

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 6TH DAY OF AUGUST 2015/15TH SRAVANA, 1937

S.A.No. 92 of 1999 (C)

AGAINST THE JUDGMENT IN AS 125/1994 of DISTRICT
COURT, THRISSUR.

AGAINST THE JUDGMENT IN OS 108/1991 of MUNSIF
COURT, WADAKANCHERY.

APPELLANT(S)/RESPONDENTS 1 TO 5/DEFENDANTS 1 TO 5:

1. CHINNAMMA ALIAS CHINNA, AGED 62,
W/O. LATE VELAYUDHAN, KAMMALAN THATTAN,
DESAMANGALAM VILLAGE,
THALAPPILLY TALUK. (DIED; ADDL.6TH APPELLANT
IMPLEADED)
2. T.V. MOHANAN, SON OF LATE VELAYUDHAN,
KAMMALAN THATTAN, AGED 47,
DESAMANGALAM VILLAGE,
THALAPPILLY TALUK.
3. T.V. RAMACHANDRAN, AGED 40, PROFESSOR,
SREE KERALA VARMA COLLEGE, THRISSUR.
4. T.V. UNNIKRISHNAN, BUILDING INSPECTOR,
OTTAPPALAM MUNICIPALITY, OTTAPPALAM P.O.,
PALAKKAD DISTRICT.
5. GANGADHARAN, SON OF LATE VELAYUDHAN,
AGED 34, ELECTRICIAN,
THRISSUR ASWINI HOSPITAL,
NEAR VADAKKE BUS STDAND, THRISSUR.

ADDL. A6: T.V. SAROJAM, AGED 50 YEARS,
W/O. LATE VENUGOPALAN,
D/O. CHINNA ALIAS CHINNAMMU,
NADUVIL VEETIL HOUSE,
NEAR LAKSHMI MOVIES, PONNANI.

THE LEGAL HEIR OF DECEASED 1ST APPELLANT IS
IMPLEADED AS ADDL. 6TH APPELLANT AS PER ORDER DATED
26.9.2011 IN I.A. 2247/2011.

BY ADVS.SRI.T.KRISHNAN UNNI (SR.)
SRI.A.BALAGOPALAN,
SRI. K.C. CHARLES
SRI. IMTHIAS AHAMMED.

RESPONDENT(S)/APPELLANT & RESPONDENTS 6 TO 8/PLAINTIFFS
1 TO 3 AND 6TH DEFENDANT:

1. VASUDEVAN, AGED 55,
S/O. LATE KUNHIKRISHNAN,
DESAMANGALAM VILLAGE,
THALAPPALLY TALUK,
NOW RESIDING AT 19/273,
KRISHNA VIHAR, POOTHOL DESOM,
THRISSUR VILLAGE, THRISSUR TALUK.
(DIED; ADDL. R5 TO R7 IMPLEADED)
2. T.K. LEELA, ALIAS UNNI,
D/O. LATE KUNHIKRISHNAN,
THAYANKULANGARA DESOM,
THRISSUR VILLAGE, THRISSUR TALUK.
3. P.V. AMMALU, WIFE OF LATE KUNHIKRISHNAN,
DESAMANGALAM VILLAGE, THALAPPALLY TALUK,
PRESENT ADDRESS THAYANKULANGARA, THRISSUR
VILLAGE, THRISSUR TALUK. (DIED)
(IT IS RECORDED THAT R3 DIED AND R2 AND 4, WHO
ARE ALREADY IN THE PARTY ARRAY ARE THE LRS OF DECEASED R3
VIDE ORDER DT.22.2.2011 IN MEMO CF.1146/11.)

4. RAJI ALIAS RAJALAKSHMI,
D/O. LATE KUNHIKRISHNAN,
THAYANKULANGARA, THRISSUR VILLAGE,
THRISSUR TALUK.

ADDL. R5 TO R7 IMPLEADED.

5. RATNAMMA, AGED 63 YEARS,
W/O LATE VASUDEVAN, RESIDING AT
KRISHNA VIHAR, P.O.,
KANIMANGALAM, THRISSUR.
6. PREETHA, AGED 39 YEARS, D/O. LATE VASUDEVAN,
RESIDING AT KRISHNA VIHAR, P.O. KANIMANGALAM,
THRISSUR.
7. PRIJU, AGED 37 YEARS,
D/O. LATE VASUDEVAN,
RESIDING AT KRISHNA VIHAR,
P.O. KANIMANGALAM, THRISSUR.

LEGAL REPRESENTATIVES OF DECEASED R1 ARE IMPEADED
AS ADDL. R5 TO R7 AS PER ORDER DATED 4.4.2011 IN I.A.
487 OF 2011.

BY ADV. SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON
06-08-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

- - - - -
S.A. No. 92 of 1999
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Dated this the 6th day of August, 2015.

JUDGMENT

The defendants in O.S. 108 of 1991, who were successful before the trial court, but who suffered a decree at the hands of the lower appellate court are the appellants. The suit was one for recovery of possession on the strength of title. Though the plaintiff proved his title, the trial court held that he had lost his title by adverse possession and limitation and non-suited him. The appellate court thought otherwise.

2. Now on to the facts absolutely necessary for the disposal of this appeal.

3. Admittedly, the property belonged to Velu, who was the father of Kunjikrishnan and Velayudhan. According to the plaintiffs, Velu executed Ext.A1 assignment deed in favour of Kunjikrishnan and ever since then he has been in absolute possession and enjoyment of the property.

Since Velayudhan had no house of his own, Kunjikirishnan, out of sympathy, allowed him and his family to reside in the house. After the death of Velayudhan, when Kunjikirishnan demanded the legal heirs of Velayudhan to vacate the property since they have no manner of right, they claimed rights over the property. In the reply notice, it was contended that there was an oral partition of which 36 cents in Sy. No.470/4 and 21 cents in Sy. No.470/2 were set apart to Sankaran and Raman and 21 cents was set apart to Velayudhan and 21 ½ cents in Sy. No. 459/2 was set apart to Kunjikirishnan. In the plaint it is averred that the defendants denied permissive occupation and contended in the reply notice that they were residing in the house on their own independent right. Pointing out that the defendants have no manner of right to reside in the house, recovery of possession was sought for with mesne profits.

4. The suit was resisted by the defendants by pointing out that the property

originally belonged to Velu, father of Kunjikirishnan, Velayudhan, Sankaran, Raman and Lakshmy. Velu was residing in the house situated in the property along with his family. It was claimed that the property was a joint family property and Velu had divided the properties and given to Sankaran and other children during his lifetime itself. He was indebted to Desamangalam Service Society and to discharge the debts due to the Society, he had borrowed amounts from Kunjikirishnan and executed a registered deed in his favour in respect of the plaint schedule property. Though such a deed was executed, it had never been acted upon and the rights over the property continued with Velu and remained as a joint family property. In pursuance to the oral partition, plaint schedule property fell into the share of Velayudhan, the predecessor-in-interest of the defendants and the claim of the plaintiffs that the deed referred to in the plaint conferred right on the plaintiffs is without basis. According to

the defendants, they looked after Velu till his death. Certain documents claimed to have been executed by Kunjikirishnan happened to be so only because the property stood in the name of Kunjikirishnan though he had no independent right over the same. They also contended that they had made considerable improvements and in case they are found liable for eviction, they are entitled to value of improvements. On the basis of these contentions, they prayed for a dismissal of the suit.

5. On the above pleadings, issues were raised by the trial court. The evidence consists of the testimony of P.W.1 and documents marked as Exts.A1 to A10 from the side of the plaintiffs. The defendants examined D.Ws.1 and 2 and had Exts.B1 to B5 marked. Ext.C1 is the commissioner's report.

6. Both the courts below found that the claim of the defendants that it is a joint family property and there was an oral partition are untrue

and found that the assignment evidenced by Ext.A1 by Velu in favour of Kunjikirishnan to be a genuine document. In other words, title was found in favour of Kunjikirishnan. However, the trial court based on the documents produced by the defendants came to the conclusion that title if any of Kunjikirishnan had been lost by adverse possession and limitation and therefore, dismissed the suit. The aggrieved plaintiffs carried the matter in appeal as A.S. 125 of 1994 and the lower appellate court on a re-evaluation of the evidence in the case found that the finding of adverse possession and limitation entered into by the trial court to be erroneous and without basis and reversed the same. The lower appellate court passed a decree in the following terms:

"36. In the result:-

- a) This appeal is allowed.
- b) The impugned judgment and decree are set aside.
- c) The suit O.S. 108/91 is decreed and defendants 1 to 5 are directed to -

- i) Surrender possession of the plaint schedule properties to the plaintiffs within 90 days from this date.
- ii) Pay compensation for use and occupation at the rate of Rs.1,100/- per annum from 1.10.1990 to the date of surrender of possession.
- iii) Not to alter the lie of the plaint schedule property, not to commit waste or damage therein, not to sell earth or quarry stones from the plaint schedule property and not to cut trees in the plaint schedule property.
- d) The parties are directed to suffer their respective costs."

7. This Second Appeal is filed challenging the decree of the lower appellate court.

8. Notice was issued on the following substantial questions of law:

"A. Has not the lower appellate court committed a serious error in reversing the finding of the trial court's finding that Ext.A1 is a sham document?

B. Whether the lower appellate court is justified in holding that Ext.A1 is valid

in the light of P.W.1's admission that Kunjikirishnan did not make any payment for Ext.A1?

C. Is not Ext.A1 sale deed void for want of consideration.

D. Have not the lower appellate court erred in holding that the permissive possession of the appellant's predecessor can never become adverse and that the appellants cannot plead or set up adverse possession in respect of the suit properties?

E. Have not the lower appellate court gone wrong in interfering with the trial court's finding that the plaintiffs' title if any is lost by adverse possession and limitation."

9. Shri.Krishnanunni, learned Senior Counsel appearing for the appellants contended that even assuming that the title stood in the name of Kunjikirishnan, and accepting that Ext.A1 assignment is a true and genuine document, the trial court had extensively considered the evidence on record and on the basis of evaluation of evidence had come to the conclusion that the claim made by the

plaintiffs that the defendants were licensees is untrue. The trial court found that they were in possession of the property in their own independent right, and title, if any, of the plaintiffs had been lost by adverse possession and limitation. Learned Senior Counsel went on to point out that the said finding of the trial court is a possible view arrived at on evaluation of the evidence and merely because a different view is possible, it does not entitle the lower appellate court to reverse the finding of the trial court.

10. Learned Senior Counsel went on to contend that the plea of the plaintiffs was one of licence under which the defendants were occupying the property. The details of the licence are not given. It was under those circumstances the trial court was called upon to consider the various documents produced by the defendants which according to the trial court, was sufficient to show that they were in possession of the property in their own right. The reasons given by the lower

appellate court to reverse the said finding are not justified and are unsustainable. Learned Senior Counsel went on to point out that it is inconceivable that licensees would have paid building tax, property tax etc., for a long period. The documents, namely, Exts.B1, B2 and B3 series will clearly show that the defendants, who were in occupation of the property, were treating the property as their own and enjoying the property in their own independent right. Accordingly, it is contended that the judgment and decree of the lower appellate court are not sustainable.

11. Learned counsel appearing for the respondents Shri. N. Subramaniam contended that the trial court has grievously erred in law in holding that the title, if any of the plaintiffs, has been lost by adverse possession and limitation. The trial court, according to the learned counsel, has misdirected itself both on facts and in law in finding that title, if any, of the plaintiffs has been lost by adverse possession and limitation. In

the nature of the contentions raised in the written statement which was found to be false, it could not be said that they are asserting independent right. Once it is found that the title vested with Kunjikirishnan, the burden shifts to the defendants to show the right under which they can continue in the property. Unless the defendants are able to show a better title, they cannot remain in possession. The documents produced by the defendants namely, tax receipts, by themselves are insufficient to cloth them with any independent right and that does not derogate from the claim of the plaintiffs that the defendants were in permissive occupation. Learned counsel in support of his contention relied on the decisions reported in **A.Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam** ((2012) 6 SCC 430) and **Mariya Margarida Sequeira Fernandes v. Erasmo Jack De Sequeira** ((2012) 5 SCC 370).

12. Though the defendants set up a case of joint family and the properties which were

assigned by Velu to Kunjikirishnan to be a joint family properties, both the courts below concurrently found the claim to be untrue. It is not in dispute that the evidence show that the property was the self acquisition of Velu and he can deal with the property as he likes and consequent on the death of Velu. his children inherit the property. The claim made by the defendants was that during the lifetime of Velu, the property was partitioned. For a partition, there should be pre-existing rights. Being the self acquisition of Velu, none of the children had any pre-existing right in the properties, therefore the claim of oral partition cannot be sustained.

13. Ext.A1 is the document by which Velu assigned the property to Kunjikirishnan. That Kunjikirishnan had acted on that document and dealt with the property as if it belonged to him would be evidenced by Exts.A2 to A6 documents which are mortgage deeds executed by Kunjikirishnan. Exts. A7

and A8 are kanam deeds and kanam kychit given by the respective parties in favour of Kunjikirishnan, the landlord. It is significant to notice that Kanam deed executed by Kunjikirishnan was not for and on behalf of the family and it was in his own independent right.

14. There is absolutely no evidence to show that there was any oral partition as claimed by the defendants or that Velayudhan had been given any share of property which belonged to Velu.

15. The plaintiffs have given reasons for the occupation of the defendants. It has been pointed out by them that Velayudhan had no house of his own and therefore Velayudhan and his family were allowed to reside in the house. The evidence shows that even after execution of Ext.A1, Velu and his children continued to reside in the house. That sympathetic and benevolent gesture cannot be termed as conferring any right on the defendants. One shall not forget that subsequent to the execution of Ext.A1 there is nothing to show that

either Velu or other children of Velu except Kunjikirishnan had asserted any manner of right over the property except residing therein. Under such circumstances, the occupation can only be treated as permissive.

16. In the decision reported in **A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam** ((2012) 6 SCC 430) it was held as follows:

"42. The appellant is also guilty of introducing untenable pleas. The plea of adverse possession which has no foundation or basis in the facts and circumstances of the case was introduced to gain undue benefit. The court must be cautious in granting relief to a party guilty of deliberately introducing irrelevant and untenable pleas responsible for creating unnecessary confusion by introducing such documents and pleas. These factors must be taken into consideration while granting relief and/or imposing the costs."

17. In the decision reported in **Mariya Margarida Sequeira Fernandes v. Erasmo Jack De Sequeira** ((2012) 5 SCC 370) also the same view was taken.

18. It must be noticed that once the title of the plaintiffs is established, the burden shifts to the defendants to show a better title to hold on the property. In other words, the burden is on the defendants to show that they have been in occupation of the property in derogation of the rights of the plaintiffs for the statutory period. It is true that they have produced Exts.B1, B2 and B3 series of documents. But as rightly pointed out by the learned counsel for the respondents before this Court, those documents by themselves are insufficient to show that the defendants had asserted independent right in derogation of the rights of the plaintiffs over the property.

19. The main criterion which weighed with the trial court to hold that the plaintiffs had lost their right by adverse possession and

limitation is the fact that the defendants effected improvements in the property and the plaintiffs stood by without any objection. The finding of the trial court that the defendants were enjoying the property as their own and to the exclusion of all others will not be quite justified. It must be remembered here that even after the execution of Ext.A1 document Velu and his family continued to reside in the house. But it has already been found that ever since Ext.A1 Kunjikirishnan had been dealing with the property as his own and therefore the occupation by Velayudhan subsequent to the execution of Ext.A1 can only be treated as permissive.

20. Further, one should remember that the plea set up by the defendants is one of oral partition and their exclusive right over the suit property. Having failed to establish the same, it is difficult for them to contend that they had perfected title by adverse possession and limitation.

21. The lower appellate court has referred to the evidence of D.W.1 and has found that he was aware of the execution of Ext.A1. But the claim was that it was not acted upon. They were thus aware of the execution of the document and the lower appellate court has found that the claim was that it was not acted upon cannot be true in the light of the subsequent documents executed by Kunjikrishnan.

22. The lower appellate court was therefore perfectly justified in coming to the conclusion that the execution of Ext.A1 and the subsequent execution of various other documents will clearly reveal that the occupation of Velayudhan and his family subsequent to the execution of Ext.A1 cannot be treated as in derogation of the rights of Kunjikrishnan. At any rate, their residence in the house and occupation of the property after Ext.A1 can be treated only as permissive. When it is found that Ext.A1 has been acted upon, the burden then shifts to the

defendants to show when the permissive occupation changes into one of hostile claim, in derogation of the rights of the plaintiffs. The burden is certainly on the defendants to show that after they were inducted into permissive occupation at some point of time, they had asserted right in themselves challenging the right title and interest of the plaintiffs. Except for paying tax, there is nothing to show that the defendants had exercised any manner of right in derogation of the right of the plaintiffs. There is nothing in the evidence of D.W.1 to show that at any point of time the defendants had exercised any right hostile to the claim of the plaintiffs.

23. The lower appellate court was therefore perfectly justified in coming to the conclusion that the claim of adverse possession and limitation necessarily has to fail.

24. Learned Senior Counsel for the appellants then contended that the quantification of mesne profits is not justified. The lower

appellate court has given convincing reasons as to how it has arrived at the quantum of mesne profits payable by the defendants. It could not be said that the said finding is contrary to the evidence on record. It is a possible view. Even assuming that a different view is possible, this Court may not be justified in interfering with the same under Section 100 of the Code of Civil Procedure.

For the above reasons, this Court is inclined to take the view that no interference is called for with the judgment and decree of the lower appellate court. This appeal is only to be dismissed. I do so. However, there will be no order as to costs.

sb.

P. BHAVADASAN,
JUDGE