

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 18TH DAY OF SEPTEMBER 2015/27TH BHADRA, 1937

R.S.A.No. 855 of 2004 (B)

AGAINST THE JUDGMENT IN AS 591/1998 of 1ST ADDL.DISTRICT
COURT, THRISSUR.
AGAINST THE JUDGMENT IN OS 409/1993 of MUNSIFF
COURT,CHAVAKKAD.

APPELLANT(S)/RESPONDENT/PLAINTIFF:

ALPHONSA, W/O. ARAKKAL JOSEPH,
PAVARATTY AMSOM AND DESOM, CHAVAKKAD TALUK,
TRICHUR DISTRICT.

BY ADVS. SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.T.M.CHANDRAN
SRI.S.SUJITH

RESPONDENT(S)/APPELLANTS/DEFENDANTS:

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1. KRISHNAN NAMBOODIRI,
S/O. CHERUVAKKARA MANAKKAL KRISHNAN NAMBOODIRI,
RESIDING AT PAVARTY AMSOM, DESOM, CHAVAKKAD TALUK.
 2. NARAYANAN NAMBOODIRI,
S/O. CHERUVAKKARA MANAKKAL KRISHNAN NAMBOODIRI,
RESIDING AT PAVARTY AMSOM, DESOM, CHAVAKKAD TALUK.
 3. UNNI @ PARAMESWARAN,
S/O. CHERUVAKKARA MANAKKAL KRISHNAN NAMBOODIRI,
RESIDING AT PAVARTY AMSOM, DESOM, CHAVAKKAD TALUK.
 4. UNNI @ RAVI,
S/O. CHERUVAKKARA MANAKKAL KRISHNAN NAMBOODIRI,
RESIDING AT PAVARTY AMSOM, DESOM, CHAVAKKAD TALUK.

5. UNNI @ RAMACHANDRAN,
S/O. CHERUVAKKARA MANAKKAL KRISHNAN NAMBOODIRI,
RESIDING AT PAVARTY AMSOM, DESOM, CHAVAKKAD TALUK.

6. UNNI @ SREEKUMARAN,
S/O. CHERUVAKKARA MANAKKAL KRISHNAN NAMBOODIRI,
RESIDING AT PAVARTY AMSOM, DESOM, CHAVAKKAD TALUK.

R1 TO 6 BY ADV. SMT.PREETHY KARUNAKARAN
BY ADV. SRI.R.RAJESH KORMATH
BY ADV. SMT.M.R.MINI
BY ADV. SMT.SANJANA R.NAIR
BY ADV. SRI.JAYKAR.K.S.
BY ADV. SRI.RAHUL VARMA

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 18-09-2015 ALONG WITH R.S.A. 856/2004, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

R.S.A. Nos.855 & 856 of 2004

Dated this the 18th day of September, 2015.

JUDGMENT

Two suits O.S. 409 of 1993, a suit for injunction and O.S. 389 of 1995, a suit for recovery of possession on the strength of title were jointly tried and disposed of. O.S. 409 of 1993 was decreed, against which the defendants preferred appeal as A.S. 591 of 1998. O.S. 389 of 1995 was dismissed and the plaintiff preferred A.S. 592 of 1998. The defeated plaintiff in O.S. 389 of 1995 preferred two appeals and both the appeals were allowed by the appellate court. The result was O.S. 409 of 1993 stood dismissed while O.S. 389 of 1995 was decreed. O.S. 389 of 1995 was filed by defendants 1, 2, 4 and another person against the plaintiff in O.S. 409 of 1993. Therefore, the plaintiff in O.S. 409 of 1993 is the appellant in both these cases.

2. Since O.S 389 of 1995 was a suit based on title, it was taken as the leading case. Evidence was also adduced in that case. Hence parties and facts are hereinafter referred to as are available in O.S. 389 of 1995.

3. Plaint A schedule property was set apart to the plaintiffs as per Ext.A1 partition deed of 28.12.1964. It is item No. 7 in B schedule. Property on the western side belongs to the defendants. That was a paddy land recently reclaimed. While the reclamation was being done, a portion of A schedule was annexed to the property of the defendants. That portion of A schedule which was annexed by the defendants is shown as B schedule property. After annexing a portion of A schedule property, the defendants with ulterior motive put up a compound wall on the eastern boundary. B schedule in fact belongs to the plaintiffs and they are entitled to recover the same.

4. The suit was resisted by the defendants. They denied all the allegations in the plaint and contended that the property of the second defendant is on the western side of plaint A schedule property. They disputed the description of the plaint schedule property. According to them, the property which is annexed within the compound wall belongs to them exclusively and the plaintiffs had no manner of right. They denied trespass and contended that even if the plaintiffs had any manner of right, that was lost by adverse possession and limitation.

5. The defendants in O.S. 389 of 1995 had earlier filed O.S. 409 of 1993 against the plaintiffs in O.S. 389 of 1995 seeking to restrain them from trespassing into the plaint schedule property in O.S. 409 of 1993.

6. Issues were raised on the above pleadings and evidence was adduced by the parties. Evidence consists of the

testimony of P.W.1 and documents marked as Exts.A1 and A2 from the side of the plaintiffs. D.W.1 was examined on the side of the defendants and Exts.B1 to B5 were examined. The Commissioner was examined as C.W.1 and Exts.C1 to C4 were marked.

7. B schedule property was the bone of contention. Both sides claimed that it is their property. The trial court, applying the principle that in case of discrepancy in survey number, extent etc., the property is to be identified with respect to the boundaries, went in favour of the plaintiff in O.S. 409 of 1993. It went on to hold that plaint B schedule is not a part of item No.7 in Ext.A1 B schedule and dismissed O.S. 389 of 1995.

8. In appeal, the lower appellate court reversed both the decrees and decreed O.S. 389 of 1995 and dismissed O.S. 409 of 1993. Hence the two appeals.

9. The following questions of law are seen raised in these appeals:

“1) Has the lower appellate court acted in accordance with law in the matter of identifying the disputed properties?

2) When there is conflict between the boundaries non the one hand and the survey document, which would prevail in law?

3) Is the 2nd defendant entitled to any legal right on account of his long possession and the continuity of the same?”

10. Learned Senior Counsel appearing for the appellant contended that the lower appellate court has erred both on facts and in law. The trial court had meticulously considered the documents and correctly applied the law and had come to the conclusion that B schedule cannot form part of A schedule. The trial court found that B schedule is taken in by Exts. B1 to B4. Convincing and cogent reasons have

been given for such a conclusion. The trial court was correct in its finding that identity of B schedule was not established. The trial court attempted identification of the property with respect to the boundaries.

11. Learned Senior Counsel went on to point out that on a careful scrutiny of Ext.A1, it will be seen that the properties allotted to the plaintiffs in O.S. 389 of 1995 runs from north to south. The various items of properties granted to the plaintiff in Sy. No. 153/1 contain kole measurements. A perusal of the kole measurements will show that east west kole measurement is longest at the extreme north and the east west kole measurement of subsequent southern plots get narrowed down. While the northern most plot has an east west kole measurement of 39, as regards subsequent plots it is only 20. It is therefore clear that disputed plot cannot have an east west measurement of 20 to 22 koles. If one looks at Ext.C4, it can be clearly seen that B schedule forms a plot of

more than 20 to 22 koles. This anomaly remains unexplained. The lower appellate court has overlooked this aspect.

12. It is also contended that going by the boundaries also it is seen that properties have not been identified. Boundaries did not tally. Relying on the decisions reported in Kumaran Krishnan v. Ulahannan Mathai (1957 K.L.T. 42) it was contended that in case of ambiguity in identification, it has to be made with reference to the boundaries and this case is no exception.

13. Learned Senior Counsel appearing for the appellants conceded that it is true that the defendants did not claim any property in Sy. No. 153/1. But in all the prior documents, it has been mentioned that there is a possibility of error in survey number and extent shown in the deeds. In the light of the said recital in the deed, it is very much possible that the property obtained as per Exts. B1 to B4 had a larger extent and a portion of the property was lying in Sy. No.

153/1.

14. Learned counsel pointed out that since the document of title of the defendants, namely, Exts. B1 to B4, mention properties in Sy. No. 152/6 only or that they now owned and possessed a larger extent consisting of a portion of the property in Sy. No. 153/1, does not mean that the excess property belonged to the plaintiffs.

15. Further, learned Senior Counsel pointed out that B schedule property now lies at a much higher level than the rest of the properties and the plaintiffs had no case that they had reclaimed any portion of the property obtained by them. A boundary wall had already been put up on the eastern side of B schedule and it lies contiguous to the property owned by the defendants.

16. It was very vehemently contended that the suit is based on title and the entire burden is therefore on the plaintiffs. They will have to establish title to plaint B schedule

property. Weakness in the defence case cannot be of any use to the plaintiffs. It is also complained that even though objection had been filed to the Commission report, that had not been considered. It was overlooking the material facts and circumstances that the suit had been decreed by the appellate court. It is contended that the decrees are unsustainable both on facts and in law.

17. Learned counsel appearing for the respondents on the other hand contended that the trial court based its finding solely on the ground that the southern and northern boundaries as stated in the documents do not tally with Ext.C4 plan and had non-suited the plaintiffs in O.S. 389 of 1995. The defendants have no case that they own an inch of property in Sy. No. 153/1. The property covered by Exts. B1 to B4 is comprised in Sy. No. 152/6. The Commission report is very clear that defendants have illegally annexed B schedule to their property. The Commissioner had found that kole

measurements are not reliable for various reasons. The defendants were unable to show that there was any error in the commission report and plan. Even going by Exts. B1 to B4, the defendants are entitled to 96 cents in Sy. No. 152/6 and on measurement the defendants were found to hold much more extent of property including the property in Sy. No. 153/1. Learned counsel also pointed out that it is significant to notice that D.W.1 stated that he had come to know in 1990 that a portion of the property covered by Exts. B1 to B4 now lies in Sy. No. 153/1. But he had not taken any steps in that regard. The appellate court had considered all the matters in considerable detail and the said judgment and decree do not call for any interference.

18. It has to be noticed that the property covered by Exts.B1 to B4 belonged to the tarawad of the plaintiffs. Plaintiffs lay claim to A schedule by virtue of partition deed Ext.A1. That property is item No. 7 of D schedule.

19. One can have no quarrel with the legal proposition stated by the learned Senior Counsel for the appellant. Normally the property is identified with respect to its boundaries and in a suit based on title, the entire burden is on the plaintiffs to establish his title. However, the principle of identification by boundaries is not an invariable and inflexible rule. Various decisions lay down the principle that the factum which is more certain and definite should be the basis for identification of the property.

20. Learned counsel for the respondents is correct in her submission that the trial court merely observing that southern and northern boundaries of B schedule in the plaint do not tally with the boundaries shown in Ext.C4 had non-suited the plaintiffs. That is indeed superficial.

21. One may at this point refer to Ext.C4 to identify the location of plaint schedule property. As already stated, the

property of the plaintiffs is in Sy. No. 153/1 and that of the defendants is in Sy. No. 152/6. There cannot be any dispute that the total extent of property obtained by the defendants as per Exts.B1 to B4 is only 96 cents. It is also not in dispute that the property of the defendants situate on the western side of plaint A schedule property.

22. The lower appellate court instead of merely identifying B schedule property with respect to the boundaries as discernible from Ext.C4, felt it necessary to look into various other circumstances also. The lower appellate court on a re-evaluation of the evidence found that there is no possibility of defendants holding any property comprised in Sy. No. 153/1.

23. The lower appellate court on a consideration of the materials came to the conclusion that the courts were guided by the kole measurements as could be seen from the commission report and plan. As per Ext.A1 the plaintiffs

should have 53 cents in Sy. No. 153/1. The Commissioner found that the plaintiffs are in possession of only 33 cents in Sy. No. 153/1.

24. The trial court was of the view that the Commissioner ought to have measured the entire property in Sy. No. 153/1 and then locate the property obtained by the plaintiffs. One fails to understand the logic and rationale behind the finding. Defendants at no point of time had a case that they have any portion of the property in Sy. No. 153/1 or in other words their documents of title Exts.B1 to B4 showed the properties in Sy. No. 152/6. It is significant to notice that the Commissioner had given cogent and convincing reasons as to why reliance could not be placed on kole measurements and the lower appellate court has found the reasons given by the Commissioner to be convincing enough. Going by the kole measurement, the defendants ought to have property in sy. Nos. 147/7 and also 153/1, a case which the defendants did

not have at any point of time. More important is the fact that Commissioner on measurement with respect to title deed found that the defendants are in possession of 96 cents covered under Exts.B1 to B4 and the identity so determined tallied with survey sub division of the boundaries. If the defendants had any property in Sy. No. 153/1, that would not have been possible.

25. The Commissioner in his sketch Ext.C4 has shown the various properties owned by the different parties. He has shown the property owned by the parties and has separately shown in violet shade the portion of the property in dispute, i.e. Plaint B schedule. The property covered by Exts. B1 to B4 of the defendants have been identified as red shaded portion. As already noticed, the red shaded portion is comprised in Sy. No.152/6 and extent is 1.06 acres. The lower appellate court has also found that if the defendants' case is true, there could not have been coconut trees aged 90

years and a compound wall of approximate age of 10 years. If the cases of the defendants were true, things would not have been so. Here one has to notice that though in the written statement the pleading was that reclamation was in 1990, at the time of evidence realizing the potential danger, he said that the reclamation was in 1990.

26. These facts gain support only from the evidence of D.W.1 and there is no supporting evidence.

27. Once it is established that the property covered by Exts.B1 to B4 identified by the Commissioner is comprised in Sy. No. 152/6 and contains the extent conveyed as per those deeds and when the defendants have no case that they ever possess property in Sy. No.153/1, then it is difficult to accept the finding of the trial court based merely on two boundaries of the disputed property that plaint B schedule is not a part of plaint A schedule property.

28. It is true that the disputed portion shown in violet shade lies at a higher level than the rest of the properties in A schedule. It is also true that there is a compound wall on the eastern side of B schedule property admittedly put up by the defendants. But here one may recall the claim of the plaintiffs that it was while reclaiming their property that defendants had committed the mischief of annexing a portion of plaintiff A schedule property to their property. If the properties were measured with possession of property by the respective parties, there would not have been any defects. On such measurement, the identity of the property could be easily obtained. The Commissioner has reported that he was able to identify the property obtained by the defendants as per Exts.B1 to B4. One may notice here that the evidence of D.W.1 is to the effect that they had come to know that they had property in Sy No. 153/1 in 1990, but they

had not taken any steps to have the document rectified. On a reading of lower appellate court judgment and also from the evaluation of the evidence, it is clear that the finding of the trial court is perverse and contrary to the evidence on record. The lower appellate court had taken pains to re-appreciate the evidence and has come to the conclusion that plaint B schedule property forms part of plaint A schedule.

29. By no stretch of imagination, it could be said that the finding of the lower appellate court is perverse or contrary to the evidence on record. Further, the said court is the final court on facts entitled to take a different view from the view taken by the trial court. In the case on hand, the lower appellate court has discussed the matter in considerable detail and shown how the trial court has erred in its approach.

30. The view taken by the lower appellate court is justifiable and reasonable. While exercising the jurisdiction under Section 100 of the Code of Civil Procedure even if a

different view is possible, this Court will not be justified in substituting the finding of the lower appellate court.

For the above reasons, it is held that these appeals are without merits and they are liable to be dismissed. I do so.

sb.

P. BHAVADASAN,
JUDGE