

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 8TH DAY OF JUNE 2015/18TH JYASHTA, 1937

RFA.No. 787 of 2011 ()

**(AGAINST THE JUDGMENT IN OS.NO. 120/1988 OF SUB COURT,
ATTINGAL DATED 23-05-2011)**

APPELLANT/PLAINTIFF:

**SALMA BEEVI,D/O. KUNJU,
KALIYILAZHIKATHU HOUSE, PALLIKKAL DESOM,
PALLIKKAL VILLAGE, PIN - 691 566**

**BY ADVS.SRI.M.A.ABDUL HAKHIM
SRI.M.G.ANON**

RESPONDENT(S)/DEFENDANTS:

- 1. STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT,
SECRETARIAT, TRIVANDRUM, PIN -695 001**
- 2. THE DISTRICT SUPERINTENDENT OF POLICE (RURAL),
TRIVANDRUM, PIN- 695 001**
- 3. THE DISTRICT COLLECTOR,
TRIVANDRUM, PIN -695 001**
- 4. THE TAHSILDAR, CHIRAYINKEEZHU,
PIN -695 304**
- 5. THE ASSISTANT ENGINEER,
BUILDINGS SUB DIVISION, P.W.D ATTINGAL, PIN -695 101**

BY GOVERNMENT PLEADER SRI. EGY. N. ELIAS

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 08-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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P.B.SURESH KUMAR, J.

R.F.A.No.787 of 2011

Dated this the 8th day of June, 2015

JUDGMENT

This is an appeal by the plaintiff in a suit for declaration of title, recovery of possession and injunction.

2. The plaint schedule property is an item of property measuring 70 cents comprises in Survey No.1968 of Madavoor Village. According to the plaintiff, the plaint schedule property obtained by her mother Mariyam Beevi @ Chitty Ashya Ummal by virtue of Ext.A1 "Sthreedhana kuri" of the year 1092 ME was devolved on her and her brother Abdul Kareem on the death of their mother. It is also the case of the plaintiff that her brother Abdul Kareem released his rights over the property in her favour as per Ext.A2 release deed of the year 1986 and thus she became the

absolute owner of the same. It is alleged in the plaint that on the basis of the permission granted by the maternal grandfather of the plaintiff namely late Kunju Pakky, the Police Department was using the building in the plaint schedule property as a police outpost on a licence arrangement. It is also alleged in the plaint that the defendants who have no right in the property are attempting to construct a building therein. The plaintiff, therefore, claimed in the suit a decree declaring her title and possession over plaint schedule property and a decree of permanent prohibitory injunction restraining the defendants from constructing any building therein or altering the nature of the property. An alternative relief for recovery of possession of the plaint schedule property was also sought in the event the court finds that the defendants are in possession of the property.

3. The defendants contested the suit, contending inter alia, that the plaint schedule property does not belong

to the mother of the plaintiff Mariyam Beevi as alleged by the plaintiff and that if it is found that the plaintiff has any right in the property, the same is lost by limitation. According to the defendants, the extent of the property available in Survey No. 1968 of Madavoor village is only 29 cents and the said property belonged to one Chitty Ashya Ummal and she had surrendered the same to the Government and it is on the basis of the surrender made by the owner of the property, the police outpost was established in the said property. It is explained in the written statement filed by the defendants that the tax of the property was being paid by one Katheermeeran Lebba, the son of the elder sister of Chitty Ayisha Ummal and that the tax was paid only up to 1966.

4. A replication was filed by the plaintiff to the written statement filed by the defendants. In the replication, it is stated, among others, that the mother of the plaintiff Mariam Beevi is also known as Chitty Ashya Ummal and she

is the daughter of Chitty Ashya Ummal and that the plaint schedule property has never been surrendered to the Government.

5. At the trial, the plaintiff gave evidence as PW2. A witness was examined on her side as PW1. Exts.A1 to A4 are the documents produced by the plaintiff. The Circle Inspector of Police, Venjaramoodu gave evidence on behalf of the defendants as DW1. Exts. D1 to D4 are the documents produced on the side of the defendants.

6. The trial court, on an elaborate consideration of the entire materials on record, found that the plaintiff has established title to the plaint schedule property and that she is entitled to the reliefs claimed in the suit. Nevertheless, the trial court dismissed the suit holding that the plaintiff has not complied with the provisions contained in Section 80 of the Code of Civil Procedure. The decision of the trial court was challenged by the plaintiff before this court in A.S No.636 of 1998. This Court took the view that

as decades have passed since the institution of the suit, requirement of Section 80 of Code of Civil Procedure has fallen into insignificance and the court below was not justified in non suiting the plaintiff for non-compliance of the provisions contained in Section 80 of the Code. Despite the said finding, this Court had remitted the matter to the trial court for fresh disposal, after affording the parties an opportunity to adduce further evidence in the matter. The operative portion of the judgment in A.S No.636 of 1998 reads as follows :

"12. In the result:

1) The judgment and decree under challenge are set aside and it is made clear that since the suit has been pending for the last two decades, the question of Section 80 further need not be looked into. It can be considered as dispensed with.

2) The trial court is directed to permit both concerned to produce documentary as well as oral evidence in support of their respective contentions and then decision be taken in accordance with law.

3) Considering the peculiar facts and circumstances of this

case, if possible endeavour shall be made by both the parties to have an amicable settlement of the matter.

4) Let the matter be disposed of within a period of five months from the date of first appearance of the parties. Parties are directed to appear before the trial court on 15.11.2010.”

Pursuant to the said decision of this Court, the defendants have examined the local Village Officer as DW2. Thereupon, the trial court, without referring to the findings already rendered by it in the earlier round, came to the conclusion that the plaintiff could not prove that the plaint schedule property belongs to her and that the same is in her possession. The trial court also found that the plaintiff could not establish that she is the daughter of Chitty Ashya Ummal or that she has any right in the property in Sy.No.1968 of Madavoor village. Based on the said findings, the suit was dismissed. The plaintiff is aggrieved by the said decision of the trial court. Hence the appeal.

7. As noticed above, the case of the plaintiff is that the plaint schedule property belonged to her mother,

Mariam Beevi @ Chitty Ashya Ummal; that the same devolved on her and her brother Abdul Kareem on the death of their mother; that Abdul Kareem had released his rights over the property in her favour and thus she became the absolute owner of the property. It is also her case that her grand father Kunju Pakky permitted the Police Department to use the building in the plaint schedule property as a police outpost and it is on that basis that the police outpost was established in the property. It is her further case that the Government has constructed a building without authority of law in the said property to be used as a police station. The defendants do not claim title to the plaint schedule property. On the other hand, the contention of the defendants in the written statement was that the plaint schedule property belonged to one Chitty Ashya Ummal and that she had surrendered it to the Government. In the earlier round, on the basis of the materials on record, the trial court found that the plaintiff had established title to

the plaint schedule property and that she is entitled to the reliefs claimed in the suit. In the matter of rendering the said finding, the trial court also considered the contention raised by the defendants that the property belonged to Chitty Ashya Ummal and the plaintiff is not her daughter. Paragraphs 12 to 14 of the judgment of the trial court dated 31.1.1994 read thus :

"12. The only dispute is that Chitty Ashya Ummal is not the Mariyam Beevi, the mother of the plaintiff. But it is pertinent to note that Mariyam Beevi obtained title and possession over the plaint schedule property as per registered deed No.2345/1092 M.E. Of Chadayamangalam Sub Registrar's Office - by virtue of Sthreedhanakuri executed by her father Kunju Pakki. Thus she has title. The Patta is in the name of Chitty Ashya Ummal. According to the plaintiff the patta was in the name of Chitty Ashya Ummal. This patta is marked as Ext.A2. The plaintiff is also known as Chitty Ashya Ummal in commemoration of her grandmother. Even if that is not correct there is clear title over the property. A poor lady's property was forcibly appropriated by Government even though she resisted by sending petition. This Court has occasion to examine the plaintiff who is illiterate and poor. The property of this poor lady was forcibly taken by Government. When her brother was also holding a portion of the property for sending petition he was put to great hardship by the police. Perhaps that may be the reason that he has given his property to his sister. When the ladies are the owner and sent

petitions the troubles from the Police will be little. The date of surrender or year of surrender of the property is not aware to Government. The Police Department was holding possession over the property.

13. Her mother is the daughter of one Kunju Pakki. Kunju Pakki gave the property as Sthreedhanam to Mariyam Beevi. According to the plaintiff she is also called as Chitty Ashya Ummal. The name of the mother of Kunju Pakki is Chitty Ashya Ummal. In commemoration of her name the mother of the plaintiff is also called as Chitty Ashya Ummal. It is Kunju Pakki who has given permission for conducting the Police outpost. A permissive occupier cannot claim any adverse possession. The plaintiff has document and as per revenue records also he is the title holder and owner of the property. There is no positive evidence to show that her mother is not Chitty Ashya Ummal. She asserts that her mother is also known as Chitty Ashya Ummal. Even if otherwise the plaintiff has title and ownership over the property.

14. Who surrendered the 29 cents of property is not known to the Police Department. It is the definite case of the plaintiff that Kunju Pakki, the father of the plaintiff has given permission to Police Department to conduct outpost in a building in the property for performing outpost. There is no need to surrender 29 cents of property to the Government for conducting amount post. As I have already pointed out the property was taken from this illiterate woman by force who has title over the property. Therefore the plaintiff is entitled for declaration and recovery as prayed for, since it is found that the plaintiff has no

possession injunction prayed for is not allowable. These issues are found in favour of the plaintiff."

After holding that the plaintiff had established title to the property, the suit was dismissed on the sole ground that the plaintiff has not complied with the requirements of Section 80 of the Code of Civil Procedure. It was the said judgment that was challenged by the plaintiff before this Court in A.S. No.636/98. A perusal of the judgment of this Court in A.S. No.636/1998 indicates that the finding rendered by the trial court that the plaintiff' had established title to the property has not been interfered at all. On the other hand, having regard to the fact that a police station is functioning in the plaint schedule property owned by the plaintiff and in so far as the plaintiff has no case that the defendants have trespassed into the property, this Court took the view that the arrangement must have been either a sale or a lease or a licence and that the nature of transaction needs to be ascertained for the decision in the suit. In other words, the suit was remitted to the trial court to determine the nature

of transaction. As noticed above, after the remand, the only evidence adduced by the defendants in the case is the evidence of DW2. DW2 is the Village Officer of the concerned village. His evidence was only to the effect that the plaint schedule property is a Government puramboke. DW2 deposed before the court that the property in old Sy.No.1968 comes presently under R.S.No.529/4 and the same as per the basic tax register is a Government land. If the plaint schedule property were to be a Government land, the reason for taking the stand in the written statement filed in the suit that it belonged to Chitty Ashya Ummal has not been explained by DW2. When DW2 was cross examined on that aspect, he simply pleaded ignorance of the stand taken by the Government in the written statement. According to me, the said evidence tendered by DW2 has to be ignored as it has no bearing on the pleadings of the defendants in the written statement. The defendants have no case in the written statement that the plaint

schedule property belong to the Government. It is thus evident that though an opportunity was given to the defendants to adduce evidence to prove the transaction by which they came to occupy the plaint schedule property, they have not availed that opportunity. As such, according to me, the findings rendered by the trial court in the earlier round that the plaintiff has established title to the plaint schedule property and that she is entitled to the relief sought for in the suit, would stand. That apart, even on merits, I find force in the stand taken by the plaintiff that she is the daughter of Chitty Ashya Ummal. It is seen from Ext.A1 that Mariam Beevi had acquired 70 cents of the property in Sy.No.1968 of Madavoor village. The specific case of the plaintiff is that she is the daughter of Mariam Beevi referred to in Ext.A1. Ext.A2 is the release deed executed by one Abdul Kareem. The properties covered by both the documents are one and same. In Ext.A2, it is stated by Abdul Karim that the property belonged to his

mother Mariam Beevi and on her death, the property devolved on him and the plaintiff. As per Ext.A2 document, Abdul Kareem released his rights over the plaint schedule property to the plaintiff. The name of the father of the plaintiff and Abdul Kareem is noted in Ext.A2 as Moideen Kunju. Ext.A1 'Sthreedanakuri' also indicates that the husband of Mariam Beevi was Moideen Kunju. The defendants have not adduced any evidence to show that there is no property as shown in Ext.A1 and A2 documents. They also have not adduced any evidence to show that the property covered by the said documents is not the plaint schedule property. They have also not adduced any evidence to show as to how they came in possession of the plaint schedule property. They have further not adduced any evidence to show that there was a person called Chitty Ashya Ummal. They have further not adduced any evidence to show as to how Chitty Ashya Ummal obtained plaint schedule property. In the said circumstances, I am of the

view that the plaintiff has established beyond doubt that she is the owner of the plaint schedule property. It is seen from the report of the Advocate Commissioner appointed in the case that at present the extent of property available in Sy.No.1968 of Madavoor village is only 29 cents. The specific case of the plaintiff in the suit is that the cause of action for the suit arose on 26.2.1986 when the Superintendent of Police denied her title to the plaint schedule property and refused to surrender the same to her. True, the evidence on record does not indicate that the plaintiff is in possession of the property. In so far as the plaintiff has established title to the property, she is entitled to get her title to the plaint schedule property declared. She is also entitled to recover the plaint schedule property from the defendants.

8. As noticed above, the defendants have also contended in the written statement that if at all the plaintiff has any right in the property, the same is lost by adverse

possession and limitation. An issue is also raised by the court below as to whether the right of the plaintiff over the plaint schedule property is lost by adverse possession and limitation. The trial court did not consider the said issue as it found that the plaintiff could not establish title to the property. In so far as the said finding is reversed in this judgment, the said issue needs to be considered. At the outset, I must point out that the pleadings in the written statement are not sufficient to raise a contention of adverse possession. It is seen that it is based on the pleading of the defendants contained in paragraph 5(a) of the written statement, the issue relating to the adverse possession has been raised. The said paragraph reads thus :

"If any kind of right was there for the plaintiff (not admitted) such right was already lost by limitation."

The averments contained in paragraph 5(a), according to me, do not amount to a plea of adverse possession. Even assuming that the said averments would constitute a plea of

adverse possession, such a plea cannot be accepted, for, the State and its instrumentalities who are duty bound to protect the private properties of the citizens cannot appropriate the same on the strength of adverse possession and limitation. In an identical case where the State represented by the Superintendent of Police claimed adverse possession over a private property, the Supreme Court in **State of Haryana v. Mukesh Kumar and others** [(2011) 10 SCC 404] held that it is high time for the Parliament to consider abolishing the law of adverse possession or at least amending and making substantial changes in the law in the larger public interest. It was also held in the said case that the Government and its instrumentalities including the police who are bound to protect the properties of citizens shall not steal the same by raising the plea of adverse possession. Para 39 of the judgment reads thus:

"We inherited this law of adverse possession from the British. Parliament may consider abolishing the law of adverse

possession or at least amending and making substantial changes in the law in the larger public interest. The Government instrumentalities-including the police-in the instant case have attempted to possess land adversely. This, in our opinion, is a testament to the absurdity of the law and a black mark upon the justice system's legitimacy. The Government should protect the property of a citizen-not steal it. And yet, as the law currently stands, they made do just that. If this law is to be retained, according to the wisdom of Parliament, then at least the law must require those who adversely possess land to compensate the title owners according to the prevalent market rate of the land or property in question. This alternative would provide some semblance of justice to those who have done nothing other than sitting on their rights for the statutory period, while allowing the adverse possessor to remain on property. While, it may be indefensible to require all adverse possessors- some of whom may be poor-to pay market rates for the land they possess, perhaps some lesser amount would be realistic in most of the cases. Parliament may either fix a set range of rates or to leave it to the judiciary with the option of choosing from within a set range of rates so as to tailor the compensation to the equities of a given case."

In the light of the aforesaid decision of the Apex Court , I do not find any merit in the plea of adverse possession raised by the defendants.

9. In the result, the appeal is allowed, the impugned judgment is set aside and O.S.120/88 on the file of the Sub

Court, Attingal is decreed declaring the title of the plaintiff over the plaint schedule property. The plaintiff is also permitted to recover the plaint schedule property from the defendants as claimed in the suit. The plaintiff will also be entitled to the costs of the suit. All the interlocutory applications in the appeal are closed.

P.B.SURESH KUMAR, JUDGE.

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