

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

MONDAY, THE 16TH DAY OF MARCH 2015/25TH PHALGUNA, 1936

SA.No. 526 of 2002 ()

AGAINST THE JUDGMENT AND DECREE IN A.S. NO.88/1999 of SUB COURT,
NEDUMANGAD DATED 31-07-2001

AGAINST THE JUDGMENT AND DECREE IN O.S. NO. 419/1996 of PRINCIPAL MUNSIF
COURT,NEDUMANGAD DATED 31-05-1999

APPELLANT(S)/APPELLANT/1ST DEFENDANT:

SUNDARESAN, S/O. KOCHU CHERUKKAN,
CHARUVILA PUTHEN VEEDU, ELIKKOTTUKONAM, POOVATHOOR
ANAKUDI DESOM, VAMANAPURAM VILLAGE.

BY ADV. SRI.G.S.REGHUNATH

RESPONDENT(S)/RESPONDENTS/PLAINTIFF & DEFENDANTS 2 & 3:

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1. JAYAKUMAR, S/O. SREEDHARAN,
P.B.NO.7880, ABUDABI, U.A.E. FROM NELLIKUNNIL VEEDU
POOVATHOOR, ANAKUDI MURI, VAMANAPURAM VILLAGE
REP.BY HIS WIFE SULEKHA, JAYA BHAVAN, NELLIKUNNIL
VEEDU, POOVATHOOR, ANAKUDI MURI, VAMANAPURAM VILLAGE.
 2. REGHUNATHAN, S/O. VELU,
THADATHARIKATHU VEEDU, POOVATHOOR, ANAKUDI MURI
VAMANAPURAM VILLAGE.
 3. RAGHAVAN S/O. KUTTAN,
THADATHARIKATHU PUTHEN VEEDU, DO. DO.

R.1 BY ADV. SRI.M.R.RAJESH
R.1 BY ADV. SRI.PRADEEP.V.S.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 04-03-2015, ALONG
WITH CMA. 34/2002, THE COURT ON 16.03.2015 DELIVERED THE FOLLOWING:

A.HARIPRASAD, J.

S.A. No.526 of 2002

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C.M.A.No.34 of 2002

Dated this the 16th day of March, 2015

COMMON JUDGMENT

1st defendant in a suit for declaration and consequential prohibitory injunction is the appellant in this regular second appeal and also in the civil miscellaneous appeal. Plaintiff in the suit is the contesting respondent.

2. Pleadings relevant for disposal of the cases can be summarised as follows: Suit is filed through a power of attorney holder of the plaintiff in respect of the property described in the plaint schedule. Ext.A1 is the power of attorney executed by the plaintiff in favour of his wife. Ext.A2 is the document on which the plaintiff asserts his title. Definite case of the plaintiff is that the property belonged to one Chinnan Kunjan by virtue of a document executed in his favour in the year 1981. While he was enjoying the property, in 1987 he gifted the property in favour of his daughter Ambika from whom the plaintiff purchased the property for valuable consideration. Ext.A3 series are the tax receipts produced to show that the plaintiff is in possession of the property. On 14.01.1996, the 1st defendant along with some people tried to measure out a portion of the

plaint schedule property. On enquiry, it was revealed that he obtained a decree in O.S.No.23 of 1996 on the file of the Sub Court, Attingal against defendants 2 and 3 and his attempt was to execute the decree. In the suit neither the plaintiff nor his assignor was a party. It is, therefore, contended that the decree is not binding on the plaintiff. In the guise of executing the decree, the 1st defendant attempted to trespass upon the plaint schedule property and commit waste thereon. Hence the suit was filed.

3. The appellant/1st defendant contended that the suit is hit by res judicata. It is also contended that the suit is barred by Section 47 CPC. According to the 1st defendant, the plaintiff is a transferee of property from one of the defendants in the earlier suit, pending the litigation and, therefore, the transaction is hit by lis pendens. The very same plaintiff filed another suit before Sub Court, Nedumangad against the 1st defendant and the same was withdrawn knowing fully well that his claim was unsustainable. This suit is also without any bonafides. The allegations in the plaint that the 1st defendant tried to trespass upon the property described in the plaint schedule is absolutely false. Identity of the property shown in the plaint schedule is totally incorrect. According to the 1st defendant, while O.S.No.689 of 1989 was pending, the property was purchased from one of the defendants in order to defeat the execution of

the decree in the said suit. When the decree in O.S.No.689 of 1989 was put to execution and when the properties were measured out, it was revealed that a portion of the building and well claimed by the plaintiff have encroached upon the property in the decree schedule in O.S.No.689 of 1989. In order to wriggle out of the situation, the suit is filed. The plaintiff is not entitled to any of the reliefs.

4. After considering the evidence on record, the court below decreed the suit in part. It was declared that the judgment and decree in O.S.No.689 of 1989 before the Munsiff Court, Nedumangad was not binding on the plaintiff or on the plaint schedule property. Other prayers in the suit were disallowed. Aggrieved by the trial court's judgment and decree, both the plaintiff and the 1st defendant filed separate appeals before the lower appellate court. Upon reconsideration of the entire evidence, the lower appellate court dismissed the appeal filed by the 1st defendant and allowed the appeal filed by the plaintiff. The matter was remanded to the trial court for the limited purpose of recording fresh findings in respect of issues relating to the plaintiff's title and possession over the plaint schedule property and as to whether the plaintiff is entitled to declaration and injunction as prayed for. Aggrieved by the decision of the lower appellate court, the 1st defendant has preferred a regular second

appeal and also a civil miscellaneous appeal challenging the remand order.

5. Heard the learned counsel for the appellants and the respondents elaborately. The relevant substantial question of law raised in the appeal is as to what is the legal effect of the decree in O.S.No.689 of 1989 on the property claimed by the plaintiff in the present suit. The legality of the order of remand is under challenge in the civil miscellaneous appeal.

6. Learned counsel for the 1st defendant contended that the lower appellate court committed a legal error in finding that the plaintiff has title over the plaint schedule property. The first and foremost submission is that without identifying the properties, no relief can be granted to the plaintiff in a suit of this nature. Lower appellate court, having found that the commissioner failed to identify the property, should not have made an observation that the plaintiff has title over 30 cents of property shown in the plaint schedule. Learned counsel further contended that the finding of the court below that the plaintiff is not a representative of the 1st defendant in O.S.No.689 of 1989 is wrong. Therefore, the 1st defendant would contend that the suit in question is barred by res judicata by virtue of the decree in O.S.No.689 of 1989. When the decree in O.S.No.689 of 1989 (Ext.B1) was put in execution, the second suit came up in order to delay and defeat

the same. Therefore, the second suit is barred by Section 47 CPC is the other contention raised by the 1st defendant. Further contention raised by the 1st defendant is that the claim of the plaintiff is hit by lis pendens.

7. Per contra, learned counsel for the plaintiff contended that none of the above legal infirmities can be attributed to the claim of the plaintiff. The plaintiff never claimed any right under the 1st defendant in O.S.No.689 of 1989. Plaintiff's claim emanate from daughter of the 1st defendant in the above suit, who never traced title to her father. Since the plaintiff herein was not a party to the earlier suit, the question of res judicata does not arise. The attack made against Ext.A2 is legally unsustainable. Even though the plaintiff did not concede that there was some deficiency in identifying the property involved in the suit, his inaction in not challenging the decree passed by the lower appellate court indicates his sufferance of the directions in the remand order.

8. The lower appellate court has considered the contentions raised by the 1st defendant in detail. Learned counsel for the 1st defendant contended that except Ext.A2 sale deed of the year 1992, no anterior title deed was produced by the plaintiff to show that 30 cents of land described in the plaint schedule devolved on him by an assignment and also his assignor had obtained a valid right over the same. It is vehemently

argued that non-production of anterior title deeds is a suppression of material fact which amounts to fraud. To substantiate this contention, learned counsel for the 1st defendant placed reliance on the decision in **S.P.Chengalvaraya Naidu (dead) by Lrs. v. Jagannath (dead) by Lrs. and others (AIR 1994 SC 853)**. The facts in the said decision are entirely different. In the peculiar facts and circumstances of that case, the Supreme Court held that non-production or non-mentioning of vital documents relating to litigation may amount to fraud. This broad proposition of law stated by the Supreme Court, if applied to the facts of this case, can only show that the lower appellate court was right in directing the plaintiff to establish his legal right for claiming the reliefs.

9. Lower appellate court considered the question of res judicata threadbare. It is interesting to note that except the decree in O.S.No.689 of 1989, none of the pleadings was produced by the 1st defendant to convince the trial court that the matter in issue in O.S.No.689 of 1989 was directly and substantially in issue in this suit. Further, there was no attempt to prove that the parties in both the suits were either same or litigating under the same title. Admittedly, the plaintiff in this suit was not a party to O.S.No.689 of 1989. Going by the averments in the plaint, it cannot be stated that the plaintiff claimed any right under any of the parties in

O.S.No.689 of 1989. Merely for the reason that the assignor of the plaintiff is the daughter of a defendant in an earlier suit, it cannot be said that the suit is barred by res judicata, unless the plaintiff's assignor claimed title through the defendant in the earlier suit. Therefore, the contention of the 1st defendant that the suit is barred by res judicata was rightly repelled.

10. Another contention raised is regarding the application of Section 47 CPC. O.S.No.689 of 1989 was initially one for injunction which was later amended seeking a relief of putting up boundary. Without producing the pleadings in O.S.No.689 of 1989, it cannot be stated that neither the aspects required in Section 11 CPC nor those in Section 47 CPC were established by the party propounding the same. From the materials available in this case, it cannot be stated that the questions raised in the present suit relate to the execution, discharge or satisfaction of the decree in O.S.No.689 of 1989. Therefore, the court below rightly rejected the contention of the 1st defendant that the suit is hit by Section 47 CPC.

11. The lower appellate court is right in finding that the issue of lis pendens does not arise in this case as the plaintiff is not claiming any derivative right under any of the parties in the previous litigation. Learned counsel for the 1st defendant strongly contended that the 1st defendant in

O.S.No.689 of 1989 (2nd defendant in the present suit) wilfully created false documents to defeat the right of the 1st defendant and the present action is the product of a fraud and collusion between the plaintiff and defendants 2 and 3. According to the learned counsel for the plaintiff, the plaintiff is a bonafide purchaser of land for value and he spent hard-earned money received from his employment abroad. It is also submitted that he constructed a house and put up his family in the house. Thereafter the claim was made by the 1st defendant to demolish a portion of his house. It is true that the commissioner who submitted plans and report could not identify the property correctly. Court below for valid reasons rejected Ext.C2 report and Ext.C2(a) and C2(b) plans submitted by the commissioner. It is noted by the lower appellate court that both the parties were dissatisfied with the identification of properties by the commissioner. The lower appellate court took note of the fact that 30 cents of land claimed by the plaintiff forms part of a larger extent of property, admeasuring one acre and 36 cents. The large extent could not be identified by the commissioner. So much so, she could not plot the plaint schedule property in the larger property. Learned counsel for the appellant contended that the property described in the plaint schedule is only an imaginary one. The contention raised by the 1st defendant that the document of title in favour of

the plaintiff is a sham one cannot be legally countenanced. According to the learned counsel for the appellant, the burden is on the 1st defendant to show that Ext.A2 is a sham document. It is true that in order to secure a decree of declaration and injunction, the burden is on the plaintiff to establish his case. The interesting aspect noted here is that the pleadings and judgment in O.S.No.689 of 1989 were not produced by the 1st defendant in this case. They could have been used under Section 13 of the Evidence Act as indicated by the Supreme Court in **Tirumala Tirupati Devasthanams v. K.M.Krishnaiah (JT 1998 (2) SC 231)**.

12. After hearing both sides and perusing the records and going through the judgment of the court below, I find that the court below went wrong in entering a finding in paragraph 12 of the judgment that from the evidence of PWs 1 and 2 coupled with Exts.A2 and A3 series, it could be seen that the plaintiff has title over plaint schedule property. This finding appears to be without any reasoning, especially in the absence of establishing proper identity of the property. However, the ultimate order of remand passed by the court below cannot be faulted for the reason that the genuineness of the plaint claim or otherwise will have to be decided with reference to the description of the property revealed from the documents and also with reference to identity of the land seen on ground. The

substantial issues to be decided relate to title and possession of the plaintiff in respect of the plaint schedule property and those issues have been left open in the remand order. Therefore, I find no reason to interfere with the judgment of the lower appellate court. As a remand was inevitable for identification of the property, it can be seen that the challenge against the remand order is unsustainable. While deciding the question of title and possession, the identity of the property becomes all the more important and relevant. Therefore, the directions issued by the lower appellate court cannot be disturbed.

In the result, the regular second appeal and the civil miscellaneous appeal are dismissed. Parties are directed to suffer their respective costs. Parties are directed to appear before the trial court on 10.04.2015. Registry shall transmit the records urgently.

All pending interlocutory applications will stand dismissed.

A. HARIPRASAD, JUDGE.

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A.Hariprasad, J.

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JUDGMENT

16th March, 2015