

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 26TH DAY OF FEBRUARY 2015/7TH PHALGUNA, 1936

FAO (RO).No. 156 of 2013 ()

AS 13/2011 of ADDL. DISTRICT & SESSIONS COURT, VATAKARA

OS 13/2009 of MUNSIFF COURT, VATAKARA

APPELLANTS/RESPONDENTS/DEFENDANTS :

1. NADOL SASEENDRAN, S/O. NARAYANI, AGED 52 YEARS,
COOLIE, NADOL HOUSE, VATAKARA AMSOM DESOM
VATAKARA TALUK.
2. NADOL VEETIL GEETHA, W/O.NODAL SASEENDRAN, AGED 45 YEARS,
SWASTHAM, NADOL HOUSE, VATAKARA AMSOM DESOM
VATAKARA TALUK.
3. NADOL PRAKASAN, S/O. NARAYANI, AGED 50 YEARS,
AGRICULTURIST, NADOL HOUSE, VATAKARA AMSOM DESOM
VATAKARA TALUK.
4. SURESH, S/O.NARAYANI, AGED 42 YEARS,
COOLIE, NADOL HOUSE, VATAKARA AMSOM DESOM
VATAKARA TALUK

BY ADVS.SRI.T.KRISHNAN UNNI (SR.)

SRI.SAJU.S.A

SRI.T.SIVADASAN

SMT.MEENA.A.

SRI.K.C.KIRAN

RESPONDENTS/APPELLANTS/PLAINTIFFS :

1. VEER VEETIL THAZHA KUNIYIL SATHYABHAMA, D/O. KUMARAN,
AGED 45 YEARS, SWASTHAM, VATAKARA AMSOM DESOM
VATAKARA P.O., VATAKARA TALUK, PIN - 673 101.

2. VEER VEETIL THAZHA KUNIYIL SHOBHA, D/O. KUMARAN
AGED 45 YEARS, SWASTHAM, VATAKARA AMSOM DESOM
VATAKARA P.O., VATAKARA TALUK, PIN - 673 101.

R1-R2 BY ADV. SRI.B.KRISHNAN

R1-R2 BY ADV. SRI.R.PARTHASARATHY

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING BEEN FINALLY HEARD
ON 26-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

FAO (RO) No.156 of 2013

Dated 26th February, 2015.

J U D G M E N T

The decision of the Court of the Additional District Judge, Vatakara in A.S.No.13 of 2011 by which the suit O.S.No.13 of 2009 on the file of the court of the Munsiff, Vatakara was remitted for fresh disposal, is under challenge in this appeal. The defendants in the suit are the appellants.

2. O.S.No.13 of 2009 is a suit for recovery of possession and injunction. The case of the plaintiffs is that plaint B schedule property including the plaint A schedule property was obtained by them as per Ext.A1 sale deed from their grandmother Manikkam; that a portion of the property on the north of plaint B schedule property was sold by the plaintiffs to one Chandran as per Ext.A2 sale deed and plaint A schedule is the property remaining with the plaintiffs after the sale in favour of Chandran. According to the plaintiffs, plaint B schedule property was part of a large extent obtained by their grandmother Manikkam as per Ext.B1 will and she sold a

portion of the same on its east to one Dr.Prabhakaran and a portion of the same on its west to one Anandan and plaint B schedule property was the property remaining with Manikkam after the aforesaid sales. It is also the case of the plaintiffs that they are in possession and enjoyment of plaint A schedule property and the defendants, who are the owners of the property on its south, are attempting to trespass upon the same. Initially, the suit was one for injunction simplicitor and later the plaintiffs have claimed, by way of amendment in the plaint, recovery of possession of plaint A schedule property also in the event the court finds that the plaint A schedule property is in the possession of the defendants.

3. The defendants contested the suit contending *inter alia* that plaint A schedule property is not part of the property obtained by Manikkam; that Manikkam obtained only an extent of 29.27 cents of property as per Ext.B1 will, of which she sold 11.94 cents to Anandan and 6.08 cents to Dr.Prabhakaran and the plaintiffs had purchased only the remaining property from Manikkam. According to the

defendants, out of the property purchased by the plaintiffs from Manikkam, they sold 10.88 cents lying on its north to Chandran as per Ext.A2 sale deed and going by the extent, though the plaintiffs have 0.37 cents remaining with them, they are not in possession of any property and the property described as plaint A schedule property is a portion of the property covered by item Nos.6, 9 and 14 of Ext.B1 will allotted to Narayani and others.

4. The trial court found that the plaintiffs have not established title and possession over plaint A schedule property and consequently, dismissed the suit. Plaintiffs challenged the decision of the trial court in appeal. The appellate court reversed the decision of the trial court and remitted the suit for fresh disposal. The defendants are aggrieved by the said decision of the trial court and hence this appeal.

5. Heard Sri.T.Krishnanunni, learned Senior Counsel for the appellants and Adv.B.Krishnan, the learned counsel for the respondents.

6. As noticed above, the suit was instituted alleging that plaint A schedule property is the property remaining with the plaintiffs out of the property obtained by them as per Ext.A1 sale deed. It is also their case that the property covered by Ext.A1 sale deed is item No.1 property allotted to Manikkam as per Ext.B1 will. According to them, the defendants who do not have any right over plaint A schedule property, are attempting to trespass upon plaint A schedule property. Initially, the plaintiffs have claimed only a decree of permanent prohibitory injunction restraining the defendants from trespassing upon plaint A schedule property, but in the course of the trial, a decree for recovery of possession of plaint A schedule property was also sought.

7. It is seen that the trial court only considered the question as to whether the plaintiffs have established title and possession over plaint A schedule property and decided the suit on that basis. However, the appellate court proceeded to consider the issue as to whether the case set up by the defendants that plaint A schedule property is part of the

property covered by item Nos.6, 9 and 14 of Ext.B1 will is correct or not and held that the materials on record are not sufficient enough to hold that the said case set up by the defendants is correct. Since the plaintiffs are claiming title under Manikkam who was allotted the property covered by item No.1 of Ext.B1 will and defendants are claiming title under Narayani, who was allotted the property covered by item No.6 of Ext.B1 will, the appellate court also held that the dispute is essentially one as to the boundary of the properties of the plaintiffs and defendants and therefore, it has to be decided after identifying and locating the properties covered by item Nos.6, 9 and 14 of Ext.B1 will. It is on the aforesaid findings, the suit was remitted for fresh disposal.

8. According to me, in the light of the pleadings and the reliefs aforementioned, it is for the plaintiffs to establish that plaint A schedule property is a property covered by item No.1 of Ext.B1 will. It is settled that in a suit for recovery of possession on the strength of title, the plaintiffs have to prove their title and they cannot get a decree on the weakness of the

case set up by the defendants. The findings of the appellate court do not indicate that the appellate court was satisfied that the plaintiffs have established title to the property. In the circumstances, the finding of the appellate court that the present suit is virtually a suit for fixation of boundary and for an effective adjudication of the disputes between the parties, it is necessary to identify the properties covered by item Nos.6, 9 and 14 of Ext.B1 will is incorrect and unsustainable. The appellate court has also not taken note of the fact that the owners of the property covered by item Nos.9 and 14 of Ext.B1 will are not parties to the suit. However, since the appellate court took the view that the measurements shown for item No.1 property of Ext.B1 will are not correct, indicating that the identification of the plaint A schedule property is not correct, I am also of the view that the plaintiffs shall be given yet another opportunity to establish that plaint A schedule property is a portion of the property covered by item No.1 of Ext.B1 will.

In the result, the appeal is allowed in part and the findings of the appellate court that the suit is one for fixation of

boundary of the properties of the plaintiffs and defendants and that for an effective adjudication of the disputes between the parties to the suit, it is inevitable to identify the properties covered by item Nos.6, 9 and 14 of Ext.B1 will, are vacated. The court below is directed to dispose of the suit after affording the plaintiffs yet another opportunity to establish that plaint A schedule property is a property covered by item No.1 of Ext.B1 will.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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(true copy)

P.B.SURESH KUMAR, JUDGE.

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