

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 13TH DAY OF AUGUST 2015/22ND SRAVANA, 1937

RSA.No. 592 of 2015 ()

**AS 53/2011 of SUB COURT, KASARAGOD
AS 54/2011 of SUB COURT, KASARAGOD
OS 211/2010 of MUNSIFF, KASARAGOD**

APPELLANTS/RESPONDENTS 1 TO 5 IN AS 53 AND 54/2011/PLAINTIFFS :

- 1. MOHINI, AGED 65 YEARS, W/O. LATE NARAYANA HEGDE,
NAIKAP, KOIPADY VILLAGE, P.O. EDANAD, KASARGODE TALUK.**
- 2. LOKESH, AGED 39 YEARS, S/O. LATE NARAYANA HEGDE,
NAIKAP, KAIPADY VILLAGE, P.O. EDANAD, KASARGODE TALUK.**
- 3. USHA, AGED 37 YARS, D/O. LATE NARAYANA HEGDE,
NAIKAP,. KOIPADY VIULLAGE, P.O. EDANAD, KASARGODE TALUK.**
- 4. VINAYAKUMARI, AGED 35 YEARS, D/O. LATE NARAYANA HEGDE,
NAIKAP,. KOIPADY VIULLAGE, P.O. EDANAD, KASARGODE TALUK.**
- 5. ASHALATH, AGED 33 YEAR4S, D/O. LATE NARAYANA HEGDE,
NAIKAP,. KOIPADY VIULLAGE, P.O. EDANAD, KASARGODE TALUK.**

**BY ADVS.SRI.V.V.ASOKAN (SR.)
SRI.K.I.MAYANKUTTY MATHER
SRI.P.RAHUL**

RESPONDENTS/APPELLANTS IN AS 53/2011 AND 54/2011/DEFENDANTS :

- 1. B.THIMMAPPA, AGED 65 YEARS, S/O. THYAMPU, ,
LALITHA NIVAS, SHANTHIPALLA, KOIPADY VILLAGE,
P.O. KUMBALA - 671 321.**
- 2. CHANDRASHEKHARA NAIK, AGED 66 YEARS,
S/O. LALITHAMMA, RESIDING AT KALLAPPU HOUSE,
BALTHILA VILLAGE AND POST, BANTWAL TALUK,
DAKSHINA KANNADA DISTRICT, KARNATAKA - 674153.**

R1 BY ADV. SRI.K.G..BALASUBRAMANIAN (CAVEATOR)

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 28/7/2015, THE COURT ON 13-08-2015 DELIVERED THE FOLLOWING:**

bp

C.R.

P.B.SURESH KUMAR, J.

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R.S.A. No.592 OF 2015

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Dated this the 13th day of August, 2015.

J U D G M E N T

The plaintiffs in a suit for declaration of title and injunction is the appellant in this Second Appeal.

2. The facts relevant for decision of the Second Appeal are the following:

Plaint A schedule property belonged to deceased Narayana Hegde, the husband of the first plaintiff and the father of plaintiffs 2 to 5. On the death of Narayana Hegde, plaint A schedule property devolved on the plaintiffs. Plaint B schedule property is situated on the south and east of plaint A schedule property. According to the plaintiffs, Narayana Hegde and the first plaintiff trespassed into plaint B schedule property during December, 1975 and reduced the same to their possession by constructing a common compound wall enclosing both plaint A and B schedule properties. The case of the plaintiffs is that they have perfected title to plaint B schedule

property by adverse possession and limitation. It is alleged by the plaintiffs in the plaint that deceased Narayana Hegde and the first plaintiff had constructed a building also in plaint B schedule property. According to the plaintiffs, the first defendant attempted to demolish the compound wall of the plaint B schedule property on 23.6.2010 with a view to trespass upon the said property and the suit was necessitated on account of the said reason. The relief claimed in the suit was a declaration that the plaintiffs have perfected title to plaint B schedule property by adverse possession and limitation. A decree of permanent prohibitory injunction restraining the defendants from trespassing into plaint B schedule property was also claimed as a consequential relief.

3. The first defendant resisted the suit by filing a written statement. According to the first defendant, plaint B schedule property belonged to one Lakshminarayana Naik; that Lakshminarayana Naik was in possession and enjoyment of the said property as its absolute owner until his death and that on the death of Lakshminarayana Naik, the said property devolved

on his wife Lalithamma and his children. It is also their case that on the death of Lalithamma, her rights also devolved on the children of Lakshminarayana Naik and that they sold the property to the first defendant during 2009 by virtue of Exts.B1 and B2 sale deeds. According to the first defendant, plaintiffs and Narayana Hegde were never in possession of plaint B schedule property. As regards the building claimed to have been constructed by Narayana Hegde and the first plaintiff in plaint B schedule property, it was contended by the first defendant that the said building was constructed by the first plaintiff with the permission of Lalithamma to enable her to earn a livelihood by leasing out the building. As regards the construction of the compound wall, it was contended by the first defendant that the same was constructed by the earliest common owner of plaint A and B schedule properties.

4. The second defendant who is one of the legal representatives of Lalithamma also resisted the suit by filing a separate written statement raising contentions identical to the contentions raised by the first defendant. He also asserted that

by virtue of Exts.B1 and B2 sale deeds, the first defendant became the absolute owner in possession of plaint B schedule property. The second defendant also endorsed the stand of the first defendant that the building in the property was constructed by the first plaintiff with the permission of Lalithamma.

5. The trial court found that the plaintiffs have been in possession of plaint B schedule property for more than twelve years openly, continuously, uninterruptedly and as of right with the hostile animus against the true owners and consequently, decreed the suit declaring that the plaintiffs have perfected title to plaint B schedule property by adverse possession and limitation. A decree of permanent prohibitory injunction restraining the defendants from trespassing into plaint B schedule property or interfering with or disturbing the peaceful possession, user and enjoyment of plaint B schedule property was also granted to the plaintiffs as a consequential relief.

6. The defendants have challenged the decision of

the trial court in two separate appeals. The appellate court, relying on the decision of the Apex Court in **Gurudwara Sahib v. Gram Panchayat Village Sirthala and Another** [(2014) 1 SCC 669], held that a suit for declaration of title by adverse possession and limitation is not maintainable. The appellate court also held that a prohibitory injunction cannot be issued against the first defendant who is the owner of the property. In the light of the said findings, the appellate court allowed the appeals and dismissed the suit. The plaintiffs are aggrieved by the said decision of the appellate court.

7. Heard the learned Senior Counsel for the appellants and the learned counsel for the first respondent.

8. The learned Senior Counsel for the appellants contended that in view of the provision contained in Section 34 of the Specific Relief Act, it cannot be said that a suit for declaration of title by adverse possession and limitation is not maintainable. He relied on the decision of the Apex Court in **S.Jeevantham v. The State through Inspector of Police, Tamil Nadu** [AIR 2004 SC 4608] and the decisions in **Badri**

Chaudhuri v. Harbans Jha (AIR 1919 Patna 447) and **Shiro Kumari Debi v. Govind Shaw Tanti** (ILR 1877 Vol.II Calcutta 418) in support of the said contention. According to the learned Senior Counsel, in the light of the provision contained in Section 27 of the Limitation Act, if it is found that the suit for possession based on title is barred, the person in possession of the property becomes its owner. The learned Senior Counsel relied on the decisions of the Privy Council in **Perry v. Clissod and others** (1907 AC 73), **Ramanuj v. Ramkrishna** (AIR 1922 PC 184), **Hem Chand v. Pearey Lal** (AIR 1942 PC 64) and the decision of the Bombay High Court in **Fakirappa Melemani v. Ningappa Matti** (AIR 1943 Bombay 265) in support of the said contention. As regards the view taken by the Apex Court in **Gurudwara Sahib v. Gram Panchayat Village Sirthala** (supra) that a suit for declaration of title by adverse possession and limitation is not maintainable, the learned Senior Counsel for the appellants contended that the said decision of the Apex Court is a judgment rendered *per incuriam*. The learned Senior Counsel further contended that

at any rate, in so far as the plaintiffs have made out a case of possession, the appellate court ought to have sustained the decree of prohibitory injunction granted by the trial court.

9. Per contra, the learned counsel for the first respondent contended that in the light of the decision of the Apex Court in **Gurudwara Sahib v. Gram Panchayat Village Sirthala** (supra), the plaintiffs are not entitled to the declaration sought in the suit. According to the learned counsel, since the case of the plaintiffs is that they are trespassers to the property, they are not entitled to the decree of injunction against the first defendant who is the true owner of the property.

10. The questions fall for consideration, in the circumstances, are (i) whether a suit for declaration of title over a property by adverse possession and limitation is maintainable and (ii) whether a trespasser is entitled to a decree of injunction against the true owner of the property.

11. Section 34 of the Specific Relief Act confers power on the court to grant declaratory reliefs. Section 34

provides that any person entitled to any legal character, or to any right as to any property, may Institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled. There is no law which provides that when a person possesses a property adverse to the interest of the real owner, he becomes the owner of the property. On the other hand, when it is said that the person in adverse possession has perfected title, it only means that since the person who had the right to possession has allowed his right to be extinguished, the person who is in adverse possession will be entitled to hold the property as its absolute owner. As such, a suit for declaration of title by adverse possession can only be treated as a suit for declaration of a legal character. The question is as to whether a declaration of such a legal character can be sought. Article 65 of the schedule to the Limitation Act deals with the period of limitation for suits for possession of immovable property or any interest therein based on title. As per the said Article, the period of

limitation prescribed for suits of the said nature is twelve years from the date when the possession of the defendant becomes adverse to the plaintiff. In other words, if the possession of the defendant does not become adverse to the plaintiff, there is no period of limitation for a suit for possession based on title. Article 65 does not confer any right on the defendant over the property. On the other hand, the said Article provides for a defence to persons in possession of immovable property of others. Section 27 of the Limitation Act provides that at the determination of the period prescribed to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. Section 27 would operate only when a plea of adverse possession is established by the defendant in an action for possession based on title. In other words, the extinguishment of the right of the real owner is dependent on the establishment of adverse possession by the person in possession and the question of establishment of adverse possession arises only when a suit is filed for possession based on title. It is therefore, evident that the plea

of adverse possession is only a shield and not a sword at all. If that be so, I have no hesitation to hold that a suit for declaration of title over a property by adverse possession and limitation is not maintainable. I draw support to this view from the decision of the Apex Court in **Gurudwara Sahib v. Gram Panchayat Village Sirthala** (supra). Paragraph 7 of the said judgment reads thus:

“In the Second Appeal, the relief of ownership by adverse possession is again denied holding that such a suit is not maintainable. There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence.”

I also draw support to the said view from the decision of the Delhi High Court in **Prem Nath Wadhawan v. Inder Rai Wadhawan** (1993(3) Punjab Law Reporter (Delhi Section) 70), the decision of the Guwahati High Court in **M/s.Brahmaputra Automobiles Pvt. Ltd. v. State of Assam** [AIR 2014 (NOC) 73] and decisions of the Punjab and Haryana High Court in

Bhim Singh v. Zile Singh [AIR 2006 Punjab and Haryana 195] and **Joginder Kaur v. Gurbachan Kaur** [(2013) 1 CCC 522 (P&H)].

12. True, in **Perry v. Clissod and others** (supra), **Ramanuj v. Ramkrishna** (supra), **Hem Chand v. Pearey Lal** (supra) and **Fakirappa Melemani v. Ningappa Matti** (supra), it was held that since the provisions of the Limitation Act extinguishes the right of the real owner on determination of the period of limitation, in the absence of any provision to indicate as to the person in whom that right is to vest, it is reasonable to hold that the title of the property would vest in the person in possession of the property. The question whether a suit for declaration of title by adverse possession and limitation is maintainable or not did not arise for consideration in the said cases. As far as the decision in **Shiro Kumari Debi v. Govind Shaw Tanti** (supra) is concerned, I am unable to agree with the view taken in the said decision, for, it only reiterates a similar view taken by the said court in an earlier case. **Badri Chaudhuri v. Harbans Jha** (supra) is a case

where the owner of a property after executing a fraudulent transfer continued to be in possession of the property for more than twelve years and it was in the said context, the court held that the plaintiff being in possession for more than twelve years, has acquired title by adverse possession and he is entitled to claim a declaration to that effect. The question whether a trespasser is entitled to get a declaration to that effect did not arise for consideration in the said case also. A decision can be held to be *per incuriam* only when it is rendered contrary to a statutory provision or against the binding decisions of the courts. There is no statutory provision which enables a trespasser to file a suit for declaration of his title to the property by adverse possession and limitation. There is also no decision by any larger bench of the Apex Court which took a contrary stand on the said issue. As such, the contention advanced by the learned Senior Counsel for the appellant that the decision in ***Gurudwara Sahib v. Gram Panchayat Village Sirthala*** (supra) is a decision rendered *per incuriam* is liable to be rejected. The contention raised by the learned

Senior Counsel for the appellants based on the decision of the Apex Court in ***S.Jeevantham v. The State through Inspector of Police, Tamil Nadu*** (supra) is also liable to be rejected, for, the issue whether a suit for declaration of title over a property by adverse possession and limitation is maintainable or not has not been considered in the said case.

13. As regards the contention of the learned Senior Counsel for appellants that at any rate, the plaintiffs were entitled to a decree for injunction, I must point out at once that there is no pleading in the plaint as regards the right of the plaintiffs to obtain a decree of injunction against the defendants. As noticed above, a decree of injunction was sought in the suit as a consequential relief to the declaratory relief sought in the suit to the effect that the plaintiffs have perfected title to the property by adverse possession. Further, the specific case of the plaintiffs is that they are trespassers. It is now settled that no injunction can be granted against the true owner at the instance of a trespasser. (See ***Premji Ratansey Shah v. Union of India*** [(1994)5 SCC 547], ***Mahadeo***

Savlaram Shelke v. Pune Municipal Corpn. [(1995)3 SCC 33], **Tamil Nadu Housing Board v. A.Viswam** (AIR 1996 SC 3377) and **Sopan Sukhdeo Sable v. Asst. Charity Commr.** [(2004) 3 SCC 137). Paragraphs 25 and 26 of the decision of the Apex Court in **Sopan Sukhdeo Sable v. Asst. Charity Commr.** (supra) read thus:

“25. Now the other aspect of the matter needs to be noted. Assuming a trespasser ousted can seek restoration of possession under Section 6 of the Specific Relief Act, 1963, can the trespasser seek injunction against the true owner? This question does not entirely depend upon Section 6 of the Specific Relief Act, but mainly depends upon certain general principles applicable to the law of injunctions and as to the scope of the exercise of discretion while granting injunction. In *Mahadeo Savlaram Shelke v. Pune Municipal Corpn.* it was held, after referring to Woodroffe: *Law Relating to Injunctions*; Goyle, L.C.: *Law of Injunctions*; Bean, David: *Injunctions*; Joyce: *Injunctions* and other leading articles on the subject that the appellant who was trespasser in possession could not seek injunction against the true owner. In that context this Court quoted *Shiv Kumar Chadha v. Municipal Corpn. of Delhi* wherein it was observed that injunction is discretionary and that: (SCC p.175, para 31)

“[J]udicial proceedings cannot be used to protect or to

perpetuate a wrong committed by a person who approaches the court."

26. Reference was also made to *Dalpat Kumar v. Prahlad Singh* in regard to the meaning of the words "prima facie case" and "balance of convenience" and observed in *Mahadeo* case that: (SCC p.39, para 9)

"9. It is settled law that no injunction could be granted against the true owner at the instance of persons in unlawful possession."

In the light of the aforesaid decisions of the Apex Court, I do not think that the plaintiffs in this case are entitled to a decree of injunction against the first defendant who is the real owner of the property.

In the result, the Second Appeal fails and the same is, accordingly, dismissed.

Sd/-
P.B.SURESH KUMAR,
(JUDGE)

kvs/-

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PA TO JUDGE.