

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

RSA.No. 693 of 2005 (G)

(AGAINST THE JUDGMENT IN AS.NO. 281/1998 OF ADDL.DISTRICT AND SESSIONS
FAST TRACK COURT (ADHOC)-II, KOTTAYAM DATED 26-02-2005)

(AGAINST THE JUDGMENT AND DECREE IN OS.NO. 167/1996 OF MUNSIF COURT,
CHANGANACHERRY DATED 15-09-1998)

APPELLANTS/APPELLANTS/PLAINTIFFS:

- *1. M.SAROJINIDEVI AMMA,
D/O.LAKSHMIKUTTY AMMA, DEVIVIHAR, MUKKATTUPURAYITATHIL,
VAZHAPPALLY WEST VILLAGE, VAZHAPPALLY WEST MURI.
(DIED- LR'S RECORDED)

*LEGAL HEIRS OF DECEASED 1ST APPELLANT RECORDED

*1ST APPELLANT DIED AND APPELLANTS 2 TO 5 ARE RECORDED AS THE
LEGAL HEIRS OF DECEASED 1ST APPELLANT AS PER ORDER DATED
1/7/2010 IN MEMO BEARING CF 917/2010 DATED 8/2/2010.

2. M.SANKARI, D/O.SAROJINIDEVI AMMA,
DEVIVIHAR, MUKKATTUPURAYITATHIL,
VAZHAPPALLY WEST VILLAGE, VAZHAPPALLY WEST MURI,
NOW RESIDING AT FLAT NO.5, TYPE 4, CIFT QUARTERS,
THEVARA, ERNAKULAM.
3. M.KUSUMAM, D/O.SAROJINIDEVI AMMA,
DEVIVIHAR, MUKKATTUPURAYITATHIL, VAZHAPPALLY
WEST VILLAGE, VAZHAPPALLY WEST MURI,
NOW RESIDING AT GOKULAM, VENKATESWARA NAGAR,
POZHICHOLLOOR, MADRAS-74.
4. M.MADHAVAN NAIR, S/O SAROJINIDEVI AMMA,
DEVIVIHAR, MUKKATTUPURAYITTATHIL,
VAZHAPPALLY WEST VILLAGE, VAZHAPALLY WEST MURI,
NOW RESIDING AT DEVI VEETIL, MURUKA NAGAR,
PERUNNAI POSTAL AREA, CHANGANACHERRY.
5. M.S.MOHANAKUMAR, S/O.SAROJINIDEVI AMMA,
DEVIVIHAR, MUKKATTUPURAYITATHIL, VAZHAPPALLY
WEST VILLAGE, VAZHAPPALLY WEST MURI,
NOW RESIDING AT 102, PANCHASEEL APARTMENT,
KRISHNA TOWNSHIP, VASAY ROAD, MAHARASHTRA.

BY ADV. SRI.S.SUBHASH CHAND

R.S.A.NO.693/2005

RESPONDENT(S)/RESPONDENTS/DEFENDANTS:

- 1. SUSHAMMA,W/O. VELAYUDHAN NAIR,
FROM MADATH VEETIL, VAZHAPPALLY WEST VILLAGE,
VAZHAPPALLY WEST KARA, NOW RESIDING AT
KANJIRAKKATTU VEETIL, VARAPPETTY P.O.
KOTHAMANGALAM TALUK.**
- 2. BALAKRISHNAN NAIR, FROM KRISHNA VILASAM,
VAZHAPPALLY WEST VILLAGE, VAZHAPPALLY WEST KARA,
NOW RESIDING AT MADATHANIL, VAZHAPPALLY.**

**R1 BY ADVS. SRI.V.B.PREMACHANDRAN
SRI.P.K.SIVADASAN NAIR
SRI.K.N.GOVINDANKUTTY MENON
SRI.S.MADHAVAN NAIR**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 21-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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P.B.SURESH KUMAR, J.

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R.S.A.No.693 of 2005.

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Dated this the 21st day of December, 2015.

J U D G M E N T

The plaintiffs in a suit for declaration, recovery of possession and injunction, both mandatory and prohibitory, are the appellants in this second appeal.

2. There are six items of properties in the suit. Item No.1 is a property measuring 42 cents in survey No.172/6A of Vazhappally West Village obtained by the plaintiffs as per Ext.A1 partition deed. It is alleged by the plaintiffs that item No.2 property measuring 6.5 cents is a property set apart by the family to which the plaintiffs belong to be used as a way. According to the plaintiffs, defendants 1 and 2 had trespassed into a portion of item No.2 property. The portion of item No.2 property alleged to

have been trespassed upon by the defendants is shown in the plaint as item No.3. Item No.4 is a structure erected by the defendants in item No.3 property. Item No.5 is the latrine of defendants 1 and 2 situated in item No.3 property. Likewise, item No.6 property is the well of defendants 1 and 2 in item No.3 property. According to the plaintiffs, defendants have no right whatsoever over item No.2 property and therefore, they are entitled to get their title declared over the same and recover the same from the defendants, after getting the structures erected by the defendants therein demolished through the process of the court. The suit was resisted by the defendants. According to them, the plaintiffs have no right over item No.2 property. It was contended by the defendants that the plaintiffs can use item No.2 property only as a way to the plaint item No.1 property. The trial court found that the plaintiffs do not have exclusive right over item No.2 property. Consequently, the relief of declaration of title and

recovery of possession sought by the plaintiffs was declined. However, it was found by the trial court that in so far as item No.2 property is being used by the plaintiffs and others as a way, the plaintiffs are entitled to get the encroachments in the said property removed. In the light of the said findings, the trial court decreed the suit in part, directing the defendants, by a decree of mandatory injunction, to remove item Nos.4 to 6 structures from item No.3 property. The plaintiffs were also given a decree of permanent prohibitory injunction restraining defendants 1 and 2 from trespassing into item No.2 property or erecting any structures therein. The plaintiffs as also the defendants took up the matter in appeal. The appellate court, on a reappraisal of the materials on record, confirmed the decision of the trial court. The defendants have not challenged the decision of the appellate court. But, the plaintiffs have come up in this appeal challenging the decision of the appellate court.

3. Heard the learned counsel for the appellants as also the learned counsel for the respondents.

4. As noticed above, the grievance of the appellants in this appeal concerns the decisions of the courts below in declining the relief of declaration of title and recovery of possession sought in respect of item No.2 property. The courts below took the view that the plaintiffs do not have exclusive right over item No.2 property. In fact, in paragraph 4 of the plaint, the plaintiffs have conceded that item No.2 property is a property set apart by the family of the plaintiffs for the use of the members as a way. In other words, the plaintiffs have conceded that they do not have exclusive title to item No.2 property and that they have only right to use the same as a way. In the light of the said pleading in the plaint, it cannot be said that the concurrent decisions taken by the courts below in declining the relief of declaration of title and recovery of possession sought by the plaintiffs in respect of item No.2 property is

incorrect or illegal in any manner.

5. But, it is seen that an application has been filed by the plaintiffs in this appeal as I.A.No.3128 of 2015, seeking leave to substitute the pleading in paragraph 4 of the plaint referred to above, as follows:

“Aa]p]ᳵ kŸ]Wp]ᳵ q°LU jÒrLp] v]vq]“OĐ òsU Soᳵkr´
1965 Rs 480&LU jÒi BiLqNkWLqU vLh]Wᳵ“V v}f]\ŸO W]
Ÿ]p yiRvŸ jÒi 172/6 I p]ᳵ RkŸ KĐLU kŸ]Wp]
ᳵ v]vq]“OĐ 42 Ry£V òs¾]R£ nLYoLeV. a] 1 DU 2 DU kŸ]
W vzWᳵ r}yiRvŸpV“V SwxU pgLNWoU SmæL“V jÒi
13/15, 13/14 ID q°V jÒrOWtLp] f]q]´V SkLp]ŸOçfLeV.
kŸ]W 1 –DU 2 DU jÒrOWtORa v]ñ}i¹U r}yiRvŸàV SwxU
14.55 BiyV oLNfoLp] WOr´V SkLp]ŸOçfLeV.”

As is seen from the pleadings sought to be included in the plaint, the case now set up by the plaintiffs is that item No.2 property is part of item No.1 property obtained by them as per Ext.A1 partition deed. It is seen from Ext.A2 tax receipt and Ext.A5 basic tax register that prior to the re-survey, the plaintiffs had effected mutation in respect of 42 cents and at the time of re-survey, the property in survey No.172/6A has

been bifurcated into two sub divisions, one having an area of 11.88 ares and the other having an area of 2.70 ares. It is also seen from Exts.A3 and A4 that after the re-survey, mutation in respect of 2.70 ares of property referred to above was effected in the name of two persons namely, Madhavi Amma and Madhavan Pillai. According to the plaintiffs, 2.70 ares of property bifurcated from survey No.172/6A is the plaint item No.2 property and mutation is effected after the re-survey in respect of said property in the name of the aforesaid persons by mistake. It is also the case of the plaintiffs that the persons in whose favour mutation has been effected in respect of 2.70 ares of property referred to above are members of the family of the plaintiffs and they have nothing to do with the plaint item No.2 property. It is the further case of the plaintiffs that the aforesaid facts were omitted to be noticed at the time of institution of the suit and it is on account of the said reason, it was conceded in the plaint that item No.2 property is a

property owned by the family. A perusal of Exts.A2 to A5 documents would indicate prima facie that the case set up by the plaintiffs in the application for amendment that item No.2 property is part of item No.1 property obtained by them as per Ext.A1 under survey No.172/6A is correct. It is now settled that an application for amendment can be allowed at any stage of the suit including at the stage of a second appeal. Since it is found that the case set up by the plaintiffs in the application for amendment is prima facie correct, according to me, the plaintiffs are entitled to an opportunity to amend the plaint, as otherwise, their title, if any, to the said property will be lost for ever. It is also settled that the proviso to Order XVII of Rule 16 of the Code of Civil Procedure does not apply to the pleadings in cases provided for under Section 16(2)(b) of the Code of Civil Procedure (Amendment) Act, 2002. In the circumstances, I deem it appropriate remit the suit for fresh disposal in the interests of justice.

6. In the result, the impugned decisions are set aside, I.A.No.3128 of 2015 is allowed and the suit O.S.No.167 of 1996 is remitted to the trial court for fresh disposal. It is made clear that the defendants are entitled to file additional written statement, if they choose to do so. The plaintiffs are also permitted to implead the persons in whose favour mutation is effected in respect of item No.2 property after the re-survey.

The second appeal is allowed as above.

Sd/-
P.B.SURESH KUMAR,
JUDGE.

Kvs/-

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PA TO JUDGE.