

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&

THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

TUESDAY, THE 4TH DAY OF AUGUST 2015/13TH SRAVANA, 1937

Ex.FA.No. 38 of 2013 ()

(AGAINST THE ORDER DATED 21.8.2013 IN E.A.NO.157/2010 IN
E.P.NO.53/2010 IN O.S.NO.235/1994 OF SUB COURT, KOCHI)

APPELLANT/RESPONDENT:

MATTANCHERRY JEEVAMATHA CHURCH
REP. BY ITS PARISH PRIEST
REV.FR.JOSEPH TITUS KANDATHIPARAMBIL
AGED 49, S/O.RAPHEL, RESIDING AT PAROCHIAL HOUSE
JEEVAMATHA CHURCH, MATTANCHERRY, KOCHI-682 002.

BY ADVS.SRI.K.L.JOSEPH
SRI.V.NAMADEVA KAMATH

RESPONDENT/CLAIM PETITIONER:

M.I.DAVID, AGED 50 YEARS
S/O.MURUKKUMCHERIL ISMAIL, C.C.13/403, K.C.ROAD
CHULLICKAL, THOPPUMPADY, KOCHI-682 005.

BY ADV. SRI.P.K.RAVISANKAR

THIS EXECUTION FIRST APPEAL HAVING BEEN FINALLY HEARD ON
04-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**T.R.RAMACHANDRAN NAIR &
K.P.JYOTHINDRANATH, JJ.**

Ex.F.A.No.38 of 2013

Dated this the 4th day of August, 2015

JUDGMENT

Jyothindranath, J.

This appeal is preferred by the respondent in E.A.No.157/2010 in E.P.No.53/2010 in O.S.No.235/1994 on the file of the Sub Court, Kochi. The facts of the case are as follows :

The appellant is the decree holder in O.S.No.235/1994. It was a suit filed for eviction of the tenant. The suit was decreed. A.S.No.477/1997 moved by the defeated tenant before this Court was also unsuccessful. It was dismissed by judgment dated 23.12.2009. Thereafter, the decree holder/the appellant herein filed E.P.No.53/2010 before the Sub Court for the execution of the decree. Meanwhile, the respondent herein, who is a sub tenant according to the decree holder, filed O.S.No.6/2010 for a declaration to the effect that the respondent is not liable to be evicted in execution of the decree in O.S.No.235/1994. He also filed E.A.No.157/2010 before the Execution Court under Order

XXI Rule 99 of C.P.C.

2. In E.A.No.157/2010, the case of the petitioner was that he was in possession of 37 cents of land in Sy.No.1269 of Mattancherry village and was also in possession of building bearing No.6/407 with an old No.6/382, which is lying in the said property. It is the case of the claimant that it was a Government puramboke land and it was leased by the Government to the claimant during 1987 period. It is also the case of the claimant therein that he has been doing business in recondition of empty barrels in the building in the said property since 1987 in the name and style as 'Davood Traders'. The claim was considered by the execution court and the execution court allowed the claim petition in part and ordered that the claimant shall not be evicted from claim A schedule property in execution of the decree in O.S.No.235/1994. Aggrieved by the said order, which will be a deemed decree, this appeal is preferred.

3. When the appeal came up for hearing, the learned counsel for the appellant vehemently argued before us that only after eviction,

the respondent/claimant will have a right to move the court against the dispossession. It is also submitted before us that the execution court allowed the claim petition on a finding that the decree obtained in O.S.No.235/1994 is in respect of Sy.No.103, whereas the building of the claimant situates in Sy.No.1269. It is the submission of the learned counsel that when identity is one and the same, clerical or mere mistake in quoting the survey number will not be much relevant. It is the submission that there was a commission report which will indicate that the property measuring 51 cents in between road and the Kayal was in the exclusive possession of the appellant herein. It is also the submission that the appellant church was having leasehold right of 67.27 hectors of land in Sy.No.102/3 , 1214/1, 1214/2, 1268, 1327 and 1269 of Mattancherry village and was paying tax for the same. It is also the submission that earlier a notice was issued by the Tahsildar demanding the church to pay a sum of ₹61,145/- which was quashed by this Court in O.P.No.2512/1988. It is the further submission that in that particular area, except the church, no other person was having any

holding or leasehold right. When no other person was having any leasehold right at the particular place, a mistake in the survey number will not have much effect especially when the positive contention of the appellant is that the claimant is only a sub tenant. It is also the submission before us that Ext.B2 is the original lease executed by the original tenant and it will show that the building in question is leased by the appellant herein.

4. The learned counsel for the respondent submitted before us that they were in possession of the claim schedule property from 1987 onwards. It is also submitted before us that the property in question is admittedly a Government puramboke land. They were conducting business as per the licence issued by the Cochin Corporation. It is also submitted that they produced copy of Ext.A3 notice dated 12.10.1999 by the District Collector to the petitioner demanding him to show cause why property having extent of 37 cents in Sy.No.1269 shall not be taken from his possession. The positive submission of the learned counsel for the respondent is that when survey number of the property

for which the decree obtained varies from the survey number of the property for which he moved the claim petition and when there is no description of the boundaries of the plaint schedule property which indicate that the decree was obtained in respect of the property for which claimant got right, there is nothing to interfere with the order of the execution court. It is the further submission before us that Ext.A4 is the copy of the receipt for remittance of licence fee for the period 2009-2010 for building No.6/407 where the old No. was 6/382. It is the submission that there is nothing to show that when suit was filed the very same number was assigned to the building in question. Under such circumstances, there is nothing to interfere with the order of the execution court.

5. After considering the rival contentions and submissions, the point to be considered in this appeal is that whether Sy.No.103 and Sy.No.1269 of Mattancherry village are one and the same or whether the building ordered to be evicted in O.S.No.235/1994 is the building in Sy.No.1269 of Mattancherry village.

6. There is no dispute in respect of the fact that the decree obtained in O.S.No.235/1994 is in respect of the building lying in Sy.No.103 of Mattancherry village. We perused the decree obtained in O.S.No.234/1994. The description of the property given therein is as follows :

“ Tiled buildings in the properties comprised in Sy.No.103 in Mattancherry village bearing Door No.6/401 to 6/416 with vacant land of building bearing door No.6/416.”

7. Thus it can be seen that separate boundaries are not shown therein. It only says that property comprised in Sy.No.103 in Mattancherry village with the door Nos. 6/401 to 6/416. There is nothing to show that the property decreed therein is the very same property sought to be evicted in the execution court by the appellant herein. When there is nothing to show that the property sought to be evicted is the property decreed by the court in O.S.No.235/1994, the similarity in the building number will not have much effect, especially when the identity of the landed property on which the alleged building

lies is not positively proved to be leased. It is also pertinent to note that in every five years there is every chance of changing building number especially in metro city like Cochin. It is to be noted that at the time of filing of the suit, property situated in Mattancherry Municipality, but now it is the part of Cochin Corporation. We have also perused Ext.B2 registered lease deed by which the original judgment debtor got the property on lease. The schedule attached to the said lease shows survey numbers 103 and 1196 and the building Nos. 2/124, 2/125, 2/126, 2/127, 2/128, 2/129, 2/130, 2/131, 2/132 of Mattancherry Municipality.

8. Apart from the above documents, we have also perused the commission report obtained in E.A.No.200/2010 along with a sketch prepared by the Taluk Surveyor. There also it can be seen that the property sought to be evicted lies in Sy.No.1269 of Mattancherry village and it is in the occupation of the respondent herein. It is also pertinent to note that the Commissioner categorically highlighted that in between the property in Sy.No.103 and 1269 a property with

Sy.No.102 also situates.

9. Thus, considering all these materials we are not in a position to say that the building decreed to be evicted in O.S.No.235/1994 is one and the same property sought to be evicted in E.P.No.53/2010 in O.S.No.235/1994 on the file of the Sub Court, Kochi. There is nothing to interfere with the finding of the execution court and we affirm the order of the execution court.

Accordingly, the appeal is dismissed. The parties will bear their costs in the appeal.

T.R.RAMACHANDRAN NAIR, JUDGE

K.P.JYOTHINDRANATH, JUDGE

SV.