

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 28TH FEBRUARY 2007 / 9TH PHALGUNA 1928

RSA.No. 1377 of 2004()

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AS.145/1994 of SUB COURT, TIRUR  
OS.346/1990 of MUNSIF COURT, TIRUR  
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APPELLANT/PLAINTIFF/APPELLANT  
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HAMZA, S/O.THAIKKAT YAHU,  
MEENADATHUR, TANALUR, TIRUR TALUK,  
MALAPPURAM DISTRICT.

BY ADV. SRI.T.KRISHNAN UNNI

RESPONDENTS/DEFENDANTS/RESPONDENTS  
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1. MOIDUTTY,  
S/O.PULLAT SAIDALIKUTTY,  
MEENANDATHU, TANALUR, TIRUR TALUK,  
MALAPPURAM DISTRICT.

2. SAINABA, W/O.MOIDUTTY, DO.DO.

BY ADV. SRI.R.RAJESH KORMATH  
SMT.PREETHY KARUNAKARAN  
SMT.MEENA.A.  
SMT.M.R.MINI  
SRI.V.S.ROBIN

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION  
ON 28/02/2007, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

**M.SASIDHARAN NAMBIAR,J.**

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R.S.A .NO. 1377 OF 2004  
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Dated 28<sup>th</sup> February 2007

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

Plaintiff in O.S.346/1990 on the file of Munsiff court, Tirur is appellant. Respondents are defendants. Suit was filed for permanent prohibitory injunction contending that under Ext.A1 assignment deed plaint schedule property has been in possession of appellant and respondents have no manner of right or possession over the same and they attempted to trespass into the plaint schedule property and they are to be restrained by a decree for permanent prohibitory injunction. Respondents filed written statement contending that plaint schedule property is part of the property assigned by appellant in their favour under Ext.B1 assignment deed dated 2/11/1990 and property was measured and property covered within the boundaries shown in the document was handed over and they are in possession of the property and they have constructed a boundary wall on the east and while constructing wall on southern side, suit has been filed and appellant

is not entitled to the decree sought for. Learned Munsiff framed necessary issues. On the evidence of Pws.1 and 2 and Ext.A1 and DW1 and Exts.B1, and C1 to C4, learned Munsiff found that appellant did not establish his possession over the plaint schedule property and therefore dismissed the suit. Appellant challenged the decree and judgment before Sub Court, Tirur in A.S.145/1994. Learned Sub Judge on re-appreciation of evidence confirmed the findings of learned Munsiff with regard to possession and dismissed the appeal. It is challenged in the second appeal.

2. Learned counsel appearing for appellant as well as respondents were heard.

3. Argument of learned counsel appearing for appellant is that respondents are claiming right under Ext.B1 assignment deed executed by appellant on 2/11/1990 and Ext.B1 itself shows that appellant has property obtained by Ext.A1 registered sale deed 38/84 and therefore possession of appellant over Ext.A1 property cannot be disputed and suit has been filed within 15 days from the execution of Ext.B1 sale deed in favour of respondents and therefore failure of appellant to produce tax receipts to prove possession is not very

relevant as respondent cannot dispute his possession in view of the recitals in Ext.B1 and therefore courts below should have granted the decree sought for. It was argued that in a suit for injunction, when respondents contended that plaint schedule property was obtained by them under Ext.B1 and Ext.B1 specifically shows that only the property originally belonged to appellant under registered sale deed 24/78 was sold to respondents they cannot claim any right or possession over the plaint schedule property as the property covered under Ext.B1 is entirely different from Ext.A1 property and hence courts below should have granted the decree for injunction. It was also argued that appellate court has specifically found that plaint schedule property is identified correctly by the Commissioner in Ext.C4 plan and therefore respondents cannot claim any right or possession over plaint schedule property and as they are claiming right only under Ext.B1, courts below should have found that appellant is entitled to the decree sought for. Learned counsel appearing for respondents argued that courts below appreciated the evidence in proper perspective and there is no reason to interfere with appreciation of evidence by courts below

or the findings on the question of possession and in the appeal no substantial question of law is involved.

4. Immediately after institution of suit respondents have taken out an advocate commission. The commissioner has inspected the property in the presence of appellant and submitted Ext.C2 report and C1 plan. In Ext.C2 report commissioner specifically stated that when appellant was directed to pointed out the plaint schedule property claimed by him under Ext.A1 sale deed, a photocopy of which was furnished to the commissioner by appellant, appellant was not in a position to point out the boundaries or the property covered under the document. As rightly found by both the courts below, in a suit for injunction based on possession the failure of plaintiff to point out the suit properly and the boundaries in a very relevant factor to decide the question of possession involved in the suit.

5. Specific case of respondents in the written statement was that when Ext.B1 sale deed was executed the property to be sold was pointed out with reference to boundaries and after measurement of that property within the boundaries, it was sold under Ext.B1 and they obtained possession of the property. It is their case

that after assignment of the property under Ext.B1, appellant is not left with any property there. Argument of learned counsel appearing for appellant is that in view of recitals in Ext.B1 whereunder it is stated that appellant has got right over two separate title deeds viz. registered sale deeds 38/84 and 24/1978 and property transferred under Ext.B1 is only the property obtained under registered sale deed 27/78 respondents cannot dispute the right of appellant over the remaining property covered under registered sale deed 38/84 which was not sold under Ext.B1 and therefore burden is on respondents to prove that under Ext.B1 they obtained possession of the entire properties.

6. Arguments of learned counsel appearing for appellant could have been accepted if the suit is based on title. As suit is only for injunction the only question to be decided is whether appellant has been in possession of plaint schedule property on the date of institution of the suit. Specific contention of respondents is that when property covered under Ext.B1 was transferred to them, properties were measured and the entire property of appellant therein was transferred to them and they obtained possession of the whole

property. Eastern boundary of the property transferred under Ext.B1 is shown as property of railway and not the remaining property in the possession of appellant. Even though commissioner in Ext.C3 plan identified the property covered under Ext.A1 and demarcated the same as plot BCD and learned Sub Judge found that plot BCD in Ext.C3 plan is the property covered under Ext.A1, commissioner did not identify the property covered under Ext.B1. Unless property covered under Ext.B1 is measured and identified with reference to the boundaries shown in Ext.B1 case of respondents that they obtained possession of entire property including the disputed plaint schedule property cannot be negatived based on the identification of Ext.A1 property. Learned Munsiff and learned Sub Judge on appreciation of evidence found that appellant failed to establish their possession. That factual finding on the evidence cannot be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure.

7. Appellant failed to prove his possession of the plaint schedule. Except Ext.A1 and the interested oral testimony of appellant no evidence was adduced to prove that appellant was in possession of the plaint

schedule property at the time of institution of the suit. Appellant is therefore not entitled to the decree for injunction sought for. No substantial question of law is involved in this appeal. It is dismissed. Dismissal of the suit will not disentitle appellant from instituting suit based on title, if title could be established.

M.SASIDHARAN NAMBIAR,  
JUDGE.

uj.