

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 9TH DAY OF JULY 2015/18TH ASHADHA, 1937

RSA.No. 755 of 2008 (F)

AGAINST THE JUDGMENT IN AS 9/2006 of SUB COURT, HOSDURG DATED
31-05-2007

AGAINST THE JUDGMENT IN OS 80/2002 of MUNSIFF COURT, HOSDURG
DATED 23-12-2005

APPELLANT/APPELLANT/DEFENDANTS:

1. THERUVTH KUNHIRAMAN,
AGED 71 YEARS, S/O LATE MANIKKAM, BEEDI ROLLER,
RESIDING AT LAXMI NAGAR,
HOSDURG VILLAGE OF HOSDURG TALUK.
2. H.V. SUMATHI, AGED 44 YEARS,
BEEDI ROLLER, RESIDING AT LAXMI NAGER,
HOSDURG VILLAGE OF HOSDURG TALUK.
3. CHEERU, AGED 74 YEARS, W/O.APPARU,
HOUSEHOLD, RESIDING AT KOLOTH VALAPPIL,
ADOT, AJANUR VILLAGE AND POST.
4. MADHAVI, AGED 56 YEARS,
D/O LATE APPARU AND CHIRUTHAKUNHI, HOUSE HOLD
RESIDING AT KOLOTH VALAPPIL, ADOT,
AJANUR VILLAGE OF HOSDURG TALUK.
5. K.V. BHASKAAN @ VASU, AGED 49 YEARS,
S/O.LATE APPARU AND CHIRUTHAKUNHI, HOUSE HOLD,
RESIDING AT KOLOTH VALAPPIL, ADOT , AJANUR VILLAGE
OF HOSDURG TALUK.
6. LAXMI, AGED 45 YEARS, D/O LATE APPARU
AND PATTI, RESIDING AT THERUVTH, HOSDURG
VILLAGE OF HOSDURG TALUK.
7. CHANDRAN, AGED 39 YEARS, S/O LATE APPARU
RESIDING AT THERUVTH, HOSDURG VILLAGE OF
HOSDURG TALUK.

RSA.No. 755/2008

8. SARTHA, AGED 43 YEARS,
D/O.LATE APPARU, RESIDING AT THERUVTH
HOSDURG VILLAGE OF HOSDURG TALUK.
9. ASHOKAN, AGED 39 YEARS,
S/O LATE APPARU, RESIDING AT THERUVTH,
HOSDURG VILLAGE.
10. RAMESH, AGED 31 YEARS,
S/O LATE APPARU, RESIDING AT THERUVTH,
HOSDURG VILLAGE.

BY ADV. SRI.SURESH KUMAR KODOTH

RESPONDENTS/RESPONDENTS/PLAINTIFF & SUPPLEMENTAL DEFENDANT
No.8:

1. P.KUNHIKANNAN, AGED 68 YEARS,
S/O. LATE THERUVATH KARICHI, CULTIVATER,
RESIDING AT LAXMI NAGAR, HOSDURG VILLAGE AND TALUK,
K.O. KANHANGAD.
2. SUKUMARAN @ SUKU,
AGED 41 YEARS, S/O. LATE APPARU AND PATTU, RESIDING AT
THERUVATH, HOSDURG VILLAGE OF HOSDURG TALUK.

R1 BY ADV. SRI.T.K.VIPINDAS

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
09-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Regular Second Appeal No.755 OF 2008

Dated this the 9th day of July, 2015.

J U D G M E N T

Defendants in a suit for declaration of title, recovery of possession and other consequential reliefs are the appellants.

2. The plaint A schedule property currently having an extent of 77 cents includes plaint B schedule property having 49.34 cents. It is alleged that the suit property originally belonged to one Ambady and by an illidarwar deed of the year 1864, possession was handed over to Morarji and Seetharamayya. From the records, it is seen that there were some liquidation proceedings and the liquidator came into possession of the property. Whatever that be, ultimately, the property came to vest with one Kannan, son of Ambady. Out of the property thus obtained by Kannan, he sold 80 cents to his sister Vellachi and nephew Achuthan as per sale deed dated 30.11.1932 which is Ext.A1 in this case. Even though the plaintiff initially set up a case of lease in favour of his mother,

later on he purchased the rights of Vellachi and nephew of Ambady, Achuthan, from their legal representatives and he instituted the suit for declaration of his title and other consequential reliefs.

3. The defendants resisted the suit by pointing out that the property originally belonged to the tarwad of Ambady. Even though they admitted the lease arrangement, it is pointed out that being successor of Ambady, they are entitled to the property. There is an alternative plea of adverse possession and limitation also.

4. The trial court raised necessary issues for consideration. Evidence consists of the testimony of PW1 and the documents marked as Exts.A1 to A5 on the side of the plaintiff. The defendants examined DWs 1 and 2 and had Exts.B1 to B16 marked. Exts.C1 and C2 are the commission reports.

5. On an appreciation of the evidence in the case, the trial court came to the conclusion that the plaintiff has been able to establish his title to the suit property but he had failed to get the B schedule property identified so as to get a decree in that regard

and a decree was passed declaring that the plaintiff is the absolute owner of the plaint A schedule property and limiting the further relief to surrender of possession of the buildings in the property of the plaintiff by the defendants.

6. Aggrieved defendants carried the matter in appeal as A.S.No.9/2006. The lower appellate court, on an independent analysis of the materials before it, found that there was no merit in the appeal and also in the cross objection and dismissed both of them.

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

Whether the courts below were justified in holding that the suit filed by the plaintiff for declaration of title and recovery of possession is maintainable, despite the suit not having been brought within a period of twelve years of dispossession and the appellants were admittedly in continued and uninterrupted occupation of the property adversely to the plaintiff for more than twelve years?

8. Sri.Suresh Kumar Kodoth, learned counsel appearing for the appellants contended that both the courts below were not justified in finding title with the plaintiff in the light of the earlier

litigation between the parties and the findings entered therein. All throughout the plaintiff was relying on a lease from Achuthan and Vellachi in favour of his mother which he claimed devolved on him consequent on the death of his mother. He had staked such a claim before the Land Tribunal also. He lost before the Land Tribunal and also before this Court earlier in that respect. In a second appeal filed by the defendants as S.A.No.523/1985 which arose from O.S.No.266/1978 which was a mere suit for injunction, it was found that the plaintiff in the suit was not in possession of the entire property and he was granted a decree in respect of a portion of the property shown as A schedule. The courts below, according to the learned counsel, have erroneously found that this Court had concluded that title to the property continued with Vellachi and nephew of Ambady, Achuthan, and having purchased that right, plaintiff has become title holder of the property. According to the learned counsel, having banked on a lease for the occupational and possessory rights, the plaintiff cannot now fall back upon the title of Vellachi and Achuthan. Further it is contended that all throughout the defendants have

been in possession of at least a portion of property which would show that they are entitled for title to the said portion by way of adverse possession and limitation.

9. Learned counsel appearing for the respondents, on the other hand, contended that there is no merit in the appeal at all. All throughout, both before the Land Tribunal and also in the suit, the contention of the defendants was that they are co-owners of the property and that the plaintiff is not entitled to any relief. Learned counsel contended that there is a plea of adverse possession and limitation. But having pursued both the contentions which are inconsistent and contradictory, courts below were justified in concluding that the defendants cannot pursue the plea of adverse possession and limitation. Learned counsel also invited the attention of this Court to Exts.A2 and B16 wherein this Court had occasion to consider the question of title though incidentally and found that title vests with Vellachi and nephew of Ambady, Achuthuan. It is contended that from the legal heirs of said Vellachi and Achuthan that the plaintiff had obtained right over the property and it therefore could not be

said that the plaintiff did not have title to the suit property. Accordingly, it is contended that there are no grounds made out to interfere with the judgment and decrees of the courts below.

10. Parties have been litigating for years. There seems to be no end in the near future. Whatever that be, the journey started with S.M.No.917/1977 before the Land Tribunal, Kanhangad. The said proceedings ended in favour of the applicants in the suo moto proceedings which was challenged by filing an Interlocutory Application before the Land Tribunal which allowed the application and set aside the order of assignment. It is worthy here to note that there was a suit between the parties as O.S.No.266/1978 which was filed by the present plaintiff for injunction based on possessory rights. In the suit the trial court found that the parties are co-owners on the basis of Ext.B1 and dismissed the suit. The appeal filed by the plaintiff against the said order was allowed and the suit was decreed in favour of the plaintiff. The defendants carried the matter in second appeal. While disposing of the second appeal by judgment dated 12.06.1990, this Court had occasion though incidentally to go

into the question of title. This Court found that the document by which mortgage was created was a genuine document and the property had gone into the hands of the liquidators and Kannan had obtained property on assignment from the said liquidators. This Court also found that the said Kannan had assigned the plaint schedule property to his sister Vellachi and Achuthan as per document dated 30.11.1932. However, it was found that with regard to a portion of the property, the plaintiff in the suit has miserably failed to prove his possession and being a suit for injunction he has to fail in respect of that portion of the property. The second appeal was disposed of by modifying the decree of the lower appellate court and confirming the decree of injunction to a portion of the property.

11. While things stood so, parallel proceedings were going on in the Land Tribunal and that ended up in C.R.P.No.1597/1993 being filed before this Court. This Court too found that claim of lease set up by both the parties is not true and that Vellachi and Achuthan retained title over the suit property. Holding so, dismissal of the S.M proceedings was confirmed by this Court in

the C.R.P mentioned above.

12. It appears that subsequent to the dismissal of the C.R.P, plaintiff cleverly obtained an assignment deed from the legal heirs of Vellachi and Achuthan and thus having claimed to have obtained title to the property, laid the present suit.

13. The defendants resisted the suit on two grounds; one by contending that they are co-owners of the property and the other by contending that even though the plaintiff had any right to suit property, that was lost by adverse possession and limitation. The theory of co-ownership has to necessarily fail because that was agitated before the Land Tribunal and even though the Land Tribunal while setting aside the proceedings, in I.A.No.7/1978 did observe that property was outstanding on co-ownership, that finding did not favour with this Court. While disposing of the C.R.P this Court found that the claim with regard to oral lease was not proved and title continued to vest with Vellachi and nephew Achuthan. Of course, this Court, while disposing of the C.R.P found that the parties relied considerably on the judgment in S.A.No.523/1985 wherein it was found that

Vellachi and Achuthan have obtained title to the property from one Kannan who got the property from liquidators.

14. It is an admitted fact that by Ext.A3 dated 27.09.2001 plaintiff obtained the assignment deed from the legal heirs of Vellachi and Achuthan. But this Court in two proceedings had held that they have no title to the suit property. Thereafter suit was laid.

15. It is true that as early as in 1990 while disposing of S.A.No.523/1985, the claim of possession of the entire property was found against the plaintiff and it was found that a portion of the property was outstanding with the defendants.

16. Learned counsel appearing for the appellants contended that having invited such a decision, the plaintiff could not have claimed in the present suit that B schedule property was trespassed upon by the defendants subsequent to the assignment in favour of the plaintiff. That has to be a false story. It is very clear that the plaintiff was concealing certain facts and trying to take advantage of the assignment deed in his favour. This aspect has been lost sight of by both the courts below. The defendants

have been in actual physical possession of the property for considerably long period and that right of the defendants have not been recognised by the courts below. At any rate, according to the learned counsel, the plea of adverse possession and limitation should have been found in favour of defendants.

17. It is no doubt true that the defendants are entitled to take merely inconsistently pleas in the written statement. In the case on hand, they claimed that they are co-owners of the property. In the alternative they pleaded that they had perfect title by way of adverse possession and limitation.

18. One may remember here that recovery of possession was sought in respect of B schedule property having an extent of nearly 49.34 cents. The defendants could not have pursued the plea of co-ownership and adverse possession and limitation parallelly. Plea of adverse possession and limitation pre-supposes that the title of the opposite party is admitted and that the defendants by virtue of their long, independent and continued possession claim in derogation of the title of the plaintiff.

19. One cannot omit to note that the suit is one under

Article 65 of Limitation Act. That means when title is established, burden shifts to the defendants to show that they have better title to hold on the property. One must remember that suit is not for mere possession alone. Having pursued their contention of co-ownership, they cannot at the fag end turn around and say that they have perfect title to the property by way of adverse possession and limitation. Further, there is no evidence to show that they have been in exclusive possession of the property in derogation of the right of the plaintiff. One has to remember that appellants continued with their plea of co-ownership. In order to succeed in the plea of adverse possession and limitation, they had necessarily to show that they had shed their right as co-owners since they had been holding the property adverse to the claim of the plaintiff. There is hardly any evidence in this regard. True, present suit is for recovery of possession which shows that as far as possession of 49.34 cents of property is concerned, it is admitted to be with the defendants. But that is far from saying that they have perfected title to a portion of land by adverse possession and limitation.

20. It may be noticed here that even though recovery of possession of B schedule property was sought for, relief was not granted since the trial court found that that portion of the property has not been identified.

21. Both the courts below found that there is absolute want of evidence to show that the ingredients to attract adverse possession and limitation have been established in the case on hand. That is essentially a finding on fact arrived at on an appreciation of evidence. Since the finding of the courts below is not shown to be either perverse or contrary to the evidence on record, it does not call for any interference.

Result is that, this appeal is without merits and it is liable to be dismissed. I do so. There will be no order as to costs.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A. to Judge.