

Rasheed @ Rafeed vs Mary Fernandez

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Court : Kerala

Decided On : Jul-25-2022

Judge : Honourable Mrs. Justice M.R.Anitha

Appeal No. : RSA/266/2015

Appellant : Rasheed @ Rafeed

Respondent : Mary Fernandez

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE M.R.ANITHA
MONDAY, THE 25TH DAY OF JULY 2022 / 3RD SRAVANA, 1944 RSA
NO. 266 OF 2015 AGAINST THE JUDGMENT AND DECREE DATED
16.01.2015 IN AS OS 74/2008 OF PRINCIPAL SUB COURT,KOCHI
APPELLANTS/APPELLANTS IN AS/DEFENDANTS 1 TO 3:

1 RASHEED @ RAFEED, AGED 42 YEARS S/O.LATE ADIMA,
RESIDING AT MUNNEKAPARAMBU, NJALIPARAMBU ROAD,
VDATHAZHATHU, FORT KOCHI DESOM, FORT KOCHI VILLAGE,
KOCHI-682001. 2 ANITHA W/O.RASHEED,AGED 37 YEARS
RESIDING AT MUNNEKAPARAMBU, NJALIPARAMBU ROAD,

VDATHAZHATHU, FORT KOCHI DESOM, FORT KOCHI VILLAGE, KOCHI- 682001. 3 SAINUDHIN S/O.LATE ADIMA,AGED 55 YEARS RESIDING AT MUNNEKAPARAMBU, NJALIPARAMBU ROAD, VDATHAZHATHU, FORT KOCHI DESOM, FORT KOCHI VILLAGE, KOCHI- 682001. BY ADVS. SRI.M.P.RAMNATH SRI.BEPIN PAUL SRI.P.RAJESH KOTTAKKAL SRI.SHALU VARGHESE SMT.S.SANDHYA SEI.M.VARGHESE VARGHESE

RESPONDENTS/RESPONDENTS 2 TO 5 IN A.S./ADDITIONAL PLAINTIFFS 2 & 3 AND DEFENDANTS 3 & 4: 1 MARY FERNANDEZ W/O.LATE PHILIP FERNANDEZ, AGED 73 YEARS, HOUSE NO.1/873(1) VADATHAZHATHU, NJALIPARAMBU, FORT KOCHI DESOM, FORT KOCHI VILLAGE, KOCHI-682001.

2 JULIET P.SOMAR D/O.LATE PHILIP FERNANDEZ, AGED 34 YEARS, HOUSE NO.1/873(1) VADATHAZHATHU, NJALIPARAMBU, FORT KOCHI DESOM, FORT KOCHI VILLAGE, KOCHI-682001. 3 SUBAIDA D/O.ADIMA, AGED 52 YEARS, VADATHAZHATHU, FORT KOCHI DESOM, FORT KOCHI VILLAGE, KOCHI-682001, NOW HAVING ADDRESS AT W/O.NOUSHAD, MAHAJANAVADI, MATTANCHERY, KOCHI-682002. 4 SAHIDA D/O.LATE ADIMA, AGED 47 YEARS, VADATHAZHATHU, FORT KOCHI DESOM, FORT KOCHI VILLAGE, KOCHI-682001. BY ADVS. SRI.V.V.ASOKAN (SR.) SRI.P.RAHUL SMT.UMA R.KAMATH

THIS REGULAR SECOND APPEAL HAVING COME UP FOR HEARING ON 05.07.2022, THE COURT ON 25.07.2022 DELIVERED THE FOLLOWING: 'CR' M.R.ANITHA, J ***** R.S.A.No.266 of 2015 ----- Dated this the 25th day of July, 2022

JUDGMENT

This Regular Second Appeal has been directed against the

judgment and decree in A.S.No.56/2012 on the file of I Additional

District Judge, Ernakulam which arise out of the judgment and decree of O.S.No.74/2008 on the file of Sub Court, Kochi.

2. Defendants 1 to 3 are the appellants. (Parties will be

referred as per their status before the trial court). The suit was one for recovery of possession of plaint B schedule property, damages for use and occupation and also perpetual injunction. Original plaintiff died pending the proceedings and his legal heirs were impleaded as additional plaintiffs 2 and 3. It is alleged that an extent of 7 cents of property in Sy.No.209/2 in Fort Kochi Village and house therein with their amenities is in the possession

and enjoyment of the first plaintiff for the last fifty years as per gift deed No.447/1956 of Kochi S.R.O and the property is scheduled as A schedule property. First plaintiff reduced the appurtenant land in A schedule property by occupying the house in the year 1956 and renewed the house providing septic tank, latrine and other amenities and the plaintiffs are living along with the husband of 3rd plaintiff in the house. The property originally belonged to Palakkal Pailo Eleeswa of Fort Kochi from whom Narayana Iyer purchased the property and during the time of Narayana Iyer first plaintiff and his predecessors were in possession and enjoyment of the plaint schedule property. Late Narayana Iyer and his legal heirs were never in possession of the property and intervened with the plaintiff's exclusive possession of the property. Apprehending trespass and interference of 1st plaintiff's possession in 'A' schedule property by legal heirs of late Narayana Iyer or anyone claiming under them, plaintiffs filed O.S.No.47/2006 before Sub Court, Kochi and that suit was decreed, declaring the plaintiffs possession over the property and restraining the defendants from trespassing into the property.

Earlier first plaintiff had filed O.S.No.386/1990 before the Munsiff's Court, Kochi for eviction of Adima and his legal heirs from the house in A schedule property. Munsiff court and first appellate court dismissed that suit. But this Court in

R.S.A.No.687/1998 decreed the suit and defendants were directed to vacate from the plaint schedule house on the strength of title. On 08.04.2002, defendants were evicted and possession of the house was recovered. Thereafter, defendants encroached and put up a house on the eastern side of the land on 10.04.2002 using bamboo poles and tar sheets and it has been described as B schedule, in violation of the interim injunction obtained by the first plaintiff in O.S.No.218/2002 from Munsiff's Court, Kochi on 10.04.2002. Defendants have no interest or right in plaint A schedule property and plaintiffs have exclusive possession and enjoyment of plaint schedule property from 1956 onwards publicly and uninterruptedly as of right without being objected by the owner late Narayana Iyer or anyone else and perfected title about 40 years ago in 1968 by adverse possession and limitation. Plaintiff claimed an amount of Rs.300/- per month

towards damages for use and occupation till the recovery of plaint B schedule property. Permanent injunction is also sought against trespass and committing waste in plaint A schedule property.

3. Defendants 3 and 5 remained ex parte. Defendants 1,

2 and 4 filed written statement contending that the description of plaint A schedule is incorrect and plaintiff is not in possession and enjoyment of plaint schedule property. Suit is not maintainable. A portion of the plaint schedule property was enjoyed by the predecessor of the defendants and after their demise it is being enjoyed by the defendants. By gift deed No.447/1956 plaintiff did not get ownership or possession of plaint A schedule property. He became the owner of a thatched shed alone as per the gift deed. The defendants predecessor was in occupation of an unnumbered shed in plaint A schedule property. While so, the first plaintiff abandoned the house and left to Bombay. The first plaintiff's brother-in-law requested the defendants predecessor to look after and maintain the homestead. For decades together nothing was heard from the plaintiff. So defendants predecessor

did not obtain a Corporation number to his thatched shed. In early nineties first plaintiff came back and requested the defendants father to vacate the house. Thereafter, the suit was filed and a decree was passed for recovering possession

of the shed covered by the gift deed. The plaintiff has no case about the appurtenant land in that case or about the thatched shed in occupation of the defendants predecessor. First plaintiff was in Bombay for more than four decades prior to 1990. He started to occupy the shed in the year 2002 after getting delivery of the thatched shed from the defendant. At the time of delivery of that shed, the defendants unnumbered thatched shed was existing and the Ameen reported about it. Defendants done renovation work in the thatched shed and it has been displayed wrongly as B

schedule in the plaint. Defendants have no knowledge about O.S.No.47/2006. The decree and judgment in O.S.No.47/2006 will not affect the possessory right of the defendants over the property. Defendants have not put up any new house as alleged on 10.04.2002. He only renovated the existing shed. So, the plaintiffs and defendants were in joint possession of the respective house within the land of Narayana Iyer. Plaintiffs are not entitled for any damages for use and occupation of B schedule property.

4. Additional written statement was also filed by the 1 st defendant contending that his father had another son by name Beerasu and he is residing in the house constructed by Adima.

5. PWs 1 to 4 examined and Exts.A1 to A23 and C1 to C2(a) were marked from the side of plaintiff. DWs 1 and 2 examined and Exts.B1 to B8 marked from the side of the defendants.

6. On evaluating the facts and circumstances and

evidence adduced, the learned Munsiff found that the plaintiffs are entitled to get a decree of recovery possession of plaint B schedule property. Prohibitory injunction as well as damages for use of occupation as sought for also granted.

7. Against the judgment and decree, the defendants 1 to

3 filed A.S.No.56/2012 before the I Addl.District Court, Ernakulam and judgment and decree of trial court was confirmed. Aggrieved by the same, defendants 1 to 3 approached this Court in Second Appeal for the various grounds stated in the

memorandum of appeal.

8. At the time of admission, this Court formulated the following substantial question of law:

(i) Whether the plaintiffs/respondents 1 and 2 are precluded from raising possessory title in the suit by virtue of Order 2 Rule 2 C.P.C since they did not raise such plea either in O.S.No.686 of 1990 or O.S.No.218 of 2002 filed before the Munsiff's Court, Kochi?

(ii) Whether the decree in O.S.No.47 of 2006 before the Sub Court, Kochi is binding on the appellants herein?

(iii) Whether the lower appellate court failed to appreciate evidence which resulted in a perverse finding?

9. According to the learned counsel for the defendants,

as per gift deed No.447/1956 of Fort Kochi S.R.O, the plaintiffs right is only with respect to thatched shed and has no right over the appurtenant land. Now, the plaint schedule property though has been described as 7 cents of property measurement as per the Commissioner's report and plan, shows that the extent of plaint schedule property is 5.90 cents in Sy.No.1/873 and the plaint B Schedule has been identified as 1.090 cents with brick shed and thatched bathroom, toilet etc. It is contended that in none of the previous proceedings against the defendants, the plaintiffs have raised any claim with respect to appurtenant land.

Ext.A1 and A2 judgment and decree of this Court in S.A.No.687/1998 which arouse out of A.S.No.64/1996 which in turn arouse out of O.S.No.386/1990 is with respect to plaint schedule building alone. In O.S.No.218/2002 filed by the first plaintiff also the plaint schedule has been described as the thatched shed and the relief sought in the plaint is to restrain the defendants from making any waste, damage or put up any new structure in the plaint schedule property but the plaint schedule property was a thatched shed.

10. Description of the plaint schedule property as per

Ext.A14 decree copy of O.S.No.218/2002 is that house with Cadjan and bamboo having 5 rooms. It is contended that even though in the body of the plaint there is allegation with regard to the intention of the defendants to trespass into the plaint schedule property and snatch away part of the plaint schedule property, in the schedule of plaint it is restricted to the thatched

shed. So, the main contention of the learned counsel is that since there is allegation in the plaint with regard to the intention of the defendants to trespass into the plaint schedule property and snatch away part of the plaint schedule property, the relief now sought against the trespass and other reliefs ought to have been claimed in the previous suits. So, the present suit filed by the plaintiff for recovery of plaint B schedule property and permanent injunction and damages etc is barred by Order II Rule 2 of the Code of Civil Procedure, 1908 (in short 'the Code').

11. It is further contended by the learned counsel that

suit O.S.No.47/2006 filed before Principal Sub Court, Kochi in a representative capacity under Order 1 Rule 8 will not bind the defendants since they were not parties to the proceedings and no proper service of notice was effected in that case against the defendant and no proper address of the defendant has also been given in that suit and that service was effected to the defendant residing in Shencottah, Tamil Nadu by paper publication in a local

newspaper in Kochi. Since defendants were not parties and they were not claiming under the defendant in O.S.No.47/06, that

judgment and decree in that case will not bind them. Judgment in

O.S.No.47/06 which is marked as Ext.A15 would show that an ex parte decree was passed declaring the plaintiffs possessory title over plaint schedule property and permanent injunction was also passed against the defendant and all others. The decree scheduled property is described as 2.8 Ares of property and House No.1/873 (old No.1/660) and appurtenant land with latrine, septic tank with compound wall and fence and all rights therein.

12. Learned counsel for the plaintiffs/respondents, on the

other hand, would contend that defendants had been raising inconsistent pleas in different proceedings throughout. They claimed right of Kudikidappu in O.S.No.386/1990 and though the matter was referred to Land Tribunal it was returned by the Land Tribunal for the reason that landlord has not been made a party.

13. In O.S.No.218/02 the defendants contention was that predecessor of the defendants put up a house adjacent to the

plaint schedule house and that house was in a ruined condition and first defendant who is claiming to be the power of attorney of the plaintiffs approached their predecessor asking to occupy the thatched shed after doing necessary repairs and accordingly the defendant predecessor renovated the house.

14. He would also contend that though defendants made

attempt to prove their possession and enjoyment of shed in the plaint schedule property by producing various documents in the present suit, it has been found that ration card issued with respect to house No.1/671 in the name of defendants, stands in the name of Regional Fire Officer, Ernakulam as per Ext.A21. Electric connection has also been taken showing that number. So, according to the learned counsel, defendants manipulated all those documents to establish that they had been occupying in a house situated in the plaint schedule property. It is further contended that Beerasu, one of the sons of original defendant

filed a suit to set aside the judgment and decree in O.S.No.47/2006 and that was dismissed for default, which would indicate that defendants were quite aware of the filing of O.S.No.47/2006, but did not challenge Ext.A15 and A16

judgment and decree and hence they cannot contend that it will

not bind them.

15. At the outset, I may point about an argument raised

by the learned counsel for the defendants about the description of the house in the plaint schedule property as 'homestead' which according to him would indicate the nature of occupation as

contemplated under S.2(25) of Kerala Land Reforms Act. However, it has no much relevance at present because as per Ext.A1 judgment plaintiffs right over the house was declared and defendants were directed to vacate from the house and recovery of possession of the house was ordered. So also defendant could not establish his kudikidappu right over the house.

16. With regard to the contention of bar of Order II Rule 2,

the reply of the learned counsel for the plaintiffs is that first suit O.S.No.386/1990 as well as O.S.No.218/2002, they have been claiming under Catherine. But the present suit has been filed by them after acquiring title by adverse possession as per Exts.A15 and A16, the judgment in O.S.No.47/06. So, it is his contention

that bar under Order II Rule 2 will not apply. With respect to objection of not impleading the defendant as a party in O.S.No.47/2006, the contention of the learned counsel for the plaintiffs is that the defendants herein is claiming under the defendant in O.S.No.47/06 and hence when the suit has been filed under representative capacity in compliance of Order 1 Rule 8 the decree passed therein would bind the plaintiff also.

17. So, the point for determination before this Court is (1)

whether the present suit is barred under Order II Rule 2 for not seeking the relief in O.S.No.386/1990 on the file of Additional Munsiff Court, Kochi and O.S.No.218/2002 of Sub Court, Kochi.

(2) Whether the judgment and decree in O.S.No.47/2006 filed

under Order 1 Rule 8 will bind defendants or their right over the plaint schedule property excluding the building which was delivered as per Ext.A1 judgment in O.S No.386/1990.

18. Sub Rule 1 of Order II Rule 2 provides that every suit

shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and it permits a plaintiff to relinquish any portion of his claim in order to bring the suit

within the jurisdiction of any court. Sub Rule 2 further provides that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. Sub Rule 2 of Order II expressly prohibits the plaintiff who omitted to sue or relinquishes a portion of his claim from suing with respect to portions so omitted or relinquished.

19. Learned counsel for the defendants in this context

drew my attention to *Sidramappa v. Rajashetty and Others* : 1970 KHC 391. Paragraph 7 of the judgment is relevant in this context to be extracted which reads thus:

..... The requirements of Order 2 rule 2, Code of Civil Procedure is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a "cause of action." 'Cause of action' means the, 'cause of action for which the suit was brought'. It cannot be said that the cause of action on which the present -suit was brought is the same as that in the previous. suit. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to

which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings."

20. It is also relevant in this context to quote Mohd. Hafiz

v. Mohd. Zakaria : AIR 1922 PC 23 wherein the scope and ambit of Rule 2 Order II has been dealt with. That was a case in which a mortgage deed provided that if the interest was not paid for six months the creditor should be competent to realise

either the unpaid amount of the interest due to him or the amount with interest for bringing a suit in court without waiting for expiration of the time period and plaintiff after more than three years filed a suit for interest alone and obtained a decree. In that context, it was held that the plaintiff must be deemed to have relinquished his claim for further relief, he having exercised the option of suing for interest alone. So, the second suit for principal and suing for interest was not maintainable.

21. Plaintiff filed suit originally as O.S.No.386/1990 for

recovery of possession and permanent prohibitory injunction against the defendant with respect to the thatched house situated in the plaint schedule property. Defendant set up right

of kudikidappu and that was not actually answered by the Land Tribunal though it was referred, since the owner was not made a party and the Munsiff's Court as well as the first appellate court dismissed the suit of the plaintiff and this Court in second appeal decreed the suit directing the 2nd defendant and after his death his legal heirs to vacate the plaint schedule thatched shed finding that plaintiff proved title over the building. In that case, the plaintiff has not sought for any relief for recovery of possession of appurtenant property. This Court while ordering recovery of possession confined the relief to plaint schedule building alone.

22. After getting eviction of the defendants from the plaint

schedule house described in O.S.No.386/1990, the plaintiff filed O.S.No.218/2002, certified copy of the judgment of which is marked as Ext.A13, for injunction, for restraining the defendants from making any waste or damage or put up any new structures in the plaint schedule property. Plaint schedule property again is house alone. It has been contended by the defendants in the written statement in O.S.No.218/2002 that the plaintiff has not produced any document to prove his right over any property

other than the thatched shed. It is also contended that though in the plaint schedule, building alone is stated, in the body of the plaint, matters regarding property is also included. It is further contended that as per the registered

document the plaintiff is the owner of the house and the house is very adjacent to the house put up by the predecessor of the defendants. So, the defendants had specifically contended about the averments in the body of plaint with regard to the appurtenant land though in the plaint schedule the thatched house alone has been shown as the plaint

schedule property. Defendants also stoutly denied the right of plaintiffs over the appurtenant land. They also contended about the shed which has been put up by them adjacent to the plaint schedule shed and occupation of the house adjacent to the plaint schedule building after the order of eviction passed by the High Court in Ext.A1 case. So also, there is specific averment in the plaint regarding appurtenant land attached to the plaint schedule property and the specific denial of the defendant over the right of the plaintiff over the appurtenant land and the occupation of a shed by them nearby the plaint schedule shed described in

O.S.No.218/2002. In spite of such specific contentions raised by the defendants in the written statement and averments in the plaint with regard to the intention of the defendant to trespass into the property and commit waste and put up new structures, since no relief has been sought by the plaintiff in O.S.No.218/2002 with respect to the shed which has been

occupied by the defendants or to evict them from the appurtenant land plaintiff cannot get rid of the bar under Order II Rule 2 of the Code. Since there is specific assertion from the part of the defendants in O.S.No.218/2002 itself denying the right of the plaintiff over the appurtenant land and asserting the right of the plaintiff with respect to the shed alone, the failure on the part of the plaintiff to claim the relief in O.S.No.218/2002 with respect to the appurtenant land or the shed in which defendants are

occupying would amount to intentional relinquishment or omission which would prevent the plaintiff from raising that claim

in a subsequent proceedings. Ext.A13 certified copy of judgment

in O.S.No.218/2002 dated 22.02.2003 also would show that the learned Munsiff had found about the existence of B schedule shed

in that case and found that plaintiff has no grievance about that shed and contention of the plaintiff that the said shed was constructed after filing of the suit was also negated by noting the commission report. The dispute of the defendants with respect to the title of the plaintiff over the property around the building also has been discussed. But the question of title of the plaintiff over the surrounding land has not been gone into since that property is not scheduled in the plaint.

23. Argument of the learned counsel for the plaintiffs that

in the previous suit the plaintiffs were claiming under Catherine and hence the claim with respect to the plaint schedule property was not incorporated etc. does not hold good. Earlier suits were filed by the plaintiff against the defendants. The emphasis of bar under Order II Rule 2 is with respect to the claim and its relinquishment and not as to under whom the claim is made, it has rather no relevance at all. The object of bar under Order II Rule 2 is to protect the interest of the defendant. The omission to include the appurtenant land in the earlier suits would indicate that at the time when O.S.No.386/1990 and O.S.No.218/2002

were filed plaintiffs were not having any title so as to evict the defendants from the appurtenant land of the plaint schedule property described in those cases. That is the reason why intentionally the relief with respect to the appurtenant land was omitted in O.S.No.386/1990 and appurtenant land and B schedule shed was omitted in O.S.No.218/2002. As rightly contended by the learned counsel for the defendants it has come out from the Commissioner's report in O.S.No.218/2002 (Ext.A12) that a new shed constructed with tar sheet roof and with 8 bamboo poles to support the roof on the eastern side of the house inside the property and some building construction materials were also seen inside the shed. Outside the shed, river sand and old laterite stones were also seen collected. So, it is very clear from the Commissioner's report that at the time of filing O.S.No.218/2002, the defendant had put up a shed near plaint schedule thatched shed described in O.S.No.218/2002 but no relief was sought against that trespass to land in

O.S.No.218/2002 also. So, this is a clear case in which bar under

Order II Rule 2 applies in entertaining the present suit against
the defendants.

24. Learned counsel also contends about the bar under

Explanation 4 to Section 11 of the Code. Explanation 4 to Section 11 provides that any matter which might and ought to have been made ground of defence or attack in former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

25. It is relevant in this context to quote *Ayichutty v.State of Kerala* [2002 (2) KLT 125] wherein while dealing with Explanation IV to Section 11 of the Code it has been held as follows: The principles of *res judicata* is applied by the courts in

order to give a quietus to the dispute between the

parties so that same parties shall not be vexed of successive litigations on the same subject matter or cause of action. There shall always be finality of resolution of disputes arising out of same cause. That is the principle behind *res judicata*. The principles as contained in Explanation IV to S. 11 CPC is also aimed at that general principle to give finality to resolution of

disputes raised by the same parties. That means when an incumbent has a cause of action, touching same disputes whatever be the grounds available to get the relief incumbent ought to have raised all such grounds and pleaded all the reliefs touching the subject matter. Whatever not raised in a particular case pleading for a relief shall always be taken as forgone and has been settled between the parties as if such grounds have been raised.

26. In *Commissioner of Income Tax v. T.P. Kumaran*

[1996 (2) KLT 867 (SC)] it has been held that the principles of constructive res judicata provided under Explanation IV to Section 11 of the Code envisages that any matter which might and ought to have been made ground of defence or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in a subsequent suit.

27. In the present case, at the time of filing of O.S.No.386/1990 and O.S.No.218/2002 the plaintiff was well aware of the trespass made by the defendant to the appurtenant land. Defendants raised specific contention in the written statement that the plaintiffs have no right over the appurtenant

land apart from the thatched shed. In spite of that plaintiff did not opt to seek for any relief with respect to the appurtenant land or the shed and appurtenant land in O.S.No.218/2002 which has been put up by the defendant admittedly by the plaintiff on

10.04.2002. So that is a claim which ought to have been made a ground of attack in the former suit and shall be deemed to be a matter directly and substantially in issue in those suits. Hence when a case was filed against the defendants with respect to the plaint schedule house, this claim with respect to the appurtenant land ought to have been raised in the earlier suit. So the suit is barred by the principles of constructive res judicata also.

28. Hence the bar under Explanation IV to Section 11 of

the Code also squarely applies since the plaintiff omitted to raise the claim with respect to the appurtenant land in the previous proceedings and it ought to be taken as forgone and has been settled between the parties.

29. Next point for consideration is whether the decree passed in O.S.No.47/2006 before the Sub Court, Kochi is binding

on the defendants. The certified copy of the judgment and decree in O.S.No.47/2006 have been produced and marked as Ext.A15 and A16. The suit was filed by the plaintiffs against one H.Mahadevan, 55 years old, father's name is shown as unknown with house number and particulars as Shencottah, Tamil Nadu

and an ex parte order was obtained on 23.11.2006. In the plaint in the present case, it has been alleged that the property originally belonged to one Palakkal Pylo Eliswa, Fort Kochi and subsequently purchased by one Narayana Iyer Ganapathi Iyer and during the life time of Narayana Iyer, the predecessor of the plaintiffs were in exclusive possession of the plaint schedule property and apprehending trespass by the legal heirs of Narayana Iyer or anyone claiming under them, plaintiffs filed O.S.No.47/2006 and a decree was passed declaring the title of the first plaintiff and restraining trespass.

30. It has been vehemently contended by the learned counsel for the defendants that the judgment in O.S.No.47/2006 will not in any way bind the defendants since they were not made parties

to the suit. As per Ext.A15 judgment the plaintiff's possession

Ext.A16 decree would reveal that the plaint schedule property is the house No.1/873 (old No.1/660) and appurtenant land with latrine septic tank etc having an extent of 7 cents (2.8 Ares) with compound wall and fence. Paper publication was

effected in a local daily. He would also contend that judgment

and decree has been obtained by playing fraud upon the court since the defendant who is admittedly in possession of a part of the plaint schedule property have not been made parties to the proceedings.

31. The question is whether Exts.A15 and A16 judgment

and decree will bind the defendants? Order 1 of the Code of Civil Procedure, 1908 deals with parties to suits and Rule 1 states as to who may be joined as plaintiffs, defendants etc. Rule 8 of

Order I provides that where there are numerous persons having

the same interest in one suit and one or more of such persons may with the permission of the court sue or be sued or may defend such suit on behalf of or for

the benefit of all the persons interested and the court may direct that one or more of such persons sue or be sued or may defend such suit on behalf of or

for the benefit of such persons so interested. So, Order I Rule 8 of the Code makes it explicit that when there are numerous persons having same interest in one suit one or more of such persons can sue or be sued on behalf of or for the benefit of those persons so interested. Explanation under Order 1 Rule 8 distinguishes persons having the same interest in one suit or persons having the same cause of action.

32. To establish the sameness of interest, it is not necessary to establish sameness of the cause of action. Sameness of interest is a pre-requisite for application of under

Order 1 Rule 8 of the C.P.C.

33. It is relevant in this context to quote S.N.D.P.Sakhayogam v. Kerala Atmavidya Sangham : 2017

(4) KLT 866 (SC) wherein it has been held that if the facts

pleaded and reliefs claimed in the plaint do not satisfy the requirements of Order 1 Rule 8 for grant of the relief to the public at large, then the Court is bound to consider whether the suit is capable of being tried as a regular suit on behalf of the plaintiff for granting relief to parties in their personal capacity. Paragraph

22 of the judgment is relevant in this context to be extracted which reads thus:

22) Secondly, if the plaintiff is held entitled to file such suit, whether the facts pleaded and the reliefs claimed in the plaint can be said to be in the nature of representative character so as to satisfy the ingredients of Order 1 Rule 8 of the Code which are meant essentially for the benefit of public at large for grant of any relief and lastly, if the facts pleaded and the reliefs claimed in the plaint do not satisfy the requirements of

Order 1 Rule 8 of the Code for grant of relief to the

public at large then whether such suit is capable of being tried as a regular suit on behalf of the plaintiff for granting reliefs in their personal capacity because the suit relates to ownership of land, namely, who is the owner of the suit land."

34. In John v. John Joseph : 2020 (1) KLT Online

1154 a learned Single Judge of this Court held that an application under Order 1 Rule 8 of the Code is not maintainable unless it concede that there are numerous persons having the same interest in the suit in question. Here the question for consideration is whether Exts.A15 and A16 judgment and decree in O.S.No.47/2006 is binding on the defendants. It has been contended by the learned counsel that the suit was filed in a representative capacity against the owner of the property who is alleged to be legal heir of Narayana Iyer Ganapathi Iyer and defendant had been claiming kudikidappu right under him and hence there is proper representation of the defendant when

judgment and decree has been obtained by the plaintiff in a

representative capacity in O.S.No.47/2006. So, the question arose whether the plaintiff and the defendant in O.S.No.47/2006 were having sameness of interest. It is strenuously contended by the learned counsel for the defendants that a defendant naming H. Mahadevan without father's name or house name will not even leads to an interference that this Mahadevan referred in Exts.A15 and A16 is a legal heir of Narayana Iyer Ganapathi Iyer. Ext.A15, the ex parte judgment did not state anything with regard to the pleadings in the plaint. Copy of the plaint in that case has not been produced. The contention of the learned counsel for the plaintiffs was that during evidence DW1 admitted about the legal heir of Narayana Iyer as Mahadevan and that would show that defendant is also claiming under Mahadevan impleaded in the

suit. But, on going through the deposition of DW1 it could be seen that questions were put to him with respect to Mahadeva Iyer and not Mahadevan. Even if it is assumed that the defendants are claiming under the said Mahadevan, how can

the interest of landlord and kudikidappukaran be the same. It will only be conflicting interest.

35. During cross-examination, DW1 would admit that this

is the property of Mahadeva Iyer and he came to their house and talked to them before three years. He also stated that Mahadeva Iyer is the nephew of Narayana Iyer as per the information. He also admitted that he saw Mahadeva Iyer in Shencottah in Tamil Nadu and it would go to show that though DW1 speaks about Mahadeva Iyer the defendant in O.S.No.47/2006 is H.Mahadevan without father's name or house name. So also even though

defendants had raised a contention in O.S.No.386/1990 regarding the right of kudikidappu with respect to plaint schedule thatched shed described therein, in subsequent proceedings, after eviction from the plaint schedule property in O.S.No.386/1990 it has come out that a new shed has been put

up. Though the defendant attempted to establish that it was an old shed, it was found by the two courts that it was a new shed put up by him after eviction from the shed belonging to the plaintiff. But, even in the written statement in O.S.No.218/2002, the defendants have made specific contention that the plaintiffs have no right over the appurtenant land and it has already been found that the failure of the plaintiff to claim relief with respect to appurtenant land in O.S.No.218/2002 would preclude the plaintiff from raising that claim in the present suit due to the bar under

Order II Rule 2 as well as Explanation 4 to Section 11. So, when

a suit has been filed by the plaintiff against one Mahadevan when there is nothing in evidence to show who is that Mahadevan and whether the said Mahadevan and the defendant are having same interest in the suit filed under Order I Rule 8, obtaining an ex parte decree declaring possessory right of the plaintiff will not in any way bind the defendants. That is more so because the suit filed is for declaration of possessory right over the plaint schedule property against Mahadevan without making the defendants who admittedly are occupying a shed

in the plaint schedule property

admittedly by the plaintiff for six years from 2002 onwards.

36. Learned counsel for the defendant also would contend

that Exts.A15 and A16 judgments and decree was obtained by fraud and misrepresentation and it cannot be sustained in law. In this context, he drew my attention to Meghmala & Ors. v. G.Narasimha Reddy & Ors. : MANU/SC/0608/2010 wherein it has been held in paragraph 20 that it is a well settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of law. The contention of the learned counsel for the plaintiffs is that they impleaded Mahadevan as the landlord and in order to represent all persons claiming under him Order 1 Rule 8 publication was effected. In view of the facts and circumstances, the bona fides of the said contention is not free from doubt. So also, it has already been found that there is no sameness of interest between the alleged H.Mahadevan as well as the defendant so as to bind the judgment in O.S.No.47/2006 upon the defendants.

37. Learned counsel for the plaintiffs would contend that a

suit for possessory title is sustainable in law as per the settled position in Kunjikkishnan T.K. v. State of Kerala and Another : 2018 (1) KHC 813 : 2018 (2) KLT SN 3 : 2018 (2) KLJ 234 as well as Ravinder Kaur Grewal and Others v. Manjit Kaur and Others : 2019 (4) KHC 256 and would contend about the plaintiffs possessory title over the plaint schedule property in the light of Exts.A15 and A16 judgments. But, it has already been found that Exts.A15 and A16 judgments will not

bind the defendant since they were not parties to that proceedings and though the suit was filed in a representative capacity the person arraigned as defendant has no sameness of interest with that of the defendants in the present case. Hence Exts.A15 and A16 judgment and decree are of no avail to the plaintiffs to claim adverse possession as against the defendants. That is more so because even at

the time of filing written statement in O.S.No.218/2002, defendants have made a specific contention that the plaintiffs have no right over the appurtenant land and they have been in possession of the property along with the plaintiff. It is also contended by them in the written

statement that plaintiff abandoned the plaint schedule property for decades and only arrived in the year 1990. Plaintiff's counsel would contend that the plaint schedule property is lying as a compact plot within the boundaries and since house in the property is found to be belonging to the plaintiffs, it can very well be presumed that they were in occupation of the appurtenant land also. But plaintiff also have not made any specific averment as to when exactly was the defendants predecessor Adima was put in possession of the shed in the plaint schedule property or when did he left to Bombay by entrusting the plaint schedule property to 1st defendant. The fact that the documents produced from the side of the defendants to prove their possession over the shed in the plaint schedule property were found to be fabricated by the courts below also will not enable the plaintiff to get a decree in their favour since the weakness of the defence case will not improve the plaintiffs case and the plaintiffs have to prove the case on their own (See Ramdas v. Salim Ahammed and Another : (1998) 9 SCC 719 : 1998 KHC 1468; Union of India and Other v. Vusari Co-operative Society Ltd. :

(2014) 2 SCC 269 : AIR 2014 SC 937 : 2014 KHC 4011).

Hence the suit O.S.No.47/2006 filed for declaration of possessory title without making the defendants not parties will not bind the defendants. The only document produced by the plaintiff to prove the right over the plaint A and B schedule property excluding house No.1/873 (1) (Old Nos.1/873, 1/1953, 1/660, 3/256 5.930 cents (2.40 Ares) (A schedule) 1.090 cents (B Schedule) after amendment without amending the extent in the body of the plaint is Exts.B15 and B16. It has already been found that it will not bind the defendants. So, on the strength of those documents,

plaintiffs are not entitled to get recovery of possession and consequential reliefs against the defendants. In the result, judgment and decree passed by the courts below are set aside and the second appeal stands allowed with cost of

appellants/defendants 1 to 3. M.R.ANITHA, JUDGE jsr True Copy P.S to Judge

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