[2009] 10 S.C.R. 779

DEVAKI ANTHARJANAM A
v.
SREEDHARAN NAMBOODIRI & ANR.
(Civil Appeal No. 3206 of 2006)

JULY 7, 2009 B

[DR. MUKUNDAKAM SHARMA AND DR. B.S. CHAUHAN, JJ.]

Kerala Compensation for Tenants Improvements Act, 1959 – ss. 5(3) and 2(b) – Suit for recovery of possession of immovable property – Defendants claimed compensation for improvements made by them in the property – Suit decreed – Compensation for improvements also adjudged in the decree – Execution petition – Additional compensation awarded by Executing Court in terms of s.5(3) for improvements made in property after the date of decree – Revision petition against – High Court remitted the matter to Executing Court to assess claim for further compensation – Justification of – Held :On facts, not justified –The Executing Court assessed compensation with regard to improvements after proper assessment thereof with aid and assistance of the Court Commissioner – Findings recorded by Executing Court were legal and valid – High Court committed manifest error of law and also exceeded its jurisdiction by interfering with the said findings – Code of Civil Procedure, 1908 – s.115. C D E F

The appellant-landlady filed suit for recovery of possession of immovable property. In the written statement, the respondents-defendants claimed compensation for the improvements made by them in the suit property. The trial court decreed the suit and, on basis of the report given by Court Commissioner aided by an expert, directed that the respondents would be entitled to receive compensation of Rs.1,35,000/-. The G

A decree, though challenged by the respondents, was upheld by the first appellate court as well as the High Court. Since despite the decree, and payment of compensation by appellant, the respondents did not vacate the suit property, the appellant filed execution B petition seeking their eviction. Respondents prayed for additional compensation in terms of Section 5(3) of the Kerala Compensation for Tenants Improvements Act, 1959 for improvements made to suit property after the date of decree. The Executing Court after coming to a C finding that the entire ground floor of the property was completed before the date of decree and that such factor escaped the notice of the earlier Commissioner and Expert appointed by Court for that purpose at the trial stage, made revaluation of the entire ground floor portion D and directed the appellant to deposit an amount of Rs.3,12,000/- over and above the amount of Rs. 1,35,000/ - adjudged in the decree. Appellants deposited the additional amount of Rs.3,12,000/- as well, but the respondents filed revision petition claiming further compensation for the improvements made. The High E Court remitted the matter to the Executing Court to assess the claim of respondents. Hence the present appeal.

Allowing the appeal, the Court

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HELD : 1.1. It was pointed out that the respondents were seeking payment of compensation for the improvements made despite an undertaking given by them before the Court that they would not claim any G value for the improvements made in the first floor of the property. Any construction made after the aforesaid undertaking cannot be said to be improvements made in the *bonafide* belief that they are entitled to make some improvements. [Para 23] [792-G-H; 793-A]

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A 1.2. Even assuming for the purpose of argument that the respondents could make some improvements even after passing of the decree by the trial court, but they could not have made any improvement in the suit property by way of constructing the first floor and claim compensation for it when they had given a clear B undertaking that they would not claim any compensation towards value of the said construction made on the first floor. They also undertook that they would not claim anything on account of the construction of the room and the toilet in the first floor. They are bound by the aforesaid C undertaking given to the Court and they are not entitled to resile from the same subsequently and claim any compensation. When they filed an undertaking they definitely had the knowledge that they are not entitled to make any improvement thereon in view of the currency D of the order of injunction and therefore they proceeded to give such an undertaking which disentitles them to claim any compensation towards any such improvement made. [Para 24] [793-A-E]

E 1.3. The Executing Court took notice of the said fact and therefore assessed compensation with regard to improvements made in respect of the ground floor only after proper assessment thereof with the aid and assistance of the Court Commissioner aided by an expert at Rs. 3,12,000/- over and above Rs. 1,35,500/-. The High F Court acted without jurisdiction in interfering with the aforesaid order in the exercise of the jurisdiction under Section 115 CPC. [Paras 25 and 26] [793-E-G]

1.4. There is no reason to linger on the matter any G further by remanding the matter back to the High Court as it is found that the findings recorded by the executing court are legal and valid. The said findings do not call for any interference and the High Court committed a manifest error of law and also exceeded its jurisdiction by H

A **interfering with the said findings. The order passed by the High Court is set aside and the order of the trial court is restored. The trial court is directed to take steps for execution of the decree in accordance with law. [Para 27] [793-G-H; 794-A-B]**

B *Kunjan Nair Sivaraman Nair v. Narayanan Nair and Ors.* **(2004) 3 SCC 277, referred to.**

Case Law Reference:

C **(2004) 3 SCC 277 referred to Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3206 of 2006.

From the Judgment & Order dated 25.5.2005 of the High D Court of Kerala at Ernakulam in Civil Revision Petition No. 803 of 2004. (G).

T. Anamika, B.V. Deepak and (for T.T.K. Deepak & Co.) for the Appellants.

E Subramonium Prasad for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. This appeal is directed against the judgment and order dated 25.5.2005 F passed by the High Court of Kerala whereby the High Court while allowing the Civil Revision filed by the respondent herein and setting aside the order passed by the Execution Court directed that the Execution Court should proceed to fix the value of improvements due to the respondent in accordance Section G 5(3) of the Kerala Compensation for Tenants Improvements Act, 1959 (for short "the Act").

2. The appellant herein filed a suit seeking for a decree for recovery of possession of immovable property including the H building on the strength of a title with a further prayer for grant

of a decree for mesne profit. The suit was instituted by the appellant in her capacity as the landlady of the said property in the year 1987. The respondents/judgment debtors contested the said suit by filing a written statement. In the written statement filed by the respondents, they claimed value of improvements made by them which they themselves assessed at Rs. 7 lakhs and for recovery of the same.

3. By judgment and decree passed on 31.5.1991, the suit filed by the appellant was decreed granting a decree for recovery of possession of the plaint schedule property from the respondents and also decreeing the suit for recovery of mesne profit at the rate of Rs. 1000 per year from the defendant No.1 /respondent No. 1 from the date of institution of the suit till delivery of possession. It was also directed in the said suit that respondent No. 1 would be entitled to get value of improvements of Rs. 1,35,000/- from the plaintiff/appellant herein and that the amount would be first charged on the plaint schedule property and that the defendant No. 1 would also pay the cost of the suit to the plaintiff/appellant.

4. The aforesaid decree was challenged by the respondents herein before the first appellate court which dismissed the said appeal.

5. Feeling aggrieved, the respondent filed an appeal before the High Court wherein also the value of improvements as fixed by the trial court and upheld by the first appellate court was challenged.

6. The High Court, however, dismissed the said appeal and thereby upheld and confirmed the decree passed by the trial court as also confirmed by the first appellate court. Consequent result is that the claim of the independent title and also the claim of title by way of adverse possession set up by the respondents were rejected whereas all the courts including the High Court confirmed only to the extent that the respondents were entitled to value of improvements being Rs. 1,30,000/- for

A the building and Rs. 5,500/- for the motor pump set and pump house, aggregating to a total of Rs. 1,35,500/- only.

7. The aforesaid valuation was made by the trial court by its judgment and decree dated 31.5.1991 on the basis of Exts. B C2 and C3, Final Report and Valuation Statement of August and September, 1990 submitted by the Commissioner appointed by the Court aided by an expert. The said amount also came to be paid by the appellants herein.

8. After the decree was granted by the trial court under C judgment and order dated 31.5.1991 and since despite the decree and also payment of the compensation as determined and assessed by the courts including the High Court, the respondents did not vacate the suit premises, the appellants were compelled to file an execution case bearing Execution D Petition No. 331 of 1999 seeking for eviction of the respondents from the suit premises. In the said execution petition, the respondents took up a plea that in terms of the provisions of Section 5(3) of the Act, the execution court is required to conduct a supplementary enquiry to determine (i) E additional compensation for improvement made to the building after the date of the decree on the ground that the Act permits to include amount of compensation for the improvements made even subsequent to the passing of the decree and (ii) on revaluation of this building for which compensation had already F been adjusted in the decree, the value of the said building with reference to its conditions.

9. The Executing Court took up the aforesaid plea raised by the respondents and after consideration of the same and after hearing the counsel appearing for the parties held that the G judgment debtors/ respondents could not be said to be persons in bonafide occupation of the premises so as to come within the ambit of "tenant" under Section 2(d) of the Act from the date of the decree and therefore they would not be entitled to the value of improvements put up subsequent to the date of decree. H The Executing Court also found as a matter of fact that as on

the date of the decree, the building in the property did not have any first floor and that the first floor had come into existence after passing of the decree. Consequent to the recording of the aforesaid finding, the Executing Court held that the respondents/ judgment debtors were not entitled to additional compensation for the improvements effected after the date of the decree. However, the Executing Court took into account the condition of the entire ground floor of the building on the basis of the Commissioner's Report filed in execution proceedings and its own finding that the entire portion of the ground floor had been completed before the date of the decree in the suit a factor which had escaped the notice of the earlier Commissioner and Expert appointed by the Court for that purpose at the trial stage.

10. The Executing Court thereafter made a revaluation of the entire ground floor portion of the building and directed that an amount of Rs. 3,12,000/- was to be deposited by the appellants-decree holder over and above the amount of Rs. 1,35,500/- adjudged in the decree which was already deposited by the appellant.

11. Needless to point out that the aforesaid assessment of Rs. 3,12,000/- was made without giving any depreciation of the building. Be that as it may, it transpires from the records that the appellants paid the said amount also in terms of the order passed by the Executing Court that is to say the appellants deposited the amount of Rs. 3,12,000/- over and above the amount of Rs. 1,35,500/-.

12. The respondent still not being satisfied, filed a revision petition before the High Court of Kerala. In the final order passed in the revision petition, the High Court held that unless the appellants could establish that there was an order passed by the High Court restraining the respondent from claiming further value of improvements, the respondent would be entitled to get such improvements also and that the same could not be denied. Having held thus in paragraph 14, the High Court observed as follows:-

A "14. It is also the settled position of law that section 5(3) of the Compensation for Tenants Imrovements Act only empowers the executing court to assess the amount of compensation for improvements made subsequent to the date up to which compensation for improvements had B been adjudged in the decree and section 5(3) does not enable the executing court to re-open the adjudication made by the trial court as held in *Kamalamma vs. Madhavan* pillai (1959 K.L.T. 578). In this case there are no materials available on record to find whether there was C a final order of injunction prohibiting the petitioner from claiming further value of improvements. The executing court proceeded on the wrong assumption that since the trial court passed the decree for recovery of the suit property, the petitioner is not entitled to claim any value of D improvements effected after the said date. That finding is illegal. So the matter requires reconsideration. I have no other option but to set aside the impugned order and remand the case back to the executing court to fix the value of improvements due to the petitioner in accordance with the provisions contained in section 5(3) of the E Compensation for Tenants Improvements Act."

13. In terms of the aforesaid findings, the civil revision filed by the respondent was allowed by the High Court. The order passed by the Executing Court was set aside and matter was F remanded back to the Executing Court to fix the value of improvements in accordance with the provisions of Section 5(3) of the Act.

14. The appellant being aggrieved by the aforesaid order G of remand passed by the High Court, has filed this appeal in which notice was issued by this Court and after notice was served this Court granted the leave. The original records of the case have been received. On the prayer of the parties, there was a direction by this Court that this appeal be listed for hearing during summer vacation and consequently it was H

placed before us for final hearing during the summer vacation when we heard the learned counsel appearing for the parties. A

15. Before we proceed to discuss the rival contentions raised on behalf of the respective parties, we would like to make a reference to the relevant provision of the aforesaid Kerala Compensation for Tenants Improvements Act, 1959. Section 2(b) of the Act reads as follows: - B

> "2(b) "improvement" means any work or product of a work which adds to the value of the holding, is suitable to it and consistent with the purpose for which the holding is let, mortgaged or occupied, but does not include such clearances, embankments, levellings, enclosures, temporary wells and water-channels as are made by the tenant in the ordinary course of cultivation and without any special expenditure or any other benefit accruing to land from the ordinary operations of husbandry;" C D

16. The expression "tenant" is also defined under Section 2(d) of the Act as follows :

> "2. *(d) 'Tenant'.*—'tenant' with its grammatical variations and cognate expressions includes— E
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> *(i)* a person who, as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee, or sub-mortgagee of land, is in possession thereof; F
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> *(ii)* a person who with the *bona fide* intention of attorning and paying a reasonable rent to the person entitled to cultivate or let wasteland, but without the permission of such person, brings such land, under cultivation and is in occupation thereof as cultivator; and G
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> *(iii)* a person who comes into possession of land belonging to another person and makes improvements thereon in the *bona fide* belief that he is entitled to make such H

A improvements."

17. Further, Section 4 of the Act lays down that every tenant shall on eviction be entitled to compensation for improvements which were made by him or his predecessor-in-interest or by any person not in occupation at the time of the eviction who B 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 C possession until eviction in execution of a decree or order of court.

18. Section 5 thereof provides that the decree passed in eviction suit would be conditional on payment of compensation. D Sub-Section (3) of Section 5 thereof which is relevant for our purpose is also extracted below:-

"5(3) The amount of compensation for improvements made subsequent to the date up to which compensation for improvements has been adjudged in the decree and E the re-valuation of an improvement, for which compensation has been so adjudged, when and in so far as such re-valuation may be necessary with reference to the condition of such improvement at the time of eviction as well as any sum of money accruing due to the plaintiff F subsequent to the said date for rent, or otherwise in respect of the tenancy, shall be determined by order of the court executing the decree and the decree shall be varied in accordance with such order."

G 19. The aforesaid provisions particularly Section 2(d) and Section 5 came to be considered by this Court in the case of *Kunjan Nair Sivaraman Nair vs. Narayanan Nair and Others* [(2004) 3 SCC 277]. We have carefully considered the said decision. In paragraph 23 of the aforesaid judgment this Court H has considered the definition of Section 2(d) and analysed the

said definition of tenant by stating thus:- A

"**23.** It is to be noted that the three clauses of Section 2(d) use different expressions to meet different situations and class of persons. While clause (i) refers to a person who is a lessee or sub-lessee, or mortgagee or sub-mortgagee B or in "good faith" believing himself to be any one of the above such persons, clause (ii) deals with a person with "bona fide intention" by doing any one of the things enumerated is in occupation as cultivator, and clause (iii) deals with a person who comes into possession of land C belonging to another and makes improvement thereon in the "bona fide belief" that he is entitled to make such improvements. According to the appellant, both clauses (i) and (iii) are applicable to him. Clause (i) deals with the person who bona fide believes himself to be a lessee in respect of the land in question. The fact that he asserted D a claim for purchase of jenmam rights, irrespective of the rejection of the claim would go to show that at any rate he was believing in good faith to be one such person viz. lessee. Clause (iii) encompasses a person who comes into possession of land belonging to another person and E makes improvements thereon with the bona fide belief that he is entitled to make such improvements. The appellant was claiming himself to have been put in possession as the nephew of late Narayanan Nair, and as a person in such possession — claims to have made certain F improvements. Indisputably he was in possession. Though, in view of the judgments of the courts below his claim to assert a title in him has been rejected and his possession cannot be a lawful possession to deny the right of the real owner to recover possession or assert any adverse claim G against the lawful owner to any longer squat on the property — his initial induction or entering into possession cannot be said to be by way of encroachment. Whether such a person could not claim to have entertained a bona fide belief that he is entitled to make such improvements has H

A to be factually determined with reference to the point of time as to when he really made such improvements. If the alleged improvements are found to have been made after the disputes between parties commenced then only it may not be in bona fide belief. Improvements made, if any, even B thereafter only cannot fall under clause (iii). The court dealing with the matter is required to examine the claim and find out whether the prescriptions in the different clauses individually or cumulatively have any application to the claim of the appellant for improvements alleged to have C been made, if so really made. The courts below have noted that the appellant made a claim that he was a lessee and thereafter made the improvements. The courts below do not appear to have considered the issues arising at any rate in respect of the claim for the alleged improvements D said to have been made, from the aforesaid angle. As factual adjudication is necessary as to whether the appellant acted in good faith or with bona fide belief as envisaged; this has to be decided taking into consideration the materials placed before the court in that regard. It is, therefore, appropriate that the trial court should consider E this aspect afresh uninfluenced by any observation made by it earlier or by the appellate courts. We also do not express any conclusive opinion on the merit of the claim except indicating the parameters relevant for such consideration. For that limited purpose, the matter is F remitted to the trial court which shall make an endeavour to adjudicate the matter within six months from the date of judgment, after allowing the parties to place material in support of their respective stands."

G 20. In view of the aforesaid settled legal position, we are required to consider whether the respondent could make a claim for enhanced compensation for improvements allegedly made by him.

H 21. Initially, when the suit was filed, even at that stage the

relief sought for in the suit was for a decree of recovery of possession as also for payment of mesne profit. In the said suit itself, the respondent pleaded in the written statement that he has made improvements in the suit premises and therefore, he is entitled to claim value of improvements made by him which they themselves assessed and determined at Rs. 7 lakhs and prayed for recovery of the same. The suit was decreed both for decree of recovery of possession and also for payment of mesne profit. The trial court held that the respondent would be entitled to Rs. 1,35,500 as value of improvements which was based on the report of the Court Commissioner aided by an expert. All the aforesaid findings recorded by the trial court were under challenge both before the first appellate court as also before the High Court. Both the courts not only upheld and confirmed the decree but also held that the appellants are entitled to a decree of eviction whereas the respondents would be entitled to compensation for improvements made at Rs. 1,35,500/-.

22. We are also conscious of the fact that an affidavit was filed by the respondents herein before the Kerala High Court on 12th July, 1999 wherein they had given an outline of the eviction proceedings initiated against them by the appellant herein. They had stated that the second appeal arises from a decree and judgment in OS No. 294 of 1987 of the Sub Court, Irinjalakuda. It was also mentioned therein that the suit was for declaration, title and recovery of possession. In the Second Appeal the appellant filed CMP 1133 of 1999 seeking order of injunction to restrain the respondents herein from undertaking any construction activity in the plaint schedule property and committing any waste therein and that the said CMP was filed on the allegation that the respondents herein were attempting to construct a first floor to the existing residential building situate in the plaint schedule property. In the said application, it was also alleged that the said construction work was done in order to delay the benefit of decree that might be passed in the appeal and that the existing residential building was constructed

A by the ancestors of the appellant (respondents herein). It was stated that the said allegations are incorrect. Despite the said statement, the High Court passed an interim order of injunction restraining the respondents particularly respondent No. 1 from making any further construction in the property. After stating thus, B the respondents through respondent No. 1 gave an undertaking in the said affidavit particularly in paragraph Nos. 3 and 4 in the following manner:-

> "3. We are not constructing first floor to the existing residential building. A small room with an attached toilet C was constructed more than two to three weeks prior to the date of passing of the order of injunction. As regards the said room, the flooring painting and plastering of the ceiling is yet to be completed. Once we are informed of the passing of the order of the injunction we had stopped D further works including the one stated above. I think it proper to seek the permission of this Hon'ble Court to complete the said work. Accordingly, the accompanying CMP is filed seeking permission to complete the flooring, painting and plastering works of the said small room and E toilet already constructed on the first floor of the existing residential building.
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> 4. We undertake that we will not claim the value of the said room and toilet constructed on the first floor of the building F Neither we will claim any special equities on account of the construction of the said room and toilet. We may be permitted to complete the said works at our risk and costs."

23. It is also pointed out that now the respondents are G seeking for payment of compensation for the aforesaid improvements also made despite an undertaking given by them before the High Court that they would not claim any value of the said room and the improvements made in the first floor of the building. Since the aforesaid undertaking was placed on record H by the respondents, any constructions made after the aforesaid

undertaking given by the respondents cannot be said to be improvements made in the bonafide belief that they are entitled to make some improvements.

24. Even assuming for the purpose of argument that the respondents could make some improvements even after passing of the decree by the trial court, but they could not have made any improvement in the suit property by way of constructing the first floor and also claimed compensation for it when they had given a clear undertaking that they would not claim any compensation towards value of the said constructions made on the first floor of the building. They also undertook that they would not claim anything on account of the construction of the room and the toilet in the first floor. They are bound by the aforesaid undertaking given to this Court and they are not entitled to resile from the same subsequently and claim any compensation. When they filed an undertaking they definitely had the knowledge that they are not entitled to make any improvement thereon in view of the currency of the order of injunction and therefore they proceeded to give such an undertaking which disentitles them to claim any compensation towards any such improvement made.

25. The trial court or the executing court took notice of the said fact and therefore had assessed compensation with regard to improvements made in respect of the ground floor only after proper assessment thereof with the aid and assistance of the Court Commissioner aided by an expert at Rs. 3,12,000/- over and above Rs. 1,35,500/-.

26. The said findings and conclusions arrived at by the trial court are found to be valid and justified. The High Court acted without jurisdiction in interfering with the aforesaid order in the exercise of the jurisdiction under Section 115 of the Code of Civil Procedure.

27. We do not find any reason to linger on the matter any further by remanding the matter back to the High Court as we

A find that the findings recorded by the executing court are legal and valid. In our considered opinion, the said findings do not call for any interference and the High Court committed a manifest error of law and also exceeded its jurisdiction by interfering with the said findings. We, therefore, allow this B appeal and set aside the order passed by the High Court and restore the order of the trial court. The trial court would now take steps for execution of the decree in accordance with law.

28. The appeal is allowed with costs.

C B.B.B. Appeal allowed.