

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 30TH DAY OF JUNE 2015/9TH ASHADHA, 1937

RSA.No. 353 of 2015 ()

AGAINST THE JUDGMENT AND DECREE IN AS NO. 128/2009 of I ADDITIONAL DISTRICT
COURT, PALAKKAD DATED 17-10-2014

AGAINST THE JUDGMENT AND DECREE IN OS NO. 152/2006 of ADDITIONAL SUB COURT,
PALAKKAD DATED 06-01-2008

APPELLANT(S)/APPELLANTS/DEFENDANTS 1 TO 3 & 8:

1. CHENTHAMARA, W/O.LATE SAHADEVAN, AGED 48 YEARS
KENATHPARAMBU, PALAKKAD.
2. SAJU, AGED 26 YEARS,S/O.LATE SAHADEVAN
KENATHPARAMBU, PALAKKAD.
3. JINCY, AGED 24 YEARS, D/O.LATE SAHADEVAN,
KENATHPARAMBU
PALAKKAD (LEGAL HEIRS OF LATE RAMANKUTTY).
4. MANIKANDAN, AGED 48 YEARS,
S/O.RAMANKUTTY, ELANTHYANKODE, KUNNATHURMEDU
PALAKKAD.

BY ADVS.SRI.N.L.KRISHNAMOORTHY
SRI.K.LAKSHMINARAYANAN
SMT.SATHYA SHREEPRIYA

RESPONDENT(S)/RESPONDENTS/PLAINTIFF & DEFENDANTS 4 TO 7 & 9 TO 12::

1. RAMAKRISHNAN, S/O.MURUKANDI,
AGED 76 YEARS, KALIYANGADOTH VEEDU, ELANTHYANKODE
KANNANNUR AMSOM, PALAKKAD-678 702.
2. SOUBHAGYAVATHY
AGED 51 YEARS, W/O.SREENIVASAN, PUTHAN VEEDU
PERINGGUNNAM POST, CHITHALI, ALATHUR TALUK-678 702.
3. SULOCHANA
AGED 49 YEARS, W/O.SUBRAMANIAN, MULLARITHODI
KARIAGODE POST, MATHUR-686 610.
4. SUSEELA
AGED 47 YEARS, W/O.CHANDRAN, AMBADU
PALLANCHATHANUR, PALAKKAD-678 013.

5. SUDEVAN
AGED 56 YEARS, S/O.RAMANKUTTY, ELANTHIANKODE
KUNNATHURMEDU, PALAKKAD-678 013.
6. KRISHNANKUTTY
AGED 44 YEARS, S/O.RAMANKUTTY, ELANTHIYANKODE
KUNNATHURMEDU, PALAKKAD. 678 072.
7. UDAYAPRAKASH
AGED 44 YEARS, S/O.LATE RAMANKUTTY, ELANTHIYANKODE
KUNNATHURMEDU, PALAKKAD-678 072.
8. MURUKESAN
AGE NOT KNOWN, FATHERS NAME NOT KNOWN, LAUNDRY WORK
KENATHUPARAMBU, PALAKKAD-678 072.
9. MANI
AGE NOT KNOWN, FATHERS NAME NOT KNOWN, AUTO DRIVER
KENATHUPARAMBU, PALAKKAD-678072.

R1 BY ADV. SRI.P.B.KRISHNAN(CAVEATOR ADVOCATE)

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
30-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A.HARIPRASAD, J.

R.S.A. No.353 of 2015

Dated this the 30th day of June, 2015

JUDGMENT

Appeal against the judgment and decree in A.S.No.128 of 2009 before the court of learned District Judge, Palakkad. The suit is one for recovery of possession of plaint schedule property on the strength of the plaintiff's title. Defendants 1 to 3 and 8 in the above suit are the appellants in this appeal and the plaintiff and other defendants are the respondents.

2. Heard the learned counsel for the parties.

3. Short facts are thus: Plaintiff got title and possession over the plaint schedule property by virtue of Ext.A3 partition deed of the year 1961. Item No.5 in the C schedule to Ext.A3 is the plaint schedule property. Plaintiff's brother Ramankutty is the father of defendants 4 to 10. He had no house for residing at the time of the partition. The plaintiff, therefore, in the year 1964 permitted his brother Ramankutty and family to reside in the house. Plaintiff's brother died about four years back. The defendants are the legal heirs of deceased Ramankutty. Defendants 11 and 12 are impleaded in the suit as they claimed possession over plaint schedule property. According to the plaintiff, the defendants have no manner of right

over the plaint schedule property. In spite of demand, they failed to vacate the property and therefore, the suit was filed for recovery of possession.

4. Defendants 1 to 3 and 8 filed a written statement contending that they are not residing in the house in the property on account of any permission granted by the plaintiff. Even prior to Ext.A3 partition deed, deceased Ramankutty and family started residence in the house situated in the property. Although the plaint schedule property was set apart to the share of the plaintiff as per Ext.A3 partition deed, deceased Ramankutty was in actual possession over the plaint schedule property. He had been in possession and enjoyment of the property for more than 41 years. Deceased Ramankutty and after his death, the defendants are paying basic tax in respect of the property. The rights of the plaintiff, if any, had been lost by adverse possession and limitation. Hence the suit is incompetent.

5. Trial court, after considering both the oral and documentary evidence and after hearing the parties, decreed the suit directing the appellants/contesting defendants to surrender the property to the plaintiff. Feeling aggrieved, the matter was taken up in first appeal before the court of learned District Judge. Lower appellate court after re-appreciating the evidence, dismissed the appeal by confirming the decree of the trial court.

6. Learned counsel for the appellants/contesting defendants

submitted that the decree passed by the court below is legally incorrect. According to him, the court below failed to appreciate the plea of adverse possession and limitation raised by the appellants in the correct legal sense. Per contra, learned counsel for the plaintiff contended that there is no proper plea raised by the contesting defendants for claiming a right of adverse possession and limitation. As per the averments in the written statement, defendants 1 to 3 and 8 denied the contention that they came into possession of the property on account of permission granted by the plaintiff. The case pleaded in the written statement is that even before Ext.A3 partition deed, the defendants' predecessor-in-title was in possession of the property. It is to be noted that before 1961, the property was a co-ownership property and that is why Ext.A3 was executed. It is the definite case of the plaintiff that even after Ext.A3, plaintiff permitted his brother and family to continue residence in the house situated in the property. Although the defendants have a case that they are in possession of the property for more than 41 years, there is no case pleaded as to when they re-entered the property with a hostile animus. It is well settled that a person possessing the property on account of any derivative right or permission from the owner cannot claim adverse possession unless he pleads and proves that he changed the character of possession and re-entered the property with a hostile animus. Nowhere in the written

statement such a plea is seen raised. Therefore, no quantum of evidence can salvage the case of the appellants/contesting defendants that they have perfected title by adverse possession and limitation.

7. Learned counsel for the appellants relied on **Devaki Pillai v. Gouri Amma (2003 (1) KLT 421)**. The abstract proposition of law stated therein is unchallengeable. If the person in possession of the property was holding it under a right which is hostile to the real owner and if the real owner fails to take action within the period prescribed in Article 65 of the Limitation Act, certainly his right will be barred by adverse possession. But, in this case, in the absence of any foundational facts pleaded, I find it difficult to apply this principle in this case. Therefore, I am of the view that the decree passed by the trial court, which is confirmed by the lower appellate court, is legally correct.

8. Learned counsel for the contesting defendants contended that the court below without considering the stipulations in Ext.A3 partition deed directed the defendants to surrender possession to the plaintiff. It is seen that some trees standing in the plaint schedule property had been allotted to the predecessor-in-title of the defendants by virtue of Ext.A3. Learned counsel for the contesting respondent/plaintiff contended that there is no evidence as to whether those trees included in Ext.A3 in the year 1961 are still in existence in the property. Admittedly the contesting defendants are

enjoying the property. Therefore, it is not clear as to whether they have cut and removed the trees from the property. In the absence of any evidence relating to trees involved in Ext.A3, I find no justification for making any observation regarding those matters in this proceedings.

9. Considering the relationship between the parties and also the request made by the learned counsel for the appellants, I feel it apposite to grant a reasonable time to the appellants to vacate the premises. Therefore, the appellants are permitted to continue occupation in the house for a period of six months from today on the condition that they shall, within a period of two weeks, file an affidavit before the trial court undertaking to vacate the premises after expiry of the said period of six months without raising any further claims. It is also made clear that the permission given is only for residing in the house and they shall not commit any waste in the property nor shall they cause any obstruction to the plaintiff's enjoyment of the property.

In the result, I find no merit in the appeal. It is dismissed.

All pending interlocutory applications will stand dismissed.

A. HARIPRASAD, JUDGE.

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