IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

TUESDAY, THE 31ST DAY OF AUGUST 2021 / 9TH BHADRA, 1943

RSA NO. 15 OF 2006

[Against the judgment and decree dtd. 4th July,2003 in AS 80/1998 on the file of the Sub Court, Thalassery and the judgment and decree dtd. 4th April,1998 in OS 265/1995 on the file of the Munsiff's Court, Kuthuparamba]

APPELLANT/RESPONDENT/DEFENDANT:

THANNICKAL CHACKO, S/O.JOSEPH,
KOTTIYOOR AMSOM DESOM,
P.O.CHUNKAKUNNU,THALASSERY TALUK.

BY ADVS.
SRI.A.ANTONY
SMT.LEELAMMA ANTONY

RESPONDENTS/APPELLANTS/PLAINTIFFS:

1 THANNICKAL ANNAKUTTY, W/O.LATE JOHN,
THANNICKAL HOUSE, KOTTIYOOR AMSOM DESOM,
P.O.KOTTIYOOR, THALASSERY TALUK.

2 LISSY CHACKO, W/O.CHACKO, PUNJAKUNNEL.P.O.,
CHITTARIPARAMBA, KELAKAM AMSOM DESOM,
THALASSERY TALUK.

3 BABU JOHN, S/O.JOHN, THANNICKAL VEEDU,
KOTTIYOOR AMSOM DESOM.

4 MARY JOHN, W/O.PAUL KURIEN,
CHOORAKKKATHADATHIL, KELAKOM AMSOM DESOM.

5 JOSEPH.T.J. S/O.JOHN, THANNICKAL VEEDU,
KOTTIYOOR AMSOM DESOM.

6 JOHNSON T.J. S/O.JOHN,
THANNICKAL VEEDU, KOTTIYOOR AMSOM DESOM.

7 MARTIN T.J. S/O.JOHN,
THANNICKAL VEEDU, KOTTIYOOR AMSOM DESOM.

8 LIJI JOHN D/O.JOHN,
THANNICKAL VEEDU, KOTTIYOOR AMSOM DESOM.

BY ADVS.
SRI.K.V.SOHAN
SMT.SREEJA SOHAN.K.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 09.08.2021, THE COURT ON 31.08.2021 DELIVERED THE FOLLOWING:

J U D G M E N T

This appeal is directed against the judgment and decree dated 4th July,2003 in AS 80/1998 on the file of the Sub Court, Thalassery (hereinafter referred to as 'the first appellate court') reversing the judgment and decree dated 4th April,1998 in OS 265/1995 on the file of the Munsiff's Court, Kuthuparamba (hereinafter referred to as 'the trial court'). Appellant is the defendant. The suit was for permanent prohibitory injunction restraining the defendant from trespassing into the plaint schedule property and in the alternative, for recovery of possession. The trial court dismissed the suit. The appeal taken

before the first appellate court was allowed against which this second appeal has been filed.

2. The suit was filed alleging inter alia that the plaint schedule property belongs to John, the husband of the first plaintiff, who is the father of plaintiffs 2 to 4. About two years prior to the institution of suit, John died and thereafter, they have been in possession of the plaint schedule property as his legal heirs. The defendant is the direct brother of said John and he is holding a property on the immediate west of the plaint schedule property. The plaint schedule property has got well defined boundaries on

all four sides. The defendant is residing in a house situated in the property lying immediately west of the plaint schedule property. There is a road on the immediate east of the plaint schedule property. About five years back, a road commencing from this road and leading to defendant's house was constructed, which has got a width of about 8 feet. A portion of the said road was brought into existence with the consent of deceased John and lies east-west in the plaint schedule property and the defendant is using this portion of the road as permitted by deceased John and later by the plaintiffs. Since the defendant sought permission for planting

certain plantains in the plaint schedule property, and the permission was declined by the plaintiffs, the parties were not in good terms. The defendant threatened that he will trespass into the plaint schedule property and cultivate plantain therein disregarding their objection. Hence, the suit was filed.

3. The defendant had filed a written statement contending that the plaint schedule property does not belong to the plaintiffs. The plaint schedule description is denied. According to the defendant, out of the entire property of 3½ acres including the plaint schedule property originally belongs to Thannikkal

John. Two and a half acres was assigned by him to the defendant in 1971 and the remaining 1 acre was also given possession to the defendant fixing a consideration of Rs.6000/- and receiving an advance amount of Rs.500/- in 1976. Later, the said John received remaining consideration of the property and since then the property has been in the absolute possession and enjoyment of the defendant. Due to some difficulty for meeting the expenses in connection with the execution and registration of the assignment deed, the document could not be executed and registered in respect of plaint schedule property having an extent of 1 acre of

land. The defendant contended that he is entitled to get right and possession over the property based on the principles of part performance under Section 53A of the Transfer of Property Act. The plaint schedule property and remaining property of the defendant are all possessed as single unit within well defined boundaries. There is a house in the property in which the defendant has been residing with his family. It was further contended that the plaintiffs' rights, if any, have been lost by adverse possession and limitation. The allegation that the road was constructed to the house of the defendant connecting the eastern road about 5 years back with the

consent of John is unproved. The road was constructed by the defendant through his own property. According to the defendant, the plaintiffs have not been in possession of any property near to the defendant's property.

4. The trial court framed requisite issues for trial. During the trial, Power of Attorney Holder of the first plaintiff was examined as PW1 and PWs.2 and 3 were examined and marked Ext.A1 to A7 on the plaintiffs' side. DWs.1 to 3 was examined on defendant's side and marked Exts.B1 to B5. The Commissioner was examined and marked Exts.C1 to C4. Exts.X1 to X7 were also marked.

5. The trial court dismissed the suit holding that the plaintiffs have not proved the case and the defendant is entitled to get protection under Section 53A of the Transfer of Property Act,1882 (hereinafter referred to as 'the T.P.Act'). The first appellate court, on appeal, reversed the judgment and decree of the trial court holding that Section 53A of the T.P.Act is not available to the defendant and the plaintiffs have proved the factum of possession on the date of suit over the plaint schedule property. Hence, this Second Appeal.

6. Heard Smt.Leelamma Antony, learned counsel for the appellant and

Sri.K.V.Sohan, the learned counsel for the respondents.

7. Learned counsel for the appellant contended that the plaintiffs' predecessor deceased John executed an agreement with respect to the plaint schedule property in the name of the defendant and on that basis the defendant has been put in possession of the plaint schedule property. According to the learned counsel, none of the plaintiffs entered in the witness box to give evidence. The evidence in the case in support of the plaintiffs is that of their Power of Attorney. In the facts and circumstances of the case, according to the learned counsel, the first appellate court

went wrong in reversing the judgment and decree holding that Section 53A of the T.P.Act is not applicable.

8. Per contra, the learned counsel for the respondents submitted that no reliable evidence was adduced by the defendant to prove the agreement between the predecessor of the plaintiffs and the defendant to substantiate the factum of Part performance as contemplated under Section 53A of the T.P.Act. The learned counsel for the respondents would further submit that the plaintiffs have got absolute right over the plaint schedule property subsequent to the death of John by virtue of Exts.A1 to A7 documents. It was contended that the

plaintiffs proved their title over the plaint schedule property and the first appellate court reversed the decree granting recovery of possession from the defendant.

9. When this appeal came up for admission on 26.8.2009, this Court admitted the appeal on the following substantial questions of law.

i. None of the plaintiff entered the witness box to give evidence. The evidence in the case in support of the plaintiff is that of their power of attorney who was examined as PW1 in the case. In view of the same, has not the court below gone wrong in law in relying on his evidence for upsetting the decree and judgment of the trial court (Vide AIR 2005 SC 439);

ii. In the facts, evidence and circumstance is it not the court below went wrong in holding that the

defendant has not proved the claim under Section 53A of the T.P,.Act;

iii. Whether the averments in the plaint is sufficient to grant a decree for recovery of possession;"

10. Certain facts are admitted. An area of 3½ acres of the property originally belonged to late John, the husband of the first plaintiff and the father of plaintiffs 2 to 4. The defendant is none other than the brother of late John. The parties are closely related. Subsequent to the death of John, plaintiffs, who are the legal heirs of late John, are entitled to succeed his assets. They have claimed exclusive right over the entire property as legal heirs of late John. It is the case of the plaintiffs that after the death of John, the defendant, who is their father's

brother, requested them to grant permission for cultivating the plaint schedule property. According to them, they did not accede to his request. They would say that infuriated for the above said reason, the defendant made an attempt to trespass into the plaint schedule property which necessitated in filing the suit.

11. The defendant contended before the trial court that he has been in absolute possession and enjoyment of the plaint schedule property on the strength of a sale agreement executed by deceased John way back in 1976 and pursuant thereto, he has been in possession of the plaint schedule property. He admitted that the

plaint schedule property forms part of an area of 3½ acres of property originally belonged to his brother John. According to him, the property, excluding the plaint schedule property, was purchased by him from deceased John by virtue of Ext.X1 assignment deed dated 3.3.1971. Ext.X1 indicates that the defendant obtained title over an area of 2.50 acres of property from the predecessor of the plaintiffs by virtue of Ext.X1. Admittedly, the remaining property is scheduled as one acre in the plaint. During the trial stage, a Commissioner was deputed to measure out the property and the Commissioner filed report and plan. Relying on the commission report

and plan, the plaintiff amended the plaint schedule property limiting the area as 87 cents.

12. To support the plea of the defendant, Ext.B2 agreement dated 30.7.1984 was produced before the trial court to show that the remaining area of the property was in the possession of the defendant pursuant to Ext.B2. What was produced before the trial court was Ext.B2 agreement dated 30.7.1984 in which reference was made in respect of a previous agreement of the year 1976. PW1, who is the son-in-law of the first plaintiff, denied execution of Ext.B2 agreement before court. He also denied the signature in Ext.B2. To contradict the

version of PW1, the defendant produced a letter allegedly sent by the first plaintiff to one Mathew, who is the brother of the defendant and deceased John. The defendant strongly relied on Ext.B1 letter and Ext.B2 agreement. In Ext.B1 letter, it is admitted that the defendant had cut and removed the entire trees in the the plaint schedule property. The execution of Ext.B1 letter was not denied. In Ext.B1 letter, reference was made in respect of an agreement of the year 1976. On a reading of Ext.B1 letter, it is difficult to hold that the reference was made in respect of the plaint schedule property. It is a fact that late John assigned an area of 2.5

acres of property to his brother- the defendant. When 2.5 acres of property was assigned to his brother by late John, the defendant would be obliged to show the circumstances warranting to execute an agreement in 1976 in respect of the balance area owned by late John. In fact, the agreement of the year 1976 was not produced. Instead, Ext.B1 letter was produced to show that such an agreement was executed. However, Ext.B1 does not specifically provide that the agreement was in respect of the plaint schedule property. When a plea of specific performance is set up based on an agreement, the burden is on the part of the defendant to prove the

alleged agreement before the court. In fact, the agreement alleged to have been executed by deceased John in 1976 was not produced before the Court. Instead, Ext.B2 agreement of the year 1984 was produced. The execution thereof was denied by the plaintiffs.

13. During the trial of the case, the defendant set up a case that late John executed an agreement for sale way back in 1971 agreed to sell the the plaint schedule property for a total consideration of Rs.6000/- on receiving Rs.500/- as consideration. According to the defendant, he paid the balance consideration. Although the defendant set up an agreement

for sale and passing of possession thereunder from 1971 onwards, the alleged agreement was not produced before the court as an evidence. As rightly held by the first appellate court, the defendant did not raise such a plea in the written statement as well. No specific date was mentioned in the written statement. No plausible explanation was offered for not producing the agreement before the trial court. Although Ext.B1 letter was produced, Ext.B1 mentions about an agreement of the year 1976. Ext.B1 has no nexus or connection with the alleged agreement of the year 1971. In view of the contentions raised by the defendant during

the trial, it is explicitly clear that the defendant set up three agreements to non-suit the plaintiff. The three agreements are of the year 1971,1976 and 1984 respectively, out of which Exts.B2 agreement dated 30.7.84 alone was produced by the defendant.

14. In Ext.B2 agreement, it is stated that out of 3.5 acres of property belong to John, an assignment deed waa executed in the name of the defendant with respect to 2.5 acres of property and regarding the balance one acre of the property, John had executed an agreement for sale in favour of the defendant for a consideration of Rs.6000/-. Strange as it

may sound, in Ext.B2, it was further stated that the sale consideration was paid to John and he had agreed to execute sale deed as and when demanded. John, being the brother of the defendant, it was the duty on the part of the defendant to offer an explanation as to why his brother did not execute the sale deed in his favour despite the receipt of entire sale consideration pursuant to Ext.B2 agreement. At the same time, the defendant took sufficient precaution to execute a sale deed in his favour in respect of 2.5 acre of property from the aforesaid John. When he was examined, he admitted that he purchased an adjacent property in the year 1979 as per

Ext.B3 document in the name of his wife. Under the circumstances, the first appellate court refused to believe the version of the defendant that he had financial difficulties to get the sale deed executed in his favour.

15. To prove that the defendant has been in possession of the suit property for a considerable long period of time, an attempt was made during trial that an area of 2½ acres of property which the defendant got assignment from John as per Ext.X1 was mortgaged with the Co-operative Bank, Thalassery for availing a loan. According to him, the entire property including the plaint schedule property was mortgaged.

However, the documents produced from the bank would inter alia show that what was mortgaged by deposit of title deeds is only in respect of the property covered under Ext.X1 and not in respect of the property scheduled in the suit.

16. In an attempt to sustain the plea of part performance, DW3 was examined to show that the defendant entered into an agreement with him pertaining to the rubber trees situated in the plaint schedule property. Ext.X4 agreement was produced before the court through DW3 allegedly executed on 15.8.1993 between the defendant and DW3. As per Ext.X4, old rubber trees in the plaint schedule property were sold

to DW3. The first appellate court refused to act upon Ext.X4 agreement presumably for the reason that DW3 produced Ext.X4 before the court in collusion with the defendant. The first appellate court held that Ext.B2 agreement and Ext.X4 agreements are suspicious in nature.

17. In a case where the defendant claims the benefit of part performance, evidence that he was inducted into possession for the first time subsequent to the contract would be a strong piece of evidence regarding the contract. It is true that the contract need not contain a direct covenant regarding the transfer of possession. It is only necessary that

possession should have been taken in part performance of the contract.

18. So far as Section 53A of the T.P.Act is concerned, the Section provides for a shield of protection to the proposed transferee to remain in possession against the original owner, who has agreed to sell the transferee, if the proposed transferee satisfies other conditions of Section 53A.

19. The following postulates are sine qua non for basing a claim on Section 53A of the T.P.Act.

i. **There must be a contract to transfer for consideration any immovable property.**

ii. **The contract must be in writing, signed by the transferor, or by someone on his behalf.**

iii. The writing must be in such words from which the terms necessary to construe the transfer can be ascertained.

iv. The transferee must in part performance of the contract take possession of the property or of any part thereof.

v. The transferee must have done some act in furtherance of the contact.

vi. The transferee must have performed or be willing to perform his part of contract.

20. On going through the evidence in this case, the defendant has no consistent case regarding the alleged agreement executed by him. According to him, he was put in possession of the property way back in 1971. Subsequently, he stated that he was put in possession of the property in 1976. He also raised a plea that he was put in possession of the property in 1984

by virtue of Ext.B2. In the written statement, there is absolutely no plea regarding the agreements allegedly executed by John in favour of the defendant. In fact there is no plea in the written statement that an agreement was executed in writing by John in favour of the defendant. Ext.A7 notice was issued by one K.J.Joseph, Advocate, who was examined as PW2. After filing the written statement, Ext.A7 notice was issued. In Ext.A7, it was contended that Ext.B2 was executed on 30.7.1984. Evidently, this was done after filing the written statement. In the absence of pleadings and evidence of all essential conditions making out a defence of part

performance to protect possession claimed by the defendant, the plea of part performance would not be attracted. The plea under Section 53A of the T.P.Act raises a mixed question of law and fact and therefore, cannot be permitted to be raised for the first time after filing the written statement by way of an Advocate Notice.

21. Considering the close relationship between the parties, the possession of any portion of the plaint schedule property by the defendant can only be treated as a permissive possession. Family ties are important. In case the defendant's brother allows him to possess the property, it can only be considered as permissive

possession. In the absence of any evidence with regard to hostile possession, the continuity in possession for a long time could not be advised but could be permissive possession.

22. The plea of adverse possession being essentially a plea based on facts, it is required to be proved by the defendant raising it on the basis of proper pleadings and evidence. The burden of proof of such plea is therefore on the defendant, who has pleaded it. It is a well settled proposition that a mere possession by a person however long would not confer any right as against the true owner unless the person, who claims adverse possession, has

animus to hold the land adverse to the title of the true owner. To perfect title by adverse possession, the possession must be hostile, open, continuous and there must be *animus possidendi*. In this case, the evidence is traceable to show that the possession claimed by the defendant at the commencement was permissive without animus. Hence, the possession of defendant cannot be treated as adverse to the real owner. The defendant has no consistent case regarding the date on which he was put in possession or the date on which the alleged agreements were executed. Ext.B2 agreement was not proved in accordance with law.

23. In a civil case,it is invariably

not necessary to examine the plaintiff before the court. The son-in-law of the plaintiff was examined as PW1 and adduced evidence in support of the plaint allegations. On going through the evidence adduced, it cannot be held that non-examination of the plaintiff before the court is a ground to non-suit the plaintiffs to get a decree for recovery of possession. In the facts and circumstances of the case, none of the ingredients under Section 53 A of the T.P.Act are proved in evidence.Considering the close relationship and trust between the parties, this Court is of the view that the first appellate court rightly reversed the judgment and

decree of the trial court and granted a decree for recovery of possession on the strength of Exts.A1 to A7 and Exts.C1 to C4. No interference in second appeal is warranted. The substantial questions of law formulated by this Court have been answered as hereinabove.

For the aforesaid reasons, this R.S.A is dismissed with costs to the contesting respondents. Pending applications, if any, stand closed.

Sd/-

(N.ANIL KUMAR)
JUDGE

MBS/