

NON-REPORTABLE**IN THE SUPREME COURT OF INDIA****CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO.5366 OF 2017**

(Arising out of SLP (Civil) No.3873 of 2014)

Poonamma Jagadamma & Others.

.... Appellants

Versus

Narayanan Nair & Others.

.... Respondents

J U D G M E N T

A.M.KHANWILKAR, J.

1. This is third round of proceedings between the parties in relation to property bearing Survey No.2063 at Anchamada Village, Thiruvananthapuram, admeasuring around 79 cents. The father of Respondent No.1 was the owner, who, during his life-time sold 20 cents of the said land to a third party. The remaining 59 cents were

purportedly given by the father of Respondent No.1 to him and his brother Achuthan Nair by a registered Will. The present proceedings pertain to the said 59 cents of land bearing Survey No.2063 (for short "**suit property**"). The Appellants are in occupation of the neighbouring property bearing Survey No.2061 and have constructed a building thereon.

2. Respondent No.1 had filed a suit before the Munsiff Court in the year 1975 being O.S. No.1004 of 1975 against the predecessor of the Appellants in respect of the suit property. That suit, however, was dismissed on 11.11.1977 against which Respondent No.1 preferred an appeal before the District Court but was unsuccessful due to dismissal of the appeal on 29.02.1980. In the intervening period, the predecessor of the Appellants filed a suit for injunction against Respondent No.1 in respect of the suit property, being O.S. No.1069 of 1976. This suit, however, was dismissed on 25.03.1978 by the Munsiff Court at Trivandrum. The predecessor of the Appellants filed an appeal against the said decision before the District Court which, however, was dismissed on 20.03.1981. Thus,

both sides were unsuccessful in getting relief of injunction against the other party in their respective suits.

3. Respondent No.1 however, filed a fresh suit (from which the present appeal arises) being O.S. No.547 of 1981 before the Munsiff Court at Trivandrum for relief of mandatory injunction and prohibition against the Appellants. In this suit, it has been asserted by the Respondent No.1 that his father bequeathed 59 cents of the property described in Schedule B to the plaint to him and his brother by way of a registered Will. Thus, asserting title over the 59 cents in Survey No.2063, Respondent No.1 sought a mandatory injunction against the Appellants and also a direction that the Appellants shall remove the portion of the building on the western side of the suit property, being an encroachment made by the Appellants. Respondent No.1 further prayed for reliefs of injunction and declaration that he was entitled to put up a boundary wall to separate the two Survey Nos. namely 2061 and 2063, owned and occupied by the respective parties. Respondent No.1 also sought a prohibitory injunction against the Appellants from entering upon the suit property which was in possession of the Respondent No.1.

4. The Appellants resisted the said suit by filing their written statement. According to the Appellants, Respondent No.1 was not representing his brother Achuthan Nair and the suit for mandatory injunction on the basis of title was bad for non joinder of necessary parties. The Appellants asserted that they were in occupation/possession of Survey No.2061 which had a clear boundary separating the property allegedly owned and occupied by Respondent No.1. Further, the matter in issue in the present suit was already considered in the previous suits filed by the parties and could not be re-agitated once again between the parties. The parties produced evidence in support of their respective claims. After considering the rival contentions and the evidence on record, the Trial Court, by the judgment and decree dated 09.02.1990, was pleased to decree the suit in the following words:

“In the result a mandatory injunction is issued directing the defendants to demolish the portion of their building that abuts on the plaint B Schedule property as seen in Exhibit C1 (a) plan. The defendants are also directed to remove the newly erected bathroom and latrine to fill up the pit as shown in Exhibit C1 (a) plan. In case the defendants will not obey the injunction within a period of three months from today, the plaintiff shall be entitled to have the same demolished and removed through court in execution at the expense of the defendants. The defendants are permanently restrained from trespassing into the plaint B Schedule property, from demolishing its boundary and from making any construction

therein after complying the mandatory injunction. Plaintiff is allowed to put up permanent boundary wall on the eastern boundary of plaint B Schedule property through the C.D. line in Exhibit C1 (b) plan. Exhibits C1 (a) and C1 (b) plan will form part of the decree. No costs.”

5. Against this decision, the Appellants preferred an appeal before the District Judge, Thiruvananthapuram, being Appeal Suit No. 201 of 1990. The first Appellate Court, on the basis of rival submissions, framed the following points for consideration:

- “(i) *Whether the plaintiff is entitled for fixation and putting up of boundary.*
- (i) *Whether the plaintiff is entitled for a mandatory injunction directing the defendants from demolishing the part of the building which situates in Survey No.2063.*
- (ii) *Whether the plaintiff is entitled to the prohibitory injunction prayed for.*
- (iii) *Whether there is sufficient reason to interfere with the decree of the lower court.*
- (iv) *Reliefs and costs.”*

The first Appellate Court allowed the appeal and was pleased to set aside the judgment and decree passed by the Trial Court. The first Appellate Court took the view that on the basis of the Will relied upon by the Respondent No.1- plaintiff, it could be seen that 10 cents out of 59 cents of the property was bequeathed to Achuthan

Nair and the Respondent No.1 – plaintiff was allotted the balance 49 cents. The first Appellate Court noted that the said Achuthan Nair was not made party in the suit. The Appellate Court held that the Will was not probated by the Respondent No.1 – plaintiff. On that analysis, it proceeded to hold that the Respondent No.1 - plaintiff was not able to substantiate his title over the whole of the suit property and thus, was not entitled to any relief of mandatory injunction or prohibitory injunction against the Appellants.

5. Aggrieved by the said decision, Respondent No.1 - plaintiff carried the matter in second appeal before the High Court of Kerala, being Second Appeal No.105 of 1998(D). The High Court entertained the second appeal and framed the following substantial questions of law:

“(i) When a will relied on is not denied or disputed and genuineness is not questioned is the Will still to be strictly proved under Section 68 of the Evidence Act?

(ii) Is not the 1st Appellate Court bound to evaluate the entire oral and documentary evidence in the case?

(iii) When only a portion of the building is abutting into another man’s property is not enough that mandatory injunction alone is sought for and is it necessary that recovery of possession of the site should also be claimed?

(iv) When title and possession of plaintiff is not disputed or denied over the entire property but is denied only in respect of portion on which a building is abutting, should not the Court grant a decree declaring title, possession and injunction in respect of that portion. In a case where there is no distinction

demarcating the boundary between the two properties should not the relief of fixation of boundary be granted?”

The High Court noticed that the attestors to Ext. A-1 were not alive at the time of filing of the suit and therefore, could not be examined. The High Court also noted that Ext. A-1, A-4, A-5, and Book No.III Volume 18 and the Thumb Impression register were produced before the Trial Court and duly considered. From the evidence of PW2 relied upon in respect of Ext. A-1 Will, the same was proved. The High Court then noted the contention of the Respondent No.1 – plaintiff, that the execution of the Will was not specifically denied by the defendants; and that even if the Will was not proved, the right of the Respondent No.1 - plaintiff over the suit property as the co-owner, being one of the sons of the original owner of the property, was indisputable. For that reason, it was unnecessary to go into the question of genuineness of the Will. It was open to the co-owner to ask for a prohibitory injunction and that could not be refused. To that extent, Respondent No.1 succeeded before the High Court. While dealing with the issue of proper description of the suit property, the High Court adverted to the Commissioner’s report and

held that since part of the area in the suit was found to have been trespassed upon but as the Respondent No.1 - plaintiff had failed to establish his exclusive title over the entire 59 cents including the portion on which stated encroachment was noticed, he was not entitled to mandatory injunction of removal of encroachment against the defendants. The High Court observed that 10 cents of the suit land was bequeathed to the brother of the Respondent No.1 – plaintiff. It was not demarcated. Further, the decree passed by the Court below had already become final. The High Court, however, then noted the stand of the Respondent No.1 - plaintiff that even if his claim regarding title over 59 cents of suit property was not accepted, considering the fact that he was indisputably a co-owner of suit property, he was entitled to protect the suit property by erecting the boundary wall so that no further encroachment or interference from the Appellants-defendants need be countenanced. Moreso in the present case, the Appellants - defendants were not claiming any right over the suit property bearing Survey No.2063 owned and occupied by the Respondent No.1 plaintiff. This contention found favour with the High Court. The High Court held that to meet the ends of justice in the peculiar facts of the present

case, it would be just and proper that the Respondent No.1 - plaintiff is allowed to put up a compound wall by leaving aside the portion of trespassed portion in Survey No.2063 by the Appellants -defendants; and also leaving some more land so as to avoid further dispute pertaining to the same. The High Court thus, thought it appropriate to mould the reliefs to do substantial justice to the parties. The High Court then outlined the location where the compound wall could be constructed, on the basis of the plan which had come on record. The relevant portion of the impugned judgment of the High Court reads thus:

“22. I find that in order to meet the ends of justice, it would be just and proper that the plaintiff is allowed to put up a compound wall but leaving that part of the area which was trespassed upon by the defendant and also leaving out some more land so as to avoid further dispute pertaining to the same.

23. Point ‘M’ shall be marked four links to the west of point ‘D’ shown in Ext. C1 (a) plan. Another point ‘Q’ shall be marked on ‘CD’ line at its middle; that is, 12 links to the south of the point ‘D’. Two perpendicular lines, one from point ‘M’ towards south and another from point ‘Q’ towards west shall be drawn which will meet at point ‘Y’. That plot ‘DMYQD’ shall be left out to be used and possessed by the defendant. The plaintiff/appellant is permitted to put up a compound wall along ‘MY’, ‘YQ’ and ‘QC’ lines.

24. In the result, this R.S.A. is disposed of as follows:-

25. *Since the prayer for declaration of title was rejected the plaintiff is not entitled to get the mandatory injunction as sought for and to that extent the Second Appeal fails. But in order to see that justice is done to the parties the plaintiff/appellant is permitted to put up a compound wall along the line 'MY 'YQ' and 'QC' mentioned above. The plot 'DMYQD' shall be excluded and that plot shall be used and possessed by the defendant.*

The assistance of a Surveyor to assist the Amin shall be ordered for executing the decree. If necessary, an Advocate Commissioner can also be appointed by the execution Court to assist the Amin to execute the decree.”

6. This decision has been assailed by the Appellants mainly on the argument that the High Court exceeded its jurisdiction in exercise of powers under Section 100 of CPC. The High Court re-appreciated the evidence on record to reverse the decision of the District Court, which had allowed the appeal preferred by the Appellants by setting aside the decree passed by the Trial Court in its entirety and also dismissed the suit filed by the Respondent No.1- plaintiff. As a matter of fact, the High Court did not answer the substantial questions of law formulated by it but went on to carve out an arrangement which it found would meet the ends of justice. According to the Appellants, even though the High Court affirmed the finding recorded by the Courts below that the Respondent No.1 - plaintiff had not substantiated his title and

moreso his exclusive possession over the suit property where the proposed compound wall has been allowed to be constructed, the question of granting any relief to the Respondent No.1 - plaintiff did not arise.

7. Respondent No.1 on the other hand contended that the fact that he was one of the co-owners of the suit property was indisputable. Even if the 10 cents of the suit property bequeathed to Achuthan Nair (his brother) has not been demarcated, that would make no difference to the co-ownership of Respondent No.1 over the suit property. On the basis of this claim of co-ownership, there was nothing wrong in the order passed by the High Court granting limited relief to Respondent No.1 to erect the compound wall in the suit property. According to Respondent No.1, it was not the case of Appellants that the location where the compound wall has been permitted to be constructed by the High Court was not on the suit property or in any way affecting the occupation and possession of any neighbouring property including that of the Appellants bearing Survey No.2061. Respondent No.1 submitted, in that sense, the decision of the High Court was a benign direction which did not

affect the rights of the Appellants in any manner. In other words, the High Court permitted the Respondent No.1 to do what he was otherwise entitled to do in law, to put up a compound wall on the suit property without affecting the rights of any neighbouring property owner. The Appellants cannot claim any right over that portion of the suit property on which the compound wall has been allowed to be constructed. According to Respondent No.1, in the fact situation of the present case, this Court ought to be loath to interfere with a just and fair order passed by the High Court and *moreso* because the same is not adverse to the Appellants in any manner.

8. Having considered the rival submissions, we find force in the argument of Respondent No.1 that even if the claim of Respondent No.1 regarding title over the whole of the suit property is answered against him, that does not necessarily negate his claim of being a co-owner of the suit property along with his brother. The fact that demarcation of 10 cents out of the suit property (which has been bequeathed to the brother of Respondent No.1, Achuthan Nair) under a Will executed by their father has still not been done, that

would not negate the Respondent No.1 from being a co-owner in the suit property along with his brother and to have undivided share therein. Being a co-owner of the suit property, there is nothing wrong if Respondent No.1, with a view to protect the suit property from any further encroachment, was to construct a compound wall within the portion of the suit property as specified by the High Court. The limited relief granted by the High Court to construct such compound wall, is very specific and in no manner likely to adversely affect the Appellants. Nothing has been brought to our notice to the contrary. Indeed, the construction of compound wall must conform to the mandate of municipal laws and other compliances in that behalf.

9. So long as the compound wall is constructed by the Respondent No.1 on the portion of suit property over which the Appellants have no right, title or interest; and by leaving out the portion which has been encroached upon by the Appellants/defendants and some more land from such trespassed portion, the Appellants can have no grievance whatsoever. It is a different matter that the High Court has not dealt with each of the

substantial questions of law formulated while entertaining the second appeal. As the arrangement provided by the High Court would meet the ends of justice and also avoid any further litigation between the parties, it would not be necessary to deal with all the substantial questions of law. As a matter of fact, in absence of specific denial about the execution or existence of the said Will by the Appellants – defendants, the question of examining the issue of admissibility of that Will pales into insignificance. The High Court also justly noted that the beneficiary under the Will was not before the Court. Even for this reason, it would be unnecessary to answer the substantial questions of law formulated at the instance of the Appellants - defendants and because the nature of the arrangement predicated by the High Court is such that it would not affect the rights of the Appellants - defendants in any manner with regard to the enjoyment of the property owned or occupied by them bearing Survey No.2061 and including the stated encroached portion in Survey No.2063. In that sense, there is no subsisting cause for the Appellants to question the correctness of the Will nor is there any tangible ground to assail the arrangement specified by the High

Court while disposing of the second appeal filed by Respondent No.1.

10. Accordingly, we find no reason to interfere in the fact situation of this case. The appeal is, therefore, dismissed with no order as to costs.

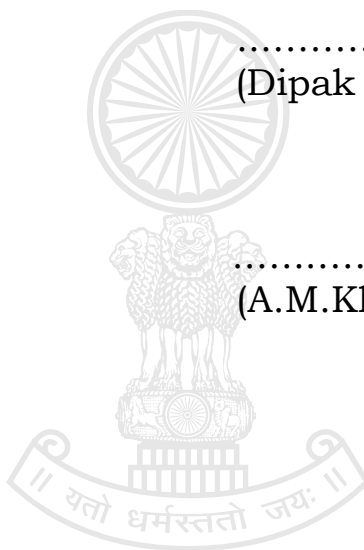
.....J.

(Dipak Misra)

.....J.

(A.M.Khanwilkar)

New Delhi,
Dated: May 1, 2017



JUDGMENT