

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

WEDNESDAY, THE 4TH DAY OF MARCH 2015/13TH PHALGUNA, 1936

SA.No. 857 of 1998 (B)

**AGAINST THE JUDGMENT IN AS. NO. 274/1993 OF I ADDL. DISTRICT COURT,
THRISSUR DATED 01-07-1998.**

**AGAINST THE JUDGMENT IN OS. NO.293/1988 OF MUNSIFF COURT,
WADAKKANCHERRY DATED 26/07/1993.**

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APPELLANTS/APPELLANTS/DEFENDANTS:

***1. P.C. APPUKUTTAN, S/O.CHAKKUNNY,
PANTHAMPULAKKAL, KADANGODE VILLAGE,
TALAPPILLY TALUK. (DIED)**

*** IT IS RECORDED THAT THE 1ST APPELLANT WHO IS THE
FATHER AND POWER OF ATTORNEY HOLDER OF 2ND APPELLANT
DIED AS PER ORDER DATED 04/06/2004 VIDE MEMO DATED 01/11/2003.**

**2. THYAGARAJAN, S/O.APPUKUTTAN,
REPRESENTED BY POWER HOLDER
P.C. APPUKUTTAN, -DO- -DO-.**

**BY SRI.T.KRISHNAN UNNI, SENIOR ADVOCATE.
ADVS. SRI.K.K.MOHAMED RAVUF.**

RESPONDENT/RESPONDENT/PLAINTIFF:

****1. CHERUKUTTY, S/O.VAREED,
THOLATH HOUSE, THIPPALISSERI DESOM,
PERUMPILAVU VILLAGE, TALAPPILLY TALUK. (DIED)**

**** ADDL. R2 TO R6 IMPEADED**

**2. SABITHA, D/O.CHERUKUTTY (DEAD),
THOLATH HOUSE, THIPPILASSERY DESOM,
PERUMPILAVU VILLAGE, TALAPPILLY TALUK,
THRISSUR DISTRICT.**

3. BESSY, D/O.CHERUKUTTY, -DO- -DO-.

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4. GEEVAR, S/O.CHERUKUTTY, -DO-.

5. SILVI, W/O.KOCHURUVY, D/O.CHERUKUTTY, -DO-.

6. SOBHANA, W/O.DAVIS, D/O.CHERUKUTTY, -DO-.

**** ADDL. RESPONDENTS 2 TO 6 IMPEADED AS THE LRS OF
R1 VIDE ORDER IN I.A. NO.138/2007 DATED 18/01/2007.**

**BY ADVS. SRI.N.SUBRAMANIAM,
SRI.M.S.NARAYANAN.**

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 05/11/2014
THE COURT ON 04/03/2015 DELIVERED THE FOLLOWING:**

rs.

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APPENDIX

PETITIONER'S ANNEXURES:-

**ANNEXURE A COPY OF THE PETITION DATED 11/10/1999 FILED BY THE
PETITIONER BEFORE THE POLICE SUB INSPECTOR,
ERUMAPETTY.**

RESPONDENT'S ANNEXURES:-

**ANNEXURE I COPY OF THE STAY ORDER GRANTED BY THE LOWER
APPELLATE COURT (DISTRICT COURT, THRISSUR) IN
I.A. NO.2053/1993 IN A.S. NO.274/1993 DATED 07/09/1993.**

//TRUE COPY//

P.S. TO JUDGE

rs.

A.V.RAMAKRISHNA PILLAI, J.

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S.A No.857 of 1998

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Dated this the 4th day of March, 2015

JUDGMENT

The defendants in the original suit are the appellants.

2. The original suit was instituted by the deceased first respondent for permanent prohibitory injunction which was subsequently amended incorporating the prayer for recovery of possession.

3. The first appellant died during the pendency of this appeal and the second appellant was recorded as his legal representative. Respondents 2 to 6 are the legal heirs of the deceased first respondent.

3. The first respondent alleged that the plaint schedule properties were assigned to him by the Government as per patta in LA(P) 2/85 K.G.D as it remained in his possession ever before the assignment and he was doing cultivation. He made application to the

Rubber Board for subsidy, for rubber plantation in his property. It was also alleged that the appellants are having properties on the western side of the suit properties. The appellants have no right over any portion of the plaint schedule property. Alleging attempts of trespass from the appellants, the suit was instituted.

4. In the written statement, the first appellant contended that the description of the property as well as the boundaries are incorrect. He pleaded ignorance regarding the patta relied on by the respondents. He alleged that his son (the 2nd appellant) purchased 1.43 ¼ acres of land as per Document No.354/1984 from a person who had obtained Patta No.103/70 in respect of the said property in the year 1970. He contended that the survey number of the said property is 1282. He further alleged that the said property is in possession of the first appellant and his son, who is the second appellant.

5. On the basis of the said contention, the second appellant,

who is the son of the first appellant was impleaded as additional second defendant in the suit. He filed written statement adopting the contentions raised by the first appellant.

6. The trial court after framing proper issues for trial permitted both sides to adduce evidence. At the trial, PW1 and Dws.1 to 4 were examined and Exts.A1 to A4 series, B1 to B3, C1 series and C1 series as well as X1 to X3 series were marked. The trial court after considering the evidence granted a decree allowing the respondents to recover possession of an extent of 1 acre 22 cents comprised in Sy. No.1282/3 on the strength of possession and title as identified by the Commissioner in Ext.C2(a) plan. Regarding the remaining plaint schedule item, respondents were granted a decree of permanent prohibitory injunction restraining the appellants from trespassing upon that portion or committing any waste.

7. The appellants took the matter in appeal before the first appellate court which by the impugned judgment confirmed the

decree of the trial court dismissing the appeal. Thus, the appellants have come up before this Court.

8. Arguments have been heard.

9. The learned senior counsel appearing for the appellants would argue that the courts below failed to see that no definite description of the property with boundaries were given in the plaint, as identifiable, so as to get a decree for injunction and recovery of possession. It was argued that the documents relied on by the appellants do not show the boundaries and it do not say which property was assigned in which sub division. It was argued that in the absence of such discussions, it is not discernible as to how the Taluk Surveyor prepared Ext.C2 plan.

10. According to the learned senior counsel for the appellants, the appellants' case is that 1 acre 43 $\frac{1}{4}$ cents comprised in Sy. No.539/24/3 present Sy. No.1282 was assigned to the predecessor-in-interest of the appellant as early as in the year 1970 from whom the

appellant had purchased the same for valid consideration in the year 1984. Therefore, even if the plaintiff got any property by way of assignment in the year 1985, he cannot get the entire property in the light of the assignment in favour of the predecessor-in-interest of the appellant. Therefore, according to the learned senior counsel, the assignment in favour of the respondents 1985 cannot, in anyway, possibly relate to 1 acre 43 $\frac{1}{4}$ cents already assigned to the predecessor-in-interest of the defendant in the year 1970.

11. It was also argued that both the courts below committed grave mistake in decreeing the suit for the reason that the appellant who is the defendant had failed in proving his title over the property purchased by him. According to the learned senior counsel, the said approach of the courts below is against the rules of evidence and, therefore, ended in miscarriage of justice.

12. The learned counsel for the respondents, *per contra*, would argue that the the appellant/defendant had set up a defence plea that

the property in dispute was assigned to the predecessor-in-interest of the appellants. According to the learned counsel for the respondents, the courts below were justified in ascertaining whether the appellant defendant was having title to the said property and on finding that his case is not proved, the courts below were right in granting the decree in favour of the respondents on the basis of preponderance of probability.

13. The bone of contention between the parties is 2.15 acres of land comprised in Sy. No.1282/2 and 3 of Kandangode village. The respondent/plaintiff claimed title to it as per Ext.A1 patta dated 10.5.1985. According to him, even prior to the date of assignment, he was in possession of the said property. The appellants, per contra, contended that the second appellant is the owner in possession of 1.43 $\frac{1}{4}$ cents of land as per Document No.354/1984 which the assignor got as per patta of 1970. He further contended that the second appellant got another 93 cents on the west of 1.43 $\frac{1}{4}$ cents.

14. From the respondents' side, they have produced Ext.A1 patta and Ext.A2 which is the copy of the plan issued by the Special Tahsildar, Land Assignment, Thrissur. Exts.A3 and A3(a) are the documents produced to show that the first respondent had obtained subsidy from the Rubber Board and had planted rubber in a portion of the said property. Exts.A4 series are the tax receipts. However, on the side of the appellants, Ext.B1 assignment deed was executed in favour of the deceased first appellant by one Raman Nair as well as Ext.B2 which is the certified copy of the patta issued to the Raman Nair by the Special Tahsildar, Wadakkancherry as well as certain tax receipts were produced.

15. The learned senior counsel for the appellants gave thrust to the point that the respondents had no title and previous possession over the portion now allowed to be recovered by the courts below. According to the learned senior counsel, the courts below were not correct in ordering recovery of possession of the disputed portion.

The lower appellate court re-appreciated the evidence tendered by both sides. The lower appellate court relying on the admission of DW1 found that it cannot be said that the identity of the property was not proved. Though Exts.C2 and C2(a) were put to severe challenge, the lower appellate court after an elaborate consideration of the evidence found that they are in order. It was further observed by the lower appellate court that the defence witness could not establish that Raman Nair, who is the assignor of the second appellant, got title or possession over any property comprised in Sy. No.1282/2 or 3.

16. The main argument advanced by the learned senior counsel for the appellants was that the weakness of the defendants' case shall not be a ground for granting a decree in favour of the plaintiff. However, it has to be noted that both the parties were making rival claims in respect of a particular piece of land. In the light of the definite assertion by the appellants that the second appellant was having 1.43 $\frac{1}{4}$ cents of land in Sy. No.1282/2 and 3, the court below

was justified in proceeding to enquire whether the said case is correct or not and on such enquiry it was found that none of the documents produced by the appellants show that the appellants ever acquired title to any land in Sy. No.1282/2 or 3. On the other hand, it was found that Ext.C1 file which contains the application of the second appellant to the Rubber Board states that the survey number of the property in his possession is 1383/2 and not 1282/2 or 3. Therefore, it was found by the courts below that it is too idle for the appellants to contend that they have title to any portion of the properties comprised in Sy. No.1282/2 or 3.

17. Now as per the decree granted by the trial court, respondents are allowed to recover 1 acre 22 cents of land in Sy. No.1282/3 on the strength of the title, as shown by the Commissioner in Ext.C2(a) and regarding the remaining portion, the respondents are granted a decree of permanent prohibitory injunction. The lower appellate court while disposing of the appeal clarified that the decree

of injunction is with respect to remaining portion of the schedule property i.e. 0.93 acres referred to in Ext.C2(a). There is threadbare discussion of entire evidence by the lower appellate court and it was on the basis of the evidence, the lower appellate court came to the conclusion that there is no justifiable reason to vacate the decree granted by the trial court.

18. As the evidence has been appreciated in the correct perspective by the lower appellate court and the correct conclusion have been arrived at, this Court finds no reason to interfere with the same in the second appeal.

In the result, this second appeal fails and accordingly, it is dismissed. No order as to costs.

sd/- A.V.RAMAKRISHNA PILLAI
JUDGE

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