

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 28TH DAY OF MAY 2015/7TH JYAISHTA, 1937

FAO.No. 41 of 2009 ()

AGAINST THE JUDGMENT IN AS 211/2003 of DISTRICT COURT,
PALAKKAD.

AGAINST THE JUDGMENT IN OS 131/2000 of MUNSIF COURT,
ALATHUR.

APPELLANT(S)/RESPONDENTS/DEFENDANTS.:

1. CHATHU, S/O.LATE RAKKAAAAANDI,
THEKKEKKAD HOUSE, VANDAZHI POST, ALATHUR TALUK,
PALAKKAD DISTRICT. (DIED; LR. IMPLEADED).
2. MANI, S/O.CHATHU, THEKKEKKAD HOUSE,
VANDAZHI POST, ALATHUR TALUK, PALAKKAD DISTRICT.
3. PRABHAKARAN, S/O.CHATHU, THEKKEKKAD HOUSE,
VANDAZHI POST, ALATHUR TALUK, PALAKKAD DISTRICT.

BY ADVS.SRI.O.RAMACHANDRAN NAMBIAR
SRI.GEEN T.MATHEW

RESPONDENT(S)/APPELLANTS/PLAINTIFFS.:

1. INDIRA, D/O.LATE THANGAMMAL,
CHERUNGODE HOUSE, VANDAZHI POST, ALATHUR TALUK,
PALAKKAD DISTRICT.
2. RAJESWARI, D/O.LATE THANGAMMAL,
CHERUNGODE HOUSE, VANDAZHI POST, ALATHUR TALUK,
PALAKKAD DISTRICT.
3. KANNAN, S/O.LATE THANGAMMAL,
CHERUNGODE HOUSE, VANDAZHI POST, ALATHUR TALUK
PALAKKAD DISTRICT.
4. SUSEELA, D/O.LATE THANGAMMAL,
CHERUNGODE HOUSE, VANDAZHI POST, ALATHUR TALUK
PALAKKAD DISTRICT.

5. KARPAKAM, D/O. LATE THANGAMMAL,
CHERUNGODE HOUSE, VANDAZHI POST, ALATHUR TALUK,
PALAKKAD DISTRICT.
6. SASI, S/O. LATE THANGAMMAL,
CHERUNGODE HOUSE, VANDAZHI POST, ALATHUR TALUK,
PALAKKAD DISTRICT.
7. RADHAKRISHNAN, S/O. LATE THANGAMMAL,
CHERUNGODE HOUSE, VANDAZHI POST, ALATHUR TALUK,
PALAKKAD DISTRICT.
8. SANTHI, D/O. LATE THANGAMMAL,
CHERUNGODE HOUSE, VANDAZHI POST, ALATHUR TALUK,
PALAKKAD DISTRICT.

ADDL. R9 IMPEADED.

9. SEETHA, W/O. VIJAYAN,
THATTAN CHALLA, VANDITHAVALAM,
CHITTUR TALUK, PALAKKAD DISTRICT.

ADDL. R9 IS IMPEADED AS THE LEGAL REPRESENTATIVE OF
DECEASED 1ST APPELLANT VIDE ORDER DATED 1.7.2010 IN I.A.
373/2010.

R1 TO R8 BY ADV. SRI. JOHN JOSEPH (ROY)

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY
HEARD ON 28-05-2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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F.A.O. No. 41 of 2009
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Dated this the 28th day of May, 2015.

JUDGMENT

Aggrieved by the order of remand made by the lower appellate court, the defendants in O.S. 131 of 2000 of Munsiff's Court, Alathur has come up before this Court.

2. The plaintiff claimed that plaint schedule property having an extent of 12 cents was acquired by her husband under Ext.A1 purchase certificate and eversince then he was in possession and enjoyment of the property. Complaining about the attempted trespass by the defendants and their acts of trying to interfere with the possession of the plaintiff, suit was laid.

3. The defendants resisted the suit and pointed out that the plaintiff had no title to the suit property and the property belonged to them. There is a large pit on the side of the property of the plaintiff and that has been in the possession of the defendants. They therefore contended that

the plaintiff is not entitled to any relief and therefore the suit be dismissed.

4. On the above pleadings, necessary issues were raised. The evidence consists of the testimony of P.Ws.1 and 2 and documents marked as Exts.A1 to A5 from the side of the plaintiff. Defendants examined D.Ws. 1 to 3 and Exts.B1 to B12 marked. On an appreciation of the evidence in the case, the trial court came to the conclusion that the plaintiff had miserably failed to show that the plaintiff schedule property was taken in by his purchase certificate and holding that the plaintiff has not established her title, dismissed the suit.

5. The aggrieved plaintiff took up the matter in appeal as A.S.211 of 2003. The lower appellate court, on going through the records felt that the real issue was regarding the identity of the property and there were rival claims to the property. Under such circumstances, according to the learned appellate Judge, the proper course would have been to get the property identified with

respect to documents of title of each of the parties and resolve the issue. That exercise had not been undertaken and that has resulted in failure of justice and the appellate court found that an opportunity need to be given to the parties to have the properties identified with respect to the title deeds of each of the parties. Accordingly, the judgment and decree of the trial court was set aside and the matter was disposed of as follows:

"In the result, the judgment and decree under appeal are set aside and the suit is remanded to the lower court for fresh disposal according to law. The learned Munsiff is directed to remit the commission reports, Exts.C1 and C2 to the very same Commissioner or to appoint another Commissioner to identify the plaint schedule property with the help of the title deeds of the appellants and also the survey records. The parties are entitled to adduce further evidence."

6. Learned counsel appearing for the petitioners before this Court complained that the

two grounds which were found favoured with the lower appellate court, namely, properties were not properly identified and that the properties were not taken in by his title deeds, were not included in the memorandum of appeal filed before the court below and the plaintiff had not filed any objection regarding the identification of the property made by the Commissioner. The lower appellate court, according to the learned counsel, has developed a case not complained of by the plaintiff and has found in her favour. This is not legal.

7. No valid reasons are given for the remand and a remand cannot be given for mere asking. For the proposition that remand in the present case is not warranted, learned counsel for the petitioners relied on the decision reported in **Krishnan A. v. Federal Bank Ltd., Palakkad** (2014(2) KHC 724), **Righesh Babu v. Gopalan Nambiar** (2014(4) K.L.T. 654) and in **Glan Chand Khatana v. Inderjit Chohdha** (AIR 2003 HP 49). By no stretch of imagination, it could be said, according to the

learned counsel that remand is warranted in the present case.

8. Learned counsel appearing for the respondents took this Court through the judgment of the court below and contended that one of the main contentions raised before the court below was regarding the identity of the property. It therefore could not be said that there is any error committed by the court below regarding the identity of the property and the grievance of the plaintiff was voiced before the court below. The court below was impressed by the non-identity of the property with respect to the respective title deeds and infact there is rival claims in respect of the same property. None of the decisions, accordingly to the learned counsel, applies to the facts of this case. Learned counsel did not dispute the proposition that remand cannot be made for mere asking or on the whims and fancies of the court below and according to the learned counsel, in the case on hand, it cannot be disputed that the real

issue is regarding the identity of the property and if that be so, both the plaintiff and defendant claimed title to the property, it is necessary to have a proper identification of the property. Learned counsel went on to point out that there is no patent error or illegality in the order of remand made by the court below and this appeal is only to be dismissed.

9. True, as rightly pointed out by the learned counsel for the appellants, remand cannot be an automatic affair. There should be convincing and cogent reasons for the remand to be made to the trial court. If the materials available on record are sufficient to reach a conclusion, then the remand may not be justified. If real issues have been raised and evidence had been adduced and the evidence so adduced is sufficient for a decision, then going by the decisions relied on by the learned counsel, there cannot be a remand. The lower appellate court is satisfied that there have been a non-consideration of necessary facts for

determination of the issue involved in the suit and that has resulted in prejudice to the parties. The lower appellate court should be clearly satisfied that the parties did not focus their attention on the real issue and the real issue has been lost sight of. Bearing the above principles in mind, it can be noticed that the court below was right in finding that the real issue is regarding the identity of the property. While the plaintiff would claim that pond is within his property and that it was his water source, defendants alleged it to be a pit within his property. Both have got purchase certificates in respect of their properties and also as noticed by the lower appellate court, the real issue therefore is regarding the identity of the property covered by the two purchase certificates.

10. It is not in dispute before this Court that there was no effort from the side of either of the parties to get the property properly identified on the basis of the respective purchase

certificates. The Commissioner also did not feel it necessary to do so nor there was a direction to the Commissioner to do so. The lower appellate court was therefore perfectly justified in coming to the conclusion that the real issue has been lost sight of and what was needed to be done was to identify the respective properties. Merely because a pond or pit has fallen outside the boundaries now shown by the commissioner may not by itself be a ground to non-suit the plaintiff. As already noticed, both parties say that the property scheduled to the plaint is covered by two purchase deeds. Normally purchase certificate is accompanied by a sketch. Whatever that be, the Land Tribunal concerned must have the necessary records to show which are the properties assigned to which of the parties.

11. It cannot therefore be disputed that the lower appellate court was perfectly justified in holding that the real issue has been lost sight of and necessary materials to resolve that issue

are found wanting in this case. As noticed by the lower appellate court the question is regarding the identity to the suit property with respect to the respective title deeds. It is absolutely necessary that the properties be identified with respect to the title deeds of the parties. Viewed from that angle, the conclusion of the court below cannot be found fault with.

For the above reasons, this Court finds no reason to interfere with the order of the lower appellate court. This Appeal is without merits and it is accordingly dismissed.

sb.

P. BHAVADASAN,
JUDGE