

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA, 1937

RSA.No. 626 of 2015 ()

**(AGAINST THE JUDGMENT AND DECREE IN AS.NO. 12/2013 OF SUB COURT,
NEYYATTINKARA DATED 29-11-2014)**

**(AGAINST THE JUDGMENT IN OS.NO. 1089/2010 OF ADDL.MUNSIFF COURT-I,
NEYYATTINKARA DATED 30-11-2012)**

APPELLANT(S)/OBJECTIONERS/DEFENDANTS:

- 1. KUMARAN, AGED 44 YEARS, S/O.BALAN,
RESIDING AT POTTAYYIL LEKSHAM VEEDU COLONY,
KOTTUKAL VILLAGE.**
- 2. BABY, AGED 40 YEARS, D/O.PADMANABHAN,
RESIDING AT POTTAYYIL LEKSHAM VEEDU COLONY,
KOTTUKAL VILLAGE.**

**BY ADVS.SRI.K.SHAJ
SRI.SAJJU.S**

RESPONDENT/APPELLANT/PLAINTIFF:

**CHELLAMMA, AGED 72 YEARS, D/O.KUNJI,
POTTAYYIL LEKSHAM VEEDU COLONY,
PAYATTUVILLA P.O., KOTTUKAL VILLAGE.PIN-695 009**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 04-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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P.B.SURESH KUMAR, J.

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R.S.A.No.626 of 2015.

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Dated this the 4th day of November, 2015.

J U D G M E N T

The defendants in a suit for recovery of possession based on title are the appellants in this second appeal.

2. The case of the plaintiff is that she has acquired title to the suit property by virtue of Ext.A1 patta and that the first defendant who is none other than the son of her sister has trespassed into the property on 10.6.2009. The first defendant contested the suit contending *inter alia* that the plaintiff has no title to the suit property and that the patta obtained by the plaintiff in respect of the suit property is one obtained on his behalf also. There was an earlier suit between the same parties as O.S.No.334 of 2008. The earlier suit was also filed by the plaintiff. The said suit was filed seeking a decree of permanent prohibitory injunction restraining the first defendant from

trespassing into the suit property. In the earlier suit, the court found that the first defendant is also in possession of the suit property and consequently declined to grant the injunction sought by the plaintiff. However, the plaintiff was given a decree in the said suit restraining the first defendant from interfering with the possession of the plaintiff. Thereupon, the plaintiff filed an execution petition alleging that the first defendant trespassed into the suit property on 10.6.2009. The execution court in the said proceedings found that the allegations levelled against the judgment debtor by the decree holder is incorrect and dismissed the execution petition. When the present suit came up for hearing, the trial court took the view that since the plaintiff has filed an application to execute the decree in O.S.No.334 of 2008 alleging that the first defendant has trespassed into the property on 10.6.2009 and since the said execution petition was dismissed holding that the said allegation of the plaintiff is incorrect, the present suit on the very same cause of action is barred by *res judicata*. Consequently, the suit was dismissed. The matter was taken up in appeal by the plaintiff. The appellate court reversed

the decision of the trial court and decreed the suit. The defendants, who are aggrieved by the decision of the appellate court, have thus come up in this second appeal.

3. Heard the learned counsel for the appellants.

4. The learned counsel for the appellants contended that the plaintiff has not made out a cause of action at all for the suit as found by the trial court and therefore the appellate court was not justified in reversing the decision of the trial court.

5. It is beyond dispute that the first defendant could not establish that the plaintiff do not have title to the suit property. In other words, it has to be reckoned that the plaintiff has title to the suit property. If the plaintiff has title to the suit property, she is entitled to institute a suit for recovery of possession based on title at any time. Merely for the reason that the plaintiff had filed an execution petition earlier to execute the decree for injunction obtained by her in an earlier suit alleging that the first defendant has trespassed into the suit property on a particular day, and merely for the reason that the said case was found against, it cannot be said that the plaintiff has no cause of

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action at all. So long as the first defendant remains in possession of the property over which the plaintiff has title, the plaintiff has a cause of action against him and therefore, the view taken by the appellate court that the plaintiff has made out a cause of action against the first defendant to seek a decree for recovery of possession is perfectly in order. There is, therefore, no merits in the second appeal and the same is accordingly dismissed. All the interlocutory applications in the appeal are closed.

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

Kvs/-

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PA TO JUDGE.