

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 12TH DAY OF JUNE 2015/22ND JYAISHTA, 1937

SA.No. 836 of 2001 (G)

AGAINST THE JUDGMENT IN AS 641/1994 of SUB
COURT, NEYYATTINKARA.

AGAINST THE JUDGMENT IN OS 694/1987 of PRINCIPAL MUNSIF
COURT, NEYYATTINKARA.

APPELLANT(S)/RESPONDENTS 1 AND 2/PLAINTIFFS 1 AND 2:

1. DEVADASAN NADAR DEVANESAN,
SHAJI BHAVAN, KAIVANKALA,
KUNNATHUKAL DESOM,
KUNNATHUKAL VILLAGE, .

2. ROSILY LILLY BAI OF DO. DO.

BY ADVS.SRI.N.NANDAKUMARA MENON (SR.)
SRI.K.VINODKUMAR
SRI.P.K.MANOJKUMAR

RESPONDENT(S)/APPELLANTS 2 TO 6 & RESPONDENTS 3 AND 4/
DEFENDANTS 2 AND LRS OF 1ST DEFENDANT - DEFENDANTS 3 AND
4:

1. ENOSE RAJAYYAN,
KIZHAKKUMKARA PUTHUVAL PUTHEN VEEDU,
KAIVANKALA, THOLICAL,
KUNNATHUKAL DESOM,
KUNNATHUKAL VILLAGE.

2. RAHEL MARIYA,
THOLICAL KIZHAKKUMKARA KAIVANKALA
PUTHEN VEEDU, KUNNATHUKAL DESOM,
KUNNATHUKAL VILLAGE.

3. MARIYA VIJAYAMMA OF DO. DO.

4. ENOSE SEKHARAN OF DO. DO.

5. ENOSE SURENDRAN OF DO. DO.

6. THANKAMMA PILLAI INDIRA BAI,
PARAMESWARA VILASOM BUNGLOW,
PONAYARAKONAM OF KUNNATHUKAL DESOM,
KUNNATHUKAL VILLAGE.
7. SAMUEL LAZER,
THOLICAL KIZHAKKUMKAA PUTHEN VEEDU,
OF DO.
8. SREEDHARAN ALIAS BABU,
GENERAL COLL DRINKS HOUSE,
APNA GHAR BUILDINGS, S.B.S. ROAD,
COLABA, MUMBAI 400 005.

R1 TO 5 & 8 BY ADV. SRI.R.T.PRADEEP
R1 TO 5 & 8 BY ADV. SRI.V.VIJULAL

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON
12-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

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S.A. No. 836 of 2001
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Dated this the 12th day of June, 2015.

JUDGMENT

The plaintiffs in O.S. 694 of 1987 are the appellants. They instituted the suit seeking declaration of title and possession of the suit property and for putting up of boundary. The trial court decreed the suit. The defeated defendants carried the matter in appeal as A.S. 641 of 1994. The appellate court reversed the finding of the trial court and dismissed the suit holding that the plaintiffs in the suit had miserably failed to prove their title and possession over item Nos.1 to 3 of plaint A schedule.

2. The facts absolutely necessary for the disposal of this appeal are as follows:

A compact plot of 2.40 acres originally belonged to Vedappu and Yacob David, each of them having right over 1.20 acres of land. Vedappu sold 50 cents of his share to Thankamma, his daughter.

Thankamma had three children, namely, Salomi, Thomas and Nesan and as on the date of suit the whereabouts of Nesan was not known. Salomi, the daughter of Thankamma executed Ext.A1 dated 19.2.1979 in favour of the plaintiffs for 25 cents. They have redeemed the mortgages mentioned in Ext.A1. Salomi also sold another 25 cents as per Ext.A3 dated 7.3.1980. She also sold 20 cents to the plaintiffs as per Ext.A4 dated 2.9.1985. The plaintiffs therefore claimed absolute possession and enjoyment over 70 cents of land.

3. The records indicate that Thomas, one of the sons of Thankamma instituted a suit as O.S. 859 of 1987 claiming partition of 50 cents. The plaintiffs were also parties to the said suit. That suit was dismissed and A.S.524 of 1994 was allowed and a decree for partition was passed and $1/3^{\text{rd}}$ share was allotted in favour of the plaintiffs. A second appeal was also preferred which was also dismissed. Final decree was passed in the

partition suit and properties were set apart to each of the sharers.

4. At the time of hearing of this appeal, learned counsel appearing for the appellants pressed only one point for consideration. He has pointed out that even assuming that Salomi did not have absolute right over 50 cents which was the subject matter of partition, 20 cents assigned as per Ext.A4 lies apart and with regard to that portion of the property, there was no justification for declining relief to the plaintiffs.

5. To understand the case in the proper perspective, it is proper to look into Ext.C1(a) plan. 70 cents is shown as ABCDEFGHIJK. A schedule item No.1 is shown as BCDEFL having 25 cents. ABLJK having 25 cents is A schedule item No.2 and JFGHI is item No.3 of plaint A schedule having 20 cents. It is not in dispute that partition related to only 50 cents. It cannot be disputed that Salomi could not have assigned more

than what she could get on partition of the property which was the subject matter of gift in favour of Thankamma. Whatever that be, even though she had only right over 16 and odd cents, she had assigned 70 cents to the plaintiffs.

6. The contention taken at the time of hearing was that the plot shown as JFGHI stands apart and there can be no claim by the plaintiffs in the partition suit with respect to that property and they can have no objection in allowing the plaintiffs to put up boundary along HI and IJ line. There was a contention taken by the appellants that David's share of 1.20 acres lies on the northern side of the road and that of Vedappu lies on the southern side of the road. One need not labour much on this as this is not very relevant as of now.

7. Before the trial court parties adduced evidence. Evidence consists of the testimony of P.W.1 and documents marked as Exts.A1 to A4 from

the side of the plaintiffs. The defendants examined D.W.1 and had Ext.B1 marked. Exts.C1 and C1(a) are the commission report and plan.

8. By a strange method of reasoning, the trial court came to the conclusion that the plaintiffs have been able to establish title over the property and granted a decree. As already stated, the matter was carried in appeal by the defendants and the appellate court found that Salomi had no right to assign 70 cents and therefore the plaintiffs had miserably failed to establish title to the suit property and therefore reversed the decree of the trial court and dismissed the suit. Hence this Second Appeal.

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

i. Whether in the light of Exts.A1 to A4 registered documents and in the light of Ext.C1 report of the Commissioner and Ext.C1(a) plan prepared by the Commissioner concerning the plaint A schedule properties, the plaintiffs are

entitled for a decree for declaration of title and for putting up of boundaries on the western, southern and eastern side of the plaint schedule properties?

ii. Whether the court below was right in declining to grant a decree for putting up of boundaries to the plaintiffs on the ground of defect of title of the assignor of the plaintiffs' properties?

iii. Whether the court below was correct in accepting additional evidence adduced by the defendants along with I.A.1499 of 1990 and 364 of 1997 filed under Order XLI Rule 27 of the Code of Civil Procedure?

10. As already stated, the controversy now remains confined to JFGHI shown in Ext.C1(a) plan. It is very vehemently contended by the learned counsel for the appellants that nobody could have any claim to the property for the simple reason that even assuming that Salomi had sold property in excess of what she had i.e., over 50 cents and she still had 70 cents of property if that share is partitioned, that will go to the

plaintiffs in the suit by the principle of doctrine of feeding the grant. Viewed in that angle, there is no justification for declining relief in respect of JFGHI.

11. It is also pointed out by the learned counsel for the appellants that the neighbouring owners of the property had no objection in the plaintiffs putting up boundary along HI and IJ line. The two neighbouring owners were parties to the suit and they remained ex parte and therefore it is clear that they had no objection in the plaintiffs putting up boundary as sought for by them in the plaint.

12. Shri.R.T.Pradeep, learned counsel appearing for the respondents pointed out that the arguments would have been good, but for the subsequent suit filed by the very same plaintiffs in respect of 70 cents of property. He referred to O.S.147 of 2002 wherein the very same plaintiffs in the present suit sued for declaration of title and

possession in respect of 70 cents. It is also contended that if it was found that they had no title, they had perfected title by adverse possession and limitation. After elaborate consideration of the matter, the trial court dismissed the suit holding that the plaintiffs had miserably failed to establish the title. The matter was carried in appeal by the present plaintiffs as A.S. 438 of 2010. The appellate court did not find any reason to disagree with the trial court and on an independent appreciation of the evidence came to the conclusion that the trial court decree is correct. Therefore, the learned counsel contended that the claim of title over 70 cents stands declined and if that be so, the plaintiffs cannot now say that they had right over JFGHI.

13. There may be considerable force in the submission of the learned counsel for the respondents. While the present suit was pending,

the plaintiffs in the present suit had filed another suit for declaration of title and possession.

14. Even assuming for a moment that the parties in the present suit may not have much say in the matter, the fact remains that the claim of title over 20 cents stands rejected by the decree in O.S.147 of 2002 as confirmed in appeal by the appellate court as already mentioned. If that be so, being a suit on title, as rightly noticed by the lower appellate court, weakness of the defence case cannot strengthen the case of the plaintiffs. The plaintiffs have to establish their title by producing sufficient materials. In the light of the decree in O.S. 147 of 2002 as confirmed in appeal as A.S.438 of 2010, the plaintiffs cannot now be heard to say that they are entitled to relief in respect of item No.3 of plaint A schedule i.e., JFGHI for the simple reason that their title is seen negatived in the subsequent suit. For the

above reason, this court finds no reason to interfere with the judgment and decree of the lower appellate court and there is merit in this Second Appeal. However, if any equitable relief is available thereafter, they may agitate the same in appropriate proceedings.

This Second Appeal is dismissed.

sb.

P. BHAVADASAN,
JUDGE