

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P. BHAVADASAN

FRIDAY, THE 5TH DAY OF JUNE 2015/15TH JYAISHTA, 1937

RSA.No. 363 of 2005 ()

AGAINST THE JUDGMENT & DECREE IN AS.NO. 13/1998
OF SUB COURT, ATTINGAL DATED 21-08-2004
AGAINST THE JUDGMENT & DECREE IN OS.NO. 68/1993 AND OS NO. 134/1993
OF MUNSIFF COURT, VARKALA DATED 31-01-1997

APPELLANT/RESPONDENT/DEFENDANT :

(IN OS NO. 68/1993 APPELLANT IS THE PLAINTIFF)

G. INDIRA,
D/O. GOPALAN, AGED 60 YEARS,
PERUMALVILA VEEDU, CHARUVILA VEEDU
CHERUKUNNAM DESOM, VARKALA VILLAGE.

BY ADVS.DR.K.P.KYLASANATHA PILLAY
SRI.ARUN B.VARGHESE
SRI.T.P.DEYANANTHAN
SMT.SREEDEVI KYLASANATH

RESPONDENTS/APPELLANTS/PLAINTIFFS :

1. LALITHA,
D/O. GOPALAN, AGED 45 YEARS,
VAZHAVILA VEEDU, AYANTHI, CHERUNNIYOOR VILLAGE
AND CHERUNNIYOOR DESOM.

2. PUSHANGADA PANICKER,
AGED 50 YEARS, VAZHUVILA VEEDU, AYANTHI
CHERUNNIYOOR VILLAGE AND DESOM.

R1 & R2 BY ADVS. SRI.VAKKOM N.VIJAYAN
SRI.R.SURESH
SMT.VINITHA PRASANNAN
SRI.P.ANIYAN
SMT.RAGAM.K.P.
SMT.REENA.C.STEPHENSON

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 05-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

Mn

P.BHAVADASAN, J.

R.S.A. No. 363 of 2005

Dated this the 05th day of June, 2015

J U D G M E N T

The defendant in O.S.No. 134/1993 has come up in appeal.

2. The appellant and the first respondent are siblings. Both of them laid suit for mandatory injunction and other reliefs. In fact, the suit filed by the respondents before that Court is one for fixation of boundary, recovery of possession etc.

3. Both trace their title to respective properties as per Ext. B1 partition deed dated 27.10.1979. 67 cents of properties were divided among 7 parties and six of them got ten cents each and one of them got 7 cents. The respondents herein claimed to have obtained ten cents each.

4. Both parties laid suits. The appellant laid O.S.No. 68/1993 and the respondents laid O.S.No. 134/1993. A

Commission was appointed. Both suits were jointly tried. Separate issues were raised and decided. Common evidence was adduced.

5. The evidence consists of the testimony of PWs 1 to 3 and documents marked as Exts. A1 to A4 from the side of the plaintiffs. The defendant examined DWs 1 to 3 and had Exts. B1 to B3 marked. Exts. C1 and C1(a) are the Commissioner's report and plan. Exts.X1 to X4 are the third party exhibits. It may be mentioned here that O.S.No. 134/1993 was treated as the leading case and evidence was adduced in the said case.

6. In O.S.No.68/1993 filed by the appellant herein, the following issues were raised:

- “i) Is the suit not maintainable?
- ii) Whether the plaintiff is in absolute possession and enjoyment of the plaint schedule property?
- iii) Whether the plaintiff is entitled to get a permanent prohibitory injunction against the defendant as prayed?

iv) Reliefs and Costs.”

7. In O.S.No. 134/1993, the issues raised were as follows:

“i) Whether plaintiffs are entitled to get declaration as prayed for?

ii) Whether plaintiffs are entitled to get an order of mandatory injunction as prayed for?

iii) Whether plaintiffs are entitled to get compound wall constructed separating plaint 'A' schedule property and defendant's property?

iv) Whether plaintiffs are entitled to get mesne profits as prayed?

v) Whether suit is bad for non-joinder of necessary parties?

vi) Whether defendant is entitled to get compensatory cost?

vii) Reliefs and Costs.”

8. The trial court, on an appreciation of the evidence, found that the plaintiff in O.S.No.68/1993 filed by the appellant herein was not successful in establishing her case and found that she was not in absolute possession and enjoyment of ten cents as claimed by her. It was also found that she is not entitled to get a permanent prohibitory

injunction against the defendant. The trial court also found that even though there is evidence for trespass by the defendant in the suit namely O.S.No. 134/1993, since the suit was one for laying of boundary also and the trial court felt that all neighbouring owners should be parties to the suit, dismissed the suit for non-joinder of necessary parties.

9. The appellant who lost the suit namely O.S.No.68/1993 let the decree became final and did not challenge in appeal. The respondents herein who filed O.S.No.134/1993, so far as the decree was against her, challenged the decree in A.S.No. 13/1998. The lower appellate court on re-appreciation of the evidence reversed the finding of the trial court as regards the finding in O.S.No. 134/1993 and granted a decree in favour of the plaintiff in the said suit. Assailing the same, this second appeal has been filed.

10. The learned counsel appearing for the appellant pointed out that the judgment and decree of the court below

are clearly unsustainable both on facts and in law. Heavy reliance has been placed on the Surveyor's report which is not in accordance with the actual possession available on site and that sketch ought not to have been accepted. It is contended that it is an admitted fact that even the ten cents were set apart to both the plaintiff as well as the defendant in the suit, they did not get the actual extent of property and they got a far lesser extent of property. It is also seen that a portion of the property was taken for the purpose of widening the road. Therefore, the claim of the plaintiff in O.S.No.134/1993 that she is in possession of ten cents cannot be accepted. Further, it is pointed out that there is considerable level difference between the property of the appellant and the respondents and there could not have been any doubt regarding the boundary separating the two properties. These vital aspects have been omitted to be noticed by the courts below that has resulted in a wrong decree being passed.

11. The learned counsel appearing for the respondents raised a preliminary objection that the appeal is not maintainable since it is barred by *resjudicata*. It was contended on behalf of the respondents that O.S.No.68/1993 filed by the appellant herein was dismissed on merits finding that she has not been successful in showing that she is in actual possession of ten cents as claimed by her. Her prayer for injunction against the defendant in the said suit was also rejected. That decree has become final. Therefore, it cannot be said that she is in possession of ten cents thereafter. Though O.S.No. 68/1993 and O.S.No.134/1993 were jointly tried, issues were raised in each of the case separately and they were answered independently. Since the respondent was not aggrieved by the judgment and decree in O.S.No. 68/1993, she did not file an appeal from that judgment and decree. She was concerned only with the judgment and decree in O.S.No. 134/1993 which was her suit and therefore she filed the appeal. The learned counsel

went on to point out that the claim of the appellant that by getting a portion of the property said to have been encroached by the appellant herein, the claim put forward by the appellant that she is getting ten cents of land cannot be countenanced. Even after obtaining the trespassed portion which is assessed as 498 sq.links, the extent of the property in the possession of the plaintiff in O.S.No. 134/1993 will be far less than the ten cents granted in the partition deed. The learned counsel went on to point out that the trial court was not justified in dismissing her suit for non-joinder of necessary parties for the simple reason that dispute was only between the plaintiff and the respondents and there was no dispute with regard to the boundaries among the parties. In short, it is contended that there are no grounds to interfere with the judgment and decree of the lower appellate court.

12. 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 respondents. True the learned counsel for the appellant relied on the decision reported in **Ramchandra Sakharam Mahajan v. Damodar Trimbak Tanksale** [(2007) 6 SCC 737] and **Sheodan Singh v. Daryao Kunwar** [AIR 1966 Supreme Court 1332] and contended for the position that when a suit is dismissed on technical ground, it cannot act as *resjudicata*. The mere fact that no appeal has been filed from the decree in O.S.No.68/1993 cannot attract the principle of *resjudicata*.

13. The above contention has no merits. It is true even otherwise that when a suit is dismissed on technical grounds without going into the merits of the case, it could not be said that the issues arising in the suits have been decided finally resolving the rights of parties. But it was not the suit of the appellant namely O.S.No.68/1993 which was dismissed for non-joinder of necessary parties. Her suit for injunction was dismissed on merits. As rightly noticed by

the learned counsel respondents, even though the suits were jointly tried, issues were separately raised and answered. In the suit filed by the appellant herein, it was found that she is not in possession of the property as claimed by her and she is not entitled to any relief thereafter. That judgment and decree has become final.

14. The respondents too are filed a suit for various reliefs i.e. declaration of title, fixation of boundaries and other reliefs. The court below placed reliance on Ext.C1(a) Commissioner's sketch and found that going by the Commissioner's report and sketch, the allegation of trespass by the appellant herein was true and granted a decree in respect of 498 sq.links of property shown as BCDE in Ext.C1 (a) plan. The claim put forward by the appellant that by virtue of the extent now granted of which recovery is given, the respondent is making good the property to have ten cents, cannot be countenanced. In the plan appended to the Commissioner's report, it has been clearly stated that even

though the plaintiff in O.S.No.134/1993 was granted ten cents as partition deed, she had obtained only 8 and odd cents. The portion trespassed by the appellant herein is shown to be 498 sq. links. Therefore, even if that portion of the property is added, still it would not come to ten cents. It will be less than that ten cents which is allotted to as per partition. This is exactly the case of the appellant also. The claim that the sketch is not properly drawn, cannot be countenanced in view of the fact that both the courts below have accepted the Commissioner's report as correct and true. Apart from the fact that this appeal is barred by *resjudicata*, there is no merit also as there is no infirmity in the findings of the court below.

This appeal is without merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge