

(2023) 11 KL CK 0216

High Court Of Kerala

Case No: Regular Second Appeal No.394 Of 2023

Annamma Thomas

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision: Nov. 21, 2023

Acts Referred:

- Code of Civil Procedure, 1908 - Section 100, Order 42 Rule 1

Hon'ble Judges: A. Badharudeen, J

Bench: Single Bench

Advocate: P.T.Mohankumar, George Cherian, Rajesh Cherian Karippaparambil, R.V. Sreejith, G.Maheswary, T.Rini, K Denny Devassy

Final Decision: Dismissed

Judgement

A. Badharudeen, J

- The plaintiff in O.S.No.244/2017 on the files of the Munsiff's Court, Kottayam is the appellant in this regular second appeal filed under Section 100 r/w Order XLII Rule 1 of the Code of Civil Procedure, 1908, and she impugns judgment dated 19.07.2019 in the above suit and the judgment dated 07.02.2023 in A.S.No.155/2019 on the files of the Additional District Court, Kottayam.
- Heard the learned counsel for the appellant as well as the learned Government Pleader appearing for the State.
- I shall refer the parties in this regular second appeal as 'plaintiff' and 'defendants' for convenience.
- It is noticed that as per order dated 15.06.2023, my learned predecessor raised substantial questions of law and admitted this appeal. On hearing both sides, it

appears that the substantial questions of law would require re-formulation, in view of the facts and evidence involved herein. Accordingly, the substantial questions of law are re-formulated as under:

- (1) Whether the courts below went wrong in non-suiting the plaintiff, who claimed title on the basis of Ext.A2 title deed?
- (2) Whether the courts below went wrong in negativing the contentions raised by the defendant by way of adverse possession?
- (3) What is the legal effect of Ext.A3 notice issued by the Government in the matter of getting back the encroached portion of Government land, by the plaintiff?.

5. The case of the plaintiff before the trial court is that the husband of the plaintiff obtained 3 cents of property and after the death of the husband, the plaintiff, who is the legal representative of the husband, has been possessing and enjoying the entire property, inclusive of 0.932 cent in addition to 3 cents covered by the title deed, Ext.A2. Further, on 12.11.2017, a notice was issued by the third defendant herein, demanding the plaintiff to remove the building and the well situated in the plaint schedule property within seven days, on the allegation that the same is Government land. After issuance of the said notice, the plaintiff filed WP(C) No.18762/2015 before this Court and this Court disposed of the same with liberty to the plaintiff to raise objections before the third defendant. As directed by this Court, an order was passed overruling the objection raised by the plaintiff and communicated to the plaintiff with direction to vacate possession of the Government land alleged to be occupied by the plaintiff. At this juncture, the present suit has been filed to restrain the defendants from evicting the plaintiff from the plaint schedule property coming to 3.0932 cents and not to disturb her peaceful possession over the same.

6. The defendants filed written statement and submitted that the plaintiff's husband had obtained only 3 cents of property as per Ext.A2, the title deed relied upon by the plaintiff and the plaintiff encroached upon 0.932 cents of Government land adjacent to the above 3 cents and accordingly, initially notice was issued and subsequently, Ext.A3 order was passed by the Assistant Executive Engineer in obedience to the direction of this Court finding that 0.932 cents of property is part of the Government land.

7. The court below raised necessary issues and tried the case. PW1 and PW2 examined and Exts.A1 to A7 were marked on the side of the plaintiff. DW1 examined and Exts.B1 to B4 were marked on the side of the defendants. Exts.C1 to C3 and Exts.X1 to X3 also were marked. The trial court elaborately considered the evidence available and finally, dismissed the suit.

8. Challenging the same, A.S.No.155/2019 was filed before the District Court, Kottayam, and the Additional District Court, Kottayam, dismissed the appeal and confirmed the

finding of the trial court as per judgment and decree dated 07.02.2023.

9. While impeaching the veracity of the concurrent verdicts entered into by the trial court as well as appellate court, the learned counsel for the plaintiff argued that even though as per Ext.A2 title deed in the name of the husband of the plaintiff, the extent of land is only 3 cents from 1971 onwards, the plaintiff had been in possession and enjoyment of the entire property, inclusive of 0.932 cent. It is also submitted that otherwise, adverse possession and limitation should be found to hold that the plaintiff perfected title by adverse possession. Accordingly, the courts below went wrong in negating the contentions raised by the plaintiff.

10. The learned Government Pleader, on the other hand, justified the verdicts of the trial court as well as the appellate court and submitted that Ext.A2 title deed is in respect of only 3 cents of property and the plaintiff encroached upon Government land, annexed 0.932 cent of property and made construction therein. On noticing the same, initially notice was issued and when the plaintiff filed Writ Petition No.18762/2015 before this Court, this Court issued a direction and thereafter Ext.A3 notice cum order was passed seeking surrender of the encroached portion by the plaintiff. It is at this juncture, the present suit was filed without any bonafides to retain possession of Government land without any justification. Therefore, the finding of the trial court as well as the appellate court is only to be confirmed and the second appeal deserves dismissal.

11. While arguing this case, it is admitted by the learned counsel for the plaintiff that as per Ext.A2, the property entitled by the husband of the plaintiff is only 3 cents. But at present, the plaintiff is in occupation of 3.932 cents and constructed building therein. Therefore, the claim for adverse possession pressed for by the plaintiff should have been found and the courts below went wrong in negating the said plea.

12. The learned counsel also given emphasis to Ext.A4 judgment of this Court in WP(C) No.18762/2015 dated 18.09.2015 to highlight direction issued by this Court when the initial notice, referred as Ext.P3 in the judgment in the writ petition, was issued. The relevant portion of Ext.A4 judgment is as follows:

“2. This Court, by order dated 23/06/2015 has granted an interim stay of Ext.P3 notice, which was extended further and is still in existence. This Court is of the view that since Exhibit P3 being a notice, the petitioner shall raise objection to the notice. This shall be done within two weeks from the date of receipt of a copy of this judgment. On receipt of the objection, appropriate decision shall be taken by the Assistant Executive Engineer. The Assistant Executive Engineer shall pass appropriate orders within a further period of two weeks. If it is found that the petitioner's objections are unsustainable, the Assistant Executive Engineer is free to take appropriate action to remove the encroachments. Till a final decision is taken in the matter, interim order

passed by this Court will continue.

13. It is submitted by the learned Government Pleader as well as the learned counsel for the plaintiff that it was as per the direction issued in Ext.A4 judgment and after considering the objection filed by the plaintiff, Ext.A3 finding was entered and thereby the plaintiff was directed to vacate 52.46 M2 and 10.44 M2 area encroached upon by the plaintiff within a period of seven days.

14. In this case, even though, at the end, the plaintiff claimed title to the entire extent of 3.932 cents and plea of adverse possession has been raised in respect of 0.932 cent, knowing fully well that Ext.A2 title deed would cover only 3 cents. In paragraph No.3 of the plaint, plea of adverse possession seen raised.

15. Now the question is; how far the plea of adverse possession proved in this case. On analysis of the materials herein read along with evidence of PW1 and Exts.A1 to A4, it is clear that the title of the plaintiff in continuation of her successor, her husband, is only in respect of 3 cents property and not in excess of 3 cents. True, the plaintiff raised plea of adverse possession in relation to 0.932 cent of property, which, in fact, directed to be vacated as per Ext.A3 notice cum order, on the finding that the said area is the Government property encroached by the plaintiff.

16. It is well settled law that in order to perfect title by adverse possession, pleadings with essentials perfecting the same should be there. The second mandate is to prove the plea of adverse possession to perfect the said plea. Even though in paragraph No.7, plea generally seen raised to perfect title by adverse possession along with title as per Ext.A2, the solitary evidence adduced by the plaintiff to establish the said plea is the evidence of PW1. PW1 is none other than the power of attorney holder of the plaintiff, who is the daughter of the plaintiff. On perusal of the chief affidavit filed, it has been stated by PW1 that as per Ext.A2, late Thomas, the husband of the plaintiff, purchased the property in the year 1971 and thereafter, the entire property was possessed by late Thomas and in continuation of the same, the plaintiff obtained title and possession over the same. PW1 was cross-examined to ensure authenticity of her affirmations in the chief affidavit filed by PW1. During cross-examination, PW1 stated that during 1971, when Thomas purchased property, she was aged 6 years alone. When it was asked as to where 0.932 cent is situated, the answer of PW1 was that the lie of 0.932 cent is not stated in the plaint referring to the same as one which would lie on the northern side of 3 cents of property. She also given evidence that no expert commission was taken to assess the age of the construction in 0.932 cent of property. Thus, it appears that at the time of filing the suit, the plaintiff is not exactly aware, where 0.932 cent is situated and also PW1, who was aged 6 years during 1971, had only hearsay knowledge regarding these vital facts. It is not because that Thomas who obtained only 3 cents of property in the year 1971 started possession of 3.932 cents and made construction therein in 1971,

without support of clinching and cogent evidence. Thus the evidence of PW1 is quite insufficient to perfect title by adverse possession. Consequently, It has to be held that the plaintiff had no title over the entire extent of 0.932 cent and the title is confined to that of 3 cents alone. In so far as 0.932 cent of property is concerned, the same is evidently, government property as stated in Ext.A3 notice and in the commission report. Therefore, the plaintiff miserably failed to establish the plea of adverse possession by establishing the three ingredients, 'nec vi', 'nec clam' and 'nec precario', ie. without force, without secrecy and without permission. The said claim also must fail as rightly found by the trial court as well as the appellate court. Regarding Ext.A3, it is held that the same was legally issued in consideration of the direction issued by this Court in the writ petition (Ext.A4) and its legal consequence is nothing but get back the property of the Government.

17. In this context, it is apposite to refer two decisions of the Apex Court: 2010 (2) SCC 461 in *Mandal Revenue Officer v, Goundla Venkaiah* and 2023 (5) KHC 264 in *Government of Kerala v. Joseph*. In the decision reported in *Mandal Revenue Officer* (Supra), it was held that "**.....it is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the court is duty-bound to act with greater seriousness care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give an upper hand to the encroachers, unauthorized occupants or land grabbers**". The second one, *Government of Kerala v. Joseph* (Supra), it was held that "**when the land subject of proceedings wherein adverse possession has been claimed, belongs to the Government, the Court is duty-bound to act with greater seriousness, effectiveness, care and circumspection as it may lead to Destruction of a right/title of the State to immovable property. In state of Rajasthan v. Harphool Singh (two-judge Bench) it was held: "So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third party encroacher title where he had none."** Further, in *Manadal Revenue officer v. Goundla Venkaiah* (two-judge Bench) it was stated: "**It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the Court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give an upper hand to the encroachers, unauthorized occupants or land grabbers**".

18. Therefore the court is duty bound to look into the claim over government properties with greater seriousness, care, and circumspection and the possibility of destruction of the right and title of the Government properties by the unauthorized occupants, land grabbers, and upper-hand encroachers should be avoided.

19. In view of the matter, finding of the trial court, negativing the claim of the plaintiff, confirmed by the first appellate court found to be in order. Therefore, the appeal fails and the same is dismissed accordingly.

All interlocutory orders stand vacated and all interlocutory applications pending in this regular second appeal stand dismissed.

Following the mandate of the Apex Court decisions referred above, the third defendant is directed to expedite the proceedings to get vacate possession of Government land without fail, at any rate, within a period of two weeks from the date of receipt of copy of this judgment.

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