

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 13TH DAY OF JULY 2015/22ND ASHADHA, 1937

RSA.No. 352 of 2006 (A)

AGAINST THE JUDGMENT IN AS 97/2005 of ADDL.DISTRICT COURT,
NORTH PARAVUR DATED 22-10-2005

AGAINST THE JUDGMENT IN OS 436/2000 of MUNSIFF COURT, NORTH
PARAVUR DATED 30.10.2004

APPELLANTS/RESPONDENT/DEFENDANT:

1. ANTONY S/O.KURIAN, VITHAYATHIL VEETIL,
OLANADU KARA, VARAPPUZHA VILLAGE, PARAVUR TALUK.
2. RANI, W/O.ANTONY, VITHAYATHIL VEETIL,
OLANADU KARA, VARAPPUZHA VILLAGE, PARAVUR TALUK.

BY ADV. SRI.B.JAYASANKAR

RESPONDENT/APPELLANT/PLAINTIFF:

GOPALAN, S/O.SANKARAN, KURUPPANTHARA VEETIL,
CHITTATTUKARA, VADAKKEEKKARA VILLAGE,
PARAVUR TALUK.

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
13-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Regular Second Appeal No.352 OF 2006

Dated this the 13th day of July, 2015.

J U D G M E N T

The defendants in O.S.No.436/2000 before the Munsiff Court, North Paravur who had succeeded in getting the suit dismissed but who were unfortunately slapped with a decree by the lower appellate court are the appellants before this Court.

2. Plaintiff A schedule property belonged to the plaintiff. Plaintiff B schedule property belonged to the defendants. The allegation is that while putting up a compound wall, defendants encroached into C schedule property and reduced it into their possession. In spite of demand to remove the encroachment, defendants did not do so and hence suit was laid.

3. Defendants resisted the suit. They contended that C schedule property regarding which complaint of trespass is made is unidentifiable and there is no such property. As far as the compound wall is concerned, it was contended by the defendants that there was a dispute regarding putting up of

compound wall and that was amicably settled between the parties and thereafter the compound wall was put up. Contending that the plaintiff is not entitled to any relief and there is no cause of action, the defendants prayed for dismissal of the suit.

4. On the above pleadings, issues were raised. Evidence consists of the testimony of PWs 1 and 2 and the documents marked as Exts.A1 to A4 on the side of the plaintiff. The defendants examined DW1. Ext.C1 is the commission report and Ext.C1(a) is the rough sketch.

5. The trial court, mainly based on the Commissioner's report which stated that C schedule property is not identifiable and also based on the admission by PW1 in cross examination that compound wall was put with his consent, found that the plaintiff is not entitled to any relief and dismissed the suit. Aggrieved plaintiff carried the matter in appeal and the lower appellate court however felt that the triangular portion shown in Ext.C1(a) is prepared after measurement and that being a part of the plaintiff's property, he is entitled to recover the same and granted a decree in that regard. Aggrieved by the said decree,

the defendants have come up before this Court.

6. Notice was issued on the following questions of law:

- "i) Whether the decree and judgment of the courts below are faulty and unsustainable for the reason that they are contrary to the pleading and the evidence on record?
- ii) In the light of the specific admission of the plaintiff in his deposition that there was an earlier dispute with regard to the boundary and that the granite foundation for the compound wall separating the A & B Schedule was laid after settling the disputes and that it was laid with his permission has not the plaintiff acquiesced in the construction of the granite foundation complained off and in such circumstances is he entitled for a decree for mandatory injunction as prayed for in the suit.
- iii) When the case pleaded by the defendants in their written statement and deposed in the box is that there was a boundary dispute between the plaintiff and the defendants and the same was settled even before the filing of the suit which stands admitted by the plaintiff while deposing as PW1 whether the plaintiff is entitled to pursue the suit for same relief which is admittedly settled.
- iv) Whether the plaintiff is entitled to sue and sustain the suit when admittedly the cause of action

projected in the plaint is admittedly settled?

- v) Whether the findings of the courts below are perverse such that no reasonable tribunal would have come to such a conclusion on the facts, evidence and admissions in the case?"

7. Learned counsel appearing for the appellants contended that the lower appellate court was not justified in granting a decree in respect of the triangular portion shown in Ext.C1(a) sketch as there was no prayer to that effect and especially when it was found by the trial court that C schedule property regarding which relief was sought is not identifiable. It is also contended that the plaintiff in his cross examination had categorically admitted that there was a dispute between the parties regarding putting up of compound wall and it was after the issue was settled between the parties and with the consent of the plaintiff that the foundation of the boundary wall was put up. Learned counsel also went on to point out that the decree now granted is in respect of a portion of a property which is not scheduled to the plaint and regarding which no relief is sought for by the plaintiff. Accordingly, it is contended that the decree granted by the lower

appellate court is unsustainable in law.

8. After having heard the learned counsel for the appellants, there seems to be considerable force in the submission made by the learned counsel for the appellants. The Commissioner's report categorically mentions that C schedule property shown in the plaint is unidentifiable. It is significant to notice that the plaintiff owned 48.5 cents of land and his brother 15 cents which is lying near to each other. By Ext.A1 dated 07.06.1999 the plaintiff assigned 28 cents of land out of the 48.5 cents he had to the defendants. His brother also assigned 15 cents to the defendants.

9. The suit was laid on the allegation that C schedule property shown in the plaint has been trespassed upon by the defendants by putting up a compound wall. The Commissioner had submitted a report and also a sketch which is prepared with the help of a Taluk Surveyor. The Commissioner's report categorically says that C schedule property is not identifiable. However, Commissioner has noticed that a narrow triangular strip of land situates on the west and southern side of defendants'

property is actually a portion of the plaintiff's schedule property. It may be noticed that compound wall has now been put up on the western side of this triangular strip of land. But the Commissioner reports that it should have been on the eastern side. The trial court found that there was no prayer with regard to this strip of land and that as regards putting up of boundary wall the plaintiff has admitted that there was a dispute between them. It is also admitted by him that the issue was amicably settled and it was after the settlement of the dispute that the compound wall was put up. It was the said fact which persuaded the trial court to dismiss the suit.

10. Curiously enough, the lower appellate court by a strange reasoning decreed the suit. According to the lower appellate court, the evidence of PW1 has to be read as a whole and even assuming that the plaintiff has admitted that compound wall was put up with his permission and that it is soon after settling the dispute between the parties, that will not enable the defendants to retain the triangular portion. Reversing the decree of the trial court, the decree in respect of the triangular portion

shown in blue shade in Ext.C1(a) was granted to the plaintiff.

11. By no stretch of imagination, the decree of the lower appellate court can be sustained. Even after the commission report was filed mentioning that C schedule property is not identifiable and that there is encroachment, the plaintiff did not feel it necessary to amend his plaint and incorporate relief with respect to triangular portion said to have been reduced into possession of the defendants. Result is that the plaint as it now stands does not contain any prayer or relief with respect to that portion of the property.

12. Added to above is the evidence furnished by PW1, the plaintiff. In the proof affidavit filed by the plaintiff, it is stated as follows:

“ബി) 'എ' പട്ടികയിൽ അതിക്രമിച്ചു കയറിയും, വടക്കുവശം കിഴക്കു പടിഞ്ഞാറായി കെട്ടിയിരിക്കുന്ന റീട്ടെയിനിംഗ് വാൾ (പതികളുടെ ചിലവിൽ പൊളിച്ച് നീക്കം ചെയ്യണമെന്ന് ആജ്ഞാപിച്ചും, ഏതെങ്കിലും കാരണവശാൽ (പതികൾ ആയതിന് വഴങ്ങാതിരുന്നാൽ എന്റെ ചെലവിൽ പൊളിച്ച് നീക്കം ചെയ്യുന്നതിന് എന്നെ അനുവദിച്ചും, ആയതിലേക്ക് വരുന്ന ചെലവ് (പതികളിൽ നിന്നും, ടിയാന്മാരുടെ ഇതര സ്വത്തുക്കളിൽ സ്ഥാപിച്ചും ഈടാക്കുന്നതിന് അനുവദിച്ചും”.

13. In cross examination of PW1, it is submitted that regarding the laying of foundation of compound wall there was some dispute between the parties and after the dispute was resolved, further construction was made. He in no less terms admitted that it was with his consent that the structure was put up.

14. Result is that the decree now given by the lower appellate court is not in respect of the property which is sought for by the plaintiff even at the time of evidence. He has not sought for any relief in respect of the triangular portion shown in Ext.C1(a) even while he was examined as PW1. That means he had no grievance with regard to that portion of the property. Along with this fact is the admission by PW1 that there was a dispute between the parties with regard to laying of foundation of compound wall and it was after the dispute was settled and with his consent that construction was made. If that be so, the plaintiff cannot complain about the compound wall so put up as mentioned by the Commissioner in his report.

15. The trial court was justified in its conclusion that the

plaintiff is not entitled to any relief in this suit. The lower appellate court has misdirected both on facts and in law and the reasoning given by the lower appellate court is clearly not acceptable and is not in tune with the evidence on record. Further the lower appellate court has ventured to give a decree with respect to a portion not scheduled and with respect to a property regarding which no relief is sought for by the plaintiff even at the time of evidence.

In the result, this appeal is allowed. The judgment and decree of the lower appellate court are set aside and that of the trial court is restored. There will be no order as to costs.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A. to Judge.