

**IN THE COURT OF THE ADDITIONAL DISTRICT JUDGE,
NEYYATTINKARA.**

Present : **Sri. SUBASH.S., Additional District Judge.**

Tuesday, the 2nd day of November, 2021

11th day of Karthika, 1943.

APPEAL SUIT No. 435 / 2015

(Appeal from the Decree and Judgment in O S No.516 / 2007 dated 25/11/2009 of the II Additional Munsiff Court, Neyyattinkara.)

Appellants :

1. Gopalan Rajendran, 49 years, residing at Parakuzhi Puthen Veedu, Thlayal Desom, Athiyanloor Village.
2. Devaki Sobhana aged 47 years, do..do.
3. Devaki Jayakumari aged 43 years, do..do.
4. Gopalan Jayachandran, aged 41 years residing do..do.
5. Devaki Vineetha, aged 39 years, residing Kundayathu Konathu Shaija Bhavan, Thathiyoor Desom, Perumkadavila Village having also Parakkuzhi Puthen Veedu, do..do.

By Adv. Sri. R.Hari Gopal

Respondents:

1. Kesavan Krishnan aged about 70 years, Puttumonkavu Veedu, Arumanoor Desom. (Died).
2. Sundaresan Jayan, aged 43 years, Arinthottam Veedu, do..do.
3. Nalini Neenu aged 41 years, do..do.
4. Kesavan Sreedharan, 68 years, Punnakulam, Kazhuvoor Desom, Karumkulam Village.

5. Prasannakumari, aged 53 years, Chellamma Bhavan, Chanthiram, Arumanoor Desom, Thirupuram Village.
6. Viswambharan Jivan Kumar, aged 33 years, residing at do..do.
7. Jileekumar, S/o Viswambharan, aged 33 years, residing at do..do.
8. Viswambharan Pravinkumar aged about 28 years do..do.
9. Prasannakumari Seetha Lekshmi, aged 23 years, do..do.
10. Kesavan Ramachanran aged about 58 years, of Pattiykkala Thottathu Veedu, Thirupuram Desom, do..do.
11. Chellamma Radha, aged 53 years, Aji Bhavan, Panicker Thottathil Arumanoor Desom, Thirupuram.
12. Kesavan Natarajan, aged 48 years of Puttumonkavu Roadarikathu Veedu, Arumanoor, do..do.
13. Padmavathi, W/o late Kesavan Krishnan, 65 years of Puttumonkavu Veedu, Arumanoor Desom do..do.
14. Jayasree, D/o Padmavathi 37 years, do..do.
15. Vijayasree, aged 35 years, of do..do.
16. Minisree, aged 32 years, do..do.
17. Rajasree, aged 30 years, do..do.
18. Sampath 28 years, S/o Krishnan do..do.

(Respondents 13 to 18 impleaded as Legal representatives of the original first defendant Kesavan Krishnan.)

R1 By Adv. Sri. Vipin Clement

R2 to R12 Exparte

R13 to R 18 By Adv. Sri. Arun.V.G.

This Appeal Suit came up for hearing on 31..08..2021 and the Court on 02..11..2021 passed the following :

JUDGMENT

The plaintiffs in O.S. 516/2007 on the file of the Additional Munsiff's Court –II, Neyyattinkara are the appellants herein. The parties are referred to in their original status as in the trial court for convenience.

2. The brief facts leading to the filing of this appeal are as follows:-

The plaint schedule properties originally belonged to one Raman Kesavan by virtue of mortgage deed No. 520 /1110 M.E, and sale deeds Nos. 2786/1113 M.E., 1330/1117M.E., 4139/1119 M.E. and 2248/1956. By virtue of the above deeds said Kesavan was in possession and enjoyment of the plaint schedule properties which are lying on either side of the road and he constructed a building in plaint A schedule item 1. While so, the said Kesavan Mortgaged the said properties to his daughter Devaki and her husband Gopalan as per the mortgage deed No. 1289/1957. The plaintiffs and one Jayachandran are the children of Devaki and Gopalan. The said Devaki and Gopalan are no more and their right over the said properties devolved upon their children, the plaintiffs and one Jayachandran. As the said Jayachandran is working abroad this suit is instituted for and on behalf of him also.

3. The deceased Gopalan along with plaintiffs instituted a suit for declaration of their title over the plaint schedule property in the year 1998 as O.S. 489/1998, which was dismissed by the Additional Munsiff II, Neyyattinkara on 12.7.2000. Though the plaintiffs challenged the said

decree before the Subordinate Judge's Court, Neyyattinkara in AS.86/2000, the above appeal was dismissed confirming the decree and judgment of the trial court. Challenging the said decree, the plaintiffs approached the Hon'ble High Court of Kerala in RSA 619/2006. The Hon'ble High Court dismissed the said appeal with an observation that the dismissal of the suit will not affect the right of appellants to work out their remedy by appropriate proceedings. Thereafter the plaintiffs instituted this suit for partition of the plaint schedule item No. 1 and for declaration of title and possession over item No.2. The further case of the plaintiff is that the mortgage of the year 1110 was executed in favour of Kesavan and his brother Chellappan. The said Chellappan assigned his right in favour of Chellamma, who is none other than the wife of Kesavavan. On the death of said Chellamma her right devolved upon her children, Devaki, Sundaresan, Sreedharan, Viswambharan, Ramachandran, Nandirajan, Krishnan and Radha. The said Sundaresan and Viswambharan died intestate and the defendants 2 and 3 are the legal heirs of Sundaresan. The defendants 5 to 9 are the legal heirs of deceased Viswambharan. So the plaintiffs and the said Jayachandran are jointly entitled to a 9/16 share in the plaint A schedule item No.1 property and the defendants are jointly entitled to 7/16 share in the said property. So the plaintiffs instituted the above suit for partition of plaint A schedule item No.1 and for declaration of title and possession in respect of the plaint A schedule item No. 2.

4. Defendant filed written statement contending as follows:

Plaint schedule descriptions are not correct. The deceased Kesavan had no right or possession over the plaint schedule property. The executants of the mortgage deed of the year 1110 M.E. also had no right or possession over the property covered by the said deed. The said Kesavan had not constructed any building in the plaint A schedule item No. 1. The mortgage of the year 1957 claimed by the plaintiff has not come into effect. Raman Kesavan had no right to execute such a document. While the whole property including the plaint schedule properties was in oodukoor, one Parvathi Ummini and Parvathi Thaivani, who had right and possession over 10 ½ cents in Survey 240/2 and 26 ½ cents in Survey 251/1, executed a lease deed No. 1881/1102 M.E. in favour of Ummini Gopalan. Ummini Gopalan assigned his leasehold right in favour of Krishnan Narayanan by virtue of the deed No. 258/1955. Whiles, Krishnan Narayanan made an assignment of his leasehold right in respect of 13 ¾ cents comprised in Survey 251/1 and lying on the western side of the road; 5 ¼ cents comprised in Survey 240/2 and lying on the eastern side of the road in favour of the first defendant by virtue of the document number 1910/62. The first defendant is in possession and enjoyment of the said properties and he is residing in the building situated on the property lying in the western side of the road. Out of the property lying on the eastern side of the said road he sold 2 cents to one Sugathan by virtue of the deed No.

330/1975. The said Sugathan constructed a building therein and is residing there.

5. In 1966, one Perumal Lekshmi and others instituted a suit for redemption of the mortgage as O.S. 903/1966 in which the first defendant herein was the fourth defendant and parents of the plaintiffs herein were the second and third defendants. In the said suit the 1st defendant herein filed written statement contending that he is having leasehold right over the property and the said suit was dismissed finding that this defendant is a tenant. In view of the said judgment and decree this suit is barred by the principles of constructive resjudicata and estoppel by conduct. The defendant further contended that in view of the judgment in AS 86/2000 and OS 489/1998 also this suit is barred by resjudicata and estoppel.

6. Based on the above pleadings, the trial court framed the following issues:

1. Whether the suit is barred by principles of estoppel and resjudicata?
2. Whether the plaint schedule description is correct?
3. Whether the A1 schedule property is partible ? If so, what is the share allotted?
4. Whether the prayer for putting up of boundary is allowable? If so, through which line?
5. Reliefs and costs.

Plaintiffs and defendants have not adduced any oral evidence. Exts. A1 to A10 were marked from the side of the plaintiff and Exts. B1 to B19 were marked from the side of the defendant.

7. After considering the evidence on record, the trial court dismissed the suit vide judgment and decree dated 25.11.2009. Aggrieved by the said decree the plaintiffs preferred this appeal.

8. Heard both sides.

9. The points that arise for consideration in this appeal are as follows:

1. Whether the decree and judgment of the trial court warrant any interference of this Court?

2. Reliefs and costs.

10. Point No. 1: The plaintiffs instituted the above suit for partition and separate possession of their share in the plaint A schedule item No.1 and for declaration of title and possession over plaint schedule item No.2. Plaintiffs and one Jayachandran are the children of deceased Devaki and Gopalan. Devaki is the daughter of deceased Kesavan. The case of the plaintiffs is that in 1110 ME, the plaint schedule properties were mortgaged to Raman Kesavan and his brother Chellappan as per Ext.A1 mortgage deed. While so, said Chellappan made an assignment of his right over the said property covered by Ext.A1 mortgage deed in favour of Chellamma, who is none other than the wife of deceased Kesavan. In 1957 deceased

Kesavan executed a mortgage in favour of his daughter Devaki and her husband Gopalan as per Ext.A6 mortgage deed. On the death of Devaki and her husband Gopalan their right over the property devolved upon their children, who are the plaintiffs and one Jayachandran. On the death of Chellamma, the right acquired by her as per the assignment made by Chellappan devolved upon her Children Devaki, Sundaresan, Sreedharan, Viswambharan, Ramachandran, Radha, Nandirajan and Krishnan. Viswambharan and Sundaresan are no more. Defendants 2 and 3 are the legal heirs of deceased Sundaresan and defendants 5 to 9 are the legal representatives of deceased Viswambharan. According to the plaintiffs the plaintiffs and one Jayachandran are jointly entitled to 9/16 share in the plaintiff A schedule item No.1 property and the defendants are jointly entitled to the remaining 7/16 share.

11. The first defendant contended that one Perumal Lekshmi and others instituted a suit for redemption of Ext.A1 mortgage as O.S.903/1966, in which the parents of the plaintiffs herein were the second and third respondents and the first defendant herein was the 4th defendant in that suit. The first defendant further contended that he filed written statement in the said suit contending that he has leasehold right over the said property and the learned Munsiff dismissed the said suit finding that he is a tenant. Ext.B7 is the certified copy of the judgment in the said suit. From Ext.B7 judgment it can be seen that the learned Munsiff dismissed the above suit

on the ground that the prayer for redemption is not allowable as the transaction covered by Ext.A1 deed is otti and kuzhikanam. The contention of the first defendant in that suit that he is holding the property as per the lease deed of the year 1102 ME was not accepted. So, the contention of the first defendant that this suit is barred by the principle of resjudicata and estoppel by conduct is not sustainable.

12. Another contention of the first defendant is that this suit is barred by the principle of constructive resjudicata in view of the judgment in O.S. 489/98. It is true that the deceased Gopalan, along with the plaintiffs herein preferred a suit before the trial court for declaring their title and possession over the plaint schedule properties and for injunction restraining the defendants from trespassing into the plaint schedule property. The said suit was dismissed by the learned Munsiff holding that the plaintiffs are not having exclusive title and possession over the plaint schedule property. Challenging the said decree the plaintiffs approached the Sub Court, Neyyattinkara in A.S. 86/2000 , which was also dismissed by the first appellate court. Thereafter the plaintiffs approached the Hon'ble High Court in A.S. 619/2006. The Hon'ble High Court dismissed the appeal holding that the appellants could only claim a fractional share and without impleading all the legal heirs of Chellamma, appellants are not entitled to a decree for declaration of fractional share in the suit. In the said judgment the Hon'ble High Court made clear that the dismissal of the suit will not affect the right

of appellants to work out the remedy by appropriate proceedings. Thereafter the plaintiffs instituted this suit for partition and separate possession of their share in the plaint A schedule item No.1 and for declaration of title and possession over the plaint A schedule item No. 2. Earlier suit was for declaration of their absolute title and possession over the entire property and the said suit was dismissed on the ground that they had only fractional share in the plaint schedule property and now the plaintiffs preferred this suit for partition and separate possession. So, the contention of the first defendant that the suit is barred by constructive resjudicata in view of the judgment in O.S. 489/98 is not sustainable.

13. The trial court dismissed the suit on the ground that the plaint schedule description is not correct and the plaint A schedule item No.1 property is not partible. The plaintiffs are claiming right over the property through deceased Kesavan and his wife Chellamma. As per Ext.A1 deed 9 $\frac{1}{4}$ cents of property which is part of 1 acre 6 cents comprised in Survey 251/1 and 42 cents comprised in Survey 240/2 was mortgaged to deceased Kesavan and Chellappan. By virtue of Ext.A6 mortgage deed deceased Kesavan mortgaged the said property to his daughter Devaki and her husband Gopalan. Accordingly Devaki and Gopalan got $\frac{1}{2}$ right in the property covered by Ext.A1 mortgage deed. On the death of said Devaki and Gopalan the said $\frac{1}{2}$ right devolved upon their children, ie., the plaintiffs and one Jayachandran. The further case of the plaintiffs is that the

remaining one half right acquired by Chellappan as per Ext.A1 deed was assigned in favour of Chellamma, the wife of deceased Kesavan. On the death of Chellamma, the said one half right over the property devolved upon her children including the deceased Devaki. So, the plaintiffs and one Jayachandran are jointly entitled to 9/16 share in the plaint A schedule item No.1 and the defendants are jointly entitled to 7/16 share. The first defendant contended that the plaint schedule description is not correct and it is against the description in the documents relied on by the plaintiffs. The property covered by Ext.A1 deed is 9 ¼ cents, which is part of the 1 acre 6 cents comprised in Survey 251/1 and 42 cents comprised in Survey 240/2. But in the plaint two properties are described, one is plaint A schedule item number 1 and the other is plaint A schedule _item No. 2. The plaint A schedule item No. 1 is 5.10 Ares comprised in Survey 251/1 and the plaint A schedule item No. 2 is 5.625 cents comprised in 240/2. As per Ext.A1 deed deceased Chellappan and Kesavan got 9 ¼ cents out of the property comprised in survey 251/1 and survey 240/2. As per the plaint schedule description the total extent of property is more than 18 cents. So it cannot be said that the property described in the plaint and the property covered by Ext.A1 mortgage deed are one and same. It is not known how the plaintiffs acquired title over 5.10 ares in survey 251/1 and 5.625 ares in survey 240/2. So, the description of the plaint schedule properties are not correct and they are not entitled to any of the reliefs sought for in the plaint.

14. In view of the foregoing discussion this Court is of the considered opinion that the trial Court correctly decreed the suit and the decree and judgment of the trial Court do not warrant any interference of this Court. The above point is answered accordingly.

15. Point No. 2: Thus there is absolutely no reason to interfere with the findings of the trial Court in the above regard in the decree under challenge. Needless to say that the decree in O.S. 516/2007 rendered by the trial Court on 25.11.2009 is not liable to be reversed, altered or modified. Considering the facts and circumstances of the case, I feel it proper to direct the parties to suffer their respective costs. The points are so answered.

In the result, the appeal is hereby dismissed. The decree rendered by the court below in O.S. 516/2007 dated 25.11.2009 stands confirmed . There will be no order as to costs.

Dictated to the Confidential Assistant, transcribed by her, revised and corrected by me and pronounced in Open Court on this, the 2nd day of November, 2021.

**SUBASH.S.,
ADDITIONAL DISTRICT JUDGE**

APPENDIX : Nil.

ADDITIONAL DISTRICT JUDGE.

Typed by : BG.
Compared by : BC.

Fair / Copy of Judgment in
A.S. 435/2015
Dated : 02..11..2021