Chacko vs State of Kerala

Chacko vs State of Kerala

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Court : Kerala

Decided On : Apr-30-2024

Judge : Honourable Mr. Justice T.R.Ravi

Appeal No. : OP(C)/524/2017

Appellant : Chacko

Respondent : State of Kerala

Judgement :

& O.P.(C)No.524 of 2017 1

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE T.R.RAVI TUESDAY, THE 30TH DAY OF APRIL 2024 / 10TH VAISAKHA, 1946 RSA NO. 800 OF 2013 AGAINST THE JUDGMENT DATED IN AS NO.312 OF 2011 OF ADDITIONAL DISTRICT COURT (SPECIAL), KOTTAYAM ARISING OUT OF THE JUDGMENT DATED IN OS NO.378 OF 2010 OF MUNSIFF COURT, CHANGANACHERRY APPELLANT/APPELLANT/DEFENDANT No.1: CHACKO @ ACHANKUNJU, AGED 47 YEARS, S/O MOSAH, VAZHAPARAMBIL, SACHIVOTHAMAPURAM P.O., MANDIRAM KAVALA BHAGOM,

KURICHY VILLAGE, CHANGANACHERRY TALUK, KOTTAYAM, PIN - 686 532. BY ADVS. SRI.M.P.MADHAVANKUTTY SRI.S.RANJIT KOTTAYAM RESPONDENTS/RESPONDENTS/PLAINTIFFS & DEFENDANT No.2: 1 M.A. MATHEWKUTTY AGED 61 YEARS MUKKATTU HOUSE, MANDIRAM KAVALA BHAGOM, SACHIVOTHAMAPURAM P.O., MANDIRAM KAVALA BHAGOM, KURICHY VILLAGE, CHANGANACHERRY TALUK, KOTTAYAM, PIN - 686 532. 2 BINU SCARIAH AGED 48 YEARS S/O.DR.C.P.SCARIAH CHATHURATHUNDIYIL HOUSE, MANDIRAM KAVALA BHAGOM SACHIVOTHAMAPURAM P.O., KURICHY VILLAGE, CHANGANACHERRY TALUK, KOTTAYAM PIN - 686 532. 3 V.T. CHANDY AGED 61 YEARS & O.P.(C)No.524 of 2017 2 VADAKKETHALACKAL HOUSE, MANDIRAM KAVALA BHAGOM SACHIVOTHAMAPURAM P.O., KURICHY VILLAGE, CHANGANACHERRY TALUK, KOTTAYAM PIN - 686 532. 4 KURICHY GRAMA PANCHAYATH REPRESENTED BY ITS SECRETARY, GRAMA PANCHAYATH OFFICE, KURICHY, PIN - 686 532. BY ADVS. SRI.TOM K.THOMAS (CAVEATOR) FOR R1 TO R3 SRI.M.A.ASIF SRI.T.A.SHAJI (SR.) FOR R4 THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 18.12.2023, ALONG WITH OP(C)No.524/2017 THE COURT ON 30.04.2024 DELIVERED THE FOLLOWING: & O.P.(C)No.524 of 2017 3

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE T.R.RAVI TUESDAY, THE 30TH DAY OF APRIL 2024 / 10TH VAISAKHA, 1946 OP(C) NO. 524 OF 2017 AGAINST THE ORDER DATED 13.01.2017 IN OS NO.250 OF 2010 OF MUNSIFF COURT, CHANGANACHERRY PETITIONER/PETITIONER/PLAINTIFF: CHACKO S/O MOSHA,VAZHAPARAMBIL HOUSE, SACHIVOTHAMAPURAM.P.O,KURUCHI VILLAGE, CHANGANACHERRY TALUK. BY ADVS. SRI.M.P.MADHAVANKUTTY

SRI.GOKUL DAS V.V.H. RESPONDENTS/RESPONDENTS/DEFENDANTS:

1 STATE OF KERALA REPRESENTED BY DISTRICT COLLECTOR, KOTTAYAM 686 001. 2 RE-SURVEY SUPERINTENDENT TALUK OFFICE,CHANGANACHERRY-686 532. 3 THAHASILDAR TALUK OFFICE,CHANGANACHERRY-686 532. 4 VILLAGE OFFICER VILLAGE OFFICE,KURUCHY-686 532. 5 SECRETARY KURUCHI GRAMA PANCHAYAT,KURUCHY-686 532. 6 BINU SCARIAH S/O.C.P.SCARIAH,CHATHURATHUNDIYIL HOUSE, MANDIRA KAVALA BHAGOM, SACHIVOTHAPURAM.P.O, KURUCHI VILLAGE,CHANGANACHERRY TALUK, KOTTAYAM,PIN-686532.

& O.P.(C)No.524 of 2017 4 7 V.T.CHANDY VADAKETHALAKKAL HOUSE,MANDIRA KAVALA BHAGOM,SACHIVOTHAPURAM.P.O,KURUCHI VILLAGE, CHANGANACHERRY TALUK, KOTTAYAM,PIN-686532. 8 M.A.MATHUKUTTY MUKKATTU HOUSE,MANDIRA KAVALA BHAGOM,SACHIVOTHAPURAM.P.O,KURUCHI VILLAGE, CHANGANACHERRY TALUK, KOTTAYAM,PIN-686532. BY ADVS. SMT.K.B.SONY, GOVERNMENT PLEADER SRI.ATHUL SHAJI SRI.TOM K.THOMAS SRI.T.A.SHAJI SR. THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 18.12.2023, ALONG WITH RSA.800/2003, THE COURT ON 30.04.2024 DELIVERED THE FOLLOWING: & O.P.(C)No.524 of 2017 5

T.R. RAVI, J.

---------- & O.P.(C)No.524 of 2017 ---------- Dated this the 30th day of April, 2024

JUDGMENT

The second appeal and the original petition relate to the same property and are heard and disposed of together.

Facts that led to R.S.A.No.800 of 2013:

2. The appellant in the second appeal was the appellant in

A.S.No.312/2011 of the Additional District Court (Special), Kottayam, and the 1st defendant in O.S No.378/2010 of Munsiffs Court, Changanacherry. The respondents 1 to 3 herein are the plaintiffs and the 4th respondent herein is the 2nd defendant before the trial Court. The suit was for mandatory as well as prohibitory injunction. The suit was filed contending that the plaintiffs and other residents of Mandiram Kavalabhagom in Kurichy village are using plaint schedule Item 1 Panchayat road, named Chathurathundil CMS & O.P.(C)No.524 of 2017 6 L.P School road, which had a width of 3.6 metres for access to the Kottayam-Changanacherry M.C road. The plaintiffs contend that the way was clearly demarcated from the neighboring properties on either side. The appellants property is situated on the northern side of plaint schedule item No.1 way and the property has a road frontage. The cause of action for the suit pleaded was that the 1 st defendant trespassed into plaint schedule property and constructed a granite Kayyala. The said granite wall is plaint schedule item No.2 and the encroached area is plaint schedule item No.3. It is stated that even though the plaintiffs had complained to the 2 nd defendant about the encroachment, no action was taken against the 1 st defendant. The plaintiffs hence prayed for a mandatory injunction directing the removal of plaint schedule item No.2 and a prohibitory injunction restraining the 1st defendant from reducing the width of plaint schedule item No.1 by encroaching upon it.

3. The 1st defendant contended that the width of Panchayat

road as stated in the plaint is incorrect, that there was alteration in the survey records without the knowledge of the 1 st defendant, and that O.S.No.250 of 2010 filed by him against the State and other officers including the 2nd defendant Panchayat for fixation of the & O.P.(C)No.524 of 2017 7 southern boundary of 1st defendants property which includes the plaint schedule item No.2 property, is pending. It is also his case that the building and boundary wall were constructed 30 years ago and as such the boundary wall is not liable to be demolished.

4. The 2nd defendant filed a written statement stating that

they were not a necessary party to the suit and that the suit was bad for misjoinder of parties. It was contended that the plaint schedule item No.1 is a public way as shown in resurvey records, is vested with the revenue authorities, and the authorities have ample power to remove the obstruction, if any, from the road.

5. PW1 and PW2 were examined and Exhibits A1 to A3 were

marked on the side of the plaintiffs. DW1 was examined and Exhibit B1 was marked on the side of the defendants. Exhibits C1 and C2 series were marked as Court Exhibits and CW1 & CW2 were examined as Court witnesses.

6. The trial court decreed the suit finding that the appellant

had encroached upon the plaint schedule item No.1 way, and directed the appellant to remove plaint schedule item No.2 granite wall from plaint schedule item No.1 with liberty to the plaintiffs to & O.P.(C)No.524 of 2017 8 get it removed by the process of Court if the 1 st defendant failed to remove the same and to restore its original position as shown in Ext.C2 (a) plan. The court also passed a decree of prohibitory injunction restraining the 1st defendant from encroaching into any portion of plaint schedule item No.1 way. The appellant preferred A.S No.312/2011 before the First Appellate Court which has been dismissed affirming the decree and judgment of the trial court. The second appeal filed in 2013 has not been formally admitted, though notice had been issued to the respondents and they have entered appearance. Owing to the passage of time, I deem it appropriate that a further notice on the questions to be formulated need not be issued and the questions already formulated can be treated as the questions of law which needs to be answered. I say so since the respondents are also put on notice regarding the questions of law well in advance.

Facts that led to OP(C) No. 524/ 2017

7. The petitioner is the appellant in R.S.A.No.800 of 2013

and the plaintiff in O.S No.250/2010 of Munsiffs Court, Changanacherry, for fixation of the southern boundary of Plaint schedule item No.1 property and for a permanent prohibitory & O.P.(C)No.524 of 2017 9 injunction restraining the defendants from creating any boundary marks or trespassing over plaint schedule item No.1 property. The petitioner filed I.A No.6 of 2017 in O.S No. 250/2010 seeking a stay of further proceedings in the above-mentioned suit and the said petition has been dismissed. The original petition is filed challenging the order in I.A.No.6 of 2017. The petitioner contends that O.S.No.378 of 2010 filed by respondents 6 to 8 in the original petition for mandatory and prohibitory injunction is a subsequent suit, in which the issues involved are the same as in O.S.No.250 of

2010. The petitioner had sought for withdrawal of O.S No.250/2010

to this Court to be heard along with R.S.A.800 of 2013 by filing Tr.P(C) No.619/2016, which was disposed of directing the petitioner to move the trial Court. According to the petitioner, the application for a stay of proceedings was filed as directed by this Court, but the same has been dismissed.

8. Heard both sides.

9. I shall first deal with O.P.(C)No.524 of 2017. The impugned order is one passed in an application filed under Section 10 of the Code of Civil Procedure, 1908. Section 10 reads thus: & O.P.(C)No.524 of 2017 10

> 10.Stay of suit.-No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court. Explanation.-The pendency of a suit in a foreign court does not preclude the courts in India

from trying a suit founded on the same cause of action.

10. The scope of the Section has been explained by the Honble Supreme Court in Aspi Jal v. Khushroo Rustom Dadyburjor, [(2013) 4 SCC 333], as follows:

> The use of negative expression in Section 10 i.e. no court shall proceed with the trial of any suit makes the provision mandatory and the court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied. The basic purpose and the underlying object of Section 10 of the Code is to prevent the courts of concurrent

& O.P.(C)No.524 of 2017 11

> jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject-matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding.

It is thus evident that the mandate is concerning proceeding with the subsequent suit and not the prior suit. Admittedly, O.S.250 of 2010 is the prior suit. Hence a petition for a stay of the prior suit is clearly not what is contemplated in Section 10. The application is hence fundamentally flawed and the trial court has not committed any error in dismissing the application, though for other reasons. The contention that the application was filed as directed by this Court is also not factually correct. This Court in the judgment in Tr.P.(C) No.619 of 2016, dismissed the application filed under Section 24 of the Code of Civil Procedure finding that the remedy of the petitioner was not a petition under Section 24. This Court merely observed that the remedy if any for the petitioner was to move the trial court under Section 10 or Section 151 of the Code of & O.P.(C)No.524 of 2017 12 Civil Procedure if such an application is legally allowable. In the above circumstances, O.P.(C)No. 524 of 2017 is dismissed.

11. As already stated, the second appeal has not so far been admitted. The appellant has raised the following questions as substantial questions of law;

(i). Is it legal to pass a decree based on resurvey measurements when the same itself is under challenge in a previously instituted suit filed under the provisions of the Survey and Boundaries Act.

(ii) Is it possible to construe a resurvey plan as final and binding when proceedings for the correction thereof is pending before a competent civil Court under the provisions of the Survey and Boundaries Act.

(iii) Whether a commission report in another suit can be ignored in toto merely because of the reason that the commissioner is not examined.

(iv) Whether the publication under Order I Rule 8 of the Code of Civil Procedure, 1908 is mandatory when the plaintiff sue for a public right for and on behalf of the public.

(v) Whether the appreciation of documentary evidence are so perverse, illegal and irregular that it resulted in wrong conclusions and finding of facts by the courts below. & O.P.(C)No.524 of 2017 13

12. The first and second questions cannot be considered to

be substantial questions of law. The appellant has questioned the regularity of the proceedings in the subsequent suit when a previously instituted suit was pending. As long as there was no bar for the trial of the subsequent suit, there was nothing wrong with the trial court in proceeding with the trial and deciding the case. I shall deal with the other three questions later in this judgment.

13. The suit has been filed for permanent injunction and a

mandatory injunction, on the allegation that the appellant had trespassed into the Panchayat road and reduced its width, affecting easy access to the plaintiffs' property. There are two commission reports. The plan produced along with the second report has been made part of the decree. There is a clear finding that the appellant has encroached into the Panchayat road. The extent of encroachment

has been clearly demarcated. The above aspects are all factual aspects on which there cannot be a correction in an appeal preferred under Section 100 of the Code of Civil Procedure unless it can be found that the findings of fact are perverse or based on no evidence at all. [See the judgments in Vidhyadhar v. Manikrao (1999) 3 SCC 573 and Yadarao Dajiba Shrawane v. & O.P.(C)No.524 of 2017 14 Nanilal Harakchand Shah (2002) 6 SCC 404], the relevant portions of which are extracted below;

> Vidhyadhar v. Manikrao, (1999) 3 SCC 573 Para.23 23. The findings of fact concurrently recorded by the trial court as also by the lower appellate court could not have been legally upset by the High Court in a second appeal under Section 100 CPC unless it was shown that the findings were perverse, being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion. Yadarao Dajiba Shrawane v. Nanilal Harakchand Shah, (2002) 6 SCC 404 Para.31

31. From the discussions in the judgment it is clear that the

High Court has based its findings on the documentary evidence placed on record and statements made by some witnesses which can be construed as admissions or conclusions. The position is well settled that when the

judgment of the final court of fact is based on

> misinterpretation of documentary evidence or on consideration of inadmissible evidence or ignoring material evidence the High Court in second appeal is entitled to interfere with the judgment. The position is also well settled that admission of parties or their witnesses are relevant pieces of evidence and should be given due weightage by courts. A finding of fact ignoring such admissions or concessions is vitiated in law and can be interfered with by the High Court in second appeal. Since the parties have

& O.P.(C)No.524 of 2017 15 been in litigating terms for several decades, the records are voluminous. The High Court as it appears from the judgment, has discussed the documentary evidence threadbare in the light of law relating to their admissibility and relevance.

14. The trial court as well as the First Appellate Court has

gone into the evidence in detail and has arrived at the finding after due consideration of facts. Pending the second appeal, this Court directed the 4th respondent to produce the relevant extracts of the old and new road registers which contain the details of the Panchayat road in question. The details are produced along with a memo by the counsel for the 4 th respondent and the said documents also show that the Panchayat road in question had a width of 3.6 metres as per the old register and 3 metres as per the new register with a carriage way of 1 metre width. The report of the Commissioner which has been annexed to the decree of the trial court would also show that the width of the road is 3.6 metres in the portions where there is no encroachment and the width has reduced at the portion where the appellant has been found to have encroached. There is no reason to interfere with the said findings of fact in an appeal under Section 100 of the Code of Civil Procedure. & O.P.(C)No.524 of 2017 16

15. Regarding the questions of law formulated, the third

question that the commission report in another suit has been ignored for the reason that the Commissioner was not examined cannot be treated as a substantial question of law. If the appellant wanted to rely on a commission report in another suit, it was for him to have proved the same in a manner known to law. Even though the Commissioners who had submitted Exts.C1 and C2 reports were examined, nothing has been brought out in their evidence to doubt the veracity of the findings in their report. About the question whether the publication under Order 1 Rule 8 of the Code of Civil Procedure is mandatory, the Appellate Court has correctly held that a person can bring a suit to assert his right over a community property or to protect such property, and there is no requirement for a publication under Order 1 Rule 8 of the Code of Civil Procedure in such cases. The suit cannot be treated as one filed for protecting the interest of the public at large and

is a suit that has been filed for protecting the rights of the plaintiffs as well as neighbouring owners.

16. The only other question that is raised is whether the

court has gone wrong in appreciating the documentary evidence & O.P.(C)No.524 of 2017 17 which according to the appellant is perverse, illegal, and irregular and has resulted in wrong conclusions. The proceedings of the case would show that the defendant had not produced any document except the copy of the commission report in O.S.No.250 of 2010, which was marked subject to proof. As such, the contention that there was a perverse appreciation of documentary evidence does not have even a factual backing as there were no documents produced in evidence.

17. In the result, the second appeal fails and is dismissed. It

is however made clear that the dismissal of the second appeal will not in any manner affect the contentions raised by the appellant in O.S.No.250 of 2010 so long as they relate to the title over the plaint schedule properties. Sd Sd/- T.R. RAVI JUDGE dsn & O.P.(C)No.524 of 2017 18 APPENDIX OF OP(C) 524/2017 PETITIONER EXHIBITS EXHIBIT P1 TRUE COPY OF THE PLAINT IN O.S.250 0F 2010 BEFORE THE MUNSIFF'S COURT,CHANGANACHERRY DATED NIL EXHIBIT P2 TRUE COPY OF THE WRITTEN STATEMENT IN O.S.NO.250 OF 2010 BEFORE THE MUNSIFF'S COURT,CHANGANACHERRY DATED 3.12.2010 EXHIBIT P3 TRUE COPY OF THE WRITTEN STATEMENT FILED BY RESPONDENTS 6 TO 8 IN O.S.250 OF 2010 BEFORE THE MUNSIFF'S COURT,CHANGANACHERRY DATED NIL. EXHIBIT P4 TRUE COPY OF THE PLAINT IN O.S.378/2010 BEFORE THE MUNSIFF'S COURT,CHANGANACHERRY DATED 15.11.2010 EXHIBIT P5 TRUE COPY OF I.A.6/2017 IN O.S.NO.250/2010 ON THE FILE OF THE MUNSIFF'S COURT,CHANGANACHERRY EXHIBIT P6 TRUE COPY OF OBJECTION IN I.A.6/2017 IN O.S.NO.250/2010 ON THE FILE OF MUNSIFF'S COURT,CHANGANACHERRY EXHIBIT P7 TRUE COPY OF THE ORDER DATED 13.1.2017 IN I.A.6/2017 IN O.S.NO.250/2010 PENDING BEFORE THE MUNSIFF'S COURT,CHANGANACHERRY.