

Joseph K.X. vs K.P.Michael

Joseph K.X. vs K.P.Michael

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Court : Kerala

Decided On : Jan-29-2024

Judge : Honourable Mr. Justice a. Badharudeen

Appeal No. : RSA/101/2023

Appellant : Joseph K.X.

Respondent : K.P.Michael

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN
MONDAY, THE 29TH DAY OF JANUARY 2024 / 9TH MAGHA, 1945
RSA NO. 101 OF 2023 AGAINST THE DECREE AND JUDGMENT
DATED 16.02.2016 IN OS (RENT CONTROL) AGAINST THE DECREE
AND JUDGMENT DATED 30.06.2022 IN AS
APPELLANT/APPELLANT/PLAINTIFF: JOSEPH K.X. AGED 62 YEARS
S/O. XAVIER, KOCHUVEETIL, PERUMANNOR P.O, ERNAKULAM
VILLAGE, KANAYANNOOR TALUK, KOCHI-682 015. BY ADVS. AMAL
GEORGE MANU GEORGE KURUVILLA PARAMESWARAN S.D.
RESPONDENTS/RESPONDENTS/DEFENDANTS 1 K.P.MICHAEL
AGED 68 YEARS S/O. PETER, KOCHUVEETIL, PERUMANNOR P.O,

ERNAKULAM VILLAGE, KANAYANNOR TALUK, KOCHI-682 015. 2 HARSH KUMAR AGED 64 YEARS S/O K.N SADASIVAN, KRISHNA KRIPA, KADAVANTHARA DESOM, ELAMKULAM VILLAGE, PIN-682 020. BY ADV SREEJITH S. NAIR FOR R1 AND R2 THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 29.01.2024 ALONG WITH RSA NO.102/2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN
MONDAY, THE 29TH DAY OF JANUARY 2024 / 9TH MAGHA, 1945
RSA NO. 102 OF 2023 AGAINST THE DECREE AND JUDGMENT
DATED 16.01.2016 IN OS (RENT CONTROL) AGAINST THE DECREE
AND JUDGMENT DATED 30.06.2012 IN AS
APPELLANT/APPELLANT/DEFENDANT: JOSEPH K.X. AGED 56
YEARS S/O. XAVIER, KOCHUVEETIL, PERUMANOOR P.O., KOCHI-
682015, ERNAKULAM VILLAGE IN KANAYANNOOR TALUK. BY
ADVS. AMAL GEORGE MANU GEORGE KURUVILLA(K/493/2006)
PARAMESWARAN S.D.

RESPONDENTS/RESPONDENTS/PLAINTIFFS: 1 K.P.MICHAEL S/O.
PETER, AGED 68 YEARS, KOCHUVEETIL, PERUMANOOR P.O.,
ERNAKULAM VILLAGE, KANAYANNOOR TALUK, KOCHI-682015. 2
PHILOMINA PETER, AGED 95 YEARS W/O. PETER, KOCHUVEETIL,
PERUMANOOR P.O., ERNAKULAM VILLAGE IN KANAYANNOOR
TALUK, KOCHI-682015. 3 ALBI, AGED 75 YEARS S/O. PETER,
KOCHUVEETIL, NEAR COIR BOARD,

KALAVOOR P.O., ALLEPPY, PIN-688522. 4 TRESSIAMMA, AGED 73
YEARS D/O. PETER, KOCHUVEETIL, PERUMANOOR P.O.,
ERNAKULAM VILLAGE, KANAYANNOOR TALUK, KOCHI-682015. 5
THOMAS, AGED 71 YEARS S/O. PETER, KOCHUVEETIL HOUSE,
THEVARA, KOCHI-682013. 6 RAJEENA, AGED 67 YEARS
KOCHUVEETIL, PERUMANOOR P.O., ERNAKULAM VILLAGE,

KANAYANNOOR TALUK, KOCHI-682015. 7 FRANCIS, AGED 65 YEARS S/O. PETER, KOCHUVEETIL, NEAR COIR BOARD, KALAVOOR P.O., ALLEPPEY, PIN-688522. 8 HARSH KUMAR, AGED 64 YEARS S/O. K.N.SADASIVAN, CONDUCTOR, KRISHNA KRIPA, KADAVANTHRA DESOM, ELAMKULAM VILLAGE, PIN-682020. BY ADV SREEJITH S. NAIR FOR R1, R3 TO R5, R7 AND R8 THIS REGULAR SECOND APPEAL HAVING COME UP FOR

ADMISSION ON 29.01.2024 ALONG WITH RSA NO.101/2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 29th day of January, 2024 These regular second appeals have been filed under Section 100 read with Order XLII Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC' for short).

2. Sri.Joseph, the plaintiff in O.S.No.1422/2004 on the files of the Additional Munsiff's Court-III, Ernakulam, is the appellant in RSA No.101/2023. The respondents herein are the defendants in the above Suit.

3. RSA No.102/2023 also is at the instance of

Joseph, who is the defendant in O.S.No.1055/2005 on the files of the Additional Munsiff Court-III, Ernakulam and the said suit had been filed by the respondents in this second appeal as plaintiffs.

4. Heard the learned counsel for the appellant on admission.

5. I shall refer the parties in these regular second appeals as 'Joseph' and 'Michael' for convenience.

6. The contention raised by Joseph before the trial in

O.S.No.1422/2004 is that he is the title holder of plaint 'A' schedule property therein, obtained on the strength of settlement deed No.603/2000 of SRO Ernakulam. The above property is the property covered by family settlement deed

No.229/1969. When Joseph apprehended trespass upon the said property, he filed a suit seeking relief of permanent prohibitory injunction. Subsequently, Michael and others filed O.S.No.1055/2005, seeking relief of fixation of boundary, recovery of possession, declaration of easement right and consequential prohibitory injunction.

7. According to Michael and another, there is no

boundary existing in between plaint 'A' schedule property of Michael in O.S.No.1055/2005 with that of plaint 'C' schedule property owned by Joseph. He also sought the relief of recovery of possession of plaint 'B' schedule in the possession of Joseph, relief of declaration of right of easement by prescription over plaint 'D' schedule pathway and consequential injunction.

8. The trial court recorded evidence after raising necessary issues and tried both suits jointly, treating O.S.No.1055/2005 as the main case.

9. PW1 to PW3 examined and Ext.A1 to A3 were marked. DW1 and DW2 examined and Exts.B1 to B3 were marked. Ext.C1 and Ext.C2 series were marked.

10. Finally the trial court dismissed O.S.No.1422/2004 and allowed O.S.No.1055/2005 as under: In the result: OS No.1422/2004

1. The suit stands dismissed.

2. The parties shall bear their respective costs. OS No.1055/2005 The suit decreed as follows:

1. The boundary between the plaint 'A' schedule which shall be inclusive of the plaint 'B' schedule and plaint 'C' schedule shall be fixed as shown in exhibit C2(a) sketch.

2. The eighth plaintiff shall be entitled to recover

possession of plaint 'B' schedule from the defendant and the defendant is directed to put the eighth plaintiff in possession of the plaint 'B' schedule property after removing the structures therein at the defendant's expense within thirty days failing which the eighth plaintiff shall be entitled to execute this decree through the process of law and at the expense of the defendant.

3. It is hereby declared that the eighth plaintiff shall have the right of way through the plaint 'D' schedule property.

4. The defendant is restrained by a decree of

permanent prohibitory injunction to the effect that he shall not in any manner restrain the eighth plaintiff from using the plaint 'D' schedule pathway to access the plaint 'A' schedule of which the 'B' schedule is also held to be a part

11. Even though A.S.Nos.95/2016 and 100/2016 were filed challenging the said common verdict, the appellate court also confirmed the finding of the trial court.

12. At the time of admission, the learned counsel for

Joseph submitted that, insofar as the right claimed over the plaint 'D' schedule pathway is concerned, there are no sufficient pleadings and according to the learned counsel, the pleadings in paragraph 9 of the plaint in O.S.No.1055/2005

are insufficient to grant the relief. He also submitted that the father of Joseph purchased the property only in the year 1972 and there exists no way as contended. He also pointed out that, as per Ext.C2(a) plan, the portion of plaint 'D' schedule pathway running through plaint 'C' schedule (the property of Joseph) is reported to be one, where a septic tank and banana plantains are situated as per Ext.C2 report.

13. In order to address the grievance advanced by the

learned counsel for Joseph, I have perused Ext.C2(a) plan. As per Ext.C2, the Commissioner measured the properties covered by document No.229/1969

marked as Ext.A1. It was reported by the Commissioner that plot A is a property having an extent of 5.225 cents, as against the description of the same having an extent of 5.75 cents in Ext.A1. The Commissioner located A1 plot as property having an extent of 0.135 cent as against the property covered by A schedule to Ext.A1. Similarly, the Commissioner located plaint 'B' schedule, having an extent of 0.390 cent, as plot B.

Accordingly, the entire extent of property obtained as per Ext.A1 by Michael and another is located as 5.75 cents. The Commissioner also located 5.500 cents of property described as plaint 'B' schedule in Ext.A1 as plot C, having an extent of 5.235 cents. C1 plot having an extent of 0.110 cent is located as in possession of a third party. Similarly, 0.155 cent is the property identified as the portion of D schedule way where

Michael and another claimed right of easement by prescription. Accordingly, 5.500 cents of property of the defendant also was located.

14. The learned counsel for Joseph submitted that PW2, an independent witness, given evidence stating that D schedule is in use only from 1972.

15. In the trial court judgment, the learned Munsiff

appreciated the evidence of PW1 along with the evidence of DW1. The trial court extracted the portion of the evidence of DW1, found in page No.3, admitting use of D schedule way by Joseph 1972 onwards and also admitted that apart from D schedule, no other way was available to Joseph.

16. Insofar as location of the boundary between plaint

'A' and 'C' schedule property, separating A plot and C plot, is concerned, the same is tallying with the title deeds. Similarly, plaint 'D' schedule also is located and a portion of the same having an extent of 0.155 cent is located as the portion of D schedule.

17. In the case at hand, DW1 admitted the existence

of the way, use of the same and non-availability of any other way to Michael. In addition to that, none of the parties never put up any contention to the effect that apart from the narration in Ext.A1 title document, any property in excess available in any manner. Since Ext.C2(a) clearly located the lie of the properties in tune with the narration in Ext.A1 and specified the area in the possession of Michael and Joseph. It appears that the trial court rightly granted the decree. The appellate court, on re-appreciation, also concurred with the same rightly.

18. In this case, in fact, the learned counsel for Joseph/appellant failed to justify any substantial question of law warranting admission of the second appeal. 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 appellant to urge any other ground in the appeal without the leave of the Court, given in accordance with the provision of section 100.

19. 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.

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

21. In a latest decision of the Apex Court in

Government of Kerala v. Joseph, reported in [2023 (5) KHC 264 : 2023 (5) KLT 74 SC], it was held, after referring *Santosh Hazari v. Purushottam Tiwari*, [2001 (3) SCC 179] (three - Judge Bench), 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.

22. 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.

23. In view of the above fact, no substantial question of law arises in this matter to be decided by admitting this appeal.

24. In the result, these appeal are found to be

meritless and the same are dismissed without being admitted. All interlocutory applications pending in these second appeals, stand dismissed. Registry shall inform this matter to the trial court as well as the appellate court, forthwith. Sd/- A. BADHARUDEEN JUDGE nkr

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