

(2013) 06 KL CK 0097

In the High Court Of Kerala

Case No : Second Appeal No. 571 of 2000 (Arising against the Judgment in A.S. No. 10 of 1996 of Sub Court, Muvattupuzha, in O.S. No. 375 of 1990 of Munsiff Court, Muvattupuzha)

Rajamma

APPELLANT

Vs

Ammini Amma

RESPONDENT

Date of Decision : 12-06-2013

Acts Referred:

Citation : (2014) 1 KHC 319

Hon'ble Judges : Mr. M.L. Joseph Francis, J.

Bench : Single Bench

Advocate : S. Vidyasagar, Advocate, for the Appellant; M.P. Ashok Kumar, Advocate, for the Respondents

Final Decision : Allowed

Judgement

Mr. M.L. Joseph Francis, J. - Appellant herein is the plaintiff in OS No. 375 of 1990 on the file of the Munsiffs Court, Muvattupuzha and appellant in AS No. 10 of 1996 of Subordinate Judge's Court, Muvattupuzha. Respondents herein are the defendants in the said original suit and the respondents in the first appeal.

2. The original suit was filed for declaration of title and for recovery of possession of plaint schedule properties.

3. Plaint averments in short are as follows. The plaintiff and the first defendant are sisters and they are parties to the family partition deed No. 2643/1959. As per that partition deed, plaintiff obtained 53 cents of property described in "K" schedule. The first defendant obtained property in I schedule. The said 53 cents of property consists of 30 cents in Sy. No. 158/8-C and 23 cents in Sy. No. 158/10A which are lying contiguously. The former item of property is lying on the western side of the latter. On 27/12/1988, the first defendant and her men cut open a new pathway through the 53 cents of property belonging to the plaintiff by trespassing therein. A portion of the said 53 cents of property is lying on the

northern side of the pathway. The plaintiff filed OS No. 1 of 1989 for declaration of title and recovery of possession of property through which the pathway was constructed by the first defendant. While the suit was pending, the defendants enclosed the portion of the plaintiffs property lying on the northern side of the newly built pathway by putting up "Kayyala" and reduced the same into their possession. A commission was taken out in OS No. 1 of 1989 for measuring out the plaintiff's property with the help of the surveyor. On measuring out the property, it has been revealed that 6 cents of property lying on the northern side of the pathway in Sy. No. 158/8C has been trespassed upon by the first defendant and another 91/2 cents of property lying on the northern side of the pathway in Sy. No. 158/8C was also trespassed upon by the second defendant. These items of properties are plaint scheduled item Nos. 1 and 2 in the original suit. The plaintiff sought a declaration of her title over plaint schedule properties and recovery of possession of the same.

4. The defendants jointly filed a written statement contending that even at the time of partition as per partition deed No. 2643/1959, there was a pathway lying on the northern side of the property in Sy. No. 158/8C obtained by the plaintiff and that the pathway runs to the eastern side to the paddy field. Defendants contended that the first defendant has property in Sy. No. 158/10A on the northern side of the plaintiff's property and on its western side lies the property belonging to the second defendant in Sy. No. 158/11. The defendants do not have any property in Sy. No. 158/8C and since there was no actual measurement of the properties and allotment of respective shares after the partition in 1959, if any portion of the plaint schedule property is found in possession of the defendants, the right of the plaintiff over it has been lost by adverse possession and limitation.

5. Before the Munsiff's Court PW 1 was examined and Exts. A1, A2 and A2(a) were marked on the side of the plaintiff. No oral evidence was adduced from the side of the defendants. Ext. Nos. B1 to B4 were marked on the defendants' side. The learned Munsiff on considering the evidence on record dismissed the suit on finding that the plaintiff never came into possession of the plaint schedule properties ever since the execution of Ext. A1 partition deed and that the defendants have perfected the title over the plaint schedule properties by adverse possession. Against that judgment and decree dismissing the suit, the plaintiff filed AS No. 10 of 1996 before the Sub Court, Muvattupuzha which was also dismissed. Against that judgment and decree the appellant/plaintiff filed this Second Appeal.

6. Heard the learned counsel for the appellant and the learned counsel for the respondents. At the time of hearing, learned counsel for the appellant raised the following arguments. The Courts below grossly erred in not relying on the clinching evidence available in the case, marked as Exts. A2 and A2(a) in the Trial Court. The Courts below ought to have relied on the commission report and survey plan produced as Exts. A2 and A2(a) and found that there was actual

trespass over the plaint schedule property, on the northern side of the pathway newly constructed by defendant Nos. 1 and 2 in the plaintiffs property and that they have reduced it into their possession. The finding of the Courts below with regard to adverse possession claimed by the defendants is based on surmises and conjuncters and there was no material evidence on record before the Courts below including documentary as well as oral evidence to substantiate the claim of adverse possession by defendants. The Courts below ought to have found that the property including the plaint schedule properties which forms a part of the property in Ext. A1 partition deed, was in joint possession and enjoyment of all the members of the Tharawad, including the plaintiff and first defendant subsequent to Ext. A1 partition deed and that there was no separation of each one's share and hence the plea of adverse possession, adverse to the other co-owner cannot be sustained in law. The Courts below failed to consider and appreciate that a defence set up by way of adverse possession has to be pleaded and proved by the defendants, and the burden cast upon them, is very high, especially when the property is alleged to be in the joint possession and ownership of the co-owners. Learned counsel for the respondents supported the judgments of the Courts below.

7. The plaint schedule item No. 1 property as described in plaint schedule is having an extent of 6 cents comprised in Sy. No. 158/8C which was allegedly trespassed and reduced into the possession of the first defendant. The plaint schedule item No. 2 property is having an extent of 91A cents comprised in Sy. No. 158/8C which was trespassed and reduced into the possession of the second defendant. The main prayer in the plaint is for a declaration of the title of the plaintiff over the plaint schedule properties and recovery of possession of the plaint schedule item No. 1 property from the first defendant and plaint schedule item No. 2 property from the second defendant. The plaintiff claimed title over the plaint schedule properties on the basis of partition deed No. 2643/1959. Ext. A1 is the photocopy of that partition deed.

8. In the written statement, the defendants admitted that as per that partition deed the plaintiff was allotted 30 cents in Sy. No. 158/8C and 30 cents in Sy. No. 158/10A and that after the partition deed the plaintiff was in possession of the properties allotted to the plaintiff and the first defendant was in the possession of the properties allotted to her and that the properties were never measured as per survey measurements. The plaintiff claimed title over the property having a total extent of 53 cents of which 30 cents in Sy. No. 158/8C and 23 cents in Sy. No. 158/10A allotted to the plaintiff's share as "K" schedule in Ext. A1 partition deed. When the first defendant cut open a new pathway through the 53 cents of property belonging to the plaintiff, the plaintiff filed OS No. 1 of 1989 before the Munsiffs Court against the first defendant herein.

9. An advocate commissioner was appointed in that case and that commissioner with the assistance of the Taluk Surveyor measured out the 53 cents of property and filed commission report and plan. Ext. A2 is the copy of the commission

report and Ext. A2(a) is the copy of the plan produced in OS No. 1 of 1989. In Exts. A2(a) plan, the proper having a total extent of 30 cents comprised in Sy. No. 158/8C is shown as plot numbers 1, 2 and 3. Plot No. 1 is having an extent of 17 cents in the possession of the plaintiff. Plot No. 2 is having a total extent of 3? cents comprised in that survey number which is a pathway connecting the panchayath road. Plot No. 3 is shown in Ext. A2(a) plan as 9 1/2 cents in Sy. No. 158/8C, which is in the possession of others. In Ext. A2(a) plan, the property having a total extent of 23 cents comprised in Sy. No. 158/10A is shown as plot numbers 4, 5, 6 and 7. The property in the possession of the plaintiff is shown in that plan as plot No. 4 having an extent of 14? cents. Plot No. 5 is having an extent of 1? cents which is a part of pathway. Plot No. 6 is having an extent of 3/4 cents which is in the possession of a stranger. Plot No. 7 is having an extent of 6 cents which is in the possession of others. In the plaint, the plaintiff seeks recovery of possession of 6 cents in Sy. No. 158/8C (as per Ext. A2(a) plan correct Sy. No. is 158/10A) and 9? cents comprised in Sy. No. 158/8C. Since the defendants 1 and 2 admitted the title of the plaintiff over the plaint schedule item numbers 1 and 2 properties, which is also proved by Ext. A1 partition deed, the Courts below went wrong in finding that the plaintiff has not proved the title over the plaint schedule properties.

10. The appellant/plaintiff has produced a copy of the judgment in OS No. 1 of 1989 on the file of the Munsiff Court, Muvattupuzha for perusal, which shows that the suit was decreed against the first defendant, who is the first defendant in the present suit. Against that judgment and decree the defendant in OS No. 1 of 1989 filed AS No. 71 of 1991 before the Sub Court, Muvattupuzha. The appellant/plaintiff herein produced copy of that judgment in this appeal for perusal which shows that the Appellate Court modified the judgment and decree in OS No. 1 of 1989 and thereby the plaintiff was allowed to recover only plot nos. 2 and 5 of Ext. C2 sketch. Ext. A2(a) in the present suit is a copy of that Ext. C2 sketch.

11. It is well settled in law that before a party can succeed in establishing title on the basis of adverse possession, a plea to that effect must be specifically raised. It is a cardinal principle that a person who claims adverse possession must plead to that effect and must show on what date he came into possession, what was the nature of his possession, whether the fact of his adverse possession was known to the owner and what was the period of such adverse possession

12. In the decision reported in Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak 2004 KHC 485 : AIR 2004 SC 1893 : 2004 (3) SCC 376 : 2004 (3) CHN 60 it was held that:

"To establish ouster in cases involving claim of adverse possession, the defendant has to prove three elements, namely, hostile intention, long and uninterrupted possession and exercise of the right of exclusive ownership openly and to the knowledge of the owner. In cases of adverse possession, the starting point of limitation does not commence from the date when the right of ownership arises

to the plaintiff but it commences from the date when the defendant's possession became adverse."

In the decision reported in *Saramma Ittoop v. Kunjamma Kuruvilla* 2006 KHC 821 : 2006 (2) KLJ 836 : ILR 2006 (3) Ker. 272 : 2006 (3) KLT SN 75, it was held that:

"Mere possession by him for any length of time would not entitle him to claim exclusive title unless there is proof of ouster and adverse possession. It is well-settled that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of other as to constitute ouster. A secret hostile animus to possess adversely to the real owner is not sufficient."

In the decision reported in *Puthumana Meenakshi Amma v. Puthumana Kalliani Amma and Others* 2010 (4) KHC 282 : 2010 (4) KLT SN 32 : ILR 2010 (4) Ker. 449, it was held that:

"The onus to prove adverse possession and ouster is on the person who sets up the adverse title. It is well settled that mere keeping the possession or not sharing the income by itself are not sufficient to constitute ouster. The principle is that the adverse possession pleaded must be adequate, continuous and exclusive. There must be evidence of assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the exclusion of all others."

13. In the present case, it is not pleaded by the defendants as to when they came into possession of the plaint schedule properties. The defendants have not gone to the witness box to prove adverse possession over the plaint schedule properties. There is no dispute that when Ext. A1 partition deed was executed, the plaintiff and first defendant are minors and the properties covered by that document were not measured. Ext. B1 is the copy of the plaint in OS No. 1 of 1989. Ext. B2 is the copy of the commission application filed by the plaintiff in that case as IA No. 2312 of 1989. Ext. B3 is the copy of the commission report and Ext. B3(a) is the copy of the rough sketch prepared by the Commissioner. Ext. B4 is the copy of another commission application filed by the plaintiff in OS No. 1 of 1989. In Ext. B3 report it is stated that the property allotted to the plaintiff and the property allotted to the defendant in that suit are lying contiguously without any external demarcation to separate both the properties and that a new pathway was put up in that properties. The documents produced by the defendants in the present case will not prove adverse possession over the plaint schedule item nos. 1 and 2. Therefore, the title of the plaintiff over the plaint schedule properties is not lost by adverse possession. In that view of the matter, I find that the Courts below went wrong in dismissing the suit.

Accordingly this Second Appeal is allowed and the judgments and decrees of the Courts below are set aside and OS No. 375 of 1990 on the file of the Munsiff Court, Muvattupuzha is decreed and the title of the plaintiff over the plot shown

in Ext. A2(a) plan as plot No. 3 having an extent of 9? cents in Sy. No. 158/C and the plot no. 7 having an extent of 6 cents in Sy. No. 158/10A is hereby declared. The respondents/defendants are directed to put the plaintiff in possession of those plots within three months from the date failing to which the plaintiff is allowed to recover possession of those plots through Court process. Both parties are directed to suffer their respective costs in the suit, appeal and in the second appeal. Ext. A2(a) plan will form part of the decree.