IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOMAS P.JOSEPH

FRIDAY, THE 28TH DAY OF SEPTEMBER 2012/6TH ASWINA 1934

RSA.No. 920 of 2012 ()

AS.115/2006 OF IST ADDL.SUB COURT, KOZHIKODE
OS.78/2001 OF ADDL. MUNSIFF COURT-II, KOZHIKODE

APPELLANT/APPELLANT/ DEFENDANT :

THIRUTHIMMAL SASEENDRAN,
S/O.APPUKKUTTAN, AGED 58, RESIDING AT PUTHIYAVEETTIL,
OLAVANNA AMSOM DESOM, KOZHIKODE TALUK.

BY ADV. SRI.C.P.MOHAMMED NIAS

RESPONDENTS/RESPONDENTS/PLAINTIFFS :
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1. **CHERAYAKKATT VELAYUDHAN,**
   S/O.IMBICHYKUTTAN, AGED 70,
   OLAVANNA AMSOM DESOM
   KOZHIKODE TALUK - 673 025.

2. **CHERAYAKKAT SREEMATHI,**
   W/O.VELAYUDHAN, AGED 58,
   OLAVANNA AMSOM DESOM
   KOZHIKODE TALUK - 673 025.

R1 & R2 BY ADVS. SRI.P.B.SAHASRANAMAN
SRI.T.S.HARIKUMAR
SRI.K.JAGADEESH

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 28-09-2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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THOMAS P. JOSEPH, J.

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R.S.A. No. 920 of 2012

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Dated this the 28th day of September, 2012

JUDGMENT

The second appeal arises from the judgment and decree of the Additional Munsiff's Court, Kozhikode – II in O.S. No.78 of 2001 allowing recovery of possession of the plaint C schedule on the strength of title and granting decree for prohibitory injunction, confirmed by the Ist Additional Sub Court, Kozhikode in A.S. No. 115 of 2006.

2. The respondents/plaintiffs claimed that the plaint A schedule belonged to the second respondent/second plaintiff. The total extent of land available to the second respondent was 73 cents out of which she assigned 30.95 cents to Sarojini as per document No. 2322 of 1987. Of the remaining extent, the second respondent assigned 21.56 cents to Gangadharan and others and another 5 cents to Sulochana. She relinquished 3 cents from the remainder, for formation of a road towards northern side of the property. The 5 cents assigned to Sulochana is situated on the further north of that road. What

remained with the second respondent is 8.50 cents.

3. The plaint B schedule is situated on the east of the plaint A schedule. The 85 cents originally belonged to Chiruthakutty. She assigned the said property to her three daughters – Ammu, Karthyayani and Kalyani. Of them, the latter two assigned their 2/3rd undivided share to the first appellant. The remaining 1/3rd belonged to Ammu. They together assigned 24 ¾ cents to the appellant/defendant as per assignment deed a copy of which is marked as Ext.A4. Ammu assigned the rest of a property to the first respondent.

4. It is the case of the respondent that the appellant trespassed into a portion of the plaint B schedule and took possession of the same sometime in the year, 2001. According to the respondents, plaint C schedule forms part of their property (plaint B schedule). Accordingly they have sued for recovery of possession of the plaint C schedule on the strength of title and for other releifs.

5. Appellant contended that plaint C schedule is not part of the plaint B schedule and that the respondents have no right, title or interest over the plaint C schedule. According to the

appellant, he has got title and possession of the plaint C schedule as per Ext.A4. A further contention raised is that the title if any of the respondent over the plaint C schedule is lost by adverse possession and limitation. He contended that regarding the property he acquired as per Ext.A4 including the plaint C schedule, he had obtained a decree against one Purushothaman in O.S. No. 681 of 1993. The present suit is instituted by the respondent at the behest of the said Purushothaman.

6. The trial court, referring to the documents of title produced by the respondents and Exts.C1 to C3 found that the plaint C schedule is part of the plaint B schedule belonging to the respondents. The plea of adverse possession was found against. Accordingly, a decree was granted as prayed for. That decision, the first appellate court has confirmed.

7. It is contended by the learned counsel on behalf of the appellant that finding of the courts below that plaint C schedule is part of the plaint B schedule belonging to the respondents is erroneous. The entire property referred to in the plaint A and B schedules are not measured to ascertain whether the plaint C schedule is part of the plaint B schedule. The learned counsel

submits that the trial court has rejected that contention of the appellant on the ground that to decide whether the plaint C schedule is part of the plaint B schedule, it is not necessary to measure the entire property. It is also pointed out by the learned counsel that the finding the first appellate court has made that the disputed property appears to be a drain is based on the impression the Advocate Commissioner has drawn and stated in Ext.C1. The finding of the courts below regarding adverse possession is also under challenge.

8. The learned counsel who took notice for the respondents, contended that the Advocate Commissioner has identified the entire property referred to in the plaint A and B schedules based on the survey records and title deeds of the parties and taking into account the representations made by the parties at the time of measurement. It is argued that the Advocate Commissioner or the Surveyor are not examined to show any error in the measurement made and referred to in Exts. C1 to C3. In the circumstances, challenge to Exts. C1 to C3 cannot be accepted. It is further argued that the contention of the appellant that he is in adverse possession of the plaint C schedule cannot be

accepted.

9. So far as the prayer for recovery of possession is concerned, since it is based on title, it is needless to say, respondents have to prove the same whether or not the appellant was successful in proving his title. The respondents have produced the documents of tile based on which they claimed title over the plaint B schedule. It is not disputed that the appellant has acquired 24 ¾ cents from out of the total extent of land mentioned in the plaint B schedule as per Ext.A4. Therefore, the title of the respondents over the property including 24 ¾ cents covered by Ext.A4 cannot be disputed by the appellant.

10. Then the question is whether the plaint C schedule forms part of the plaint B schedule belonging to the respondent ? To decide that controversy, reference has to be made to Exts. C1 to C3 (copy of which is given to me for perusal). Though appellant has a contention that the entire plaint A and B schedules are not identified by the Advocate Commissioner and though, the trial court has taken the view that it is not necessary to do so, the first appellate court has adverted to that contention and found that the Advocate Commissioner has identified the

entire properties referred to in the plaint A and B schedules. In paragraph 3 of Ext.C1, the Commissioner states that he has identified the properties with the help of the plaint schedules, title deeds of the parties, the survey records and the representations made by the parties at the time of the inspection and measurement.

11. It is also seen from Ext. C1 that apart from the above statement in paragraph 3, the Commission has referred to identification of plaint A and B schedules. The plaint A schedule is described as a garden land and the same was identified with reference to document No.2965 of 1978 relied by the respondents. The Advocate Commissioner has also identified the portions assigned by the second respondent from the total extent of 73 cents. The total extent is identified by the Advocate Commissioner as plots A, B, C and D in the sketch. The properties assigned by the second respondent has also been separately identified by the Commissioner.

12. Coming to the plaint B schedule, it is seen that the Advocate Commissioner has identified the plaint B schedule property in accordance with document No.2597 of 1966, No.

1511 of 1979, No. 2272 of 1978 and Ext.A4 (in favour of the appellant). The entire property is shown separately in the sketch drawn in the plan prepared by the Advocate Commissioner. Though the total extent according to the respondents was 85 cents, the Advocate commissioner has found it to be 80.33 cents.

13. Coming to the plaint C schedule, the Advocate Commissioner has identified that property also with reference to the relevant documents. The Commissioner states that the property referred to in Ext.A4 in favour of the appellant was also identified but the measurements of the property in the possession of the appellant did not tally with the measurements of the property conveyed to him as per Ext.A4. Thus, the Commissioner, on measurement has reported that the plaint C schedule in the possession of the appellant is not part of the property covered by Ext. A4 and instead, it formed part of the property belonging to the respondents.

14. It is seen that it is with reference to the documents of title relied on by the parties, the survey records and taking into account the representations made by the parties that the Advocate Commissioner has identified the properties. No

attempt was made by the appellant to show any error in the measurement made by the Advocate Commissioner and the Surveyor and reported in Exts. C1 to C3. Therefore, challenge to Exts. C1 to C3 cannot succeed.

15. The finding of the trial and first appellate courts that the plaint C schedule forms part of the property belonging to the respondent and is not covered by Ext.A4 is based on the evidence and involves no substantial questions of law.

16. The next contention is regarding adverse possession and limitation. The trial and first appellate courts observed that the claim of the appellant is based on Ext.A4 and hence the plea of adverse possession cannot be sustained. Though, some decisions take the view that a claim of title is inconsistent with the plea of adverse possession, the Supreme Court has held in **L.N. Aswathama Vs. T. Prakash** (2009) 13 SCC 229 (para.17, 18)) that the plea based on title and adverse possession are not inconsistent but, are only alternative. Therefore, notwithstanding the plea of title, it may be open to the appellant to raise a plea of adverse possession as well.

17. In the present case, the evidence revealed that in

January, 2001 respondents have preferred a complaint to the local police alleging that the appellant trespassed into their property. There is no evidence let in by the appellant to show that he came into possession of the plaint C schedule beyond the statutory period. If that be so, the appellant cannot successfully contend that he got possession of the plaint C schedule as per Ext.A4. There is no evidence to show when else according to the appellant, he got possession of plaint C schedule. On the other hand the available evidence is that the trespass was sometime in January, 2001. In that view of the matter the finding of the courts below regarding adverse possession also is correct and involves no substantial question of law.

Second appeal is dismissed.

All pending interlocutory application will stand dismissed.

Sd/-

smv **THOMAS P.JOSEPH,**
JUDGE

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P.A. To Judge