IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

TUESDAY, THE 30TH NOVEMBER 2010 / 9TH AGRAHAYANA 1932

AS.No. 204 of 1994(A)

OS.192/1980 of PRL.SUB COURT, KOTTAYAM
.....

APPELLANTS/ADDL. PLAINTIFFS 2 TO 5:
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1. **THANKAMMA (ELIYAMMA) VARGHESE, KAPPILPARAMBIL, PALAI ANGADY, LALAM KARA AND VILLAGE.**
2. **VARGHESE GEORGE, PARAMBIL HOUSE, PERUNNAI, CHANGANACHERRY.**
3. **VARGHESE SEBASTIAN, KAROTTU HOUSE, MUTTUCHIRA.**
4. **VARGHESE MATHEW, KAPPILPARAMBIL, LALAM VILLAGE & DO. KARA.**

BY ADV. SRI.JOSE JOSEPH ARAYAKUNNEL,
SRI.VARGHESE PARAMBIL,
SRI.K.RAVEENDRANATHAN NAIR.

RESPONDENT/DEFENDANT:

MUNICIPAL COUNCIL, PALAI,
REPRESENTED BY THE
MUNICIPAL COMMISSIONER, PALAI.

BY ADV. SRI.V.M.KURIAN,
SRI.A.V.THOMAS,
SRI.E.K.DILRAJ,
SRI.MATHEW B.KURIAN.

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 30/11/2010, ALONG WITH SA NO. 527 OF 1999 AND SA NO.758 OF 1999, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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AS.No. 204 of 1994(A)

ORDER ON C.M.P.NO.5877/1999 IN A.S.NO.204/1994

DISMISSED

30/11/2010. **SD/- M.N.KRISHNAN, JUDGE**

//TRUE COPY//

P.A. TO JUDGE

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M.N. KRISHNAN, J.
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A.S. NO. 204 of 1994 and
S.A. Nos.527 and 758 OF 1999
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Dated this the 30th day of November , 2010.

J U D G M E N T

At the out set I may like to state that the first appeal and second appeals are clubbed together and disposed of for the reason that the fate of the case depends upon the documents relied on by the plaintiff which are very same in the two cases.

2. Now first I may refer to A.S.204/94. It is an appeal preferred against the judgment and decree passed by the Subordinate Judge, Kottayam in O.S.192/80. It is a suit instituted by the plaintiff against the Municipality for a declaration with respect to their title over the property and for recovery of possession on the strength of title. There is also a claim for damages.

3. It is the case of the plaintiffs that by virtue of the document executed in the year 1088 M.E., the predecessor in interest of the plaintiff got an extent of nine cents of property out of which 4.5 cents were assigned in favour of the Bishop of Pala and the plaintiff continued to be in possession and enjoyment of the remaining 4.5 cents of property. The Municipality who got the property from Bishop had encroached upon the plaint schedule property and had reduced it into their possession by converting a portion to a road and by erection of electric post. Therefore the plaintiff prays for declaration to that effect.

4. The defence raised by the Municipality is that of a total denial of the plaintiff's right over the plaint schedule property. According to them the plaintiff had only

obtained 4.5 cents of property which had been totally transferred in favour of the Bishop and therefore he could not have got right over any other extent of property in this case. Therefore they had denied the factum of any trespass and prayed for dismissal of the suit. They have also raised the plea of adverse possession in this case.

5. Now the other cases S.A.Nos. 758 and 527/99 are both preferred against the judgment and decree passed by the Subordinate Judge's Court Pala in A.S.21/96. A.S.21/96 in turn was preferred against the judgment and decree of the Munsiff, Pala in O.S.149/88. The suit O.S.149/88 was for recovery of possession, declaration of title and fixation of boundary with respect to 2.25 cents of land. It is their case that defendants in the suit had trespassed into the

property and had converted that 2.25 cents into their possession though they have no right and it is really a part and parcel of 4.5 cents of land which had been retained by the plaintiff after assigning the property in favour of the Bishop.

6. The defence in the case is to the effect that the plaintiff does not have any title to that property which is a part and parcel of their property.

7. The trial court dismissed the suit and in appeal the learned Subordinate Judge reversed the judgment and decree granted a decree in favour of the plaintiff and so the aggrieved parties have filed these second appeals before this Court. The substantial questions of law formulated in the memorandum of appeal which are necessary for consideration of the matter is,

(1) Whether the description of the property in title deeds by boundaries and area by Kampu measurements do not prevail over the extent of property referred to in the documents when there is conflict between the boundaries and such extent referred to in the documents?

(2) Whether the title and possession claimed by plaintiffs is not lost by adverse possession and limitation?

8. It is true that the suits are filed against two sets of defendants. But the issue is with respect to the title over the property having an extent of 4.5 cents of land. So, if the Court is able to find that the plaintiffs have got right over that property as contended by them, then the plaintiffs are entitled to the reliefs prayed for, otherwise not. Before adverting to the materials it is desirable to

lay down the points, that is the principles to be followed in cases of this nature.

9. When a suit is filed by the plaintiff for recovery of possession on the strength of title the plaintiff has to succeed or fail on the basis of his documents and evidence and he cannot afford to find out loop wholes in the case of defendant to win his case. It is equally important when the defendant set up rival title which is also a matter that can be taken into consideration by the Court for analysing the matter but the task of proving the title will always remain on the plaintiff and nobody else. Now I will refer to the facts necessary for the disposal.

10. The first document which is relied upon by the plaintiff is a document of Ext.A1 executed in the Malayalam year 1088.

Unfortunately I find in that document the extent of property conveyed in favour of the predecessor in interest of the plaintiff is not mentioned. What is mentioned in that document is that the property having a length of 9 dhandu had been assigned in favour of one Kayyalackal Thomas and the property beyond that is assigned in favour of the plaintiff. A2 is a document executed by the plaintiff in favour of the Bishop of Pala whereby he had transferred 4.5 cents of land to him. It is described in that document that after the assignment of the property of 4.5 cents, there is some remainder left with the plaintiff and it is seen described in the body of the document. In the schedule to the document it is specifically stated that the property on the western side is the property that has been given to this Kayyalackal Thomas.

Now these are the two basic documents on the strength of which the plaintiff has to succeed or fail.

11. Now the learned counsel for the appellant in the first appeal would submit before me that it has to be analsyed and understood that the total extent of property is 23 cents out of which only 14 cents had been given to that Kayyalackal Thomas and therefore the remaining extent of 9 cents is with the plaintiff with title. Now it is to be stated that for this the learned counsel relies upon a partition deed entered into and marked as Ext.A7. It is not the first round of litigation. In the earlier round of litigation this Court by virtue of the earlier order directed the properties to be identified with reference to the title deeds in order to decide

the fate of the parties. Accordingly a survey Commissioner was issued by the trial court and he had submitted a plan and report. I am referring to one of the plans mainly that is submitted in the first appeal for the reason that unnecessary complications can be averted. Now the properties are comprised in two Survey Nos. 646/28A and 646/28B. The total extent of these properties would come to 37 cents and 100 sq.links. The Commissioner had marked plot 5 as the town hall, plot 4 as the property assigned in favour of the Bishop plot 3 as the trespassed area in the suit O.S.192/80 and plot 2 is the property involved in the other suits and plot 1 is the 14 cents of land which belonged to this Kayyalackal Thomas. The Commissioner has also pointed out the existence of a petrol pump as well as town hall and also river. Now the trial

judge in the suit O.S.149/88 and the Subordinate Judge has considered these matters firstly with reference to the document of the title of the plaintiff. The document of title of the plaintiff specifically narrates that after the measurement of 9 dhandu of the property the remaining is sold to the plaintiff. The Courts below had taken the view that as per the prevailing system in that area 1 dhandu = 10 ft. and the Courts below has taken it as 120 inches. So whatever it may be the length is 90 ft. Now referring to the plan, Ext.C4 in O.S.192/80, 90ft. will terminate only after plot Nos.1 and 2 are exhausted. The measurement appears to be 21.1 mtrs. plus 5.4 mtrs. which is equal to 26.5 mtrs. which would come approximately 90 ft. or more. So if the property is identified or demarcated with respect to the title deed,

Ext.A1 then the plaintiff would not have any property before that 90 ft. point. It has also to be remembered that there is no dispute that point D is the starting point. When 90 ft. is measured from point D towards east then only after the 90th ft. the plaintiff's property starts. Certainly that will not take in the property claimed by the plaintiff now.

12. Now another important indicator is that in the document executed by the plaintiff in favour of the Bishop of Pala the western boundary of the property so assigned is shown as this Kayyalackal Thomas's property. If the contention of the plaintiff in this case is to be accepted there must be portions of property in between the property assigned to the Bishop and the property possessed by Thomas. It is a very important boundary which would have a tell-

tale effect on the title of the plaintiff. But unfortunately for reasons best known to the plaintiff the western boundary is shown as the property belonging to this Kayyalackal Thomas and therefore when read with the title deed Ext.A1 which makes the starting points of the plaintiff's property after the 90th ft and when it is clubbed together with the boundary then one has to hold that the plaintiff does not have right over that property.

13. Now the learned counsel for the appellant very persuasively submits before me the following facts. There is no case for this Kayyalackal Thomas that he has got more than 14 cents of property. He would also contend that the Bishop has no case that they are in possession of any property that is not covered by the document. Therefore he would also rely

upon the fact that the survey records shown with the total extent of the property is 23 cents and only 14 cents belonged to Thomas and therefore 9 cents belonged to the plaintiff and when 4.5 cents is taken he is entitled to the property. He would also contend for the position that he had been paying revenue for the property and that will also support his case. Now it has to be stated that survey records cannot confer title. The payment of basic tax even if accepted also cannot confer title though it can be an incident to prove possession of the property.

14. Now the demarcating Kayyala between the property is admitted but the contention is the position has been changed. But materials are not available to fix the Kayyala which was in existence, according to the plaintiff even.

15. Now I may like to deal with the Commissioner's plan and report and the surveyor's evidence to show that it has not been done properly by the surveyor and the Commissioner. The surveyor when examined as PW4 in this case in cross examination had to admit so many points which will cut at the root of the case of the plaintiff. He had categorically admitted that nothing is available regarding the extent under Ext.A1. He would also further depose that the property cannot be identified with respect to Ext.A1. He is also aware of the nine dhandu mentioned in the document. He has stated that he did not take that into consideration but took the other documents for the purpose of identifying the property and he then relies upon Ext.A7 for the said purpose. Even his evidence would show that the document

Ext.A7 on which he has placed reliance is not totally reliable for the reason he would depose that the eastern boundary is not tallying. The eastern boundary of Kayyalackal Thomas is the crucial boundary and that boundary does not tally means that reliance cannot be placed. He has also submitted he has read Ext.A2 and a question was asked whether he had identified the property with the side measurement given in Ext.A2.Then he has admitted that ....” He had also admitted “..... measurement- ....” So the acid test which the plaintiff has to prove, that is regarding the title to the property, has not been proved in this case. Ext.A1 does not show any clarity about the extent of the property involved. In Ext.A2 though it shows an extent of

4.5 cents the western boundaries stares at the face of the plaintiff and therefore Exts.A1 and A2 does not help the plaintiff to establish his title and it has to be held that the plaintiff has not succeeded in proving his title.

16. Learned counsel had brought to my attention a decision of the Division Bench of this Court reported in (***Savithri Ammal v. Padmavathi Amma 1990 (1) KLT 187)*** wherein the Court held that when extent mentioned in the document clearly manifests the intention of the parties that can be given effect to when the boundaries are otherwise. But it is also equally laid down in that decision that the methodology of identifying the property when there is a discrepancy between the extent, measurement etc. is the boundaries and it has also to be stated that the most infallible

method is to be adopted.

17. Now the extent of the property is in dispute for the reason that it is submitted that the plaintiff does not have nine cents of property under the title deeds. So unless these factors are proved the Court is not in a position to grant a decree in favour of the plaintiff and the finding of the trial court in O.S.149/88 appears to be proper and correct and the learned Subordinate Judge has reversed it improperly and the plaintiff has not discharged his burden in proving the title. Therefore from these discussions I hold that the appeal A.S.204/94 is liable to be dismissed and I do so.

18. The other second appeals S.A.527 and 575/99 are liable to succeed. The judgment and decree of the Subordinate Judge is reversed and

the judgment and decree passed by the trial court is confirmed which means that O.S.149/88 is dismissed. In all the appeals the parties are directed to bear their respective costs.

M.N. KRISHNAN, JUDGE.

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M.N. KRISHNAN, J.

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A.S. NO. 204 of 1994 and
S.A. Nos.527 and 758 OF 1999

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J U D G M E N T

30th November, 2010.