IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 18TH DAY OF JANUARY 2024 / 28TH POUSHA, 1945

RSA NO. 17 OF 2024

AGAINST THE DECREE AND JUDGMENT OS 168/2015 OF MUNSIFF MAGISTRATE, ERATTUPETTA

AS 17/2021 OF ASSISTANT SESSIONS COURT/SUB COURT, PALA

APPELLANT/APPELLANT/DEFENDANT:

RAVEENDRAN NAIR
AGED 72 YEARS
S/O.RAMAN NAIR, MANNIPLACKAL HOUSE,
KUNNOM KARA, POONJAR THEKKEKARA VILLAGE,
KUNNONNI P.O., KOTTAYAM, PIN – 686582.
BY ADV K.P.SREEKUMAR

RESPONDENTS/RESPONDENTS/PLAINTIFFS:

1 BHASKARAN (DIED)
AGED 83 YEARS
S/O.KUTTY, PUTHUPPALLIL HOUSE, KUNNOM KARA,
POON].AR THEKKEKARA VILLAGE, KUNNONNI P.O.,
KOTTAYAM, PIN – 686582.

2 VENUGOPAL
AGED 58 YEARS
S/O.BHASKARAN, PUTHUPPALLIL HOUSE, KUNNOM KARA,
POONJAR THEKKEKARA VILLAGE, KUNNONNI P.O.,
KOTTAYAM, PIN – 686582.

3 MOHANDAS
AGED 58 YEARS
S/O,BHASKARAN, PUTHUPPALLIL HOUSE, KUNNOM KARA,
POONJAR THEKKEKARA VILLAGE, KUNNONNI P.O.,
KOTTAYAM, PIN – 686582.

4 VIJAYAN
AGED 45 YEARS
S/O.BHASKARAN, PUTHUPPALLIL HOUSE, KUNNOM KARA,
POONJAR THEKKEKARA VILLAGE, KUNNONNI P.O.,
KOTTAYAM, PIN – 686582.

5 SUDHAKARAN
AGED 65 YEARS
S/O.BHASKARAN, PUTHUPPALLIL HOUSE, PERINGULAM KARA, POONJAR THEKKEKARA VILLAGE, PERINGULAM P.O, KOTTAYAM, PIN – 686582.

6 BINU P.B
AGED 56 YEARS
S/O.BHASKARAN, PUTHUPPALLIL HOUSE, KUNNOM KARA, POON].AR THEKKEKARA VILLAGE, KUNNONNI P.O., KOTTAYAM, PIN – 686582.

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 12.01.2024, THE COURT ON 18.01.2024 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 18TH DAY OF JANUARY 2024 / 28TH POUSHA, 1945

RSA NO. 20 OF 2024

AGAINST THE DECREE & JUDGMENT IN OS 302/2014 OF MUNSIFF MAGISTRATE, ERATTUPETTA

DECREE & JUDGMENT IN AS 16/2021 OF ASSISTANT SESSIONS COURT/SUB COURT, PALA

APPELLANTS/APPELLANTS/PLAINTIFFS:

1 SARASAMMA
AGED 70 YEARS
W/O.RAVEENDRAN NAIR MANNIPLACKAL HOUSE, KUNNOM KARA POONJAR THEKKEKARA VILLAGE, KUNNONNI P.O., KOTTAYAM, PIN – 686582.

2 RAVEENDRAN NAIR,
AGED 72 YEARS,
S/O.RAMAN NAIR MANNIPLACKAL HOUSE, KUNNOM KARA, POONJAR THEKKEKARA VILLAGE, KUNNONNI P.O., KOTTAYAM, PIN – 686582.

BY ADV K.P.SREEKUMAR

RESPONDENTS/RESPONDENTS/2ND AND 3RD DEFENDANTS & ADDL.DEFENDANTS 4-11:

1 BHASKARAN (DIED)
AGED 83 YEARS
S/O.KUTTY PUTHUPPALLIL HOUSE, KUNNOM KARA POON].AR THEKKEKARA VILLAGE, KUNNONNI P.O., KOTTAYAM, PIN – 686582.

2 VENUGOPAL
S/O.BHASKARAN, PUTHUPPALLIL HOUSE, KUNNOM KARA, POONJAR THEKKEKARA VILLAGE, KUNNONNI P.O. KOTTAYAM, PIN – 686582.

3 VALSAMMA
W/O.THAMKACHAN, MEVARAYATTU HOUSE, ADUKKOM P.O., ADUKKOM KARA, THALANADU VILLAGE, PIN – 686582.

4 SUDHAKARAN
S/O.BHASKARAN, PUTHUPPALLIL HOUSE, PERINGULAM KARA, POONJAR THEKKEKARA VILLAGE, PERINGULAM P.O KOTTAYAM, PIN – 686582.

5 MOHANDAS
S/O.BHASKARAN, PUTHUPPALLIL HOUSE, KUNNOM KARA, POONJAR THEKKEKARA VILLAGE, KUNNONNI P.O. KOTTAYAM, PIN - 686582

6 BINU P.B
S/O.BHASKARAN PUTHUPPALLIL HOUSE, KUNNOM KARA, POON].AR THEKKEKARA VILLAGE, KUNNONNI P.O., KOTTAYAM, PIN – 686582.

7 SANU P.B. @ VIJAYAN
S/O.BHASKARAN, PUTHUPPALLIL HOUSE, KUNNOM KARA, POON].AR THEKKEKARA VILLAGE, KUNNONNI P.O., KOTTAYAM, PIN – 686582.

8 BABU K.S
S/O.SREEDHARAN, KUNNEL HOUSE, ANAKKARA KARA, ANAKKARA VILLAGE CHAKKUPPALLOM PANCHAYATH, IDUKKI DISTRICT, PIN – 685512.

9 KANNAN BABU
S/O. BABU KUNNEL HOUSE, ANAKKARA KARA, ANAKKARA VILLAGE CHAKKUPPALLOM PANCHAYATH, IDUKKI DISTRICT, PIN – 685512.

10 KANCHANA
D/O.BABU KUNNEL HOUSE, ANAKKARA KARA, ANAKKARA VILLAGE CHAKKUPPALLOM PANCHAYATH, IDUKKI DISTRICT, PIN – 685512.

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 12.01.2024, THE COURT ON 18.01.2024 DELIVERED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

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R.S.A Nos.17 and 20 of 2024

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Dated this the 18th day of January, 2024

C O M M O N J U D G M E N T

The defendant in O.S.No.168/2015 on the files of Munsiff Court, Erattupetta is the appellant in R.S.A.No.17 of 2024. Plaintiffs in the above Suit are the respondents herein. The appellant assails the decree and judgment in the above Suit, which were confirmed by the appellate court in A.S.No.17/2021.

2. R.S.A.No.20 of 2024 is at the instance of the plaintiffs in O.S.302/2014 on the files of Munsiff Court, Erattupetta. The respondents are the defendants in the above Suit. Verdicts in O.S.No.302/2014 on the files of Munsiff Court, Erattupetta and A.S.No.16/2021 on the files of the Sub Court, Pala, are under

challenge in this appeal.

3. Heard the learned counsel for the appellants on admission. Perused the judgments under challenge and the documents placed by the learned counsel for the appellants.

4. Originally O.S.No.302/2014 was filed by Sarasamma and another as plaintiffs arraying Nalini and others as defendants. The prayer in the Suit was to declare right of the plaintiffs over item No.3 property in the above Suit. According to Nalini and others, plaint item No.3 property is part and parcel of plaint items No.1 and 2.

5. By filing written statement, Nalini and others resisted the Suit denying the contention that plaint item No.3 as part and parcel of plaint item No.1 and 2 properties and Sarasamma and others have no property up to the western PWD road and it was wrongly stated in their title deeds as road as the western boundary.

6. Bhaskaran and Nalini as plaintiffs filed O.S.No.168 of 2015 against one Raveendran Nair, who is the 2nd plaintiff in O.S.No.302/2014 and the prayer in the Suit was to restrain

Raveendran Nair, the defendant therein, from widening the pathway on demolishing the mud wall in the plaint schedule property therein. In the written statement filed by Raveendran Nair, the contentions raised in O.S.No.302/2014 were reiterated.

7. The trial court jointly tried both the matters treating O.S.No.302/2014 as the main case. PWs 1 to PW4 were examined and Exts.A1 to A5 were marked on the side of the plaintiffs. DW1 to DW4 were examined and Exts.B1 to B6 were marked on the side of the defendants. Exts.C1 series and C2 series were also marked as court exhibits.

8. Finally the trial court dismissed O.S.No.302/2014 while granting injunction as prayed for in O.S.No.168/2015.

9. Challenging the said verdicts, two appeals, viz., A.S.No.16/2021 and A.S.No.17/2021 were filed before the Sub Court, Pala. On re-appreciation of evidence, the appellate court found that item No.3 property in O.S.No.302/2014 is part of item No.1 and 2 properties, covered by title deeds of plaintiffs in O.S.No.302/2014. However, the appellate court refused the relief

of declaration sought for therein holding that the plaintiff in O.S.No.302/2014 ought to have sought the relief of recovery of possession also, so as to grant an executable decree. The appellate court confirmed grant of injunction in O.S.No.168/2015. Accordingly both appeals were dismissed.

10. While impeaching the veracity of the concurrent verdicts, the learned counsel for the appellants submitted that the appellants are aggrieved mainly in the matter of non grant of declaration in respect of plaint item No.3 property in O.S.No.302/2014, even though the first appellate court practically reversed the finding of the trial court as to the ownership of item No.3 property in O.S.No.302/2014, in favour of the plaintiffs therein. According to the learned counsel for the appellants, plaint item No.3 property is not larger extent of property, but only a small strip of property confined to 32 square meters and, therefore, even without prayer for recovery of possession, the relief of declaration of title and recovery of possession could have been granted by the first appellate court since the first appellate court found that plaint

item No.3 property in O.S.No.302/2014 is part and parcel of plaint item No.1 and 2 properties in O.S.No.302/2014.

11. In support of this contention, the learned counsel placed decision of this Court reported in [2014 (2) KLJ 289] ***Kathirummal Chirammal Karthyayani v. Kunnool Balakrishnan***, wherein this Court considered a case involving a narrow strip of land, where no relief of recovery of possession was sought for. The learned counsel submitted that in the said Suit, this Court made certain observations in paragraph 18 and allowed recovery of possession even without a prayer. In paragraphs 17 and 18 of the judgment, the learned Single Judge of this Court held as under while dealing with a Suit for fixation of boundary:

> *"17. Since the dispute is only in regard to a very narrow strip of land lying along the boundary line of the property of the appellant and respondents, it has to be held that the respondents, whose property as per the title deed and survey record extends upto the line `EF' must be held to be in possession of the narrow strip of land shaded in blue colour as well.*
>
> *18. "Possession" is a polymorphous term. It may have different meaning in different context. Meaning of "possession" depends on the context in which it is used. The concept of "settled*

possession" is not so fluid as to accommodate the case on hand. A casual act of possession, stray or even intermittent act of trespass would not mature into "settled possession". It was so held by the Hon'ble Supreme Court in Munshi Ram v. Delhi Administration -AIR 1968 SC 702. The Hon'ble Supreme Court had also occasion to deal with the term "settled possession" in Puran Singh v. State of Punjab -AIR 1975 SC 1674. There it was explained that "settled possession" must extend over sufficiently long period and acquiesced in by the true owner. So far as the case on hand is concerned there is nothing in evidence to show that the true owner had acquiesced in the alleged possession of the narrow strip of land by the defendant. So much so, it cannot be said that the defendant was in settled possession of that narrow strip of land which lies along the boundary so as to contend that the suit for mere fixation of boundary or injunction cannot be sustained. The plea raised by the defendant that unless the plaintiff sues for recovery of possession of that narrow strip of land, the plaintiff is not entitled to get the boundary fixed along the line `EF' demarcated by the Advocate Commissioner must thus fall to the ground. Bearing in mind the principles of law adumbrated by the Division Bench in P.Narayanan Nair's case, affirmed by the Hon'ble Supreme Court, I have no hesitation to drove out the plaintiff from his possession. There is nothing on record to show that the plaintiff was dispossessed by the defendant or his predecessor-in-interest from the land in dispute. It is true that in a suit for injunction, the burden is on the plaintiff to prove that he was in possession of the property as on the date of the suit. But it has to be gathered from the evidence and circumstances obtained in the particular case. When the defendant has absolutely no right

over the narrow strip of land lying along the boundary, the contention that he was in possession of the property and that the plaintiff was out of possession cannot be sustained, especially, in view of the fact that the plaintiff has proved that he has title in respect of narrow strip of land as well. The argument to the contrary advanced by the learned counsel for the appellant cannot thus be sustained.

The substantial question of law is answered against the appellant. This RSA is hence dismissed."

12. On reading the above judgment, the ratio therein cannot be applied to the facts of this case. The rationale is, in O.S.No.302/2014, the specific prayer is to declare title of the plaintiffs in O.S.No.302/2014 over plaint item No.3 property. As per the survey plan, the Commissioner located the plot 25, 26, j, 27, 25 as property having an extent of 32 square meters (0.790 cent) as the plaint item No.3 property in O.S.No.302/2014 in possession of the defendant. The prayer in O.S.No.302/2014 is for declaration of title alone in respect of plaint item No.3 property. Although the first appellate court found title of plaintiffs in O.S.No.302/2014 in relation to plaint item No.3 property negating the finding of the trial court, the relief of declaration was

disallowed by the first appellate court holding that no declaratory decree could be passed when the plaintiffs, being able to seek further relief than a mere declaration of title, omitted to do so. The first appellate court relied on the decision reported in [2012 (8) SCC 148], ***Union of India v. Ibrahim Uddin & another***, where the Apex Court held as under:

> *"In view of the above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief. In the instant case, suit for declaration of title of ownership had been filed though, the plaintiff/respondent No.1 was admittedly not in possession of the suit property. Thus, the suit was barred by the provision of section 34 of the Specific Relief Act and, therefore, ought to have been dismissed solely on this ground."*

13. The crux of the case centers on the following simple questions:

i) When the plaint lacks a prayer for recovery of possession in a Suit for declaration of title, when the property over which declaratory relief sought for is not in possession of the plaintiff, declaration of title is liable to be granted?

ii) Is relaxation to proviso to Section 34 of the Specific Relief Act, 1963 is permissible, when the property to be recovered is a small strip of land?

14. In order to address these questions, reference to Section 34 of the Specific Relief Act is necessary and the same is extracted as under:

> *"34. Discretion of court as to declaration of status or right. —Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:*
>
> *Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."*

On scanning proviso to Section 34, it is emphatically clear that no court shall make any declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. In ***Union of India v. Ibrahim Uddin & another***'s case (*supra*), the Apex Court affirmed the view.

15. Thus it is the trite law in terms of Section 34 of the Specific Relief Act that when there is a Suit for declaration of title in respect of a property, which is not in possession of the plaintiff, the Suit must be one for declaration of title and recovery of

possession. If the relief of recovery of possession omitted to be asked for, in view of the proviso to Section 34 of the Specific Relief Act, the Suit must fail for the sole reason. In such Suits, the Court is powerless to grant either the relief of declaration of title or recovery of possession or both reliefs in any manner.

16. Since it is argued by the learned counsel for the plaintiffs in O.S.No.302/2014 that as the property found to be in possession is a small strip of land relaxation of proviso to Section 34 of the Specific Relief Act has to be considered, I am inclined to address the said question also. In ***Kathirummal Chirammal Karthyayani v. Kunnool Balakrishnan***'s case (*supra*), this Court held that in a Suit for fixation of boundary when it was found a narrow strip of land abutting the boundary as per the title documents and survey records, boundary could be fixed inclusive of the narrow strip of land, so as to get recovery of possession of the narrow strip of land, even when there was no prayer for recovery of possession, in deviation from the general rule that in a Suit for fixation of boundary, recovery of possession also to be

sought, when any portion of the property is not in possession of the plaintiff, to grant the decree. In fact, this Court never considered a Suit for declaration of title in ***Kathirummal Chirammal Karthyayani v. Kunnool Balakrishnan***'s case (*supra*). Since the law is abundantly clear, as discussed herein above, when the plaintiffs omit to seek the relief of recovery of possession in tune with the mandate of proviso to Section 34 of the Specific Relief Act, the relief of declaration of title or recovery of possession or both cannot be granted for any reason. As such the verdicts, under challenge in R.S.A.No.20 of 2024 do not warrant interference.

17. Coming to the other Suit, in fact, the plaintiffs in O.S.No.168/2015 apprehend trespass upon the property for the purpose of widening the road abutting the same. Since it was found that the defendant therein had no manner of right, apart from using the available way, to encroach upon the plaintiffs' property, the trial court granted prohibitory injunction and the appellate court rightly confirmed the same. Thus the decree and judgment

in the said case also do not require any interference. On perusal of the verdicts under challenge, it is held that decree and judgment dismissing O.S.No.302/2014 and the decree and judgment decreeing O.S.No.168/2015 rendered by the trial court and confirmed by the appellate court are perfectly in order and as such there is no substantial question of law to be formulated to admit and maintain these appeals.

18. In order to admit and maintain a Second Appeal, substantial question of law necessarily to be formulated by the High Court within the mandate of Order XLII Rule 2 Read with Section 100 of C.P.C.

19. In these cases, the learned counsel for the appellants failed to raise any substantial question of law warranting admission of the Second Appeals. Order XLII Rule 2 provides thus:

> ***"2. Power of Court to direct that the appeal be heard on the question formulated by it.-****At the time of making an order under rule 11 of Order XLI for the hearing of a second appeal, the Court shall formulate the substantial question of law as required by*

section 100, and in doing so, the Court may direct that the second appeal be heard on the question so formulated and it shall not be open to the defendant to urge any other ground in the appeal without the leave of the Court, given in accordance with the provision of section 100."

20. Section 100 of the C.P.C. provides that, (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. (2) An Appeal may lie under this section from an appellate decree passed ex parte. (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. Proviso says that nothing in this sub-section shall be deemed to

take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

21. In the decision in [2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168], ***Nazir Mohamed v. J. Kamala and Others*** reported in the Apex Court held that:

> *The condition precedent for entertaining and deciding a second appeal being the existence of a substantial question of law, whenever a question is framed by the High Court, the High Court will have to show that the question is one of law and not just a question of facts, it also has to show that the question is a substantial question of law referring* ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, [(1999) 3 SCC 722.***

22. In a latest decision of the Apex Court reported in [2023 (5) KHC 264 : 2023 (5) KLT 74 SC], ***Government of Kerala v. Joseph***, it was held as under:

> *For an appeal to be maintainable under Section 100, Code of Civil Procedure ('CPC', for brevity) it must fulfill certain well – established requirements. The primary and most important of them all is that the appeal should pose a substantial question of law. The sort of question that*

qualifies this criterion has been time and again reiterated by this Court.

23. The legal position is no more *res-integra* on the point that in order to admit and maintain a second appeal under Section 100 of the C.P.C, the Court shall formulate substantial question/s of law, and the said procedure is mandatory. Although the phrase 'substantial question of law' is not defined in the Code, 'substantial question of law' means; of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as S.109 of the Code or Art.133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. As such, second appeal cannot be decided on equitable grounds and the

conditions mentioned in Section 100 read with Order XLII Rule 2 of the C.P.C. must be complied to admit and maintain a second appeal.

24. In view of the elaborate discussion, no substantial question of law arises in these Second Appeals to be decided by admitting the same.

In the result, these appeals are found to be meritless and the same are dismissed without being admitted.

All pending Interlocutory Applications stand dismissed.

Sd/-

(A.BADHARUDEEN, JUDGE)

rtr/