a "Kudikidappukaran" under the provisions of the Kerala Land Reforms Act, 1963 as the person cannot be said to be in possession of land in excess of the limit prescribed in S. 2 (25) of the Act as co-ownership property cannot be taken into consideration. However, the Full Bench found that the land in D the appellant's possession was not in co-ownership with others and hence, repelled his right to have Kudikidappu rights.

Against the Judgement of the Full Bench, the appellant has appealed to this court, contending that if the person has only co-ownership over the land it cannot be said that he is the owner thereof, nor can it be said that E he is in possession of it; alternatively even if the co-ownership can be taken into account, the area of the appellant's land, after partition, would fall below 10 cents in extent.

Dismissing the appeals, the Court

F HELD : 1. The person claiming to be a Kudikidappukaran should not have, in his possession, land exceeding ten cents in a panchayat area, either as owner or as tenant on which he could erect a dwelling house. The word "homestead" in the context would only mean a dwelling house. [173-H-G]

G 2. Ownership imports three essential rights, namely, right to possession, right to enjoy and right to dispose. If an owner is wrongly deprived of possession of his property he has a right to be put in possession thereof. All the three essentials are satisfied in the case of co-owner of a land. All co-owners have equal rights and co-ordinate interest in the property, though their shares may be either fixed or indeterminate. Every co-owner H has a right to enjoyment and possession equal to that of the other co-owner

or co-owners. Each co-owner has, in theory, interest in every infinitesimal portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with others. [174-F-G] A

Mitra's Co-ownership and partition, Seventh Edition, referred to. B

3.1 A co-owner owns every part of the composite property alongwith others. To hold that a co-owner is not an owner and his possession is not the possession envisaged in Section 2 (25) of the Kerala Land Reforms Act is in conflict with the correct legal position. If a co-owner wants to erect homestead on the land he is free to do so. When a division of the co-ownership property takes place the co-owner who put up the homestead can claim that the said portion may be allotted to his share. Courts would ordinarily grant such equitable relief when claimed. If the other co-owner objects to the construction of a homestead he can get the co-ownership property divided by partition, and if the other party is not readily willing to that course it is open to him to get it partitioned through suit. These are various remedies available to the co-owner in respect of his land. Merely because he has to resort to such steps it cannot be said that a co-owner cannot erect a homestead on his land. [175-C-D] C D

Sri Ram Pasricha v. *Jagannath and Ors.* AIR (1976) SC 2335 and *Nutbehari Das* v. *Nanilal Das and Ors.,* AIR (1937) PC 61, relied on. E

3.2 The view of the Full Bench that the property held in co-ownership cannot be taken into account while considering whether the claimant has possession of land exceeding the limit prescribed in Section 2 (25) of the Act cannot be upheld. [173-E] F

Chakkara Ramakrishnan and others v. *Kuruvaikkandy Kumaran and others,* (1980) and *Kerala Law Notes 19, Pennamma* v. *St. Paul's Convent,* (1972) Kerala Law Times 12, overruled.

Vasudevan v. *Sreemathi Amma,* (1966) Kerala Law Times 594, relied on. G

Vasishta Vadhyar v. *Mohini Bai,* (1975) Kerala Law Times 365, and *Damodaran* v. *Vasukutty,* (1978) Kerala Law Times 1, referred to.

4. The appellant, his wife and son, who was at that time a minor, were H

allotted 27-1/2 cents of land as per the partition deed. A combined reading of Sections 2 (43) and 2 (14) of the Act leads to the only conclusion that appellant (with or without his wife and minor son) has 27-1/2 cents of land. There is no contention that the nature of the land is such that no homestead could be erected thereon. Even if the minor son would have claimed his share after attaining majority, appellant and his wife together would still have land much in excess of 10 cents. [176-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 9725-26 of 1995.

From the Judgment and Order dated 20.12.94 of the Kerala High Court in S.A. Nos. 274 and 415 of 1991.

K. Sukumaran, Ms. Kartika, S. and G. Prakash for the Appellant

K. John Mathew, N. Sudhakaran for the Respondents.

The Judgment of the Court was delivered by

THOMAS, J. A Full Bench of the Kerala High Court has held that when a person has land in co-ownership with another, whatever be its extent, it would not disentitle him to claim the rights of a `Kudikidappukaran' under the provisions of the Kerala Land Reforms Act, 1963 (for short 'the Act,). Having held so the Full Bench proceeded to consider whether appellant has such an entitlement. It was found that the land in his possession is not in co-ownership with others and hence the Full Bench repelled his claim to have Kudikidappu rights.

The predecessor of respondent (late Geevargis Koshy) was the owner of a building which he rented out to the appellant in the year 1963 for conducting a tea-shop. As per a settlement in the family of the said Geevargis the said building and the land on which it is situate have been allotted to the share of first respondent. Two suits were filed in respect of this building, one by the appellant for a declaration that the building is his, and the other by the first respondent together with Geevargis Koshy for recovery of possession of the building.

The suits underwent a checkered carrier and when they reached the Kerala High Court on an earlier occasion in Second Appeal a direction was issued to the trial court on 11.9.1982 to refer the question (which relates to the claim of appellant that he is entitled to Kudikidappu rights) to the Land Tribunal under Section 125(3) of the Act. Pursuant to the reference made by

the trial court the Land Tribunal answered the question in favour of the appellant holding that he is Kudikidappukaran. Accordingly the suit filed by the respondent was dismissed by the trial court but the District Court before which respondents filed a regular appeal, reversed the finding and decreed the suit for recovery of possession on the premise that appellant has in his possession land in excess of ten cents in area. Appellant took up the matter before the Kerala High Court again in Second Appeal.

In the High Court, appellant adopted a contention that since the land is held by him in co-ownership with his wife and son it cannot be taken into consideration while deciding whether he has right of Kudikidappukaran. When the Second Appeal came up before a Division Bench an earlier decision of another Division Bench was cited before it *Chakkara Ramakrishnan and others* v. *Kuruvaikkandy Kumaran and others,* (1980) Kerala Law Notes 19. But the Division Bench which heard the Second Appeal could not persuade themselves to follow the said decision as learned judges were inclined "to take the view that possession of other lands in co-ownership by a person claiming to be a Kudikidappukaran in excess of the limits prescribed under Section 2(25) of the Act will dis-entitle him from claiming the benefits thereunder." Hence the matter was placed before a Full Bench which again concurred with the view adopted in Chakkara Ramakrishnan (Supra).

We are unable to uphold the view of the Full Bench that the property held in co-ownership cannot be taken into account while considering whether the claimant has possession of land exceeding the limit prescribed in Section 2(25) of the Act. The said sub-section, which is the definition clause, is extracted below (only the material portion which is necessary for this case):

> "Kudikidappukaran means a person who has neither a homestead nor any land exceeding in extent three cents in any city or major municipality or five cents in any other municipality or ten cents in any panchayat area or township, in possession either as owner or as tenant, on which he could erect a homestead.."

The word 'homestead' in the context would only mean a dwelling house. As the land said to be in the possession of the appellant is situated in a panchayat area the necessary requirements can be re-cast like this: The person claiming to be a Kudikidappukaran should not have, in his possession, land exceeding ten cents in a panchayat area, either as owner or as tenant on which he could erect a dwelling house.

A Here the contention is that if the person has only co-ownership over the land it cannot be said that he is the owner thereof, nor is he in possession of it. Conflicting decisions have been adopted by the Kerala High Court on that point at different times. In *Vasudevan* v. *Sreemathi Amma,* (1966) Kerala Law Times 594 a single judge took the view that the person who has joint ownership of the necessary extent of land is disentitled to the rights of B Kudikidappukaran. But a contrary view was adopted by a Division Bench in *Pennamma* v. *St. Paul's Convent,* (1972) Kerala Law Times 12. Another Division Bench has held in *Vasistha Vadhyar* v. *Mohini Bai,* (1975) Kerala Law Times 365 thus: "A member of a joint family has no ownership or possession exclusively on any portion of the property belonging to the joint C family. Therefore, the fact that a person owns land with others as joint tenant cannot disentitle him from the protection extended under S.2(25) of the Act. On the words of the section, this is the only conclusion that can be arrived at." Nonetheless, the Division Bench doubted whether the above principle can be extended to a tenant-in-common since possession of such a person is different from the possession of a co-parcener or member of a tarwad. D However, a single judge in *Damodaran* v. *Vasukutty,* (1978) Kerala Law Times 1 took the view that there is no distinction between a member of joint family and a tenant-in-common or a co-owner and that he too can claim to be a Kudikidappukaran.

E We are not now considering the question whether a person who has right in a joint family property can be treated as one in possession of that land. But we do consider now whether a person who is a co-owner along with others can be treated as owner and whether he is in possession thereof.

Ownership imports three essential rights, namely, right to possession, F right to enjoy and right to dispose. If an owner is wrongly deprived of possession of his property he has a right to be put in possession thereof. All the three essentials are satisfied in the case of co-owner of a land. All co-owners have equal rights and co-ordinate interest in the property, though their shares may be either fixed or indeterminate. Every co-owner has a right G to enjoyment and possession equal to that of the other co-owner or co-owners. Each co-owner has, in theory interest in every infinitesimal portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with others. (vide Mitra's Co-ownership and Partition, Seventh Edn.)

H A three-Judge Bench of this Court has held in *Sri Ram Pasricha* v.

Jagannath and ors., AIR (1976) SC 2335 that a co-owner owns every part of the composite property along with others. The following statement of law has been made by their Lordships :

> "Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place."

To hold that a co-owner is not an owner and his possession is not the possession envisaged in Section 2(25) of the Act is in conflict with the correct legal position. If a co-owner wants to erect homestead on the land he is free to do so. When a division of the co-ownership property takes place the co-owner who put up the homestead can claim that the said portion may be allotted to his share. Courts would ordinarily grant such equitable relief when claimed. *vide Nutbehari Das* v. *Nanilal Das and ors.*, AIR (1937) PC 61. If the other co-owner objects to the construction of a homestead he can get the co-ownership property divided by partition, and if the other party is not readily willing to that course it is open to him to get it partitioned through suit. These are various remedies available to the co-owner in respect of his land. Merely because he has to resort to such steps it cannot be said that a co-owner cannot erect a homestead on his land.

The view adopted by the Full Bench of the Kerala High Court that once the claimant is a co-owner of whatever extent of land, he must be treated as a person who has no land on which he could erect a homestead, has preposterous legal implications. For example, a co-owner having 50 acres of land along with another co-owner claims right of Kudikidappu as against another person who has only a wee bit of land. If the Full Bench view gains acceptance the claimant must be declared entitled to Kudikidappu right. Such an order would be unjust and inequitable, if not ridiculous. The Full Bench of Kerala High Court has gone wrong in adopting such a view.

Learned counsel for the appellant alternatively contended that even if this co-ownership land can be taken into account, the area of his land, after partition, would fall below 10 cents in extent. Ext. B-16 is a Partition Deed of the year 1952 executed by the appellant and his brother as per which 27½ cents of land has been allotted to the appellant, his wife and son who was then a minor. "Person" is defined in Section 2(43) of the Act as including "a company, family, joint family, association or other body of individuals"...

A Section 2(14) of the Act defines "family" as consisting of "husband, wife and their unmarried minor children or such of them as exist".

A combined reading of the above definitions leads to the only conclusion that appellant (with or without his wife and minor son) has 27½ cents of land. There is no contention that the nature of the land is such that no homestead
B could be erected thereon. Even if the minor son would have claimed his share after attaining majority, appellant and his wife together will still have land much in excess of 10 cents.

So looking from any angle, appellant has no right to claim that he is a Kudikidappukaran in respect of the building which is the subject matter of
C the suit. We therefore dismiss this appeal, without any order as to costs.

A.T. Appeals dismissed.