

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 29TH DAY OF JULY 2015/7TH SRAVANA, 1937

RSA.No. 1021 of 2006 (E)

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AGAINST THE JUDGMENT IN AS 76/2003 of ADDL. DISTRICT & SESSIONS  
COURT, VADAKARA DATED 07-07-2006

AGAINST THE JUDGMENT IN OS.102/2002 of MUNSIF COURT, VADAKARA  
DATED 22-07-2003

APPELLANT/APPELLANT IN A.S./PLAINTIFF IN O.S.:

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THURUTHEEMMAL BALAN, S/O.KUTTY,  
61 YEARS, FISHERMAN, PALAYAD AMSOM AND DESOM  
VADAKRA TALUK, KOZHIKODSE DISTRICT.

BY ADVS.SRI.B.KRISHNAN  
SRI.PARTHASARATHY

RESPONDENT/RESPONDENT IN A.S/DEFENDANT IN O.S.:

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K.P. KUNHIKANNAN, (FATHER'S NAME NOT KNOWN), 77 YEARS,  
PALAYAD L.P. SCHOOL MANAGER,  
PALAYAD P.O., IRINGAL (VIA), VADAKARA TALUK,  
KOZHIKODE DISTRICT. (DIED) (LRs impleaded as addl.respondents 2  
to 6).

ADDITIONAL RESPONDENTS 2 TO 6

2. SAVITHRI, W/O. LATE KUNHIKANNAN, AGED 76 YEARS,  
RESIDING AT KIZHAKKANCHALIL, PALAYAD AMSOM, DESOM,  
POST PALAYADNADA, VADAKARA TALUK, KOZHIKODE  
DISTRICT, KERALA STATE.
3. SUJAYA, D/O. LATE KUNHIKANNAN, AGED 51 YEARS, RESIDING  
AT KIZHAKKANCHALIL, PALAYAD AMSOM, DESOM, POST  
PALAYADNADA, VADAKARA TALUK, KOZHIKODE DISTRICT,  
KERALA STATE.
4. RAFILA,D/O. LATE KUNHIKANNAN, AGED 48 YEARS, RESIDING  
AT KIZHAKKANCHALIL, PALAYAD AMSOM, DESOM, POST  
PALAYADNADA, VADAKARA TALUK, KOZHIKODE DISTRICT,  
KERALA STATE.

RSA.No.1021/2006

5. VIPIN KUMAR, S/O. LATE KUNHIKANNAN, AGED 46 YEARS, RESIDING AT KIZHAKKANCHALIL, PALAYAD AMSOM, DESOM, POST PALAYADNADA, VATAKARA TALUK, KOZHIKODE DISTRICT, KERALA STATE.
6. SALILA, D/O.LATE KUNHIKANNAN, AGED 44 YEARS, RESIDING AT KIZHAKKANCHALIL, PALAYAD AMSOM, DESOM, POST PALAYADNADA, VATAKARA TALUK, KOZHIKODE DISTRICT, KERALA STATE.

(LEGAL REPRESENTATIVES OF DECEASED SOLE RESPONDENT ARE IMPEADED AS ADDL. RESPONDENTS 2 TO 6 AS PER ORDER DTD. 2/6/15 IN I.A.2488/2012).

R3, R4 & R6 BY ADV. SRI.G.S.REGHUNATH  
R2 & R5 BY ADV. SRI.BASANT BALAJI

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 29-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Regular Second Appeal No.1021 OF 2006**  
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**Dated this the 29<sup>th</sup> day of July, 2015.**

**J U D G M E N T**

Defeated plaintiff has come up in appeal. His suit for injunction was dismissed by the courts below.

2. The real issue involved in the case is whether a few school buildings are taken by Ext.A1 document of title by which the plaintiff obtained 22 cents of property. The plaintiff claimed that by virtue of the document of title in his favour, he is in absolute possession of the property and that he has a right to run the school which is situated in the property. The plaintiff claimed that the defendant threatened him that he will trespass into the property and reduce the school compound into his possession. The defendant also threatened that he will construct a compound wall separating the school compound possessed by the plaintiff. Apprehending such illegal action from the defendant, the plaintiff laid a suit for injunction.

3. The defendant resisted the suit. He immediately pointed out that there was a previous suit between the parties in which there is a categoric admission by the plaintiff in the present suit that the defendant was in actual possession of the property and that the plaintiff would be resorting to the remedy of recovery of possession of the property on the strength of title. Having thus admitted the possession of the defendant in the earlier suit, suit for injunction in the present nature is not maintainable. It is further contended that there was no need for the defendant to demand that the school building should be handed over for the simple reason that document of title of the plaintiff would show that he received 22 cents of property as per Ext.A2 document excluding the school compound. He also pointed out that the plaintiff has never been in possession of the school building and the school was always being run by the defendant. On the basis of the above pleadings, he prayed for dismissal of the suit.

4. The evidence in the case consists of the testimony of PW1 and the documents marked as Exts.A1 to A28 from the side of the plaintiff. The defendant had Exts.B1 to B25 marked.

Exts.C1, C2 and C3 are the commission report and plans.

5. Both the courts below on independent evaluation of the evidence came to the conclusion that going by the document of title, it is clear that the property that was actually conveyed to the predecessor in interest of the plaintiff was that portion of the land excluding the school building and if that be so, the plaintiff could not get a better right than his vendor. Further, courts below noticed that there was a previous suit as O.S.No.28/1999 in which there was a categoric and specific admission on the part of the plaintiff that the school building was in the possession of the defendant and he would be taking appropriate steps to have the property recovered from him. Both the courts below also noticed that the earlier suit was identical in nature as the present suit. Further, on perusal of the evidence, both the courts below found that it is highly improbable that the plaintiff had been put in possession of the school compound in the light of the recital in the document of title and came to hold that the plaintiff has miserably failed to establish his possession and dismissed the suit. The lower appellate court confirmed the findings of the

trial court.

6. Notice has been issued on the following questions of law:

- 1) Whether the courts below are justified in not finding a case of possession for the plaintiff in Ext.A1 where the derivative title is recoded in contrast to Ext.B9 title deed where the right to previous possession of the defendant is never recorded or mentioned.
- 2) Whether the courts below were justified in relieving the defendant against his burden in the context of a specific case put forward by him under Ext.B9, claiming right to the plaint property, further followed by a refusal by the defendant to make available the title deed to identify the property of the defendant in the context of the judgment reported in 2003 S.A.R (Civil) 929?
- 3) Whether the courts below are correct in balancing the probabilities of the case of the plaintiff and defendant from the documents to find a case for the defendant?

7. Learned counsel appearing for the appellant contended that the courts below have not adverted to the case put forward by the defendant regarding his right to possess the school building and to run the school. They should have noticed that the

defendant has no manner of right over the property in which the school is situated. The document of title produced by the plaintiff clearly shows that he had obtained 22 cents of property. It must include the school compound and if that be so, the findings of the courts below cannot be sustained. According to the learned counsel, once title is established, it is for the defendant to show his right to remain in possession and having no document to establish the said fact, he cannot be heard to say that the plaintiff has no right to safeguard his possession.

8. Learned counsel appearing for the respondents, on the other hand, pointed out that both the courts below have independently considered the evidence on record and had come to the identical conclusion that the property obtained by the plaintiff was excluding the school compound and therefore it could not be said that the document of title of the plaintiff includes the school compound.

9. Drawing attention to Exts.B1, B2 and B3, learned counsel appearing for the respondents contended that there is a categorical admission by the plaintiff in Ext.B1 suit that the

defendant herein was in actual possession of the property and that the plaintiff would be taking steps to have the property recovered. Relying on the boundaries shown in Ext.A3 purchase certificate, learned counsel pointed out that it is clear that the property obtained by the plaintiff would not extend to the eastern end and that would belie the claim put forward by the plaintiff. These vital aspects have been considered by the courts below and both the courts have come to an identical conclusion that the plaintiff has failed to establish his claim. The findings of the courts below are essentially findings on fact based on appreciation of evidence. There is no substantial question of law involved and the second appeal is only to be dismissed.

10. After having heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents and also after having perused the records and the orders of the courts below, it seems that there is considerable force in the submission made by the learned counsel for the respondents. The suit was laid under the apprehension that the defendant is attempting to trespass into the property where the

school is situated which the plaintiff claims to have obtained as per Ext.A1. He claimed right to a shed 7 x 7 exploited by the defendant for running the school.

11. One must remember that the suit is one for injunction and the only question is whether the plaintiff has proved his exclusive possession over the suit property. Ext.A2 is a prior document of title of the plaintiff and the property covered under Ext.A2 was assigned to the plaintiff under Ext.A1. It is therefore clear that under Ext.A1 the predecessor in interest of the plaintiff could have conveyed only what he received under Ext.A2 and nothing more. A perusal of Ext.A2 will clearly show that the property conveyed under that deed is exempting the school buildings and the compound. The contention raised by the appellant is that in order to have 22 cents of property assigned under Ext.A1, it is absolutely necessary that it should take in the school compound and the mere fact that there is a wrong recital in Ext.A2 will not enable the plaintiff from asserting his right over the property.

12. The argument though may look formidable is devoid of

merit. First of all, the plaintiff had not mounted the box and given evidence. This has to be viewed in the light of the fact that there is a specific denial by the defendant that the plaintiff has no title to the suit property. His definite stand is that what is conveyed to the plaintiff was 22 cents excluding the school buildings and its compound. If the plaintiff had a case that it is not so, it is for him to mount the box and speak about those facts. Apart from the above aspect, there was an earlier suit between the parties as would be evidenced by Exts.B1, B2 and B3. It appears that the plaintiff in the present suit has instituted O.S.No.28/1999. That suit arose when the defendant, according to the plaintiff, tried to put up a latrine near the well of the plaintiff. It was claimed therein that the defendant has no right over the property and that he may be prevented from doing so. What is significant is that in Ext.B1 plaint in paragraph 2 it is stated that the 1<sup>st</sup> defendant is the Manager of the school run in the plaint schedule property and the 2<sup>nd</sup> defendant is the Headmaster. It is further stated that the plaintiff will take steps to evict the defendant from the plaint schedule property on the

strength of his title.

13. Ext.B2 is the written statement filed by the defendant in the suit disputing various claims made by the plaintiff. That suit happened to be dismissed on the ground that the plaintiff reported no instructions. What is relevant in the context is the statement which is referred to in Ext.B1 that school and its compound is in the possession of the defendant and the plaintiff will be taking such steps as are necessary to recover possession. Having made such a statement, it comes with little grace in the present suit to say that the defendant is trying to trespass and to reduce the school into his possession.

14. It is here again the significance and importance of the plaintiff remaining shy from mounting the box arises. Obviously, had he appeared, he would have been confronted with this statement and in order to avoid such a question he remained away from the box. There is yet another aspect. Ext.A3 is the purchase certificate obtained by the plaintiff. Commissioner's report in the present case shows that the eastern boundary of the property is the main road. If, as a matter of fact, the property in

respect of which purchase certificate was obtained was in respect of the school compound, the eastern boundary of the land covered by the said certificate should have been shown as road. It is not so. That, according to both the courts below, clearly indicates that in all probability the plaintiff as per Ext.A1 document did not receive the property extending to the road on the eastern side taking within its fold the school and its compound.

15. Faced with the above situation, learned counsel appearing for the appellant had moved this Court seeking an amendment to the plaint incorporating the prayer for recovery of possession on the strength of title. Normally, this Court would have considered the matter liberally. But it is to be noticed that the plaintiff was fully aware of the fact that the defendant was in possession of the property as would be evident from Ext.B1 document wherein he had specifically mentioned that he will be taking such steps as are necessary to have the defendant in the suit evicted from the property and to recover the property. Having so stated in the earlier suit, one fails to understand the

logic behind the present suit one for being injunction simplicitor especially when there is no case for the plaintiff that subsequent to Ext.B1 suit, the plaintiff had obtained possession of the property and there was a subsequent trespass. It is not as if the right asserted by the defendant is made for the first time before this Court and it could not be said that the plaintiff was taken by surprise by the stand taken by the defendant. All throughout the stand taken by the defendant was that the property conveyed to the plaintiff was excluding the school and its compound and the plaintiff has never been in possession of the school and its compound.

16. Under these circumstances, since the plaintiff was fully aware of the true state of affairs, it comes too late in the day to seek an amendment in the plaint. As rightly pointed out by the learned counsel for the respondents, the prayer for amendment can be treated only as a mischievous one. The finding of the courts below that the defendant is in possession of the school compound is based on appreciation of evidence in the case and is essentially a finding on fact. It is not shown that the findings are

either perverse or contrary to the evidence on record. If that be so, even assuming for argument sake a different view is possible, exercise of jurisdiction under Section 100 of the Code of Civil Procedure is not warranted.

Result is that, the second appeal is without merits and it is liable to be dismissed. I do so. However, there will be no order as to costs.

**P.BHAVADASAN  
JUDGE**

smp

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P.A. to Judge.