

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE S.S.SATHEESACHANDRAN

MONDAY, THE 28TH DAY OF JANUARY 2013/8TH MAGHA 1934

SA.No. 90 of 2003 (A)

**AGAINST THE ORDER/JUDGMENT IN AS.NO.48/1997 of ADDL.SUB COURT,
THALASSERY DATED 24-09-1999**

....
**AGAINST THE ORDER/JUDGMENT IN OS.NO.79/1992 of MUNSIF COURT,
KUTHUPARAMBA DATED 27-01-1997**
.....

APPELLANT(S)/APPELLANTS/DEFENDANTS:

- 1. KAITHERI PARVATHI AMMA,
W/O.KRISHNAN NAMBIAR,AGED 63 YEARS,NO OCCUPATION,
MUZHAKUNNU AMSOM,PALA DESOM,THALASSERY TALUK.**
- 2. KAITHERI NARAYANAN NAMBIAR,
S/O. KRISHNAN NAMBIAR,37 YEARS,POSTMAN, DO. DO.**

**BY ADVS.SRI.M.CHATHUKUTTY NAMBIAR
SMT.T.RETHI
SRI.K.B.DAYAL
SRI.SHEJI P.ABRAHAM**

RESPONDENT(S)/RESPONDENT/PLAINTIFF:

**NELLIKUNNEL VARKEY, S/O. THOMAS,
53 YEARS,BUSINESS,MUZHAKKUNNU AMSOM,
PALA DESOM,THALASSERY TALUK.**

BY ADV. SRI. K.V.PAVITHRAN

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 28-01-2013, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:**

J U D G M E N T

**No representation for appellant today also. Second Appeal
dismissed.**

28/01/2013

SD/- S.S.SATHEESACHANDRAN,JUDGE

/True Copy/

P.A.to Judge

Kss

A.HARIPRASAD, J.

R.S.A No.90 of 2003

Dated this the 6th day of January, 2015.

J U D G M E N T

Appellants are the defendants in a suit for injunction simplicitor filed by the respondent/plaintiff.

2. The appeal was admitted on the following questions of law :

i) Whether both the lower courts are right in holding that the plaintiff is entitled to an extent of 10 cents of property when he claimed only 8 cents in the plaint ?

ii) Was it proper for the courts below to decree the suit in the absence of proving any cause of action for the suit against the appellants ?

3. Heard the learned counsel for the appellants and the learned counsel for the respondent.

4. Shorn of unnecessary details, the facts are as follows :

Properties belonging to the appellants and respondent were belonging to Kunhoondi Amma. Ext.C2 is the plan submitted by the Advocate Commissioner after inspecting on giving notice to both sides. Plot B in Ext.C2 plan belongs to the appellants. Plot A and a shop building thereon are the properties belonging to the plaintiff/respondent. Plot A1, lying on the southern side of plot A and northern side of plot B, is the disputed property. Ext.A1 is the gift deed on which the plaintiff claims right and possession over the plaintiff A schedule property. Plaintiff B schedule property is described as Plot A1 in Ext.C2 plan and Plots A and A1 in Ext.C10 plan. According to the averments in the plaint, the plaintiff/respondent obtained plaintiff A schedule property as per Ext.A1 gift deed from his father. Ext.A1 would show that the property was outstanding in tenancy right in

favour of plaintiff's father from the above mentioned Kunhoondi Amma. As per the averments in the plaint, there is a well defined boundary on the southern side to separate the property of the defendants/appellants and that of the plaintiff/respondent. Originally in the plaint, the plaintiff claimed possession in respect of 8 cents of property. After submitting Ext.C9 report and Ext.C10 plan, the plaint was amended stating that the plaintiff/respondent has title and possession over 10 cents of property. Plaintiff contended that on 29-01-1992, the appellants attempted to trespass into the plaint schedule property and demolish the ridge separating the properties. Hence the suit for prohibitory injunction was filed.

5. The appellants filed a written statement raising the following contentions :

The plaintiff cannot claim right or possession in respect of any property in excess of 5 cents as covered by Ext.A1

document. The appellants contended that the disputed property is included in Ext.B1 purchase certificate and the plaintiff has no right or possession in plaint B schedule property. Still further, the appellants contended that the disputed property lies in a lower level than the property of plaintiff thereby clearly demarcating the disputed property and indicating that it is in the possession of the appellants.

6. The courts below, after considering the oral and documentary evidence, found that the respondent/plaintiff is in possession of plaint B schedule property and decreed the suit. It is to be noted here that subsequent to the submission of Exts.C9 report and C10 plan, the plaint was amended seeking adjudication of the issue relating to title to the plaint schedule property. Court fees was also paid under Section 27(a) of the Kerala Court Fees and Suits Valuation Act, 1959.

7. Learned counsel for the appellants submitted that the

courts below committed a grave mistake in decreeing the suit especially when the documents produced by the plaintiff do not show that he is in possession of any land beyond 5 cents. The trial court as well as the lower appellate court considered the evidence adduced in the case elaborately. The identity of the property cannot be resolved on the basis of description of extent alone. It is worthwhile to note that both in Exts.B1 and B2, no measurements of the property have been shown. What is shown in Ext.B1 is only the extent of the property. Learned counsel for the respondent contended that the boundaries shown in Ext.A1 gift deed would clearly help the courts to identify the property claimed by the plaintiff, including the disputed property. It is true in the matter of identification of property, the rule is that the feature which is more stable and decisive should be taken as primary point. In this case, the boundaries shown in Ext.A1 in respect of plaint A schedule property would clearly show that

the land on the southern side is the property now claimed by the appellants. In Ext.B1 also, the northern side is that of the respondent's property. There is no dispute regarding the properties on the north, east and west of the plaint B schedule property.

8. The courts below considered the fact that there is a ridge in existence on the southern side of plaint B schedule property separating the disputed property from the property admittedly possessed by the appellants. It is also seen on evidence that there is no separating feature between the disputed properties and the property admittedly in the possession of the respondent. These aspects indicate that the disputed property lies contiguous to the plaintiff's property. The similarity in age of trees standing on respondent's property and the disputed property is also an indication that these two properties are enjoyed as a single holding. Likewise, the improvements in the

property admittedly belonging to the appellants show a different age, indicating that the trees in the disputed property and the property held by the appellants were planted at different times.

9. Exts.C1 and C2 are the initial report and plan submitted by the Advocate Commissioner. Exts.C9 and C10 are the final report and plan submitted by the Advocate Commissioner. Learned counsel for the appellants submitted that the courts below went wrong in appointing another Advocate Commissioner for submitting Exts.C9 and C10, when the Commissioner, who filed Exts.C1 and C2 was practising in the same court. It is settled law that without setting aside the earlier report and plan, another Commissioner cannot be deputed for identification of the property. But in this case, it is an undisputed fact that the Commissioner, after filing Exts.C1 and C2, stopped his practise and the trial court was compelled to issue another Commission for gathering the details required for adjudication

of the case. In such a situation, it cannot be contended that Exts.C9 and C10 should not be looked into. It is also clear from the provisions in Order 26 of the Code that the report and plan submitted by the Commissioner would form part of the records. Therefore, the courts below is justified in relying on Exts.C9 and C10 to find that there is a clear demarcating feature to separate the disputed property from the appellant's property, indicating that the disputed property is part and parcel of the plaint A schedule property.

10. Learned counsel for the appellants contended that the courts below erred in finding that the respondent is having title in respect of property beyond that is claimed in the plaint. In answer to this argument, learned counsel for the respondent submitted that the courts below on the evidence found that there is a ridge to separate the property belonging to the appellants and that of the respondent. The extent shown in the document is

of not much importance, since the property is bounded by clear boundaries. That apart, the defendants have claimed adverse possession in respect of the disputed property indicating that at one point of time, they admitted title of the respondent including the portion now disputed. Merely for the reason that Ext.A1 shows a lesser extent than the property in the possession of the respondent, it cannot be held that the plaintiff is not having title in respect of the property bounded by the boundaries shown in Ext.A1 document. Therefore, I find no illegality in decreeing the suit by the courts below.

11. Another question of law is regarding the cause of action. Learned counsel for the appellants contended that the courts below decreed the suit without considering the fact that there was no cause of action against the appellants. The cause of action is a bundle of rights. The plaintiff asserted that there was a threat on his right and possession posed by the appellants. In

reply to the plaint, they filed a written statement raising a contention that the plaintiff has no right over the disputed portion of the property. That itself is a threat posed to the legal right of the plaintiff. Whether a separate cause of action in respect of interference in the possession of plaintiff is proved or not, the stand taken by the appellants is sufficient to hold that the respondent/plaintiff has a cause of action against them. Therefore, that point is also decided against the appellants.

In the result, the second appeal is dismissed as it is devoid of any merit. There is no order as to costs.

All pending interlocutory applications will stand dismissed.

**Sd/-
A.HARIPRASAD,
JUDGE.**

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P.A to Judge