

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 9TH DAY OF JUNE 2015/19TH JYAISHTA, 1937

RSA.No. 19 of 2015 ()

**AGAINST THE JUDGMENT AND DECREE IN AS 22/2010 of SUB COURT,
KOTTARAKKARA DATED 16-09-2014.**

**AGAINST THE JUDGMENT IN OS 627/2008 of MUNSIFF COURT, KOTTARAKKARA
DATED 30-11-2009.**

APPELLANT/APPELLANT/DEFENDANT :

**YESUDASAN, AGED 58 YEARS,
S/O.PETER, SAROVARA , ANTHAMON MURI,
KALAYAPURAM VILLAGE, KOTTARAKKARA TALUK,
(PETER VILLAGE, VELLIMON PO.,
PERINAD VILLAGE IS SHOWN IN OS NO. 627/2008).**

**BY ADVS.SRI.MANOJ R.NAIR
SMT.SINDHU MANOJ.**

RESPONDENTS/RESPONDENTS/PLAINTIFF :

- 1. D.CHACKO, PRESIDENT,
SOCIETY FOR CULTURE AND DEVELOPMENT (SCD),
SCD CENTRE, KADAMPANADU THEKKU , PATHANAMTHITTA.**
- 2. D.CHACKO, AGED 49 YEARS,
SOCIETY FOR CULTURE AND DEVELOPMENT (SCD),
SCD CENTRE, KADAMPANADU THEKKU , PATHANAMTHITTA.**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
09-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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A.HARIPRASAD, J.

R.S.A No.19 of 2015

Dated this the 9th day of June, 2015.

J U D G M E N T

Defendant in a suit for injunction simplicitor aggrieved by the decree and judgment of the trial court approached the lower appellate court. But he could not get a favourable verdict. The plaintiff's contention is that he is in possession of the property and the defendant tried to trespass upon the property. Incidentally, there were some disputes in respect of management of a society of which we are not very much concerned. The trial court after taking evidence found that the plaintiff/respondent failed to establish possession over the property. Nonetheless, a permanent prohibitory injunction decree was granted against the appellant from taking yield from plaint schedule property, committing waste and alienating the property. That decree and judgment was challenged before the lower appellate court. The lower appellate court after appreciating the evidence dismissed the appeal. Grievance of the appellant is that while doing so, the

lower appellate court made an observation that the plaintiff can file appropriate suit for recovery of possession of the property from the defendant. Subsequent to this judgment, the defendant contended, the plaintiff filed O.S No.235/2011 before the Munsiff's Court, Kottarakkara for recovery of possession of the plaint schedule property on the strength of the title.

2. Heard the learned counsel for the appellant. I have carefully perused the impugned judgments. Learned counsel for the appellant submitted that the plaintiff should have filed an appeal against the decree or they should have at least filed a cross objection in the appeal filed by the defendant challenging the findings of the trial court that they were not in possession of the property which resulted in the dismissal of a suit for permanent prohibitory injunction. Learned counsel further submitted that having failed to do so, the plaintiff could not have filed a second suit for recovery of possession on the strength of

the title as it will be hit by Order 2 Rule 2 C.P.C and Explanation IV to Section 11 C.P.C. I am afraid, I cannot agree with this argument for the following reasons :

The plaintiff, in the first round of litigation, approached the trial court with a suit for prohibitory injunction simplicitor alleging that he is in possession of the property by virtue of certain documents. The court below on appreciation of evidence negated the contention of the plaintiff and found that he failed to establish possession over the property for claiming a prohibitory injunction against the defendant from entering the property. However, the court below passed a decree injunctiong the defendant from committing waste in the property, alienating etc. Feeling aggrieved, the defendant has taken up the matter in appeal where the plaintiff did not even file a cross objection. On a reading of Order 41 Rule 22 C.P.C, it is clear that any respondent, though he may not have appealed from any part of

the decree, may not only support the decree but also state that the finding against him in the court below in respect of any issue ought to have been in his favour. He may also take any cross objection to the decree which he could have taken by way of appeal. In this case, the plaintiff did not choose to file either cross objection or a regular appeal. By virtue of the above provision, he is not precluded from supporting that part of the decree which is in his favour and also opposing the other part of the decree which went against him. Merely for this reason, it cannot be stated that the plaintiff is precluded from filing a regular suit for recovery of possession based on title paramount, if there is no legal impediment in doing so.

3. The contention regarding bar under Order 2 Rule 2 C.P.C raised by the learned counsel for the appellant also cannot be sustained for the reason that the essential ingredients to be looked into is the cause of action for the first suit and the second

suit. The pleadings as well as the reliefs are also relevant for deciding whether the second suit is barred by Order 2 Rule 2 C.P.C. This proposition is settled by the pronouncements by a Constitution Bench in ***Gurbux Singh v. Bhooralal* (AIR 1964 SC 1810)**, which is reiterated in ***Rathnavathi and Another v. Kavitha Ganashamdas* ((2015)5 SCC 223)**. Therefore, I do not find any bar created by Order 2 Rule 2 C.P.C in this case where the plaintiff could be said to have been precluded from filing a suit for recovery of possession on the strength of the title based on a cause of action different from that in the first suit.

4. Learned counsel for the appellant contended that the lower appellate court should not have made any observation regarding the entitlement of the plaintiff to file a suit on the strength of the title to seek recovery of possession. I am of the view that even without such an observation, if law permits the plaintiff can approach the appropriate court with a suit for

recovery of possession, provided he is able to establish his title and if the claim is not barred by the law of limitation. I make it clear that the observation by the lower appellate court in that regard shall in no way cause prejudice to the appellant in defending the suit on the strength of title.

On a perusal of the entire records, I find no substantial question of law arising in this matter. Hence, the regular second appeal is dismissed.

All pending interlocutory applications will stand dismissed.

Sd/-
A.HARIPRASAD,
JUDGE.

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P.A to Judge