IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

MONDAY, THE 29TH DAY OF JANUARY 2024 / 9TH MAGHA, 1945

RSA NO. 901 OF 2011

AGAINST THE DECREE AND JUDGMENT DATED 29.01.2011 IN AS 59/2007 OF PRINCIPAL SUB COURT,IRINJALAKUDA IN OS 266/2005 OF MUNSIFF COURT, CHALAKUDY

APPELLANT/APPELLANT/PLAINTIFF:

ELSY FRANCIES, W/O VATTOLY FRANCIES,
VELLIKULANGARA VILLAGE AND DESOM, MUKUNDAPURAM TALUK
BY ADV SRI.T.N.MANOJ

RESPONDENTS/RESPONDENTS/LEGAL HEIRS OF DECEASED 2ND RESPONDENT:

1 SECRETARY, MATTATHUR GRAMA PANCHAYATH
P.O.,MATTATHUR-682503
2 BEENA, W/O.LATE JOSEPH, KAVUNGAL HOUSE
VELLIKULANGARA VILLAGE AND DESOM-682504
3 ROBIN JOSEPH, S/O.LATE JOSEPH,
-DO-
4 ROSHAN JOSEPH, S/O.LATE JOSEPH,-DO-
5 DUTTU ROHIT JOSEPH,
S/O.LATE JOSEPH,-DO-DO-
6 PAUL, S/O.KAVUNGAL OUSEP,
VELLIKULANGARA VILLAGE AND DESOM-682504
7 ANTU, S/O.KAVUNGAL OUSEP,
VELLIKULANGARA VILLAGE AND DESOM-682504
8 DAVI S/O,.KAVUNGAL OUSEP
VELLIKULANGARA VILLAGE AND DESOM-682504
9 FRANCIES, S/O.KAVUNGAL OUSEP,
VELLIKULANGARA VILLAGE AND DESOM-682504
10 KOCHAPPU, S/O.KAVUNGAL LONAPPAN,
VELLIKULANGARA VILLAGE AND DESOM-682504

11 RAJAN, S/O VADASSERY DEVASSY,
VELLIKULANGARA VILLAGE AND DESOM-682504

12 SUNNY @ THOMAS, ALOOKKARAN HOUSE
VELLIKULANGARA VILLAGE AND DESOM-682504

BY ADVS.
R1 BY ADV. VENUGOPAL M.R.
DHANYA P.ASHOKAN(K/001671/2000)
ADV M.J.POLLY FOR R2, R4, R5, R6, R7, R9, R10, R11, R12

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ORDERS ON 29.01.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

2024:KER:6937

"C.R."

JUDGMENT

This Regular Second Appeal emanates from the decree and judgment dated 15.03.2007 passed by the Munsiff's Court, Chalakkudy, in O.S.No.266 of 2005, which was confirmed by the Principal Subordinate Judge's Court, Irinjalakkuda in A.S. No.59 of 2007. The plaintiff is in appeal before this Court under Section 100 of the Code of Civil Procedure.

2. The case of the plaintiff in a nutshell is as follows:-

The plaint schedule property belongs to the plaintiff. Defendant No.1 is Mattathur Grama Panchayat. The property of the Panchayat is on the eastern boundary of the plaint schedule property. The other defendants have property on the east and southern sides of the plaint schedule property. Defendant Nos.3 to 9 are making preparations to convert a thodu that lies on the east of

the property as a pathway. The plaintiff attempted to protect the suit property by constructing a compound wall. The Panchayat obstructed the plaintiff. The thodu that flows on the east belongs to the plaintiff. The plaintiff is entitled to a declaration that the thodu on the east of the property belongs to her. The plaintiff is also entitled to a permanent prohibitory injunction restraining the defendants from obstructing the construction of the compound wall on the western boundary of the thodu.

3. Defendant No.1, the Panchayat, resisted the suit and pleaded the following:-

4. The thodu that flows on the east of the plaint schedule property in the north-south direction is a puramboke property. It originates from Thesserikulam on the north of the property of the Panchayat and proceeds to the south and joins the 'Valiyathodu'. The suit property and property of the defendants were originally paddy fields from which water drains through the thodu. The plaintiff started constructing a compound wall by

encroaching upon the purampoke land and taking possession of a 40 year old Teak tree standing therein. The Panchayat attempted to stop the construction. It was after that the plaintiff instituted the suit with ulterior motives.

5. Defendant Nos. 2 to 9 pleaded as follows:'-

They never attempted to convert the thodu into a pathway. Water from the neighbouring lands, including that of defendant Nos.2 to 9, drains out through the thodu on the east of the plaint schedule property. The plaintiff attempted to reduce the width of the thodu. The plaintiff has no bonafides.

6. The evidence consists of the oral evidence of PWs 1 to 4 and DW1. On the side of the plaintiff, Exts.A1 to A10 were marked. Exts.B1 to B3 were marked on the side of the defendants. Exts. X1 and X2 were marked as third-party exhibits. Ext.C1 series were marked as Court Exhibits.

7. The Trial Court held that the plaintiff failed to establish her right over the thodu and dismissed the suit.

8. The plaintiff challenged the decree and judgment passed by the Trial Court before the First Appellate Court by filing A.S.No.59 of 2007. The First Appellate Court confirmed the judgment of the trial Court.

9. After hearing both sides, this Court reformulated the substantial questions of law as follows:-

(1) Was not the issue regarding the ownership over the thodu on the eastern side of the plaint schedule property (issue No.2), in the judgment dated 14.11.2005 in O.S.No.462 of 2003 of the Munsiff' Court, Chalakkudy (Ext.A5) collateral or incidental?

(2) Does not the finding on issue No.2 in Ext.A5 judgment operate as a bar to try the same issue in the present suit by reason of the principle of *res judicata*?

10. Heard Shri. T.N.Manoj, the learned counsel for the plaintiff and Smt. Dhanya P. Ashokan, the learned Counsel appearing for the defendant-panchayat.

11. The learned counsel for the plaintiff submitted that the issue as to the title of the thodu on the east of the plaint property was directly and substantially in issue in O.S.No.462 of 2003 between the plaintiff and defendant No.1. The learned Counsel submitted that the judgment in O.S.No.462 of 2003, (Ext.A5) operates as a bar to try the same issue in the present suit, and therefore, the defendant-Panchayat cannot reopen the issue on the title of the thodu in the present suit. The learned Counsel submitted that in O.S.No.462 of 2003, the plaintiff had pleaded that the thodu on the eastern side of the plaint schedule property was part of her property and a specific issue as to whether the eastern thodu belongs to the plaintiff was raised by the Court and a finding was recorded in her favour.

12. The learned Counsel for the defendant - Panchayat Smt. Dhanya P. Ashokan submitted that the adjudication of the issue regarding the ownership of the thodu was not material and essential for the decision in Ext.A5 judgment. The learned Counsel submitted that the question was collaterally or incidentally an issue in that suit. A decision on that issue was not necessarily to be recorded for adjudication on the principal issue, and therefore, the application of the principle of *res judicata* does not arise.

13. The plaintiff in the present suit prayed for a declaration that the thodu on the east of the plaint schedule property belongs to her. She also prayed for consequential injunction against the defendants, claiming that she has title over the thodu. O.S.No.462/2003 was a suit instituted by the plaintiff for injunction simpliciter. The plaintiff prayed for directions to the Panchayat to construct a septic tank on the premises of the bus stand owned by the Panchayat situated on the east of the plaint

schedule property. The reliefs prayed for were essentially on the ground that no septic tank was constructed for the latrine and the acts of defendant No.1 caused nuisance to the plaintiff as well as the neigbhouring property owners. The question of whether the construction of a latrine on the bus stand owned by the Panchayat caused nuisance to the plaintiff and other neighbouring property owners was essentially under consideration in that suit. In the plaint, the plaintiff had pleaded that the thodu on the east of the property is part of the plaint property. When the defendant-Panchayat disputed the pleadings, the Court framed an issue as to whether the canal (thodu) on the east of the plaint schedule property belongs to the plaintiff, and the Court answered the issue in favour of the plaintiff, holding that the thodu situated in the plaint schedule property belongs to the plaintiff. The plaintiff had not produced the plaint and the written statement in O.S.No.462 of 2003 in the present suit so as to ascertain the nature of pleadings set up by the parties. It is

discernible from Ext.A5 judgment that the plaintiff had pleaded that the thodu on the eastern side of the property belongs to her, and the defendants pleaded that the thodu is in the purampoku land.

14. *Res judicata* is an ancient doctrine of universal application and permeates every civilized system of jurisprudence. The doctrine encapsulates the basic principles in all judicial systems, which provide that an earlier adjudication is conclusive on the same subject matter between the same parties.

15. Section 11 of the Code of Civil Procedure, which deals with the principle of *res judicata* embodies the rule of conclusiveness as evidence or bars as a plea as an issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became final.

16. Section 11 does not create any right or interest in the property but merely operates as a bar to try the same issue once over. The principle aims to prevent

multiplicity of the proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit between the same parties or their privies been decided and became final.

17. The doctrine of *res judicata* is founded on three principles which are non-negotiable in any civilised version of jurisprudence. They are:

> "1.*nemo debet bis vexari pro una et eadem causa*: no man should be vexed twice for the same cause;
>
> 2.*interest republicae ut sit finis litium*: it is in the interest of the State that there should be an end to a litigation; and
>
> 3.*res judicata pro veritate accipitur:* a judicial decision must be accepted as correct, in the absence of a challenge.

18. The learned counsel for the plaintiff/appellant relied on ***Sulochana Amma v. Narayanan Nair*** [(1994) 2 SCC 14] in support of his contentions.

19. The learned counsel submitted that even in a suit for an injunction when the title is an issue, to grant

injunction, the issue directly and substantially arises in that suit between the parties and the finding, which has become final, would operate as res judicata in a subsequent suit based on the title where the same issue directly and substantially arises between the parties. In ***Sulochana Amma*** (Supra), the Supreme Court observed thus:-

> "9....It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as res judicata."

20. The learned counsel relied on ***Anathula Sudhakar v. P. Buchi Reddy (Dead) by Lrs. And Others*** [(2008) 4 SCC 594] to contend that a second suit would be barred when the facts relating to title are pleaded when an issue is raised in regard to title, and parties lead evidence on the issue of title and the Court,

instead of relegating the parties to an action for declaration of title, decides upon the issue of title and that decision attains finality.

21. The learned counsel for the defendant-Panchayat, relying on ***Sayed v. Ummer*** [(2000)3 SCC 350] contended that if the issue was only collaterally and incidentally decided the issue was not material or essential for a decision in the earlier suit.

22. Relying on ***Anathula Sudhakar*** **(**Supra), the learned counsel for the Panchayat submitted that a second suit would be barred only when the facts relating to the title are pleaded. When an issue is raised with regard to title, the decision on title attains finality.

23. In ***Gangai Vinayagar Temple and others v. Meenakashi Ammal and others*** [(2009) 9 SCC 757] on the principle of *res judicata* the Apex Court observed thus:-

> **"87.**In*Corpus Juris*(Vol. 34, p. 743) explaining the importance of this doctrine, the following principles have been laid down:

"Res judicata is a rule of universal law pervading every well-regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation; the other, the hardship to the individual that he should be vexed twice for the same cause."

88.These very principles have been accepted by a Constitution Bench of this Court in *Daryao* v. *State of U.P.*[AIR 1961 SC 1457]

89. In *Daryao,* [AIR 1961 SC 1457] , it has also been held that Section 11 of the said Code is not exhaustive of the said principle of res judicata. And this was pointed long ago in *Hook* v. *Administrator General of Bengal*[(1920-21) 48 IA 187] at p. 194 of the Report.

90.Therefore, the importance of the doctrine of res judicata can hardly be overemphasised

91.The question whether a finding reached by a court of competent jurisdiction in a previous suit between the same parties should operate as res judicata or not does not depend on the reasons on which the said finding is based. In this connection I may refer to the observations of Rankin, C.J. in a Full Bench decision of the Calcutta High Court in *Tarini Charan* v. *Kedar Nath Haldar* [AIR 1928 Cal 777] . Rankin, C.J. held as under in *Tarini Charan case*[AIR 1928 Cal 777] : (AIR p. 781, para 1)

"*1*. The question whether decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata."

92.The learned Chief Justice further held as under: (*Tarini Charan case* [AIR 1928 Cal 777] , AIR p. 781, para 1)

"*1*. ... To say, as a result of such disorderly procedure, that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that therefore it may be disregarded, is an indefensible form of reasoning."

93.If the court reaching the finding has the jurisdiction to do so, such a finding, in the absence of an appeal, cannot be diluted merely on the ground that the reasoning is weak or that the finding is unnecessary, even though it was on a question which was directly and substantially in issue between the parties."

24. In ***Sajjadanashin Sayed Md. B.E. Edr v.Musa Dadabhai Ummer*** [(2000) 3 SCC 350], the Supreme Court held thus:-

24. Before parting with this point, we would like to refer to two more rulings. In *Sulochana Amma* v. *Narayanan Nair* [(1994) 2 SCC 14] this Court held that a finding as to title given in an earlier injunction suit would be res judicata in a subsequent suit on title. On the other hand, the Madras High Court, in *Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple* v. *Rajanga Asari* [AIR 1965 Mad 355 : ILR (1965) 1 Mad 232] held (see para 8 therein) that the previous suit was only for injunction relating to the crops. Maybe, the question of title was decided, though not raised in the plaint. In the latter suit on title, the finding in the earlier suit on title would not be res judicata as the earlier suit was concerned only with a possessory right. These two decisions, in our opinion, cannot be treated as being contrary to each other but should be understood in the context of the tests referred to above. Each of them can perhaps be treated as correct if they are understood in the light of the tests stated above. In the first case decided by this Court, it is to be assumed that the tests above-referred to were satisfied for holding that the finding as to possession was substantially rested on title

upon which a finding was felt necessary and in the latter case decided by the Madras High Court, it must be assumed that the tests were not satisfied. As stated in *Mulla*, it all depends on the *facts of each case* and whether the finding as to title was treated as *necessary* for grant of an injunction in the earlier suit *and* was also the *substantive* basis for grant of injunction. In this context, we may refer to *Corpus Juris Secundum* (Vol. 50, para 735, p. 229) where a similar aspect in regard to findings on possession and incidental findings on title were dealt with. It is stated:

> "Where title to property is *the* basis of the right of possession, a decision on the question of possession is res judicata on the question of title to the extent that adjudication of title was *essential* to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title."

25. In ***Sayed v. Ummer*** [2000(3) SCC 350] the Apex Court observed thus:-

> "12.MATTERS COLLATERALLY OR INCIDENTALLY IN ISSUE
> It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only "collaterally or incidentally" in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue."

26. In ***Sayed v. Ummer*** the Supreme Court has considered ***Sulochana Amma v. Narayanan Nair*** and held that the tests referred to in ***Sulochana Amma*** were

satisfied for holding that the finding as to possession was substantially rested on title upon which a finding was felt necessary. In ***Sayed,*** the Apex Court further observed that it all depends on the facts of each case and whether the finding as to title was treated as necessary for the grant of an injunction in the earlier suit and was also the substantive basis for the grant of injunction. The Supreme Court, deducing the principle from *Corpus Juris Secundum,* observed that where title to property is the basis of the right of possession, a decision on the question of possession is res judicata on the question of title to the extent that adjudication of title was essential to the judgment, but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title.

27. It is also profitable to refer to paragraph 20 of the judgment in ***Anathula Sudhakar*** (Supra):-

> 20.In *Vanagiri* [From the Final Judgment and Order dated 18-1-1999 of the High Court of Judicature of Andhra Pradesh at Hyderabad in SA No. 29 of 1992] the finding on possession did not rest on a finding on title and there was no issue regarding title. The case related to an agricultural land and raising of crops and it was obviously possible to establish by evidence who was actually using and cultivating the land and it was not necessary to examine the title to find out who had deemed possession. If a finding on title was not necessary for deciding the question of possession and grant of injunction, or where there was no issue regarding title, any decision on title given incidentally and collaterally will not, operate as res judicata. On the other hand, the observation in *Sulochana Amma* [AIR 1965 Mad 355] that the finding on an issue relating to title in an earlier suit for injunction may operate as res judicata, was with reference to a situation where the question of title was directly and substantially in issue in a suit for injunction, that is, where a finding as to title was necessary for grant of an injunction and a specific issue in regard to title had been raised. It is needless to point out that a second suit would be barred, only when the facts relating to title are pleaded, when an issue is raised in regard to title, and parties lead evidence on the issue of title and the court, instead of relegating the parties to an action for declaration of title, decides upon the issue of title and that decision attains finality. This happens only in rare cases. Be that as it may. We are concerned in this case, not with a question relating to res judicata, but a question whether a finding regarding title could be recorded in a suit for injunction simpliciter, in the absence of pleadings and issue relating to title.

28. Going by the available materials, I am of the view that the question of whether the plaintiff was entitled to an injunction in O.S.No.462 of 2003 could be decided with reference to the finding on possession alone, and substantial pleadings on the question of title of the thodu were not set up therein by the parties. I am of the view that the question of ownership of the thodu was only

2024:KER:6937

ancillary and incidental in O.S.No.462 of 2003, and the same was not necessary and essential for deciding the suit. Therefore, the contention that the issue as to the title was directly and substantially in issue in the previous suit, O.S.No.462 of 2003, is not sustainable, and there is no bar for challenging or resisting the claim of the tile by the plaintiff in the present suit by reason of the principle of res judicata. The substantial questions of law are therefore answered against the appellant/plaintiff.

29. The Regular Second Appeal stands dismissed.

Pending interlocutory applications, if any, stand closed.

Sd/-
K. BABU, JUDGE

kkj

APPENDIX OF RSA 901/2011

RESPONDENT ANNEXURES

Annexure R1	VERTIFIED COPY OF THE BTR REGISTER OF VELLIKULANGARA VILLAGE