

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 6TH DAY OF JANUARY 2015/16TH POUSHA, 19361

Ex.SA.No. 13 of 2014 ()

AS.NO.106/2010 OF ADDL.DISTRICT COURT, NORTH PARAVUR
E.A.NO.226/2008 IN E.P.NO.4/2008 IN OS.NO. 278/2002 OF MUNSIF COURT,ALUVA

APPELLANT/APPELLANT/PETITIONER:

PRADEEP, AGED 42 YEARS,
S/O.CHATTU, PUTHUMANA HOUSE, ALUVA KARA,
ALUVA WEST VILLAGE, ALUVA TALUK.

BY ADV. SRI.B.JAYASANKAR

RESPONDENTS/RESPONDENTS/RESPONDENTS :

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1. MOHAMMED ASEEM,S/O.KUNJALI NAINA,
VEZHAPPILLY HOUSE, PALACE ROAD, ALUVA,
PIN-683 101.
 - *2. HALEENA NAINA,S/O.KUNJALI NAINA,
VEZHAPPILLY HOUSE, PALACE ROAD, ALUVA,
PIN-683 101. (DIED)
 3. V.K.HARIS, S/O.KUNJALI NAINA,
VEZHAPPILLY HOUSE, PALACE ROAD, ALUVA,
PIN-683 101.
 4. ALUVA MUNICIPALITY,REPRESENTED BY ITS SECRETARY,
MUNCIPAL OFFICE, ALUVA, PIN-683 101.
 5. SURESH BABU,S/O.KUTTAPPAN,
AMC-18/483, PALACE ROAD,ALUVA, PIN-683 101.

*ADDL.R6 & R7 IMPEADED

*ADDL.R6: KUNJALI NAINA, VAZHAPPILLY HOUSE,
PALACE ROAD,ALUVA-683 101

*ADDL.R7: V.K.AZEES, S/O.KUNJALI NAINA,
VAZHAPPILLY HOUSE, PALACE ROAD, ALUVA-683 101

*LRS OF DECEASED R2 ARE IMPEADED AS ADDL.R6 & R7 AS PER ORDER
DATED 26/08/2014 IN IA.NO.2214/2014.

R1 & R3,ADDL.R6 & ADDL.R7 BY ADV. SRI.S.B.PREMACHANDRA PRABHU
R1 & R3 BY ADV. SRI.K.B.RAJESH
R4 BY ADV. SRI.V.M.KURIAN, SC, ALUVA MUNICIPALITY

THIS EXECUTION SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 06-01-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

A.HARIPRASAD, J.

EX.S.A.No.13 of 2014

Dated this the 6th day of January, 2015

J U D G M E N T

Substantial questions of law raised in this Execution Second Appeal are as follows:

(i) Whether the execution court and the appellate court were justified in arriving at their conclusions without adjudicating the right, title or interest raised by the appellant under Order 21 Rule 97 of the C.P.C.

(ii) Whether the courts below erred in dismissing the application filed by the appellant under Order 21 Rule 97 of the C.P.C without proper identification of the subject matter of the decree.

2. Heard the learned counsel for the appellant and the learned counsel for respondents 1, 3, 6 and 7.

3. Facts in short, which are essential for the disposal of the dispute, are as follows: Original respondents 1 to 3 in this proceedings are the plaintiffs in O.S.No.278 of 2002 on the file of the Munsiff's Court, Aluva. Pending the proceedings, respondent 2 died and his legal heirs were impleaded. The

defendants in the suit are respondents 4 and 5. The suit is one for mandatory and prohibitory injunction against the 1st defendant (Aluva Municipality). The prayer made is for issuing a mandatory injunction against the 1st defendant (Aluva Municipality) to demolish the structure in the plaint B Schedule property which was built illegally and also for a permanent prohibitory injunction against the 2nd defendant (5th respondent) restraining him from conducting a bunk shop illegally constructed in the Plaint B-Schedule property. The suit was decreed in favour of the plaintiffs/contesting respondents. The decree has become final. When the decree was put in execution, the appellant/stranger approached the court below with an application under Order 21 Rule 97 of the C.P.C contending that he has independent right over the bunk shop situated in the plaint B-Schedule property and on the guise of executing the decree, the contesting respondents were trying to evict him from the bunk shop. According to the appellant, he got possession of the bunk shop over which he claims right as per Ext.A1 'Panaya Udambady' dated 01.06.2001. By virtue of that document he is in possession of the bunk shop bearing No. VIII/40(1) of the Aluva Municipality having an extent of

200sq.links. The appellant got possession of the bunk shop from the 5th respondent. It is the contention of the appellant that the bunk shop which he claims was not the subject matter of the suit and decree.

4. The contesting respondents resisted the claim of appellant. According to the respondents, the appellant is only a henchman of the 5th respondent (2nd defendant in the suit). It is also contended by the learned counsel for the contesting respondents that there was an earlier suit between the contesting respondents and others as O.S.No.328 of 1987 on the file of the Munisiff's Court, Aluva. That was a suit for partition. In the execution proceedings, the 5th respondent herein (2nd defendant in the suit) raised a contention that he had right over 200sq.links of property included in Ext.B4 in this case.

5. Learned counsel for the respondent submitted that the issue ultimately reached this Court in Execution Second Appeal No.14 of 2010 and it was conclusively determined that the 5th respondent had not derived any right by virtue of Ext.B4. So much so, the appellant cannot get any right under the 5th respondent. These are the contentions raised by the

contesting respondents.

6. Learned counsel for the appellant contended that this is the second round of appeal before this Court in the execution proceedings. The matter came up in Execution Second Appeal No.08 of 2009 before this Court. A learned Single Judge disposed of the case as per judgment dated 13.11.2009. The question of law raised therein read as follows:

“When an obstruction petition is filed by a third party to the decree contending that the property in his occupation is not the subject matter of the decree sought to be executed, is not the execution court bound to adjudicate the same as contemplated in Order XXI Rules 97 to 103 and enter a finding on all questions including questions relating to title or interest in the property arising between the parties?”

7. After considering the rival contentions, the learned Judge allowed the Second Appeal and set aside the order by the trial court and also the lower appellate court passed under Order XXI Rule 97 of C.P.C. The matter was remanded to the executing court to enable the parties to identify the disputed bunk shop.

8. After remand, the parties adduced evidence and

the trial court again dismissed the application. That was challenged in appeal before the learned Additional District Judge, North Paravur, who in turn again dismissed the claim raised by the appellant. Aggrieved by those orders the appellant has come up in this appeal.

9. Learned counsel for the appellant mainly contended that the description in the plaint Schedule does not tally with the description shown by the Advocate Commissioner in Ext.C1 report and C1(a) rough sketch. In the plaint B-Schedule property the description of the bunk shop is shown as a wooden structure with brick walls on the eastern and western sides, covered with asbestos and tin sheet. As per the Advocate Commissioner's report the description of the bunk shop is totally different.

10. In answer to this argument the learned counsel for the contesting respondents contended that the nature of the bunk shop was altered pending the litigation. There is no evidence to hold that there is another bunk shop in the property in question.

11. Learned counsel for the respondents contended that the records produced by the Municipality, namely, Exts.X1 and

X2 would show that the 5th respondent made an application to Aluva Municipality to assign a number to his bunk shop only on 20.04.2002. But Ext.A1 'Panaya Udambady' is seen dated 01.06.2001. It is therefore contended that on the date of Ext.A1 document, Suresh Babu (5th respondent) had no right over the bunk shop and number of the bunk shop, mentioned in the document, will clearly indicate that Ext.A1 is a document created falsely for raising a claim in respect of it. I am of the view that this submission of the learned counsel for the contesting respondents is acceptable. Exhibit X2 document also shows that the application for assessment of property tax was allowed by the Municipality only on 30.04.2002, much later to Ext.A1. That also makes the contention of the appellant highly improbable that he was put in possession of the bunk shop as per Ext.A1.

12. That apart, the courts below considered the fact that though Ext.A1 is styled as a mortgage deed, it was not registered, making it inadmissible in evidence as it violates Section 17 of the Registration Act. At the most, it can be looked into for determining the nature of possession of the appellant. The documents produced in this case would not show that the

appellant was in possession of the disputed property. The courts below rightly relied on Exts.A2 to A4 to find that all the documents relating to payment of electricity charges, building tax receipt, etc., stood in the name of the 5th respondent, even subsequent to Ext.A1. Therefore, the courts below were legally justified in finding that the claim of possession raised by the appellant on the basis of Ext.A1 cannot be countenanced.

13. Learned counsel for the contesting respondents relying on Ext.B1, B7, B8 and B9 contended that the claim of the appellant that he is in possession of a bunk shop, which is not included in the decree, is also not sustainable. Ext.B1 is a certificate issued under the Right to Information Act from Aluva Municipality. It can be seen that the bunk shop No.XVIII/433 is re-numbered in the next assessment year (2004-2005) as VII/35. One person by name P.K.Kumaran is shown as the person in possession, who is none other than father of the 5th respondent. Exts.B7 and B8 would show that there was no bunk shop in existence in Aluva Municipality in ward No.VIII as building No.40(1). Similarly, the case that the electric connection stood in the name of the 5th respondent was shifted to the appellant is also belied by Ext.B9.

14. Considering the entire evidence, I am of the view that the questions of law raised in this case can only be answered against the appellant. The courts below correctly appreciated the evidence and found that the attempt of the appellant is to prolong the litigation at the behest of 5th respondent, who is the second defendant in the suit I find no merit in the appeal.

In the result this appeal is dismissed. There is no order as to costs.

A.HARIPRASAD, JUDGE.

AS