

(2012) 03 KL CK 0243

High Court Of Kerala

Case No: Regular Second Appeal . No. 431 of 2012

Surenderan Nair Pillai

APPELLANT

Vs

S. Mohankumar, represented By
his Power of Attorney Holder K.
Sukumaran Nair

RESPONDENT

Date of Decision: March 23, 2012

Hon'ble Judges: Thomas P. Joseph, J

Bench: Single Bench

Advocate: R.S. Kalkura, Sri. M.S. Kalesh, Smt. A.V. Priya and Sri Harish Gopinath, for the Appellant;

Final Decision: Dismissed

Judgement

Thomas P. Joseph, J.

The second appeal arises from the judgment and decree of learned Additional Munsiff, Neyyattinkara in O.S.No.956 of 2005 as confirmed by the learned Sub Judge, Neyyattinkara in A.S.No.143 of 2007. Respondent, claiming title over the suit property and the building thereon as per Ext.A2, sale deed No.5692 of 1978 sought eviction of appellant from the said building. According to the respondent, plaint A schedule and other items originally belonged to the tharwad of Parvathy Amma Narayani Amma, as per partition deed No.1487 of 1103. Plaint A schedule and other items were allotted to sub tharward of the said Narayani Amma. While so, there was a partition among the said Narayani Amma and others as per document No.5203 of 1951. Plaint A schedule was allotted to the mother of Narayani Amma as per document no. 5203 of 1951. On the death of the mother, there was yet another partition as per document No. 2348 of 1957. Plaint A schedule was allotted to the share of Narayani Amma. She executed Ext.A2, assignment deed in favour of the respondent, it is claimed. It is the further case of respondent that in the year, 1957 Kunjukrishna Pillai, predecessor-in-interest of the appellant was allowed to occupy plaint B schedule building (situated in plaint A schedule) to run a tea shop. He constructed a lean-to with the permission of predecessor-in-interest of respondent.

Kunjukrishna Pillai filed O.A.No.736 of 1970 in the Land Tribunal claiming kudikidappu. That application was dismissed as per Ext.A3, order dated 31-08-1972. Respondent claimed that after Kunjukrishna Pillai, appellant continued in permissive occupation of plaint B schedule building. In the re-survey, plaint A schedule was included in survey Nos.41-8 and 4-4 in the name of respondent. But in the Thundapper Register(Ext.A5 is its extract), survey No.41/8 was shown in the name of appellant. Respondent preferred complaint to the Director of Survey who passed Ext.A4, order dated 06-02-2004 including the name of respondent as owner of property in re-survey No.41/8. Respondent issued notice to the appellant on 02-08-2005 to vacate the premises. He did not comply and hence, the suit.

2. Appellant contended that 10 cents in re-survey No.41/8 and building thereon (A and B schedules) is in the possession of appellant and his predecessor in interest since the last 50 years. On the death of his father, appellant, his mother and sister acquired right over it. Appellant claims to have acquired the right of his mother and sister as per document No.1594 of 1994. He also contended that Ext.A3, order was not passed on merit by the Land Tribunal.

3. Trial court accepted the case of respondent and granted a decree for eviction. That was confirmed by the first appellate court.

4. It is contended by the learned counsel for appellant that Ext.A2 refers to property comprised in survey No.721/2 while the suit property is comprised in re-survey No.41/8. It is contended by the learned counsel that notwithstanding that appellant has denied title of the respondent, relevant documents are not produced. It is further contended that at any rate, appellant and predecessor-in-interest having been in possession of the suit property since the last 50 years, they have perfected title by adverse possession.

5. PW2 is the Advocate Commissioner who prepared Ext.C1 and C1(a). Commissioner has identified the suit property and reported that it lies in well defined boundaries. Ext.A2 is produced by the respondent to prove his title over the property. Though, a contention is raised that Ext.A2 (of the year 1978) refers to survey No.721/2 while the suit property is comprised in re-survey No.41/8, it is seen from Ext.A4, order dated 06-02-2004 of the Director of Survey that property comprised in re-survey No.41/8 was ordered to be included in the name of respondent. No challenge was made to Ext.A4, order. Contention that survey number in Ext.A2 does not tally with the re-survey number in the suit property cannot be accepted. I must also notice that admittedly, the father of appellant had filed O.A.No.736 of 1970 claiming kudikidappu over the building in question and was unsuccessful in that as seen from Ext.A3, order. Learned Munsiff has stated that Ext.A3 order was passed by the Land Tribunal after recording evidence.

6. Thus it is seen from the evidence that even the father of appellant had recognized predecessor-in-interest of respondent as the owner of suit property and claimed

permissive occupation under her. If that is so, appellant cannot turn round and contend that respondent has no title over the property.

7. Further fact to be noticed is that though appellant contended that his father got right over the suit property, it is not stated in what way his father got right. In that situation, even if it is assumed that he has obtained document 1594 of 1994 executed by his mother and sister, that would not defeat the title of respondent or confer title on the appellant.

8. Respondent has claimed possession of the building on the strength of title. Once title is proved, the only defence available to the appellant is adverse possession. In this case, evidence shows that predecessor-in-interest of the appellant claimed to be in permissive occupation of the building under the predecessor-in-interest of respondent. If that is so, appellant also continued in such occupation. There is no evidence to show that there was any assertion of hostile title against the respondent for the statutory period and thus appellant was in adverse possession.

9. I have heard learned counsel for appellant and gone through the judgments under challenge. I find no substantial question of law involved which require decision by this Court.

10. Learned counsel has alternatively requested that this Court having taken the above view, appellant may be granted six month's time to vacate the building. It is contended by the learned counsel that appellant is running a tea shop and he may be granted sufficient time to find out alternative accommodation. Having heard learned counsel, I am inclined to grant three month's time to vacate the building. I make it clear that it will be open to the appellant to request the executing court to grant further time, if that is required and if such a request is made, the executing court shall consider that request after hearing the respondent as well.

The second appeal is dismissed. Appellant is granted three month's time to vacate plaint B schedule building subject to the following conditions.

(1) Appellant shall not create documents, encumber plaint A or B schedule property or induct third parties into possession of plaint A and B schedule during the said period of three months.

(2) By the expiry of time granted hereby (unless time is extended by the executing court as aforesaid) appellant shall vacate plaint B schedule building without making any objection or claim on any account.

(3) Without prejudice to the right of appellant to challenge this judgment, he shall file affidavit in executing court within two weeks from the date on which a copy of this judgment is notified for delivery to appellant undertaking to comply with the above conditions.

(4) In case any of the above conditions is not complied, it will be open to the respondent to execute the decree notwithstanding the time granted hereby.