

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

FRIDAY, THE 27TH DAY OF NOVEMBER 2015/6TH AGRAHAYANA, 1937

SA.No. 439 of 2002 ()

**AGAINST THE JUDGMENT & DECREE IN AS 47/2000 of SUB COURT, NEDUMANGAD
DATED 5.2.2002**

**AGAINST THE JUDGMENT & DECREE IN OS 98/1996 of ADDITIONAL MUNSIF COURT,
NEDUMANGAD DATED 14.10.1999**

APPELLANT/RESPONDENT/DEFENDANT:

**M. SADASIVAN NAIR
VADAKKUMKARA PUTHENVEEDU, KOLLANKAVU
KARIPPORU VILLAGE, NEDUMANGAD.**

BY ADV. SMT.R.BINDU

RESPONDENT/APPELLANT/PLAINTIFF:

**S. RAJAMMA
NEELA BHAVAN, KOLLAMKAVU, VADAKKUMKARA MURI
KARIPPOORU VILLAGE, NEDUMANGAD.**

**BY ADV. SRI.G.P.SHINOD
BY ADV. SRI.RAM MOHAN.G.
BY ADV. SRI.MANU V.**

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27-11-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ALEXANDER THOMAS, J.

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S.A.No. 439 of 2002

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Dated this the 27th day of November, 2015

J U D G M E N T

The appellant herein (who is the defendant, who could succeed before the trial court) is aggrieved by the judgment and decree of the lower appellate court in reversing the verdict of the trial court. The respondent herein had filed Original Suit as O.S.No. 98/1996 before the Addl. Munsiff's Court, Nedumangad, wherein the said court, as per the judgment and decree rendered therein on 14.10.1999, had dismissed the suit and also partly decreed the counter claim preferred by the defendant therein. Being aggrieved by the judgment and decree of the trial court, the plaintiff preferred Appeal Suit as A.S.No.47/2000 before the Court of Sub Judge, Nedumangad. The lower appellate court, as per the judgment and decree rendered on 5.2.2002, reversed the judgment and decree of the trial court and decreed the suit in favour of the plaintiff. As indicated earlier, being aggrieved by the aforesaid judgment of the lower appellate court that the defendant in the suit has come up

before this Court by instituting the instant Second Appeal.

2. The above Original Suit was instituted by the plaintiff (respondent herein) for declaration of title and for recovery of possession with mesne profits, etc.

3. The case set up by the plaintiff is as follows:- That the plaint schedule property belongs to one Parameswaran Pillai and his brothers. The said property forms a part of a larger extent of property (97 cents) that was allotted to Parameswaran Pillai (predecessor in interest of the plaintiff) and his brothers pursuant to the partition deed No.7386 of 1961. One Thamkamma Pillai, who was the mother of the above said Parameswaran Pillai, had life interest reserved in the said property till her death. The allottees of the above said 97 cents had later entered into a partition deed 3975/1979, whereby 28.5 cents, out of the above said property, described as A schedule therein, was allotted to Parameswaran Pillai, with a life interest therein reserved in favour of his mother, Thankamma. That when the said Thankamma was in possession and enjoyment of the plaint schedule property, she leased out a small portion of the same in the north western side of the plaint schedule property by way of an oral lease on 1.8.1971, to the defendant. That

thereupon, the defendant had put up a bunk shop in the said property and he was paying ground rent to Thankamma upto 30.10.1979 @ Rs. 7/- per month. Later, the defendant committed default in payment of the rent. Thereupon, Thankamma issued notice to the defendant on 9.8.1980 terminating the lease with effect from 31.7.1980 and she demanded him to vacate the plaint schedule property by 9.8.1980. As the defendant did not give vacant possession of the property, Thankamma and her son, Parameswaran Pillai, had instituted an Original Suit, as O.S.No.300/1980 before the Munsiff's Court, Nedumangad, for recovery of possession based on the termination of the alleged rental arrangement between the parties. Later, in 1984, Thankamma had relinquished her life interest over the plaint schedule property in favour of Parameswaran Pillai. Thereafter, the plaintiff had purchased the plaint schedule property on 18.12.1985 from Parameswaran Pillai as per Ext.A-1 sale deed No.4998/1985 dated 18.12.1985. Since the defendant had not given vacant possession of the plaint schedule property to Parameswaran Pillai, the plaintiff herein had also not obtained actual possession of the said property while she purchased the plaint schedule property from

Parameswaran Pillai. That earlier, along with the aforestated 97 cents of land and later along with the 28.5 cents of land (which formed part of 97 cents of land), the predecessors-in-interest of the plaintiff were in possession of the property, which was situated at the western extremity of the aforestated larger extent of property. That the bunk shop of the defendant is situated in about 0.75 cents of land, which is the western extremity of the aforestated property and that the bunk is facing west towards the public road. That the defendant had filed written statement in O.S.No.300/1980 denying the title of the plaintiffs therein (who are the predecessors- in-interest of the present plaintiff herein). The defendant pleaded in the earlier suit that the land in which the bunk is situated is Government puramboke land and further took up an alternate plea that in the event it is found that he is the tenant of the plaintiff therein, then he is entitled for fixity of tenure for which purpose the matter may be referred to the Land Tribunal concerned for determination of that issue in terms of the mandate of Sec.125(3) of the Kerala Land Reforms Act. Accordingly, the civil court, which dealt with O.S.No.300/1980, had referred the matter to the Land Tribunal concerned for its

determination of the aforestated issue. The Land Tribunal appointed the Revenue Inspector attached to that Tribunal as authorised officer under Sec.105A of the Land Reforms Act to appraise the Tribunal about the information necessary for the disposal of the Reference. The Revenue Inspector submitted his report (Ext.C-1 of the Land Tribunal's order, which is attached to Ext.B-1 herein). In the said report, the Revenue Inspector reported that the plaint schedule property is comprised in Sy.No. 877/2 and that the bunk of the defendant herein is situated on the western end corner of the property comprised in Sy.No.877/2, which is owned, possessed and enjoyed by the abovesaid Parameswaran Pillai, who is the 2nd plaintiff in O.S.No. 300/1980. Further it is specifically stated therein that it is not situated in any Government land. It was also specifically reported that the defendant is not entitled for fixity of tenure under the Kerala Land Reforms Act. The Civil Court in O.S.No.300/1980 held that the plaintiff therein could not prove landlord-tenant relationship as between the plaintiffs and the defendant, but that since it is proved by the report of the Revenue Inspector that the bunk is situated on the western extremity of the property owned, possessed and enjoyed by the 2nd plaintiff therein,

a decree for recovery possession could be granted in the said suit. Accordingly, the civil court, as per Ext.B-1 judgment and decree in O.S.No.300/1980 held that the plaintiffs are entitled to recovery of the plaint schedule property from the defendant after removing the bunk thereon, but that the plaintiffs are not entitled to get any arrears of rent or future rent. The defendant had taken up the matter in appeal as A.S.No.65/1986 to impugn the judgment and decree in O.S.No.300/1980. The lower appellate court held, as per Ext.A-2 judgment in A.S.No.65/86, that the plaintiffs have failed to prove landlord-tenant relationship in that case and that since they had not set up any alternate plea for recovery based on the title, the decree granted by the trial court in O.S.No.300/1980 is legally wrong and had accordingly reversed the trial court verdict. However, the lower appellate court, while dismissing the suit as per Ext.A-2, had granted liberty to the plaintiffs to institute a fresh suit seeking recovery of possession of the property from the defendant on the strength of title. The present plaintiff herein had got herself impleaded as additional respondent No.6 in A.S.No.65/1986. It is the further case of the plaintiff herein that there are specific and clear recitals in Ext.A-1 sale deed authorising her to execute the

decree in O.S.No.300/1980, by initiating appropriate proceedings as against the defendant, etc. Later the plaintiff herein had issued notice to the defendant demanding vacant possession of the property and as the defendant had failed to give vacant possession, the plaintiff herein had filed the instant suit, O.S.No.98/1996. The unamended plaint in the instant suit has proceeded as if the bunk is not situated in any Government puramboke land, but that it is situated in the western extremity of the plaint schedule property in Sy.No. 877/2 of Nedumangad village. It is the case of the plaintiff that the land comprising of an area of 0.5 cents in which the said bunk is situated, blocks the road-frontage access to the plaint schedule property and that it is highly necessary for the proper beneficial enjoyment of the plaint schedule property.

4. The defendant had resisted the plea of the plaintiff by filing their written statement. It is contended therein by the defendant that there never existed any rental arrangement as between the predecessor-in-interest of the plaintiff herein and the defendant herein and further that the bunk is situated in Government puramboke land and that he was in possession of the said property from 1962 onwards. That immediately after getting

possession of the puramboke land in 1962, he secured necessary licences from the Panchayat/Local Self Government Body concerned for running of the bunk shop. That the bunk is situated in a land, which is outside the extent and boundary of the plaint schedule property. That there are demarcating boundary stones, which demarcate the boundary between the property in which the bunk is situated and the plaint schedule property. The defendant also pleaded an alternate plea based on adverse possession. During the pendency of the suit, an Advocate Commissioner was appointed by the court as required by both sides, to identify the property with the assistance of the Taluk Surveyor concerned. The Advocate Commissioner with the assistance of the Taluk Surveyor, after due inspection of the property, had submitted Ext.C-1 report and Ext.C-1(a) plan prepared by the Taluk Surveyor, identifying the properties. In Exts.C-1 and C-1(a) the plaint schedule property is identified to comprise as five cents in Sy.No.877/2. However, the Advocate Commissioner with the assistance of the Taluk Surveyor has found that the land, in which, the bunk is situated and the small portion of the land adjacent thereto are part of Government puramboke land in Sy.No.874/1 & 2 and both these pieces of land are in survey

Nos.874/1 & 2. The land in which the bunk is situated is identified in the plan as one with light grey colour and the small portion adjacent thereto, which is in "L" shape is identified in Ext.C-1 plan and shaded as light red colour. Ext.C-1(a) plan has also identified the aforesaid 28.5 cents of land, which was earlier allotted to the predecessor in interest, out of which the plaint schedule property of five cents forms a part.

5. Both sides had accepted the correctness of Exts.C-1 report and Ext.C-1(a) plan submitted by the Advocate Commissioner with the assistance of the Taluk Surveyor. In the light of the findings in Ext.C-1 report and Ext.C-1(a) plan, the plaintiff sought for amendment of the pleadings in the plaint, which was allowed by the trial court. As per the amended pleadings, the case set up by the plaintiff is that though the registered holding of the property conveyed in Ext.A-1 sale deed is five cents in Sy.No. 877/2, the predecessors in interest of the plaintiff were always enjoying about one cent of land, which is on the western extremity of the plaint schedule property, which is comprised in Sy.No. 874/1 & 2 and that the plaintiff had secured the right to enjoy the said property in continuation of such right enjoyed by the predecessor

interest of the plaintiff. Further it is specifically pleaded that even if the plaintiff or her predecessor in interest is not having absolute proprietary title over the said excess land of one cent, in which the bunk is situated, they are having possessory title over that property in view of their continued possession enjoyed by the predecessor in interest of the plaintiff over such property. That therefore the plaintiff has better title over the land compared to the defendant. In pursuance of the amended pleas, the plaint schedule was also amended by making mentioning of this excess one cent of land comprised in Sy.No.874/ 1 & 2 so as to make it within the ambit of the schedule to the plaint. It was also pleaded that the recovery of the possession of the land, in which, the bunk is situated is highly necessary for facilitating the road frontage with the total extent of property of six cents and for its beneficial enjoyment, etc.

6. The defendant filed additional written statement to resist the pleas in the amended plaint. It is contended therein that the land in which the bunk is situated is Government puramboke land, which never formed part of the plaint schedule property and that a counter claim was also set up by the defendant in the additional written statement. The prayers set up in the counter claim

of the defendant were for a declaration of his possession over the 1.337 cents of property mentioned in the counter claim schedule, subject to the right of the Government and for a consequential injunction restraining and prohibiting the plaintiff from trespassing into the counter claim schedule property or from destroying its boundaries or structures therein or from committing any waste therein. As per the description in the schedule to the counter claim, the property covered by the counter claim schedule is consisting of a total extent of 1.337 cents of land, which comprises of the component of 337 sq.links (0.337 cents) in Sy.No. 877/2 on the western side of the 4.663 cents of land covered by Ext.A-1 sale deed and consisting of the further component of one cent of Government puramboke land in Sy.No. 874/1 & 2, which lies immediately to the western side of the aforestated 337 sq.links (0.337 cents) of land, together with the bunk of the defendant, which is situated in the aforestated land covered by the aforestated counter claim schedule.

7. In the light of the aforestated pleadings, the trial court had framed the following issues for determination:

- “1. Whether the suit is maintainable ?
2. Whether the suit is barred by resjudicata.

3. Whether the plaintiff has got title over the plaint schedule property ? If so, whether the title of the plaintiff is lost by adverse possession ?
4. Whether the declaration prayed for is allowable ?
5. Whether the recovery prayed for is allowable ?
6. Whether the mesne profits prayed for is allowable ?
7. Reliefs and costs."

8. The plaintiff had examined PWs 1 to 3 on her side and had marked Exts.A-1 to A-5 and A-6 series consisting of Exts.A-6, 6(a) and A-6(b). The defendant had examined himself as DW-1 and had marked Exts.B-1 to B-4 and B-5 series consisting of Ext.B-5, Ext.B-5(a) to B-5(j).. The Advocate Commissioner's report and the plan prepared by the Taluk Surveyor have been marked as Ext.C-1 and Ext.C-1(a) respectively.

9. As indicated earlier, the trial court held that the plaintiff could not prove the title and had accordingly dismissed the suit. However, the trial court considered the counter claim of the defendant and held that the claim of the defendant that he was having possession over the entire 1.337 cents of the counter claim schedule property cannot be recognised and that it can only to be held that the defendant had been in possession and occupation of the aforesated bunk, which is situated in the counter claim

schedule property. Therefore, the prayer for declaration of possession of the entire 1.337 cents of the counter claim schedule property was negated by the trial court. But the trial court granted a decree in the counter claim to the defendant injunction the plaintiff from dismantling or removing the aforesaid bunk alone.

10. The lower appellate court as per the impugned judgment has come to the considered conclusion that the appreciation of evidence made by the trial court to hold that the plaintiff could not prove her title and that she is not entitled for a decree for recovery of possession is wrong and untenable. The lower appellate court held that on the basis of the available materials and evidence, the plaintiff could succeed to prove the case that he she had possessory title over the plaint schedule property including one cent of Government puramboke land occupied by the defendant, which is situated in Sy.No. 874/1 & 2 and granted a decree for recovery of possession of the plaint schedule property.

11. Heard Smt.R.Bindu, learned counsel appearing for the appellant herein/defendant and Sri.G.Ram Mohan, learned counsel appearing for the respondent/plaintiff.

12. While admitting the present Second Appeal, this Court as

per order dated 13.8.2002, had framed the following question of law, which is to be entertained in this Second Appeal;

“Has not the lower appellate court wrongly interpreted the scope of Exhibit A1 Sale Deed and is not the title of the plaintiffs to the property restricted to the property described in A Schedule, which specifically shows that the property having an extent of 337 Sq. Links comprised in Sy.No.877/2 in the possession of the defendant is specifically excluded ?”

13. Though the scope of entertaining this Second Appeal in view of the aforestated question of law is on a very narrow compass, this Court has heard both sides in extenso so as to decide the larger issue as to whether the appreciation of evidence made by the lower appellate court in coming to the conclusion in favour of the plaintiff deserves to be interdicted in accordance with law. The specific case set up by the plaintiff in the present suit as well as by her predecessor in interest (who were the defendants in Exts.B-2 plaint/Ext.B-1 judgment in O.S.No.300/1980) was that the aforestated earlier larger extent of property, which was enjoyed by Parameswaran Pillai and others come to about 97 cents in Sy.No. 877/2 as per the partition deed effected in 1961 and further that the said total extent of 97 cents were partitioned between Parameswaran Pillai and brothers, whereby Parameswaran Pillai was allotted 28.5 cents of land (which forms part of the greater extent of

97 cents of land) as per the partition deed effected in the year 1979. That the mother of Parameswaran Pillai has life interest reserved therein and that she had given lease of a small portion of that property, lying on the western extremity of the aforestated property in Sy.No. 877/2, to the defendant on a rental arrangement with effect from 1.8.1971, with the liability to pay ground rent at the rate of Rs.7 per month. That later, though the defendant was earlier paying the rent, he committed breach, which led to the institution of the suit, O.S.No. 300/1980. No doubt, the plea of the rental arrangement could not be proved. Based on the alternate plea set up by the defendant in O.S.No. 300/1998, the matter was referred to the Land Tribunal for its determination under Sec. 125(3) of the Kerala Land Reforms Act. Thereupon, the Land Tribunal appointed the Revenue Inspector concerned of the Revenue Department as the authorised officer in terms of Sec.105A of the Kerala Land Reforms Act. The Revenue Inspector in that process found in his report that the plaint schedule property is comprised in Sy.No. 877/2 and that the bunk of the defendant herein is situated on the western end corner of the property comprised in Sy.No. 877/2, which is owned, possessed and enjoyed by the aforestated Parameswaran Pillai, who

is the 2nd plaintiff in O.S.No. 300/1998. Further it was specifically and clearly found in the said report of the Revenue Inspector that the bunk of the defendant is not situated in any Government land. Thereupon, based on the report of the Revenue Inspector, the Land Tribunal found that the defendant in O.S.No. 300/1998 is not entitled for fixity of tenure at any rate under the provisions of Sec.7A of the Kerala Land Reforms Act and answered the statutory Reference made by the civil court accordingly. The said order dated 25.5.1984 of the Land Tribunal, Thiruvananthapuram, in answering the said Reference has been attached along with Ext.B-1 judgment and decree dated 22.11.1985 in O.S.No.300/1998. The aforestated report of the Revenue Inspector is referred to as Ext.C-1 in the aforestated order of the Land Tribunal. The trial court in O.S.No. 300/1980 found that the plaintiffs therein could not successfully prove landlord-tenant relationship as between the plaintiffs therein and the defendant therein. However, the trial court found that the plaintiffs are entitled to get recovery of the plaint schedule property based on the finding of the Revenue Inspector in the aforestated Ext.C-1 that the bunk is situated in the plaint schedule property, which is possessed and enjoyed by the plaintiffs therein and had

accordingly decreed the suit. The said decree as per Ext.B-1 in O.S.No. 300/ 1980 was reversed in Ext.A-2 judgment and decree by the lower appellate court in A.S.No.65/1986. However, liberty was granted to the plaintiffs therein to institute fresh suit for recovery of possession based on their claimed title. Based on the report of the Revenue Inspector and the findings of the Land Tribunal, the trial court clearly held in Ext.B-1 judgment that the version given by the defendant that the bunk is situated in Government puramboke land is factually wrong and incorrect. The lower appellate court also noted in Ext.A-2 judgment in A.S.No.65/1986 that the specific finding of the Land Tribunal that the bunk is not situated in Government land. The lower appellate court in Ext.A-2 judgment has also found that DW-1 therein (who is defendant therein/ defendant herein) has admitted that the Revenue Inspector had measured the property and that the aforesaid finding of the Land Tribunal is correct. Therefore, at the time of the institution of the suit in O.S.No. 300/1980 and thereafter, all the parties except the defendant were proceeding on the factual premise that the bunk is situated within the northern extremity of the plaint schedule property therein and that the bunk is situated in that private property owned by the

predecessor in interest of the plaintiff herein and not in any Government puramboke land. The officials of the Revenue Department were also proceeding on the factual premise (obviously based on the Revenue records concerned) that the bunk is situated in the private land covered by the plaint schedule and not the Government puramboke land. The defendant herein, DW-1 herein, has also deposed before the trial court in the instant suit that he had made an application for assignment of the land, in which the bunk is situated before the competent Revenue authority concerned, which was rejected by the competent authority concerned on the ground that the land in which the bunk is situated is not Government/puramboke land and that therefore it is not an assignable land. Therefore, consistently the Revenue officials concerned were also proceeding on the factual premise that the land in which the aforestated bunk is situated is not Government/puramboke land, but in private land of the predecessor in interest of the plaintiff as now covered by the unamended plaint schedule property. True that the defendant herein was resisting the pleas in O.S.No.300/1980 with the specific plea that the bunk is situated in Government/ puramboke land. After the reception of the statutory

report of the Revenue Inspector in the statutory reference made by the civil court, even the defendant herein believed in the correctness of the factual findings made in Ext.C-1 report therein by the Revenue Inspector that the bunk is situated in private land belonging to the predecessor in interest of the plaintiff and not in Government/ puramboke land. It is accordingly that the defendant herein has clearly admitted in the previous round of litigation, as reflected in page 15 of Ext.A-2 judgment in A.S.No. 65/1986, that the aforestated finding of the Land Tribunal based on the report of the Revenue Inspector is correct. It is in the light of these aspects that the plaintiffs in O.S.No. 300/1980 as well as the plaintiff herein were under the bona fide belief that the bunk is situated in the aforestated plaint schedule property belonging to them. Ext.C-1 report of the Advocate Commissioner along with Ext.C-1(a) plan prepared by the Taluk Surveyor was submitted before the trial court in the instant case only on 19.1.1998. It is only thereafter that for the first time, the parties were made to realise based on the plan prepared by the Taluk Surveyor based on the survey records that the aforestated land, in which, the bunk is situated and the land immediately adjacent thereto (which is described in the amended

plaint herein as coming to an extent of about one cent) is situated in Government puramboke land. Therefore, it is in the light of these aspects that the plaintiff had amended the plea accordingly in the manner indicated earlier herein above. In the amended pleadings the plaintiff has also set up a specific plea that in the event it is found that the plaintiff is not having proprietary title over the aforestated excess land in which the bunk is situated, then she is entitled to succeed on the basis of her possessory title over the land by virtue of the continuance possession enjoyed by the predecessor-in-interest of the plaintiff in respect of the plaint schedule property as well as the excess one cent land. Therefore, the issue to be determined is as to whether the plaintiff could successfully establish her pleas set up on the basis the amendment of the plaint and not with reference to the pleadings in the unamended plaint, which had proceeded on an entirely different factual premise as stated above.

14. From the evidence let in in this case, it is clear beyond any doubt that the predecessor in interest of the plaintiff or the plaintiff could not prove the rental arrangement that is said to have existed between the parties and that the plaintiff or her predecessor

in interest could not prove proprietary title over the plaint schedule property. Even though the defendant had conceded regarding the correctness of the finding of the Revenue Inspector of the Land Tribunal to the effect that the bunk is situated in the property owned, possessed and enjoyed by the predecessor in interest, the Advocate Commissioner with the assistance of the Taluk Surveyor has clearly found that the land in which the bunk is situated and the immediately adjacent portion of land thereto, are Government puramboke land. It is on this basis that the amended pleas in the plaint have been put up by the plaintiff. Therefore, the main and limited question to be determined in these proceedings is as to whether the plaintiff could prove possessory title over the amended plaint schedule property.

15. In this regard it would be profitable to refer to the legal position in respect of the matters concerning the possessory title. It is well settled law that not only the Specific Relief Act but also the provisions of the Code of Criminal Procedure provide for safeguarding possessory title. The empowered Magistrate having jurisdiction under Sec.145 of the Code of Criminal Procedure can exercise his discretionary power in order to maintain such

possession until the eviction in due course of law or to restore possession, if the possessor has been forcibly and wrongly dispossessed within two months preceding. Over and above the statutory provisions, the rule of English law envisages that possession is good title against anyone who cannot show a better title, has been broadly accepted and recognized by the courts in India. The Division Bench of this Court in the case *Narayanan v. Mathai*, reported in 1966 KLT 1, has held as follows:

“Possession by itself is a substantive right recognised by law and has legal incidents attached to it apart from ownership. Even before the acquisition of statutory title by adverse possession for the requisite period under the Limitation Act, the possessory owner has well-defined rights in property. It is now settled beyond all dispute that this interest is heritable, devisable and transferable. This interest is referred to as possessory title as distinct from proprietary title. A person having such interest must be allowed to enforce those rights against all the world except those who have a better title or better right than himself. Possession is evidence of ownership and is itself the foundation of a right to possession. It is a good title against all the world except the person who can show a better title. Therefore a person in juridical possession, if dispossessed by a trespasser without title, can recover possession on the sole ground of his prior possession even beyond six months from the date of dispossession”.

Further, a Division Bench of this Court in the case *Rev. Father K.C.Alexander v. N.S.S. Ltd.* reported in 1966 KLT 333, has held as follows:

"8. But, these statutory provisions notwithstanding, the courts in India have all along adopted the rule of English law that "possession is a good title of right against any one who cannot show a better, and that a wrongful possessor has the right of an owner with respect to all persons except earlier possessors and except the true owner himself." (Salmond on Jurisprudence Eleventh Edition, page

345—see also pages 473 and 474). Or, in the words of the Privy Council in *Perry v. Clissold* 1907 A. C. 73 at 79 "a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner." And the several High Courts are at one in holding that a person in possession, even if he be a mere trespasser, can, on the strength of his possessory title, get back possession from any person, (except the true owner) who dispossesses him, if he brings a suit within the 12 years limited by law if he brings it within six months under S.9 of the Specific Relief Act he can recover possession even from the true owner. This view has been affirmed by a division bench of this court in a recent decision not yet reported (S. A. No. 901 of 1961) after an exhaustive discussion of authority, both Indian and English, and there is nothing that we can usefully add to what has been there said except perhaps to observe that the High Court of Calcutta which alone had earlier struck a discordant note in *Nisa Chand Gaita v. Kanchiram Bagani* ILR. 26 Calcutta 579 has fallen into line with the remaining High Courts with *Currimbhoy & Co. v. L. A. Creet* AIR. 1930 Calcutta 113 and *Satishchandra v. Madanmohan* AIR. 1931 Calcutta 483.

9. If possession by itself confers title against all but the true owner, it must follow that an earlier possessor has a prior, and, therefore, a better title than a later possessor and can, unless his title has been extinguished by limitation, recover not merely from the trespasser who dispossessed him but from any subsequent trespasser. As observed by Salmond at pages 473 and 474 of his book on Jurisprudence (Eleventh edition)

"If a possessory owner is wrongfully deprived of the thing by a person other than the true owner, he can recover it. For the defendant cannot set up as a defence his own possessory title, since it is later than, and consequently inferior to the possessory title of the plaintiff. Nor can he set up as a defence the title of the true owner the jus tertii, as it is called; the plaintiff has a better, because an earlier, title than the defendant, and it is irrelevant that the title of some other person, not a party to the suit, is better still."

Or as Pollock and Wright put it at page 95 of their book "Possession in the Common Law",

"Possession being once admitted to be a root of title, every possession must create a title which, as against all subsequent intruders, (we might add, not necessarily the immediate intruder) has all the incidents and advantages of a true title..... In the language of the modern authorities, 'possession is good title' nothing less 'against all but the true owner'."

10. Just as a true owner who is dispossessed can, within the period limited by law, bring a suit for possession against the person in possession notwithstanding that the latter is not the

immediate but only a subsequent intruder, irrespective of the number or nature of the intervening adverse possessory titles, so can a possessory owner against all but the true owner. Does it make any difference then that, in between, there was an interval during which the true owner was in possession? Would that extinguish the title of all earlier possessory owners so as to entrench a subsequent trespasser and give him good title against all but the true owner? We think not. For, the title of a possessory owner springs from the fact of his possession and that is not erased by the true owner regaining possession. The possessory owner's title continues to exist; only it is an imperfect title which is of no avail against the perfect title of the true owner; but, against the inferior title of any subsequent possessor, it is a good title. Halsbury (Simonds Edition, Vol. 24 Para.492 at page 255) says on the authority of *Asher v. Whitlock* (1865) 1 Q. B. 1 and *Perry v. Clissold* 1907 A. C. 73,

"if a series of trespassers, adverse to one another and to the rightful owner, take and keep possession of land continuously in succession for various periods, each less than, but exceeding in the whole, twelve years, the rightful owner is barred. The earliest possessor within the twelve years has the best title."

The reason why the earliest possessor within the twelve years is allowed to recover from the latest is that he has a prior and therefore a better title, a title which becomes absolute the moment the title of the rightful owner is barred; it is not that he is entitled to evict the trespasser who dispossessed him and that trespasser the next until the latest is reached; and therefore it should make no difference that, in between, there was an interval when the true owner was in possession from whom no recovery was possible. So long as the actual possessor is only a subsequent trespasser with an inferior title, an earlier possessor can recover on the strength of his superior title.'

16. It is also brought to notice that the Division Bench ruling of this Court in *Rev. Father K.C.Alexander v. N.S.S. Ltd.* reported in 1966 KLT 333= AIR 1966 Ker.286, has been affirmed by the Apex Court in the case *N.S.S. Ltd. v. Rev. Father K.C.Alexander*, reported in AIR 1968 SC 1165 = 1968 KLT 182 = 1968 KLJ 176 = 1968 KHC 280.

17. In the case Philip & Ors. v. Skaria & Ors. reported in 1987 (1) KLT 213, this Court held that possession by itself is a substantive right recognized by law and apart from ownership, it has got all the legal incidents attached to it. That even before acquiring statutory rights by adverse possession or otherwise, he has got well defined rights in the property. As against the whole world except those who are having better right or title than him, his possessory title will hold good and must be allowed to be in force. Possessory title is heritable, divisible and transferable. Possessory title is distinct from proprietary title. The normal rule is that if such a suit is brought within six months of dispossession under Sec.6 of the Specific Relief Act on the strength of previous possession, title need not be alleged and proved. But if the suit is brought beyond six months of dispossession, the plaintiff cannot recover merely on the strength of possession, but he has to prove title also. But that rule is applicable only if the person, who dispossessed him, is having title or better title. A rank trespasser having no right cannot set up his own possessory title obtained by force, as a defence because it is later than and consequently inferior to the possessory title of the plaintiff. Earlier possessory title is better than

possessory title obtained later by dispossession without recourse to law. Existing possession, however, acquired, is protected against any interference by a mere wrongdoer. That wrongdoer cannot defend himself by showing a better title in a third person under whom he himself is not claiming. This Court in Philip's case supra also held the impact of the bar created by Sec.20A(1), which provided that:—

“No civil court shall have jurisdiction to entertain any suit or proceeding for the eviction of any person who is in unauthorised occupation of any land which is the property of Government, whether a puramboke or not, or the recovery of any fine, assessment, or prohibitory assessment or the value of any trees destroyed or appropriated or any compensation or damages, payable under this Act or cost of eviction or removal of encroachments, or any portion of such fine, assessment, prohibitory assessment, value of trees, compensation, damages or cost.”

18. This Court held in Philip's case supra that the effect of the prohibition engrafted in Sec.20A(1) is that the right conferred on the Government for eviction and the methods provided for that purpose in the Act and Rules shall not be superseded by somebody else filing suits before civil courts. If a person is in unauthorised occupation of the land belonging to the Government, the right to evict him and otherwise deal with him is within the sole competence of the Government. The prohibition is only regarding matters provided for in the Kerala Land Conservancy Act and the Rules

thereunder. If somebody other than the Government forcibly evicts a person in unauthorised possession of land belonging to Government, that is a contingency for which provision is not made as per Sec.20A. That the prohibition contained in S.20A cannot affect the common law rights of such a person to seek relief against trespasser to recover possession through the court of law on the strength of his possessory title, though it did not mature into statutory title. An unauthorised occupant of a Government land who acquired possessory title has a valid title against all the world except the Government which is the actual owner. He could be evicted only by the Government. If he is forcibly evicted by somebody else his right to recover possession is not in any way affected by S.20A of the Kerala Land Conservancy Act, etc. It would be profitable to make a reference to para 8 of the ruling in Philip's case supra, which reads as follows:

"8 Possession by itself is a substantive right recognised by law. Apart from ownership it has got all the legal incidents attached to it. Even before acquiring statutory rights by adverse possession or otherwise he has got well defined rights in the property. As against the whole world except those who are having better right or title than him his possessory title will hold good and must be allowed to be in force. Possession is not title only against those who are having better right or title. Possessory title is heritable, devisable and transferable. Possessory title is distinct from proprietary title. If dispossessed without recourse to law possessory title is good even as against the true owner provided a suit is brought within six months of dispossession under S.9 of the Specific Relief Act on the strength of the possessory right. Title or better title may not be a defence in such

a suit in which all questions of title are foreign to the scope of the enquiry. Bar of suits beyond six months of dispossession in a suit brought merely on the strength of dispossession is applicable only when it is against the true owner. Against all others there is the period of limitation fixed under the Limitation Act within which a suit for possession can be brought on the strength of possession alleging dispossession. Against them possessory title is good title. The normal rule is that if a suit is brought within six months of dispossession under S.9 of the Specific Relief Act on the strength of previous possession, title need not be alleged and proved. But if the suit is brought beyond six months of dispossession the plaintiff cannot recover merely on the strength of possession, but he has to prove title also. But that rule is applicable only if the person who dispossessed him is having title or better title. A rank trespasser having no right cannot set up his own possessory title obtained by force as a defence because it is later than and consequently inferior to the possessory title of the plaintiff. Earlier possessory title is better than possessory title obtained later by dispossession without recourse to law. The expediency of this doctrine of possessory ownership is that if it were not for such a rule, force and fraud would be left to determine all disputes as to possession between persons of whom neither could show an unimpeachable title to the thing as the true owner of it. Existing possession, however acquired, is protected against any interference by a mere wrongdoer. Wrongdoer cannot defend himself by showing a better title in a third person under whom he himself is not claiming."

19. In the case *Krishnankutty Nair v. Subramanian* reported in 1988 (1) KLT 886 = 1988 (1) KLJ 543 = 1988 KHC 241, this Court held that even possession without valid title is a substantive right which has been recognized by law and that such possession has legal incidents attached to it apart from ownership. That a person can always protect his possessory title from invasion by trespassers. A person having possessory title can enforce that limited right against all persons except those who have a better title or a better right than himself. That where a person in possession but having no

proprietary title is ejected from his property, he can definitely sue for recovery of possession on the strength of his possessory title. The principle underlying the rule is that possession is a good title against all except the person who can show a better title. The Court can always protect the possessory right of a person except against the true owner unless the remedy of the latter is barred by limitation. In a case where a plaintiff failed to prove his proprietary title, but has proved his prior possession, he is entitled to a decree for recovery of possession the moment it is found that the defendant is a trespasser. That it will not be necessary for the plaintiff to establish his possession for the statutory period. The position is that as between two persons who are unable to make out a valid title, the person who was having possession prior to the dispossession, is really entitled to have the property restored to him from the trespasser. A trespasser does not have any right whatsoever to dispossess a person in possession. A trespasser cannot take the stand that the person whom he had thrown out from the property had no proprietary title and consequently the least concerned with any other interest in the property. As possession is good title against all but the true owner and as a

person in peaceful possession of land has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed, the importance of possessory title cannot be ignored. This Court held in Krishnankutty Nair's case *supra* in paras 4 to 6 as follows:

'4. In the above context we have to consider whether the plaintiff is entitled to recover the property from the defendant on the strength of his possessory title. Possession even without valid title is a substantive right which has been recognised by law. Such possession has legal incidents attached to it apart from ownership. A person can always protect his possessory title from invasion by trespassers. A person having possessory title can enforce that limited right against all persons except those who have a better title or a better right than himself. Where a person in possession but having no proprietary title is ejected from his property he can definitely sue for recovery of possession on the strength of his possessory title. The principle underlying the rule that possession is a good title against all except the person who can show a better title is stated in *Narayana Row v. Dharmachar* (ILR. 26 Madras 514) thus:-

The principle underlying the rule of law in question seems to be that acquisition of title by operation of the law of limitation being a lawful mode of acquiring title, the person in peaceable possession is entitled to maintain such possession against all but the true owner and that therefore a third party who has no better title than the person in possession has no right to invade upon the possession of the latter and interrupt or arrest his lawful acquisition of title by his continuing to remain in, possession for the statutory period. It is the true owner alone that is entitled to assert his title as against the person wrongfully in possession, and prevent such wrongful possession ripening into prescriptive title But a third party who without deriving title under the true owner and without his authority, interrupts such possession before it has ripened into prescriptive title, is a trespasser; not only against the true owner, but also against the party actually in possession; and, subject to the law of limitation, either of them is entitled to maintain a suit in ejectment against such intruder as a trespasser."

5. The Court can always protect the possessory right of a person except against the true owner unless the remedy of the latter is barred by limitation. In a case where a plaintiff failed to prove his proprietary title but has proved his prior possession he is entitled to a decree for recovery of possession the moment it is found that the defendant is a trespasser. It will not be necessary for the plaintiff to establish his possession for the statutory period. In *AIR. 1924 Patna 709 (Akal Ahir v. Baijnath Das)* it has been held that a person in

possession of the land even without title thereto could not be successfully turned out by another person who also had no title. The Patna High Court held as follows:-

There is abundant authority for the proposition that if a person is in possession of land even without title thereto he cannot be successfully turned put by another person who also had no title, and if such a thing should happen the person first in possession is entitled to be put again in possession even if he should fail to prove that he had a title to the land".

Thus, the position is that as between two persons who are unable to make out a valid title the person who was having possession prior to the dispossession is really entitled to have the property restored to him from the trespasser. The settled legal position is that a trespasser does not have any right whatever to dispossess a person in possession. A trespasser cannot take the stand that the person whom he had thrown out from the property had no proprietary title and consequently the least concerned with any other interest in the property. As possession is good title against all but the true owner and as a person in peaceful possession of land has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed, the importance of possessory title cannot be ignored.

6. In *K. C. Alexander v. Nair Service Society Ltd.* (AIR. 1966 Kerala 286) the Court observed thus:

"Possession by itself confers title against all but the true owner; hence an earlier possessor has a prior, and, therefore, a better title than a later possessor and is entitled unless his title has been extinguished by limitation, to recover not merely from the trespasser who dispossessed him but from any subsequent trespasser. Just as a true owner who is dispossessed can, within the period limited by law, institute a suit for possession against the person in possession notwithstanding that the latter is not the immediate but only a subsequent intruder, irrespective of the number or nature of the intervening adverse possessory titles, so can a possessory owner do so against all but the true owner "

Thus the irrefutable position is that a person in possession of land can on the strength of his possessory title sue for recovery of possession of the property from a trespasser.

In the light of these aspects, this Court held that though the plaintiff therein has not succeeded in establishing his legal title as it is based on oral assignment, there is evidence regarding his possessory title in the property and that therefore on the strength of the possessory

title, he is entitled to recover the property from the defendant therein and accordingly, it was held that the plaintiff therein is entitled to recovery of possession of the property from the defendant therein and the concurrent findings of the courts below were set aside and the suit for recovery of possession was decreed.

20. After scanning the case laws in this regard, this Court in the case in *Pathukutty & Anr. v. Aisakutty & Ors.* reported in 2014 (2) KHC 212 = 2014 (2) KLJ 455 = 2014 (2) KLT SN 50, has held that though in primitive society, absolute ownership was the rule, the concept of limited ownership came into existence in later times. Although the definitions of ownership are more appropriate to absolute ownership, nevertheless limited owners are also regarded as owners. That all the co-owners have equal rights and co-ordinate interest in the property. Theirs shares may be either fixed or indeterminate. Each co-owner is in theory interested in every infinitesimal portion of the subject matter and each has the right irrespective of the quantity of his interest to be in possession of every part and parcel of the property jointly with others. That joint property is the generic name given to any property held by co-owners. Any property held by tenants in common is sometimes

called common property in order to distinguish the same from other forms of joint property. That therefore the word ownership or co-ownership does not confine to absolute ownership but also to limited right like possessory right as the one which arises for consideration in the case therein. This Court therein also noted the Division Bench decision in Rev. Father K.C.Alexander's case, reported in 1996 KLT 333, wherein it was held that a person in possession, even if he be a trespasser, can on the strength of his title, get back possession from any person (except the true owner) who dispossesses him, etc. and that the said ruling was affirmed by the Supreme Court in N.S.S. v. Rev. Father K.C.Alexander reported in AIR 1968 SC 1165. It was held therein that possessory title is good title against all, though not against the true owner. That possessory title is heritable, divisible and transferable and possessory title is distinct and different from proprietary title. It would be profitable to refer to paras 18 to 21 of that ruling (see KHC report) which read as follows:

'18. In primitive Society absolute ownership was the rule. Limited ownership came into existence in later times. Although the definitions of ownership are more appropriate to absolute ownership, limited owners are nevertheless regarded as owners. All co-owners have equal rights and co-ordinate interest in the property. Their shares may be either fixed or indeterminate. Each coowner is in theory interested in every infinitesimal portion of the subject matter

and each has the right irrespective of the quantity of his interest to be in possession of every part and parcel of the property jointly with others. The trust of co-ownership is co-ordinate interest. If there is no joint possession of the parties in respect of the entire property, there is no co-ownership. Applying the test of equal rights of enjoyment and possession of the entire property the claim for partition made by the deceased first plaintiff to get her share in the property is well justified. Joint property is the generic name given to any property held by co-owners. Any property held by tenants in common is sometimes called common property in order to distinguish the same from other forms of joint property. Therefore, the word ownership or co-ownership does not confine to absolute ownership but also to limited rights like possessory right as the one which arises for consideration in the case on hand.

19. Another Division Bench of this Court in Rev. Father K.C. Alexander v. Nair Service Society Ltd. – 1966 KLT 333 it was held :

“A person in possession, even if he be a trespasser, can on the strength of his possessory title, get back possession from any person (except the true owner) who dispossesses him, if he brings a suit within 12 years period .”

20. The aforesaid decision was affirmed by the Hon'ble Supreme Court in Nair Service Society Ltd. v. Rev. Father K.C. Alexander – 1968 KLT 182. Therefore, Sri.Rammohan, the learned counsel for the appellants would submit that if possession by itself confers title against all but the true owner, it must follow that his interest; namely possession, has to be protected. When the other person in joint possession tries to disturb his possession then certainly his remedy is to sue for partition and allotment of his share in the possessory title. In such cases, the question whether the plaintiff has proved proprietary title to the property or not does not assume much relevance so long as the defendant/respondent does not prove better title. The defendant was held to be only having joint possession along with the plaintiff. Since that being the concluded finding in the earlier case, the defendant cannot now contend that the plaintiff should prove proprietary title so as to enable her to get partition of the property. If anybody claiming better title comes forward, the decree for partition passed may not bind such a person who claims better title. But so far as the defendant is concerned , he cannot contend that the plaintiff should prove proprietary title so as to get a decree for partition. What is sought for is only the partition of the possessory right and not the proprietary title or ownership of the property. Possession by itself is a substantive right recognized by law. It has got all the legal incidents attached to it.'

21. Possessory title is good title against all though not against the true owner. Therefore, possessory title is heritable, divisible and transferable. Possessory title is distinct and different from proprietary

title. Hence, the finding entered by the courts below that since the plaintiff could not prove title to the property, she is not entitled to get partition of the property is bereft of any merit. The partition was sought in respect of the possessory right exercised by Aaleema Umma. That will hold good against all, though it may not hold against the true owner. So long as the defendants are concerned, their possession was found to be only a joint possession along with the plaintiff. Going by the findings entered earlier, it was clear that the property was in the joint possession of Aleema Umma and Muhammed, the defendant. The decisions cited supra were followed by another Bench of this Court in Philip and Others v. State of Kerala & Others - (1987 (1) KLT 213 and in Krishnankutty Nair v. Subramanian (1988 (1) KLT 886).'

In the light of the above legal position, the main aspect to be considered is as to whether the plaintiff herein could prove possessory title over the property in question.

21. Ext.A-6 registers are the main documents relied on by the plaintiff to establish her plea that the predecessor in interest of the plaintiff had possession of the plaint schedule property and that it is on this basis that she had permitted the defendant to set up a bunk in question. PW-3 (Secretary of the Nedumangad Municipality) has deposed that Ext.A-6 series are the assessment registers of that Municipality, which show the details in respect of the aforestated bunk in question. Ext.A-6(b) is in respect of the period from 1979-1984, Ext.A-6(a) is in respect of the period from 1989-94 and Ext.A-6 is assessment register for the period from 1994-99. In all these documents, Thankamma is shown as the owner of the bunk in

question. In Ext.A-6(b) for the period from 1979-1984, the defendant is shown as tenant. In Ext.A6(a) for the period from 1989-94 and in Ext.A6 for the period from 94-99 the owner Thankamma herself is shown as occupier/tenant. The defendant has no case that the door number of the bunk shown in Ext.A-6 series of documents is not pertaining to the bunk involved in this case. The trial court has not placed reliance on Ext.A-6 series of documents mainly on the ground that no land tax receipts were produced by the plaintiff in respect of the property in which the bunk is situated and also that no other Revenue documents were also produced by the plaintiff in respect of the property and further that Ext.A-6(a) series of documents do not show the survey number of the property in which the bunk is situated. It is on this specific basis that the trial court comes to the conclusion that Ext.A-6(a) series cannot be relied as a safe piece of evidence in proceeding in favour of the plaintiff. However, the appellate court clearly finds that it is a matter of consistent official practice in Local Self Bodies like the Municipalities/Panchayaths that their assessment registers in respect of the buildings will not show the survey number of the property in which the buildings are situated. Thus the approach of

the lower appellate court cannot be faulted. Further, it is to be noted that the trial court has discarded Ext.A-6 series of documents mainly on the ground that that the land tax receipts or other Revenue records have not been produced by the plaintiff in respect of the title of the property in which the the bunk is situated and that therefore though the name of the predecessor in interest of the plaintiff (Thankamma) is shown as the owner of the bunk in question as per those assessment registers of the Municipality, the same will not amount to sufficient proof regarding the title of the predecessor in interest of the plaintiff. This approach of the trial court is found to be completely erroneous and wrong by the lower appellate court.

22. It is to be borne in mind that a specific alternate plea put up by the plaintiff in her amended plaint is that even if the plaintiff is not having any legal/proprietary title over the plaint schedule property, she and predecessor in interest are having possessory title over the plaint schedule property and that possession of the property was being enjoyed by the predecessor in interest of the plaintiff in continuation of the possession of the property under their legal title. Therefore since the main claim to be considered by

the trial court was one based on possessory title and not based on legal title, it was totally irrelevant and wrong for the trial court to have insisted that the plaintiff ought to have produced documents by way of land tax receipts or such other Revenue documents to prove her title. Therefore, it is merely on the basis that the plaintiff could not produce land tax receipt or such other Revenue documents in respect of the property in question that the trial court has discarded the evidence based on Ext.A-6 register. Therefore, the lower appellate court was fully right in correcting this wrong approach of the trial court and in having reached the considered conclusion that Ext.A-6 documents would clearly point to the fact that the predecessors in interest of the plaintiff were having possession of the property in which the bunk is situated and the land immediately adjacent thereto (which forms part of the amended plaint schedule) and consequently that this strongly probabalise the case of the plaintiff that the defendant would have set up the bunk in question in the amended plaint schedule property on the basis of the permission granted by the predecessors in interest of the plaintiff, who were having possession over the said property, etc. Therefore, this Court is of the considered opinion that

the lower appellate court was fully right in coming to the considered conclusion that Ext.A-6 series of documents could be relied upon as a strong piece of evidence in favour of the possessory title set up by the plaintiff in the amended plaint.

23. Another strong circumstance emanating in this case is that the Revenue Inspector in his aforestated Ext.C-1 report (which formed part of Land Tribunal's order appended to Ext.B-1 judgment in O.S.No.300/1998) that the defendant's bunk is situated in the property owned, enjoyed and possessed by the predecessor-in-interest of the plaintiff. True, that the survey number mentioned in the aforestated Ext.C-1 as well as Ext.B-1 decree is pertaining to Sy.No.877/2, but as stated earlier, the plaintiff's predecessors-in-interest and the Revenue Department, etc., were proceeding on the bonafide belief that the bunk is situated in the property of the predecessor-in-interest of the plaintiff in Sy.No.877/2. Even the defendant has also admitted the correctness of this finding of the Land Tribunal at that point of time as evident from Ext.A-2 judgment. True, that in the light of Ext.C-1 report of the Advocate Commissioner and Ext.C-1(a) plan of the Taluk Surveyor, it is now admitted by all the parties, including the plaintiff, that the bunk is

situated in Government puramboke land situated in Sy.No.874/1 & 2. But the fact remains that even at that point of time, the Revenue Inspector, who was the statutory authorised officer appointed by the Land Tribunal, has factually found that the bunk is situated in a property which was under the enjoyment and possession of the predecessor-in-interest of the plaintiff. Even though the findings of the Revenue Inspector regarding the survey number of the said land and about its owner, etc., are not correct, in the light of Ext.C-1 and Ext.C-1(a), the staring fact is that the Revenue Inspector has clearly found therein that the bunk is situated in a land which was enjoyed and possessed by the predecessor-in-interest of the plaintiff. Even the defendant herein, who was examined as DW1 in the instant suit, admitted in evidence that he had made an application for assignment of the land in which the bunk is situated and that the application for land assignment was rejected by the competent Revenue authority concerned on the ground that the said land is not situated in the Government puramboke land and that it is in a private land. Therefore, these aspects would also lead to an additional reinforcing circumstance to show that the property in question was at least in the enjoyment and possession of the

predecessor-in-interest of the plaintiff.

24. Though the defendant in his written statement had clearly asserted that there are boundary stones which demarcate the property in which the bunk is situated and the plaint schedule property covered by Ext.A-1, the Advocate Commissioner with the assistance of the Taluk Surveyor has clearly reported that there are no boundary stones which in anyway demarcate or differentiate the land in which the bunk is situated from the property of the plaintiff covered by Ext.A-1. The aforestated report of the Advocate Commissioner has been admitted by both the parties concerned. Therefore, this would clearly establish the incorrectness of the aforestated factual assertion made by the defendant in his written statement regarding the boundary stones. The Advocate Commissioner has also clearly stated that the land in which the bunk is situated and the small portion of land adjacent immediately thereto are lying contiguous to the property covered by Ext.A-1. True, that the former land (covered by amended plaint schedule) has been identified to lie in Sy.No.874/1 & 2 and that it is the Government puramboke land whereas the latter property of 5 cents has been identified to be in Sy.No.877/2. But the undisputed fact

emanating from the Advocate Commission report that there are no boundary stones demarcating these properties and it is lying contiguous, clearly disprove the assertion made by the defendant that there are boundary stones demarcating the two. This would also be a strong circumstantial aspect which would reinforce the aforestated clinching findings regarding the enjoyment and possession of the amended plant schedule property by the predecessors-in-interest of the plaintiff.

25. Both the courts below have found that the road frontage of the amended plant schedule of the property stands blocked by the setting up of the bunk in the property in question. DW1 (defendant herein) has also admitted in evidence that the plaintiff's property has no road frontage and that a bunk is situated in the road frontage of the plaintiff's property. But it is also stated by him that the access from the public road to the plaintiff's property is through another property (Chavadipuram) which is adjacent to the property in which the bunk is situated. The lower appellate court clearly finds in page 24 of the impugned judgment that in normal course, nobody will permit another person to occupy the entire puramboke land in front of his property blocking its road frontage

and that this is also a clear aspect from where it can be seen that there is no separate lie to the property occupied by the defendant. From the aforestated aspects, this Court is of the considered opinion that in the normal ordinary course, no reasonable and prudent person would have permitted any other person to occupy the puramboke land in front of the former's property so as to block the road frontage of the former's property. It should also be remembered that at the time of the setting up of the bunk, even the Revenue Officers has proceeded on the basis that the bunk is situated in a land which is owned and enjoyed by the predecessor-in-interest of the plaintiff. Therefore, this is also a clear point to the fact that the occupation of the bunk by the defendant would have been only with the permission or consent of the predecessor-in-interest of the plaintiff as otherwise a reasonable prudent man would have certainly objected to the setting up of the bunk leading to the blockage of the road frontage of one's property.

26. Further, it is to be noted that the specific case set up by the plaintiff was that the defendant was permitted by the plaintiff's predecessor-in-interest to set up the bunk in question on 1.8.1971 whereas the specific contra assertion made by the defendant in his

written statement was that he had on his own set up the bunk in the year 1962 in Government puramboke land and that immediately thereafter he had secured necessary licenses from the local self body concerned for conducting his trade in the bunk. However, the defendant while giving evidence as DW1 has departed from this crucial aspect and has deposed that though he had set up the bunk in the year 1962, he has secured licence only 3 years thereafter. This aspect of the matter has to be evaluated in the light of the other attendant relevant circumstances in this regard. The defendant has produced Exts.B-3 to B-5 series to show that he was in occupation of the bunk and that he had secured licence to conduct the trade from the local self body and that he had paid Profession Tax to the local self body, etc. Most of these documents were also produced in the previous round of litigation in O.S.No.300/1980. Exts.B-3 dated 8.3.1977, B-4 dated 22.1.1977, B-5 dated 8.6.1978, B5(a) dated 26.6.1978, B-5(b) dated 25.11.1978, B-5(c) dated 8.6.1978, B-5(d) dated 30.12.1980, B-5 (e) dated 15.9.1971, B-5(f) dated 15.11.1972, B-5(g) dated 26.7.1979, B-5(i) dated 8.6.1978 and B-5(j) dated 9.11.1972 were marked as Exts.B-1, B-2, B-4(e), B-4(h), B-4(g), B-4(i), B-4, B-4(a),

B-4(b), B-4(c), B-4(e) and B-3 respectively in O.S.No.300/1980. Both sides admit that all the aforesaid Ext.B series documents produced by the defendant are pertaining to the bunk in question. The oldest among these B series documents produced by the defendant is Ext.B-5(e) dated 15.9.1971 and the next oldest is Ext.B-5(j) dated 9.11.1972, Ext.B-5(f) dated 15.11.1972, etc. Ext.B-5(e) is for the period 1971-72 and 1972-73 and its seen issued by the Nedumangad Panchayath in respect of the PFA licence fee in respect of the bunk in question. Presumably, it appears to be the licence fee paid in respect of the licence under the Prevention of Food Adulteration Act (PFA) for the articles traded in the defendant's bunk. Ext.B-5(j) dated 9.11.1972 is the demand notice for Profession Tax issued by the Nedumangad Panchayath for the period from 1.4.1972 to 30.9.1972. Ext.B-5(f) dated 15.11.1972 is in respect of the period 1972-73. All the other documents are pertaining to subsequent periods up to 1980. Ext.B-3 dated 8.3.1977 is the Registration Certificate as per the provisions of the Shops and Establishments Act. Ext.B-4 dated 22.1.1977 is the licence issued to the bunk to carry on wholesale trade in tobacco for the period 1977-1979. Ext.B-5 dated 8.6.1978 is penalty of the

licence fee paid to the Nedumangad Panchayath. Ext.B-5(a) dated 26.6.1978 is the Profession Tax paid to the said Municipality for the period 1973-1974 and 1974-75. Ext.B-5(b) dated 25.11.1978 is in respect of Tax paid to the Municipality for the period 1978-79. Ext.B-5(c) dated 8.6.1978 is the PFA licence fee paid for the period 1978-79. Exts.B-5(d) to B-5(i) show payment of the licence fee for 1978-79, 1979-80 and some other licence fees also for the period 1979-80, 1972-73, 1971-72, 1972-73, 1979-80 and 1980-81. The oldest period mentioned among these documents is marked as Ext.B-5(e). Ext.B-5(e) dated 15.9.1971 is in respect of the PFA licence fee paid for the period 1971-72 and for the period 1972-73. Thus, even among the documents produced by the defendant, it can be seen that the documents covering the oldest periods are Ext.B-5 (e) dated 15.9.1971 and Ext.B-5(f) dated 15.11.1972 for the period from 1972-73 and Ext.B-5(j) dated 9.11.1972 for the period 1.7.1972 and 30.11.1972. Therefore, going by the earliest period is the one pertained in Ext.B-5(e) dated 15.9.1971. The defendant could not produce any document for a period prior to 1971 to prove his asserted plea throughout the previous round of litigation as well as the present suit, that he had on his own taken possession of the

property in question and set up the bunk thereon as early as in the year 1962. Since the earliest document is the one pertaining to 15.9.1971, this highly improbabilise the asserted claim of the defendant that he had set up the bunk in question in the year 1962 and on the other hand, this would also strongly probabilises the foundation of the case set up by the plaintiff that the bunk was set up only on 1.8.1971. Though the defendant asserted in the written statement that he had set up the bunk in 1962 and had taken licence from the local self body immediately thereafter, he had retracted from this while giving evidence and deposed that though he had set up the bunk in 1962, he had taken licence only three years thereafter. Therefore, these documentary aspects and retraction of the assertion would also be clear aspects which impeach the credibility and believability of the defendant's claim and it probabilises the claim of the plaintiff.

27. PW2 has deposed that he has been plucking coconuts from the 3 coconut trees, one of which is situated in the small piece of land which is adjacent to the property in which the bunk is situated and the other two being situated in the property on the eastern side (viz., the one covered by Ext.A-1) ever since the time of

predecessor-in-interest of the plaintiff and subsequently, after the plaintiff has purchased the property. Except the fact that even as per his own deposition he is a professional coconut plucker engaged by the predecessor-in-interest of the plaintiff and the plaintiff, there is nothing intrinsically contradictory or improbable in the evidence deposed by him and his evidence is not seen successfully impeached by the defendant. Therefore, this evidence given by PW2 that he has been plucking coconuts from the coconut trees situated in the small piece of land immediately adjacent to the very property in which the bunk is situated would also be a clear pointer which would strongly probabalises the case set up by the plaintiff that the bunk is situated in a property whose enjoyment and possession was with the predecessor-in-interest of the plaintiff and consequently with the plaintiff. Therefore, all these aspects would clearly and unambiguously show that the view taken by the lower appellate court that the predecessor-in-interest of the plaintiff and the plaintiff had possessory title over the amended plaint schedule property is therefore correct and tenable.

28. It is to be noted that the Apex Court in a three-judge Bench decision in the case Dollar Co. v. Collector of Madras reported

in (1975) 2 SCC 730, para 4, has held that normally appellate interference is not called for unless there is something to show not merely that on the balance of evidence it is possible to reach a different conclusion but that the judgment cannot be supported by reason of a wrong application of principle or because some important aspect has been overlooked or misapplied. Further that, an appellate court interferes not when the judgment under attack is not right but only when it is shown to be wrong and that these twin principles serve as a backdrop to the approach while dealing with appeal.

29. Earlier, a two-Judge Bench of the Apex Court in the case S.V.R.Mudaliar v. Rajabu .F.Buhari reported in (1995) 4 SCC 15 has held that if the first appellate court had not adverted to all the reasons given by the trial court and not come into close quarters with the same, the second appellate court can interfere in the same. In the ruling in S.V.R.Mudaliar (supra) it was held in paras 14 & 15 which read as follows:

“14. We, therefore, do not propose to decide this fact by drawing any adverse inference against the respondent; but would do so on the basis of evidence led by the plaintiff. As already stated, this evidence has received better treatment at the hand of trial Judge, who, while holding that Kamal had acted as an agent of the defendants, referred to many circumstances also. Shri Parasaran had submitted that though the appellate court is within its right to take a different view on

a question of fact, that should be done after advertent to the reasons given by the trial Judge in arriving at the finding in question. Indeed, according to Shri Parasaran an appellate court should interfere with the judgment under appeal not because it is not right, but when it is shown to be wrong, as observed by a three-Judge Bench of this Court in *Dollar Co. v. Collector of Madras* (1975) 2 SCC 730. As to this observation, the contention of Shri Vaidyanathan is that what was stated therein was meant to apply when this Court examines a matter under Article 136. We do not, however, think if this meaning can be ascribed to what was observed.

15. There is no need to pursue the legal principle, as we have no doubt in our mind that before reversing a finding of fact, the appellate court has to bear in mind the reasons ascribed by the trial court. This view of ours finds support from what was stated by the Privy Council in *Rani Hemanta Kumari Debi v. Maharaja Jagadindra Nath Roy Bahadur* (10 CWN 630) wherein, while regarding the appellate judgment of the High Court of Judicature at Fort William as '*careful and able*', it was stated that it did not '*come to close quarters with the judgment which it reviews, and indeed never discusses or even alludes to the reasoning of the Subordinate Judge*'."

The said ruling was rendered on the basis of the decision of the Privy Council in *Rani Hemanta Kumari Debi v. Maharaja Jagadindra Nath Roy Bahadur* reported in 10 CWN 630 = 16 MLJ 67 PC. But, however, earlier a similar question as to whether High Court was right in interfering with the finding of facts arrived at by the lower appellate court on the ground that the lower appellate court had not adverted to various reasons given by the trial court, was the subject matter of consideration of a decision of a earlier three-Judge Bench of the Supreme Court in the Case *Ramachandra Ayyar v. Ramalingam Chettiar* reported in AIR 1963 SC 302. In *Ramachandra Ayyar's* case (supra) also a similar contention was raised by placing reliance on

the judgment of the Madras High Court in Ganthakoru Mangamma v. Dulla Paidayya reported in AIR 1941 Mad 393. The Apex Court in Ramachandra Ayyar's case (supra) held that the second appellate court could not reverse a judgment of the first appellate court on the ground that the first appellate court had not adverted to all the reasons given by the trial court or that it had not come to grips with the reasons given by the trial court. The Apex Court in AIR 1963 SC 302 has held as follows:

“Mr Chatterjee has then placed strong reliance on the decision of the Madras High Court in Mangamma v. Paidayya (AIR 1941 Mad 393). In that case, Pandrang Row, J. has held that where the first appellate court fails in its judgment reversing the finding of the trial court to come into close quarters with the evidence in the case or to meet the reasoning of the trial court in support of its conclusions, the judgment of the appellate court must be deemed to be vitiated by an error in procedure and so, can be interfered with in second appeal. These observations, no doubt, support Mr Chatterjee in contending that the High Court was justified in reversing the finding of fact recorded by the lower appellate court in this case. In our opinion, however, the broad observations made in the judgment do not correctly represent the true legal position about the limits of the High Court's jurisdiction in dealing with second appeals under Section 100. This decision shows that the learned Judge thought that the lower appellate court was bound not to go against the opinion of the trial Judge who had an opportunity of having the witnesses before him, in deciding upon the credibility of the oral evidence; and he has added that unless good reasons are given, any interference with the conclusion of the trial Judge on matters of this kind must be deemed to be erroneous in law. It is plain that this statement of the law is inconsistent with the provisions of Section 100.

In Rani Hemanta Kumari Debi v. Maharaja Jagadindra Nath Roy Bahadur (10 CWN 630) the Privy Council has no doubt observed that it is better that the appellate court whenever it reverses the judgment of the lower court, comes into close quarters with the judgment of the lower court and meets the reasoning therein. These observations, however, do not assist us in determining the scope of the provisions of Section 100. They were made in an appeal which went before the Privy

Council against the decision of the High Court when the Appellate Bench was dealing with the first appeal filed against the decision of the Judge of the first instance. The High Court had reversed the decision of the first court; and in considering the propriety or correctness of the said reversing judgment, the Privy Council observed that the appellate judgment did not come into close quarters with the judgment which it reversed. It would thus be seen that what the Privy Council has said about the requirements of a proper appellate judgment, cannot assist Mr Chatterjee in contending that if a proper judgment is not written by the lower appellate court in dealing with questions of fact, its conclusions of facts can be challenged under Section 100. That question must be considered in the light of Section 100 alone."

Considering the rulings of the two-Judge Bench in the case S.V.R.Mudaliar v. Rajabu .F.Buhari reported in (1995) 4 SCC 15, the Privy Council's decision in Rani Hemanta Kumari Debi v. Maharaja Jagadindra Nath Roy Bahadur reported in 10 CWN 630 = 16 MLJ 67 PC and the three-Judge Bench decision in Ramachandra Ayyar v. Ramalingam Chettiar reported in AIR 1963 SC 302, the Apex Court in the case Arumugham and ors. v. Sundarambal and anr. reported in (1999) 4 SCC 350 has held in para 14 of the SCC report that from the three-Judge Bench decision in Ramachandra Ayyar's case (supra), it is clear that the Apex Court has held that the second appellate court cannot interfere with the judgment of the first appellate court on the ground that the first appellate court had not come to close grips with the reasoning of the trial court and that it is open to the first appellate court to consider the evidence adduced by the parties and give its own reasons for accepting the evidence on one side or

rejecting the evidence on the other side. It is not permissible for the second appellate court to interfere with such findings of the first appellate court only on the ground that the first appellate court had not come to grips with the reasoning given by the lower appellate court. In the aforestated judgment of the Apex Court in Ramachandra Ayyar's case (supra) reported in AIR 1963 SC 302, the three-Judge Bench of the Apex Court has specifically distinguished the decision of the Privy Council reported in 10 CWN 630 = 16 MLJ 67 PC on the ground that, that was a case wherein the High Court was dealing with the first appeal. That the observations made by the Privy Council in that context, in a case where the High Court was considering a first appeal, would not be applicable to cases where second appellate court was dealing with the correctness of the judgment of the first appellate court which reversed the trial court. It was further held in Arumughan's case reported in (1999) 4 SCC 350, that in the two-Judge Bench ruling in S.V.R.Mudaliar's case reported in (1995) 4 SCC 15, the two-Judge Bench had taken a contrary view without noting the three-Judge Bench decision in Ramachandra Ayyar's case reported in AIR 1963 SC 302, wherein the Apex Court has specifically referred to the ruling of the Privy

Council's decision and distinguished the same. Therefore, it was held that the two-Judge Bench ruling in S.V.R.Mudaliar's case (supra) could not have relied on the aforecited Privy Council's decision and that hence the Apex Court has preferred in (1999) 4 SCC 350, to follow the view taken by the three-Judge Bench decision in Ramachandra Ayyar's case (supra) rather than the judgment of the two-Judge Bench in S.V.R.Mudaliar's case (supra). The decision in Arumughan's case reported in (1999)4 SCC 350 was impugned in a Review Petition and the judgment in Arumughan's case (supra) has been affirmed in the judgment reported in (2000) 10 SCC 347.

30. In Arumugham and ors. v. Sundarambal and anr. reported in (1999) 4 SCC 350, the Apex Court dealt with a case wherein the trial court had given a finding that the plaintiff therein had not proved his title to the property of his father and that the evidence also disclosed that the plaintiff was also not in possession and therefore the plaintiff was not entitled to a declaration of title nor for permanent injunction. The trial court also held that the 1st defendant therein was only the daughter of Haritheertham and Mariyayee, etc., and had dismissed the suit. The first appellate court discussed the oral and documentary evidence adduced by the

plaintiff therein and accepted the same and also relied upon the voters' list produced by the plaintiff for the purpose of proving the entry therein that he was the son of Haritheertham and the voters' list was accepted along with other documents. The first appellate court rejected the oral evidence adduced by the defendant. It also considered the documentary evidence adduced by the defendant and came to the conclusion that the case set up by the defendant could not be accepted and gave the finding that the patta was changed in the name of the first defendant without proper enquiry and by taking advantage of the weakness and illness of the first plaintiff. Resultantly, the first appellate court had reversed the trial court judgment therein and held that the plaintiff was the son of Haritheertham and is entitled to property of his father. The first appellate court also reversed the findings of the trial court in relation to the possession of the property and held that the plaintiff therein was in possession of the property on the date of suit and accordingly granted a decree of declaration of title and permanent injunction. In Second Appeal, the High Court, as per the impugned judgment therein reversed the finding of facts rendered by the first appellate court and restored the trial court judgment. The Apex

Court after referring to the aforestated rulings in S.V.R.Mudaliar's case (supra), aforestated Privy Council's decision and Ramachandra Ayyar's case (supra) had laid down the legal position that the view subscribed to by the three-Judge Bench in Ramachandra Ayyar's case (supra) as the correct one. Thereafter in para 16 of the SCC report the Arumugham's case (supra) the Apex Court held that on the question of burden of proof, even assuming that their Lordships are of the view that even assuming that burden of proof is relevant in the context of amended provision of Sec.100 of the Code of Civil Procedure, the same would not be relevant when both sides had adduced evidence. It would be relevant only if a person on whom the burden of proof lay failed to adduce any evidence altogether. In the present case, both sides had adduced oral as well as documentary evidence and therefore even assuming that it was erroneous for the lower appellate court to say that the burden of proof lay on the first defendant to prove that the plaintiff was not the son of late Haritheertham, that would not, have any material bearing on the conclusion reached therein by the lower appellate. That the lower appellate court after consideration of the oral and documentary evidence adduced by both sides could not be faulted

with in having accepted the evidence adduced on the side of the plaintiff and and having rejected the evidence adduced on the side of the defendants. Their Lordships also held that a reading of the impugned High Court judgment therein gave the impression as if the impugned judgment was dealing with a first appeal and not a second appeal. Accordingly, the Apex Court set aside the impugned judgment of the High Court therein and restored the judgment of the first appellate court.

31. Going by the aforestated principles laid down by the Apex Court on the aforestated aspects, this Court is of the considered opinion that the appreciation of evidence and the conclusion reached by the lower appellate court do not warrant any interdiction or interference at the hands of the second appellate court. The appreciation of evidence made in the impugned judgment of the lower appellate court cannot be faulted as being wrong and on the other hand, this Court is of the considered opinion that the view taken by the lower appellate court that the plaintiff could prove his possessory title set up in the amended plaint is correct and sustainable. Moreover, as held by the Apex Court in para 16 of Arumugham's case (supra) reported in (1999) 4

SCC 350, the lower appellate court has held that the documents produced by the defendant would probabalise the case set up by the plaintiff. The question of burden of proof would be relevant only if a person on whom the burden of proof lay failed to adduce any evidence altogether and in cases where both sides adduced oral as well as documentary evidence. Moreover, in the instant case, both sides have adduced evidence. The plaintiff relies on Ext.A-6 series of documents which were accepted by the lower appellate court as tenable. The defendant has also adduced evidence and it was found that he had failed to prove the assertion made by him that he had set up the bunk as early as in the year 1962. the lower appellate court also held that the aforestated documents produced by the defendant would only fortify and probabalise the very case set up by the plaintiff that the bunk in question was permitted to be set up in the year 1971. Therefore, in the light of the aforestated aspects dealt with in detail herein above, this Court is of the considered opinion that the aforestated appreciation of evidence made by the lower appellate court as well as the findings therein do not call for any interdiction in this Second Appeal.

32. The question of law framed in this case is one

formulated as question No.(3) in the appeal memorandum which reads as follows:

“Has not the courts below wrongly interpreted the scope of Exhibit A-1 Sale Deed and is not the title of the plaintiffs to the property restricted to the property described in A schedule, which specifically shows that the property having an extent of 337 Sq. Links comprised in Sy.No.877/2 in the possession of the defendant is specifically excluded?”

The recitals in Ext.A-1 sale deed clearly show that the property covered by the said conveyance is not just 4.663 cents of land but also includes some additional land contiguous thereto (അടവിൽ കൂടുതൽ) comprised in Sy.No.877/2 and that the full extent of the conveyance comes to 5 cents of land. The Advocate Commissioner in Ext.C-1 report and Ext.C-1(a) plan of the Taluk Surveyor has identified 5 cents of property covered by Ext.A-1 sale deed and has also specifically identified 0.337 cents (337 Sq. links) part of it and has specifically marked it as a triangular portion towards south-eastern portion of that property. So, even the Advocate Commissioner and the Taluk Surveyor has identified not only 4.663 cents of land, but also the contiguous 337 Sq. links of land so as to have total extent as 5 cents. Presumably, it is seen that the mere mention of first component of 4.663 cents in the recitals in Ext.A-1 sale deed had led the defendant to believe that the said conveyance

is restricted to 4.663 cents of land and the excess of 337 Sq. links could be the puramboke land in which the bunk is situated. Neither the recitals in Ext.A-1 sale deed nor the findings in Ext.C-1 report and Ext.C-1(a) plan would give any remote indication that the extra 337 Sq. links of land covered by Ext.A-1 sale deed is the one pertaining to Government puramboke land. Moreover, the Taluk Surveyor in Ext.C-1(a) plan has clearly identified not only the piece of land in which the bunk is situated and the small piece of land immediately contiguous thereto. The property in Ext.A-1 is comprised in Sy.No.877/2 and the property in which the bunk is situated and its contiguous land is in Sy.No.874/1 & 2, as per the conclusive findings in Ext.C-1 report and Ext.C-1(a) plan. Therefore, the very factual premise on the basis of which the question of law is framed as formulated in the memorandum of Second Appeal is on the basis of a wrong factual premise as can be seen from Ext.C-1 report and Ext.C-1(a) plan. All the parties, including the defendant, had accepted the correctness of findings in Ext.C1 report and Ext.C-1(a) plan. When that be the position, the assumption made by the appellant/defendant in his counter claim schedule as if one component of the counter claim property is in

Sy.No.877/2 is based on patently wrong. This wrong factual assumption made by the defendant also gives rise to negative implication as far as the very counter claim set up by the defendant. When the case set up in the counter claim is that the counter claim schedule property consists of one cent of Government puramboke land in Sy. No.874/1 & 2 and the other component of 0.337 cents of land is in Sy.No.877/2, it clearly implies that the said component in Sy.No. 877/2 is not in respect of Government puramboke land, but that it forms part of property for which the plaintiff has title as per Ext.A-1 sale deed. Moreover, the counter claim schedule does not specify as to whether the bunk is situated solely in the one cent of Government purampoke land Sy.No. 874/1 & 2 or whether the bunk is situated fully or partly in 337 Sq. links of property in Sy.No. 877/2 and this significantly weakens the case of the defendant and correspondingly would reinforce the case set up by the plaintiff. Therefore, the very counter claim set up by the defendant is not only based on wrong factual premise as can be seen from the findings in Ext.C-1 report and Ext.C-1(a) plan that it has also got negative implications as far as the very counter claim set up by the defendant. In the light of the view already taken by

this Court in the earlier portion of the judgment, no further detailed examination in this regard is called for. Suffice it to say, that as the question of law formulated in the appeal memorandum is based on wrong factual premise, the same does not arise for consideration in the facts and circumstances of this case.

In the light of these aspects, the Second Appeal stands dismissed. However, there shall be no order as to costs.

bkn/sdk+

Sd/-
ALEXANDER THOMAS, JUDGE

///True copy///

P.S. To Judge.