

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOMAS P.JOSEPH

WEDNESDAY, THE 31ST DAY OF OCTOBER 2012/9TH KARTHIKA 1934

SA.No. 796 of 1998 (C)

AS.96/1993 OF SUB COURT, PAYYANNUR
OS.180/1983 OF MUNSIF COURT, PAYYANNUR

APPELLANT/APPELLANT/PLAINTIFF:

KUNHALIYAMMA'S DAUGHTER
ANJILLATH NABEESUMMA, AGED 44 YEARS,
AGRICULTURIST, RESIDING AT KOROM AMSOM,
KANAYI DESOM, KANNUR DISTRICT.

BY ADV. SRI.M.SASINDRAN.

RESPONDENTS/RESPONDENTS/DEFENDANTS:

- *1. THEKKE KAMBRATH DEVAKI AMMA,
S/O.LATE EDACHERI KUNHAMBU PODUVAL,
HOUSE HOLD, AGED 55 YEARS,
VELLOR AMSOM, ANNUR DESOM,
PAYYANNUR (VIA), KANNUR DISTRICT. (DIED)
2. RAMAKRISHNAN, 36 YEARS, ENGINEER,
VELLOR AMSOM, ANNUR DESOM,
PAYYANNUR (VIA), KANNUR DISTRICT.
3. DINESAN, 30 YEARS,
NO OCCUPATION, VELLOR AMSOM,
ANNUR DESOM, PAYYANNUR (VIA),
KANNUR DISTRICT.
4. RUGMINI, 27 YEARS, HOUSE HOLD,
VELLOR AMSOM, ANNUR DESOM,
PAYYANNUR (VIA), KANNUR DISTRICT.
5. NARAYANAN, 22 YEARS,
VELLOR AMSOM, ANNUR DESOM,
PAYYANNUR (VIA), KANNUR DISTRICT.
6. MADHAVAN, 20 YEARS,
VELLOR AMSOM, ANNUR DESOM,
PAYYANNUR (VIA), KANNUR DISTRICT.

* R2 TO R6 ARE RECORDED AS THE LRS OF DECEASED R1 AS PER ORDER
DATED 28/06/2007 IN S.A., VIDE MEMO (C.F.2968/2007) DATED 25/06/2007.

BY ADVS. SRI.O.RAMACHANDRAN NAMBIAR,
SMT.PRASANNA H.KAMATH.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 31-10-2012, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

rs.

THOMAS P. JOSEPH, J.
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S.A. No. 796 of 1998
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Dated this the 31st day of October, 2012

JUDGMENT

The following substantial questions of law are framed for a decision:-

- 1) Were the courts below are right in declining recovery of possession of the property on which the courts below declared title of the plaintiff ?
 - 2) Were the courts below right in excluding the portion claimed by the defendant from declaration of title, when it is found that the portion claimed by the defendant is not able to be identified ?
 - 3) Were the courts below right in declining to declare title of the plaintiff on the ground that a decree for injunction was passed in an earlier suit in respect of the property ?
 - 4) Were the courts below right in dismissing the suit after declaring title of the plaintiff when the suit property is properly identified ?
2. The second appeal arises from the judgment and decree

of the Sub Court, Payyannur in A.S. No.96 of 1993 confirming judgment and decree passed by the Munsiff's Court, Payyannur in O.S. No. 180 of 1983.

3. The appellant/plaintiff sued the respondents for recovery of possession of the plaint schedule property on the strength of title she claimed. According to the appellant, the suit property belonged in jenm to one Kunhammed. Item No.1 was outstanding with Kummaran Mootha Puduval while item No.2 was in the possession of Damodaran on kuzhikanam arrangement. They assigned their right over item Nos 1 and 2 to Sumathi Amma as per document Nos. 1534 and 1591 of 1965, respectively. From the said Sumathi Amma, appellant claims to have acquired title and possession of item Nos. 1 and 2 as per Ext.A12, assignment deed dated 16.03.1976. The appellant alleged that the respondents trespassed into the suit properties and took forcible decision.

4. The respondents claimed that the appellant or her predecessors-in-interest had no title or possession of the suit property and that the said properties are not identifiable. They claimed that 1.40 acres in R.S No. 24/1 and 1.50 acres in R.S

No.14/2 were obtained by one Kunhiraman in the year, 1966. Out of the said properties, the deceased first respondent/first defendant acquired 90 cents in R.S No. 24/1 and 1.50 acres in R.S No. 14/2 as per Ext.B2, assignment deed of the year, 1974. The deceased first defendant filed O.S. No.100 of 1976 in the Munsiff's Court, Paravur against the appellant, her husband and others for a decree for prohibitory injunction concerning the properties claimed to be acquired by the deceased first defendant as per Ext.B2, assignment and obtained a decree. According to the respondents, the finding entered by the learned Munsiff, Payyannur in O.S. No. 100 of 1976 concerning title and possession claimed by the deceased first defendant over the properties covered by Ext.B2, assignment deed operated as res judicata over the present suit . Various other contentions were also raised by the respondents and the deceased first defendant.

5. The trial court found that the appellant was not able to prove the title she claimed over the plots marked as ABCDEF and AFEDGH in Ext.C1, plan. So far as the rest of the property is concerned, the trial court was of the view that the appellant has proved her title and possession. But, the suit was dismissed.

6. Appellant challenged dismissal of the suit in A.S. No. 96 of 1993. The respondents, aggrieved by the finding of the trial court regarding plea of res judicata preferred a cross objection. The first appellate court dismissed the appeal and the cross objection. The appellant is aggrieved by the dismissal of the appeal and has preferred the second appeal with the above substantial questions of law urged for a decision.

7. The learned counsel for the appellant has contended that the courts below having found title of the suit properties with the appellant, could not refuse recovery of possession of the suit property. It is also argued by the learned counsel that finding of the courts below that title of the deceased first defendant over the property he claimed as per Ext.B2 was found in his favour in O.S. No. 100 of 1976 is not correct. According to the learned counsel, identity of the properties is not established. It is not shown that the properties referred to in O.S. No.100 of 1976, are the properties shown by the Advocate Commissioner as plots ABCDEF and AFEDGH. In the circumstances, the courts below could not have entered a finding based on the judgment in O.S. No. 100 of 1976 that the said plots belonged to the deceased

first defendant. It is also argued by the learned counsel that at any rate, the courts below ought to have granted relief to the appellant with respect to the suit property other than two plots above stated.

8. The learned counsel for the respondents has contended that finding of the courts below regarding res judicata is not correct. It is argued that a perusal of Ext.B1, judgment in O.S. No. 100 of 1976 would show that in that case, title claimed by the deceased first defendant over the suit property therein which is identified by the Advocate Commissioner in Ext.C1 as plots ABCDEF and AFEDGH was found in his favour and hence claim of the appellant for title over the said plots cannot be entertained or enquired into. It is also argued by the learned counsel that there was no dispute regarding identity of property in O.S. No. 100 of 1976 as revealed by the discussions and finding on issue No.1 in that case. It is argued by the learned counsel that the Advocate Commissioner with the assistance of a Surveyor has identified the property claimed by the deceased first defendant as per Ext.B2 as plots ABCDEF and AFEDGH. Therefore, the finding of the courts below that the deceased first defendant has

title over the said plots requires no interference. It is also argued by the learned counsel that so far as rest of the property is concerned, though the deceased first defendant or the respondents did not make any claim of title, since the appellant has claimed recovery of possession of that portion of the suit property also on the strength of title, it was up to the appellant to prove the same which has not been done and hence dismissal of the suit concerning that portion of the suit property is also justified.

9. I have referred to the claim made by the parties as to the derivation of title with respect to the suit properties. I also stated that the deceased first defendant is claiming title and possession of 90 cents in resurvey No.26/1 and 1.50 acres in re-survey No.14/2 by virtue of Ext.B2, assignment deed of the year, 1974. It is admitted and proved by Ext.B1, judgment and Ext.A30 decree that the deceased first defendant has filed O.S. No. 100 of 1976 against the appellant, her husband and others for a decree for prohibitory injunction. In Ext.B1, it is stated by the learned Munsiff in paragraph 12 that though an issue regarding identity of the property was raised in O.S. No. 100 of

1976, in fact no such issue arose having regard to the contention the appellant, her husband and others had raised as defendants in O.S. No. 100 of 1976. It is further pointed out in paragraph 12 of Ext.B1, judgment that the boundary description given in the plaint schedule (of O.S. No. 100 of 1976) for the suit properties are correct and that item No.1 therein had an extent of 90 cents in RS No. 24/1. Item No.2 in O.S. No.100 of 1976 is described as having an extent of 1.50 acres in R.S. 14/2. The learned Munsiff concluded that when there was no contention that the description given in the plaint schedule (of O.S. No. 100 of 1976) are incorrect, it has to be taken that the properties are correctly described therein.

10. Now the contention advanced by the learned counsel for the appellants is that it is not shown that item Nos. 1 and 2 in O.S. No. 100 of 1976 are plots ABCDEF and AFEDGH in Ext.C1, plan. The learned counsel has invited my attention to Ext.C2, report submitted by the Advocate Commissioner. I stated that the property of which the deceased first defendant claimed title and possession as per Ext.B2, is 90 cents out of the 1.40 acres in R.S . No.24/1 and the 1.50 acres in R.S. No. 14/2. It is revealed

from Ext.B1, copy of judgment in O.S. No. 100 of 1976 and in particular the observation in paragraph 12 concerning issue No.2 relating to the identity of the property that the deceased first defendant claimed title and possession in O.S. No. 100 of 1976 concerning the 90 cents in R.S. No. 24/1 and the 1.50 acres in R.S. No. 14/2 (item Nos. 1 and 2 in O.S. No. 100 of 1976). It is the very same property the deceased first defendant claimed title and possession in the present suit as per Ext.B2. In Ext.C2, the Advocate Commissioner has reported that the deceased first defendant claimed (title and possession of) 90 cents in R.S. No. 24/1 and 1.50 acres in 14/2. Reference was made by the Advocate Commissioner to Ext.B2, assignment deed of the deceased first defendant. The Advocate Commissioner stated that description of the property in Ext.B2 is kaipadunilam and Padinjarekaipadunilam, respectively. The boundary description of the above documents are tallying with the survey as regards item No.1 i.e. 90 cents in R.S. No. 24/1, but the boundary shown (in Ext.B2) for item No.2 (i.e. 1.50 acres in R.S. No. 14/2) is not tallying with survey. On survey, it is kaipadu land of R.S. No. 1/2 (2.65 acres) on the west and on the north (of the 1.50 acres in

R.S. No. 14/2), it is mentioned as “ ഇതിൽ ഭൂശാസ്ത്ര സ്ഥലം” without mentioning anybody's possession.

11. From the above, it is argued by the learned counsel for the appellant that there is no proper identification of the 90 cents in R.S. No. 24/1 and the 1.50 acres in R.S No. 14/2. To resolve that issue, it is necessary to refer to Ext.C1, plan as well. In Ext.C1, the 90 cents in R.S No. 24/1 is identified and located by the Advocate Commissioner and shown as plot ABCDEF. The plot measuring 1.50 acres in R.S. No. 14/2 is shown as AFEDGH on the immediate north of the 90 cents referred above. On the west of plot AFEDGH is the kaipadu land in R.S. No. 1/2. It is therefore that the Advocate Commissioner stated in Ext.C1 that the boundary description of the 1.50 acres in R.S. No. 14/2 in Ext.B2 did not tally with the survey boundary on measurement.

12. True, on the west of the 1.50 acres in R.S. No. 14/2, the Advocate Commissioner has shown the property described as kaipadu land and falling in R.S. No.1/2 (in Ext.C2 , plan). But, from that alone I find myself unable to accept contention of the learned counsel for the appellant that identity of the 1.50 acres in R.S. No. 14/2 is not established. I must also notice from the

plaint schedule that the appellant is not claiming any right over the property comprised in R.S. No.1/2. Therefore, the discrepancy the Advocate Commissioner has noticed in Ext.B2 and in Ext.C1, plan as to the western boundary of the 1.50 acres in R.S. No. 14/2 need not mean that the said plot has not been properly identified. So far as the northern boundary of the 1.50 acres in R.S. No. 14/2 is concerned, the Advocate Commissioner has in Ext.C2 pointed out that the northern boundary is mentioned as “ഇതിൽ ശേഷം സ്ഥലം ” (in Ext.B2) without mentioning anybody's possession. It is revealed from Ext.C1. plan that on the north of the 1.50 acres in R.S. No. 14/2 (AFEDGH plot in Ext.C1) is the rest of property comprised in R.S. No. 14/2. That is why in Ext.B2, northern boundary of the 1.50 acres in R.S. No. 14/2 is described as “ ഇതിൽ ശേഷം സ്ഥലം”. I do not find any discrepancy as regards northern boundary of 1.50 acres in R.S. No. 14/2.

13. I must also notice that it is concerning the very same plots that the deceased first defendant had filed O.S. No. 100 of 1976 I have referred to the finding the learned Munsiff has

entered with respect to issue No. 3 in O.S. No. 100 of 1976 concerning identity of the suit property therein and the finding based on the contention in the written statement filed by the appellant and her husband and others that there was no dispute regarding identity of the property in O.S. No.100 of 1976. In the circumstances, the contention that the suit properties in O.S. No. 100 of 1976 are not shown to be the plots AFEDGH and ABCDEF in Ext.C1, plan cannot be accepted. I must also remember that Exts. C1 and C2 were prepared by the Advocate Commissioner and the Surveyor with notice to the appellant also. But no attempt was made to examine the Advocate Commissioner or the Surveyor and discredit Ext.C1 and C2. Therefore, the contention regarding identity of the property cannot be sustained.

14. The next question is whether the appellant is entitled to recover possession of plots ABCDEF and AFEDGH in Ext.C1, plan. I stated that so far as the said items are concerned, the deceased first defendant has claimed title and possession as per Ext.B2. According to the respondents, an enquiry as to title over the above said plots is not permissible in view of the finding in

O.S. No. 100 of 1976 as revealed by Ext.B1, judgment. In Ext.B1, judgment, though the suit was simply for prohibitory injunction, issue No.1 framed was whether the plaintiff in that suit (the deceased first defendant herein) has title or possession to the suit properties. That issue was considered by the learned Munsiff in paragraph 13 onwards. It is held by the learned Munsiff that item Nos. 1 and 2 (in O.S. No. 100 of 1976, i.e. 90 cents in R.S. No. 24/1 and 1.50 acres in R.S. No. 14/2) were outstanding in the possession of Ayisumma on jenm right and the legitimate conclusion that follows is that Kuhiraman (assignor of the deceased first defendant under Ext.B2) acquired valid right over the said items. in Ext.B14 (marked in O.S. No. 100 of 1976) assignment deed dated 07.2.1966 and that the said KunhIRaman was in possession of those items till he parted with his right under Ext.A2 (Ext.B2 herein) to the deceased first defendant. In other words learned Munsiff has upheld the title claimed by the deceased first defendant as plaintiff in O.S. No. 100 of 1976 concerning item Nos. 1 and 2 in O.S. No. 100 of 1976 i.e. 90 cents in R.S. No. 24/1 and 1.50 acres in R.S. No14/2.

15. In the present litigation also the learned Munsiff has

held that appellant has no title over plots ABCDEF and AFEDGH in Ext.C1, plan.

16. The first appellate court also found that in view of Ext.B1, judgment, the appellant cannot claim any right over the plots marked as ABCDEF and AFEDGH in Ext.C1, plan. The first appellate court has also referred to Ext.B2, assignment deed in favour of the deceased first defendant in paragraph 15 of the judgment to state that predecessor-in-interest of the deceased first defendant had title over the said plots and that it followed that appellant has failed to prove title claimed by her over the said plots.

17. In the light of the finding in Ext.B1, judgment which I have already adverted to concerning title claimed by the deceased first defendant over the 90 cents in R.S. No. 24/1 and the 1.50 acres in R.S. No.14/2 which were item Nos. 1 and 2 in O.S. No. 100 of 1976 and identified by the Advocate Commissioner in Ext.C1 as plots ABCDEF and AFEDH, claim of the appellant for recovery of possession of those items was rightly negatived by the courts below. I do not find reason to interfere with the said finding.

18. What remains is the claim made by the appellant over the suit property other than plots marked by the Advocate Commissioner in Ext.C1 as ABCDEF and AFEDGH. So far as that portion of the suit property (excluding the said plots) is concerned, the respondents or the deceased first defendant have no claim of title or possession. The learned counsel for the respondents has also asserted so. That is why the courts below did not grant relief with respect to the remaining portion of the suit property in favour of the appellant. In the circumstance, no recovery of that portion of the suit property is called for. The first appellate court also observed that in the light of the above finding, no interference is required with the judgment and decree of the trial court regarding that portion of the suit property other than plots ABCDEF and AFEDGH as well.

19. In so far as the respondents or the deceased first defendant has no claim of title or possession of any portion of the suit property other than plots marked ABCEDF and AFEDGH in Ext.C1, plan, no relief could and need be granted to the appellant with respect to such remaining portion of the suit property. It is open to the appellant to seek appropriate relief

with respect to that portion of the suit property other than plots marked as ABCDEF and AFEDGH in Ext.C1, plan in other appropriate proceedings as the law permits if such a course is found necessary.

20. The substantial questions of law framed are answered accordingly.

Resultantly,

- 1) The second appeal is dismissed.
- 2) Parties are directed to suffer their respective cost.
- 3) It is made clear that if law permits and circumstances required, it is open to the appellant to seek appropriate relief with respect to that portion of the suit property other than the plots ABCDEF and AFEDGH marked in Ext.C1, plan.

Sd/-
THOMAS P.JOSEPH,
JUDGE

smv

//True copy//

P.A. To Judge