

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

WEDNESDAY, THE 29TH DAY OF JULY 2015/7TH SRAVANA, 1937

SA.No. 877 of 2002 (D)

**AGAINST THE JUDGMENT AND DECREE IN AS 228/1994 of I ADDL.DISTRICT COURT,
PALAKKAD DATED 16-01-2002.**

**AGAINST THE JUDGMENT AND DECREE IN OS 139/1991 of PRL.MUNSIFF COURT,
PALAKKAD DATED 30-06-1994.**

APPELLANTS/ (APPELLANTS 1 TO 4/DEFENDANTS 1 TO 4) ::

- 1. AMMALU AMMAL.**
- 2. SEETHA.**
- 3. RAJAMANI.**
- 4. RAMADAS.**

**THE 1ST APPELLANT IS THE WIFE AND APPELLANTS 2 TO
4 ARE THE CHILDREN OF PECHYAPPA PILLAI, RESIDING AT
KONIPALAYAM, PUTHUR AMSOM DESOM, PALAKKAD TALUK.**

**BY ADVS.SRI.D.KRISHNA PRASAD.
SRI.D.NARENDRANATH.
SRI.JOJI VARGHESE.
SRI.M.HARISHARMA.
SRI.T.PELDHOSE.**

RESPONDENT (RESPONDENT/PLAINTIFF) ::

**BHASKARN NAIR (DIED), S/O.KUTTAPPAN NAIR,
RESIDING AT AMBIKAPURAM, PUTHUR AMSOM, DESOM,
PALAKKAD TALUK.**

- * 2. SARASWATHI AMMA, W/O BHASKARAN NAIR,
RESIDING AT ANJANATHIL VEEDU,
NEERATHODU, P.O MALAMPUZHA, PIN - 678 651.**
- * 3. UNNIKRISHNAN (DIED), S/O BHASKARAN NAIR,
RESIDING AT ANJANATHIL VEEDU,
NEERATHODU, P.O MALAMPUZHA, PIN - 678 651.**
- * 4. VENUGOPAL, S/O BHASKARAN NAIR,
RESIDING AT ANJANATHIL VEEDU,
NEERATHODU, P.O MALAMPUZHA, PIN - 678 651.**

- * 5. MOHANDAS, S/O BHASKARAN NAIR,
RESIDING AT ANJANATHIL VEEDU,
NEERATHODU, P.O MALAMPUZHA, PIN - 678 651.
- * 6. VIJAYAKUMAR, S/O BHASKARAN NAIR,
RESIDING AT ANJANATHIL VEEDU,
NEERATHODU, P.O MALAMPUZHA, PIN - 678 651.
- * THE LRS OF THE DECEASED SOLE RESPONDENT ARE IMPEADED AS
SUPPLEMENTAL RESPONDENTS 2 TO 6 AS PER ORDER DATED
27-02-2015 IN I.A NO.619/2011.
- * 7. PARVATHY, W/O UNNIKRISHNAN,
RESIDING AT "UPASANA", KALLINKAT,
ATHIKKODE, PANAYUR - 678 552.
- * 8. UPESH KUMAR, (MINOR). AGED 12 YEARS,
S/O UNNIKRISHNAN AND PARVATHY,
RESIDING AT "UPASANA", KALLINKAT,
ATHIKKODE, PANAYUR - 678 552.
REPRESENTED BY HIS GUARDIAN - MOTHER, PARVATHY,
W/O UNNIKRISHNAN, RESIDING AT "UPASANA", KALLINKAT,
ATHIKKODE, PANAYUR - 678 552.
- * THE 7TH RESPONDENT IS APPOINTED AS GUARDIAN OF 8TH RESPONDENT.
- * THE LRS OF THE DECEASED SUPPLEMENTAL RESPONDENT NO.3 ARE
IMPEADED AS SUPPLEMENTAL RESPONDENT NOS.7 AND 8 AS PER ORDER
DATED 27-02-2015 IN I.A NO.292/2013.

R2, R4, R5, R7 & R8 BY ADVS.SRI.P.S.APPU & SRI.T.C.SURESH MENON.
R2, R4 AND R5 BY ADVS.SRI.JIBU.P.THOMAS,
SRI.NIMOD A.R,
SRI.C.A ANOOP.

THIS SECOND APPEAL HAVING COME UP FOR ADMISSION ON 29-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

amk

A.HARIPRASAD, J.

S.A No.877 of 2002

Dated this the 29th day of July, 2015.

J U D G M E N T

Appeal by the defendants in a suit for fixation of boundary. Plaintiff is the respondent. Pending appeal the sole respondent died and his legal representatives are brought on record as respondents 2 to 8.

2. Heard the learned counsel for the appellants and the respondents.

3. The substantial question of law arising are as follows :

- “1. *Is not a plea of res judicata or bar under Order II Rule 2 of the Code of Civil Procedure open to be urged notwithstanding the fact that such a contention was not specifically raised in the pleadings.*
2. *Can a commission report and plan form the basis to find title in respect of a disputed item of property, notwithstanding the fact that the title deed relied on by such party does not take in such item.*

3. *In a suit for fixation of boundary, does not the entire burden of proof lie on the plaintiff.”*

4. The courts below concurrently found that the suit claim is allowable. According to the learned counsel for the appellants, the mistake committed by the courts below is that the discrepancy between the details shown in the plaint schedule and the documents were not considered by the court below. According to the learned counsel for the appellants Exts.A1 to A4, the documents relied on by the plaintiffs, show only an extent of 6 cents of property covered by their title deeds. Whereas in the plaint schedule, they have shown 9 cents as the extent of the property claimed by them. Further, it is contended by the learned counsel for the appellants that only one survey sub division is shown in the document whereas in the plaint schedule two survey sub divisions are separately shown to claim right over 6 and 3 cents separately. It is therefore contended by the appellants that the plaintiff cannot claim title or possession

over 3 cents which is not covered by Exts.A1 to A4.

5. In answer to this argument, learned counsel for the respondents contended that the omission in the documents cannot be taken as a reason to deny the rights of the plaintiff over the property if the boundary descriptions takes in an extent of 9 cents. According to him, the Commissioner has clearly identified the property and found that the extent tallied with the plaint descriptions. It is well settled that for identifying an immovable property features which are stable and decisive and the parties commit mistake the least have to be preferred than other features. Normally, boundaries prevail over other features. But that is not an inflexible rule. In this case, going by the Commissioner's plan and report, it is seen that the boundary descriptions in the plaint schedule justify the plaint claims. Therefore, merely for the reason that Exts.A1 to A4 show only a lesser extent in the schedule, the plaintiff's right cannot be negated for that sole reason.

6. Learned counsel for the appellants contended that the judgment and decree in the earlier suit between the parties; viz., O.S No.508/1984 filed before the Court of Munsiff, Palakkad, will operate as res judicata in this case. I am unable to accept that contention too for the reason that the matter in issue in the earlier suit was not a matter in issue directly and substantially arising in the second suit. The earlier suit was one for injunction simplicitor filed by the plaintiff against the appellants contending that they were attempting to trespass into the plaintiff's land. The trial court after marshalling the evidence found that the plaintiff could not establish possession over the entire property shown in the plaint schedule. It is to be remembered that in the plaint schedule, the plaintiff/respondent had shown 9 cents as the extent of the property. Ext.B1 is the copy of the plaint in the earlier suit and Ext.B2 is the judgment. In Ext.B1, it is specifically pleaded that there was a fence separating the property of the appellants and that of the

respondent at the time when the earlier suit was filed. It was also contended that the appellants (defendants in the earlier suit) were trying to destroy the fence. It is the submission of the learned counsel for the respondents that only after dismissal of the earlier suit the cause of action for filing this suit arose. As the matter in both cases are totally different and cannot be said to be substantially the same, the principle in Section 11 C.P.C do not get attracted.

7. Another contention raised by the learned counsel for the appellants is that the second suit is barred by the law in Order II Rule 2 C.P.C. Order II Rule 2 C.P.C will come into play only if the plaintiff omitted to seek all reliefs in one suit which could be claimed on the cause of action. In other words, the mandate of the provision is that nobody shall intentionally relinquish any portion of his claim which could have been sought in a suit based on a particular cause of action. In the earlier suit, the cause of action alleged by the plaintiff was an

attempted trespassed by the appellants. There was no dispute regarding fixation of boundary at that time. The second suit was filed on the basis that the defendants have destroyed the common boundary between the properties of the plaintiff and defendants. Therefore, it cannot be said that the earlier suit and the second suit arose out the same cause of action. In the absence of identity of causes of action, the principle in Order II Rule 2 C.P.C is not attracted. Therefore, that argument of the appellants is also not sustainable.

8. From the above discussion, I find no substantial question of law is arising in this case. Therefore, I find that the appeal is without any merit and is liable to be dismissed. I do so.

In the result, the second appeal is dismissed.

All pending interlocutory applications will stand dismissed.

Sd/-
A.HARIPRASAD,
JUDGE.
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