

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. 1074 of 2009 ()

**AGAINST THE JUDGMENT IN AS 344/2007 of ADDITIONAL DISTRICT COURT,
KOTTAYAM DATED 23-06-2009**

**AGAINST THE JUDGMENT IN OS 9/2006 of MUNSIF COURT, ETTUMANOOR
DATED 26.07.2007**

APPELLANT/APPELLANT/PLAINTIFF:

**K.E.MATHAI, AGED 82,
S/O. LATE ETTIYAVIRAH, KAKKATTIL HOUSE
KIZHAKUMBHAGAM KARA, ETTUMANOOR VILLAGE
KOTTAYAM TALUK.**

BY ADV. SRI.M.NARENDRA KUMAR

RESPONDENTS/RESPONDENTS/DEFENDANTS:

- 1. SUNNY JOSEPH, AGED ABOUT 40,
S/O. JOSEPH,
CHIRAPPURATH HOUSE, LAKKATTOOR KARA,
KOOROPADA VILLAGE,
KOTTAYAM, REPRESENTED BY POWER OF
ATTORNEY HOLDER: ALPHY MATHEW, AGED 42,
S/O.MATHAI, PANDASSERIL HOUSE, KIZHAKKUMBHAGOM
KARA, ETTUMANOOR VILLAGE.**
- 2. ALPHY MATHEW, AGED ABOUT 42,
S/O.MATHAI, PANDASSERIL HOUSE, KIZHAKKUMBHAGOM KARA
ETTUMANOOR VILLAGE.**

**R2 BY ADV. SRI.MATHEW PHILIP EDAPPALLIL
R2 BY ADV. SRI.DELEEP RAJ**

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

ds

P.BHAVADASAN, J.

R.S.A. No. 1074 of 2009

Dated this the 29th day of July, 2015

J U D G M E N T

The plaintiff, who lost before both the courts below, is the appellant. He sued for recovery of possession on the strength of title of 'B' schedule property which was negatived by both the courts below.

2. The plaintiff claims to have obtained plaint 'A' schedule property as per three sale deeds, namely, 1954/1983, 3856/1986 and 2597/1989. The property so acquired by the plaintiff abuts a road on the southern side. There was a building in the 'A' schedule property at the relevant time. The defendant owns property on the eastern and northern side of the plaint 'A' schedule property. The plaintiff claimed that in order to carry out maintenance and repairs for his building, he left a narrow strip of land on the eastern and northern side of his property and that is shown as 'B' schedule. The defendants have no manner of right over that portion of the property. Accusing the second

defendant of having trespassed into the 'B' schedule property in October, 2004, and reduced into his possession, the suit was laid.

3. The defendants filed separate written statements. They pointed out that even though the document of title of the plaintiff showed a larger extent, actually, he was in possession of only 2 cents and 375 sq. links of land. It was pointed out by them that there was an agreement between the parties by which both agreed to have construction over the entire property to its extremities and in pursuance to which extension was taken to the existing building by the plaintiff in terms of the agreement. The claim now made of having left 2½ feet on either side is without any bonafide. Denying the allegation of trespass, they prayed for a dismissal of the suit.

4. Trial court framed necessary issues for consideration. The evidence consists of the testimony of PWs 1 to 3 and documents marked as Exts.A1 to A8 from the

side of the plaintiff. The defendants examined DWs 1 to 3 and had Exts. B1 to B4 marked. Exts. C1 and C1(a) are the Commissioner's report and plan.

5. The trial court, mainly based on the Commissioner's report, found against the plaintiff and also noticed that there was a claim of easement right by the plaintiff over the suit property.

6. The aggrieved plaintiff carried the matter in appeal as A.S.No. 344/2007. The lower appellate court, on an independent evaluation of the evidence, came to the conclusion that the story put forward by the plaintiff of having left 2 ½ feet wide space on the northern and eastern side cannot be believed in the light of the evidence adduced in the case and thus, refused to interfere with the judgment and decree of the trial court.

7. Notice was issued on the following substantial questions of law:

“(i) Whether the courts below are justified in

holding that the appellant has no title to B schedule property on the strength of Exts.A2 to A4 and hence not entitled to recover it?

- (ii) Whether the courts below are justified in holding that appellant has no title to 'FIGH' plot in Ext.C1(a) plan after accepting the report Ext.C1 and the plan?
- (iii) Are not the findings of the courts below on the question of title to B schedule property perverse and contrary to admitted documents Exts.A1 to A4?"

8. Sri. Narendra Kumar, the learned counsel appearing for the appellants contended that both the courts below have erred both on facts and in law in dismissing the suit. A reading of the Commissioner's report would clearly show that the property of the defendants has not been measured with reference to the document of title and that is fatal to the case. The measurement was done with respect to the documents of the property of the plaintiff only and that is not sufficient to ascertain the exact location of the property. It is also pointed out by the learned counsel that even though the plaintiff ought to have 3 and odd cents of

land, he was found in possession of much lesser extent on measurement. The decision taken by the courts below, without having the property of the defendants measured as per the document of title, cannot be accepted. It is not discernible from the Commissioner's report whether the defendants have excess property or not. The learned counsel also invited the attention of this Court to the fact that even the defendants had objection to the Commissioner's report. At any rate, according to the learned counsel, the decision based on the Commissioner's report alone is unjustifiable and judgment and decree are liable to be interfered with.

9. The learned counsel appearing for the respondents pointed out that it is a mere figment of imagination of the plaintiff regarding the leaving of 2½ feet width of land on the northern and eastern side. He emphasized on Ext.B1 agreement and pointed out that in pursuance thereto as per Ext.B6 plan, the construction was carried out covering the

entire area obtained by the plaintiff. Having done so, it comes with little grace on the plaintiff to say that he had left 2½ feet of property on the northern and eastern side. The learned counsel also invited the attention of this Court to the Commissioner's report and pointed out that there is a compound wall along with 'FI' line shown in Ext.C1(a) plan. It is rather inconceivable that 2½ feet width of land would have been left outside the compound wall as now claimed by the plaintiff. Further, it is rather strange, according to the learned counsel, that the Commissioner simply took a portion of the property which belonged to the defendant and added it on to the property of the plaintiff to make it in tune with the measurement available as per the title deeds of the plaintiff. It is something ununderstandable and inconceivable in law. The learned counsel also drew attention of this Court to the evidence of the Commissioner who conceded that if the portion shown as to be taken from the defendants' property, that would further reduced the

extent of property of the defendants. Accordingly, it is contended that there is no basis for the claim now made by the plaintiff and the appeal is only to be dismissed.

10. It is not in dispute that the predecessor-in-interest of both the parties is the same person. Of course, there have been intermediary assignments also. However, it is also not in dispute that even though the title deeds of the parties show certain extent of land, actually, they are in possession of lesser extent of land. Ext.B1 document is not disputed. That is an agreement entered into between the plaintiff in this case and the predecessor-in-interest of the defendants. It is clear that both the parties had only small extent of land with them with to put up constructions therein. Both want to construct more structures in the property which was in their possession. As per Ext.B1 agreement, both agreed that the other person could construct the building upto the extreme of his property and there would be no objection from the other side.

Presumably in pursuance thereto, Ext.A6 plan was preferred by the plaintiff and he constructed to the extreme north and east of his property. That was an extension to the existing building. Ext.A6 plan would show that no space whatsoever was left either on the eastern side or on the northern side. Or in other words, the construction was completely occupied the entire area. This would be evident from the Commissioner's report also and the Commissioner categorically observes that the entire area i.e. 'EFDJ' is covered by a construction made by the plaintiff.

11. It is also significant to notice that the Commissioner has reported that there is pukka compound wall around 'FI' line in Ext.C1(a) plan. That would also be an indication on the fact that it is rather inconceivable that the plaintiff would have left any space outside the compound wall. Even the Commissioner's report does not indicate that on the eastern side of 'FI' line in Ext.C1(a) plan, any property which belongs to the plaintiff is available. What the

Commissioner did was to carve out a portion as 'FGHI' in the property which belonged to the defendants and submitted a report saying that if that portion is added to the extent now available to the plaintiff, that would be in tune with his title deed. Interestingly enough, he also conceded that if that is done, the extent of property held by the defendants would be reduced.

12. There is some substance in the complaint voiced by the learned counsel for the appellants that the property of the defendants was not measured with respect to the documents of title and that ought to have been done. Even if accepting it to be true, it does not make much of a difference in the case on hand in the light of the other items of evidence available on record. The fact that the plaintiff's property has been identified by the Commissioner with reference to his document and also the fact that the Commissioner has reported that the entire property is covered by a building and also the fact that there is a

compound wall on the eastern side stretching the entire building extending up to the road on the southern side, would betray the plaintiff in his claim that he has left space on either side i.e. on the eastern and the northern side of the property of his building.

13. It is here, as rightly pointed out by the learned counsel for the respondents, that Ext.B1 comes into light. That leaves one in no doubt that both the person agreed to have the whole property covered by construction and that was done also. Of course, there is a small bit of land owned by the 2nd defendant also. But that does not make much of a difference. At any rate, there is no finding by the Commissioner that defendants are in possession of excess property than what they are entitled to as per the document. In fact, the finding is that they are holding much less extent of property as per that document. There is no finding also by the Commissioner that the slice of property shown as 'FHIJ' actually belongs to the plaintiff. In fact, there is also

no observation by the Commissioner that, that portion of the land is the excess land in the hands of defendants. Merely because, the plaintiff has some deficiency in his land does not mean that it is to be made good from the property owned by the defendants. Unless of course it is shown and found that defendants are in possession of excess land than what they are entitled to. Such a contingency does not arise in this case at all.

14. The courts below have considered the matter in considerable detail and have come to the conclusion that the plaintiff is not entitled to any relief. This Court finds no ground to interfere with the judgment and decree of the courts below.

This appeal is without merits and it is accordingly dismissed. There will be no order as to costs.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge