

PETITIONER:
THE COCHIN DEVASWAM BOARD

Vs.

RESPONDENT:
CAPTAIN E.M. GEORGE & ORS.

DATE OF JUDGMENT 17/01/1995

BENCH:
PARIPOORNAN, K.S.(J)
BENCH:
PARIPOORNAN, K.S.(J)
VERMA, JAGDISH SARAN (J)
BHARUCHA S.P. (J)

CITATION:
1995 SCC (2) 387 JT 1995 (1) 663
1995 SCALE (1) 200

ACT:

HEADNOTE:

JUDGMENT:

1. These are connected cases. The plaintiff in O.S. No. 118 of 1958, Sub Court, Ernakulam -- Cochin Devaswom Board, Trichur (hereinafter referred to as the 'Board') -- is the appellant in C.A. No.2312 of 1977. The respondents in the said appeal, defendants 2,4,6,1 1, legal representatives of the 8th defendant and the legal representative of the 1st defendant in the suit are the "tenants" of the suit property. They are the petitioners in S.L.P. No. A906 of 1978. The Board appellant in C.A. No. 2312 of 1977 is the respondent in S.L.P.No.4906 of 1978.

2. The suit, O.S. No. 118/58, Sub Court, Emakulam had a chequered career. It was filed by the Board, representing one of its institutions or units the Ayyampilly Devaswom (hereinafter called 'Devaswom') against the tenants under different demises -- Kanam, verumpatton and other demises. The Board prayed for a declaration that it has the right of fishing in and over the plaint lands, nearly 220 acres in extent, out of which 107 acres are paddy lands. The Board claimed right of prawn fishing in the plaint schedule lands and also stated that the tenants-defendants had no such fishing right and prayed for an injunction to restrain the defendants from interfering with the Devaswom's right. It was claimed that the Devaswom had reseeded the right of fishing at the time of granting the demise and alternatively that it was entitled to carry on prawn fishing as a right of easement.

3. The trial court found against the plaintiff. But the lower appellate court found that the Devaswom was entitled to exercise the right of fishing, on the basis of a right of easement. The matter came up before the High Court of Kerala in S.A. No. 1208 of 1964. By judgment dated 10.4.1970, the High Court held that the grant by the Devaswom did not confer the right on the tenants to carry on the fishing operations in the plaint lands. The plaintiff

was held entitled to carry on the fishing operations in the plaint lands as well as in the thodus. The High Court further found that in view, of the Kanam. Tenancy Ant of 1955 and the Kerala Land Reforms Act of 1963, the plaintiff had been deprived of its right of fishing and that the same had become vested in the tenants. The matter was remitted to the trial court for an investigation and for passing appropriate orders, After the remit, the trial court held that the plaintiffs claim for fishing right in respect of lands granted on Kanam demise was lost by reason of the provisions of Be Kanam Tenancy Act of 1955, and had vested in the Kanani tenants. But trial court held that the right remained unaffected in respect of lands held on

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verumpattom and other demises. The Devaswom filed an appeal to the lower appellate court in respect of the Kanam lands and the defendants filed an appeal in respect of the verumpattom lands. The Devaswom's appeal (A.B. No.221 of 1972) was allowed and the defendants Appeal (A.S. No. 248 of 1972) was dismissed. Against the aforesaid judgment and decrees, the defendants-tenants filed S.A. No. 1163 of 1973 before the High Court of Kerala. The High Court held that in view of section 3 of the Kanam Tenancy Act, the Board was divested of the right to carry on prawn fishing, since the right vested in the Kanam tenants. It was further found that with regard to verumpattom tenants and tenants under other demises the rights of the landlord stood transferred to the tenant under the provisions of the Kerala land Reforms Act It was finally concluded that the Devaswom was divested of its right of fishing and that the same stood vested in the tenants-- both kanam tenants as well as tenants under the verumpattom and other demises. The second appeal filed by the tenants was allowed and the plaintiff's suit seeking a declaration and injunction was dismissed. A direction was given to the trial court to apportion the collections deposited by the receiver and for appropriate disbursement thereof for parties entitled to the said amount. The plaintiff in the suit the Cochin Devaswom Board filed C.M.P.No. 6759 of 1977 and prayed for certain clarifications in the aforesaid judgment delivered in S.A.No.1 163 of 1971 This petition was considered along ,with C.M.P.No.9751 of 1977, a similar application filed by the tenants/defendants. The above Civil Miscellaneous Petitions were disposed of in the following manner by under dated 3rd August, 1977. In C.M.T. No. 6759 of 1977, the decree was modified in the following manner:-

"We would therefore allow the Second Appeal, and modify the decree and judgment of the lower appellate court to this extent, that the plaintiff's right of fishing in respect of the kanam lands will stand extinguished on and from 1.4.1956, and in respect of the verumpattom lands and other cognate tenures, on and from 1.1.1970; and that in other respects the decree of the lower appellate court will stand. There will be no order as to costs."

In C.M.P. No. 9751 of 1977, regarding the apportionment of the collections in deposit in court, directions were given to the following effect:

"This will be done in appropriate proceedings in the trial court for directions for disbursement of the collections made by the Receiver during the time he functioned, and by those responsible, in respect of the

collections thereafter."

4. The Cochin Devaswom Board (Plaintiff in the suit) has filed C.A. No. 2312 of 1977 against the judgment of the High Court in S.A. No. 1163 of 1973 dated 7.2.1977 and subsequent clarification order dated 3.8.1977 in C.M.P. No.6759 of 1977. The defendants/tenants have filed S.L.P. No. 4906 of 1978 against the judgment in S.A. No. 1163 of 1973 and the order passed in C.M.P. No. 9751 of 1977 dated 3rd August, 1977. In effect, the plaintiff -- jenmi/landlord as well as the defendants tenants have filed the Civil Appeal and the Special Leave Petition against the judgment of the High Court dated 7.2.1977 rendered in S.A. No. 1163 of 1973 and the orders passed in the Civil Miscellaneous Petitions dated 3.8.1977. Both the matters were heard together.

5. We heard Shri k. Sukumaran, se-
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nior counsel, who appeared for the Board and Shri G. Viswanatha lyer and Shri P. Subramanian Potti, senior advocates, who appeared for the tenants.

6. Counsel for the Board raised the following three points :-

(i) Fishing rights do not appertain to agricultural operations and so cannot be regarded as a measure of agrarian reform. It cannot have the protection of Article 31 A of the Constitution. The decision of the High Court that the Kanam tenants are entitled to fishing rights is illegal, since the provision in the Kanam Tenancy Act, conferring such fishing rights on the kanam tenants is ultra vires and violative of Article 19(1) (f) and cannot have the, protection of Article 31 A of the Constitution. The Kerala High Court in the Full Bench decision reported in Narayanan Nair v. State of Kerala (1970 K.L.T. 659) at page 700 (paragraph 82) has struck down a similar provision relating to "varamdars" in the Kerala Land Reforms Act, 1963 and by parity of reasoning, the similar provision in the Kanam Tenancy Act should be held to be ultra vires and it should have been held that the fishing right did not vest in the Kanam tenants.

(ii) In view of section 66(9) of the Kerala Land Reforms Act, the right of the Devaswom Board in the suit lands will vest under the same Act in the Government only after the 'issue of a notification' specified therein. The rights of the landlord will stand transferred to the tenant or will vest in the Government only after the determination of the annuity and on issuing a notification as provided in section 66(9) of the Act. This has not been complied with and so the rights of the Devaswom Board regarding varam lands did not vest in the Government or in the tenants. Sections 72(1), 72N, 69, 56, 65, 66(9) and 68 of the Kerala Land Reforms Act were referred to in this connection.

(iii) It is only under section 50-A(2) of the Kerala Land Reforms Act, the fishing right in the nilam exercised by the landlord ceased to exist and vested in the Government or the varamdars (tenants). Section 50-A(2) of the Act was struck down by the Full Bench of the Kerala High Court in the decision reported in

Narayanan Nair vs. State of Kerala (1970 K.L.T. 659) at p.700 (para 82). It is only by the Constitution (Twenty ninth Amendment) Act, 1972 which received the assent of the President on 9.7.1972, the Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969) which inserted section 50A in the Kerala Land Reforms Act was included in the Ninth Scheduled to the Constitution of India. So, till 9.7.1972 it is the Devaswom Board which is entitled to the profits relating to the fishing rights in the nilam. The varamdars will be entitled to the said profits only thereafter. The High Court failed to give specific direction in this behalf even when passing the latter order dated 3.8.1977.

7. On behalf of the tenants, the only plea made in the S.L.P. was that the tenants are entitled to carry on fishing operations and to do acts incidental thereto in the canals and thodus abutting their properties. The tenants have got rights over the entire suit lands inclusive of the bunds and canals and it should have been so found by the High Court. The High Court erred

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in not adjudicating such valuable rights of the tenants.

8. We are of the view that there is no merit in the Civil Appeal as also in the Special Leave Petition. We will now decide the various points raised before us in seriatim.

9. The first point raised was that for the reasons given by the High Court in Narayanan Nair's case (supra) to strike down section 51A of the Kerala Land Reforms Act it should have been held that the rights of the tenants under the Kanam Tenancy Act will not cover the fishing rights in the nilam and to the extent the Kanam Tenancy Act of 1955 provides otherwise, it is ultra vires. This point was not urged before the High Court. There is no discussion of the matter in the judgment either. That apart, in a case where the vires of a legislation is challenged, the State is a necessary party. The State of Kerala is not made a party, either in the suit or in any further proceeding. In these state of affairs, we hold that Cochin Devaswom Board is not entitled to raise this plea at this belated stage.

10. The second point urged is regarding the vesting of the right, title and interest of the Devaswom in respect of the suit land in the Government or in the tenants. Section 66(9) of the Kerala Land Reforms Act was pressed into service to contend that it is only after the determination of the annuity and issue of a notification as specified in section 66(9) of the Act, the right, title and interest of the Devaswom in respect of the suit lands will vest with the Government. In this connection sections 65(1), 66(9), 72(2), 72K and 72N (1) (a) (b), (1A), (1B) and 72N(2) of the Kerala Land Reforms Act which are relevant may be quoted:

"65. Special Provisions relating to religious, charitable or educational institutions of a public nature -- (1) Notwithstanding anything contained in section 53 to 64, where in respect of a holding the landowner or the intermediary is a religious, charitable or educational institution of a public nature, such institution may, by application to the Land Board, choose whether the right, title and interest of the institution in respect of the holding should be vested in- the Government in consideration of the payment of an annuity in perpetuity by the Government or whether it should be paid such annuity by the Government

instead of purchase price in case the holding is purchased by the cultivating tenants under the provisions of this Act: Provided that no such application shall be entertained by the Land Board on or after the date notified by the Government under Section 72.

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66. Procedure for vesting of rights of religious, charitable or educational institutions in Government and for determination of annuity --

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(9) As soon as may be after the determination of the annuity in respect of all holdings specified in the application under sub-section (1) of section 65 (other than holdings in respect of which certificates of purchase have been issued), the Government shall issue a notification in the Gazette declaring that the right, title and interest of the institution in respect of such holdings shall vest in the Government with effect from a date to be

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specified in the notification, and all such right, title and interest shall accordingly vest in the Government free from all encumbrances.

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72. Vesting of landlords rights in GOVERNMENT -- (1) On a date to be notified by the Government in this behalf in the Gazette, all rights, title and interest of the landowners and intermediaries in respect of holdings held by cultivating tenants (including holders of kudiyirippus, and holders of kariamas) entitled to fixity of tenure under section 13 and in respect of which certificates of purchase under sub-section (2) of section 59 have not been issued, shall, subject to the provisions of this section, vest in the Government free from all encumbrances created by the landowners and intermediaries and subsisting thereon on the said date.

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72K. Issue of certificate of purchase (1) As soon as may be after the determination of the purchase price under section 72F or the passing of an order under sub-section (3) of section 72 MM the Land Tribunal shall issue a certificate of purchase to the cultivating tenant, and thereupon the right, title and interest of the landowner and the intermediaries, if any, in respect of the holding or part thereon, to which the certificate relates, shall vest in the cultivating tenant free from all encumbrances created by the landowners or the intermediaries, if any.

Explanation -- For the removal of doubts, it is hereby declared that on the issue of the certificate of purchase, the landowner or any intermediary shall have no right in the land comprised in the holding, and all his rights including rights, is any, in respect of trees reserved for his enjoyment shall stand extinguished.

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72N. Special provisions relating to institutions which have opted for annuity instead of purchase price -- (1) Notwithstanding anything contained in sections 72H and 72I, where in respect of a holding the landowner or intermediary is a religious, charitable or educational institution of a public nature and

(a) an application from such institution for annuity is Pending On the date notified by the Government under sub-section (1) of section 72; or

(b) the annuity payable to such institution has been determined, but no notification has been

issued under sub-section (9) of section 66, the government shall pay to such institution the annuity that would have been payable to the institution under section 67, from the date notified under sub-section (1) of section 72, and the Government shall be entitled, subject to the provisions of section 70, to the purchase price payable by the cultivating tenant and, in the case of any holding, the right, title and interest in respect of which have not vested in the Government on the said date, also the rent to which such institution is entitled from the said date till its rights, title and interest are vested in the Government;

Provided that nothing contained in this sub-section shall affect the power of the Land Board to decide whether an institution is a religious, charitable or educational institution of a public nature:

provided further that nothing contained in this sub-section shall apply in the case of an institution which is found

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by the Land Board not to be a religious, charitable or educational of a public nature:

(IA) An application from a religious, charitable or educational institution of a public nature for annuity pending or deemed to be pending on the date notified by the Government under sub-section (1) of section 72 shall, on the date of publication of the Kerala Land Reforms (Amendment) Act, 1971, in the Gazette, abate, and where any such application has been made after the date of such publication, that application shall abate on the date on which it is received by the Land Board.

(1B) For the removal of doubts it is hereby clarified that the annuity payable to a religious, charitable or educational institution of a public nature whose application abates under subsection (IA) shall be determined by the Land Tribunal under section 72F and that section 66 will not apply for such determination.

(2).Notwithstanding anything contained in sections 65 to 69, a religious, charitable or educational institution of a public nature which has not expressed its choice for annuity instead of purchase price before the date notified under sub-section 72 shall not be entitled to express such choice, and such institution shall be entitled only to the compensation under section 72A."

11. We are of the view that the right, title and interest of the landlords and intermediaries in respect of all lands in the state in respect of holdings held by cultivating tenants vested in the Government free from all encumbrances as per section 72(1) of the Act. The policy discernible from the scheme of the Act shows that a uniform date is fixed for "vesting" of the rights of the landlords in all cases. A different date for vesting, regarding lands belonging to religious institutions, is not specified or contemplated. Section 65(1) enables the religious institutions to choose whether their right, title and interest should be vested in the Government in consideration of a payment of an annuity in perpetuity or whether such annuity should be paid instead of purchase price in case the holding is purchased by the cultivating tenant under the provisions of the Act. Section 66(9) of the Act does not contain any non obstante clause to negative the application of the general vesting of all rights, interest and title of the landlord under section 72(1) of the Act. The application of section 72(1) of the

Act is not in any way affected or whittled down by section 66(9) of the Act. The vesting under section 72(1) is not subject to the provisions of section 66(9) of the Act at all. That apart, section 72N(1A) and (1B) are very significant. As per the said amended provisions by the Act 25/1971, all applications for annuity shall stand abated. There is no question for determination under section 66 of the Act. It is only Sec. 72F that applies to such application. It is a determination by Land Tribunal. Section 72 does not envisage postponement of the vesting, due to pendency of an application under section 65(1) by a religious or charitable institution of a public nature for annuity in respect of the landlord's interests in a holding held by a cultivating tenant. The plea to the contrary is repelled. The rights of the Devaswom Board Landlord hand vested in the Government on the appointed day as joined in section 72(1) of the Act.

12. The third and the last point urged on behalf of the appellant was that the right of the varamdars relating to the fish-
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ing right in the nilam as provided in section 50A (2) of the Act was declared ultra vires in Narayanan Nair's case (supra) and it is only by the Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 95 of 1969) which was included in the Ninth Schedule of the Constitution, the right vested in the varamdars became effective and enforceable. The said Act got assent of the President on 9.7.1972 and it is only from then onwards the right of the varamdars came into existence. We see force in the plea of the appellant's counsel. The High Court has, by its order dated 3.8.1977, directed the trial court for disbursement of the collections made by the receiver during the time he functioned and it is only appropriate to hold, that in giving directions in that behalf, the trial court will bear in mind that the rights of the varamdars regarding the fishing rights in the nilams became effective only from 9.7.1972. We hold accordingly.

13. Subject to the directions contained in para 12 supra, C.A. No. 2312 of 1977 filed by the Cochin Devaswom Board shall stand dismissed. But, in the circumstances, there shall be no order as to costs.

14. The only point raised in the Special Leave Petition filed by the tenants is that the High Court failed to adjudicate and declare the rights of the tenants in the entire suit lands inclusive of the bunds, canals etc., abutting their properties. We find that such a plea was not taken up or adjudicated by the High Court when it decided S.A. No. 1163 of 1973; nor when the Civil Miscellaneous Petitions Nos. 6759 and 9751 of 1977 were heard and disposed of. Since the plea now raised by the petitioners in the S.L.P. was not raised in the High Court, we hold that the ground urged in S.L.P. cannot be entertained at this belated stage. We dismiss the S.L.P. However, there shall be no order as to costs.

15. The Civil Appeal (subject to directions in para 12) and the Special Leave Petitions are dismissed, but without costs.

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