
(2012) 08 KL CK 0156
In the High Court Of Kerala
Case No : SA. No. 555 of 2001

Poulose Ouseph

APPELLANT

Vs

Gangadharan Ayyappan and Others

RESPONDENT

Date of Decision : 03-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, 91

Citation : (2012) 08 KL CK 0156

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : T.N. Manoj and Sri. Dinesh R. Shenoy, for the Appellant; V. Santharam, R5 and Smt Lilly Leslie, Government Pleader R3 and R4, for the Respondent

Final Decision : Dismissed

Judgement

Thomas P. Joseph, J.—Though the appeal was admitted and notice was ordered presumably on all substantial questions of law raised in the memorandum of appeal, on hearing the learned counsel on both sides I find that the substantial questions of law to be framed are only the following:

(i) Whether the pleadings in an earlier suit based on mere possession if withdrawn before decided on merits, will operate as constructive res judicata in a subsequent suit?

(ii) Whether or not continuous possession without the knowledge as to possession of the property be adverse possession?

The Second Appeal arises from the judgment and decree of learned Principal Sub Judge, Irinjalakuda in A.S. No.183 of 1995 confirming the judgment and decree of learned Additional Munsiff, Irinjalakuda in O.S. No.766 of 1992.

2. Respondents 1 and 2 filed the suit arraying the appellant as the 1st defendant and respondents 3 to 5 as defendants 2 to 4. They prayed for a decree for

mandatory injunction to direct the appellant vacate the plaint B schedule item Nos.1 to 3 which according to them is puramboke land in the unauthorized occupation and use of the appellant. Plaint A schedule is 25 cents allegedly belonging to the appellant. Respondents 1 and 2 claimed that plaint B schedule was being used as a way to the bathing ghat. When the appellant attempted to trespass into the plaint B schedule way, respondents 1 and 2 objected to that. The appellant filed O.S. No.2073 of 1987 against respondents 1 and 2 for a decree for prohibitory injunction. That suit was dismissed as not pressed. Respondents 1 and 2, filing the suit u/s 91 of the CPC (for short, "the Code") prayed for a decree for mandatory injunction. They also wanted respondents 3 to 5 to take action against the appellant for unauthorized possession of plaint B schedule.

3. Appellant contended that he is in possession of the puramboke land since long. He claimed that he has perfected title over the plaint B schedule by adverse possession and limitation.

4. Respondents 3 and 4, the State and the Tahsildar contended that the disputed property is the meeting place of three Villages and hence only after a detailed survey, it could be ascertained what is the extent of trespass (allegedly by the appellant). They further contended that the sketch necessary for measurement of the puramboke land is not available in the Village office and hence steps are being taken to get necessary sketch from the office of the Superintendent of Survey. On obtaining the sketch respondents 3 and 4 would take necessary steps (to identify the extent of the puramboke land and evict the encroachment if any).

5. The 5th respondent-local authority contended that the puramboke land which originally belonged to the 4th respondent has vested with the 5th respondent. It denied that the appellant or respondents 1 and 2 have any right over the puramboke land which thus vested with it.

6. The trial court, so far as as the reliefs prayed for by respondents 1 and 2 is concerned held that without ascertaining the extent of the puramboke land (allegedly) in the possession of the appellant, no decree for mandatory injunction could be granted against the appellant. But it granted the latter portion of the relief of mandatory injunction by directing respondents 3 and 4 to take necessary steps within two months from the date of the decree to remove the encroachment (from the puramboke land). In respect of the plea of adverse possession raised by the appellant the trial court held that since in the prior suit, O.S. No.2073 of 1987 appellant had not taken any such plea, the present plea cannot be entertained.

7. Appellant challenged the judgment and decree of the trial court in A.S. No.183 of 1995. Respondents 1 and 2 preferred a Cross Objection challenging that part of decree of the trial court refusing mandatory injunction to direct the appellant vacate the plaint B schedule. The first appellate court observed that the appellant could have claimed adverse possession only as against the rightful owner of the

property and not against respondents 1 and 2 who only laid the suit under Sec.91 of the Code. In paragraph 18 of the judgment, first appellate court observed that the claim made by respondents 1 and 2 is only for a customary right (to walk through the plaint B schedule) as access to the bathing ghat and for removal of public nuisance and that appellant can put forward his claim of adverse possession only against the title holder, i.e., Government if the Government took steps for removal of encroachment. It was held that question of adverse possession and limitation did not arise in this case against respondents 1 and 2. There is a further observation that the plea of adverse possession is also not proved. In other respects the first appellate court confirmed the judgment and decree of the trial court.

8. The learned counsel for the appellant has argued that in so far as the trial and the first appellate court came to the conclusion that extent of puramboke land has not been identified, even the direction given to the 3rd respondent to take steps in the matter is unsustainable. It is further contended that finding of the trial and first appellate courts as regards the plea of adverse possession is not correct. According to the learned counsel, that the plea of adverse possession and limitation was not raised in O.S. No.2073 of 1987 is no ground to defeat that plea raised by the appellant in the present suit.

9. The learned counsel for the 5th respondent-local authority contended that the plaint B schedule which was Government puramboke stands vested with the 5th respondent as per Section 218 of the Panchayath Raj Act, 1994 (for short, "the Act"). The learned counsel submitted that when examined as D.W.1, appellant has admitted that he is in possession of the puramboke land.

10. I have been taken through the evidence of D.W1 where he has claimed that he may be in possession of the puramboke land. It is not very much in dispute that some portion of puramboke land is in the possession of the appellant.

11. So far as respondents 1 and 2 are concerned, the trial court refused to grant all the reliefs they prayed for and instead, only gave a mandatory injunction to the 3rd respondent to take necessary steps to evict the encroachment on puramboke land. That part of the decree against respondents 1 and 2 was challenged in the first appellate court by way of Cross Objection. That Cross Objection stands dismissed and in this Second Appeal, respondents 1 and 2 have not preferred any Cross Objection. Since a part of the appellate decree is against respondents 1 and 2 they could challenge that part of the decree only by Cross Objection as provided under Rule 22 of Order XLI of the Code or by way of independent appeal. Since there is no independent appeal or Cross Objection from the side of respondents 1 and 2 they cannot be heard to contend that their prayer for eviction of the appellant should be allowed.

12. So far as the direction issued to the 3rd respondent- State is concerned, it is based on the evidence that the Taluk Surveyor (D.W.3) was not able to properly identify the extent of the puramboke land. Exhibits C1 and C1(a) are the report

and plan obtained in O.S. No.2073 of 1987. The Advocate Commissioner and Surveyor were examined as P.W2 and D.W.3, respectively.

13. I have referred to the contentions which respondents 3 and 4 have taken in their written statement as to the inability to ascertain extent of puramboke land under encroachment without a proper measurement of the property with reference to the plan obtained from the office of the Superintendent of Survey. It has come in evidence that the disputed place is the meeting place of Mattathur, Vellikulangara and Kuttichura Villages. D.W.3, the Surveyor has given evidence that at the time of his measurement of the disputed property, he had with him only the records from Vellikulangara Village Office and that relevant records from the other two Village Officers were not available. D.W.3 further stated that to counter check the difference in the chain measurement records from all the Village Offices above referred are required.

14. As per the evidence of D.W3, it would appear that there was no proper measurement of the puramboke land allegedly encroached. It is therefore that rather than directing the appellant to vacate the puramboke land allegedly occupied by him, the learned Munsiff thought it fit to direct the 3rd respondent to take necessary steps. Obviously steps are to be taken by the 3rd or the 5th respondent, after a proper measurement of puramboke land and ascertaining the extent (allegedly) occupied by the appellant. I do not find reason to interfere with the said direction.

15. So far as the claim made by the 5th respondent is concerned my attention is drawn to Sec.218 of the Act. I need not decide in this case whether in view of the said provision in the Act the plaint B schedule stands transferred to and vested with the 5th respondent. That is a matter to be decided primarily between respondents 3 and 5. It is not disputed that at least a portion of the puramboke land is in the actual possession and enjoyment of the appellant. Therefore I make it clear that whatever steps the trial court has directed the 3rd respondent to initiate in the matter, if the 5th respondent is the real owner of the puramboke land in view of the relevant provisions of the Act I have referred to above, the 5th respondent has to initiate appropriate action as provided under law for eviction of the unauthorized encroachment if any.

16. What remained is the claim of the appellant as to adverse possession and limitation. For two reasons, I am inclined to agree with the finding of the first appellate court stated in paragraph 18 of its judgment. Firstly, the extent of puramboke land in the actual possession of the appellant is not identified. Secondly, as observed by the first appellate court the suit was laid by respondents 1 and 2 under Sec.91 of the Code and on the allegation of public nuisance. In that case the question of appellant resisting the suit as against respondents 1 and 2 on a plea of adverse possession did not arise, reason being that the plea of adverse possession has to be raised against the rightful owner of the property.

17. Nor am I impressed by the finding of the trial court that because in O.S. No.2073 of 1987 the appellant had not raised the plea of adverse possession, he is precluded from raising that plea in the later suit. The learned counsel for the appellant submitted that in O.S. No.2073 of 1987, Exts.C1 and C1(a) report and plan were obtained. There, the claim of the appellant was that respondents 1 and 2 and others were resisting the attempt of the appellant to construct a compound wall. It is argued by the learned counsel that respondents 1 and 2 in that case were not objecting to the appellant constructing the compound wall and hence that suit was dismissed as not pressed. The learned counsel for the 5th respondent submitted that there is nothing on record to show that any such submission was made by respondents 1 and 2 (in O.S. No.2073 of 1987). Exhibits A4 and A5, copy of judgment and decree in O.S. No.2073 of 1987 only show that that suit was dismissed as not pressed.

18. But there is no final adjudication of the disputes raised in O.S. No.2073 of 1987 on merit. Moreover, that suit was filed against respondents 1 and 2 and others against causing obstruction to the appellant constructing a compound wall. It is seen from Exts.A4 and A5 that in that suit respondents 3 to 5 were not parties. Therefore as against private parties arrayed as defendants in O.S. No.2073 of 1987 appellant could not have raised a plea of adverse possession particularly as he was claiming relief on the strength of possession. In the circumstances the issue regarding adverse possession has to be left open for adjudication in appropriate proceeding at the appropriate stage. The substantial questions of law framed are answered as above.

The Second Appeal is dismissed subject to the following directions:

(i) There is no reason to interfere with the decree for mandatory injunction granted by the trial court and confirmed by the first appellate court directing the 3rd respondent to take necessary steps in the matter of identifying the extent of puramboke land and encroachment if any by the appellant.

(ii) In view of the right claimed by the 5th respondent by virtue of the provisions of the Kerala Panchayat Raj Act or the Karala Panchayats Act, as the case may be, it is made clear that in case the Government are of the view that the disputed puramboke land vests with the 5th respondent, the Government is not obliged to take the steps as directed by the trial court and confirmed by the first appellate court. Instead, the 5th respondent shall take appropriate action within the time granted by the trial court and computed from the date of this judgment.

(iii) The issue regarding adverse possession raised by the appellant is left open for decision in appropriate proceeding at the appropriate stage.

All pending Interlocutory Applications will stand dismissed.