

(2024) 03 KL CK 0185

In the High Court Of Kerala

Case No : Regular Second Appeal No. 380 Of 2023

Koyilodon Roopa

APPELLANT

Vs

Mattannur Mahallu Muslim Juma Masjith

RESPONDENT

Date of Decision : 21-03-2024

Acts Referred:

Constitution of India, 1950 — Article 133(1)(a)

Code of Civil Procedure, 1908 — Section 100, 109, Order 41 Rule 11, Order 42 Rule 2

Citation : (2024) 03 KL CK 0185

Hon'ble Judges : A. Badharudeen, J

Bench : Single Bench

Advocate : K.V.Pavithran, Jayanandan Madayi Puthiyaveettil, Jithin S Sundaran, Adarsh Kurian

Final Decision : Dismissed

Judgement

A. Badharudeen, J.

1. Aggrieved by the decree and judgment rendered by the Principal Sub Judge, Thalassery, dated 13.12.2022, in A.S.No.47/2017, plaintiff in O.S.No.99/2011 on the files of the Munsiff's Court, Kuthuparamba has filed this regular second appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC' for short). The sole defendant is the respondent herein.

2. Heard the learned counsel for the appellant on admission. Perused the records.

3. I shall refer the parties in this regular second appeal as 'plaintiff' and 'defendant' for convenience.

4. The plaintiff filed suit for declaring that the plaintiff is the absolute owner of the plaint schedule property. Recovery of possession of the same and mandatory injunction are other reliefs sought. The case put up by the plaintiff before the trial court was that the plaintiff obtained title to the property originally owned by Raghavan and his sister, Padmini as per a partition deed of the year 1955 and subsequently, they obtained a purchase certificate in the year 1977. A portion of

the property on the west was given by Raghavan and Padmini to Mohammed Kunji Haji and he has been in possession of the same. Padmini released half right in the remaining property in favour of Raghavan in the year 2006. On getting absolute right over the plaint schedule property, Raghavan assigned the same in favour of the plaintiff and also 1.5 cents to Pallikandi Ibrahim on the same day for the purpose of constructing a road. According to the plaintiff, later it was noticed that the survey number shown in the document as re-survey number 62 is not correct and the correct survey number is 60/1. Accordingly, in the year 2007, Raghavan executed a correction deed also in this regard. It was found by the husband of the plaintiff that a shed was constructed in the plaint schedule property by the defendant, who owns property on the eastern side of the plaint schedule property. Accordingly, the present suit was filed.

5. The defendant entered appearance and filed written statement. According to the defendant, the plaintiff never obtained title or possession over the plaint schedule property. The property in Kalloor desom comprised in Re-Survey No. 60/1, having an extent of 148 cents, was purchased by the defendant in the year 1958 and by correcting the Re-survey number of the property of the defendant, by executing a document of the year 2007, plaintiff's attempt was to grab the property of the defendant and therefore, the suit must fail.

6. The trial court raised necessary issues and recorded evidence. Power of Attorney holder of the plaintiff got examined as PW1 and Exts.A1 to A17 were marked on the side of the plaintiff. DW1 was examined and Exts.B1 to B4 series were marked on the side of the defendant. Exts.C1 to C6 also were marked.

7. Finally, the trial court found that from the description in Ext.B1 prior document and from Ext.A18 purchase certificate, it could not be found that the boundary descriptions of those properties were tallying with the lie of the plaint schedule property in the field and further, the survey number also was not tallying. Accordingly, it was found that the plaintiff failed to prove title over the plaint schedule property. However, the trial court, on finding possessory right, decreed the suit and ordered recovery of possession.

8. When the defendant assailed the said verdict before the Principal Sub Court, Thalassery, the learned Principal Sub Judge set aside the verdict of the trial court and found in paragraph No.19 as under:

"So after having gone through the pleadings, the evidence, and the arguments advanced by the learned counsel for the appellant, challenging the judgment and decree and the submissions made by the learned counsel for the respondent in support of the judgment and decree under challenge and mindful of the legal principles, this court is of the view that the trial court erred in finding that the plaintiff could prove her possession over the property and so the reliance upon the decision rendered by the Hon'ble High Court in Krishnan Kutty Nair v. Subramannian reported in 1998(1) KLT 886 and in K.C.Alexander v. Nair Service Society Ltd., reported in AIR 1966 Kerala 286, was not called for in the facts and

circumstances of this particular case. Hence, the points are answered accordingly.

In the result, the appeal is allowed with costs and the judgment and decree of the trial court in OS 99/2011 stands set aside.”

Accordingly, the suit was dismissed.

9. In this context, it is relevant to note that the trial court as well as the appellate court concurrently found that the plaintiff failed to prove her title over the plaint schedule property. The said finding of the trial court was not challenged by the plaintiff either by filing an appeal or by filing a cross-objection/cross appeal. It was found by the first appellate court that the prior documents of Exts.A1 and A2, whereby the plaintiff relied on title over the plaint schedule property, were not produced from the side of the plaintiff; instead, the same were produced as Exts.B1 and B2 at the instance of the defendant. The resurvey number as well as the boundaries shown therein did not tally with the property purchased by the plaintiff. It was observed further that even though Ext.B2 partition deed was executed on 19.06.2006, subsequently, correction deed was executed to ignore the partition deed. Thus, it was concurrently found by the trial court as well as the appellate court that the title claimed by the plaintiff over the plaint schedule property not at all established in any manner.

10. It is the trite law that in order to succeed a suit for recovery of possession on the strength of title, proof of title is absolutely necessary and the weakness of the defendant shall not aid the plaintiff to get the relief.

11. It is observed by the first appellate court that the trial court erred in finding that the plaintiff could prove her possession over the property and so, the reliance upon the decision in *Krishnankutty Nair v. Subramannian*, reported in 1988 (1) KLT 886 and in *K.C.Alexander v. Nair Service Society Ltd.*, in AIR 1966 Kerala 286 could not apply the facts and circumstances of the particular case. On perusal of the judgments referred by the trial court, which were found inapplicable to the facts of this case, the said finding of the first appellate court found to be absolutely correct and therefore, the first appellate court is right in negating the grant of relief by the trial court, where title failed to be proved.

12. Thus, it has to be held that the first appellate court rightly non-suited the plaintiff, who miserably failed to prove the title as contended. In view of the above, verdict under challenge does not require any interference by this Court.

13. In this case, in fact, the learned counsel for the appellant/plaintiff 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.”

14. 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.

15. 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].

16. 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.

17. 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.

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

19. In the result, this appeal is found to be meritless and the same is dismissed without being admitted.

All interlocutory applications pending in this second appeal stand dismissed.

Registry shall inform this matter to the trial court as well as the appellate court, forthwith.