

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. 951 of 2008 (E)

**(AGAINST THE JUDGMENT IN AS.NO. 15/2003 OF I ADDL.SUB COURT,
THIRUVANANTHAPURAM DATED 10-08-2007)**

**(AGAINST THE JUDGMENT IN OS.NO. 1526/1998 OF III ADDL.MUNSIFF COURT,
THIRUVANANTHAPURAM DATED 31-05-2002)**

APPELLANT(S)/APPELLANTS/DEFENDANTS 1 AND 2 :

- 1. MARYKUTTY WALTER, W/O.K.WALTER,TC 32/802,
(2), PUTHUVAL VEEDU, PUTHUVAL COLONY, VETTUKADU,
TRIVANDRUM.**
- 2. RAJEENA WILSON, W/O.WILSON, TC 32/820(1),
PUTHUVAL COLONY ALIAS SETTLEMENT COLONY,
VETTUKADU, TRIVANDRUM.**

BY ADV. SRI.G.S.REGHUNATH

RESPONDENT(S)/RESPONDENTS/PLAINTIFF AND 3RD DEFENDANTS :

- 1. PATHROSE RICHARD, S/O.LATE PATHROSE CHRISTIAN,
ANIL COTTAGE, VETTUKAD, TRIVANDRUM.**
- 2. GOVT. OF KERALA, REP. BY THE DISTRICT COLLECTOR,
TRIVANDRUM.**

R1 BY ADV. SRI.K.B.PRADEEP

R2 BY GOVERNMENT PLEADER SRI.E.M.ABDUL KHADIR

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 02-03-2015 , THE COURT ON 25-05-2015 DELIVERED THE FOLLOWING:**

sts

A.V.RAMAKRISHNA PILLAI, J

RSA No.951 of 2008

Dated this the 25th day of May, 2015

JUDGMENT

Defendants 1 and 2 in O.S.No.1526/1998 on the files of the Additional Munsiff's Court, Thiruvananthapuram are in appeal.

2. The first respondent filed a suit for declaration of title and possession over the plaint schedule property or in the alternative to allow the plaintiff to recover the plaint schedule property for injunction restraining defendants 1 and 2 from trespassing upon Plaint-A schedule property.

3. The plaintiff alleged that he is the absolute owner in possession and enjoyment of the plaints schedule property. As per Sale Deed No.16/1992 of Thiruvananthapuram Sub Registry Office, he along with his family members were residing in a hut in the area adjacent to the puramboke land for which he had applied for assignment under the Kerala Land Assignment Act and

Rules. The said puramboke land was originally in the possession of late Albert, the father of the first defendant. The said Albert had over possession of said puramboke land which admeasures to 7 cents to the plaintiff on execution of a sale deed. Both these lands are lying as a single plot with a fencing all around. Later, the aforesaid Albert filed O.S.No.1018/1980 against the plaintiff and others. However, the same was dismissed. The appeal filed against the same was also dismissed. Thereafter he filed another suit as O.S.No.1522/1982 for the same reliefs and that suit also was dismissed. No appeal was preferred against the same and the decision has become final. On 28.7.1992, the first defendant and her husband late K.Walter attempted to trespass upon the suit property and the plaintiff filed O.S.No.1772/1992 before the Munsiff's Court, Thiruvananthapuram for a decree for injunction. In the written statement filed in that suit, it was stated that as per patta No.17511 issued by the Tahsildar under the Kerala Land Assignment Act and Rules, the land was assigned in favour of the first

defendant and she got title and interest over the plaint schedule property measuring an extent of 6.5 cents and that she was residing in the building constructed therein. It was also stated that the said patta was issued in the year 1992 and that her sister Regina who is the second defendant was in possession of another 6.5 cents of land on its northern side. They claimed to have been residing in the said building for more than 10 years. They also alleged that, she has been paying tax for the entire property. The plaintiffs allege that the Government could not issue patta for the said property as it was already assigned to the plaintiff and therefore, the patta in the name of the first defendant is void. It was also alleged that notwithstanding the issuance of patta in favour of the first defendant, the plaintiff has been enjoying the property. Thereafter O.S.No.1777/1992 was withdrawn with liberty to file a fresh suit with appropriate reliefs. It is further alleged that though the patta issued in favour of the first defendant is void, the case casts a cloud over the plaintiff's title.

4. The appellants in the written statement denied the allegations in the plaint. According to them, the plaintiff had filed another suit as O.S.No.1777/1992 against the same defendants for the very same reliefs and when the case was posted in the list, the plaintiff filed a memo stating that the suit is not pressed. Therefore, according to them, the present suit is barred by *res judicata*. It was contended that the sale deeds relied on by the plaintiff is a sham document as the person who executed the document had no right or possession over the plaint schedule property. The plaintiff and his family members never resided in the suit property or adjacent puramboke land. The hut situated in the plaint schedule property has been constructed by the predecessor in interest of the defendants. The first defendant has been granted patta in respect of the plaint schedule property on account of her continuous possession of the said property. The first defendant is the absolute owner in possession of 6.5 cents and the house situated therein. On the northern side of the property, the second defendant is having the same

extent. She also had constructed a hut in that property and she is residing therein. Both of them have obtained patta in respect of the properties in their possession. Defendant's father had not executed any document in favour of the plaintiff. Therefore, they pray for a dismissal of the appeal.

5. After raising proper issues for trial, the parties were permitted to adduce evidence and at the trial Pws.1 to 3 as well as Dws.1 to 3 were examined. Exts.A1 to A4 series and B1 to B7 series and C1 series were marked. The trial court after considering the evidence partly decreed the suit. Challenging the said decree, the appellants filed A.S.No.15/2003 and the plaintiff filed A.S.No.14/2003. Both the appeals were heard together and a common judgment was passed dismissing both the appeals. The present appeal is against the judgment in A.S.No.15/2003.

6. I have heard Mr.G.S.Reghunath, the learned counsel for the appellants and Mr.K.B.Pradeep, the learned counsel for the respondents.

7. The parties can be referred to as they are arrayed in the original suit.

8. The plaintiff claims title and possession of plaint schedule property and a consequential injunction against trespass. There is an alternative prayer for recovery also. The plaint schedule property is 12.85 cents of land and a hut therein. Out of this, 5.850 cents is in Sy.No.2623/101C-6/98/9 and 7 cents lying on the southern side of it. There is no idea regarding the survey number of the said 7 cents. However, it is alleged that the entire property is lying as a contiguous plot. As per the boundary description, the property is bounded on the east by the property of one Appu and on the south by the Government land and on the west by the property belonging to one Podiyan and on the north by the property belong to one Pathiru. It was argued by the learned counsel for the appellant that the plaintiff is claiming the property obtained by the defendants as per Exts.B1 and B2 pattayam issued under Rule 9(2) of the Land Assignment Act, 1960 and Rule 1964.

9. In support of the argument, the learned counsel for the appellant invited my attention to paragraphs 6 and 7 of the plaint as well as Exts.B6, B7 and B8 as well as the deposition of PW1. It was submitted that the same property was claimed in the previous suit filed by the plaintiff as O.S.No.1777/1992. The previous suit was simply withdrawn by the plaintiff in order to escape from an adverse verdict after the filing of the written statement filed by the defendants. It was pointed out by Mr.Reghunath that the property made mention of as Exts.C1 and C1(a) reports are the properties obtained by defendants under Exts.B1 and B2. In support of the same, the learned counsel for the appellant relied on Exts.P6 and P8. It can be seen from Ext.C1(a) that there are two huts in the property, one belonging to the first defendant and the other belonging to the second defendant. The plaintiff who gave evidence as PW1 has stated that the property shown by the Commissioner in Ext.C1 is not the plaint schedule property. Therefore, the plaint schedule property, i.e. 5.85 cents comprised in Sub Division

No.98,101C/98 shown in Exts.A2 and A3 cannot be the plaint schedule property identified by the commissioner in Exts.C1 and C1(a). I see valid force in the submission made by Mr.G.S.Reghunath that the said property is the property of the defendant covered by Exts.B1 and B2 over which the defendants have absolute title and possession. The aforesaid clear admission of PW1 (plaintiff) was ignored by the courts below.

10. The Apex Court in ***Deva (died) through Lrs. v. Sajjan Kumar (dead) by Lrs.***(2003) 7 SCC 481 has observed that when a very important piece of evidence in the nature of admission has been overlooked by the courts below, the concurrent findings of facts are liable to be interfered with. Again in ***Rattan Dev v. Pasam Devi*** (2002) 7 SCC 441, it was observed by the Apex Court that the non-application of mind by the appellate court to other material, though available, and consequent failure of the appellate court to discharge its judicial obligation, did raise a question of law having a substantial question of impact on the rights of the parties and therefore, the

second appeal deserves to be heard on merits. In this case, as rightly submitted by the learned counsel for the appellant, Ext.A1 which pertains to another property was relied on by the courts below for giving a verdict in favour of the defendants. In addition to that Exts.B1, B2, B3, B6 and B7 as well as the admissions of the plaintiffs were ignored by the courts below. It can be seen that there was non-application of mind by the lower appellate court in this substantial question of law and, therefore, liable to be interfered with.

11. The defendants have a definite case that the first defendant has been granted patta in respect of the property held by him. Ext.B6 is the copy of the order dated 3.7.2000 passed by the Revenue Divisional Officer in Appeal No.1699/1993. Ext.B1 is the patta No.17511 dated 8.10.1991 issued in favour of the first defendant with respect to 6.5 cents comprised in Sy.No.2623/2001. Ext.B2 is the patta No.17512 dated 8.10.1991 issued in favour of the 2nd defendant with respect to the adjoining 6.5 cents comprised in the same survey number. Ext.B3

series are the tax receipts showing payment of land tax by defendants 1 and 2. Subsequent to the issue of patta in favour of defendants 1 and 2, the plaintiff had filed an appeal before the Revenue Divisional Officer under the provisions of Land Assignment Rules. The said appeal was dismissed as per Ext.P6 order holding that the assignment of purambokku land in favour of the defendants considering their long possession is justified. At the same time, it was held by the Revenue Divisional Officer that the plaintiff was in possession and enjoyment of 5.850 cents of registered land. It can be seen from Exts.B1 and B2 that the property assigned in favour of defendants 1 and 2 is comprised in sy.No.2623/101/C/part whereas the property owned by the plaintiff under Ext.A1 is in Sub Division No.101C-C6/98/9 of Survey No.2623. Therefore, the trial court has observed that the plaintiff's contention that the Government had issued patta in favour of the defendants in respect of the property owned by the plaintiff under Ext.A1 does not appear to be correct. The patta issued in favour of defendants 1 and 2 as per the

provisions of the Land Assignment Act and Rules carry certain presumption in favour of the defendants as those revenue records were issued in *quasi* judicial proceedings and therefore, they are legal and valid.

12. It is relevant to note that A.S.No.14/2003 and 15/2003 were jointly heard and disposed of by a common judgment. The plaintiff had a specific case that 5.850 cents and 7 cents claimed by him are lying together as a single plot within a common boundary. In order to establish that he placed reliance on Exts.C1 and C1(a). Though decree was prayed on the basis of Ext.C1(a), it was found against. He has not challenged the same. That means, the plaintiff, who had claimed right over 12.85 cents, has dropped his claim for 7 cents. Therefore, the judgment in A.S.No.14/2003 which was commonly disposed of along with A.S.No.15/2003 also stares against the plaintiff.

13. On a consideration of the entire materials now placed on record, this Court is of the view that the courts below ought not have granted the relief of declaratory

decree, the same being discretionary. The courts should not have granted a decree in favour of the plaintiff on the basis of untenable claims. Therefore, I am of the definite view that the appellant is entitled to succeed.

In the result, this appeal is allowed. The judgment and decree passed by the courts below are hereby set aside. O.S.No.1526/1998 on the file of the Munsiff's Court filed by the plaintiff is dismissed.

sd/-A.V.RAMAKRISHNA PILLAI
JUDGE

css/

true copy

P.S.TO JUDGE