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RAGHAVAN SASIKUMAR

v.

PARAMESWARAN NADAR SATHYANANADHAN NADAR
KANAKOTTU PADIPPURA VEEDU AND ORS.

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(Civil Appeal No. 4837 of 2022)

AUGUST 01, 2022

[M. R. SHAH AND B. V. NAGARATHNA, JJ.]

- Suit – Suit filed for putting up a boundary wall/fence on land – Trial Court dismissed the suit, which was confirmed by the First Appellate Court – High Court, however, allowed second appeal and decreed the suit by upsetting concurrent findings recorded by both the Courts below and holding that defendant Nos. 1 to 3 could not have more than 10 cents of land as kudikidappukars and therefore, the plaintiffs were entitled to put up the boundary as per the Commissioner's Plan and Report beyond the excess of 10 cents land – Held: In an earlier round of litigation instituted by the original landowner-predecessor-in-title of the plaintiffs, he was held to be entitled to land to the extent of 2 acres and 35 cents – Therefore, to that extent only the plaintiffs can protect their possession by putting up the boundary wall/fence and not beyond 2 acres and 35 cents – What apparently weighed with the High Court was that defendant Nos. 1 to 3 were entitled to only 10 cents as kudikidappukars – However, in a suit praying for putting up a boundary wall/fence filed by the plaintiffs, the High Court in a second appeal could not have given the findings that the defendants were entitled to only 10 cents as kudikidappukars – Judgment and decree passed by Trial Court confirmed by the First Appellate Court, accordingly, restored.*

Allowing the appeal, the Court

- G HELD:** 1. In an earlier round of litigation instituted by the original landowner - predecessor-in-title of the plaintiffs, being O.S. No. 833 of 1961, he was held to be entitled to plaint A schedule land to the extent of 2 acres and 35 cents. Therefore, to that extent only the plaintiffs can protect their possession by putting up the boundary wall/fence and not beyond 2 acres and 35 cents.
[Para 4][834-D]

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2. So far as the reliance placed upon the Commissioner's Report, which suggests that the plaintiffs were in possession of 2 acres and 77 cents is concerned, it is to be noted that plaintiffs may be found to be in possession of 2 acres and 77 cents. However, any possession beyond 2 acres and 35 cents can be said to be unauthorized possession. [Para 5][834-H; 835-A]

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3. The plaintiffs can protect their possession by putting up the boundary wall/fence to the extent of 2 acres and 35 cents only. By praying to permit the plaintiffs to put up the boundary wall/fence beyond 2 acres and 35 cents, the plaintiffs are asking for the reliefs permitting them to retain the possession of land beyond 2 acres and 35 cents, which otherwise they are not entitled to in view of the specific findings recorded by the Civil Court in the earlier round of litigation namely O.S. No. 833 of 1961. [Para 6][835-B]

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4. From the impugned judgment and order passed by the High Court, it appears that what weighed with the High Court is that the defendant Nos. 1 to 3 are entitled to only 10 cents as kudikidappukars. However, in a suit praying for putting up a boundary wall/fence filed by the plaintiffs, the High Court in a second appeal could not have given the findings that the defendants were entitled to only 10 cents as kudikidappukars. The judgment and decree passed by the Trial Court confirmed by the First Appellate Court is ordered to be restored. [Paras 7, 8][835-C-E]

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CIVIL APPELLATE JURISDICTION: Civil Appeal No.4837 of 2022.

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From the Judgment and Order dated 01.02.2018 of the High Court of Kerala at Ernakulam in S.A. No. 39 of 2000.

C.N. Sreekumar, Sr. Adv., Prakash Ranjan Nayak, Advs. for the Appellant.

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Jose Abraham, M.P. Srivignesh, Lakshman Raja T., Mithun Kumar N., Advs. for the Respondents.

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- A The Judgment of the Court was delivered by
M. R. SHAH, J.
- B 1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 01.02.2018 passed by the High Court of Kerala at Ernakulam in Second Appeal No. 39 of 2000 by which the High Court has allowed the said second appeal and has set aside the concurrent findings recorded by both the Courts below and consequently has decreed the Original Suit No. 665 of 1988, the original defendant No. 4 has preferred the present appeal.
- C 2. The facts leading to the present appeal in a nutshell are as under:-
- D 2.1 The dispute is with respect to the putting up the boundaries in respect of the B schedule Items 1 and 2. That plaint A Schedule land originally belonged to one Parameswaran Nadar. The original owner - Parameswaran Nadar filed O.S. No. 833 of 1961 before the Court of Munsiff, Neyyattinkara, in which his title to and possession over plaint A schedule land was declared to the extent of 2 acres and 35 cents. Subsequently, the original plaintiffs in the present case filed O.S. No. 640 of 1970 for recovery of the buildings situated in plaint A schedule therein. At this stage, it is required to be noted that the first plaintiff is the wife of the original owner - Parameswaran Nadar and the plaintiff Nos. 2 to 5 are his children. In O.S. No. 640 of 1970, a question of *kudikidappu* was raised, which was referred to the Land Tribunal concerned for adjudication. The Land Tribunal, after taking evidence, entered a finding that the defendants in that suit (defendant Nos. 1 to 3 herein) were entitled to *kudikidappu* rights. O.S. No. 640 of 1970 came to be dismissed. The plaintiffs filed an appeal against rejection of their claim in one of the buildings, which was situated in the plaint C schedule. The said appeal came to be allowed. In execution, the person in occupation of the C schedule was evicted. Later, a compromise was arrived at between the parties and the property now shown in C schedule was gifted to the son of the defendant in the earlier suit.
- E 2.2 That thereafter the plaintiffs herein filed the present suit being O.S. No. 665 of 1988 with a prayer to put up the boundary in respect of the plaint B schedule Items 1 and 2. It was the case on behalf of the plaintiffs that they have no objection in allotting 10 cents each to the defendant Nos. 1 and 3 in *kudikidappu* right and rest of the property
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has to be secured by putting up a boundary wall. The defendants filed the written statement disputing the description of the plaint schedule properties. They also contended that they are in possession of properties in excess of *kudikidappu* right and they are legally entitled to possess the same. It was the case on behalf of the defendants that they have perfected their title over a property having more than 10 cents in extent.

A Court Commissioner was appointed, who submitted his report - Court Commissioner's Report (Exts. C1 and C2). On appreciation of evidence, the learned Trial Court dismissed the suit, which came to be confirmed by the First Appellate Court.

Feeling aggrieved and dissatisfied with the judgment and decree passed by the learned Trial Court dismissing the suit and which was confirmed by the First Appellate Court, the original plaintiffs filed the Second Appeal No. 39 of 2000 before the High Court. The appeal was admitted on the following substantial questions of law:-

“1. When the lower court has found that the defendants have not perfected their title over plaintiff D schedule by adverse possession and limitation, should not the lower court grant a decree to the plaintiff allowing the plaintiff to put up boundary to separate plaintiff D schedule from B and C schedule properties?

E 2. Is the finding of the lower court dismissing the suit valid on the ground that the plaintiff has not prayed for recovery of the property from the receiver?

F 3. If the title of the plaintiff over the plaintiff D schedule property is found in favour of the plaintiff, can the prayer for putting up boundary be rejected on the ground that the said property is in the possession of the receiver on behalf of the plaintiff?

G 4. When the plaintiff has admitted that the defendants are in the possession of B and C schedule, can the suit be dismissed on the ground that defendants have not obtained *pattayam* for the said properties from the Land Tribunal?

H 5. Can the suit be dismissed on the ground that defendants have not obtained *pattayam* from the Land Tribunal?”

2.3 By the impugned judgment and order, the High Court has allowed the said second appeal and has decreed the suit by upsetting the concurrent findings recorded by both the Courts below and holding that

- A defendant Nos. 1 to 3 cannot have more than 10 cents of land as a *kudikidappukars* and therefore, plaintiffs are entitled to put up the boundary as per the Commissioner's Plan and Report beyond the excess of 10 cents land.

2.4 Feeling aggrieved and dissatisfied with the impugned judgment B and order passed by the High Court allowing the second appeal and quashing and setting aside the judgment and decree passed by the learned Trial Court dismissing the suit and consequently decreeing the suit, original respondent No.4 before the High Court has preferred the present appeal.

3. We have heard Shri C.N. Sreekumar, learned Senior Advocate C appearing on behalf of the appellant and Mr. Jose Abraham, learned counsel appearing on behalf of the respondents – appellants before the High Court – original plaintiffs.

4. Having heard the learned counsel for the respective parties and considered the evidence on record, more particularly, the fact that in D the earlier round of litigation instituted by the original landowner - Parameswaran Nadar – predecessor-in-title of the plaintiffs, being O.S. No. 833 of 1961, he was held to be entitled to plaint A schedule land to the extent of 2 acres and 35 cents. Therefore, the predecessor-in-title of the plaintiffs, was having the title to and possession over the plaint A schedule land admeasuring 2 acres and 35 cents only. Therefore, to that E extent only the plaintiffs can protect their possession by putting up the boundary wall/fence and not beyond 2 acres and 35 cents. Therefore, the original plaintiffs can put up the boundary wall/fence within 2 acres and 35 cents. They have no right to put up any boundary wall/fence beyond 2 acres and 35 cents. If the plaintiffs are permitted to put up the F boundary wall beyond 2 acres and 35 cents, in that case, it would be contrary to the earlier judgment and decree passed in O.S. No. 833 of 1961. Also, if the plaintiffs are permitted to put up the boundary wall/ G fence beyond 2 acres and 35 cents, in that case, it can be said to be conferring title on them beyond 2 acres and 35 cents contrary to the judgment and decree passed in O.S. No.833 of 1961 in which they were held to be entitled to plaint A schedule land admeasuring 2 acres and 35 cents only.

5. Now, so far as the reliance placed upon the Commissioner's Report, which suggests that the plaintiffs were in possession of 2 acres and 77 cents is concerned, it is to be noted that plaintiffs may be found to H

be in possession of 2 acres and 77 cents. However, any possession beyond 2 acres and 35 cents can be said to be unauthorized possession. A

6. As observed hereinabove, the plaintiffs can protect their possession by putting up the boundary wall/fence to the extent of 2 acres and 35 cents only. By praying to permit the plaintiffs to put up the boundary wall/fence beyond 2 acres and 35 cents, the plaintiffs are asking for the reliefs permitting them to retain the possession of land beyond 2 acres and 35 cents, which otherwise they are not entitled to in view of the specific findings recorded by the Civil Court in the earlier round of litigation namely O.S. No. 833 of 1961. B

7. From the impugned judgment and order passed by the High Court, it appears that what is weighed with the High Court is that the defendant Nos. 1 to 3 are entitled to only 10 cents as *kudikidappukars*. However, in a suit praying for putting up a boundary wall/fence filed by the plaintiffs, the High Court in a second appeal could not have given the findings that the defendants were entitled to only 10 cents as *kudikidappukars*. C

8. In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court is unsustainable and the same deserves to be quashed and set aside and is accordingly quashed and set aside. The judgment and decree passed by the learned Trial Court confirmed by the First Appellate Court is hereby ordered to be restored. D

Present appeal is accordingly allowed to the aforesaid extent. However, in the facts and circumstances of the case, there shall be no order as to costs. E