IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE N.K.BALAKRISHNAN

THURSDAY, THE 28TH DAY OF FEBRUARY 2013/9TH PHALGUNA 1934

SA.No. 483 of 2002 ( )

AGAINST THE JUDGMENT IN AS.20/1991 of SUB COURT, MANJERI DATED 29-11-2001

AGAINST THE JUDGMENT IN OS.491/1986 of MUNSIFF COURT, MANJERI DATED 25-8-1990

APPELLANT(S)/PLAINTIFFS/RESPONDENTS::

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1. **RAGHAVAN, S/O. KOCHUKUNJU, PULITHITTETH, AGED 76 YEARS, RESIDING AT EDAKKARA AMSOM DESOM, ERNAD TALUK, MALAPPURAM DIST.**

2. **NARAYANI, D/O. KUNHU KUNHU, AGED 67 YEARS, PULITHITTETH, RESIDIG AT EDAKKARA AMSOM DESOM, ERNAD TALUK, MALAPPURAM DIST.**

BY ADV. SRI.K.M.SATHIANATHA MENON

RESPONDENT(S)/DEFENDANTS::

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1. **THOTTUNGALL DAVOOD, S/O. SAIDU, AGED 60 YEARS, CHUNGATHARA AMSOM DESOM, ERNAD TALUK MALAPPURAM DISTRICT.**

2. **CHALIL PATHUMMA, W/O. LATE PUTHUPARAMBIL MUHAMMED KUTTY AGED 49 YEARS, RESIDING AT CHEMBANKOLLI EDAKKARA VILLAGE.**

3. **SOUDABI, D/O. MUHAMMED KUTTY, AGED 22 YEARS, RESIDING AT -DO- -DO-.**

4. **SUHARABI, D/O. MUHAMMED KUTTY, AGED 18 YEARS, RESIDING AT -DO- -DO-.**

5. **MUHAMMED MUSTHAFA, S/O. MUHAMMED KUTTY, AGED 15 YEARS RESIDING AT -DO- -DO-.**

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6. BEEPATHU, D/O. MUHAMMED KUTTY,
AGED 49 YEARS, RESIDING AT -DO- -DO-.

R2 TO R6 BY ADVS. SRI.A.P.CHANDRASEKHARAN (SR.)
SMT.PRABHA R.MENON
SRI.PUSHPARAJAN KODOTH
SRI.M.KRISHNAKUMAR
SRI.K.JAYESH MOHANKUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 28-02-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JJJ

N.K. BALAKRISHNAN, J.

S.A. No: 483 of 2002

Dated this the 28th day of February, 2013

J U D G M E N T

Plaintiffs in a suit for injunction are the appellants. The plaint schedule property was purchased by the plaintiffs as per Ext.A1 sale deed. Plaintiffs contend that they are in possession of the plaint schedule property. Suit was filed since the defendants attempted to trespass into the northern portion of the plaint schedule property and attempted to cut the teak trees standing in the boundary inside the property of the plaintiffs. The defendants filed written statement disputing the plaintiff's right over the teak trees and the possession of the land.

2. PWs 1 and 2 were examined and Exhibits A1 and A2 were marked on the side of the plaintiffs. DW1 was examined on the side of the defendants and Exhibits B1 to B4(c). Commissioner's report and plan were marked as C1

and C2. The learned Munsiff, after appreciating the evidence especially the observations made by the Commissioner in Ext.C1 report, held that the teak trees in question were situated within the property of the plaintiffs and that the line XY shown in Ext. C2 plan is the boundary separating the plaintiffs' property from the defendants property. Hence, the suit was decreed.

3. The lower appellate court found that the extent and measurement of the property up to the line marked as XY could not be ascertained and that Ext.C2 plan does not enable identification of the plaint schedule property on the basis of extent and measurement. It was thus found that it is not possible to hold that the plaintiff's property extended up to the line XY shown in Ext.C2 sketch and thus the appeal was allowed, dismissing the suit.

4. The learned counsel for the plaintiffs/appellants submits that since the suit is for injunction simplicitor, possession of the property alone was the crucial point to be decided. Even the defendants had no contention, when the Advocate Commissioner inspected and measured the property, that the entire property should be measured. In fact, no dispute was raised by the defendants regarding the plaintiff's right and possession of the plaint schedule property obtained under Ext.A1 title deed. Ext.C1 report will clinch the issue as to the possession set up by the parties to the suit.

5. In Ext.C2 plan, the Commissioner has marked the line XY, which according to the plaintiffs is the eastern boundary of their property along the north-eastern portion of their property. Going by the boundary shown in Ext.A1, according to the learned counsel for the appellants, the boundaries of the property tally with the boundary and

description shown in Ext.A1 and in the plaint. The western boundary is the property of Velayudhan. Varkey Devassy's property forms the southern boundary. On the eastern side there is the property of Sainudeen and also the property of the defendants, which were formerly in the possession of Ahammedkutty. A major portion of the northern side of the A schedule property is the property of the 1st plaintiff's brother - Kesavan.

6. It was argued on behalf of the defendants that the property of Chembankolli mosque is not shown as northern boundary of the property in Ext.A1 whereas the property of Chembankolli mosque forms the northern boundary of the line AY shown in Ext.C2 plan. It is true that PW1 also could not give a proper explanation regarding that fact. But it is argued by the learned counsel for the appellants that no acceptable evidence is there to show when actually Chembankolli mosque was constructed. The learned

counsel for the respondent submits that in the title deed of the defendant (Ext.B2) which was executed about 3 weeks prior to Ext.A1, the northern boundary was shown as the property of the Mosque. Simply based on the fact that the property lying to the north of the line AY is the property of Chembankolli mosque, it cannot be said that the plaintiff's possession of the property did not extend up to XY. There is no material to show when exactly the mosque was built to enable the parties to state that it was the property of the Mosque. No physical visible boundary as such was pointed out along the line AX. Though DW1 has stated that there is a varamba/ridge, no such varamba/ridge could be pointed out to the Advocate Commissioner. On the other hand, it was observed by the Commissioner that the property lying to the west of the line XY is on a higher level. But the property lying to the east of XY line is in the lower level. DW1, examined on the side of the defendants, had no idea

about the property. He says that the disputed property slopes towards west whereas the Advocate Commissioner has reported, and PWs 1 and 2 would also state, that the property has declivity towards east.

7. It was specifically reported by the Advocate Commissioner in paragraph 4 (last) that on appearance the teak trees were seen standing at a higher level when compared to the low lying area on the eastern side of the XY line. It was also reported that fifteen teak trees and one Poola tree were found on the XY line, which were seen as the boundary and that it did not form part of the low lying area by appearance. Further, it was reported that rubber trees on the eastern side and western side of XY line appear to be of different age. It was also noted that the rubber trees on the eastern side of XY line were seen neatly kept on the clear felled terrace in rows in north-south direction. But such a neat maintenance of clear cut rows or terrace

was not seen in the property on the western side of XY line. Evidence given by PW1 would show that the rubber trees in their property lying to the west of XY line were not planted in rows but were planted here and there in a scattered way. Difference in the age of the trees and the nature of possession, nurturing, maintenance done etc to the rubber trees would sufficiently indicate that the property lying to the west of XY line was possessed by the plaintiffs and that the property lying to the east of the line of XY was held and possessed by the defendants. Therefore, the lie, position and nature of the land and improvement and acts of possession exercised by the parties and nature of cultivation raised would sufficiently show that line XY was the demarcating line of the property of the plaintiffs' from that of the defendants'.

8. It is argued by the learned counsel for the respondents that since the suit is for injunction, the burden

is on the plaintiffs to prove their right and possession over the disputed property and that the property claimed by the plaintiffs, on the strength of Ext.A1, was not identified and measured with reference to the survey number and boundaries mentioned in the document and also with reference to the survey records and as such it cannot be found that line XY is the boundary line of the property claimed by the plaintiffs. It is further argued that it was because the plaintiffs did not get the property measured with reference to the boundaries, extent and survey number and got it located in the plan, the lower appellate court reversed the judgment and decree of the trial court and as such it cannot be said that the lower appellate court was wrong in dismissing the suit.

9. But the learned counsel for the appellants would submit that no objection, what so ever, was filed to Ext.C1 report and Ext. C2 plan. DW1, who was examined to speak

the case of the defendant, also did not attack the report and plan submitted by the Commissioner. No specific question was put to PW1 regarding Exts.C1 and C2 filed by the Advocate Commissioner. Since no objection was filed to Ext.C1 report and Ext.C2 plan submitted by the Advocate Commissioner, it is too late in the day to contend that Ext.C1 report and Ext.C2 plan cannot be used to prove the case of possession set up by the plaintiffs. It is worthwhile to note that when the Advocate Commissioner inspected the property, both sides did not request the Commissioner to have the property measured and the representation made by them to the Commissioner was that the dispute was only pertaining to the teak trees situated along the boundary; namely XY line shown in Ext.C2 plan. The salient features evidencing acts of possession of the property held by the plaintiffs up to the boundary line XY has been delineated earlier. There was no physical demarcating boundary along

the line AY. The existence of the level difference to the east of the line XY did indicate the boundary of the property held by the plaintiffs and defendants. The difference in the nature of the improvements and the acts of possession would also show that the plaintiffs were in possession of the property up to the line XY shown in Ext.C2.

10. Since it is a suit for bare injunction and since the dispute was pertaining to that small triangular portion, the parties focused their attention, at the time of trial, only to that small bit of land. Since the parties were not at issue regarding the remaining part of land held by the plaintiffs and defendants and since the suit is not for declaration of title and consequential relief, it is not necessary to delve deeper into the question of title.

11. The fact that the plaint was not amended in accordance with the report and plan submitted by the Commissioner has been projected very much by the learned

counsel for the defendants/respondents to contend that going by the boundaries shown in the plaint, the teak trees were situated around the northern boundary whereas the line XY is situated on the eastern side and so it should have been amended accordingly. But it is pertinent to note that line XY though is on the eastern boundary; it is only a part of the eastern boundary situated on the northern most portion. It is important to note that the properties are situated in a hilly area where the properties are not lying exactly in the north-south or east-west direction. Since the parties had no dispute as to the exact bone of contention and since there were no teak trees so planted in any other portion of the property forming the boundary of the plaintiff's property, the contention that as the plaint was not amended the plaintiffs are not entitled to get a decree also cannot be sustained, since the line XY forms only a small portion of the eastern boundary at its northern most

portion. Though Ext.C2 plan is not a plan drawn according to the survey measurement, since the parties did not have any objection regarding the lie and position of the row of teak trees and the boundary formed by the level difference; if Ext. C2 plan itself forms part of the decree, there could be no difficulty to get the decree executed if necessity arises.

12. The trial court had the opportunity to assess the evidence given by PW1, PW2 and DW1. PW2 was examined by the plaintiffs to say that Ramalingam, who sold the property to the plaintiffs, was holding the property up to the line XY. He has also deposed regarding the nature of the property; to say that the property lying to the west of the line XY is different referring to the age, variety and nature of improvements. These aspects were taken note of by the trial court for granting a decree for injunction against the defendants. The lower appellate court was not justified in reversing the findings so entered by the trial court.

In the result, this Second Appeal is allowed. The decree and judgment of the lower appellate court is set aside, while that of the trial court is restored. But it is made clear that the question of title is not considered and is left open. Ext.C2 plan will form part of the decree. Parties are directed to suffer their respective costs.

Sd/-
N.K. BALAKRISHNAN,
JUDGE

//True Copy//

P.A. to Judge

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