

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

SA.No. 611 of 2001 ()

**AGAINST THE JUDGMENT & DECREE IN AS 112/1998 of III ADDITIONAL SUB COURT,
KOZHIKODE DATED 5.9.2000**

**AGAINST THE JUDGMENT & DECREE IN OS 442/1995 of
ADDITIONAL MUNSIFF'S COURT-I ,KOZHIKODE DATED 27.3.1998**

APPELLANT/RESPONDENT/PLAINTIFF:

**SHABANDRI REAL ESTATE LTD.,
REPRESENTED BY ITS EXECUTIVE DIRECTOR,
MOHAMMED YUNUS SHABANDRI, S/O.S.ISMAIL,
PANNIYANKARA AMSOM, DESOM, KOZHIKODE TALUK.**

BY ADV. SRI.C.P.MOHAMMED NIAS

RESPONDENT/APPELLANT/DEFENDANT:

**SHAIK ABDUL SAMAD,
SHAIK ABDUL RAHIMAN,
1/4843, SHAIK MANZIL,
NADAKKAVU, KACHERI AMSOM, DESOM.**

BY ADV. SRI.THOMAS ANTONY

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 07-12-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ALEXANDER THOMAS, J.

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S.A.No. 611 of 2001

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Dated this the 7th day of December, 2015

J U D G M E N T

This Second Appeal is filed by the plaintiff in O.S.No.442/1995 on the file of the Munsiff's Court, Kozhikode, as he is aggrieved by the judgment and decree dated 5.9.2000 of the lower appellate court (Court of Sub Judge, Kozhikode) in A.S.No.112/1998, whereby the judgment and decree granted by the trial court in his favour have been set aside. The suit was filed for mandatory injunction and prohibitory injunction.

2. The case set up by the plaintiff broadly is as follows:-
That the plaintiff is a company registered under the Companies Act and is represented by its Executive Director, who is duly authorised to set in motion this litigation on behalf of the company. The plaintiff A schedule property was obtained by the plaintiff under Ext.A-2 sale deed dated 10.11.1993. The prior title deed in this regard is Ext.A-7 assignment deed dated 18th August, 1924. That pursuant to Ext.A-2 sale deed, the plaintiff is in possession of the property and

is enjoying the same. The northern boundary of plaintiff A schedule property is P.M.Taj Road, which was recently formed by relinquishing properties by the owners of the land in either side of that road. That the defendant was earlier in possession of the property on the northern side of the P.M.Taj Road. That the said property was assigned by the defendant to third parties and that he is having no properties now near the plaintiff A schedule property. That the plaintiff noticed on 8.4.1995 that the defendant is unauthorisidely constructing a semi permanent bunk on item No.3 of the plaintiff A schedule property. The said item No.3 of plant A schedule property is more particularly described as B schedule in the plaintiff. That the plaintiff had asked the defendant to stop the work and to remove the materials for the construction of the bunk. But that the defendant refused to comply with this and that a complaint was filed by the plaintiff before the Calicut Corporation authorities regarding the unauthorised construction undertaken by the defendant. Since this did not evoke any proper response, the plaintiff was constrained to institute the present suit.

3. The defendant resisted the pleas in the suit by filing a written statement, contending inter alia, that the suit is not

maintainable. That the plaint A schedule property cannot be identified by the description in the plaint schedule and in the title deed (Ext.A-2) produced along with the plaint. He submitted that a commission should be deputed at the expense of the plaintiff so as to obtain proper plan, etc. That from Ext.A-2 deed what is discernible is that one Ismail, for 45 other persons had executed the deed in favour of an institution, wherein his son is the Executive Director. That the said deed was so created with ulterior motives. That the property referred to in B schedule of the plaint never belonged to and was not in the possession of the plaintiff or their predecessors. The place, where the transformer is now situated and the land east of the transformer, does not belong to the plaintiff. That the plaintiff and his predecessors have no right or possession over the said property. That the predecessor of the plaintiff had properties west of the drainage channel maintained by the Calicut Corporation. That the defendant has right and title over the property, which is situated east of the transformer and that he has already set up a bunk in that piece of land after duly getting plan and licence from the Calicut Corporation authorities. That he secured title for that piece of land, wherein a bunk has already been

constructed even prior to the institution of the suit, on the basis of sale deed No.2223/1992 of Chalappuram SRO (Ext.B-1). That before the execution of the Ext.B-1 deed, the predecessors in interest of the defendant had surrendered a portion of their land thereon to the Corporation for formation of the P.M.Taj Road and that the balance portion of the land was conveyed to the defendant as per Ext.B-1 deed. That the land immediately to the east of the transformer covered by Ext.B-1 thus belongs to the defendant. That long before the filing of the instant suit on 11.7.1995 the defendant had already completed the construction of the bunk and had also started the conduct of his stationery trade and other allied trades in that bunk. That the defendant has never attempted to trespass into any land belonging to the plaintiff, etc.

4. The trial court framed the following issues for determination:

- “1) Whether the suit is maintainable ?
- 2) Whether the plaintiff has got any title and possession over the plaint schedule property.
- 3) Whether the plaintiff is entitled to get any injunction as prayed ?
- 4) Reliefs and costs.”

5. The plaintiff had examined PW-1 and had marked

Exts.A-1 to A-7 documents. The defendant had examined DW-1 and had marked Exts.B-1 to B-11. Ext.C-1 and C-2 are the report and plan submitted by the Advocate Commissioner. Exts.C-3 and C-4 are the report and plan submitted by the Advocate Commissioner after the first report and plan, which were remitted.

6. This Court, while admitting this Second Appeal on 31.7.2001, had issued notice on the questions of law, as formulated in the memorandum of this Second Appeal, which read as follows:

“1. Whether the Court below was justified in coming to the conclusion that the plaint schedule property was not identified when there was no dispute at all regarding the identity of the property but the dispute was only with respect to the title of the plaint B schedule property as both parties set up title ?

2. Whether the court below was justified in holding that the requirements under order 7 Rule 3 was not complied when there was no dispute regarding identity or description.

3. Whether the court below was justified in holding that a suit for mandatory injunction will not lie but only a suit for recovery of possession will lie in the facts and circumstances of the case.

4. Whether the court below was justified in discarding the admission of the defendant as DW1 admitting the title of the assigner of the plaintiff.

5. Whether the court below was justified in discarding the documentary evidence which clearly supported and proved the case of the plaintiff.”

7. Heard Sri.C.P.Mohammed Nias, learned counsel appearing for the appellant herein/plaintiff and Sri.Thomas Antony, learned counsel appearing for the respondent herein/defendant.

8. The trial court held that the plaintiff had established that they have right over the property as per Ext.A-2 and that the identification of the property is very clear from Ext.C-4. On this basis, it was held that the plaintiff is entitled to get B schedule property recovered from the defendant. It was further held by the trial court that the defendant failed to establish that the property where he had erected the bunk belongs to him. It was further held by the trial court that Ext.D-1 is not pertaining to plaintiff B schedule property. In the light of these aspects, the trial court held that the plaintiff is entitled to get mandatory injunction as prayed for and accordingly, decreed the suit.

9. The lower appellate court held that even after the remit of Ext.C-1 report and C-2 plan of the Advocate Commissioner, Ext.C-4 plan produced along with Ext.C-3 report would show that Ext.C-4 is only a sketch and not a survey plan and that from Ext.C-4 also it is not clear as to what all portions of which all survey sub divisions are covered by the plaintiff schedule properties. The location of the bunk was also not clear from the survey plan, which was produced before the lower appellate court. According to the lower appellate court, the location of the bunk is not clear even

from the survey plans now produced before that court. Accordingly it was held that the identity of plaint A schedule property is not identified even by Ext.C-4 plan. As regards the question of title and possession over the plaint schedule property claimed by the plaintiff, it was held by the lower appellate court that Ext.A-2 is only a photocopy of the title deed attested by the notary and hence is not admissible in evidence in terms of provisions contained in Sec.65 of the Indian Evidence Act and that since Ext.A-2 is not a certified copy as referred to Secs.65 and 76 of the Evidence Act, the same should not have been admissible in evidence. Ext.B-4, which is a photocopy attested by the notary, and the plan approved by the Calicut Corporation were also held to be not admissible in view of the aforestated reason.

10. After consideration of the entire evidence in detail, it was found by the lower appellate court that the entire portion of the land with respect to the bunk shown in Ext.C-4 was reduced into the exclusive possession of the defendant long before the institution of the suit and that he had constructed the bunk as per the plan and licence obtained from the Calicut Corporation and had started the conduct of the trade therein even prior to the filing of the suit.

Accordingly, it was found that the plaintiff had no possession over the disputed portion of the property as on the date of the suit. It was also held that for a proper finding as to title over the disputed portion (triangular portion in Ext.C-4 plan) essential and vital requirement of identification of property with reference to the town survey is not done. The lower appellate court also held that since the plaintiff had no possession of the disputed property and as no recovery of possession of the same is sought in the present suit and as no payment of proper court fee was made for inviting a finding as to the issue of the title, even a remand of the case to the trial court for identification of the disputed property with reference to survey records and for a proper finding of the disputed title may not serve any purpose. Accordingly, the lower appellate court left open the issue of title to the disputed portion of the land, wherein the bunk is constructed for consideration in any fresh proper suit, if so filed. The lower appellate court also found that the plaintiff had no possession over the disputed portion of the property, which is east of the transformer, as on the date of the institution of the suit.

11. The lower appellate court held that the trial court's finding that the identification of the property is clear from Ext.C-4 is

wrong and it was held that Ext.C-4 is not sufficient for proper identification of the property with reference to the survey and land records. The lower appellate court also held that when there was no prayer for recovery of possession, the finding made by the trial court that the plaintiff is entitled to get recovery of the disputed property, is wrong. It was held that as the defendant was already in possession of the disputed property before the institution of the suit, the plaintiff could not be entitled for grant of prohibitory injunction without seeking a proper prayer for recovery of possession. In this view of the matter, the judgment and decree of the court below granted in favour of the plaintiff were set aside and made it clear that the parties are at liberty to file fresh proper suits, etc.

12. On a consideration of the entire matter, this Court is of the considered opinion that the finding made by the lower appellate court that Ext.A-2 document produced before the trial court is inadmissible in evidence due to the aforesaid reason, is legally correct and tenable. Equally the finding made by the lower appellate court regarding the inadmissibility of Ext.B-11 for the aforesaid reason is also tenable and right. It has clearly come out in evidence

that the defendant came into possession of the land, in which, the bunk is situated and that he had actually completed the construction of the said bunk thereon and had started his trade in that bunk, etc. long before the filing of the suit. There is no prayer for recovery of possession of the disputed property, as per the prayers set up in the suit. In the absence of such a prayer for recovery of possession, the lower appellate court was fully right in holding that the prayer for mandatory injunction could not have been considered. As per the claim made by the plaintiff, Ext.A-2 dated 10.11.1993 pertains to title deed of the plaintiff. The survey number shown therein is 69/1 and the town survey numbers shown therein are 31, 32, 35, 39, 42/1. The prior title deed in respect of Ext.A-2 is Ext.A-7 is dated 18.8.1924 and survey number shown therein is 69/1. Ext.B-1 is claimed to be the title deed of the defendant in respect of the disputed property. Survey number noted in Ext.B-1 is Town Survey (T.S) No.10/2/80, 90, 20, 29, 30. Ext.A-5 dated 28.5.1965 is said to be the prior title deed pertaining to Ext.B-1. The resurvey number shown in Ext.A-5 is 10-2-30 and survey number shown therein is 68/2A-1A. Ext.B-11 photocopy is said to be pertaining to the purchase certificate issued by the Land

Tribunal, Vadakara, on 28.12.1978 and the re-survey number shown therein is 10-2-30 and survey number shown therein is 68-2A-1A. Prima facie, though the re-survey number and survey number shown in Ext.A-5 and Ext.B-11 tally, survey number therein does not tally with the town survey numbers shown in Ext.B-1. The finding made by the lower appellate court that the disputed property could have been identified only on the basis of proper survey and other official records, is fully correct. Since the matter has been pending for a very long time, the approach made by the lower appellate court in not remanding the matter to the trial court for fresh disposal after identification of the disputed property with the aid of the survey and other official records, is not just and proper. After such proper identification, the plaintiff could be permitted to pay more court fee in that regard if so required, after amendment of the prayers in the plaint. Such a course of action could have been permitted instead of imposing on the parties a fresh round of another litigation. Accordingly, in the interest of justice this Court is of the considered opinion that a consideration of the entire matter deserves to be made by the trial court afresh, so as to do full justice to both parties. In this view of the matter, both parties

agree that the questions of law raised in this Appeal to the extent they are not covered by the aforestated discussion, need not be decided on merits by this Court in this appeal. Accordingly, the impugned judgments and decrees of both the courts below are set aside. The suit would stand remitted to the trial court for disposal afresh. Both parties will be at liberty to seek proper identification of the disputed property through an Advocate Commissioner with the assistance of the Taluk Surveyor concerned. Both parties will also be at liberty to seek proper amendment of their pleadings and production of any additional oral or documentary evidence that may be necessary and relevant for determination of the matters in the suit. The Advocate Commissioner so appointed should ensure the proper identification of the disputed property with the assistance of the Taluk Surveyor on the basis of the survey and other official records as well as the title deeds produced by the respective parties. I.A.No. 1567/2013 has been filed in this Second Appeal by the appellant herein/plaintiff producing certified copy of Exts.A-2 and A-7 deeds. I.A.No. 4973/2000 has been filed in A.S.No. 112/1998 on the file of the Sub Court, Kozhikode, at the instance of the appellant herein/ plaintiff with the prayer to receive the certified

copies of the settlement register and survey plan. I.A.No. 4719/2000 has been filed in A.S.No. 112/1998 at the instance of the defendant praying to receive certified copies of the survey plan, etc.

13. The Registry of this Court is directed to return back the certified copies of the documents produced along with I.A.No. 1567/2013 to the appellant herein/plaintiff after retaining the attested photocopies of the said documents. The entire lower court records will stand transmitted by the Registry to the respective subordinate court. The plaintiff will be at liberty to take back the certified copy produced along with I.A.No.4973/2000 from the lower appellate court and the defendant will be at liberty to take back the certified copy of the documents produced along with I.A.No. 4719/2000 to enable them to produce all such documents before the trial court. Both parties will enter appearance before the trial court concerned on 14.1.2016 at 11 a.m. Since the Original Suit was instituted as early as on 11.7.1995 the trial court will ensure that top priority will be given for the disposal of the instant suit. Though this Court is not stipulating inflexible time limit, it is made clear that all reasonable endeavours should be made by the trial

court to finally dispose of the suit at least within a period of eight months from 14.1.2016.

With these observations and directions, the Second Appeal stands disposed of. There will be no order as to costs.

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Sd/-
ALEXANDER THOMAS, JUDGE

P.S. To Judge.