
(1968) KLJ 165

High Court Of Kerala

Case No: C.R.P. No. 1240/1066

Ibrahim

APPELLANT

Vs

Kunhikrishnan Nair

RESPONDENT

Date of Decision: Jan. 13, 1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) – Order 18 Rule 1, Order 18 Rule 2

Citation: (1968) KLJ 165

Hon'ble Judges: V. Balakrishna Eradi, J

Bench: Single Bench

Advocate: T. Devassia, for the Appellant; A. Achuthan Nambiar and T.P. Kelu Nambiar, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

V. Balakrishna Eradi, J.

The revision petition is the third defendant in O.S. 57/1964 on the file of the Subordinate Judge's Court,

Kasaragod. The said suit is one filed by the respondent herein for a permanent injunction restraining the defendants from trespassing into the plaintiff

properties on the allegation that the suit property belongs to the plaintiff and is in his possession and that the third defendant in collusion with the

other defendants was attempting to trespass into the said property and disturb the plaintiff's peaceful enjoyment thereof. The third defendant who

is the main contesting defendant, filed a written-statement contending that he is in actual possession of the suit properties and is residing in the

thatched house situated therein, that the 4th defendant had a valid leasehold right under the plaintiff and this right has become vested in the third

defendant by virtue of an assignment executed in his favor by the 4th defendant, that the plaintiff's allegation that he is in possession of the

properties is false and the property being in his (third defendant's) actual possession and enjoyment in leasehold right the plaintiff is not entitled to

the relief of injunction prayed for by him. When the suit came up for trial before the lower court on the 3rd October 1966, the plaintiff represented

to the court that he was resting mainly on the documents filed by him and had only rebutting oral evidence and that therefore, the defendant should

be directed to let his evidence first. The learned Subordinate Judge by his order passed on the same day, directed the defendant to produce his

evidence first obviously reserving the right in the plaintiff to adduce his evidence by way of answer after the defendant closes his evidence in the

case. The third defendant has filed this revision challenging the validity of the aforesaid order passed by the learned Subordinate Judge.

2. Under O. 18 Rules 1 and 2 C.P.C. the normal rule is that the plaintiff who has right to begin the case should first state his case and produce his

evidence in support of the issues which he is bound to prove. If however, the defendant admits the facts alleged by the plaintiff and contends only

that either on some point of law or on the basis of additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which

he seeks, in such a case, the defendant has the right to begin and it is his duty to produce his evidence in support of such defense which he is bound

to prove.

3. The question, therefore, is whether in the instant case the defendant has admitted the facts pleaded in the plaint on the basis of which the plaintiff

would ordinarily be entitled to the relief sought by him and whether the defense is rested only on some point of law or on any additional facts

pleaded by the defendant. The suit being one for injunction the plaintiff would not be entitled to relief unless in addition to his title he proves also his

possession on the date of plaint. The burden of establishing such possession is therefore, clearly on the plaintiff unless such fact has been admitted

by the defendant in his written statement. Far from making any such admission, the third defendant has categorically asserted in his written-

statement that he is in actual possession of the suit property and is residing in the hut situated therein under a leasehold right and that therefore the

prayer for injunction is not sustainable. In view of this pleading it cannot be denied that in order to obtain the relief of injunction sought by him the

plaintiff has to discharge the burden of proving that he was in possession on the date of suit.

4. It is, however, contended by the learned counsel for the respondent that the defendant has in his written-statement clearly admitted the title of

the plaintiff, and that his only plea being that he has a valid leasehold right under the plaintiff the burden is entirely on the defendant to prove the

existence of such right. It is further urged that the plaintiff's title being thus admitted and the specific case put forward by the 3rd defendant being

that the plaintiff had obtained delivery of possession from a prior tenant about 11 years ago and thereafter inducted the 4th defendant into

possession as lessee, the burden is on the defendant to show that there was such entrustment to the 4th defendant and a discontinuance of

possession on the part of the plaintiff. In support of these contentions reliance is placed by him on the decisions reported in *Seturatnam Aiyer v*

Venkatachela Goundan (I.L.R. 43 Mad 567 P.C.), *Nainapillai Marakayar v Ramanathan Chettiar* ILR 47 Mad 337 P.C.) AIR 1949 278 (Privy

Council) and *Musammat Murti Dussadhin and Others Vs. Surajdeo Singh and Others*,

5. It is now settled law that in a suit brought by a landlord for ejectment of a tenant brought after due service of notice to quit, if the plaintiff's title

and the defendant's occupation of the property as plaintiff's tenant are admitted and the defense plea is that the defendant is a lessee with a right to

fixity of tenure the onus is on the tenant who sets up a right of permanent occupancy to prove the existence of such right. In such cases it is not

necessary for the plaintiff to prove possession within 12 years since the existence of a subsisting title is necessarily implied in the defendant's

pleading that he is holding as tenant under the plaintiff. Thus, for the purpose of deciding whether Art.142 or Art.144 of the Limitation Act applies

to such suit for ejectment, it has been held in the aforesaid decisions that if a defendant not only admits the title of the plaintiff but also admits that

he derived possession from the plaintiff as a tenant the case must proceed on the defendant's plea and it must be assumed that the plaintiff has not

been dispossessed or has not discontinued his possession within the meaning of Art.142 of the Act. The aforesaid principle would govern only suits

for ejectment when the question of applicability of Art.142 or 144 of the Limitation Act arises for decision. It cannot be applied to a case like the

present where the suit being one for injunction the plaintiff can succeed only on proving his actual possession of the property on the date of suit

irrespective of his having a subsisting title to such property. The admission contained in the written-statement is at best only an admission of the

plaintiff's subsisting title. But this will not shift the burden to the defendant because the plaintiff has still to prove that he was in possession of the

property on the date of the suit. It is not as if the plaintiff would be entitled to a decree for an injunction as prayed for by him even if the lease set

up by the defendant is not proved by him. The plaintiff can succeed only if he discharges the burden of proving the factum of his possession on the

date of suit which alone would entitle him to the relief of injunction.

6. I am unable to accept the argument of the learned counsel for the respondent that because the defendant has admitted that the plaintiff was in

possession at some point of time about 11 years prior to the institution of the suit the court must presume that such possession continued with the

plaintiff and that it is up to the defendant to establish discontinuance of such possession. No such presumption can in my view, be drawn in a case

where the plaintiff has sought the relief of injunction.

7. The lower court has not given reasons whatever for departing from the ordinary rule that the plaintiff should begin the case and let in his evidence

first. In the order passed by it, it has merely recorded a representation made to it by the plaintiff's counsel and without stating anything further it has

merely directed the defendant to start his evidence. The order so passed by it, without giving any reasons and without adverting to any of the

relevant aspects, constitutes an illegal exercise of jurisdiction by the lower court. I set aside the order of the lower court and hold that this is not a

case where the defendant should be directed to let in his evidence before the plaintiff has stated his case and produced his evidence. The C.R.P. is

accordingly allowed and the lower court is directed to proceed with the trial of the suit in the light of the observations and directions contained

above. The parties will bear their respective costs in this C.R.P.