

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 3RD DAY OF SEPTEMBER 2015/12TH BHADRA, 1937

RSA.No. 581 of 2008 (C)

AGAINST THE JUDGMENT IN AS 53/2006 of DISTRICT COURT, KOTTAYAM
DATED 08-02-2008

AGAINST THE JUDGMENT IN OS 410/2000 of MUNSIF COURT, VAIKOM
DATED 22-02-2006

APPELLANTS (APPELLANTS BEFORE THE LOWER APPELLATE COURT AND
DEFENDANTS IN THE TRIAL COURT:

1. KURIAKOSE ABRAHAM, AGED 62,
VELLOOR VILLAGE,
VAIKOM TALUK THROUGH POWER OF ATTORNEY
HOLDER KURUVILA KURIAKOSE, S/O.KURIAKOSE
RESIDING AT KARAMEL MALIKAYAIL , VELLOOR KARA,
VELLOOR VILLAGE.
2. KURUVILA KURIAKOSE, SON OF KURIAKOSE
RESIDING AT KARAMEL MALIKAYAIL, VELLOOR KARA, VELLOOR
VILLAGE.

BY SRI.R.D.SHENOY (SENIOR ADVOCATE)
ADV.SRI.S.VINOD BHAT

RESPONDENTS (RESPONDENTS IN THE APPEAL AND PLAINTIFF IN THE SUIT:

1. CHACKO KURIEN, AGRICULTURIST,
RESIDING AT POTHILATH HOUSE, MEVELLOOR KARA,
VELLOOR VILLAGE,
VAIKOM TALUK, MEVELLOOR PO, 686609.
2. P.M.CHERIAN, PAYYANIKKAL HOUSE,
MEVELLOOR KARA, VELLOOR VILLAGE, VAIKOM TALUK,
MEVELLOOR PO-686609.
3. MARIAMMA CHERIAN, PAYYANIKKAL HOUSE,
MEVELLOOR KARA, VELLOOR VILLAGE, VAIKOM TALUK,
MEVELOOR PO.686609.

R1 TO R3 BY ADV. SMT.ELIZABETH MATHAI IDICULLA
R1 TO R3 BY ADV. SRI.RACHEL JOSEPH
R1 TO R3 BY ADV. SRI.MOHAN IDICULLA ABRAHAM
R1 TO R3 BY ADV. SRI.MARTIN D.ALUMKARA
R1 TO R3 BY ADV. SMT.PUSHPY B.MURICKEN

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 03-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P.BHAVADASAN, J.

Regular Second Appeal No.581 OF 2008

Dated this the 3rd day of September, 2015.

J U D G M E N T

Defendants in O.S.No.410/2000 before the Munsiff Court, Vaikom are the appellants. The parties and facts are referred to as they are available before the trial court.

2. The plaintiffs claimed that plaint item No.1 belonged to the 1st plaintiff and plaint item No.2 belonged jointly to plaintiffs 2 and 3. They alleged that plaint item No.3 forms part of plaint item Nos.1 and 2 and it lies in between the two properties. According to the plaintiffs, they left space between the properties so as to rear pigs. The defendants had instituted O.S.No.143/1988 claiming right of easement to use plaint item No.3 as a pathway. That suit was dismissed. The dismissal was confirmed in appeal and the second appeal. But while disposing of the second appeal, this Court had made certain observations regarding item No.4 in that suit. The title with reference to item No.4 in that suit which is item No.3 in the present suit was left

open. So also any other right which the plaintiffs in that suit who are defendants in the present suit may agitate other than the right of easement. Since the right of the plaintiffs with regard to item No.3 is being disputed, it becomes necessary to lay the suit.

3. Defendants resisted the suit. They pointed out that item No.3 is a thondu lying in the north south direction connecting the southern panchayat road and the plaint schedule item No.4 property. The claim of the plaintiffs that item No.3 in the present suit is a portion of plaint item Nos.1 and 2 is not correct. The only means of access for the defendants to the property is the thondu which is item No.3 in the plaint. It is also contended that the two kayyalas being outside the strip of land shown as item No.3 would clearly indicate that item No.3 did not form part of item Nos.1 and 2. They reiterated the claim of right of way through item No.3. They, therefore, prayed for dismissal of the suit.

4. On the above pleadings, issues were raised. Parties let in evidence. Evidence consists of the testimony of PW1 and documents marked as Exts.A1 to A9 on the side of the plaintiffs.

Exts.C1 and C1(a) are the commission report and plan. The defendants did not adduce any evidence. The trial court mainly based its conclusion that item No.3 forms part of item Nos.1 and 2 on the basis of the commission report and plan namely, Exts.C1 and C1(a) and also the evidence furnished by the Commissioner as PW1. Accordingly, suit was decreed.

5. Defendants carried the matter in appeal as A.S.No.53/2006. The lower appellate court held that the plaintiffs had not proved title over item No.3. But they have succeeded in showing that they have possessory right over item No.3 and thus accepting the possessory title, confirmed the decree of the trial court though for different reasons. It is that decree that is challenged in this appeal.

6. Notice was issued on the following question of law:

“When by Ext.A8 judgment the right over item No.3 pathway, which was item No.4 in that suit, was left open to be decided in appropriate proceedings and the respondents/plaintiffs have chosen to institute the suit advancing claim to the said pathway as part of their property and the lower appellate court has found on evidence that the respondents have not established that item No.3 is part of either

item No.1 or item No.2 properties, whether the title over item No.3 pathway declared in favour of the respondents/plaintiffs is sustainable?”

7. Certain facts are not in dispute. That the defendants in the present suit did file O.S.No.143/1988 claiming prescriptive right of easement through plaint item No.3 in the present suit which was in fact scheduled as item No.4 in O.S.No.143/1988 is not in dispute. All the courts i.e. trial court, first appellate court and the second appellate court found that the claim of prescriptive right of easement or any sort of easement was not available to the plaintiffs in the said suit and dismissed the suit. However, while disposing of the second appeal, this Court made an observation that there was no clear admission on the part of the plaintiffs in the earlier suit that title to item No.3 was held by the defendants in that suit who are plaintiffs herein. That issue has to be independently dealt with. This Court also observed that any other right which the plaintiffs in that suit may have excluding prescriptive right of easement which alone was decided in the said suit could be agitated in any other proceedings.

8. The plaintiffs, apprehending that the defendants may again try to tamper with the pathway shown as item No.3, instituted the present suit. They alleged that it forms part of item Nos.1 and 2 and they are absolute owners of the property. On the basis of this, they claimed title to the property lying in between item Nos.1 and 2. The defendants did resist the suit by contending that plaintiffs did not have title.

9. Learned Senior Counsel appearing for the appellants contended that the lower appellate court, after having found that item No.3 does not form part of item Nos.1 and 2, could not have granted a decree in favour of the plaintiffs based on possessory title. That was a case which was not pleaded at all and no opportunity was available to the defendants to meet such a plea. The defendants was taken by surprise that they had no opportunity to counter that finding. This has caused considerable prejudice to the defendants and that alone is sufficient to set aside the decree of the lower appellate court.

10. Learned counsel appearing for the respondents, on the other hand, contended that the lower appellate court was not

justified in coming to the conclusion that item No.3 does not form part of item Nos.1 and 2. In fact, according to the learned counsel, there is no clear finding as such that item No.3 does not form part of item Nos.1 and 2. It is significant to notice, according to the learned counsel, that the lower appellate court does not criticize the finding of the trial court that item No.3 forms part of item Nos.1 and 2. Even assuming for argument sake that there is some defect in title as regards item No.3, property has always been in possession of the plaintiffs and so also an attempt by the defendants in the present suit to claim their right over the said portion of land by previous suit having miserably failed, they can claim no right over the property.

11. It is significant to notice, according to the learned counsel for the respondents, that the Commissioner has specifically reported that a narrow strip of land lying in between item Nos.1 and 2 is neither puramboke land nor Government land. There is nothing to show that the property belongs to anybody else.

12. Drawing attention to the Commissioner's report and also the evidence furnished by PW1, it is pointed out by the learned counsel for the respondents that the Commissioner has categorically stated that going by the measurement of item Nos.1 and 2, item No.3 forms a part of item Nos.1 and 2. This crucial evidence furnished by the Commissioner was unfortunately overlooked by the lower appellate court resulting in a wrong finding being entered into regarding item No.3. Learned counsel went on to point out that there are no grounds for the lower appellate court to interfere with the finding of the trial court regarding item No.3.

13. After having heard the learned counsel on both sides and also after having perused the records, it is felt that the learned counsel for the respondents is fully justified in his submission that the lower appellate court has erred in holding that item No.3 does not form part of item Nos.1 and 2. In fact, as rightly pointed out by the learned counsel for the respondents, there is no finding as such that item No.3 lies outside the measurements of item Nos.1 and 2. The lower appellate court

seems to have been mainly guided by the fact that two kayyalas separate item Nos.1 and 2 and therefore it is presumed that it does not form part of item Nos.1 and 2. In coming to such a conclusion, unfortunately, the lower appellate court overlooked the crucial item of evidence i.e. the evidence furnished by the Commissioner who prepared the plan and report. The Commissioner is examined as PW1. He in no less terms categorically asserts that item No.3 forms part of item Nos.1 and 2. Going by the measurements, boundary of item No.1 runs along the middle portion of item No.3 so also the boundary of item No.2. This is sufficient to show that item No.3 in fact is a portion of item Nos.1 and 2.

14. As rightly pointed out by the learned counsel for the respondents, the lower appellate court does not hold that the finding of the trial court that the plaintiffs have title to item No.3 is erroneous or not based on evidence on record.

15. In the light of the materials now available before court especially the evidence furnished by PW1, it is difficult to come to the conclusion that item No.3 falls outside item Nos.1 and 2.

One cannot omit to note that defendants did not choose to adduce any evidence in this regard. It is also necessary to notice that the Commissioner has specifically stated that item No.3 is neither puramboke land nor Government land. The defendants have no case that it belongs to anybody else. It is in this context the evidence of Commissioner will have to be appreciated. The Commissioner says that on measurements it is clear that item No.3 forms part of item Nos.1 and 2. If that be so, the trial court was fully justified in granting a decree in favour of the plaintiffs. The finding of the trial court is based on evidence on record and there was no necessity for the lower appellate court to go into the question of possessory title at all when there is evidence to the effect that item No.3 forms part of item Nos.1 and 2.

For the above reasons, this appeal is dismissed though for different reasons confirming the judgment and decree of the trial court.

Sd/-

**P.BHAVADASAN
JUDGE**

smp