
(2011) 05 KL CK 0085

In the High Court Of Kerala

Case No : Regular Second Appeal No. 321 of 2011

Koora Pathumantakath Abdul Karim Haji

APPELLANT

Vs

Mookkalakkath Selekha Umma

RESPONDENT

Date of Decision : 30-05-2011

Acts Referred:

Citation : (2011) 05 KL CK 0085

Hon'ble Judges : Sasidharan Nambiar, J

Bench : Single Bench

Advocate : V. Premchand, for the Appellant; No Appearance, for the Respondent

Final Decision : Dismissed

Judgement

M. Sasidharan Nambiar, J.—Plaintiff is the Appellant and Respondent the Defendant in O.S. 249/2002 on the file of Munsiff Court, Kannur. Appellant instituted the suit seeking a decree for recovery of possession with arrears of rent, alleging that Respondent obtained the plaint schedule building as per an oral lease on 1.3.1986 agreeing to pay a monthly rent of Rs. 600/-, for a period of three months and has been continuing in possession of the building as a tenant and the lease was terminated by sending Ext.A1 lawyer notice and therefore he is entitled to recover possession of the same with the arrears of rent. Respondent resisted the suit denying the lease alleged. It was contended that Appellant had earlier instituted O.S. 96/1970 seeking recovery of possession and by Ext.A3 decree and A4 judgment dated 5.2.1979, recovery of possession was ordered and even though 23 years lapsed, Appellant did not execute the decree and possession of the building subsequent to Ext.A3 decree is not as a tenant and therefore Respondent has perfected her title by adverse possession. She also claimed that the lease was obtained 40 years back and the probable rent at that time of the lease was less than Rs. 5/- per month and she is entitled to kudikidappu right.

2. Learned Munsiff on the evidence of PWs.1 and 2, DW1 and Exts.A1 to A10 and

B1 to B5 dismissed the suit holding that when Ext.A3 decree dated 5.2.1979 stands unexecuted, Appellant could not have granted a lease in 1986 as alleged. Learned Munsiff also found that possession of the Respondent subsequent to 5.2.1979 is not as a tenant and as the decree was not executed and the present suit was filed 23 years thereafter and hence title of the Appellant has been barred by adverse possession. Appellant challenged the judgment before Sub Court, Thalassery in A.S. 13/2006. Learned Sub Judge on reappreciation of evidence confirmed the findings of the learned Munsiff and dismissed the appeal.

3. Learned Counsel appearing for the Appellant was heard.

4. Learned Counsel vehemently argued that though Appellant did not plead the factum of the earlier suit and the decree, there was a surrender and the lease as alleged in the plaint and was granted later and based on the evidence of PW1 and 2, it should have been found that Respondent is the tenant of the plaint schedule building and she is liable to pay monthly rent of Rs. 600/- and the rent as claimed in the suit is in arrears from 1.9.2000 and therefore a decree for recovery of possession should have been granted. Learned Counsel also argued that findings of the courts below that title of the Appellant is barred by adverse possession is unsustainable as the Respondent has never denied the title of the Appellant at any point of time and even in the written statement she has claimed kudikidappu right and therefore courts below should not have held that title of the Appellant was barred by adverse possession.

5. The copy of the plaint, made available by the learned Counsel appearing for the Appellant, establish that suit was instituted as a mere suit for recovery of possession by a landlord against the tenant. The court fee paid was u/s 43 as suit by a landlord against the tenant and not for a suit for recovery of possession on the strength of title. Therefore it is not necessary to consider the question of adverse possession claimed by the Respondent. If the Appellant could establish that Respondent is a tenant, he is entitled to get a decree for recovery of possession provided Respondent is not protected by any of the statutes, if the tenancy is established.

6. The plaint does not disclose anything about the institution of the earlier suit. It is admitted by the Appellant himself at the time of evidence and Ext.A3 and A4 decree and judgment was produced later. They conclusively prove that O.S. 96/1970 was filed by the Appellant against the Respondent seeking a decree for recovery of possession of the very same plaint schedule building and a decree for recovery of possession was granted as early as 5.2.1979. There is no case for the Appellant that the decree for recovery of possession was ever executed. Plaint does not disclose that there was a surrender of the decree schedule property, subsequent to Ext.A3 decree and the Appellant has been in possession of the property thereafter and while so a new lease was created on 1.3.1986 as alleged. On the other hand, reading of the plaint shows that the lease was created for the first time in 1986. Eventhough as PW1 Appellant claimed that there was a surrender of lease, it is denied by the Respondent. If there was a

surrender of lease it should have been definitely pleaded in the plaint. It is therefore absolutely clear that there was no surrender of the decree schedule property in O.S. 96/1970. Therefore there could not have been an oral lease on 1.3.1986, as rightly found by the courts below.

7. When the suit is based only on the alleged lease which is disproved by the production of Ext.A3 and A4, for failure to plead surrender, Appellant is not entitled to the decree for recovery of possession as sought for. In such circumstances, no substantial question of law is involved in the appeal. It is dismissed.