

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

TUESDAY, THE 9TH DAY OF JANUARY 2024 / 19TH POUSHA, 1945

RFA NO.42 OF 2018

AGAINST THE JUDGMENT AND DECREE DT. 31.10.2017 IN OS 246/2011 OF
PRINCIPAL SUB COURT, ERNAKULAM

APPELLANTS/PLAINTIFFS:

- 1 K.V.XAVIER,
AGED 68 YEARS,
S/O.LATE VARGHESE,KIZHAVANA HOUSE, VYTTILA
P.O,THYKODAM, ERNAKULAM DISTRICT.
- 2 K.V.ANTONY, AGED 68 YEARS,
S/O.LATE VARGHESE, KIZHAVANA HOUSE,VYTTILA P.O,
THYKODAM, ERNAKULAM DISTRICT.
- 3 KARMALI JOSEPH, AGED 72 YEARS,
D/O LATE VARGHESE, KIZHAVANA HOUSE,NOW RESIDING AT
VATTAPPILLY, MANJUMMEL P.O., UDYOGAMANDAL,ERNAKULAM
DISTRICT.
- 4 KATHREENA VINCENT, AGED 65 YEARS,
D/O.LATE VARGHESE, KIZHAVANA HOUSE,NOW RESIDING AT
KUNNATH, CHOTTANIKKARA P.O., ERNAKULAM DISTRICT.

BY ADVS.
SRI.ABRAHAM K.JOHN
SMT.C.G.ARUNDHATHI

RESPONDENTS/DEFENDANTS :

- 1 PETER AUGUSTINE,
 S/O.KUNGUSTINE (@)DEVASSY, PARAVARA HOUSE,VYTTILA P.O,
 THYKODAM, ERNAKULAM DISTRICT, PIN-682019.
- 2 SALIMKUMAR, S/O LATE BHASKARAN,
 MAMBRAYIL HOUSE, VYTTILA P.O.,THYKODAM, ERNAKULAM
 DISTRICT, PIN-682019.
- 3 SUKUMARI THILAKAN,
 D/O LATE BHARATHY, MAMBRAYIL HOUSE, VYTTILA
 P.O.,THYKODAM, ERNAKULAM DISTRICT, PIN-682019.
- 4 SANTHOSH KUMAR,
 S/O.LATE BHARATHY, MAMBRAYIL HOUSE, VYTTILA
 P.O.,THYKODAM, ERNAKULAM DISTRICT, PIN-682019.
- 5 SARASA,
 MAMBRAYIL HOUSE, VYTTILA P.O.,THYKODAM, ERNAKULAM
 DISTRICT, PIN-682019.
- 6 SURYA SOUMYA,
 D/O LATE K.B.SURESH KUMAR,MAMBRAYIL HOUSE, VYTTILA
 P.O.,THYKODAM, ERNAKULAM DISTRICT, PIN-682019.
- 7 SARIKA SOUMYA,
 D/O.LATE K.B.SURESH KUMAR,MAMBRAYIL HOUSE, VYTTILA
 P.O.,THYKODAM, ERNAKULAM DISTRICT, PIN-682019.
- 8 SAYUJ.S.KUMAR,
 S/O LATE K.B.SURESH KUMAR,MAMBRAYIL HOUSE, VYTTILA
 P.O.,THYKODAM, ERNAKULAM DISTRICT, PIN-682019.

BY ADVS.	
SMT.N.DEEPA	- R5 TO R8
T.SETHUMADHAVAN (SR.)	- R5 TO R8
DEEPA NARAYANAN	- R2
PRADEEP P B	- R1
TOMY CHACKO	- R1
VISHNU PRADEEP	- R1
KODOTH PUSHPARAJAN	- R2
VANDANA MENON	- R2
PREETHI. P.V.	- R2
K.JAYESH MOHANKUMAR	- R2

THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON
09.01.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SATHISH NINAN, J.

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R. F. A. No.42 of 2018

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Dated this the 9th day of January, 2024

J U D G M E N T

The suit for declaration of title, fixation of boundary and prohibitory injunction was dismissed by the trial court. The plaintiffs are in appeal.

2. The plaint schedule property is described as, 9 cents in Survey No.1250 of Poonithura village. The plaintiffs are the children of late Varghese. The plaintiffs claim title over the plaint schedule property as per Exts.A8 and A1 Sale Deeds dated 08.02.1955 and 13.02.1964 respectively, executed by late Devassy alias Kunjagasthy, the father of the first defendant in favour of the plaintiffs' father Varghese. The suit has been filed alleging that on the strength of Ext.B7 Partition Deed of the year 1993 executed between the 1st defendant and others, by including a portion of the plaint schedule property, attempts are being made to trespass into the plaint schedule property. Defendants 2 to 7 are

the owners of the property on the southern side of the plaint schedule property. The plaint schedule is bounded on all the other three sides by the properties of the first defendant.

3. The defendants denied the claim of title and possession of the plaintiffs over the plaint schedule property. It was contended that the plaintiffs predecessor late Varghese had not obtained title over the property under Exts.A8 and A1. The plaintiffs' claim of possession over the plaint schedule property was also denied.

4. The trial court relied on the recitals in Exts.B3 and B4 Settlement Deeds of the year 1994 executed by the father of the plaintiffs in their favour, wherein the property obtained under Exts.A8 and A1 are stated to be situated in Survey No.1236. Accordingly, the claim of the plaintiffs over the plaint schedule property situated in Survey No.1250 was

negatived.

5. This appeal was earlier disposed of by this Court as per judgment dated 05.07.2021, remanding the suit to the trial court for disposal denovo. The same was challenged by the first defendant before the Apex Court in Civil Appeal No.2595/2023. The Apex Court as per judgment dated 10.04.2023 interfered with the order of remand and directed the appeal to be disposed of afresh.

6. I have heard the learned counsel on either side.

7. The points that arise for determination in the appeal are :-

(i) Was the trial court right in having held against the claim of title of the plaintiffs over the plaint schedule property as the legal heirs of their late father Varghese, by relying on the recitals in Exts.B3 and B4 Settlement Deeds executed in their favour by their father ?

(ii) Has the plaint schedule property been correctly identified in Ext.C1(a) Commissioner's Plan ?

8. It is the case of the plaintiffs that, Ext.A8 Sale Deed was executed by the father of the first defendant in favour of their father conveying two items of properties which are situated in Survey Nos.1236 and 1250 respectively. However, due to an oversight, the property in Survey No.1250 was omitted to be scheduled to Ext.A8. It is on realising the same that subsequently Ext.A1 Sale Deed was executed scheduling the property in Survey No.1250 which is the plaint schedule property.

9. Presently we are not concerned with the question as to whether under Ext.A8 Sale Deed two items of properties were conveyed or intended to be conveyed. All that this Court is to consider is as to whether the plaintiffs have established their title over the plaint scheduled property viz. 9 cents in Survey No.1250.

10. A reading of Ext.A8 Sale Deed indicates that, it related to 9 cents of property in Survey No.1236. Subsequently Ext.A1 Sale Deed was executed between the

parties reciting that there had been a mis-description of the property in Ext.A8 Sale Deed with regard to the survey number, and that the correct survey number is Sy. 1250 and not in Sy.1236. It is important to notice that, the boundary description on all the four sides in both Exts.A1 and A8 are, one and the same.

11. Therefore, from Ext.A1 it is evident that the father of the first defendant asserted that the property conveyed by him to the father of the plaintiffs under Ext.A8 was 9 cents in Sy. 1250.

12. Ext.A8 authorised the vendee therein viz. The father of the plaintiffs, to get return from the Sub Registrar's Office a release deed in respect of the property, which was executed on the very same day releasing a liability over the plaint schedule property. Ext.A9 is the Release Deed. The boundary description of the property in Ext.A9 on all the four sides are also the very same description as in Exts.A1 and A8. Therein

also the survey number of the property is stated as Sy. 1250.

13. Ext.B6 is a Sale Deed executed by the Jenmi of the property in favour of the plaintiffs' father. Item No.4 therein is the 9 cents in Survey No.1250. The boundary description of the properties on all the four sides are the same as described in Exts.A1, A8 and A9.

14. The description of the boundaries in Exts.A1, A8, A9 and B6 which are identical, indicates that the property dealt with in all those documents were one and the same. As noticed earlier, though Ext.A8 mentions the property dealt with therein to be situated in Survey No.1236, in the subsequent document Ext.A1 it has been recited that in Ext.A8 the survey number has been mistakenly stated and that the correct survey number is Sy.1250. This suggests that the father of the plaintiffs have obtained title over the 9 cents of property in Survey No.1250 which is described in the plaint

schedule.

15. The defendants bank upon Exts.B3 and B4 Settlement Deeds which are executed in favour of the plaintiffs by their father. The said settlement deeds are stated to be in respect of the property obtained by their father under Exts.A8 and A1. In the scheduled description to the said document it has been stated that, though in Ext.A1 the property is described as situated in Survey No.1250, going by Ext.A8 and village survey, the property is in Survey No.1236. Relying upon the same, the defendants contend that the plaintiffs' father had obtained title under Exts.A1 and A8 only over the property situated in Survey No.1236 and the plaintiffs cannot lay claim over the property in Survey No.1250.

16. From the above it is evident that, there are two sets of documents - one set in which the first defendant's father (the vendor) asserts that the

property conveyed by him to the plaintiffs' father under Exts.A8 and A1 is situated in Survey No.1250 and not in Survey No.1236; the other set of documents being the ones executed in favour of the plaintiffs by their father reciting that the property obtained under Exts.A8 and A1 is situated in Survey No.1236 and not in Survey No.1250. In the light of the conflicting recitals, a finding on identity cannot be entered into either way based on such recitals regarding survey number. The finding of the trial court solely relying on Exts.B3 and B4 documents executed by the father of the plaintiffs in favour of the plaintiffs cannot be sustained. Point No.1 is answered accordingly. The judgment of the trial court is based on such finding and it is liable to be set aside.

17. Admittedly, the property in Survey No.1236 and Survey No.1250 do not lie adjacent; but they lie far apart. The plaintiffs have filed the suit claiming title

over the property not based on Exts.B3 and B4 Settlement Deeds executed by their father but as the legal heirs of their father and tracing title to Exts.A1 and A8. Therefore, the claim is independent of Exts.B3 and B4. It would appear that the plaintiffs attempt is to claim title over the property in Sy. 1236 under Exts.B3 and B4, and over Sy.1250 under Exts.A8 and A1 as the legal heirs of their father. As has been noticed supra, the question that arises for determination in this suit is as to whether the plaintiffs have established title over the plaint schedule property and not whether they have title over the properties in both survey numbers.

18. As noticed earlier, the boundary description on all the four sides of the property included in Exts.A1, A8, A9 and B6 are one and the same. Since there is discrepancy in the survey number, and the boundary description on all the four sides in Exts.A1, A8, A9 and B6 being one and the same, an identification based on

boundaries would clinch the issue. Admittedly there has been no identification by the commissioner. Unless such identification is made, it cannot be said that the plaint schedule property has been properly identified. Point No.2 is answered as above.

19. I have already found that the judgment of the trial court cannot be sustained. The suit being one on title, it is only in the interests of both sides that they be given opportunity to have the property identified afresh, especially with reference to the boundary description in the documents referred to above. The rival claim of possession over the property, and the contentions based on the same with regard to limitation etc. are all to be left open to be agitated before the trial court.

In the result, the appeal is allowed. The decree and judgment of the trial court are set aside. The suit is remanded back to the trial court for disposal denovo.

Parties shall be afforded opportunity to adduce further evidence. Considering the fact that the suit is of the year 2011, I am sure that every endeavour will be made by the trial court for an expeditious disposal of the suit.

Parties to appear before the trial court on 30.01.2024.

Sd/-
SATHISH NINAN
JUDGE

kns/-

//True Copy//

P.S. to Judge