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**Kalyani Vs. Chamiyar**

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**SooperKanoon Citation** : sooperkanoon.com/31187

**Court** : Kerala

**Decided On :** Jan-12-2015

**Judge** : Honourable Mr. Justice a.Hariprasad

**Appellant** : Kalyani

**Respondent** : Chamiyar

**Judgement** :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE A.HARIPRASAD MONDAY, THE12H DAY OF JANUARY201522ND POUSHA, 1936 SA.No. 682 of 2002 ( ) ---------- AGAINST THE

JUDGMENT
IN A.S .NO. 171/1995 of I ADDITIONAL DISTRICT COURT,PALAKKAD DATED0709.2002 AGAINST THE

JUDGMENT
IN O.S.NO. 77/1991 of PRINCIPAL MUNSIFF COURT,PALAKKAD DATED2705.1995 APPELLANT(S)/RESPONDENTS / DEFENDANTS: ---------- 1. KALYANI, D/O.KUTTIMALU AND W/O.KUTTIAPPU, AGED55YEARS, RESIDING ATTHALOOR PALLAVUR AMSOM, CHITTUR TALUK, PALAKKAD DISTRICT.

2. BALAN, S/O. KUTTIMALU, AGED49YEARS, RESIDING AT KANJIRAKANDAVIL, KOTTEKKAD AMSOM DESOM, PALAKKAD TALUK. BY ADVS.SRI.N.DHARMADAN (SENIOR ADVOCATE) SMT.D.P.RENU SRI.ARAVINDA KUMAR BABU T.K. RESPONDENT(S)/APPELLANT / PLAINTIFF: ---------- (*)1. CHAMIYAR, S/O.VELAPPAN, AGED82YEARS, RESIDING ATKANJIRAKADAVIL, KOTTEKKAD AMSOM, DESOM PALAKKAD TALUK. (DIED. ADDL.R2 TO R5 IMPLEADED AS LRS.) ADDITIONAL RESPONDENTS2TO5 2. MANI, VIJAYA RICE MILLS, KANIRAKADAVIL, KOTTEKKAD-P.O., PALAKKAD DIST.-678732.

3. KRISHNAN, KANJIRAKADAVIL, KOTTEKKAD-P.O., PALAKKAD67873.

4. SATHYABHAMA, KANJIRAKADAVIL, KOTTEKKAD-P.O., PALAKKAD67873.

5. RUGMINI, KANJIRAKADAVIL, KOTTEKKAD-P.O., PALAKKAD67873. THE LEGAL HEIRS OF THE DECEASED SOLE RESPONDENT ARE IMPLEADED AS ADDITIONAL RESPONDENTS2TO5AS PER

ORDER

DATED0807.2014 IN I.A.NO.2595/2013. ADDL.R2 TO R5 BYADV. SRI.T.C.SURESH MENON ADDL.R2 TO R5 BYADV. SRI.P.S.APPU THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON1201-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: A.HARIPRASAD, J.

---------- S.A. No.682 of 2002 ----------

Dated this the 12th day of January, 2015

JUDGMENT

The only substantial question of law arising in this Second Appeal is whether the lower appellate court is justified in reversing the decree of the trial court and decreeing a suit for injunction simplicitor without establishing the fact that the respondent/plaintiff was in possession of the property on the date of the suit.

2. Heard the learned Senior Counsel Shri N.Dharmadan for the appellants/defendants and the learned counsel Shri P.S.Appu for the respondent/plaintiff.

3. Brief facts in the case are as follows:Respondent/plaintiff contended that plaint A schedule belonged to him and he is in possession of the same. It is the case in the plaint that plaint B schedule property situated on the western side of plaint A schedule property is in the possession of the appellants/defendants. Ext.A1 is the purchase certificate issued by the Land Tribunal in a suo motu proceedings in favour of the appellants showing that the eastern boundary of plaint B schedule is the property belonging to the respondent/plaintiff. The appellants attempted to trespass into plaint A schedule property and hence the suit for injunction S.A.No.682/2002 2 was filed. Per contra, the appellants/defendants contended that 40 cents of property is in their possession and the respondent/plaintiff has no property on the eastern side of the kudiyiruppu of the appellants. According to the appellants, Ext.A1 purchase certificate was not issued on their application and the extent shown therein is not correct. It is also their contention that they are not claiming any right under Ext.A1.

4. Learned Senior Counsel for the appellants contended that the lower appellate court committed a grave error in reversing the finding of the trial court that the plaintiff failed to establish possession of plaint A schedule property on the date of suit. It is settled law that the appellate court shall reverse the judgment of the trial court only if the view adopted by the trial court is perverse or legally unsustainable. According to the learned Senior Counsel, the judgment of the trial court was reversed by the lower appellate court on mere conjectures and surmises. Therefore, there is a miscarriage of justice occurred in this case.

5. Learned counsel for the respondent/plaintiff would contend that the lower appellate court on the basis of Exts.X1 to X4 found that the plaintiff is in possession of plaint A schedule property. There is no legal or factual error in decreeing the suit, contended the learned counsel for the respondent/plaintiff.

6. It is pertinent to note that the respondent/plaintiff has not produced any document to show that he derived title and possession in S.A.No.682/2002 3

respect of plaint A schedule property. When plaintiff was examined as PW1, he deposed that plaint A and B schedule properties were originally belonged to Mukrakattil Komban. It is the case of PW1 that he constructed a house in a portion of the total property described as plaint B schedule and handed that portion over to his sister for residence. As mentioned earlier, the respondent/plaintiff did not produce any title deed or document, like revenue receipts, to prove that he is in possession of plaint A schedule property.

7. Learned counsel for the respondent/plaintiff vehementally contended that the eastern boundary shown in Ext.A1 purchase certificate issued in favour of the appellants is the property of the respondent, thereby indicating that the property on the east of plaint B schedule is in the possession of the respondent/plaintiff, which is described as plaint A schedule. It has come out in evidence that the property has been resurveyed later and new survey sub division numbers have been assigned to them. Ext.X2 plan is heavily relied on by the learned counsel for the respondent. According to him, the properties in resurvey Nos.334/11 and 334/12 together formed plaint A schedule and the property in resurvey No.334/3 is described as plaint B schedule. Original survey numbers corresponding to the above resurvey numbers are 60/4A-1 and 60/4A-2. This can be seen from Ext.X3, extract of the register. Testimony of PW3 is also pressed into service to show that there was a fence to separate S.A.No.682/2002 4 properties in resurvey Nos.334/3 and 334/12. As per the averments in the plaint, the appellants/defendants, who are residing in plaint B schedule, demolished the fence in the month of October, 1990, that is about three months before the institution of the suit, and threatened to trespass into plaint A schedule. Ext.C1 is the Commissioner's report, who visited the property on 22.02.1991 after giving notice to both parties. It is interesting to note that although the suit was filed on 23.01.1991, the plaintiff did not take any step to take out a commission to establish the state of affairs prevailed on the date of suit. The Commissioner's report would show that there was no fence seen to separate plaint A and B schedule properties. Not even any remnants could be seen indicating the existence of any fence at any point of time. That apart, heaps of mud were seen uniformly on both properties indicating that these two properties were enjoyed together as one holding. All these aspects were considered by the trial court to find that the plaintiff failed to

establish that he was in possession of plaint A schedule on the date of suit. The trial court for valid reasons discarded the testimonies of PWs 3 and 4. PW3 testified only with reference to Ext.X2 plan that there was a dividing fence between plaint A and B schedule properties. The deposition was solely based on the presence of a line separating the survey sub divisions 3 and 12 in resurvey No.334. If his testimony is to be accepted, then there should be a fence between the sub divisions 11 and 12 in the same resurvey number. Merely for the reason S.A.No.682/2002 5 that there was a survey sub division line separating the two properties, it cannot be assumed that the parties were in possession of the properties in accordance with the survey sub divisions. Independent evidence should have been adduced by the plaintiff to show that he was in possession of the property as on the date of suit.

8. The lower appellate court placed reliance on Ext.X series to find that as per the records, the plaintiff was in possession of the property at the time of suit. The contention raised by the defendants, that the plaintiff did not produce any document to indicate his right to possess and also actual possession, was not taken into account by the lower appellate court. The reasoning of the lower appellate court that the records caused to be produced from the Land Tribunal and the revenue offices would prove possession of the plaintiff is not legally sound. In the absence of any evidence, this line of thinking of the lower appellate court cannot be sustained. The contention raised by the appellants that they did not apply for getting purchase certificate (Ext.A1) in respect of 15 cents is very important in the context that the plaintiff did not produce any material to hold that Ext.A1 purchase certificate was acted upon by the appellants.

9. Learned Senior Counsel for the appellants placed reliance on Kuttan Narayanan v. Thomman Mathai (1966 KLT1 to contend a proposition that possession by itself is a substantive right recognized by law and has legal precedents attached to it apart from ownership. It is also S.A.No.682/2002 6 observed in the decision that even before acquisition of statutory title by adverse possession for the requisite period under the Limitation Act, the possessory owner has well-defined rights in the property. It is settled beyond all disputes that this interest is heritable, devisable and transferable.

10. The Supreme Court in Nair Service Society Ltd. v. Rev. Fr.K.C.Alexander (1968 KLT182 categorically held that possession is good against all but the true owner. It is also trite law that even a trespasser in settled possession can maintain an action in a suit for injunction against the true owner. Therefore, the lower appellate court wrongly appreciated the evidence and arrived at a conclusion that the respondent/plaintiff is in possession of the property on account of some revenue documents produced. The question here is not relating to the entitlement to possess, but the actual possession of the plaintiff on the date of the suit. This proposition is no more res integra. A Full Bench of this Court in Kesava Bhat v. Subraya Bhat (1979 KLT766 has clearly held that in a suit for injunction, the only question is whether the plaintiff has established his possession in respect of the subject matter of the dispute on the date of suit. In the absence of any material to show that the respondent/plaintiff was in possession of plaint A schedule property as on the date of suit, I am of the view that the reversal of the decree of dismissal of the suit passed by the trial court at the hands of the first appellate court S.A.No.682/2002 7 was legally unsustainable. Hence it has to be set aside.

11. Learned counsel for the respondent/plaintiff made a submission that his right to seek appropriate relief in respect of the property may be left open. No permission of this Court is necessary for the respondent/plaintiff to take recourse to appropriate action, if it is permissible under law. In the result, the appeal is allowed. The question of law mentioned above is found in favour of the appellants/defendants. The decree passed by the lower appellate court is set aside and that of the trial court is restored. There is no order as to costs. A. HARIPRASAD, JUDGE. cks S.A.No.682/2002 8 A.HARIPRASAD, J.

S.A.No.682 of 2002

JUDGMENT
12h January, 2015

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