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Rosily Vs Annam

C.R.P. No. 2638 of 2002

Court: High Court Of Kerala

Date of Decision: July 4, 2003

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Section 115#Limitation Act, 1963 â€" Article 64#Specific Relief Act, 1963 â€" Section 6

Citation: (2003) 3 CivCC 368 : (2003) 3 KLT 282

Hon'ble Judges: Pius C. Kuriakose, J

Bench: Single Bench

Advocate: T.A. Shaji, M.A. Asif, Lathiya Gopalan and M.S. Kiran, for the Appellant; R.D. Shenoy, for the Respondent

Final Decision: Dismissed

Judgement

Pius C. Kuriakose, J.
The defendants in a suit for recovery of possession u/s 6 of the Specific Relief Act are aggrieved by the positive

decree which is passed against them in respect of the suit schedule property-land having an extent of 3.540 cents in Survey Nos. 228/3 and 228/5

of Kaduppassery Village.

2. I will refer to the parties as they were before the trial court. According to the plaintiffs, "B" schedule property is part of "A" schedule property

having a total extent of 2 acres and 12.540 cents. "A" schedule is described as comprised of 2.09 acres in Survey Nos. 214 and 3.280 cents in

Survey No. 228/5 and 0.260 cents in Survey No. 228/3. "A" schedule property is also described as property covered by Will No. 71/89

executed by Vareed and described in the commission report in O.S. 71-5/97, a previous suit between the parties. According to the plaintiffs, "A"

schedule property stood separated from the defendants" property on its south by well-defined boundaries and the first plaintiffs father had

maintained a retaining wall with jungle stones on its southern boundary. According to the plaintiffs, a portion of this retaining wall was destroyed by

the defendants and O.S. 715/97 was instituted by the plaintiffs against the defendants seeking mandatory and prohibitory injunction. The case of

the plaintiffs is that the Commissioner appointed in that suit has reported about the nature of the retaining wall. The plaintiffs state that in violation of

the order of temporary injunction passed against the defendants in the suit - O.S. 715/97, the defendants destroyed the retaining wall completely

and thereafter lodged a counterclaim in O.S. 715/97 seeking fixation of boundaries. The Advocate Commissioner in that suit measured the

property with the assistance of the surveyor and such measurement revealed that 3.540 cents of land situated on the northern side of the retaining

wall in Survey Nos. 228/5 and 228/3 was under the possession of the plaintiffs. The Court dismissed the counter claim on 7.4.2000. During the

night of 9.5.2000 and early morning, of 10.5.2000 while the plaintiffs were away, the defendants, it is alleged, trespassed into the aforementioned

"B" schedule property having an extent of 3.540 cents and reduced the same into their possession by putting up a fence. Apart from putting up the

fence, the defendants tilled the "B" schedule property so as to make it appear that the "B" schedule property lies contiguously to the properties of

the defendants. The plaintiffs allege that the decree dismissing the counter claim lodged by the defendants in O.S. 715/97 has become final and that

what the defendants did, instead of preferring an appeal against the dismissal of the counterclaim, was to file a fresh suit for injunction-O.S. 736/00

without disclosing the true facts. Thus the suit is instituted seeking recovery u/s 6 of the Specific Relief Act on the premise that the plaintiffs who

were in possession have been dispossessed within six months other than through legal process.

3. The prominent contentions raised by the defendants were that the plaintiffs are entitled to only 2.09 acres of land in Survey No. 228/1 and that

at no point of time, the plaintiffs had any land in Survey No. 228/3 or 228/5; that in O.S. 715/97, the plaintiffs had raised claims only over

properties in Survey No. 228; that the "B" schedule property is part of the property which was obtained by the defendants under document No.

1075/84; that there never existed a jungle stone boundary wall as alleged by the plaintiffs; that a bund had been constructed by the predecessor-in-

interest of the defendants years ago along the southern side of the defendants" property for the purpose of preventing soil erosion; that the

defendants were having properties even on the northern side of that bund; that O.S. 715/97 which was filed by the plaintiffs on a foisted cause of

action was dismissed by the Court; that the commission report and plan in O.S. 715/97 are incorrect; that the defendants never violated the

injunction Orders passed in that case; that when the Commissioner conducted the measurement, no wall was available on the property; that the

alleged trespass on 9.5.2000 and 10.5.2000 are absolutely incorrect and equally incorrect is the allegation regarding tilling of the "B" schedule

property. The remedy of the plaintiffs is to prefer an appeal against O.S. 715/97 and not to file the instant suit for recovery of possession and also

that the suit is barred by limitation.

4. The learned Munsiff relied mainly on Ext. A2 certified copy of the plaint in O.S. 715/97, Ext. A4 counter claim in that suit, Ext. A5- the

judgment in that suit, Ext. A8 and Ext. A8(a) -commission report and plan respectively in that suit to hold the points in favour of the plaintiffs. Ext,

B1 - certified copy of a petition filed by the plaintiffs in O.S. 715/97 and Ext. B2 certified copy of the plaintiffs'' own deposition in O.S. 715/97 the

only two items of documentary defence evidence relied on by the defendants were not accepted by the Court below. The Court below found that

the evidence of the plaintiffs that prior to O.S. 715/97 and during the pendency of O.S. 715/97, the plaintiffs were in possession of the "B"

schedule property stood well established due to the findings in O.S. 715/97 dismissing the counter claim of the defendants which had attained

finality. The Court below noticed that the version of PW1 that the defendants put up the disputed fencing prior to the disposal of O.S. 715/97 and

tilled the "B'' schedule property and extended the compound wall on the western side by about one metre to the north was well corroborated by

Ext. A6 commission report and Ext. A6(a) plan submitted by the Advocate Commissioner in O.S. 736/00 on 19.5.2000. The court below also

noticed the report of the Advocate Commissioner in Ext. A6 that the extended portion had been newly plastered and found that the explanation of

the defendants regarding plastering as part of the routine work is not acceptable. So also the court below found that the defendants'' version of

there having been a bund put up by the defendants'' predecessor for preventing soil erosion and that about 1 1/2 metre outside the bund there

stood a natural boundary formed of boundary trees is not acceptable since such a stand runs contrary to the defence version in O.S. 715/97 as

could be noticed from the written statement in O.S. 715/97. The Court below practically accepted the defence version that the plaintiff''s do not

have title over the "B'' Schedule property. However, observing that in a suit u/s 6 of the Specific Relief Act, the question of title is not relevant

proceeded to pass a positive decree for recovery in favour of the plaintiffs.

5. Heard Sri. T.A. Shaji, learned counsel for the revision petitioners and Sri. R.D. Shenoi, learned counsel for the respondents. The learned

counsel supplied me with copies of relevant papers for perusal.

6. As regards the merits of the claim for recovery, Sri. T.A. Shaji submitted that it is absolutely incorrect to say that in O.S. 715/97 the plaintiff s

possession over the "B'' Schedule property was established. Inviting my attention to paragraph 6 of Ext. A5 judgment in O.S. 715/97, the learned

counsel submitted that the finding in Ext. A5 judgment was that the plaintiffs therein have not taken any steps to establish that the plaintiffs are

having possession over the 2 acres and 9 cents of land extending upto the southern wall of the defendants'' property. The learned counsel pointed

out that as regards the ''B'' schedule property comprised in Survey Nos. 228/5 and 228/3 it had been practically conceded that the defendants

were the owners and the plaintiffs had only a very vague version that the same was no man''s land. Learned counsel would severally criticise the

learned Munsiff for having relied on Exts. A8 and A8(a), the commission report and plan in O.S. 715/97 - the two documents not relied on by the

court which decided O.S. 715/97 to accept the plaintiffs'' claim for possession in that suit in support of its conclusion in the present suit that the

plaintiffs are in possession of ''B'' schedule property. The admissibility and relevancy of the judgment in O.S. 715/97 can only be to the extent

provided u/s 43 of the Indian Evidence Act, the learned counsel forcefully submitted. The point which Mr. T.A. Shaji tried to make more seriously

was that the suit filed u/s 6 of the Specific Relief Act by a plaintiff on the strength of previous possession within six months of the commencement of

the suit will not be maintainable against the true owner. Learned counsel placed strong reliance on the decision of this Court in Damayanthl v.

Theyyan and Ors., 1979 KLT 85 for the above proposition. The learned counsel relied very much on the first headnote which reads as follows:

Specific Relief Act, 1963, Section 6 - Suit for possession based on prior possession -Maintainability-Applicability when right of third party is

affected.

That no one can take a profit out of its own wrong is a well-known maxim. By committing a wrong one shall not take a profit out of it. He should

restore that which he has thereby acquired. Otherwise it will be an inducement to commit a wrong again. It is now well-settled that a suit for

possession on the basis of prior possession is perfectly maintainable against all except the true owners. Why is it that an exception is made in the

case of a true owner? The principle seems to be this: In the case of true owner he does not acquire any advantage or profit by doing this wrong.

As owner he is entitled to exercise his pre-existing right to possess and the fact that he exercises that right by himself without resort to a court of

law will not disentitle him to retain possession. He may be liable for any damage for forcible entry alone if claimed: So far as others are concerned

they benefit out of the wrong. So they must give back the advantage. That is the rationale of the principle that a possessory suit will not lie against

the true owner. The plaintiff has claimed relief against all the defendants. The fact that besides the owners a third person is also impleaded does not

alter the nature of the relief asked for. The plaintiff''s suit is essentially a suit for possession on the basis of prior possession and that against the

owners and the persons claiming possession. Therefore the view taken by the lower court is clearly wrong and the order of remand cannot be

sustained"".

7. Sri. R.D. Shenoi, learned counsel for the respondents would point out on the authority of Paulose v. Thomas 1999 (2) KLT 423 that three

options are available to a person in possession who has been dispossessed by a stranger or even by the owner and that the options are: (1) to

invoke Section 6 of the Specific Relief Act within six months of the date of dispossession, (2) to sue for recovery of possession on the strength of

his possessory title and (3) to sue on his title if his possession was attributable to any brand of title known to law and not necessarily proprietary

title. Learned counsel relied on the said decision in support of his argument that if the suit is instituted invoking Section 6 of the Specific Relief Act,

the question to title will be absolutely irrelevant as in the case on hand. Learned counsel submitted that the position that in a suit coming u/s 6 of the

Specific Relief Act, question of title was absolutely irrelevant was well-settled and relied on Abdul Rahiman v. Nalakath Muhammed Haji 1996 (2)

KLT 185 . Learned counsel submitted on the authority of Abdul Rahirnan (supra) itself and three decisions of the Orissa High Court in Smt.

Sobhabati Vs. Lakshmi Chand and Others, Kankala Gurunath Patro Vs. D. Dhanu Patro, and Padartha Amat and Another Vs. Siba Sahu, that

the High Court should be slow in interfering with judgments passed by courts u/s 6 of the Specific Relief Act which under the statutory scheme are

not amenable to appeal or review in view of the summary nature of the proceedings intended by the Legislature. For the very same proposition,

Mr. Shenoi also invited my attention to the decision in Bhojraj Krishnarao v. Sheshrao Diwakarrao AIR 1949 (36) Nagpur 126 and submitted that

the proper remedy of the respondents even if they are having title is to file a regular suit for recovery on title and since they are having such an

alternative remedy, this Court will not be justified in interfering in revision with the present judgment.

8. Sri. T.A. Shaji, learned counsel for the revision petitioners then submitted that there is conflict between the views of G. Viswanatha Iyer, (J.) and

J.B. Koshy (J) regarding the grantability of a decree for possession u/s 6 of the Specific Relief Act against a true owner and submitted that it is only

appropriate that the said conflict be resolved by a Bench of two Judges. Sri. R.D. Shenoi would submit that the conflict is only apparent and that

when the text of the judgment dehors the editor''s note is read carefully, it will be seen that the conflict is not real.

9. It is true that going by the headnote of the decision in Damayanthi (supra), it would appear as though it has been held in that decision that a suit

u/s 6 of the Specific Relief Act will not lie against a true owner, but then Viswanatha Iyer (J.) was dealing with a case which had not been filed u/s

6 of the Specific Relief Act. On the contrary that suit was one filed as a regular suit for recovery of possession on the strength of previous

possession, a suit of the nature envisaged by Article 64 of the Limitation Act. Importantly, Viswanatha Iyer, (J.) was deciding a Civil Miscellaneous

Appeal directed against an order of remand passed by the Court of appeal in a regular appeal filed against the judgment and decree passed in the

suit The regular appeal would not have been maintainable if the suit was one u/s 6 of the Specific Relief Act. The proposition of law stated by

Viswanatha Iyer (J.) in Damayanthi (supra) is in the context of suits for recovery of possession on the ground of prior possession or possessory

title which certainly cannot be sustained against the true owners. In a suit for recovery of possession based on possessory title or based on any

other claim of possession as envisaged by Article 64 of the Limitation Act, it will be open to the defendants to contend that the plaintiffs are not

entitled for a decree on the reason that the defendants are having a title superior to that to the plaintiffs. But judicial authority is very strongly in

favour of the, position that in suits instituted u/s 6 of the Specific Relief Act, question of title is wholly relevant since such suits are tried summarily

and the relief which the courts are competent to grant under the said suits is one for recovery alone and not any other relief to grant which question

of title will crop up even incidentally. The Supreme Court in Lallu Yeshwant Singh v. Jagdish Singh AIR 1968 SC 620 has observed in the context

of Section 9 of the old Specific Relief Act which corresponds to Section 6 of the present Act that it is well-settled that the question of title is

irrelevant in a suit filed under that Section. In Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, , Their Lordships of the

Supreme Court refused to accept an argument that there cannot be a distinction between suits instituted u/s 9 of the Specific Relief Act and a

regular suit for possession based on previous possession as envisaged by Article 64 of the Limitation Act since both suits are based on previous

possession. Their Lordships noticed that there was a distinction and found that the view of the courts is uniform that u/s 9 of the Specific Relief

Act, the plaintiff need not prove title and the title of the defendant does not avail him. But if the suit is filed after the period of six months as a

regular suit for eviction coming within Article 64 of the Limitation Act, the plaintiffs will fail if the defendants establish abettertitle. Viswanatha Iyer

(J.) Damayanthi (supra) has referred to Nair Service Society (supra) also and the learned Judge"s view that a suit for recovery based on previous

possession will not be maintainable against true owners has been expressed not in the context of suits coming within Section 6 of the Specific Relief

Act. J.B. Koshy, (J.) in Abdul Rahiman"s case has after extracting Section 6 of the Specific Relief Act in its entirety rightly observed that the

legislative objective has been to provide ""a summary, cheap and useful remedy to persons dispossessed of immovable property otherwise than in

due course of law. The object of the Section is to discourage the people from taking the law into their own hands, however good their title may

be"". Though the learned Judge has not referred to AIR 1968 SC 620 or Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, ,

it is obvious that the learned Judge had these decisions also in his mind while deciding Abdul Rahiman "s case. I am inclined to hold that there is no

conflict between the decisions of Viswanatha Iyer, (J.) and J.B. Koshy, (J.) since unlike the case decided by J.B. Koshy (J.), the case decided by

Viswanatha Iyer (J) was not coming u/s 6 of the Specific Relief Act.

10. As noticed in the various decisions cited before me by Mr. R.D. Shenoi including Abdul Rahiman''s case, decrees passed u/s 6 are neither

appealable nor liable to the reviewed. Revisional jurisdiction especially when it comes to judgment and decree passed in a suit u/s 6 will have to be

declined unless a very strong case is made out. All the items of evidence relied on by the court below to hold that the plaintiffs were in possession

within 6 months of the commencement of the suit and were dispossessed during the said period, were not perhaps acceptable legal evidence. Even

then, I am not prepared to accept the argument of Mr. T.A. Shaji that evidence to support the said finding is totally lacking in this case. After all,

the revision petitioners are not without a remedy if they continue to have title over the property in question. I do not find any infirmity about the

impugned judgment and decree warranting interference u/s 115 of the Code.

The revision fails and the same is dismissed. But in the circumstances of the case, the parties will suffer their costs.