1971 KHC 137
Kerala High Court
V. R. Krishna Iyer, J.
Mariam and Others v. Ouseph Xavier
S. A. No. 276 of 1967
5 August, 1970

Kerala Land Reforms Act, 1963 - As amended by Act 35 of 1969, S.2(25) -- Kudikidappukaran -- Unlawful trespasser does not acquire any right under S.2(25) (Para 9, 10)

Interpretation of Statutes - Golden rule is to interpret the entire provision as a whole (Para 12, 13)

Kerala Land Reforms Act, 1963 - As amended by Act 35 of 1969, S.2(25) -- Whole clause, read together, at once accents the need for permission at the inception and nullifies the potency of the landlord's later recantation. (Para 13)

Kerala Land Reforms Act, 1963 - As amended by Act 35 of 1969, S.2(25) -- Permission to be sufficient, it must be given not by one who has a legal right to be in possession but has actual possession. (Para 14)

P. K. Kesavan Nair; K. N. Narayanan Nair; For Appellants
P. K. Krishnankutty Menon; For Respondents

JUDGMENT

1 This appeal relates to a hut, a few hundred rupees in value hut its decision has been for me an unhappy experience in hesitancy and conflict of thought. It is inevitable that laws made under pressure of social compulsions, illustrated by the present case relating to protection of kudikidappu, may not neatly fit into the established scheme of property rights based on time honoured concepts and the resolution of this incongruity needs an understanding of the dynamics of social change. With this pardonable preface, let me state the facts of the case. The appellants claim to be kudikidappukarans within the meaning of S.2(25) of the Kerala Land Reforms Act, 1963 (hereinafter referred to as the Act) and consequential immunity from eviction by virtue of S.75 of the said Act, the first appellate court having decreed eviction in reversal of the Trial Court's dismissal of the suit.

2 The story may have to be narrated in some detail before the legal issues canvassed before me can be properly appreciated. The suit property 32 cents in extent is part of a larger 75 cent plot. The 1st defendant was the lessee of the plaint land where she was living with her husband and children in a hut thereon. The other portions of the larger area were in the possession of two tenants under the jenmi. The plaintiff, who got an assignment of the entire 75 cents from the jenmi, a Mana, secured khas possession of the land outstanding with the tenants except the 1st defendant and we are not concerned with that area. However, the 1st defendant said her

leasehold to one George in 1123 as per Ext. P3 and gave possession of the land, but took two months' time to hand over possession of the building. The relevant recital in Ext. P3 runs thus:

പട്ടിക വസ്തുവിലുള്ള പുരയിൽ ഞാൻ താമസിച്ചു വരുന്നതിനാൽ ഒരു മാസത്തിനകം പുരയിൽ നിന്ന് വിട്ടുമാറി പുര കൈവശം തന്നുകൊള്ളാവുന്നതും ഒരു മാസത്തിനുമേൽ ടി പുരയിൽ നിങ്ങൾ തനിയെ പ്രവേശിച്ചു നടന്നുകൊള്ളേണ്ടതും ആകുന്നു

The period of two months passed, but the 1st defendant did not hand over the possession. George, the vendee under Ext. P3, executed a release deed in favour of the plaintiff. Ext. P5 dated 29 4 1948, whereby the plaintiff came into possession of 25 1/2 cents comprised in the leasehold right of the 1st defendant, the building and the surrounding space continuing with the 1st defendant and her children, who are defendants 2, 3 and 4. The grievance of the plaintiff is that the defendants are interfering with his enjoyment of the land and are refusing to vacate the building.

3 The defendants' side of the story must now be mentioned. The lady (1st defendant) apparently had no other house to move into and continued in occupation, the assignee having been indifferent to ejecting her from the hut. However, the 2nd defendant, the eldest son, filed Ext. P10 before the authorities for getting himself registered as kudikidappukar as early as 1950. But this application was rejected under Ext. P15 on grounds which were tenable under the law as it then stood. In the present suit, however, defendants 1 and 2 have remained ex parte, presumably because the 1st defendant is a party to Ext. P3 and the 2nd defendant had restricted his claim to that of a kudikidappukaran under Ext P10. Defendants 3 and 4, however, put forward an ambitious and unrighteous contention that the 1st defendant had no right in the property and. in consequence, her assignment was of no effect, that the 1st defendant's husband was the real lessee under the jenmi, on whose death the widow and children were entitled to the leasehold right which they had been enjoying without let or hindrance from the plaintiff. Both the courts have concurrently negatived this plea and have accepted the 'plaintiff's case that the 1st defendant was the real lessee,' that she had validly assigned her rights to George under Ext. P3 and that the plaintiff had got a release from George and actual possession of the suit land minus the hut thereon. The declaration and the injunction in respect of the land were accordingly granted by both the courts. The Trial Court upheld the case of kudikidappu, alternatively set up by defendants 3 and 4, and denied the relief of recovery of possession of the building. The appellate court, however overruled that case and decreed the suit in toto. The second appeal is confined to the claim of kudikidappu although the appellants here are not merely defendants 3 and 4 but also their mother, the 1st defendant, her junction being a strategic move as I will presently explain.

4 The constitutionality of the provision conferring fixity and other rights upon kudikidappukarans has not been raised before me and I am concerned only with the construction of S.2(25) of the Act and its application to the facts of the present case. Particular attention has been paid to the interpretation of the proviso brought in by the amending Act 35 of 1969 which is the sheet anchor of the defendants and the numberless dwellers of huts and hovels in Kerala whose continuance in their petty tenements is imperilled by the land owners frowning upon their presence in the land and taking active steps to get rid of them therefrom.

5 I may begin by extracting S.2(25) of the Act as it now stands: " *'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 and --*
(a) who has been permitted with or without an obligation to pay rent by a person in lawful possession of any land to have the use and occupation of a portion of such land for the purpose of erecting a homestead; or
(b) who has been permitted by a person in lawful possession of any land to occupy, with or without an obligation to pay rent, a hut belonging to such person and situate in the said land; and 'kudikidappu' means the land and the homestead or the hut so permitted to be erected or occupied together with the easements attached thereto:
Provided that a person who, on the 16th August, 1968, was in occupation of any land and the homestead thereon, or in occupation of a hut belonging to any other person, and who continued to be in such occupation at the commencement of the Kerala Land Reforms (Amendment) Act, 1969, shall be deemed to be in occupation of such land and homestead, or hut, as the case may be, with permission as required under this clause."

6 The legislative perspective of this provision will throw light on its scope and sweep. In a community, essentially agrarian, with large chunks of the population engaged in agricultural labour and accommodated by, or with the leave and licence of, the owners in tiny tenements dotting the farms and the fields where or near where they work, feudal fashion, a certain social equilibrium is maintained. But the pressure of population and the consequent increase in the number of shacks or kudis on the one hand and the tempting rise in the price of produce and of lands appetising the landlords to vacate the occupiers of homesteads who, sometimes and on the aly, may help themselves to the income from the land on the other gave rise to a social phenomenon of many evictions of these homeless in the world. The welfare-oriented State, speaking the conscience of the community and exercising its police power, may be, stepped in to inhibit this 'operation ouster'. Loyalty to Art.38 of the Constitution obliges the State to secure a social order informed by socio economic justice and the humanist intervention of the State to arrest the eviction of landless labour largely devoted to agriculture has a higher 'rule of law' goal. The play of these social forces explains the legislative insulation of kudikidappus, punctuated by further ameliorative changes in the law calculated to plug the loopholes exploited by landowners and brought to light by judicial decisions, such as the one reported in 1966 KLT 673.

7 It may be useful to recapitulate the circumstances which led up to the enactment of the proviso to S.2(25) of the Act. The Travancore - Cochin Kudikidappukars Act of 1958 defines kudikidappukaran as follows:

"[2] [e] 'kudikidappukaran' means a person who has no homestead or land of his own to erect a homestead and has been permitted by an owner of land to have the use and occupation of a portion of the land for the purpose of erecting a homestead with or without an obligation to pay rent for the use and occupation of the site so given; and 'kudiyiruppu' means the site given together with the house, hut or shed thereon which is used as a place of residence by the kudikidappukaran with the permission of the owner."

S.3 of the said Act conferred occupancy right on a kudikidappukaran. This provision included within its scope only persons who had been permitted to erect homesteads on the land of another, and it was only by Kerala Act 1 of 1957 [S.2(3)] that those who were permitted by the

man in possession of the land to occupy a hut (whether constructed by him or not) were extended the benefit of inevitability. Next in sequence came the Kerala Act 30 of 1958 which amended Act I of 1957. We are concerned, particularly, with Explanation I to S.2 (3) in that Act which reads:

"*Explanation I.-- Any person who was in occupation of a kudikidappu on the commencement of the Kerala Stay of Eviction Proceedings Ordinance 1957, shall be deemed to be in occupation of such kudikidappu with permission as required under this clause;"*
Act I of 1964 in Explanation I to S.2 (25) stated:

"Any person who was in occupation of a kudikidappu on the 11th day of April 1957 and who continued to be in such occupation at the commencement of this Act. shall be deemed to be in occupation of such kudikidappu with permission as required under this clause."

The important point to note in Explanation I to Act 30 of 1958 is that, by that provision, persons in occupation of a kudikidappu on the commencement of the Kerala Stay of Eviction Proceedings Ordinance 1957 (which was on 11th April 1957) were to be deemed to be in occupation with permission as required under the main clause even though, actually, there was no such permission. Explanation II to S.2 (25) of Act I of 1964 substantially reproduces Explanation I to Act 30 of 1958 except that it insists that the person in occupation of the kudikidappu on the 11th day of April, 1957 must have continued to be in such occupation at the commencement of Act 1 of 1964. A few decisions were rendered by the High Court which have to be noticed at this stage before we can fully understand the need and purpose of the addition of the Explanation adverted to above and the change effected by Act 35 of 1969 when transplanting the Explanation II as a proviso with some small but spinal changes.

8 When the legislature conferred immunity from eviction on occupiers of huts brought in by the permission of the land owner by and large, they were landless families working on the farms the tendency to evict them through court became noticeable for reasons I have already stated. Since a permission to occupy was an essential ingredient of a kudikidappu, by definition, this Court held that where consent was not extant, in the sense of its having been withdrawn or not renewed, the right of kudikidappu also ceased to exist. Landlords could easily stultify the kudikidappu protection clause by unilaterally withdrawing permission to remain on the homestead and the flood gates of eviction would be 'thrown open. The legislature naturally reacted to this situation by providing, in the shape of an Explanation, that any person in occupation of a kudikidappu on 11th April 1957 and continued on the hutment would be deemed to be there with permission as required under the clause. The obvious intendment of this Explanation was to protect those who had come in by permission of the owner but who were sought to be removed by withdrawal of permission by the land owner. Once a person came to occupy a hut by permission he became a kudikidappukaran and acquired the right to fixity. Mr. Justice Velu Pillai in S. A. No. 558 of 1961 clearly brought out the meaning of this provision, when his Lordship observed:-

"*It was also argued by learned counsel, that under the definition of kudikidappukaran' in S.2, Clause.25 of Act 1 of 1964, unless the permission originally granted to the defendants or their predecessors, to have the use and occupation of the portion of the land for erecting the homestead, was renewed or was in force, these rights cannot be recognised. The definition follows the definition in previous enactments. Learned counsel is wrong in his submission that the permission admittedly granted at the inception required to be renewed from time to time or at the time Act 1 of 1964 came into force. The permission granted originally was for the use*

and occupation of the land for the purpose of erecting a homestead, and once such permission was granted, rights of kudikidappu accrued. These rights cannot be taken away subsequently. Permission once granted is irrevocable. It is not open to the plaintiffs, as contended for them, to revoke or withdraw the permission by the institution of the suit or by other means. The kudikidappu rights have therefore to be upheld."

Notwithstanding this clear interpretation of the clause of which, perhaps, the legislature was not aware, the decision being unreported, necessity was felt for amendment in the wording of the Explanation in view of a reported decision of this Court carried in 1966 KLT 673. It is widely known that the 11th of April 1957 was the date on which fixity of occupation for a wide category of kudikidappukarans was given and the strong tendency to evict them somehow was generated; and the construction of the Explanation to S.2(25) suggested by Madhavan Nair J. in the reported decision reduced the efficacy of its protection; for, his Lordship observed:

"Explanation II appended to the definition enacts that the requisite permission shall be deemed, without proof, to exist when occupation of a "kudikidappu" on the 11th day of April 1957 and the continuance of such occupation till the commencement of the Act are proved. Kudikidappu, by its very definition in the same clause (quoted above), refers to the land and the homestead permitted to be erected op the hut permitted to be occupied ..... It may be noted that with reference to the permission either to have the use and occupation of a portion of the land for erecting a homestead or to occupy a hut already on the land the tense used in sub clauses (i) and (ii) of the definition is the present perfect "has been", which, as explained by me in Karunakaran Nair v. Ramakrishnan Nair (1966 KLT 351), connotes a completed event continuing in operation. In other words, to satisfy the definition, the permission given must be continuing in effect to the relevant time; and a permission once given and subsequently withdrawn or otherwise come to termination will not satisfy the expression in sub clauses (i) and (ii) of the definition. Explanation H extends the effect of the permission had for occupation of a kudikidappu to the date of commencement of the Act when a statutory immunity from eviction is conceded."

The legislature therefore intervened once again to make the provision effective to the extent intended, by deleting the word 'kudikidappu' and substituting 'hut' instead, and by making certain other changes including converting the explanation into a proviso of the main clause.

9 As amended, what is the scope and effect of S.2(25)? Does the proviso go so far as to give legislative bonus to brazen trespassers who have successfully defied the law for 15 months from 16th August 1968 to 1st January 1970, or is it only a potent statutory armour against eviction through legal process of those who are occupiers by consent in the beginning but are sought to be ejected thanks to a judicial construction of the former provision? Running right through all the benignant enactments relating to kudikidappus is a striking feature, that protection is given only to those who have built and / or entered huts with the permission of the one lawfully in possession. Even when in Explanation I in Act 30 of 1958, Explanation II of Act 1 of 1964, and the proviso in Act 35 of 1969, a legal fiction was enacted in favour of occupiers who remain without consent, it is significant that the legislature does not "deem" them to be kudikidappukars as such but only to possess the 'permission required under this clause'. The accent is on the need for permission which is irrebuttably presumed where the occupation at the inception is not hostile and has continued during a specified period with or without permission. This latter legal fiction was necessary if the protection in the substantive clause was not to be rendered illusory. Which landlord would not withdraw permission if the

law were to deprive the kudikidappukaran of his fixity of occupation on the former withdrawing or not renewing consent to continue on the kudi?

10 In my view the two extreme positions have been avoided by the statute. The unlawful trespasser does not acquire any right under S.2(25), although one who has come in by leave and licence but continues without the consent of the landlord is protected by the Act, for, to do so would be to sap the strength of the provision. The very reference to the main clause in the proviso is a clear indication that the two have to be read in an integrated way and not independently. Had the legislature meant to create a new class of quasi kudikidappukarans who by sheer trespass had remained in occupation between 16th August 1968 and 1st January 1970 there was no need to couch it as a proviso and resort to the round about drafting of a fiction confined to the permission predicated in the main clause. Imagine a man and his family being thrown out of a hut by his enemy by criminal trespass on 15th August 1968. The complainant rushes to the police, let us assume, who investigate and charge sheet the offender; the court convicts the accused of criminal trespass, let us further assume; but if by then it is 2nd January 1970 can the accused plead S.2(25) of the Act and tell the court 'I am guilty of criminal trespass but I am a 'proviso kudikidappukaran' and my crime is converted into a valuable right'. Such an invitation to commit offences, such a lawlessness being written into the law cannot be easily assumed and indeed is contrary to the spirit and letter of the law unless we choose to read, wooden fashion, the proviso de hors the main provision violating the canons of interpretation and the commonsense of the text and the context.

11 Numerous authorities were cited at the bar to explain the office of a proviso, whether it merely cuts back on or qualifies or carves out of the main clause, or in certain circumstances expands and adds to it or serves as an independent enactment. "The proper function of a proviso" according to the ruling reported to AIR 1966 SC 462.

"is to except or qualify something enacted in the substantive clause, which but for the proviso would be within that clause. It may ordinarily be presumed in construing a proviso that it was intended that the enacting part of the section would have included the subject matter of the proviso. But the question is one of interpretation of the proviso and there is no rule that the proviso must always be restricted to the ambit of the main enactment. Occasionally in a statute a proviso is unrelated to the subject matter of the preceding section, or contains matters extraneous to that section, and it may have then to be interpreted as a substantive provision, dealing independently with the matter specified therein, and not as qualifying the main or the preceding section."

Again, in AIR 1961 SC 1596, Hidayatullah, J, as he then was, observed:

"*The law with regard to provisos is well settled and well understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily a proviso is not interpreted as stating a general rule. But. provisos are often added not as exceptions or qualifications to the main enactment but as saving clauses, in which cases they will not be construed as controlled by the section*".

12 Without encumbering the judgment with further precedents on the true role and purpose of a proviso vis a vis the principal clause, I might say that the golden rule is to interpret the entire provision as a whole, each part throwing light on the other, and making a consistent enactment of the whole.

13 The proviso is not always limited to carving a category out of what the substantive enactment embraces. It is not as if what comes within the main provision as kudikidappu is excluded by the proviso. Nor does it create an independent category altogether. The proviso here, if read harmoniously with what has gone before, really clarifies the meaning of the definition as Velu Pillai J. has ruled and removes the difficulty high lighted in the judgment of Madhavan Nair J. May be, it is explanatory in one sense and extends the scope in another. The whole clause, read together, at once accents the need for permission at the inception and nullifies the potency of the landlord's later recantation. In short, the initial leave to occupy is obligatory to make the dweller a kudikidappukaran. The proviso operates only at the next stage. If as the reported ruling (1966 KLT 673) insists, a continued existence of permission upto 11th April 1957 or other later date specified in the statute should be read into the substantive clause, the proviso steps in to dispense with it in cases where the occupant has been in the hut between 16th August, 1968 and 1st January 1970. If Madhavan Nair, J. is right, the proviso is oliose; if Madhavan Nair J. is wrong, the proviso salvages the legislative intent. Viewed against the history and the constitutional back drop of the kudikidappu provision in the tenancy legislation of the land, calculated to stabilise agrarian labour settled on the land, to start with by the owner's consent, the legislative project only sanctions their continuance against the owner's will rather than freeze all occupation even such as is secured by criminal trespass. The law loves neither him who grabs land or buildings; for, that would be humanism gone haywire, nor him who bulldozes humble dwellers out of their shacks, for that would be a negation of the wholesome humanism behind the statute.

14 Of course, the permission must have been given to him not by one who has no right to the land or the hut but by one who is in lawful possession thereof. This implies that for the permission to be sufficient it must be given not by one who has a legal right to be in possession but has actual possession. "In lawful possession" must be given its proper meaning and so the person who gives permission must be either actually in possession or at least constructively in possession. Where the occupant attorns with the one entitled to possession constructive possession and permission may be implied.

15 In the present case neither constructive possession nor permission can be spelt out of Ext. P3 because George, the vendee, was neither in actual nor in constructive possession but had a right to get possession from the vendor, the 1st defendant. If the defendant had been given some kind of permission for occupation under circumstances where one might infer constructive possession in the vendee and occupation under him by the vendor, may be the 1st defendant can claim kudikidappu right. In the present case, however, Ext. P3 expressly states that possession of the building has not been given to the vendee and two months' time is asked for in that behalf and there is nothing to show any new relationship later. The vendor is bound to give possession to the vendee under S.55(i)(f) of the Transfer of Property Act, and till such possession is delivered the vendee has the mere right to get possession, but it is not possession, actual or constructive. In this view, I hold that the 1st defendant was not an occupier by permission from one in lawful possession, but only a vendor who had withheld delivery of possession.

16 The children of the 1st defendant have in no sense been given permission to occupy but are there as dependents, along with their mother. They cannot claim to be kudikidappukaran. The law would reduce itself to an absurdity if every man, woman and child in a hut begins to set up an independent kudikidappu right merely because the master of the household has taken permission to occupy and the others are inhabiting the house along with him. The

present appeal is unsustainable so far as defendants 3 and 4 are concerned in any view. I dismiss the appeal, but in the circumstances, without costs.
