

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 23RD DAY OF JUNE 2015/2ND ASHADHA, 1937

RSA.No. 1108 of 2010 (F)

AGAINST THE JUDGMENT IN AS 338/2004 of DISTRICT COURT,TRIVANDRUM
DATED 05.03.2010

OS 2123/1993 of II ADDL.MUNSIFF COURT,TRIVANDRUM

APPELLANTS/APPELLANTS/DEFENDANTS:

1. ANAD @ ANEX, S/O. JANAB ABDUL HAMEED,
TC 43/710, VALIAVEEDU LANE, KMALESWARAM
MANACUD, MUTTATHARA VILLAGE, NOW RESIDING AT
TC 41/122, PADANTHALANE OF -DO- -DO-
2. SUBAIDA BEEVI, W/O. LATE JANAB ABDUL
HAMEED, TC 43/716, VALIAVEEDU LANE
KMALESWARAM, MANACUD, THIRUVANANTHAPURAM.

BY ADV. SRI.J.HARIKUMAR

RESPONDENTS/RESPONDENTS/PLAINTIFFS:

1. MOHANAKUMARAN NAIR, S/O. SANKARA PILLAI,
HINDU MAKKAVAZHY, SENIOR SALES OFFICER, FACT,
RESIDING AT TC 43/435-I, VALIAVEEDU LANE,
KMALESWARAM, MANACUD, THIRUVANANTHAPURAM-05.
2. SMT. B.R.USHA DEVI THANKACHY,
W/O. MOHANAKUMARAN NAIR, RESIDING AT -DO- -DO-

R1 & R2 BY ADV. SRI.C.P. PEETHAMBARAN.

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
23-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Regular Second Appeal No.1108 OF 2010

Dated this the 23rd day of June, 2015.

J U D G M E N T

Aggrieved by the decree in O.S.No.2123/1993 which was confirmed in appeal A.S.No.338/2004, the defendants in the suit have come up in appeal.

2. The suit was one for declaration of title and recovery of possession of plaint B schedule property which, according to the plaintiff, forms part of plaint A schedule property. Further relief sought for was permanent prohibitory injunction restraining the defendants from trespassing into plaint B schedule property and for mandatory injunction to remove the illegal construction of the basement in the plaint B schedule property. The plaint A schedule property which includes plaint B schedule property has an extent of 4.125 cents. According to the plaintiffs, one Sekhara Pillai obtained plaint A schedule property as per Ext.A9

decree in O.S.No.962/1965 and obtained delivery through court as per Ext.A2 and the plaintiffs obtained the property from the said Sekhara Pillai as per Ext.A1 deed. Going by Ext.A1, the plaintiffs obtained title over 4.125 cents comprised in survey No.381. Alleging trespass, suit was laid.

3. The defendants resisted the suit. It is pointed out that they had not trespassed into any portion of the property comprised in Survey No.381 and they are not in possession of the property obtained by the plaintiffs as per Ext.A1. Under the guise of alleged trespass, it is claimed that the plaintiffs are attempting to annex portion of the defendants' property.

4. On the above pleadings, issues were raised and the parties went to trial. Initially the suit was dismissed which was carried in appeal. The lower appellate court allowed the appeal and remanded the matter with a direction to the Commissioner to prepare a fresh sketch of the property with the help of a Surveyor. After the remand was made, surprisingly enough, the Commissioner without taking the aid of a Surveyor prepared Exts.C2, C2(a) and C2(b) report and plan. Evidence in the case

consists of the testimony of PWs 1 to 6 and the documents marked as Exts.A1 to A9 on the side of the plaintiffs. The defendants examined DWs 1 to 3 and had Exts.B1 to B5 marked. Exts.C1, C1(a), C2, C2(a) and C2(b) are the commission reports and plan.

5. Based on Ext.C2(a) plan, the trial court decreed the suit. The lower appellate court confirmed the same. The following are the substantial questions of law raised in the appeal.

- i. Whether the courts below went wrong while allowing the suit on the basis of a commission report and survey plan made without the assistance of a surveyor and on the basis of a measurement sketch which did not form a part of the records?
- ii. Whether the courts below failed to take note of the legal position that the suit is one for declaration of title and possession and that the plaintiffs can succeed only on the strength of their own case and that they cannot take advantage of the suspected weakness of the defence case.
- iii. Whether the courts below were justified in granting a relief in excess of what has been claimed by the plaintiffs with regard to plaint B schedule.

6. Sri.J.Harikumar, learned counsel appearing for the appellants contended that the courts below have erred both in law and on facts in decreeing the suit. Admittedly, the plaintiffs have obtained only 4.125 cents of land and by the present decree he gets more extent of land, a case which the plaintiffs did not have. Further it is pointed out that in the plaint, B schedule property is shown in a triangular shape while in Ext.C2(a) plan which is a part of the decree, B schedule property is shown in a rectangular shape. It is contended that the property admittedly obtained by the plaintiffs was in survey No.381 and going by the commission report, their property extends to survey No.382 also. Again it is contended that it is surprising to note that in Ext.C2(a) plan, going by the Commissioner's evidence, there is a boundary wall along A Y Y1 B and still the Commissioner would say that the southern boundary of the property owned by the plaintiffs is on further north of that boundary wall which is inconceivable. Learned counsel went on to point out that the Commissioner had no reason to measure the property without the help of a Surveyor and that created problems. Nobody has a case that

Sekhara Pillai had obtained more extent of land than what was allotted to him as per the decree in the partition suit. Now the Commissioner has come out with a case that Sekhara Pillai though was allotted 4.125 cents of land in fact the property delivered as per Ext.A9 is 4.682 cents, a case which nobody had so far. These basic errors have resulted in a wrong decree being passed.

7. Learned counsel appearing for the respondents, on the other hand, pointed out that there is no error committed by the courts below and that the decree based on Ext.C2(a) plan is perfectly justified. It is significant to notice, according to the learned counsel, that the property on the southern side belonged to the plaintiffs and there is no reason as to why the southern boundary of the property obtained by them under Ext.A1 should extend to the line A Y Y1 B. It is contended that the southern boundary between the properties comprised in survey Nos.381 and 382 is JC line shown in Ext.C2(a) plan. It is also pointed out that the appellants had no case that the Commissioner ought to have taken the aid of a Surveyor and should not have taken

measurement himself contrary to the order of remand. Learned counsel went on to point out that there is no case for the appellants that the boundary line shown between the properties in survey Nos.381 and 382 is wrong.

8. One should remember that the suit was earlier dismissed finding that the plaintiffs have excess property than what they had obtained under Ext.A1. That was carried in appeal by the plaintiffs and the lower appellate court found that the report and sketch are not acceptable and remanded the matter with a direction to prepare a fresh plan with the aid of a Surveyor. The lower court appointed a Commissioner who without the aid of a Surveyor prepared a plan. Before the lower appellate court, this point was highlighted by the appellants. Till the present suit nobody had a case that Sekhara Pillai had obtained more extent of land as delivered to him as per Ext.A9 document. The Commissioner in the present case surprisingly came to the conclusion that even though the property in Ext.A9 alone has been delivered, on measurement there is 4.682 cents of land. Even assuming it to be true, then the recital in Ext.A1 would have

been that out of the 4.682 cents of land obtained by Sekhara Pillai, an extent of 4.125 cents is assigned to the plaintiffs. That is not the recital in Ext.A1. Ext.A1 does not show that any portion of the property obtained by Sekhara Pillai under Ext.A9 has been retained by him. He assigned the whole extent of property and mentions the extent as only 4.125 cents. A comparison of Exts.A2, C2(a) and also Ext.A1 will show that the measurement shown in Exts.A1 and A2 do not tally with Ext.C2(a). Further, as rightly pointed out by the appellants, even it is admitted by the Commissioner that there is a compound wall along A Y Y1 B line.

9. Of course, learned counsel for the respondents contended that merely because a compound wall is there that does not mean that that should be the boundary of the property obtained as per Ext.A1 on the southern side. In the practical sense and wisdom, normally that would be the boundary. It is not possible to understand how the lower court held that even though the documents show that Sekhara Pillai had obtained only 4.125 cents, he had obtained more than that extent of property.

What is significant is that even assuming it to be so, there is nothing in Ext.A1 that out of the larger share of property obtained by Sekhara Pillai, he had retained any portion and the balance was given to the plaintiffs. The Commissioner prepared Ext.C2(a) plan without being in a position to understand how the plaintiffs described plaint B schedule property as a triangular piece of land whereas he found that it is a rectangular piece of land. There was no attempt from the side of the plaintiffs to amend the plaint. It is therefore difficult to accept Ext.C2 (a) plan for taking a decision in this case. The Commissioner ought to have taken the help of a Surveyor for preparing the survey plan. It is for the plaintiffs to prove their title and seek a decree on that basis as is so held in the decision in **Union of India and others vs. Vasavi Co-op. Housing Society Ltd. and others** (2014 KHC 4011).

For the above reasons, this appeal is allowed and the impugned judgment and decree are set aside and the matter is remanded to the trial court for fresh consideration in terms of the remand order passed on the first occasion by the lower appellate

court. The parties shall appear before the trial court on 22.07.2015. There will be no order as to costs.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A. to Judge.