K.S.E.B. Vs Abraham

A.S. No''s. 470 and 596 of 1994

Court: High Court Of Kerala

Date of Decision: Sept. 1, 2006

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 2 Rule 2, Order 2 Rule 2(2), Order 2 Rule 2(3), Order 23 Rule 1, Order 23 Rule 1(4)#Travancore Land Conservancy Act, 1091 â€" Section 9

Citation: AIR 2007 Ker 12 : (2006) 4 ILR (Ker) 94 : (2006) 4 KLT 770

Hon'ble Judges: Kurian Joseph, J; K.T. Sankaran, J

Bench: Division Bench

Advocate: M. Rajasekharan Nair, G. Janardana Kurup, N.D. Premachandran, B. Raghunandanan, Sabu George, S. Ramesh Babu, K.L. Narasimhan and V. Santharam, for the Appellant; C. Raghavan, P.V. Kunhikrishnan, R.K. Venu Nayar, T.G. Rajendran, M.V. Ibrahimkutty, A.N. Martin, S.K. Ajayakumar, A.K. Syed Mohammed and George Poonthottam, for the Respondent

Final Decision: Dismissed

Judgement

K.T. Sankaran, J.
These appeals arise out of nine suits filed by the first respondent in the respective appeals as O.S. Nos. 138 of 1991,

139 of 1991, 140 of 1991,141 of 1991, 71 of 1992, 72 of 1992, 78 of 1992, 79 of 1992 and 80 of 1992. The defendants in the suit are the

Kerala State Electricity Board, The Deputy Chief Engineer, Lower Periyar Project and the National Project Construction Corporation Ltd.

Against the judgments and decrees in the suits mentioned above, the Kerala State Electricity Board filed A.S. Nos.470 of 1994,490 of 1994,523

of 1994,521 of 1994,574 of 1994,522 of 1994,525 of 1994,558 of 1994 and 519 of 1994 respectively. The third defendant challenged the

judgments and decrees in the suits in A.S. Nos.596 of 194, 660 of 1994, 613 of 1994, 623 of 1994, 616 of 1994, 599 of 1994, 600 of 1994,

627 of 1994 and 601 of 1994 respectively.

2. The plaintiffs claim possession in respect of about nine acres of garden land lying on the south of Periyar River and on the western side of

Karimanal Hills. The plaintiffs have no title to the property. The property originally is a forest land. The plaintiffs claim that they are in possession of

the property from 1966 onwards. They also claim that they cleared the forest, levelled the land and made valuable improvements in the property

by planting rubber trees, coconut trees, cocoa, pepper wines, arecanut trees, jack trees, mango trees and other miscellaneous trees and plants. A

project called Lower Periyar Hydro Electric Project was implemented by the first defendant at the Karimanal Hills in Lower Periyar area. The

project area consists of about 100 acres of land situated on the east of Karimanal Canal. A power house was constructed at the site and necessary

buildings were also constructed. It was necessary to level the land, remove earth and stones from the hills for implementing the project. The work

of excavation, removal and dumping of earth and stones and the construction of power house was entrusted by defendants 1 and 2 with the third

defendant, National Project Construction Corporation Ltd.

3. The plaintiffs contended that the defendants started the work of removing earth and stones from the project area from October, 1983 onwards

and deposited the same on the northern side of the plaint schedule properties and also in the 2/3 portion of the southern side of the Periyar River. It

was contended that the dumping area was not the Periyar River or the southern side of it, but a place called Thookupara, about four kilometres

away from the project site. It was contended that the width of the River was reduced due to dumping of earth and the water level in the Periyar

River rose about 20 feet high. Separating the plaint schedule properties and the project area, there is a canal called Karimanal Canal. A bund was

constructed at the mouth of the Karimanal Canal for facilitating transport of earth and stones from the hills. It was contended that due to the rising

of water level and the resultant high pressure and flow of water, the bund broke and water rushed to the property of the plaintiffs submerging

substantial portion of the property. The improvements in the plaint schedule property were destroyed. A new canal having about 50 feet width and

ten feet depth was formed in the plaint schedule properties due to the flow of water. The plaintiffs contended that their property was damaged and

they sustained heavy loss due to the illegal activities of the defendants which resulted in the rising of water level and breaking of the bund. The act

of the defendants were negligent and unreasonable and they did not take necessary precautions expected of them. The filling of a portion of the

Periyar River with earth was an illegal act. The plaintiffs claimed damages on account of the loss sustained by them. They also prayed for a

mandatory injunction for restoring their property to the original condition by removing the earth and stones from their property and filling the canal

which came into existence.

4. The plaintiffs had filed another suit as O.S. No.507 of 1989, on the file of the Court of the Subordinate Judge of Emakulam, for permanent

prohibitory injunction restraining the defendants from further dumping of soil and earth in the properties in possession of the plaintiffs, reserving a

right to file a separate suit for mandatory injunction and for recovery of damages. O.S.No.507 of 1989 was transferred to the Sub Court,

Muvattupuzha, where it was renumbered as O.S.No. 164 of 1990. A Commissioner was appointed in that case and the Commissioner submitted

a report indicating the damage caused to the properties in possession of the plaintiffs. It was contended by the plaintiffs that since the reliefs prayed

for in O.S.No. 164 of 1990 became infructuous, that suit was withdrawn without prejudice to file a fresh suit.

5. The plaintiff in the respective suits claimed damages on various grounds. But, the claim was limited to Rs. 1,50,000/- in O.S.No. 138 of 1991,

Rs. 85,000/- in O.S.No. 139 of 1991, Rs. 40,000/-in O.S.No. 140 of 1991, Rs. 44,000/- in O.S.No. 141 of 1991, Rs. 1,25,000/ - in

O.S.No.72 of 1992, Rs. 40,000/- in O.S.No.71 of 1992 and Rs. 45,000/- in O.S.No.80 of 1992.

6. Defendants 1 and 2 filed a written statement and the third defendants filed a separate written statement. The defendants contended that the

plaintiffs are not entitled to any relief, since the property possessed by them is river puramboke land which was encroached by the plaintiffs. The

area earmarked for dumping the excavated soil from power house and switchyard is the down-stream of power house on the left bank of the

Periyar River. The area thus earmarked was found insufficient. The excavated soil was deposited only in the river puramboke land which is lying in

between the properties claimed by the plaintiffs and the river. In fact, the deposit of such excavated solid constitutes a protection to the land

encroached by the plaintiffs. When it was found that the dumpyard was filled up with soil making it impossible for further dumping of soil, an

additional area was made available to the third defendants on the river puramboke for dumping. However, specific instructions were given to the

third defendant not to deposit the soil in the area already encroached upon by private parties. The plaintiffs have no title to the plaint schedule

property. It was contended that no damage was caused to the plaintiffs due to the acts of the defendants and the rising of water level in the river

was a natural calamity. No damage was caused to the improvements in the encroached land. The flow of water in the Karimanal canal was never

blocked. The damage, if any, caused to the property is due to the unprecedented rain fall and not due to any act of the defendants. The defendants

are, therefore, not liable to pay compensation to the plaintiffs. The plaintiffs are also not entitled to get restoration of the property to its original

condition. The plaintiffs have no cause of action to institute the suit. The third defendant contended that the suit is not maintainable without

impleading the State as a party to the suit, since the property claimed by the plaintiffs belonged to the State. The third defendants contended that

the disposal of earth and other materials from the work site was done by the third defendant as per the agreement and at the specific instruction,

supervision and direction of the Kerala State Electricity Board. The third defendant did not dump soil in the river so as to reduce its width.

Dumping of soil was not made in the properties claimed by the plaintiffs or in the river as alleged. No damage or injury was caused to the plaintiffs

or their properties. In O.S.No.507 of 1989, on the file of the Sub Court, Ernakulam, which was transferred to the Sub Court, Muvattupuzha and

renumbered as O.S.No. 164 of 1990, written statement was filed by the third defendant. When the suit came up for trial in the list, the plaintiffs

therein did not press their claim and the suit was dismissed. Therefore, the present suit is hit by Rule 2 of Order II of the Code of Civil Procedure.

7. Before the trial court, Pws.l to 11 were examined and Exts.Al to A12 were marked on the side of the plaintiffs. Dws. 1 and 2 were examined

and Exts.B 1 and B2 were marked on the side of the defendants. Ext.Xl was also marked as produced by the witness.

8. The trial court held that the suit is not bad for non-joinder of the State. The State is not a necessary party as no steps were taken to evict the

plaintiffs from the land in their possession. It was held, after considering the documentary and oral evidence in the case, that the defendants

dumped excavated materials in the Periyar River and in the banks of the river and rejected the contention that damage was caused to the property

of the plaintiffs due to natural calamity. It was found that the plaintiffs sustained loss due to the negligent act of the defendants by dumping

excavated materials in the periyar River, on the side of the plaint schedule properties. The trial court took note of the fact that the defendants did

not produce any document to show that the area earmarked for deposing excavated materials was not at Thookupara, as contended by the

plaintiffs. The evidence of Pws. 1 to 9 were considered by the trial court and believing their evidence, it was held that the defendants dumped

excavated materials in the river, thereby reducing the width of the river. The trial court took note of the admission made by DW1 that water

escaped through the southern side of the place where the excavated materials were dumped. DW1 had also admitted that excavated materials

were dumped in the river. Ext.Al report filed by the Commissioner in O.S.No.507 of 1989 was relied on by the court below. The Commissioner

who prepared Ext.Al report was examined as PW1. The report clearly indicates that earth and stones were dumped on the southern portion of the

Periyar River at about one-half of the total width of the river at the place where the plaint schedule properties are situated. The report also would

indicate that the width of the filled up portion was 100 feet on the western side and 80 feet on the eastern side. It has come out in evidence that

damage is caused to the property in the possession of the plaintiffs. The trial court has analysed the evidence in detail and came to the conclusion

that damage was caused not due to natural calamity, but due to the acts committed by the defendants. There is nothing to indicate that the

appreciation of evidence made by the trial court is perverse or illegal. All the relevant facts were taken note of by the court below and the evidence

has been properly discussed and appreciated. If the case of the defendants is that the dumping area was not Thookupara as alleged by the

plaintiffs, they could have produced necessary documents in their possession. The burden of proof in this regard is evidently on the defendants

since that is a fact especially within their knowledge. On a reappraisal of the evidence in the case, we concur with the view taken by the court

below that damage was caused due to the acts of the defendants and not due to natural calamity as contended by them.

9. Learned Counsel for the appellants contended that the suits are hit by Rule 2 of Order II of the Code of Civil Procedure, since the earlier suit

filed by the plaintiffs for injunction was dismissed as withdrawn. It was contended that at the time when O.S.No.507 of 1989 was filed, the cause

of action on which the present suits were filed was available to the plaintiffs and they having not included the relief for compensation in the earlier

suit, the present suits are barred. Rule 2 of Order II of the CPC provides that every suit shall include the whole of the claim which the plaintiff is

entitled to make in respect of the cause of action. Sub-rule (2) of Rule 2 provides that where a plaintiff omits to sue in respect of, or intentionally

relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. Sub-rule (3) of Rule 2

provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such relief, but if he omits,

except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. It is not in dispute that the earlier

suit was withdrawn by the plaintiffs. Rule 1(4) of Order XXIII of the CPC provides that where the plaintiff abandons any suit or part of claim

under Sub-rule (1) or withdraws from a suit or part of a claim without the permission of the Court, he shall be precluded from instituting any fresh

suit in respect of such subject matter or such part of the claim. The specific case of the plaintiffs is that the earlier suit was filed only for an

injunction restraining the defendants from further dumping soil in the River and surrounding areas and the right of the plaintiffs to claim damages and

to sue for mandatory injunction was reserved. The cause of action on which the earlier suit was filed is evidently different from the cause of action

in the present suits. The prayer for injunction is based on an apprehension on the part of the plaintiffs that the acts of the defendants may further

cause loss or injury to the plaintiffs whereas the claim for damages in the present suit is based on the injury or loss already caused to them or

sustained by them.

10. In Kunjan Nair Sivaraman Nair Vs. Narayanan Nair and Others, , the Supreme Court considered the scope and ambit of Rule 2 of Order II

of the CPC and held thus:

... So far as Sub-rule 3 is concerned, before the second suit of the plaintiff can be held to be barred by the same, it must be shown that the second

suit is based on the same cause of action on which the earlier suit was based and if the cause of action is the same in both the suits and if in the

earlier suit plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press into

service in that suit cannot be subsequently prayed for except with the leave of the court. It must, therefore, be shown by the defendants for

supporting their plea of bar of Order II, Rule 2. Sub-rule (3) that the second suit of the plaintiff filed is based on the same cause of action on which

its earlier suit was based and that because it had not prayed for any relief and it had not obtained leave of the court in that connection, it cannot sue

for that relief in the present second suit....

The Supreme Court in Kunjan Nair Sivaraman Nair''s case relief on the Constitution Bench decision in Gurbux Singh Vs. Bhooralal, and M/s.

Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another, . In the Constitution Bench decision in Gurbux

Singh''s case the Supreme Court held thus:

... As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this

reason that we consider that a plea of a bar under Order II, Rule 2, CPC can be established only if the defendant files in evidence the pleadings in

the previous suit and thereby proves to the court the identity of the cause of action in the two suits. It is common that the pleadings in C.S. No.28

of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order II, Rule 2, Civil Procedure Code....

In Kunjan Nair''s case (supra) the Supreme Court held thus:

... The salutary principle behind Order II, Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by

splitting the claim and the reliefs for being indicated in successive litigations. It is, therefore, provided that the plaintiff must not abandon any part of

the claim without the leave of the court and mustclaim the whole relief orentire bundle of reliefs available to him in respect of that very same cause

of action. He will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior

permission of the court.

11. The pleadings in O.S.No.507 of 1989 (renumbered as O.S.No.164 of 1990) are not produced in the present case. The judgment in that case

is also not produced. As held in Curbux Singh''s case (supra), the defendants have to establish the necessary ingredients to found their plea under

Order II Rule 2 of the Code of Civil Procedure. The defendants having failed to produce the necessary pleadings and judgments in respect of the

earlier case, they are precluded from contending that the present suit is barred under Order II Rule 2 of the Code of Civil Procedure. On the basis

of the materials available before Court, it is clear that the cause of action in the earlier suit is different from the cause of action in the present suit.

12. In Dalip Singh v. Mehar Singh Rathee and Ors., (2004) 7 SCC 650 , the Supreme Court held that the sine qua non for applicability of Order

II Rule 2 of the CPC is that a person entitled to more than one relief in respect of the same cause of action has omitted to sue for some relief

without the leave of the Court. It is contended by the defendants that the court below omitted to raise an issue as to whether the suit is hit by Rule

2 of Order II of the CPC and, therefore, the judgment and decrees are bad in law. If an issue on that aspect was omitted to be raised, the

defendants could very well appraise the Court to raise the necessary and proper issued. The parties understood the respective contentions put

forward in the case. The defendants having failed to produce the necessary materials and data to prove their contentions with regard to the

availability of Order II Rule 2 of the Code of Civil Procedure, it cannot be said that the suits are hit by Rule 2 of Order II of the Code of Civil

Procedures. Moreover, the earlier suit having been withdrawn, the provision which applied is Order XXIII Rule 1 of the CPC and in such a case,

the plaintiffs shall be precluded from instituting any fresh suit only if the subject matter or the claim is the same in the earlier suit. Earlier suit was

only for an injunction to restrain the defendants from further committing the offending acts whereas the present suits are based on the consequences

of the illegal acts of the defendants. The claim put forward in the earlier suit is entirely different from the claim put forward in the present suits and

the subject matter and cause of action are also different. The earlier suit having been withdrawn, the contention that the present suits are hit by

Order II Rule 2 of the CPC would not be available to the defendants, since Rule 1 of Order XXIII comes into play and if the bar under Sub-rule

(4) of Rule 1 of Order XXIII is not applicable, the maintainability of the present suits cannot be doubted.

13. The learned Counsel for the appellants contended that the plaintiffs are not entitled to get damages, since they have no title to the property in

respect of which the cause of action is alleged. It is not in dispute that the plaint schedule properties belong to the Government. It is also not in

dispute that the plaintiffs were in possession and undisturbed enjoyment of the plaint schedule properties. It is evident from Exts.Bl and B2 files that

for drawing the Lower Periyar Kochi 220 KV line, trees from the plaint schedule property in O.S.No.78 of 1992 and O.S.No. 141 of 1991 were

cut and removed and compensation was paid to the plaintiff''s therein. Exts.Bl and B2 files were produced by defendants 1 and 2 as directed by

the Court on the request of the plaintiffs. The defendants 1 and 2 did not produce the file containing the agreement for drawing 220 KV line, in

spite of a direction issued by the Court. The files were not produced on the ground that they were not available in the office of the Kerala State

Electricity Board. Exts. A10, All and A12 also would prove that compensation was paid to some of the plaintiffs on cutting trees from their

properties for drawing the 220 KV line.

14. Learned Counsel for the defendants relied on the decision of the Supreme Court in Rev. Fr. K.C. Alexander Vs. State of Kerala, , in support

of their contention that the plaintiffs are not entitled to claim damages on account of the loss of improvements. In Rev. Fr. K.C. Alexander Vs.

State of Kerala, , the Supreme Court held that where a person trespassed into Government land and planted trees, it is not obligatory upon the

Government to give him notice u/s 9 of the Travancore Land Conservancy Act (Act 4 of 1091) and that he cannot on eviction claim compensation

for the trees planted by him on the Government land. In the present case, the plaintiffs, did not lay any claim against the Government for damages.

The Government have not initiated any proceedings to evict the plaintiffs. That the plaintiffs cannot have any claim against the Government for

compensation is not a ground available to the defendants in the present suits to resist a claim for damages against them. Admittedly owing to the

cutting of the trees the plaintiffs have lost their means of livelihood. The defendants did not claim any title to the properties in question. They have

no case that their property have been trespassed upon by the plaintiffs and effected improvements. So long as the defendants have no claim of title

to the properties in question, they are not entitled to raise a contention that the plaintiffs cannot claim damages in respect of the improvements on

the ground that the lands in question belong to the Government. Such a plea is available only in favour of the Government and not to the Kerala

State Electricity Board or the third defendant, who entered into the agreement for construction of a project with the Kerala State Electricity Board.

The plaintiffs having proved that they were in possession and enjoyment of the properties and that they have effected the improvements and the

defendants having put forward no claim of title to the properties, the plaintiffs are entitled to compensation for the tortious acts done by the

defendants due to which the plaintiffs sustained loss and injury.

15. As regards the quantum of compensation, the trial court has considered the facts and circumstances proved in the case in great detail and

partly allowed the claims put forward by the plaintiffs. The damages awarded by the court below are just and reasonable. The plaintiffs had put

forward various claims and they had limited their claim to lesser amounts. The court below has still reduced the quantum and awarded only lesser

amounts. On a consideration of the findings arrived at by the court below, in the light of the evidence on record, we are of the view that the court

below has not committed any error in fixing the quantum of damages.

16. The court below refused the prayer for mandatory injunction on the ground that the plaintiffs have no title to the plaint schedule properties. The

findings of the court below is correct. The respondents have not challenged that finding of the trial court.

17. It is submitted that the plaintiffs have already executed the decrees and recovered the damages awarded. The suits were filed in 1991 and

1992 and the court below disposed of those suits on 31-1-1994.

18. For the aforesaid reasons, we confirm the judgments and decrees and dismiss the appeals. In the facts and circumstances of the case, there will

be no order as to costs in the appeals.

In the Memorandum of Cross Objections, the plaintiffs have raised a contention that the amount awarded as damages is low. We are of the

considered view that the quantum of damages awarded by the court below is just and reasonable in the facts and circumstances of the case. The

Memorandum of Cross Objections are accordingly dismissed. No costs.