

IN THE COURT OF THE ADDITIONAL SUB JUDGE, KOLLAM.**Present: Sri. Rajiv Jayaraj, Addl. Subordinate Judge.**Saturday the 5th day of March, 2016/15th Phalguna, 1937.**O. S.814/2009****Between:-****Plaintiff**

Showkathumma @ Showkath beevi,
70 years, D/o.Rabu Beevi,
Thodiyil purayidom,
Thamarakulam, Kollam.

Addl.2 Sherief Babu, aged 50 years,
S/o.Rasheed Sas villa, R.N.Nagar,
Thankassery, Kollam from
Thodiyil Purayidom,
Thamarakulam, Kollam.

Addl.3 Meera bai, 43 years,
D/o.Showkathumma,
Pattanikkazhikath,
Near Thaikavu,
Pazhayattinkuzhy,
Eravipuram village,
From Thodiyil Purayidom,
Thamarkulam, Kollam.

Addl.4 Ahuja, aged 40 years,
S/o.Rasheedh, Abvi Manzil,
Chadanathoppe,
Kottamkkara village,
from Thodiyil purayidom,
Thamarakulam, Kollam.

Addl.5 Thamyia, aged 35 years,
D/o.Shoukathumma,
Thodiyil Purayidom,
Thamarakulam, Kollam.

Addl.6 Saira Banu, aged 34 years,
D/o.Showkathumma,
Thodiyil purayidom,
Thamarakulam, Kollam.

(Addl.Plaintiff 2 to 6 are impleaded as
per order in IA 575/10 dated 20-02-2010)

(By Adv. P.Sankara Pillai)

And:-

Defendants

1. Ahmed Basher, 66 years,
Tharif Manzil, Randamkutti,
Chittadeeswaram Purayidom,
Andamukom cherry, Kollam village.

(By Adv. John George)

2. Padmanabhan, 55 years,
Bhagavath Asari, Bunk No.53,
Andamukkom, Kollam.

Addl.3 The State of Kerala represented by
District Collector, Kollam.

Addl.4 The Tahsildar,
Taluk office, Kollam.

Addl.5 The Village Officer,
Kollam East village, Kollam.

(Addl.D3 to D5 impleaded as per order in
IA 780/11 dated 25-03-2011 of this court)

(By Sri. Francis Jude Netto
Addl. Dist. Govt. Pleader.

This suit is coming before me for final hearing on 05.03.2016 and on same day the court delivered the following.

JUDGMENT

1. Suit for setting aside Decree with respect to plaint 'B' Schedule property and for Permanent Prohibitory Injunction.

2. Plaint averments in brief as follows:- Plaintiff is a widow and illiterate. Plaint A schedule property having an extent of 5 cents with building was purchased in the year 1975 as per document No. 2142/1975 and in 1978, Plaintiff reconstructed the building. Plaint A schedule property is puramboke and under the possession of plaintiff's sister Shareefa Beevi. Prior to Shereefa Beevi, property was under the possession of Sara Ummal. The property was purchased from Sara Ummal by Shareefa Beevi and thereafter, the plaintiff. As plaint schedule property is Puramboke, plaintiff had not obtained purchase certificate. First defendant instituted a suit against the plaintiff and six others as OS.102/97 before the Munsiff Court, Kollam incorporating 2.570 cents of

property with building in the plaint B schedule property. The plaintiff has not obtained the summons and notice, plaintiff did not contest the suit and was set exparte and the suit was dismissed. Thereafter first defendant filed A.S 92/02 before District Court, Kollam and notice was received by plaintiff which was entrusted to second defendant and plaintiff didn't verified the details. On 08.08.09, plaintiff was evicted from the property through the process of Court and now the plaintiff is in streets. On enquiry with the second defendant, second defendant failed to give proper answer and it is now understood that the plaintiff has to give possession of plaint B schedule as per judgment in AS 92/02. The said decree was obtained due to fraudulent act of first and second defendants and hence the suit to set aside the decree in AS 92/02 against the plaintiff as null and void which is obtained by fraudulent means and for redelivery of plaint B schedule property from the first defendant and for permanent prohibitory injunction from demolishing the building in the B schedule property and from committing any act of waste.

3. First defendant filed written statement which in brief as follows: Suit is not maintainable either in law or on facts. The suit is not maintainable under section 47 of the Code of Civil Procedure. As per the

decree in OS 102/97 of Munsiff Court, Kollam, plaint B schedule property is delivered to the first defendant in EP 172/08, and, if the plaintiff has got any objection regarding the delivery proceedings, it has to be adjudicated before the Execution Court and not by a separate suit. The suit is barred by Resjudicata. Plaintiff has no right or possession over plaint A schedule property. The plaintiff herein was the 7th defendant in OS10/97 of Munsiff Court, Kottarakkara and respondent in AS 92/02 before District Court, Kollam and the present suit is not legally maintainable. On 08.07.09, plaintiff was evicted from the plaint B schedule property through the process of law. The allegation that defendants 1 and 2 fraudulently colluded and evicted the plaintiff is false and incorrect. The alleged cause of action is incorrect. Suit is instituted without any bonafides. Suit is bad for nonjoinder of necessary parties and there is estoppel. Identity of properties are incorrect. B schedule is not Puramboke and belongs to first defendant. Hence to dismiss the suit.

4. Second defendant set exparte.

5. Defendants 3 to 5 filed written statement and counter claim which in brief as follows: Suit is not maintainable either in law or on facts. Plaint B schedule property is a Puramboke land belonging to the

Government as per the revenue records. The Government has not assigned the plaint B schedule property either to the first plaintiff or to the first defendant. The said property absolutely belong to the Government and nobody has any right, title or interest therein. Sale deed No. 2142/1975 allegedly obtained by the first plaintiff would not confer any title to the first plaintiff with regard to the plaint schedule property. It may be true that the first plaintiff resided in the hut situated in the plaint B schedule property. But that itself would not confer any title to her in the plaint B schedule property. Government was neither impleaded nor made a party in OS 102/97 of the Hon'ble Munsiff's Court, Kollam. So the contentions raised by the parties to that suit or its verdict are not binding to the Government since the plaint B schedule property absolutely belong to the Government and that the Government was not a party in the suit or appeal. It is seen that the first defendant is claiming title and possession of the plaint B schedule property. The first defendant deliberately and with the malafide intention to obtain a decree in his favour by dubious methods, did not make the Government a party in those suit and appeal, though he was well aware that the plaint B schedule property belong to the Government. In the absence of the Government as party in OS 102/97 and in AS 92/02,

any decree or order passed in those suit and appeal are not binding on the Government in so far as the plaint B schedule property is concerned since, the subject matter of the suit absolutely belong to the Government as per revenue records. At the same time, since the first defendant is claiming title and possession over the plaint B schedule property on the basis of the decree in AS 92/02 of the Hon'ble District Court, Kollam in which the defendant 3 to 5 herein are not parties, defendants are raising counter claim for decree of declaration that the plaint B schedule property's title and possession vest in the Government of Kerala holding that the decree in OS 102/07 of the Munsiff's Court, Kollam and AS 92/02 of the District Court, Kollam are not binding to the Government of Kerala in so far as the plaint B schedule property is concerned and for a perpetual injunction restraining the plaintiffs and defendants from trespassing into the plaint B schedule property or committing any waste. For the purpose of counter claim, the plaint B schedule property is described hereunder as counter claim schedule property. The cause of action for the counter claim arose on and from 25.07.12 the date on which defendants 3 to 5 came to know about the proceedings in OS 102/97 and AS 92/12 and the decree passed therein without making the Government party. Hence to dismiss the suit.

4. On the basis of the above said pleadings, the issues framed by my learned Predecessor are:

1. Is the suit maintainable?
2. Is the suit barred by Resjudicata?
3. Is the suit bad for nonjoinder of necessary parties?
4. Is the decree in A.S 92/02 liable to be cancelled?
5. Is the defendants are restrainable as prayed for?
6. Is the prayer for Recovery of possession allowable?

Framed Additional Issues No. 7 to 10 and Issue No. 7 recast as Issue No. 11.

7. Is the counter claim not maintainable?
8. Are the Defendants 3 to 5 entitled for Declaration of title and possession over plaint B schedule property?
9. Are the defendants entitled for Declaration that decree in A.S 92/02 of District Court, Kollam are not binding on the Government of Kerala?
10. Are the defendants entitled for Permanent prohibitory Injunction against plaintiff and defendants 1 and 2?
11. Reliefs and costs.

6. As plaintiff died, her legal representatives impleaded as per order in IA 575/10. Defendants 3 to 5 endorsed in the counterclaim to withdraw the counterclaim with liberty to approach the execution Court and permission granted on 03.03.16.

7. Issue No.1: Order XIV Rule 2(2) CPC envisages the Court to dispose the suit on preliminary issue which goes to the root of the suit without recording the evidence on the merits on the claim.

By virtue of the Amendment Act 1976, a sea change with respect to the resolving of disputes over the executability of a decree for possession has taken place after the Amendment Act of 1976 to the Code, by which the provisions covered by Rr.97 to 103 of O.XXI of the Code lay down the scheme for adjudication of all disputes over the right, title and interest of any person over the property covered by the decree, and once the execution has commenced the execution Court alone can consider such disputes and cannot be agitated by a separate suit. Even if a suit is entertained challenging a decree for possession of property before commencement of the execution proceedings of such decree, the scheme covered by the provisions of Rr.97 to 103 of O.XXI after the amendment

spells out that if the execution of that decree has culminated in a Court sale of the property or the plaintiff in that suit has already been dispossessed, the claim raised over the property has to be adjudicated only by the execution Court and not by any other Court. Such being the effect of the amendment under the 1976 Amendment Act, the suit filed by the plaintiff when she is resisting execution of the decree before the Execution Court in EP 172/08 pending before Munsiff Court with respect to this property is not at all maintainable. Challenge against the sale of B schedule property covered by the decree as vitiated by fraud, or on any other ground, is to be agitated before the execution Court and not by a separate suit. The plaintiff had been dispossessed from the B schedule properties under the decree in execution. Her right to work out remedies by way of appropriate proceedings, however, does not confer on her any authority to vindicate her claim over B schedule properties under the decree by way of a suit.

Where the provisions covered by Rr.97 to 103 of O.XXI is a complete Code by themselves, as has been held by the Apex Court, time and again, in the matter of adjudication over the disputes as between any person and the decree holder over a property covered by a decree for

possession put in execution, where under the jurisdiction to decide such disputes vests with the Execution Court and none else, when the execution of a decree has led to dispossession of the claimant, only an application under R.99 of O.XXI would lie, if the applicant is so entitled to. *A suit before any court impeaching the correctness, setting up any claim over the property covered cannot at all be entertained.* As the very jurisdiction of a Court to entertain a suit, under the circumstances indicated, is interdicted by the provisions covered by Rr.97 to 103 of the Code, the inescapable conclusion which follows is that the suit filed by the plaintiff in the present case is not maintainable. This aspect is clearly laid down by Hon'ble High Court of Kerala in Unnikrishnan V Kunhi Baby (2009 (1) KLT-502. As regards plaint A schedule property, admittedly from the plaint averments, it is puramboke and so there is bar under section 20 A(2) of Kerala Land Conservancy Act, 1957.

In view of finding in issue No. 1 that suit is not maintainable, other issues do not arise for consideration.

In the result, suit dismissed. Counter claim withdrawn with liberty to approach the Execution Court. Costs made easy.

Dictated to the Conf. Asst., transcribed and typed by her, corrected by me and pronounced in open court on this the 5th day of March, 2016.

Sd/-
Rajiv Jayaraj
Additional Sub Judge

APPENDIX

NIL

Id/-
Additional Sub Judge

Typed by: Lily.P.S
Compd. By:

Rajiv Jayaraj
Additional Sub Judge