

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 JYASHTA, 1937

RSA.No. 533 of 2013

A.S.NO.258/2010 OF II ADDITIONAL SUB COURT, ERNAKULAM

**E.A.NO.577/2009 IN E.P.NO.747/1988 IN O.S.NO.469/1986 OF PRINCIPAL MUNSIF
COURT, ERNAKULAM**

**APPELLANT(S)/3RD & 4TH APPELLANT/3RD & 4TH JUDGMENT DEBTOR/
3RD & 4TH DEFENDANT :**

- 1. SABU, AGED 42 YEARS,
S/O. BABY, MULLACKAL HOUSE, THIRUVAMKULAM DESOM,
THIRUVAMKULAM VILLAGE, KANAYANNUR TALUK,
ERNAKULAM DISTRICT.**
- 2. NISHA, AGED 37 YEARS,
D/O.BABY, MELOTH HOUSE, CHALACKALPARA,
KANJIRAMATTOM.P.O., KANJIRAMATTOM, ERNAKULAM-682 315.**

**BY ADVS.SRI.K.J.KURIACHAN
SRI.SUNIL JACOB**

RESPONDENT(S)/RESPONDENT/DECREE HOLDER/PLAINTIFF :

**M.V.DANIEL, AGED ABOUT 70 YEARS,
S/O. VARGHESE, RETIRED GOVT. EMPLOYEE,
THIRUVAMKULA DESOM, THIRUVAMKULAM VILLAGE,
KANAYANNUR TALUK, ERNAKULAM DISTRICT,
NOW RESIDING AT MULLACKAL HOUSE
VIKASVANI, THENGODU.P.O- 682 021.**

**BY ADVS. SRI.P.N.RAMAKRISHNAN NAIR
SRI.P.VISWANATHAN**

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

Msd.

A.V.RAMAKRISHNA PILLAI, J

R.S.A.No.533 of 2013

Dated this the 25th day of May 2015

JUDGMENT

The third defendant in O.S.No.469/1986 on the file of the Munsiff's Court, Ernakulam, is the appellant. The respondent herein filed the aforesaid suit for recovery of possession of the plaint schedule property along with other reliefs. Defendants 1 and 2 in the original suit are the father and mother of the appellant. Respondent is the plaintiff in the original suit, who is the younger brother of the father of the appellant.

2. The original suit was decreed ex-parte. The respondent moved the Execution Court with E.P.No.747/1988 for recovery. The appellant herein, during the course of the execution proceedings, filed E.A.No.577/2009 stating that he was a minor at the time of the institution of the suit and hence, the decree is a nullity and cannot be executed. The contention was upheld by the Execution Court, which was challenged by the respondent before this Court in CRP.No.204/1992. In

that case, this Court upheld the contention of the appellant that the decree is a nullity. Though it was challenged before the Apex Court in Civil Appeal Nos.8072-8073/2001 (arising out of S.L.P. Nos.12754 and 12755 of 1997), the apex court found that the decree passed by the trial court against the appellant was void and it could not have been executed against the appellant and thus endorsed the view taken by this Court in CRP.No.204/1992.

3. During the pendency of the Civil Appeal before the Apex Court, the first defendant/first judgment debtor expired. After the judgment of the Supreme Court, the execution petition was revived and delivery was ordered against the appellant in his capacity as the legal representative of the first judgment debtor. The appellant challenged the same in CRP No.1312/2006. Initially, the same was dismissed on 10.3.2006. The appellant filed R.P.No.526/2006 against the dismissal. The same was disposed of, permitting the appellant to move an application to establish his independent right under Rule

97 of Order XXI CPC. It was also observed that, as what was put into execution was the decree in O.S.No.469/1986, which was binding on the 1st and 2nd defendants and also against their legal representatives, it does not suffer from any infirmity at that stage. Thereafter, the appellant filed E.A.No.577/2009 before the Execution Court which was dismissed ordering delivery of properties. The appellant took the matter before the lower appellate court as A.S.No.258/2010. The II Additional Sub Court, Ernakulam which heard the appeal, dismissed the same confirming the order of E.A.No.577/2009. The said judgment is under challenge in this second appeal.

4. I have heard Mr.K.J.Kuriachan, the learned counsel for the appellant and Mr.P.Viswanathan, the learned counsel for the respondent.

5. The contention raised by the appellant that he was a minor at the time of filing the suit and he was not properly defended was upheld by the Apex Court. This court, as per orders in R.P.No.526/2006 in CRP.No.1213/2006 permitted the appellant to substantiate

his independent right through a petition filed under Rule 97 Order XXI CPC. It was on that basis he has approached the execution court with E.A.No.577/2009. It was argued by the learned counsel for the appellant that there is a categorical admission to the effect that the property was in possession of the appellant since 15.3.1986 and therefore the decree is a nullity as against the appellant. It was argued that by ordering delivery of possession of property, the courts below is nullifying the earlier findings of this Court which was upheld by the Apex Court.

6. It is true that the appellant was minor when the original suit was disposed of and therefore, the decree could not be executed against the appellant in his personal capacity. However, there was no bar in executing the said decree against the appellant as legal representatives of the deceased appellants 1 and 2. The point has already been considered and set aside by this Court in order dated 20.8.2009 in RP.No.526/2006 in CRP.No.1312/2004. It was upheld as under:

“By virtue of various orders passed right from the learned Munsiff to the Apex Court, it has been

held that the decree passed against the 3rd defendant as in his individual capacity is void and it is not in existence. So, the question of executing the decree against the 3rd defendant in his individual capacity does not arise. It has to be treated as if he is not a party to the proceeding and the decree is not binding on him. Then comes the interesting question. He is the legal representative of the deceased father. Necessarily there is a valid enforceable decree against the father. It is to be executed by a competent court of law. When such an execution is filed as the legal representative of the deceased father as far as the decree is binding on the father and the mother, execution is possible with respect to them. Since the courts have declared that the decree as against D3 is void, it has to be stated that there is no decree at all against D3 and so the question of executing a personal decree against D3 does not arise. So, it has to be understood that what is put in for execution is the decree rendered by the court against D1 and D2, and the legal representatives of the deceased father are bound to obey the decree. If he has got

an independent right over the property since there is no valid decree passed against him, he cannot be thrown out provided he comes forward before court, moves an application to establish his right which is now permissible under Order XXI Rule 97 and it can be decided as a title suit as per Order XXI Rule 101 C.P.C. and that will finally adjudicate his right. So now what is put into execution is the decree in O.S.No.469 of 1986 which is binding against D1 and D2 and against legal representatives of D1 and D2 also. So that order at this stage does not suffer from any infirmity and therefore there is nothing to be reviewed. But, I make it clear that under Order XXI Rule 97 CPC when an application is filed by Sabu claiming independent right the court is bound to consider it in accordance with law and pass appropriate orders.”

7. The same order has not been challenged by anybody and it was become final. Now, what the appellant claims is that he acquired prescriptive title to the property on account of adverse possession and

limitation. It is settled law that in order to establish a claim of title by prescription, the adverse possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding 12 years. A long and continuous possession by itself would not constitute adverse possession. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period of prescription will not commence. It is crucial to note that the appellant has not entered the witness box to establish his case. He has not produced any documents to substantiate his claim of adverse possession. The respondent had never admitted that the appellant was in hostile of possession of the decree schedule property. The appellant is claiming the date of decree in the original suit as the commencement of date of adverse possession. The appellant was bound to independently plead and prove his case of adverse possession and limitation, as possession will start only on the basis of an event. The

burden is on the person who claims possession to prove the exact date on which he started to possess the property in question as well as the event by which he was put in possession.

8. As there is no reliable evidence to substantiate the case of the appellant, the courts below were perfectly right in dismissing the claim petition.

9. No question of the law has been wrongly decided by the courts below calling for interference by this Court in the second appeal.

In the result, the appeal fails and accordingly it is dismissed.

Sd/-
A.V.RAMAKRISHNA PILLAI
JUDGE

VS

/TRUE COPY/

PA TO JUDGE