

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYAISHTA, 1937

FAO.No. 173 of 2009 ()

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IN AS 68/2005 of ADDITIONAL DISTRICT COURT (ADHOC) III, PALAKKAD
DATED 12-06-2009**

IN OS 936/1999 of ADDITIONAL MUNSIF COURT, PALAKKAD DATED 30-10-2004

APPELLANT(S)/APPELLANT:

- 1. KRISHNANKUTTY, S/O. CHAMI,
KUNDUKATTIL HOUSE, MUDAPPALLORE AMSOM AND DESOM
ALATHUR TALUK. (DIED)**
- 2. NANI, W/O. KRISHNANKUTTY IN DO-DO-**
- *ADDL.A3. SUMATHI, D/O. LATE KRISHNANKUTTY,
KUNDUKATTIL HOUSE, MUDAPPALLORE AMSOM AND DESOM
ALATHUR TALUK.**
- *ADDL.A4. GANGADHARAN, S/O. DO IN DO-DO-**
- *ADDL.A5. SULOCHANA, D/O. DO IN DO-DO-**
- *ADDL.A6. MURALEEDHARAN, S/O. DO IN DO-DO-**

***(2ND APPELLANT IS RECORDED AND ADDL. APPELLANTS 3 TO 6 ARE IMPEADED
AS THE LEGAL REPRESENTATIVES OF THE DECEASED 1ST APPELLANT VIDE ORDER
DTD 6/9/10 IN IA 2684/2010)**

**BY ADVS.SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN
SRI.R.SURAJ KUMAR
SMT.GEETHA P.MENON
SRI.P.M.NEELAKANDAN**

RESPONDENT(S):

- 1. DEVAKI, W/O. LATE CHELLAPPAN,
PANTHAPARAMBIL, MUDAPPALLORE AMSOM, DESOM,
ALATHUR TALUK.**
- 2. JAYAKRISHNAN, S/O. DO. IN DO-DO-**

3. CHENTHAMARAKSHAN, S/O. DO. IN DO. DO.
4. SREEDHARAN, S/O. DO. IN DO. DO.
5. SURENDRAN, S/O. DO. IN DO. DO.
6. SATHYABHAMA, W/O. BABU,
VAZHODUKALAM, KALLINGALPADAM, PANNIYANKARA.P.O.
THRISSUR.
7. CHANDRIKA, W/O. MANIKANDAN,
PATHAPPALLA HOUSE, KIZHAKKEMURI, ELEVANCHERY
PALAKKAD.
8. BINDU, W/O. KUNCHU, PAPPANA QUARTERS,
CHIRA, MANJAPARA, PALAKKAD.
9. R.SURESH, S/O. RAMAKRISHNAN, RESIDING AT
CHENTHRAPINNI, KODUNGALLORE, THRISSUR.
10. KASUMANI, S/O. APPUKUTTAN,
THEKKENCHERRY, MUDAPPALLORE, ALATHUR TALUK.

R1 TO R8 BY ADV. SRI.SAJAN VARGHEESE K.
R1 TO R8 BY ADV. SRI.LIJU. M.P

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
25-05-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P.BHAVADASAN, J.

F.A.O. No. 173 of 2009

Dated this the 25th day of May, 2015

J U D G M E N T

Aggrieved by the order of remand passed by the lower appellate court, the defendants before the trial court have come up in appeal.

2. O.S.No. 936/1999 was the suit for recovery of possession on the strength of title. The plaintiff claimed that he had obtained purchase certificate in respect of plaint schedule property along with certain other properties and he was in absolute possession and enjoyment of the same. He had improved the property and made several constructions also. The allegation was that taking advantage of the absence of the plaintiff from the plaint schedule property, defendants 1 and 2, who had engaged in toddy trade, along with the third defendant, who is a contractor, trespassed into the property and constructed a shed therein. In spite of several demands made to vacate, they did not do so. Hence

the suit.

3. Defendants 1 to 3 resisted the suit. They filed a common written statement contending that the plaintiff had no manner of right over the suit property and that the survey number of the plaint schedule property is wrong. According to them, the plaint schedule property was one gifted to one Nani by her husband Krishnankutty and these defendants were running a toddy shop as a lessee under the said Nani. They also contended that there was an earlier suit between the plaintiff and Krishnankutty with regard to the plaint schedule property as O.S.No.84/81 by the very same plaintiff in which he met with defeat. They pointed out that the plaintiff has no manner of right over the suit property and the suit is only to be dismissed.

4. Coming to know about the suit, the defendants 4 and 5 got themselves impleaded vide order in I.A. 324/2000 and they filed written statement. They pointed out that there was an earlier suit between parties as O.S.No. 84/1981

in which the title regarding the property was gone into though the suit was one for injunction only and it was found that the plaintiff in the said suit who is the plaintiff in the present suit also had no right, title or possession over the property and that suit has been dismissed. Merely by changing the survey number, the plaintiff cannot say that the present property is different. They also pointed out that any claim with respect to suit property is barred by resjudicata.

5. The trial court raised necessary issues for consideration and the evidence consists of the testimony of PWs 1 and 2 and documents marked as Exts. A1 to A10 from the side of the plaintiff. The defendants examined DW1 and had Ext.B1 to B11 marked. The Commissioner was examined as CW1 and Exts. C1 to C4(b) are the Commissioner's report and plan.

6. The trial court on an appreciation of the evidence came to the conclusion that the properties involved in both

O.S.No. 84/1981 and in the present suit are one and the same and since the earlier suit has been dismissed and that had become final, the present suit is barred by resjudicata.

7. Assailing the same, the plaintiff preferred A.S.No. 68/2005. The lower appellate court, on an independent evaluation of the evidence, came to the conclusion that even though the extent of property is the same, the survey number and boundaries are different and therefore, the plea of resjudicata cannot be availed of by the defendants. The appeal was allowed and the matter was remanded for fresh consideration.

8. Sri. P.B. Krishnan, the learned counsel appearing for the petitioner pointed out that the lower appellate court has misdirected itself both on facts and in law. It is not necessary that always the party should be identical or the cause of action should also be same. Regarding the plea of resjudicata, it is sufficient to show that the matter that is being agitated is the one which has already been agitated

and the decision has been rendered between the parties. In the case on hand, the learned counsel went on to point out that 16 cents of property which involved in the present suit was the subject of matter of O.S.No. 84/81 also and that was between the plaintiff in this case and defendants 4 and 5 in the present suit. Finding that the plaintiff had no title or possession over the property, the court had dismissed that suit. The learned counsel went on to point out that none of the reasons given by the lower appellate court is sufficient to warrant interference with the decision of the trial court. He therefore contended that the lower appellate court decree cannot stand.

9. Sri. K. Sajan Varghese, the learned counsel appearing for respondents on the other hand pointed out that the definite case of the plaintiff was that the property involved in the present suit is the very same property involved in O.S.No. 84/81. The contention is that by changing the survey number, the plaintiff has come forward

with a new suit in respect of the very same property.

10. After having heard the learned counsel on both sides, there seems to be considerable force in the submission made by the learned counsel for the petitioner. It is true that in the earlier suit, that is in O.S.No. 84/1981, the property scheduled was 16 cents comprised in survey number 155/4A1. It is no doubt true that the plaintiff traces his title to the purchase certificate obtained by him which is produced as Ext.A1. O.S.No. 84/1981 related to 16 cents of property comprised in survey number 155/4A1. It is also true that in the present suit, the property is seen comprised in survey number 157/3. There is a slight difference in the boundaries of the two properties involved in the two suits.

11. A Commissioner was deputed to identify the property. He filed three reports namely, Ext. C1, C3 and C4. In Ext.C3 Commissioner's report, the Commissioner pointed out that the property involved in the present suit is the same

as the property involved in the earlier suit. Dissatisfied with the said observation of the Commissioner, the plaintiff had filed an interlocutory application to set aside the report and call for a fresh Commissioner's report.

12. The trial court felt is unnecessary to set aside the Commissioner's report but thought it sufficient to call for further detail in the matter. That is how Exts.C4 and C4(a) came into existence.

13. Both the courts below have undertaken an exercise of identifying the property with respect to boundaries. The trial court, after elaborately considering the evidence, came to the conclusion that the properties are the same. The lower appellate court chose to differ from the trial court on the ground that the boundaries do not tally and so also one of the boundaries is also different.

14. The lower appellate court seems to have completely overlooked the Commissioner's report. In Ext.C3 Commissioner's report, the Commissioner have observed

that the properties involved in the two suits are the same. The Commissioner has also produced a survey sketch.

15. Exts. C3 and C4 are the Commissioner's reports and plan. Ext.C4(b) shows a narrow strip of land which is the subject matter of the suit. The Commissioner initially filed Ext.C3 report which, according to the plaintiff, was unsatisfactory and he sought for a better report by seeking to have the earlier report set aside. The Commissioner's report was remitted instead of setting aside and the Commissioner filed Exts. C4 and C4(a) and (b) plan. Unfortunately for the plaintiff, the Commissioner reported that the property involved in the present suit is situated on the eastern side of the canal and the property in survey number 157/3 was located on the western side of the canal. The fact that the property comprised in survey number 157/3 is located on the western side of the canal should clinch the issue.

16. Of course, there is a slight difference regarding the boundaries. But the trial court has considered the matter in considerable detail though it has omitted to note the observations in the Commissioner's report that the property comprised in survey number 157/3 is situated on the western side of the canal.

17. Sri. Sajan Varghese, the learned counsel appearing for the respondent pointed out that going by the documents produced by the defendants, it can be seen that they had no case that the property involved in the present suit is the property comprised in survey number 155/4A1 which was the subject matter in the earlier suit. So long as that is not the case put forward by the defendants 4 and 5, they cannot succeed. Even if for any reason, this Court finds that there is want of identification of the property, the learned counsel pointed out that there may be a direction to the court below to get the property identified and then dispose of the suit.

18. This Court has already found that the properties are identical. Going by the boundaries also, though there is a slight variance, in all probabilities, the properties are identical. As already noticed, the property comprised in Sy.No. 157/3 as per Exts. C4 and C4(a) plan is on the western side of the canal. But 16 cents shown in Sy. No. 157/3 is on the eastern side of the canal. This undoubtedly shows that the property involved in the suit and in O.S.No. 84/81 are one and the same.

19. The trial court was therefore perfectly justified in coming to the conclusion that properties involved in both suits are same. If that be so, principle of resjudicata applies.

20. The lower appellate court was not justified in interfering with the judgment and decree of the court below.

This appeal is allowed and the impugned order is set aside and the judgment and decree of the trial court are restored.

**P.BHAVADASAN
JUDGE**

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