

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 18TH DAY OF AUGUST 2015/27TH SRAVANA, 1937

SA.No.688 of 2001 (F) & CROSS OBJECTION

AGAINST THE JUDGMENT IN AS 149/1994 of III ADDL.DISTRICT COURT,
KOLLAM DATED 13.06.2001

AGAINST THE JUDGMENT IN OS 1423/1988 of PRINCIPAL MUNSIFF COURT,
KOLLAM DATED 24-08-1994

APPELLANT/APPELLANT/DEFENDANT:

BHANU ASAN RADHAKRISHNAN,
AGED 45, VISHNU NIVAS,
KARPOORAM CHERRY, VADAKKEVILA VILLAGE,
KOLLAM.

BY SMT.V.P.SEEMANDINI (SENIOR ADVOCATE)
BY ADV.SRI.M.S.UNNIKRISHNAN

RESPONDENT/RESPONDENT/PLAINTIFF:

V.V. NANOO, MALIKEKKAL VEEDU,
PAZHICKUZHI MURI, PERINAD VILLAGE,
KARUNAGAPPALLY TALUK,
NOW RESIDING AT MALLIKA VIHAR,
WARD No.4 ASRAMAM, CHERRY KOLLAM (DIED. LRs IMPEADED AS
ADDL.R2 & R3)

ADDL.R2 P. VASANTHI, W/O. NANU, MALLIKA VIHAR, WARD No.4,
ASRAMAM, CHERRY, KOLLAM.

ADDL.R3 N. ABHIRAM, S/O. V.V. NANU, -DO- -DO-
(LRs OF THE DECEASED SOLE RESPONDENT ARE IMPEADED AS
ADDL. R2 & R3 VIDE ORDER DATED 14.03.2011 IN
CMP. 1136/2003).

ADDL. R2 & R3 BY ADV. SRI.K.SUBASH CHANDRA BOSE

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON
18-08-2015, ALONG WITH SA. 962/2001, THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

**Second Appeal Nos.688 & 962 OF 2001 &
Cross Objection**

Dated this the 18th day of August, 2015.

J U D G M E N T

Two suits namely, O.S.No.1423/1988 and O.S.No.149/1990 were disposed of by a common judgment. O.S.No.1423/88 was treated as leading case and evidence was adduced in the said case. Therefore parties are being referred to with reference to that suit.

2. The plaintiff claimed to be the owner of plaint A, B and C schedule properties and the defendant in the suit the owner of D schedule property. The properties belonging to the plaintiff are lying contiguously and there is no boundaries separating the property of the defendant from that of the plaintiff. Since the defendant was bent upon committing mischief, the plaintiff was constrained to lay a suit for fixation of southern boundary of A,B, C schedule properties.

3. The suit was resisted by the defendant. The defendant contended that the description of the properties is wrong and that

the defendant has got 30½ cents in Thrikkadavoor Village out of which 15½ cents is comprised in survey No.8302/153/229 and another 15 cents is in Survey No.8302/153/305. The property on its southern side belonged to the father of the plaintiff. The Bank for a debt incurred by the father of the plaintiff brought the properties for sale and the said properties have been mis-described in the plaint. The defendant disputed that B schedule is a Kayal Varambu of 10 links width and it was claimed that there was no such property available. There was no C schedule property as alleged in the plaint and the properties are not lying contiguously within a common boundary. It is claimed that the defendant's father had certain properties in various survey numbers and that property is situated on the northern side of the defendant's property having an extent of 30½ cents. It is also claimed that the defendant had 4 cents of land in Survey No.1003/A and 6 cents in Survey No.10024/E. That property is situated on the western side of 30½ cents. It was further claimed by the defendant that 10 cents of property on the southern side of the above property was given to

kudikidappukaran and there is well defined boundary between the properties of the plaintiff and defendant. The present attempt of the plaintiff is to clandestinely annex a portion of the property belonging to the defendant to the plaintiff's property. On the basis of the above contentions, the defendant prayed for dismissal of the suit.

4. The plaintiff had filed a replication detailing his title to the suit properties and pointing out that there has been some error in mentioning the survey number etc.

5. Later the defendant in O.S.No.1423/88 laid a suit as O.S.No.149/90 initially for permanent injunction seeking to have the defendant restrained from trespassing into the plaintiff's schedule properties namely, 6 cents of property comprised in Survey No.10024E and 4 cents in 10032 A of Kollam Village and 30½ cents in survey No.8302/153/304 and 229 of Thrikkadavoor Village. Later the plaintiff was amended seeking declaration of plaintiff's title over those properties. The defendant in O.S.No.149/90 who is the plaintiff in O.S.No.1423/88 filed a written statement traversing the allegation in the counter-claim.

6. Based on the above pleadings, issues were raised and the parties went to trial. Evidence in the case consists of the testimony of PWs 1 to 3 and the documents marked as Exts.A1 to A13 on the side of the plaintiff. The defendant had DWs 1 to 3 examined and had Exts.B1 to B9 marked. Exts.C1, C2 and C2(a) are the commission report, plan and mahazar.

7. The trial court found that the plaintiff in O.S.No.1423/88 has succeeded in showing that there are no boundaries separating his property with the defendant and a decree was passed allowing the plaintiff in the suit to get boundary put up on the southern side of A schedule property shown in blue shade in Ext.C2(a) plan over D C line at his own cost. Consequently, a decree of injunction was also granted restraining the defendant from interfering or trespassing into the property owned and possessed by the plaintiff. Ext.C2(a) plan formed as part of the decree. Finding that the plaintiff had not succeeded in establishing his title to the suit properties scheduled to the plaint, O.S.No.149/1990 was dismissed.

8. Aggrieved defendant in O.S.No.1423/88 filed two

appeals before the District Court, Kollam. A.S.No.149/1994 was directed against the judgment and decree in O.S.No.1423/88 and A.S.No.150/1994 was directed against the judgment and decree in O.S.No.149/90. The respondent in the appeals had filed a petition for amendment and also a cross objection.

9. The lower appellate court, after independent evaluation of the evidence, came to the conclusion that there are no grounds made out to interfere with the judgment and decree of the trial court and dismissed the appeals. As regards the application for amendment and cross objection, the court found that there is no substance in the same. The court reached a conclusion that at no point of time the plaintiff in O.S.No.1423/88 had a complaint that the defendant in the suit had reduced any portion of his property into his possession. Merely based on the commission report which showed a narrow strip of land shown in blue shade to be in possession of the defendant in the suit though that actually belonged to the plaintiff, the plaintiff in the suit is not entitled to any relief. Aggrieved by the judgment and decrees in the two appeals, these second appeals have been filed.

10. S.A.No.962/2001 is directed against the judgment and decree in A.S.No.150/1994 and S.A.No.688/2001 is directed against the judgment and decree in A.S.No.149/1994. In S.A.No.688/2001 the respondent has filed a cross objection with a petition to condone the delay in filing the cross objection.

11. Notice was issued in both the appeals on the following questions of law formulated.

- a) Is the judgment and decree of the court below is legal and proper when there is glaring inconsistency between the report and sketch prepared by the Advocate Commissioner and Ext.B9 sub division sketch proved in the case?
- b) Is it proper to accept the Commissioner's report on the sole basis that the surveyor was not examined when there is sufficient documentary evidence to show that the very basis adopted by the Adv.Commissioner to prepare the plan and sketch is wrong?

12. Learned counsel appearing for the appellant confined his arguments to 6 cents of property comprised in survey No.10024E of Kollam Village which the appellant claimed to have obtained under Ext.B3. Drawing attention to Ext.C2(a) plan, it is

pointed out that it is not on the basis of sub division plan that Ext.C2(a) plan had been drawn and in doing so, the Commissioner has also not identified the 6 cents of land which admittedly belonged to the appellant before this Court and which is covered by Ext.B3 document. Learned counsel went on to point out that even assuming that the plaintiff in O.S.No.1423/88 had 3 cents in survey No.10024/D and 14 cents in survey No.10024/E, the location of two items of properties by the Commissioner in Ext.C2(a) plan cannot be correct. The Commissioner is not justified in coming to the conclusion that out of the total 35 cents of property in survey No.10024, 17 cents belonged to the plaintiff, 10 cents were given to kudikidappukaran and 8 cents were in the possession of strangers. From the very sketch namely, Ext.C2(a), it can be seen that the location of 17 cents shown as item No.2 in the plan cannot be correct. It may be that 10 cents of property to kudikidappukaran was given by the predecessor in interest of the appellant. However, 3 cents of property comprised in survey No.10024/D can be only on the extreme eastern side of the

property comprised in survey No.10024/E. It is contended that there was no proper identification of the property and now the plaintiff in O.S.No.1423/88 confined his claim to 6 cents of property which actually belonged to the defendant in the suit who is the appellant herein.

13. Learned counsel appearing for the appellant, relying on Ext.B9, contended that the claim of the Commissioner that there was no sub division sketch available cannot be true as Ext.B9 would falsify such a claim. If Ext.B9 is accepted, then obviously Ext.C2(a) plan cannot stand. There is no justification as to why Ext.B9 should not be accepted. There is a sub division of properties in survey No.10024 and even going by the claim made by the plaintiff, 17 cents comprised in survey No.10024 was split up into 3 cents in survey No.10024/D and 17 cents in survey No.10024/E. Referring to Ext.C2(a) plan, it was pointed out that the Commissioner has observed that the property in survey No.10024 has a total extent of 20 cents. If that be so, 6 cents obviously belonged to the defendant and it was not identified and located. Therefore, it is contended that the decree based on

Ext.C2(a) plan is unjustified and unreasonable. It is clear, according to the learned counsel, that the Commissioner has not located the properties and identified the properties as is required under law.

14. Learned counsel appearing for the respondent, on the other hand, contended that there is no basis for the above submission at all. The Commissioner has clearly specified in the report that survey No.10024 has a total extent of 35 cents out of which admittedly 17 cents belonged to the plaintiff in O.S.No.1423/88, which is not even disputed by the defendant in the suit. Admittedly, again 10 cents of property has been given to kudikidappukaran and balance 8 cents have been located by the Commissioner as item No.6 in Ext.C2(a) plan in the possession of strangers. It is therefore clear according to the learned counsel that the property shown as item No.2 in blue shade portion showing 17 cents is the property the plaintiff obtained under Ext.A1 consequent on the sale proceedings conducted by the Bank. Learned counsel relied on Exts.A1, A4, A5, A9, A10 and A11 in support of his claim.

15. Learned counsel appearing for the respondent contended that there was no attempt from the side of the defendant in O.S.No.1423/88 to have his 6 cents comprised in survey No.10024 identified and located. There is no suggestion to the Commissioner that any such demand was made to him to locate the property or that the Commissioner had erred in any manner in locating the other properties. Learned counsel went on to point out that true, objections have been filed. But the mere filing of objections on the Commissioner's report will not make report unacceptable unless objections are found to be sustainable. There is no suggestion to the Commissioner that there was any error in drawing of the plan. It is not suggested to the Commissioner that in spite of demand made by the defendant in the suit, 6 cents of property admittedly belonging to the defendant, in survey No.10024 was deliberately not located.

16. Learned counsel appearing for the respondent went on to point out that one has to remember that there is a suit by the defendant in O.S.No.1423/88 as O.S.No.149/90 for declaration of title and possession in respect of the same property. The burden

certainly is on the plaintiff in O.S.No.149/90 to establish title and possession. But the plaintiff in O.S.No.149/90 has miserably failed to do so.

17. It is not in dispute that the plaintiff in O.S.No.1423/88 obtained title to the property by assignment by the Bank. It appears that the father of the plaintiff was the owner of the property and he incurred certain debts and his properties were brought to sale. Exts.A4 and A5 are the relevant documents of sale as far as the Bank is concerned. Ext.A1 is the document of title of the plaintiff in O.S.No.1423/88. Even though Ext.A4 does not make any reference to survey Nos.10024/D and 10024/E and so also Ext.A5, Ext.A1 mentions that 6 cents in survey No.10024/E and 3 cents in survey No.10024/D has been assigned by the Bank. It may be noticed here that the defendant has no case that these properties were not the subject matter of sale in the proceedings conducted by the Bank nor is there a case for the plaintiff that even though those properties were not the subject matter of sale, they were clandestinely included in the document of title of the plaintiff or in other words, the title of the plaintiff in

respect of 17 cents consisting of 3 cents in survey No.10024/D and 14 cents in survey No.10024/E is not disputed at all.

18. It is true that Ext.C2(a) plan does not show the sub divisions of survey No.10024 of Kollam Village. The courts below depended on Ext.C2(a) plan and granted a decree in favour of the plaintiff in O.S.No.1423/88. The property belonging to the plaintiff in the suit has been located as 1, 4, 7, 2 and 8 and item Nos.1 and 4 shown in blue shade is the property over which the plaintiff has right and also the property in his possession. Item No.7 shown in green shade is the property over which the plaintiff has right and item No.8 is in fact the property which is in possession of the plaintiff, in survey No.10032. Commissioner found that item No.2 shown in yellow shade actually forms part of the property belonging to the plaintiff in the suit but was in possession of the defendant.

19. Learned counsel appearing for the appellant to a certain extent is justified in his submission that it may not be possible to simply accept Ext.C2(a) plan in the light of Ext.B9 which shows that there are sub divisions of the property. A

perusal of Ext.B9 shows that survey No.10024 is divided into A, B, C, D and E. Ext.B9 shows that E plot contains 20 cents, D plot 3 cents, C plot 2 cents, B plot 6 cents and A plot 4 cents. It may be remembered here that the plaintiff in O.S.No.1423/88 lays claim only to 14 cents in survey No.10024/E and balance 3 cents is claimed in survey No.10024/D. It is based on the above claim made by the plaintiff that the defendant demands that there are 6 cents left in survey No.10024/E which belonged to the defendant as the plaintiff in the suit has no claim over the same. The complaint is that the said property had not been located and that vitiates the decree.

20. It may be noticed here that the Commissioner has categorically stated that survey No.10024 contains 35 cents of property only which is not disputed. Out of the said 35 cents, 17 cents belonged to the plaintiff, 10 cents have been given to kudikidappukaran. The Commissioner has also stated that balance 8 cents of property was outstanding with strangers. The said properties belonging to the plaintiff, kudikidappukaran and outstanding with strangers are shown as 4, 5 and 6 in Ext.C2(a)

plan.

21. Even though strong objections were filed by the defendant to the commission report, there was no attempt to substantiate the objections. There was no suggestion to the Commissioner as to whether there was any attempt to locate the property belonging to the defendant as per his document of title since the defendant had filed a suit for declaration of title and possession. There was no suggestion also to the Commissioner that the item Nos.4, 5 and 6 located are not correct. Of course, it is suggested to the Commissioner that there are sub divisions. But the Commissioner replied that she had based her plan on the settlement register.

22. Both the courts below have found that even though the defendant laid a claim to 6 cents of property in survey No.10024 and also instituted a suit in that regard, the defendant made little effort to have the property identified in terms of his document of title. It is surprising to note that the Surveyor who prepared the plan which was submitted by the Commissioner was not examined by the defendant to show that survey plan submitted

by the Surveyor is incorrect. As already stated, even though Exts.A4 and A5 do not contain any property comprised in survey Nos.10024/D and 10024/E, there is no specific denial or that it is even admitted that the plaintiff in O.S.No.1423/88 has 14 cents in survey No.10024/E and 3 cents in survey No.10024/D.

23. It is significant to notice that the Commissioner in Ext.C2(a) plan has located the property over which the defendant has made claim as item No.3 shown in pink shade. Both the courts below have found that as regards the claim made by the defendant in O.S.No.1423/88 regarding title and possession, he has filed a suit as O.S.No.149/90 and the defendant in O.S.No.1423/88 has not succeeded in proving that the properties are in his possession and he has title over the same.

24. Even though, at the first blush, the contentions taken by the learned counsel for the appellant may look attractive, on a close scrutiny, it can be found that there is no merit in that contentions. Apart from the fact that there was no attempt to have the properties of the defendant in O.S.No.1423/88 identified by the Commissioner especially when a suit for declaration of title

and possession was laid by the defendant in O.S.No.1423/88, the plaintiff in the suit has no property in the said survey numbers. In fact, as already stated, there is no dispute regarding the fact that the plaintiff in O.S.No.1423/88 has got 14 cents in survey No.10024/E and 3 cents in survey No.10024/D.

25. At the risk of repetition, one may again refer to the fact that there was no attempt from the side of the defendant in the suit when the Commissioner was examined as DW2 to show that the identification of the property is erroneous. Not a single question was put to the Commissioner to the effect that the Commissioner had not made any attempt to identify the property covered by the document of title of the defendant in spite of any demand in that regard. It is also surprising to note that there is no suggestion to the Commissioner that the allocation of 14 cents in survey No.10024/E and 3 cents in survey No.10024/D is patently wrong going by the descriptions in the document of title and also by Ext.B9. In the absence of any such suggestions, the courts below were justified in coming to the conclusion that there are no justification not to accept Ext.C2(a) plan.

26. Since in these appeals, the dispute is confined to the properties in survey No.10024 of Kollam Village, that alone is being dealt with. There is no dispute as regards the properties mentioned in the plaint in O.S.No.1423/88.

27. Coming to the cross objection, the lower court also considered the cross objection and found that it is untenable. When examined as PW1, the plaintiff in O.S.No.1423/88 submitted that he has no case that the defendant has reduced any portion of the property into his possession. Inspired by the Commissioner's report wherein it was shown that plot No.2 actually belonged to the plaintiff in O.S.No.1423/88, objections were upheld.

28. Learned counsel appearing for the respondent took aid of the proposition that possession follows title to claim relief in respect of 2 cents of property. Plot No.2 and also 1.750 cents of property which the Commissioner has, in his report and plan, shown to be actually belonged to the plaintiff has been reduced into the possession of the defendant. The court below has noticed that never a claim was raised and other items of

properties shown in the Commissioner's report belonged to the plaintiff which was actually in the possession of the defendant. At no point of time the plaintiff had a case that the defendant had trespassed into any portion of his property and reduced into his possession. The lower appellate court was therefore not inclined to allow the amendment application and also the cross objection. The lower appellate court has given cogent and convincing reason as to why the relief sought for by the plaintiff in O.S.No.1423/88 cannot be granted.

29. Therefore, in both the appeals including the cross objection, respective parties have not been able to show that the findings are either perverse or contrary to the evidence on record warranting interference under Section 100 of the Code of Civil Procedure.

Result is that, these appeals and the cross objection are without merits and they are liable to be dismissed. I do so. There will be no order as to costs.

Sd/-

P.BHAVADASAN
JUDGE

smp