

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

FRIDAY, THE 20TH DAY OF MARCH 2015/29TH PHALGUNA, 1936

RFA.No. 72 of 2015 ()

AGAINST THE ORDER/JUDGMENT IN OS 112/2008 of SUB COURT,ATTINGAL

APPELLANT/PLAINTIFF:

STELLUS NETTO, AGED 84 YEARS
S/O.BENZITH NETTO,
RESIDING AT MOLLY LAND
PUTHENTHOPPU, PUTHENTHOPPU P.O.
ST.XAVIERS COLLEGE VIA, THIRUVANANTHAPURAM-695 586.

BY ADVS.SRI.DINESH R.SHENOY
SRI.SANIL JOSE

RESPONDENTS/DEFENDANTS:

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1. STANLY ALBY, AGED 87 YEARS
S/O. ALBIN PERIRA, WEST END ROAD, SOUTH HALL
MIDDLESEX, ENGLAND, UBEIIJH.
 2. STELLA STANLY ALBY, AGED 79 YEARS
W/O.STANLEY ALBY, WEST END ROAD, SOUTH HALL
MIDDLESEX, ENGLAND, UBEIIJH.
 3. ALPHONSA M.K. ALBY, AGED 58 YEARS
13C, CADDAGON GARDENS, FINCHLY
LONDON, ENGLAND (ANI).
 4. MERRY HELLEN, AGED 62 YEARS
W/O.BONFACIE PERIERA, ATTARIKATHU VEEDU
ST.XAVIERS COLLEGE VIA, THIRUVANANTHAPRUAM DISTRICT 695001.
 5. SHERLY GEORGE, AGED 53 YEARS
D/O.DAISY D'CRUZ, ROSE HOUSE, ATTARIKATHU VEEDU
ST.XAVIERS COLLEGE VIA, THIRUVANANTHAPRUAM DISTRICT, 695001.

R1 TO R3 BY ADV. SMT.PM.ZOHRA
R4 BY ADV. SRI.M.R.ANANDAKUTTAN (CAVEATOR)

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION ON 20-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.N.RAVINDRAN & ANIL K.NARENDRA, JJ.

R.F.A. No.72 of 2015

Dated this the 20th day of March, 2015

J U D G M E N T

P.N.Ravindran, J.

The appellant is the plaintiff in O.S.No.112 of 2008 on the file of the Court of the Subordinate Judge of Attingal. The respondents are the defendants therein. The suit instituted by the appellant for a decree declaring that he has acquired right, title and interest over the plaint schedule property by adverse possession and for a decree of permanent prohibitory injunction restraining the defendants or their men from trespassing into the plaint schedule property and taking possession thereof and restraining defendants 1 and 2 from creating any document with respect to the plaint schedule property was dismissed after trial by judgment delivered on 16.8.2014. The appellant has aggrieved thereby filed this appeal. The brief facts of the case are as follows:

2. The plaintiff and the defendants are near relations. The second defendant is the wife of the first defendant and the third defendant is their daughter. Defendants 4 and 5 are nieces of the first defendant namely, his sister's children. The second defendant is

also the sister of the plaintiff's wife. Defendants 1 to 3 (respondents 1 to 3) are citizens of England. The plaint schedule property which is a parcel of land 2 acres in extent (82.60 ares) situate in Survey No.32/1 of Kadinamkulam Village, Thiruvananthapuram Taluk, Thiruvananthapuram District was admittedly purchased by defendants 1 and 2 as per Ext.A1 sale deed dated 1.2.1961 registered as document No.354 of 1961 of SRO, Kazhakootam. The appellant contended that he took actual possession of the plaint schedule property on 10.1.1962 when strangers tried to take possession of the plaint schedule property. He contended that defendants 1 and 2 have knowledge of his possession, that he got the original document of title from the document writer, that he was and is holding the plaint schedule property adversely against the real owners (defendants 1 and 2) uninterruptedly, openly and without any disturbance from 1962 onwards and that he is thus in possession and enjoyment of the plaint schedule property. He also contended that defendants 4 and 5 are on inimical terms with him for the reason that O.S.No.145 of 1980 instituted by their mother against him was dismissed and that they are taking steps to get the plaint schedule property by creating false documents. It was also contended that the title of the original owners stands extinguished by adverse possession and limitation and

therefore, the plaintiff is entitled to get his title over the plaint schedule property declared.

3. Upon receipt of summons, defendants 1 to 3 entered appearance and filed a written statement dated 31.10.2007. They contended that the original title deed of the plaint schedule property was entrusted by defendants 1 and 2 with Hamil Periera (DW2) for the purpose of effecting mutation in the revenue records and for payment of tax, that the father of Hamil Periera was looking after the property on behalf of defendants 1 and 2, that mutation was effected and land tax was also paid. It was averred that while matters stood thus, as instructed by them, the plaintiff's daughter Molly Merlin got the documents from Hamil Periera on 25.6.2006. Along with their written statement, defendants 1 to 3 also produced the original of the receipt dated 25.6.2006 issued by Molly Merlin to Hamil Periera, upon receipt of the original title deed from Hamil Periera. Though the original of the said document is available in the records, it has not been marked in evidence. It is relevant in this context to note that Molly Merlin, who is none other than the daughter of the plaintiff was also the President of Kadinamkulam Grama Panchayat. Defendants 1 to 3 further contended that by the year 2006, management of the property was entrusted with defendants 4 and 5 and thereafter they are looking

after the property on their behalf. In paragraph 6 of the written statement defendants 1 to 3 contended that the plaintiff's wife is the younger sister of the second defendant and therefore, the defendants had complete faith and trust in the plaintiff's family. They contended that the claim of the plaintiff that he has perfected title by adverse possession is false and that the plaintiff was never in possession of the plaint schedule property. They also contended that they are the real owners of the plaint schedule property and that they are in possession thereof ever since the date of purchase. They contended that the plaintiff has not paid tax for the property. Defendants 1 to 3 also produced Ext.B3 series of tax receipts in support of their contention. The plaint averment that the plaintiff got original of the title deed from the document writer was also denied.

4. In the trial court, the plaintiff examined himself as PW1 and two other witnesses as PWs 2 and 3. He also produced and marked Exts.A1 to A7. On the side of the defendants, the power of attorney holder of defendants 1 to 3 appointed as per Ext.B1 power of attorney was examined as DW1 and Hamil Periera with whom the original of the title deed was entrusted was examined as DW2. They also produced and marked Exts.B1 to B9. The Advocate Commissioner who submitted Ext.C1 report and Ext.C1(a) rough sketch was examined as

DW3. The letter produced by DW2 was marked as Ext.X1 and X1(a). The trial court on an analysis of the pleadings and the evidence oral and documentary available in the case held that the plaintiff has failed to prove his possession over the plaint schedule property. His contention that he has perfected title by adverse possession was also found against him. The trial court also held relying on the decision of the Apex Court in **Gurdwara Sahib v. Gram Panchayat Village Sirthala** [(2014) 1 SCC 669] that the suit for a declaration that the plaintiff has perfected tile by adverse possession is not maintainable. The suit was accordingly dismissed. Hence this appeal.

5. We heard Sri.Dinesh R.Shenoy, learned counsel appearing for the appellant and Smt.P.M.Zohra, learned counsel appearing for respondents 1 to 3. We have also gone through the pleadings and the materials on record including the lower court records, which have been called for. As stated earlier, the suit instituted by the appellant is for a declaration that he has perfected title over the plaint schedule property by adverse possession and limitation. He has also prayed for a decree of permanent prohibitory injunction restraining the defendants or their men from trespassing into the plaint schedule property and taking possession thereof and from creating any document with respect to the plaint schedule property. Such a relief is sought on the averment

that ever since 10.1.1962 he is in possession of the plaint schedule property to the knowledge of the defendants openly, continuously and as of right. As rightly noticed by the trial court, the plaintiff has not produced any receipt evidencing payment of tax by him. There is no document to prove that he is in actual physical possession of the property or that he had exercised acts of possession over the plaint schedule property. Though the plaintiff examined PWs 2 and 3 to prove that he is in possession of the plaint schedule property, it has come out in evidence that PW2 is his classmate and PW3 is his worker. Defendants 1 to 3 had on the other hand produced evidence to prove that the land continues to be in their possession and that they are paying tax in respect thereof. They have also explained the circumstances in which the plaintiff came by the original of the title deed relating to plaint schedule property (Ext.A1) by producing Ext.X1 letter sent by them to DW2 and Ext.B4 letter sent by the plaintiff's daughter Molly Merlin. The contents of Ext.B4 letter sent by the plaintiff's daughter to defendants 1 and 2 disclose that she was managing the property on their behalf. If as contended by the appellant he was in exclusive possession and enjoyment of the property, there is no reason why his daughter should have sent Ext.B4 letter to defendants 1 and 2. Likewise, Ext.X1 letter sent by the

defendants to DW2 (Hamil Periera) shows that the original title deed was with DW2 and that he was asked to handover the document of title to the plaintiff's daughter. Ext.X1 letter cuts at the root of the plaintiff's contention that after the sale deed was executed, he collected it from the document writer. These facts coupled with the fact that the plaintiff has not produced even a single scrap of paper to show that he had paid tax in respect of the plaint schedule property conclusively establishes the fact that he has failed to prove the case set out by him in the plaint. Though the learned counsel appearing for the appellant contended that he had successfully resisted a suit instituted by the mother of defendants 4 and 5, on examination of the plaint in that suit namely Ext.A4, we find that the said suit related to a property situate in another Village and not to the plaint schedule property. Therefore, nothing turns on the fact that plaintiff had successfully resisted a suit instituted by defendants 4 and 5. It is also relevant to note that defendants 4 and 5 have no right over the plaint schedule property. Therefore, the plaintiff cannot rely on Ext.A4 plaint and Ext.A5 decree to contend that he has proved possession over the plaint schedule property. We are therefore in complete agreement with the court below that the plaintiff has failed to prove his possession of the plaint schedule property or his further case that he has

perfected title to the plaint schedule property by adverse possession and limitation.

We accordingly hold that no grounds have been made out warranting interference with the impugned judgment. The appeal fails and is dismissed in limine. Having regard to the fact that the document of title stands in the name of defendants 1 and 2 and the trial court has held that the plaintiff has not perfected title to the plaint schedule property by adverse possession, we deem it appropriate to direct the trial court to return Ext.A1 only to defendants 1 and 2 or their counsel.

**P.N.RAVINDRAN,
(JUDGE)**

**ANIL K.NARENDRA,
(JUDGE)**

vps