

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 1ST DAY OF JUNE 2015/11TH JYAISHTA, 1937

RSA.No.281 of 2006

(Against the judgment and decree dtd.6.4.2005 in A.S.No.130/1999 of Sub
Court, Neyyattinkara
O.S.No.339/1997 of 2nd Additional Munsiff Court, Neyyattinkara)

APPELLANT:-APPELLANTS/DEFENDANTS:

1. THANKAPPAN, S/O. GANGADHARAN,
T.C.44/59, MANACAUD, TRIVANDRUM.
2. B.NALINI, KULATHUMKARA VEEDU,
MUDAVOORKONAM, THALAYAL DESOM, PALLICHAL VILLAGE.
3. N.SANILAKUMARI, DO. DO.
4. K.SANALKUMAR, DO. DO.
5. N.JAYASREE, DO. DO.
6. K.JAYAKUMAR, AUTO DRIVER,
IDUVA ROAD, MANGALATHUKONAM, VENGANOOR DESOM,
FROM DO. DO.

BY ADV. SRI.G.S.REGHUNATH

RESPONDENT:- (RESPONDENT/PLAINTIFF):

SREEMATHY AMBILY, SUMI BHAVAN,
INCHIVILA, POOMCODUKONAM, VENGANOOR DESOM
DO. VILLAGE.

BY ADV. SRI.B.JAYASURYA

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

P.BHAVADASAN, J.

Regular Second Appeal No.281 OF 2006

Dated this the 1st day of June, 2015.

J U D G M E N T

The short question that arises for consideration in this appeal is whether the decree granted in favour of the plaintiff in respect of B schedule property which has an extent of little over 2 cents is justified. It may be borne in mind that both the courts below have found in favour of the plaintiff.

2. Certain facts are not in dispute. Plaintiff A schedule property is having an extent of 10 cents, Plaintiff C schedule 5 cents and Plaintiff B schedule 2 cents. The plaintiff traced her title through one Gomathy who claims to have obtained kudikidappu right for 10 cents of property. Gomathy assigned 5 cents of property to strangers and the remaining 5 cents were in her possession. After the death of Gomathy, that 5 cents devolved upon her legal heirs and her legal heirs sold 2 cents of property which is scheduled as B schedule to the plaintiff.

Alleging that the defendants are attempting to trespass into the property, suit was laid.

3. Defendants resisted the suit. They pointed out that the claim of kudikidappu based on a purchase certificate having been obtained by Gomathy without making real landlord party to the O.A proceedings and any purchase certificate or kudikidappu certificate obtained behind the back of the original landlord is not binding on the landlord and amounts to fraud. They pointed out that there was an earlier suit in respect of the plaint schedule property in which one Kamalamma was a party and she suffered a decree. Contending that the plaintiff has no manner of right over the plaint schedule property, they prayed for dismissal of the suit.

4. Before the trial court, evidence consists of the testimony of PW1 and documents marked as Exts.A1 to A3 series on the side of the plaintiff. The defendant examined DW1 and had Exts.B1 to B5 marked. Exts.C1 and C1(a) are commission report and plan.

5. The trial court, on evaluation of the materials, came to

the conclusion that the plaintiff is not entitled to any relief as far as plaint C schedule is concerned and she can succeed as against plaint B schedule property and a decree was granted in her favour in respect of that portion of the property.

6. Aggrieved defendants carried the matter in appeal as A.S.No.130/1999. The lower appellate court confirmed the decree of the trial court and dismissed the appeal.

7. In this appeal, notice has been issued under the following substantial questions of law.

- "1. Is not the suit barred by resjudicata by virtue of the judgments Exts.B1 and B3?
2. When Ext.B3 confers title and possession to defendants over the entire 86.687 cents and when it is proved by Ext.C1(a) that B schedule is a portion of that 86.687 cents can a decree of injunction be granted to the plaintiffs regarding B schedule property?
3. Is not the judgment Ext.B3 relevant for considering the claims of plaintiff over a portion of the property involved in Ext.B3?
4. Is not the plaintiff estopped by judgment in claiming right over plaint A and B schedule property?

5. Is not the suit liable to be dismissed for non production of the certificate of purchase which is the basic document on which plaintiff claims title and possession are B schedule property?
6. Is not the certificate of purchase claimed by plaintiff vitiated by fraud and collusion and hence not binding on defendants?"

Though several questions have been raised, the real question that would arise for consideration is question No.6 which would determine the actual issue involved in the suit.

8. It will be useful here to refer to the Commissioner's report and plan which are produced as Exts.C1 and C1(a). It is not in dispute that the two cents of property over which decree is now granted is a portion of original 1 Acre of land which was divided as a result of acquisition for a canal as southern portion and northern portion. 13 and odd cents was acquired for the canal and the party had only 87 cents situated on either side of the canal.

9. There was a suit as O.S.No.841/1982 wherein the defendants were plaintiffs and one Kamalamma and others were defendants. It is true that in the said suit, plaintiffs admitted

that Kamalamma was residing in a portion of the property. The trial court dismissed O.S.No.841/1982. However, the lower appellate court reversed the finding of the trial court and by Ext.B3 judgment decreed the suit as follows:

“15. From the above findings it follows that the decree and judgment under challenge are unsustainable and liable to be set aside. As the plaintiffs have established their possession over the plaint schedule property, the suit has to be decreed in terms of the plaint. Thus, the appeal is to be allowed setting aside the decree and judgment under challenge. Accordingly, I do so. Further, I pass a decree as prayed for in the plaint. In the circumstances, I am of the opinion that both parties will be directed to suffer their costs. These points are answered accordingly.

In the result, the appeal is allowed setting aside the decree and judgment of the court below. A decree of injunction is passed, permanently restraining the defendants from trespassing upon the plaint schedule property, demolishing the boundaries thereof and committing waste in it. Both parties are directed to suffer their respective costs”.

10. 10 cents claimed by Gomathy is situated on the south western portion of the entire 1 Acre of land. Commissioner has

located that property as FGH A4 A5 A6 A7 YZ A2, B schedule as F A2 A3 and C schedule as EF A2 Z A1.

11. Sri.G.S.Raghunath, learned counsel appearing for the appellants, contended that it is clear from the evidence of PW1 that it is an experimental suit. He pointed out that going by the evidence of PW1, Gomathy claims to have obtained kudikidappu right showing Kamalamma as landlord of the property. Kamalamma was admittedly a party to O.S.No.841/1982 and she had suffered a decree wherein it was held that she had no right over the property and she was restrained by an order of injunction. It is with that person shown as landlord of the property that Gomathy, the predecessor in interest of the plaintiff claims to have obtained purchase certificate. Learned counsel relied on the decisions in **Kesava Bhat** vs. **Subraya Bhat** (1979 KLT 766(F.B)), **Velappan** vs. **Thomas** (1979 KLT 412) and in **Sree Karikad Devaswom** vs. **Wandoor Jupiter Chits (P) Ltd** (1980 KLT 760) and pointed out that when a purchase certificate or kudikidappu right is obtained without showing the real landlord on the party array, the landlord is not bound by the certificate.

He can simply ignore. If that be so, purchase certificate obtained by Gomathy is of no help to the plaintiff. Admittedly, B schedule property is obtained as per Ext.A1 document from the legal heirs of Gomathy who traced their title to the purchase certificate obtained by Gomathy.

12. Learned counsel appearing for the appellants also pointed out that PW1 has stated that she does not know any of the defendants. Relying on Ext.A1, it is contended that there is no building in the B schedule property and so, story of demolition of the building etc. are false. In other words, according to learned counsel, it is nothing but an experimental suit as cause of action is also doubtful.

13. Sri.B.Jayasurya, learned counsel appearing for the respondent relied on the following sentence in Ext.B3 judgment which reads as follows:

“12.It is evident from Exts.B1 & B2 purchase certificates that one Kochappi Lekshmi has obtained Kudikidappu right over 10 cents in Sy.24/1. When asked in cross examination, PW1 has deposed that the said Kochappi Lekshmi and Gomathi Amma and one Babu are residents in the plaint schedule

property and that there is no dispute between the plaintiffs and those persons.....”.

14. It is contended on the basis of the above submission that even at the time of passing of Ext.B3 judgment plaintiffs in the said suit who are defendants in the present suit were aware of the existence of the assignment in favour of Gomathy. If that be so, according to the learned counsel, the property has been in possession of Gomathy and therefore whatever right Gomathy had, devolved on her children who subsequently assigned the same to the plaintiff in the present suit. It was these aspects which were relied on by the court below to come to the conclusion that the plaintiff has a right over plaint B schedule property.

15. If, as a matter of fact, Gomathy produced a certificate, that could have been as against C schedule property also. But, as far as C schedule property is concerned, since Kamalamma was the predecessor in interest and she had suffered a decree, no right can be claimed over C schedule property. Further, it is to be noticed that Kamalamma had in her turn instituted a suit

which was dismissed.

16. It is significant to notice that in the present suit the basis for the claim of title was the purchase certificate in favour of Gomathy. In the written statement, the defendants had categorically denied the existence of any purchase certificate in favour of the plaintiff and they also contended that even if any purchase certificate or kudikidappu right has been obtained by Gomathy, it was behind the back of the real owners of the property and they are not bound by the same. PW1 in her evidence had admitted that Gomathy claims right through Kamalamma. Kamalamma, as already stated, had suffered a decree as against her. May be Gomathy was not a party to Ext.B2 suit. But, as long as she claims right through Kamalamma whose rights were found against by Ext.B3, the claim of the plaintiff became precarious.

17. Faced with the above situation, Sri.B.Jayasurya, learned counsel appearing for the respondent in this appeal contended that Gomathy has been in possession from 1993 onwards and that possession needs to protect. It is here that

one has to notice the evidence furnished by PW1 in this case. She does say that she does not know the defendants at all. Whatever that be, the question as to whether the claim of right through Gomathy who claims right through Kamalamma is just, proper and valid has not been considered by the court below.

18. The issue that actually arises for consideration is whether the purchase certificate under Section 72B of Kerala Land Reforms Act or kudikidappu right under Section 80B of the Act obtained without making real landlord in the party array is binding on the landlord. Answer to this question is really a clinching issue. This question has not been answered by the court below. It has necessarily to be considered.

In the result, this appeal is allowed and the judgment and decree are set aside and the matter is remanded to the lower appellate court for consideration of the above aspect in accordance with law and in the light of what has been stated above. Parties will be allowed to adduce further evidence. The parties shall appear before the lower appellate court on 01.07.2015 and the lower appellate court may make every

endeavour to dispose of the matter as expeditiously as possible, at any rate, within a period of six months from the date of appearance of parties.

Sd/-

P.BHAVADASAN
JUDGE

smp