

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYAISHTA, 1937

RSA.No. 227 of 2010 ()

**AGAINST THE JUDGMENT & DECREE IN AS 186/2006 OF DISTRICT COURT,
PALAKKAD DATED 03-07-2009
AGAINST THE JUDGMENT & DECREE IN OS 423/2003 OF MUNSIFF'S COURT, CHITTUR
DATED 30-06-2006**

APPELLANT/RESPONDENTS/PLAINTIFFS :

VIJAYALAKSHMI (DIED)

- 1. HAMSAVENI, AGED 46 YEARS
D/O.SOMASUNDARAN CHETTIAR,
NELLIPPALLAM, NELLEPPILLY
THEKKEDESOM, CHITTUR TALUK.**
- 2. MAHESWARI, AGED 49 YEARS,
D/O.SOMASUNDARAN CHETTIAR, -DO- -DO-**
- 3. BALSEKHAR, AGED 45 YEARS,
S/O.SOMASUNDARAN CHETTIAR, -DO- -DO-**
- 4. NARAYANASWAMY, AGED 43 YEARS,
S/O. SOMASUNDARAN CHETTIAR, -DO- -DO-.**
- 5. JANAPRASAM, AGED 41 YEARS,
S/O.SOMASUNDARAN CHETTIAR, -DO-, -DO-.**
- 6. RATHNAVEL, AGED 41 YEARS,
S/O. SOMASUNDARAN CHETTIAR, -DO- -DO-.**
- 7. MAHALAKSHMY, AGED 36 YEARS,
D/O.SOMASUNDARAN CHETTIAR, -DO-, -DO-.**
- 8. RATHI, AGED 34 YEARS,.
D/O.SOMASUNDARAN CHETTIAR, -DO- -DO-.**

**BY ADVS. SRI. M.K. NARAYANAN POTTI
SRI.A.DINESH RAO**

RESPONDENT/APPELLANT/DEFENDANT :

N. KATHIRAVEL, AGED 37 YEARS
S/O.NATARAJAN CHETTIAR, NELLIPALLAM, NELLEPPILLY
THEKKEDESOM, CHITTUR TALUK, PALAKKAD DISTRICT.

BY ADVS. SRI.BINOY VASUDEVAN
SRI.R.MANIKANTAN

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 03-03-2015, THE COURT ON 25-05-2015 DELIVERED THE FOLLOWING:

Mn

...3/-

RSA.No. 227 of 2010 ()

APPENDIX

PETITIONERS' ANNEXURES :

ANNEXURE A : COPY OF THE DECREE IN OS NO. 292/04 ON THE FILE OF THE COURT OF THE MUNSIFF AT CHITTUR.

RESPONDENT'S ANNEXURES : NIL

//TRUE COPY//

P.S. TO JUDGE

Mn

A.V.RAMAKRISHNA PILLAI, J

RSA No.227 of 2010

Dated this the 25th day of May, 2015

JUDGMENT

The plaintiffs in O.S.No.423/2003 on the file of the Munsiff's Court, Chittur are the appellants.

2. The suit was instituted by the deceased first plaintiff for injunction restraining the defendant from trespassing upon the plaint schedule property and from doing any acts which would affect the peaceful possession and enjoyment of the plaintiffs. The first plaintiff died during the pendency of the suit and supplemental plaintiffs 2 to 9 were impleaded as his legal representatives.

3. The plaintiffs allege that the suit property having an extent of 68.5 cents comprised in Sy.No.44/14 (old Sy.No.47/1) is in their possession and that they are cultivating the same. They allege that the defendant is the owner in occupation of the paddy field on the north of the plaint schedule property as he had obtained the same in court auction conducted by the Catholic Syrian Bank pursuant to a decree obtained by the bank against Njana Prakashan and

Rathnavel who are the children of the first plaintiff. They alleged that the defendant was trying to trespass upon the plaint schedule property.

4. The respondent who is the defendant in his written statement contended that the plaint schedule property is not identifiable. According to him, the plaintiffs have not disclosed the manner in which they obtained the property. He also alleged that he had purchased 2 acres 66 cents of land as per sale deed No.1747/2003 of the Sub Registry Office, Chittur which belonged to the children of the deceased plaintiff who had mortgaged the property with Catholic Syrian Bank which obtained a decree. The said property was sold in court auction and accordingly, the respondent has purchased the same.

5. After raising proper issues, the suit was tried by the learned Munsiff. At the trial, PW1, PW2, DW1 and DW2 were examined and Exts.A1, A2, B1, X1 to X12 and C1 and C1(a) were marked.

6. Though the trial court granted an injunction as prayed for, the respondent took the matter in appeal. The lower appellate court who heard the appeal reversed the decree and dismissed the suit by impugned judgment.

7. I have heard Mr.M.K.Narayanan Poti, the learned counsel for the appellants and Mr.Binoy Vasudevan, the learned counsel for the respondent.

8. Evidently, there is a scramble for possession in respect of a particular item which, according to the appellants, belongs to them. The respondent contended that the property is unidentifiable and the plaintiffs' attempt is to grab possession of the property which is in their possession which they obtained on the basis of Ext.B1 sale deed.

9. Mr.Narayanan Poti submitted that though it is alleged that as per Ext.B1 the respondent has purchased two acres 64 cents in court auction, he had obtained only two acres 34 cents as is evident from Ext.X12. The lower appellate court refused to grant a decree in favour of the appellants for the reason that the appellants had failed in proving their possession of the plaint item, though the burden was on them to establish possession by cogent evidence as the suit was for injunction of simplicitor. The appellants have claimed possession of the property on the basis of Exts.A1 and A2 entries in the revenue records. The lower appellate court was of the view that the entires in the revenue records itself are not sufficient to prove either title or possession. It was also

observed that even the possession certificate, tax certificates were obtained just before the institution of the suit. The lower court also found that apart from the self serving testimony of PW1, no independent evidence has been adduced to prove possession of the plaintiffs. Mr.Narayanan Potti would submit that the respondent has no case that he had purchased any property comprised in Resy.No.44/14, when the specific case of the appellants is that the plaint schedule property is in Resy.No.44/14. It was pointed out that the commissioner has identified the plaint schedule property as 68.5 cents in Resy.No.44/14 and the lower appellate court lost sight of the fact that the auction purchaser who is the defendant had purchased only an extent of 2 acres and 32 cents.

10. This is not a case where the plaintiffs has not adduced any evidence at all in proof of their possession. They have produced certain documents in support of their case. There is evidence of PW1 also. It is true that the evidence tendered by the appellants is not sufficient enough to grant a decree as prayed for. The appellants could have established his possession by properly identifying the property on the basis of a measurement.

11. Mr.Biny Vasudevan, the learned counsel for the

respondent submitted that the respondent had preferred O.S.No.292/2004 against the original plaintiff and the third appellant seeking an injunction against trespass in respect of the property obtained by him as per Ext.B1. The said suit was decreed as per Annexure-A judgment appended to the counter affidavit filed by the respondent against I.A.No.1870/2014. It was also submitted that the said judgment has become final.

12. However, Mr.Narayanan Potti would point out that the actual extent of property comprised in the survey number mentioned above is more than what has been obtained by the respondent on account of the purchase. This can be established only by a proper measurement.

13. This Court is of the definite view that it would not be just and proper to non-suit the plaintiffs without affording them an opportunity to establish their case by getting the suit property identified by measurement. Therefore, this Court is of the view that the matter requires a re-look by the trial court.

In the result, this appeal is allowed. The impugned judgment and decree passed by the lower appellate court are set aside. The matter is remitted back to the trial court for fresh disposal. The appellants shall make necessary

amendments in the plaint including proper reliefs. The trial court shall at the expense of the appellants depute a commissioner assisted by a competent surveyor to locate the suit property as well as the property obtained by the respondent through court auction. The trial court shall provide opportunity to the appellants for the above and thereafter the respondent shall be given an opportunity to submit his additional written statement. Both parties shall be given an opportunity to adduce additional evidence, if they choose. The entire exercise shall be completed within a period of six months from the date of receipt of a copy of this judgment giving the final verdict in the matter.

Sd/- A.V.RAMAKRISHNA PILLAI

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true copy

P.S.TO JUDGE

The judgment dated 25.5.2015 in RSA No.227/2010 is recalled as per the order dated 18.2.2016 in R.P.No.1208/2015 in RSA No.227/2010.

Sd/-
Registrar (Judicial)