

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 24TH DAY OF JUNE 2015/3RD ASHADHA, 1937

RSA.No. 640 of 2010 ()

**AGAINST THE JUDGMENT DATED 22/02/2010 IN AS. NO.168/2007 OF
ADDITIONAL DISTRICT COURT-II, MAVELIKKARA.
AGAINST THE JUDGMENT DATED 30/06/2006 IN OS. NO.171/2003 OF
MUNSIF COURT, KAYAMKULAM.**
.....

APPELLANTS/RESPONDENTS 1 & 2/DEFENDANTS 1 & 2 :

- 1. SIVARAJAN,S/O.KUTTAN, PALLICKASSERIL
PADEETTATHIL, ELIPPAKKULAM MURI,
KATTANAM VILLAGE.**
- 2. SUBHADRA, D/O.BHARATHY, PALLICKASSERIL
PADEETTATHIL, ELIPPAKKULAM MURI,
KATTANAM VILLAGE.**

**BY ADVS.SRI.GEORGE VARGHESE (PERUMPALLIKUTTIYIL),
SRI.A.R.DILEEP,
SRI.SUNIL KUMAR,
SRI.JAWAHAR HAMID.**

**RESPONDENTS/APPELLANT & RESPONDENTS 3 TO 6/
PLAINTIFF & DEFENDANTS 3 TO 6:**

- 1. SURENDRAN, S/O.PARAMU,
KANJIRAVILAYIL HOUSE, KADUVINAL MURI,
VALLIKUNNAM VILLAGE.**
- 2. ASOKAN, PALLICKASSERIL PADEETTATHIL,
ELIPPAKKULAM MURI, KATTANAM VILLAGE.**
- 3. ANIL KUMAR, PALLICKASSERIL PADEETTATHIL,
ELIPPAKKULAM MURI, KATTANAM VILLAGE.**
- 4. ANITHA KUMARI, PALLICKASSERIL PADEETTATHIL,
ELIPPAKKULAM MURI, KATTANAM VILLAGE.**
- 5. AJAYAKUMAR, PALLICKASSERIL PADEETTATHIL,
ELIPPAKKULAM MURI, KATTANAM VILLAGE.**

R1 BY ADV. SRI.R.SATISH KUMAR.

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 24-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

rs.

P.BHAVADASAN, J.

R.S.A. No. 640 of 2010

Dated this the 24th day of June, 2015

J U D G M E N T

Defendants 1 and 2 in O.S.No. 171/2003 of the Munsiff Court, Kayamkulam, who suffered a decree for injunction at the hands of the lower appellate court, are the appellants before this Court.

2. The suit was one for injunction. The plaintiff obtained the plaint schedule property as per Ext.A1 dated 22.06.1991, a sale deed executed by the second defendant in the suit. Complaining of attempted trespass and other mischiefs in relation to his property by the defendants, the plaintiff laid the suit for injunction.

3. The defendants resisted the suit by pointing out that even though Ext.A1 sale deed was executed by the 2nd defendant, possession was not handed over nor was it intended that possession should be given to the plaintiff. In fact, it was as security for an amount borrowed from the

plaintiff that the property was assigned in his name. The oral understanding was that if the money is repaid, the land would be re-conveyed. They also contended that there is no demarcating boundary separating a plaint schedule property from the rest of the property and that the articles kept in the plaint schedule property are actually the properties belonging to the defendants. They therefore prayed for a dismissal of the suit.

4. On the above pleadings, issues were raised. The evidence consists of the testimony of PW1 and documents marked as Exts. A1 to A4 from the side of the plaintiff. The defendants examined DWs 1 and 2. Exts. C1 to C3 are the Commissioner's report.

5. The trial court, on an appreciation of the evidence, came to the conclusion that it was not possible to identify and locate the plaint schedule property from the rest of the properties and if that be so, injunction cannot be granted without proper identification of the property and thus

dismissed the suit.

6. The plaintiff carried the matter in appeal as A.S.No.168/2007. The lower appellate court, mainly on the basis that, since the title has been established, the principle of possession follows title was invoked and reversed the decree of the trial court and relief of injunction was granted. It is against the said decree that this appeal has been filed.

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

“i) Isn't the Appellate Court justified in presuming possession of the plaintiff over the plaint schedule property based on Exts. A1 to A4 without appreciating the rebuttal evidence adduced by the defendants?

ii) Isn't the Appellate Court justified in putting the burden on the defendants to disprove the possession of the plaintiff so as to disentitle him the relief of injunction in the suit in view of the peculiar facts and circumstances of the case?

iii) Isn't the Appellate Court justified in interfering the discretion exercised by the Trial Court without rendering any finding as

regards the cause of action proved by the plaintiff?

iv) Isn't the Appellate Court justified in granting injunction without rendering any finding regarding the identity of the property contrary to the finding of fact recorded by the Trial Court that the property is not properly identified by the plaintiff?"

8. The learned counsel appearing for the appellants contended that the lower appellate court was not justified in reversing the decree of the trial court, which had analysed the evidence in meticulous details and had come to the conclusion that the plaint schedule property is not identifiable from the rest of the property which belonged to defendants. The trial court had come to the conclusion that there was no attempt from the side of the plaintiff to get the plaint schedule property covered by Ext.A1 identified and there was no demarcating boundaries to separate the properties lying contiguously. Under such circumstances, the learned counsel pointed out that the trial court was perfectly justified in dismissing the suit. The learned counsel

then went on to point out that the approach of the lower appellate court cannot have support in law. The principle of possession follows title is very seldom invoked and usually, it is invoked only in cases where a property is incapable of being independently possessed by its very nature. In the case on hand, the extent is 29 cents of land and it is clearly identifiable. Even after the Commissioner's report, namely, Ext. C1 which indicated that the property was lying contiguously with rest of the properties and it is not identifiable, still there was no attempt from the side of the plaintiff to have a Commission taken out and get his property demarcated and identified. The learned counsel, in support of his contention that in such circumstances, injunction could not have been granted, relied on the decision reported in **Jose Lalichan v. Augustine** (2011 (4) KHC 847). It was therefore contended the decree passed by the lower appellate court cannot be sustained.

9. The learned counsel appearing for the respondents on the other hand contended that the description of way is available from Ext.A1 document and the property is also identifiable. The lower appellate court has considered all these facts and has come to the conclusion that the possession of the plaintiff has been established over the suit property and therefore had granted injunction. The finding that the plaintiff is in possession is a question of fact arrived at by the lower appellate court based on appreciation of evidence in the case and exercising the jurisdiction under Section 100 of C.P.C., this Court may not be justified in interfering with the said finding.

10. It is not in dispute that the plaint schedule property was assigned in favour of the plaintiff by the second defendant. Of course, there is a case for the defendants that it was not intended to be an outright conveyance and possession was not given. Possession continued with the second defendant. They say that it is

only intended to be as a security for the amount borrowed from the plaintiff and he was not put in possession of the property.

11. The trial court, on materials before it, came to the conclusion that since the property is not identifiable and since the plaintiff has not proved his possession, the decree for injunction could not be granted. However, the lower appellate court took a different view and held that since the plaintiff has title, it can be presumed that the possession follows title.

12. As rightly pointed out by the learned counsel for the appellants, the principle of possession follows title is seldom invoked and if at all it is invoked, it is only in such cases where the property in question is incapable of independent possession by its very nature. In the case on hand, it is 29 cents of land described as "Tharanilam". The very description in the plaint shows that it is portions of several items of property. It is significant to notice that the

boundary shown in the plaint schedule and Ext.A1 do not actually tally.

13. The plaintiff is admittedly residing far away from the property, while the defendants have properties lying contiguous to plaint schedule property. It is here that the Commissioner's report assumes significance. The Commissioner's report has categorically indicated that it is virtually impossible to identify the plaint schedule property from the rest of the properties lying contiguous to plaint schedule property. He has also pointed out various articles that was found in plaint schedule property. Of course, there is controversy between parties as to who is the owner of those items found in the plaint schedule property.

14. At any rate, there is no evidence at all to show that the plaint schedule property lies within well defined boundary so as to easily identifiable. Even after the Commissioner has reported that the property is lying contiguously with neighbouring properties and is not

separately identifiable, the plaintiff felt shy from getting a sketch prepared and to have the plaint schedule property properly identified.

15. The defendants have a case that even though the document of title was executed in favour of the plaintiff, no possession was given. In the decision reported in **Varkey v. Chacko** (2012 4 KLT 515), this Court had occasion to consider such an issue and it was held as follows:

“24. A recital in a deed as to possession is not a 'term' of the contract. Hence oral evidence is admissible to show that as against the recital in the document that possession of the property was transferred, there was no such transfer of possession. Such evidence is not excluded by S.91 or 92 of the Act. Nor is evidence excluded to prove that Ext.B1 was not intended to be an agreement for sale of property. The learned senior Advocate has placed reliance on the decision of *Alka Gupta v. Narender Kumar Gupta* JT 2010(11) SC 178= 2010 KHC 4735). There, it is held that even though a particular ground of defence or attack was not actually taken in the earlier suit, it was

capable of taken in earlier suit, it become a bar in regard to the said issue being taken in the second suit in view of the principle of constructive *res judicata*. Here, that question does not arise since I found that as per the averments in the plaint what happened on 15.02.1996 is only an occasional interference with the possession of the plaintiff while on 10.03.1996 as pleaded in the counter claim of the plaintiff, there was a total dispossession of the plaintiff from the 20 cents out of the suit property after the institution of the suit. That is not a matter which the plaintiff could have urged in the plaint filed much before the dispossession on 10.03.1996.”

16. It is therefore clear that merely because, a document of title is executed in favour of a person, it does not follow that he automatically obtained possession also. The vendor can show that possession was not actually handed over and continued with him. There is no presumption that possession is automatically handed over, even though the vendee may be entitled to possession as a matter of right.

17. The question as to what is the state of affairs when a prayer for injunction is made and the property is unidentified, was considered in the decision reported in Jose **Jose Lalichan v. Augustine** (2011 (4) KHC 847). In the said case, the suit related to two items of properties and item No. 1 alone was identified while item No.2 remained unidentified. Relief was granted in respect of both the items. This Court, noticing that the second item had not been identified, observed as follows:

“14. When the identity of the property was put in issue, and it was also pointed out by the defendants that there are no demarcating boundaries between the properties, it was necessary for the plaintiffs to take out a commission to identify the property. One fails to understand as to why no commission was taken out to get a report and sketch prepared. That would have been the property course to be adopted.”

18. As already stated, the Commissioner has categorically reported that the suit property cannot be identified and there is no demarcating boundaries. Under such circumstances, the trial court was justified in its conclusion that a permanent prohibitory injunction could not be granted. As already stated, the principle invoked by the lower appellate court cannot be readily accepted. It is significant to notice that Ext.A4, the possession certificate produced by the plaintiff is long after the suit has been filed. In fact, a reading of the evidence of PW1 would show that he is not very definite about the property.

For the above reasons, this appeal is allowed. The impugned judgment and decree are set aside and the matter is remanded to the trial court for fresh consideration in accordance with law, after obtaining proper Commissioner's report. Both parties will be at liberty to adduce fresh evidence, if they so chose.

The parties shall appear before the trial court on **23.07.2015**. The trial court may make every endeavour to dispose of the suit as expeditiously as possible.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge