

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 8TH DAY OF JULY 2015/17TH ASHADHA, 1937

AS.No. 185 of 2000 (B)

**JUDGMENT DATED 30-09-1999 IN OS 414/1991 OF ADDITIONAL SUB COURT,
PALAKKAD**
.....

APPELLANT(S)/L.RS OF 1ST DEFENDANT:

1. **P.V.KRISHNANKUTTY, LEGAL HEIRS OF 1ST DEFENDANT, RESIDING AT PLACHIKKATTIL, PUDUPPARIYARAM AMSOM, PALAKKAD TALUK, PALAKKAD DISTRICT.**
2. **P.K.MEENAKSHI, (LEGAL HEIRS OF 1ST DEFENDANT), PLACHIKKATTIL, PUDUPPARIYARAM AMSOM, PALAKKAD TALUK, PALAKKAD DISTRICT.**

**BY ADVS.SRI.K.RAMESH
SRI.K.MOHANAKANNAN**

RESPONDENT(S)/PLAINTIFF & DEFENDANTS 2 TO 7:

- *1. **P.C.MURUKAN, S/O.CHAMI, RESIDING AT RESIDING AT PLACHIKKATTIL, MUTTIKULANGARA, PUDUPPARIYARAM AMSOM, PALAKKAD TALUK, PALAKKAD DISTRICT. (DIED)**
2. **KANDAMUTHAN (DIED)**
3. **THANKA, W/O.LATE KANDAMUTHAN.**
4. **UNNIKRIISHNAN, S/O.LATE KANDAMUTHAN.**
5. **SUNDARAN, S/O.LATE KANDAMUTHAN.**
- *6. **SANTHAKUMARI, D/O.LATE KANDAMUTHAN. (DIED)**
7. **GOPALAKRISHNAN, S/O.LATE KANDAMUTHAN, RESPONDENTS 2 TO 7 ARE RESIDING AT PLACHIKKATTIL, PUDUPPARIYARAM AMSOM, PALAKKAD TALUK, PALAKKAD DISTRICT.**

Msv/

AS.No. 185 of 2000 (B)

* ADDITIONAL RESPONDENTS IMPEADED

8. P.M.RAVI, S/O.P.C.MURUKAN,
 PLACHIKKATTIL, MUTTIKULANGARA,
 PUDUPPARIYARAM AMSOM, PALAKKAD TALUK,
 PALAKKAD DISTRICT.

9. P.M.CHANDRIKA, D/O.SANTHA KUMARI,
 PLACHIKKATTIL, MUTTIKULANGARA,
 PUDUPPARIYARAM AMSOM, PALAKKAD TALUK,
 PALAKKAD DISTRICT.

* ADDL. R8 & R9 ARE IMPEADED AS LEGAL REPRESENTATIVES OF
 DECEASED FIRST AND SIXTH RESPONDENTS RESPECTIVELY AS PER
 ORDER DTD.23.10.2013 IN IA.195/2012.

R8 BY ADVS. SRI.T.C.SURESH MENON
 SRI.P.S.APPU
 SRI.A.R.NIMOD

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON
08-07-2015, ALONG WITH AS. 354/2000 THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

msv/

P.B.SURESH KUMAR, J.

A.S.Nos.185 and 354 of 2000

Dated this the 8th day of July , 2015

JUDGMENT

These appeals are preferred against the decree and judgment in O.S.No.414 of 1991 on the file of the Sub Court, Palakkad. Among the appeals, A.S.No.185 of 2000 is by the legal representatives of the first defendant and A.S.No.354 of 2000 is by the plaintiff.

2. The suit was originally filed before the Munsiff Court, Palakkad as O.S.No.525 of 1986 seeking, among others, a decree of prohibitory injunction restraining the defendants from trespassing into the plaint schedule properties. The defendants have contested the suit contending, among others, that the plaint schedule properties are not identifiable. The trial court accepted the said contention of the defendants and dismissed the suit. The decision of the trial court was challenged by the plaintiff in A.S.No.155 of 1989 before the District Court, Palakkad. A.S.No.155 of 1989 was allowed and

the suit was remitted for fresh disposal. Thereupon, the plaintiff amended the suit and recovery of possession of the plaint schedule properties on the strength of title was also claimed. Consequent on the inclusion of the prayer for recovery of possession, the value of the suit exceeded the pecuniary jurisdiction of the Munsiff Court and consequently the suit was re-presented before the Sub Court, Palakkad and renumbered as O.S.No.414 of 1991.

3. The essence of the case set up by the plaintiff is that the plaint schedule properties belonged to one C.K Viswanatha Iyer and others and the plaintiff has got assignment of the rights of Viswanatha Iyer as per Exts.A2 and A4 assignment deeds. According to him, in the circumstances, he is entitled to recover possession of the plaint schedule properties on the strength of his title. The defendants contested the suit contending, among others, that the suit properties are not identifiable and that they are entitled to fixity of tenure in respect of the properties under the Land Reforms Act on the strength of the tenancy rights held by them over the same.

4. The trial court, on a consideration of the materials on record, came to the conclusion that item Nos.1 to 3 properties in the suit are identifiable with reference to the boundaries of

the said properties as contained in Ext.A2 assignment deed. The trial court also found that the defendants have not established any tenancy rights over the suit properties. Consequently, the suit was decreed permitting the plaintiff to recover possession of plaint schedule item Nos.1 to 3 properties on the strength of his title. Since it was found that the plaintiff has not established the identity of item No.4 property, the suit was dismissed as regards the said property. The plaintiff as also the legal representatives of the first defendant are aggrieved by the decision of the trial court and hence these appeals.

5. Heard the learned counsel for the appellants as also the learned counsel for the respondents.

6. The learned counsel for the appellant in A.S No.354 of 2000, relying on the evidence tendered by the first defendant as DW1, contended that the defendants had no doubts as to the identity of plaint schedule item No.4 property and therefore, the court below should not have non suited the plaintiff in relation to the said property. The learned counsel, however, conceded that the plaintiff has not taken out a Commission to identify plaint schedule item No.4 property.

7. The learned counsel for the appellants in

A.S.No.185 of 2000 contended that in so far as the defendants had tenancy rights in respect of the suit properties, the right, title and interest, if any, of the plaintiff over the suit properties had already been vested with the Government in accordance with the provisions of the Kerala Land Reforms Act and therefore, he is not entitled to the decree sought in the suit. The learned counsel also contended that though a specific plea of tenancy was raised by them in the written statement, the impugned judgment was rendered without referring the claim for decision by the Land Tribunal as provided for under Section 125 (3) of the Kerala Land Reforms Act. As such, according to the learned counsel, the impugned judgment is liable to be interfered with at any rate. He relied on the decision of this Court in **Lissy vs. Kuttan** [1976 KLT 571 F.B] and **Kesava Bhat vs. Subraya Bhat** [1979 KLT 766 F.B] in support of the said contention. The learned counsel further contended that the plaintiff, who has acquired only a fractional right in the property, is not entitled to file a suit for recovery of possession on the strength of title.

8. The vesting of the right, title and interest of the landlord in the Government as per the provisions of the Kerala Land Reforms Act is a legal fiction which would take effect

when it is established that a person has a tenancy right over the property. In the absence of any evidence to show that the defendants have tenancy rights over the plaint schedule properties which enable them to claim fixity of tenure, the vesting does not take effect. As such, there is no merit in the contention advanced by the learned counsel for the appellants in A.S.No.185 of 2000 that the suit is not maintainable on account of the vesting of the property.

9. It is seen from the evidence tendered by the first defendant as DW1 that the defendants had though moved the Land Tribunal earlier for purchase of the right, title and interest of the predecessors of the plaintiff over the plaint schedule properties on the basis that they have tenancy right over the properties, the application submitted by them for the said purpose was rejected by the Land Tribunal. When it is admitted that the application filed by defendants for assignment of the right, title and interest of the landlords in the plaint schedule properties before the Land Tribunal was dismissed, it cannot be contended that a question of tenancy arises for consideration in the suit. It is now settled that merely for the reason that a claim of tenancy was raised in the written statement, the court is not bound to make a reference

of the claim to the Land Tribunal for decision. In order to refer the claim for decision to the Land Tribunal as provided for under Section 125(3) of the Land Reforms Act, the claim should arise for consideration in the suit. When it is admitted that the claim was earlier raised and rejected, it cannot be said that the claim for tenancy arise for consideration in the suit. As such, the court below cannot be faulted with for having not referred the issue relating to the alleged tenancy right claimed by the defendants in the suit. It is all the more so since the defendants have not even chosen to file an application under Section 125 (3) of the Land Reforms Act.

10. As indicated above, the suit property belonged to one Viswanathayyer and others. It is seen that the plaintiff has acquired only the rights of Viswanathayyer. According to me, the non acquisition of the rights of all the co-owners of the property by the plaintiff will not affect his right to institute the suit, for, it is now settled that the holder of a fractional right in the property is entitled to file a suit for recovery of possession of the whole property.

11. Though the identity of the plaint schedule properties was disputed by the defendants in the written statement filed by them, the evidence of DW1 indicates that there is in fact no

dispute as to the identity of the properties. The first defendant as DW1 has admitted in his evidence that he knows the plaint schedule properties. It is seen from the records that earlier, while the suit is pending before the Munsiff Court, Palakkad, an Advocate Commissioner was deputed for local inspection and the said Advocate Commissioner filed a report after conducting a local inspection. The plaint was amended thereafter and the boundaries as also the extent of the properties were altered. True, the plaintiff has not taken out a fresh commission to identify the properties after the amendment of the plaint. Since the court below found that the plaint schedule item No.4 property is not identifiable with reference to the boundaries shown in the documents of title of the plaintiff, I am of the view that an opportunity shall be granted to the plaintiff to establish identity of the property before non suiting him on that technical plea. The plaintiff has to be granted an opportunity to establish the identity of plaint schedule item No.4 property also for the reason that the defendants have no doubts regarding the identity of the property.

In the result, A.S.No.185 of 2000 is dismissed and A.S.No.354 of 2000 is allowed in part. The decree and judgment impugned in the appeals is set aside to the extent it

dismisses the suit O.S.No.414 of 1991 in relation to plaint schedule item No.4 property and the suit is remitted to the trial court for fresh disposal for considering the claim of the plaintiff over plaint schedule item No.4 property, after affording the plaintiff an opportunity to establish the identity of the same. In all other respects, the decree and judgment impugned in these appeals is confirmed. All the interlocutory applications in the appeals are closed.

P.B.SURESH KUMAR, JUDGE.

smm