

(1981) 09 KL CK 0007

In the High Court Of Kerala

Case No : S.A. No. 875 of 1976-F and C.M.P. No. 14673 of 1981

Karicherry Charadan Nair and Another

APPELLANT

Vs

Edayillam Kunhambu Nair and Others

RESPONDENT

Date of Decision : 02-09-1981

Acts Referred:

Evidence Act, 1872 — Section 35, 65, 76, 77, 79
Kerala Land Reforms Act, 1963 — Section 72K(2)

Citation : AIR 1982 Ker 232

Hon'ble Judges : U.L. Bhat, J

Bench : Single Bench

Advocate : K.P.V.B. Ejman and B. Ramayya Alva, for the Appellant; B. Sreedhara Bhat, V.R. Venkatakrishnan and K.N. Sudhakaran, for the Respondent

Final Decision : Dismissed

Judgement

U.L. Bhat, J.—The plaintiffs filed a suit in the Munsiff's Court, Kasaragod for a permanent prohibitory injunction restraining the defendant from trespassing into the suit properties. The defendant denied the plaintiff's possession on the date of the suit. The trial court dismissed the suit with costs holding that the plaintiffs are not in possession of the suit properties. This decree has been confirmed by the Subordinate Judge, Kasaragod in first appeal. Hence this second appeal.

2. The suit properties are described as 16 cents of garden land in R. Section No. 684/ 2C, 60 cents of paddy field in Rection Section No. 685/1 A3 together with kumki rights appurtenant thereto. According to the plaintiffs these properties belonged to two sisters by name Kammadathu Amma and Kunhammar Amma, from whom the plaintiffs obtained a lease under Ext. X-I Chalgenichit (lease for one year) and while they were in possession of the properties, they purchased one half right of Kammadathu Amma's share in the property from her legal representatives under Ext. A-I sale deed ia 1989. The defendant was formerly residing in small hut in the Kumki land. He has no right or possession over the suit properties; but he is trying to trespass into the suit properties because of the

disappointment caused by the refusal of the owners to sell the property to him. It appears that after the suit through a Land Tribunal as per Ext. A-10 order, the plaintiffs has obtained the other half right of Kunhammar Amma. The purchase certificate which was issued to the plaintiffs on 31-1-1976 is now produced along with C. M- P. No. 14673 of 1981 before this court. The defendant denied that he was put in occupation of the house in the kumki land. He sets up an oral lease of the properties in 1953 and claimed possession thereunder. He challenges Exi. X-1 lease deed as concocted document.

3. The plaintiffs adduced oral and documentary evidence. The documentary evidence consisted of Ext. A-1 sale deed, Exts. A-2 to A-7 land tax receipts issued in the name of P. W. 3 Narayanan Nair for the years 1961 to 1967, Ext. A-8, A-9 rent receipts for 1139 to 1141 M. E, issued by P. W. 3 and Ext. A-10 order of the Land Tribunal in favour of the plaintiffs in regard to the other half of the Jenmam right over the suit properties. The plaintiffs also relied on Ext. X-1 chalgénichit (lease deed) executed by the plaintiffs in favour of the jenmies on 12-4-1959. This document was produced in court by P. W. 3 as per summons taken out by the plaintiffs. The first plaintiff was examined as P. W. 1. P. W. 2 is the scribe of Ext. X-1 and P. W. 3 is the son of Kammadathu Amma. The defendant relied on Ext. B-4 ration card which has been frozen for a short period, Exts. B-1 to B-3 extracts from the Paddy Producers and Rent Receivers from 1965 to 1968, and Exts. B-5 to B-8 copies of cultivation register for the period from 1965 to 1969. The defendant was examined as D. W. 1. He also examined two other witnesses in support of his case.

4. The two courts below rejected Ext. X-1 as concocted document and found that the lease and the possession set up by the plaintiffs have not been proved. For this purpose the two courts below also relied on. Exts. B1 to B3 and B5 to B8 which show that during the period from 1965 to 1969 the defendant has been cultivating plaintiff item No. 2.

5. The learned counsel for the appellants contended that even though the burden of proving possession on the date of the suit rests on the plaintiffs, since the defendant has set up a specific contention, viz., his possession based on an oral lease, it is for him to prove his case and the issue in the case must be decided on the preponderance of probabilities. It is true that the issue in the case, as any issue in a civil case, must be decided on preponderance of probabilities on the evidence adduced and the circumstances emerging in the case. In a suit for injunction based on possession, the defendant could rest content by denying the plaintiff's case. He may also set up possession for himself, either under a lawful title or otherwise and where he sets up a specific case that case also has to be considered by the court in deciding where exactly the preponderance of probability lies. Nevertheless, in order to succeed in the suit it is for the plaintiff to establish his case; of course it is open to him to contend that preponderance of probabilities on the evidence and the circumstances lies in his favour. However, it does not mean that in every case where the defendant fails to establish the

specific case put up by him, the plaintiff is entitled to succeed. Plaintiff's success depends on the totality of the evidence and the preponderance emerging therefrom.

6. It is contended by the learned counsel for the appellants that the two courts below overlooked material and legal evidence in the case in deciding on the question of the plaintiffs' possession. The suit properties originally belonged to two sisters Kammadathu Amma and Kunhammar Amma and certain others. Rights of others came to vest in the two sisters in 1953. The plaintiffs claim possession on the basis of a lease said to have been granted by the two sisters under Ext. X-I dated 12-4-1959. Ext. X-I was produced on summons by Kammadathu Amma's eldest son Nara-yanan Nair (P. W. 3). The plaint does not even give the date of the chal-genichit on the ground that the plaintiffs are not aware of the date. This plea of ignorance has to be appreciated in the light of Exts. A-8 and A-9, two alleged rent receipts wherein the date of the lease deed is mentioned. The plaint proceeds on the basis that the lease deed was executed by both the plaintiffs in favour of Kammadathu Amma. Ext. XI lease deed purports to be executed only by the first plaintiff in favour of both the sisters. Plaintiffs purchased one half jenman right of Kammadathu Amma over the suit properties under Ext. A1 dated 2-1-1959 from her legal heirs. Ext. A1 only states that the plaintiffs are in possession on lease-hold right. It does not even mention the execution of a lease deed. At that time Ext. X-I was said to be available with the vendor P. W. 3 and Exts. A8 and A9 were said to be available with the vendees. Yet, the lease deed is not referred to in Ext. A1. There is no explanation offered for all these contradictions. The appearance of Ext. XI evokes considerable suspicion. It is seen to be written in an old form. Ink has spread and it does not look like a twenty year old document. It looks as if an old form has been subsequently utilised for the purpose of creation of a document. Though, P. W.s. 1 to 3 have spoken about Ext. XI their evidence does not improve the case. Exts. A8 and A9 also are highly suspicious. If they were really available with the plaintiffs on the date of the plaint, the date of the lease deed at least would have been mentioned in the plaint. Ext. A8 is the receipt for the rent due for two years said to have been paid on the date of Ext. A8, while Ext. A9 is the receipt for rent paid for one year on that date. This has to be appreciated in the light of the assertion of P. W. 3, who is said to have issued the receipts that the rent in all years was being paid in two instalments. It is under these circumstances that the courts below rightly chose to characterise Ext. XI and the connected documents as concocted for the purpose of the suit. That being so, the basis of possession set up by the plaintiffs collapses. The only other material left is the oral evidence of P. W.s. 1 to 3. All of them are private to the concoction of Ext. XI and their evidence, without anything more, does not deserve acceptance.

7. The defendant's case is spoken to by himself examined as D. W. 1 and two neighbours examined as D. W.s. 2 and 3. Of course D. W.s. 2 and 3 are not witnesses in regard to the oral lease; but they spoke about possession of the defendant for a large number of years of the suit property. Their evidence is

supported by certain documents, viz., Exts. B1 to B3 and Exts. B5 to B8 and also Exts. B4 ration card which was frozen for a certain period. Exts. B1 to B3 and B5 to B8 show that during 1965 to 1969 the defendant was cultivating the plaint item No. 2. Exts. B1 to B3 also show that because of this cultivation the ration card of the defendant has been frozen to some extent. If these documents are accepted, they go to corroborate the oral testimony of D. Ws. 1 to 3.

8. Exts. B1 to B3 and B5 to B8 were marked by the trial court subject to the objection by the plaintiffs. It is argued that these documents require proof and since no such proof has been adduced, they cannot be looked into. The learned counsel for the appellants has placed reliance on the decision reported in *Thunga Bai and Others Vs. Vishalakshi Heggadthi and Another*,) and an unreported decision of this court in Section A. No. 123 of 1968. In the former case the Karnataka High Court had to consider the effect of the non-production of levy demand notices produced by the defendant and it was observed as follows (at p. 113):

".....Levy Demand Register is not prepared under any statute or statutory rule. It is prepared under executive orders for the purpose of issuing food-grain levy demands from cultivators. The learned Civil Judge relied upon the survey numbers noted on some levy demand notice produced by defendant 1 and held that defendant had proved her possession subsequent to 1971. Unless the official responsible for preparing the levy demand notices is examined, no reliance can be placed on the survey numbers etc., noted in the said notices."

It has to be noticed that it was not stated that the levy demand register is inadmissible for want of proof. What has been held is that the document cannot be relied on in the absence of the evidence of the officer who prepared the levy demand notices. In the unreported decision of this Court in Section A. No. 123 of 1968 reliance was placed on certain extracts of (Matter in Vernacular omitted. -- Ed.) which showed the plaintiff to be cultivator of the properties in that case. This court observed as follows:

".....Under what circumstances such an entry has been made, what was the basis for the same and who made it are not matters on which there is evidence in this case. If P. W. 4 is to be believed it was made by one Shambogue. Those who were associated with the preparation of the register have not been examined and the register by itself cannot prove the truth of the statement therein."

It is evident that there was no material in that case to show under what circumstances the register came to be maintained and who prepared it. The only evidence was that one Shambogue prepared it. It was not explained whether it was the name of a person or the designation of an official. It was not argued before the court in that case that the register is a document covered by Section 35 of the Indian Evidence Act and that it is a public document. This court had no occasion to consider the admissibility or value to be attached to such a register in

case it is to be treated as a public document

9. Section 5 of the Indian Evidence Act states that evidence may be given in any proceeding of the existence of facts in issue or relevant facts. Section 35 of the Act states that an entry in a public or other official book, register or record stating the fact in issue or relevant fact and made by a public servant in discharge of his official duty or by any other person in the performance of the duty specially enjoined by the law of the country in which such book, register or record is kept is itself a relevant fact. Section 64 of the Act states that documents may be proved by primary evidence except in cases thereafter mentioned. Section 65 lays down the contingencies in which the secondary evidence relating to existence, condition or contents of a document may be given. Section 65(e) states that the secondary evidence may be given of a document when the original is a public document within the meaning of Section 74 of the Act and that a certified copy of the document is admissible. Section 74 explains what are public documents. Documents among other things, forming the acts or records of the acts of public officers, legislative, judicial and executive, of any part of India are public documents. Section 76 states that every public officer having custody of a public document which any person has a right to inspect, may give that person on demand a copy of it on payment of the legal fee therefor, with a certificate to the effect that it is a true copy. Section 76 lays down in what manner the certificate is to be prepared. These copies are called certified copies. Section 77 states that such, certified copies may be produced in proof of the public document or any part thereof for which they purport to be copies. Section 79 states that every document purporting to be a certified copy which is by law declared to be admissible as evidence of a particular fact and which purports to be duly certified by any officer of the State Government, etc.

10. P. W. 2 is an erstwhile village assisllant. He has worked in the village in which the suit properlies are situate and in other villages. He has deposed that since 1964 in every village cultivation registers are maintained showing the various lands cultivated by different persons, that the village assistant inspects the fields and thereupon prepares the cultivation register and such cultivation registers were prepared for lands in the village in which the suit properties are situate. Exts. B-5 to B-8 copies of entries in the cultivation register, show the register as Cultivation Register No. 1. Exts. B-1 to B-3 extracts from Paddy Producers and Rent Receivers" Register would show that they are entered in Register No. 3. There can be no doubt that these registers have been prepared by the village assistant, who is a public servant and that the registers are official registers. They are obviously prepared for the purpose of imposing levy for procurement of rice and paddy and also to enable the authorities to freeze ration cards depending on the paddy or rice income of the cultivators. In other words, these records are necessary for official and public purposes. These are entries in public or official register made by public servants in the discharge of their official duties. As to who was in cultivation of the disputed property is a relevant fact.

11. In order to render an entry in such a register relevant u/s 35 of the Evidence Act, the register need not be one enjoined by law to be maintained. Section 35 contemplates two kinds of official or public registers; (i) registers maintained by public servants in the discharge of their official duty and (ii) registers maintained by persons other than public servants in the performance of a duty specially enjoined by law. Where the register is maintained by a person who cannot be regarded as a public servant. Section 35 requires that it must have been maintained by that person in the performance of the duty specially enjoined by statute or statutory rule. The qualification "being specially enjoined by law" is not applicable to registers maintained by public servants in discharge of their official duties. In the case of registers maintained by public servants in the discharge of their official duties, no express statute or statutory rule is needed for creating the authority or the duty to maintain the registers. It is stated in Wigmore on Evidence, Vol. III Page 1961 thus:

"It is clear that no express statute or regulation is needed for creating the authority or duty to make the statement. The existence of the duty, and not the source of its creation, is the sanctioning circumstance. Not all, nor the greater part, of an officer's conceded duties are expressly laid upon him by written law. They may arise from the oral and casual directions of a superior, or from functions necessarily inherent in the office. Where the nature of the office fairly requires or renders appropriate the making and recording of a specific statement, that statement is to be regarded as made under official duty."

12. These registers are maintained not as enjoined by law. But, they are official registers maintained by public servants in the discharge of their official duties. as such the entries therein are relevant u/s 35 of the Evidence Act. They are public documents. The combined effect of Sections 35, 65(e), 76, 77 and 79 of the Indian Evidence Act is to enable proof of public documents by production of certified copies. Besides the production of certified copies of the entries in these registers, the law does not insist on the maker of these entries to be examined in court in proof of the entries.

13-14. In Woodroffe & Amirali's Law of Evidence, 1979 Ed., Vol. II, it is stated as follows:

"If the entry states relevant fact, the entry becomes by the force of the section, relevant fact; that is to say, it may be given in evidence as a relevant fact became, being made by a Public Officer or other person in the performance of a special duty, it contains an entry of a fact which is relevant. Entry is evidence though the person who made it is alive and not called as a witness."

In Sarkar's Law of Evidence, XII Ed., Vol. I, it is stated as follows at page 430:

"Official Registers or books kept by persons in public offices and similar documents of public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual test of truth, namely, by swearing, and the cross-examining, of the persons who prepared them."

In the Head Note of the decision of a Division Bench of Madras High Court in G. Narayanasawmi Naidu, Receiver Vs. Chintalapati Subbaraju, minor, by Mother and Guardian, Bangariah, it is stated as follows:

"The accuracy of a statement prepared by the Revenue Department that a particular field was cultivated on the footing of which the plaintiff had to pay revenue which the defendant was bound to pay, need not be proved by the evidence of some one present at the time the inspection of the field was made."

I am, therefore, of the opinion that entries in cultivation registers and registers of Paddy Producers and Rent Receivers are admissible even without examining the public servant who made the entries.

15. To say that the entries are admissible without examination of the maker does not mean that in all cases and in all circumstances, the entries have the same probative value. The probative value of such entries depends on a host of circumstances as also other evidence which may be adduced in a given case. Of course, if the maker of the entries is examined in court, the court will be in a better position to assess the probative value of the entries. Even without such examination the court has to assess the probative value of the entries. In this case the testimony of P. W. 2 is that registers were prepared after local inspection by the village assistant. Hence they must certainly have some value. No motive is attributed to the concerned village assistant to make such entries in regard to the property covered by the disputed item. Since both the parties have less than the minimum extent of the paddy fields, they are not assessed to levy. But, these entries themselves show that because of the cultivation of plaint item No. 2 by the defendant, his ration card has been frozen for some time. The ration card is also produced. Plaintiffs have admittedly other paddy fields of some extent. In order to decide as to what extent the ration card of plaintiffs is to be frozen, the authorities would certainly require to find out the extent of their cultivation. It is clear that in freezing their ration card, if any, their cultivation of the disputed paddy field has not been taken into consideration. Had it been so taken into consideration, their names would have been found in these registers and reference would have been made to their ration card. That has not been done. No other acceptable documentary evidence regarding their possession or cultivation has been produced. In the light of these circumstances, the entries in the cultivation registers have considerable value. The two courts below cannot be said to have erred in holding that these entries corroborate the oral evidence adduced on behalf of the defendant in regard to his possession of plaint item No. 2.

16. There is a controversy regarding the residence of the defendant. In the plaint it is stated that there is a thatched house in the kumki land attached to the leasehold property which is in the occupation of the defendant as permitted by P. W. 3. The defendant has denied this in his written statement and stated that he is residing in a thatched shed constructed by him in plaint item No. 1 and that he has built a new structure in the kumki land which he has not yet occupied. It is

significant to note that Ext. X-1 does not mention the existence of any structure in the kumki land or plaint item No. 1. Ext. X-1 mentions existence of a thatched house in the suit property. That could not have been the house claimed as standing in the kumki plot. At the stage of evidence P. W. 1 stated that the house in the kumki plot has been destroyed and that the defendant is now residing in his wife's house. Plaintiffs could have easily established the case regarding the house in the kumki land and the non-existence of the house in plaint item (11 by taking out a commission. They have not done so. On the evidence now on record it cannot be said that the two courts below were in error in holding that the plaintiffs have not proved their possession of plaint item No. 1 as well.

17. The plaintiffs appear to have obtained an order from the competent Land Tribunal regarding the half Jenmam right of Kunhammar Amma Ext. A-10 is the order. Subsequently they obtained the purchase certificate which is now produced in this court in C. M. P. No. 14673 of 1981. The learned counsel for the appellants contended that the purchase certificate is conclusive u/s 72-K (2) of the Kerala Act 1 of 1964. The plaintiffs have no case that this order has been passed in the presence of the defendant or that the Land Tribunal has issued notice to him before issuing the purchase certificate. The order Ext. A-10 has been passed and the certificate issued without notice to the defendant. It has been held by this Court that a purchase certificate is not conclusive as against a person to whom individual notice has not been issued before passing such order directing issuance of the purchase certificate. (See Vellappan Vs. Peter Thomas,); Kochu Lakshmi v. Velayu-dhan 1980 KLNJ642; Sree Karikkad Devaswom v. Wandoor Jubitar Chits (P) Ltd. 1980 KLT 760. It cannot, therefore, be said that the purchase certificate or the order is binding on the defendant or will shut out his contention. The order was passed and the purchase certificate was issued behind his back and therefore it can have no evidentiary value in so far as his claim is concerned, C. M. P. No. 14673 of 1981 is dismissed.

I see no error of law requiring interference. The judgment and decree of the first appellate court are, therefore, confirmed and the second appeal is dismissed with costs.