IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE MARY JOSEPH

FRIDAY, THE 22ND DAY OF APRIL 2022 / 2ND VAISAKHA, 1944

RFA NO. 447 OF 2006

AGAINST THE DECREE AND JUDGMENT DATED 27.06.2005 IN O.S.NO.41/2000 OF I ADDITIONAL SUB COURT, THIRUVANANTHAPURAM

APPELLANT/ADDL.6TH PLAINTIFF (L.R. OF THE 1ST PLAINTIFF):

SHAJEEDHA BEEVI,
DAUGHTER OF MUHAMMED MUSTAPHA, NANNARAVILAKOM PUTHEN VEEDU,, KONCHIRAVIALA, MANACAUD P.O., THIRUVANANTHAPURAM.

BY ADVS. SRI.V.SURESH
SRI.G.SUDHEER

RESPONDENTS/DEFENDANT & PLAINTIFFS 2 TO 5

1 STATE OF KERALA
REPRESENTED BY ITS CHIEF SECRETARY, SECRETARIAT, THIRUVANANTHAPURAM.

*2 SAINUM BEEVI,[DIED] , W/O.S.M.MUHAMMED MUSTAFFA
TC 49/940, NANNARAVILAKAM PURAYIDAM,
SREE MOOLAM NAGAR, KOCHIRAVILA, MANACAUD P.O., THIRUVANANTHAPURAM (ADDITIONAL SECOND PLAINTIFF).

3 M.NAJEEB, TC 4/2488, FIRDOUS MANZIL, MARAPPALAM, THIRUVANANTHAPURAM.

4 M.NIZAR, TC 55/1856, VILAYIL VEEDU, PAPPANAMCODE, THIRUVANANTHAPURAM.

* [IT IS RECORDED THAT THE 2ND RESPONDENT DIED AND APPELLANT AND THE RESPONDENTS 3 AND 4 ALREADY IN THE PARTY ARRAY ARE HER LEGAL REPRESENTATIVES VIDE ORDER DATED 05.04.2017 IN IA 1587/2015.]

R2 TO R4 BY ADVS. SRI.J.R.PREM NAVAZ
SRI.P.T.SHEEJISH

R1 BY SRI. N K THANKACHAN, GOVERNMENT PLEADER
SRI.NOBLE MATHEW, SR.GOVERMENT PLEADER

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 21.04.2022, THE COURT ON 22.04.2022 DELIVERED THE FOLLOWING:

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MARY JOSEPH, J.

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R.F.A.No.447 of 2006

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Dated this the 22nd day of April, 2022

JUDGMENT

This appeal is originated from a judgment passed on 27.06.2005 by I[st] Additional Sub Court, Thiruvananthapuram (for short 'the trial court') in O.S. No.41 of 2000. Appellant is the additional 6[th] plaintiff, who is the daughter of the original plaintiff.

2. The trial court had dismissed the suit on the basis of a finding arrived at by it which is incorporated in paragraph 13 of the impugned judgment, extracted hereunder:

> "13. The learned counsel for the plaintiff has relied on Exts.A1 and A2 to show that the plaintiff had got ownership, title and possession over the property. On the basis of the aforesaid documents, the learned counsel has submitted before court that the entire property belongs to the plaintiff and the same was wrongfully acquired by the officers of the defendant for constructing a road without providing compensation to the plaintiff. According to him, the action of the defendant is arbitrary and illegal. But I do not find any merit in the plea of the plaintiff as he failed to prove his ownership, title and possession of the property. The mutation of property does not confirm title over the

same. So also the alleged patta produced by the plaintiff does not confirm title to the property. Here the sole claim of the plaintiff is that he obtained the property by virtue of a partition deed and PWs 1 to 4 spoke to the fact that the said partition deed was in the possession of the plaintiffs and that they failed to produce the same before court and the same can be considered as suppression of best evidence which would warrant an adverse inference regarding the claim made by the deceased first plaintiff and the other additional plaintiffs. At the same time the evidence of DW1 shows that the road was constructed by converting a bund road into a pacca road and the bund is lying through the property of the Government. There is nothing on the records to show that the defendant or his officers had trespassed upon the property of the plaintiff and annexed the entire property for constructing a road after causing damage to the owner. The fact that the plaintiff had not obstructed the construction of the road itself would show that he had no right over the property. His claim is not based on valid grounds. There is no material before court to show that the deceased plaintiff had got property comprised in Sy.No.1857 of Manacaud Village. The fact that another person has also filed a case based on the same Survey number would show that all these suits are filed on experimental basis in order to obtain unlawful gain. In a suit for damage, it is the duty of the plaintiff to prove that he is the title holder and possessor of the property and that the defendant had illegally trespassed upon his property causing damage. But in this case the plaintiff has thoroughly failed to prove the aforesaid aspects. In fact the plaint schedule description is mischievous and incorrect. There is no material before court to show that the defendant had actually trespassed upon the property allegedly possessed by the plaintiff. The adjacent property owners were not produced before court as witnesses to substantiate the plea of the plaintiff. PWs 1 to 4 are relatives and their interested testimony will not help the plaintiff to prove his claim. Since there is no evidence to show that he has got property in Sy.No.1857 of Manacuad Village, the question of obtaining consent for the acquisition of land does not arise at all. So also there is no need of issuing

> notice to the plaintiff under any of the provisions of law before constructing the road as the plaintiff has got no property near the road. Accordingly I do not find any wilful negligence on the part of the defendant. The suit itself is the result of wrong assumption of fact based on imaginary things and that the plaintiff cannot claim any amount as damage from the defendants. Accordingly these issues are found against the plaintiff."

3. It is contended by Sri.V.Suresh, the learned counsel for the appellant that the finding of the trial court, which formed the basis for dismissal of the suit was the outcome of an incorrect appreciation of the evidence on it's record. According to him, Ext.A1 tax receipt with reference to plaint schedule property was produced before the trial court by the original plaintiff, the father of the appellant. According to him, the issue as to whether the property through which the 1st respondent has constructed a public road belongs to the original plaintiff, though vital in the Suit, was not framed by the trial court and therefore was not adjudicated. According to him, from the specific contention of the 1st respondent in the written statement filed in the suit that the original plaintiff has consented for acquisition of the plaint schedule property for public purpose itself, it can be drawn that he has title over the property and was its owner at

the relevant time of acquisition. According to him, the trial court has erroneously drawn adverse inference against the plaintiffs and it ought not to have done so, when the 1st respondent himself failed to controvert the oral evidence tendered by PWs 1 to 4 to establish title of the original plaintiff. According to him, the contention of the original plaintiff that the acquisition was without complying with the procedures as contemplated under the Land Acquisition Act, 1894 (for short 'the Act') is strengthened by the contention taken by the 1st respondent in the written statement that the original plaintiff has consented for acquisition of the land for a public purpose. The learned counsel has also pointed out that the trial court is highly unjustified in holding that the original plaintiff is not entitled to sue, since the suit filed by some other person based on the same survey number stands dismissed. The finding of the trial court that there was no necessity to obtain consent from the original plaintiff is erroneous. The trial court appears to have gone beyond the pleadings of the parties and arrived at the finding as above based on surmises and conjectures. Lastly and finally it was

contended by the learned counsel that the original plaintiff died during the pendency of the suit itself and his wife and children were brought on record as additional plaintiffs. Since the posting was for pre-trial steps even prior to the death of the original plaintiff, the suit was listed for trial immediately after bringing the legal heirs on record by way of impleadment. According to the learned counsel, by doing so, the trial court had also denied the additional plaintiffs with sufficient opportunity to produce documents to establish the suit claim effectively.

4. The appeal on hand was preferred in the year 2006. On 12.12.2019, I.A.No.03/2019 was filed by the appellant in the appeal on hand under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (for short 'the CPC'). In the affidavit accompanying the above application, it was stated that the partition deed bearing No.2632/1979 dated 17.10.1979 (wrongly shown as partition deed No.2532 of 1979 in the judgment), through which the original plaintiff allegedly obtained title over the plaint schedule property was not produced before the trial court. According to her, the trial

court failed to frame an issue on title of the original plaintiff over the plaint schedule property and therefore, the document was not produced. According to her, her brother was looking after the affairs of the case filed by her father and the original partition deed was with him. She was staying at UAE with her husband employed there and landed down hometown only recently. Thereafter, the partition deed was procured from it's custodian and produced alongwith a petition filed under Order XLI Rule 27 CPC seeking reception of it as additional evidence.

5. The learned Senior Government Pleader on behalf of the 1st respondent has contended that the trial court is perfectly justified in dismissing the suit filed by the original plaintiff seeking for damages. According to him, though the original plaintiff claimed title in respect of the plaint schedule property under a partition deed No.2632/1979 dated 17.10.1979 registered at the Office of Sub Registrar, Thiruvananthapuram, the same was not produced and marked in evidence during trial in the suit. According to him, the original plaintiff had given his consent for acquisition of the

plaint schedule property for a public purpose and therefore the acquisition was on due compliance with all the procedural formalities under the Act and compensation was not paid to him. According to him, for want of production of the partition deed wherefrom title to the property reached the hands of the original plaintiff, the trial court found him dis-entitled for compensation and dismissed his claim for damages. According to the learned Senior Government Pleader, interference with the impugned judgment in that context is totally uncalled for and the appeal is liable to be dismissed with costs.

6. Sri.Prem Navas, the learned counsel representing respondents 2 to 4 supported the claim of the appellant.

7. It is pertinent to note on a glance at the evidence on record that the contention taken by the 1st respondent in the written statement that the original plaintiff had consented for acquisition of plaint schedule property for a public purpose is admitted by the original plaintiff. According to the original plaintiff consent was given for acquisition of the plaint schedule property subject to due observance of the

procedures contemplated under the provisions of the Act. According to him, the 1st respondent proceeded to acquire the land and constructed a public road through the plaint schedule property, without recourse to procedural formalities contemplated under the Act. According to him, notice was not served on him and not even a declaration has been issued by the 1st respondent in the matter and therefore, acquisition of the plaint schedule property was utterly tainted with illegality. According to him the trial court is erred in holding that if consent for acquisition was given, the 1st respondent need not have to comply with the formalities envisaged under the Act.

8. It is relevant in the context on hand to have an idea about the facts of the case, and a conspectus of it is given below: In the description followed, the parties to this appeal are referred to as the plaintiffs and the defendant as referred to in O.S.No.41/2000.

The original plaintiff claimed to be the owner of plaint schedule property having an extent of 14½ cents comprised in Survey No.1857 of Manacaud Village, title to which was

allegedly obtained through a partition deed bearing No.2632/1979 dated 17.10.1979 registered at Sub Registry Office, Thiruvananthapuram. The plaint schedule property is well described in 'B' schedule to the above deed and the original plaintiff claimed as it's absolute owner and possessor. While the original plaintiff was holding ownership and possession of the plaint schedule property, construction of a road from Chiramukku to Kallidimukku through 14½ cents of plaint schedule property was proposed by the defendant. The plaintiff obtained information of the proposal from the Newspaper. The inaugural ceremony relating to the construction of the road was held on 22.03.1994 under the auspices of Sri.P.K.K.Bava, the Minister for Public Works and Sri.B.Vijayakumar, the MLA and the Chief Engineers of Public Works Department. After the inaugural ceremony, Government Officials from the Revenue Department trespassed into the plaint schedule property and marked 15 numbers of coconut trees for the purpose of levelling the ground for construction of the road. Thereafter, a retainer wall was also constructed by the defendant through the plaint

schedule property without any authority or without obtaining the consent for doing so from the original plaintiff, who claimed to be it's owner then. Notice as contemplated under Section 4 of the Act was also not served on the original plaintiff prior to taking over possession of the property for the construction of the road.

9. A notice under Section 80 CPC was issued by the original plaintiff to the defendant on 27.07.1994, whereunder, he has tendered his no objection for surrender of his land for a public purpose after invoking the various formalities of acquisition envisaged under the Act. No reply was received by the plaintiff for the notice issued under Section 80 CPC, and therefore the suit was filed before the Subordinate Judge's Court, Thiruvananthapuram as O.S.No.41 of 2000 seeking for a decree of declaration and recovery of compensation. According to the original plaintiff, the plaint schedule property is a garden land situated in an important locality of the City of Thiruvananthapuram and Rs.15,000/- was yielded from it as annual income. According to him the property had a market value of Rs.50,000/- per cent at the

relevant time of proposal for acquisition. According to him having due to regard to the above aspects and a probable escalation of 40% addition to Rs.50,000/-, ought to have been taken and thus he is entitled to get a sum of Rs.10,61,500/- as compensation and that was claimed in the suit filed.

10. The defendant in it's written statement has denied the averment of the original plaintiff and contended that the description of the plaint schedule property is incorrect and imaginary, that the original plaintiff had title and possession over the plaint schedule property, that the original plaintiff has not lodged any complaint before the revenue authority or the concerned Government officials, that he had only issued a notice stating that he has no objection in surrendering the land for a public purpose under the Act, that a similar case has been filed as O.S.No.154/2003 by Sri.Nagaphushanam in respect of the same property, wherein it has been stated that a bund road was passing through the property and officials of the Irrigation Department entered into it and cut down the coconut trees for formation of Iyranimuttom bund road, that

the bund road was converted into a PWD road in the year 1990, that the officials of the Irrigation Department and Officials responsible for the Land Acquisition were made parties in the suit, that the original plaintiff failed to prove loss or damages caused to him and therefore he is not entitled to get any compensation and that the suit filed on an experimental basis with a view to get compensation illegally, is only liable to be dismissed.

11. Sri.Najeeb, the additional 4th plaintiff was examined on the side of the plaintiffs as PW1 and he had given a version strictly in tune with the averments in the plaint. E.Noohu Kannu, the sister of PW1, Sri.A.Saleem, the husband of the additional 3rd plaintiff and Sri.A.P.Khan, the brother in law of the 1st plaintiff respectively were examined as PWs 2 to 4. The Tax receipt dated 02.04.1996, the Pattayam dated 26.03.1982, the notice issued on 27.07.1994 prior to the institution of the suit, the acknowledgment obtained from the postal authority and the postal receipt respectively were marked in evidence as Exts.A1 to A4 and

A4(a). The Assistant Engineer of Roads Division, PWD, Thiruvananthapuram was examined by the defendant as DW1.

12. It is pertinent to note that the title to the plaint schedule property though claimed to have been obtained under partition deed registered as 2632/1979 it was not produced and marked in evidence. The plaintiff has produced Ext.A2, Pattayam obtained on 26.03.1982 by their predecessor in interest. A cogent reason was not forthcoming from any of the witnesses examined by the plaintiffs for non production of the original partition deed whereunder title to plaint schedule property was claimed by the original plaintiff. Only photocopy of a pattayam was produced and marked in evidence, which being inadmissible in evidence was rightly discarded by the trial court. The original plaintiff has also not raised a claim in the plaint that title to the plaint schedule property was obtained through Ext.A2. The reliefs sought in the plaint were declaration of title, recovery of possession of the plaint schedule property and compensation for illegal acquisition of the same by the defendant. The party claiming compensation for illegal acquisition of some property allegedly

owned and possessed by him is bound to establish firstly his title and possession over the property allegedly acquired from him. In the case on hand, title to the plaint schedule property was alleged as obtained by the original plaintiff on the strength of a partition deed bearing No.2632/1979, but it was not produced and marked in evidence. The document produced and marked in evidence as Ext.A2 has no relevance at all since the claim for title was not based on it.

13. The plaintiffs having been failed to prove the title and possession of the original plaintiff over the plaint schedule property, the trial court cannot be found fault with for dismissal of the suit. The specific stand of the plaintiffs during examination of PWs 1 to 4 was that the partition deed was in their possession. But they failed to produce it. The oral evidence tendered by DW1 would show that the road in question was constructed by converting a bund road into a PWD road and the bund road in fact was lying through the property of the Government. The trial court had concluded on it's basis that there is total absence of evidence to show that the 1st respondent and his officers have trespassed into the

property of the original plaintiff and the road in question was constructed therein, causing irreparable injuries to him. Therefore, it appears that the non production of the registered partition deed, conferring title on the original plaintiff over the plaint schedule property has a crucial impact on dismissal of the suit by the trial court. Or in otherwords, the suit was dismissed for dearth of evidence to establish title of the original plaintiff over the plaint schedule property. Therefore, reception of the partition deed in evidence alone would enable the court to have a just and proper adjudication of the issue of title involved in the suit. The entitlement of the original plaintiff for compensation is very much depend upon the establishment of title of the original plaintiff over the plaint schedule property, allegedly acquired by the defendant without following the formalities under the Act.

14. In I.A.No.03/2019 filed under Order XLI Rule 27 CPC, it was stated by the appellant that her brother was conducting the suit originally as she was abroad at the relevant time and he failed to produce the original partition deed in his custody, before the trial court. According her, for

non production of the partition deed and marking it in evidence, the trial court found against her claim and declined to grant the reliefs sought. According to her, partition deed is now procured and seeks for reception of it in additional evidence.

15. It is incumbent upon this Court to see whether reception of additional documents in evidence in the context is permissible under Order XLI Rule 27 CPC. The provision permits reception of additional evidence but only in certain contingencies specifically provided for thereunder: The provision is extracted hereunder:

> "**27. Production of additional evidence in Appellate Court.-**
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> (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-
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> (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
>
> (aa) the party seeking to produce additional evidence, establishes that not-withstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise

of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the court shall record the reason for its admission.(Emphasis supplied)"

Clause (2) of Rule 27 of Order XLI says that wherever additional evidence is allowed to be admitted in evidence by an appellate court, the court shall record the reasons for its admission. Therefore, only when failure of the party to adduce evidence before the trial court was on account of any of the reasons stated under Sub-clauses (a) and (aa), the court will be able to record a reason that he had a sufficient cause for non production of it at the right time. Under Sub-clause (b) of Rule 27 (1) of Order XLI CPC when the appellate court finds that for passing of a judgment, just and

proper, the incorporation of the document proposed to be received and marked in additional evidence is very much relevant and inevitable, it is empowered to receive and mark it in evidence. Therefore, the power under Sub-clause (b) can be exercised by the court on it's satisfaction upon application of mind that the document proposed to be marked in additional evidence is very crucial in adjudication of the issues framed by it in the case pending on it's file. As already discussed with, the reasons stated in the affidavit filed in support of I.A.No.03/2019 are insufficient to serve the requirements contemplated under Sub-clauses (a) and (aa) of Rule 27 (1) of Order XLI CPC. Therefore this Court is unable to record a reason justifying the reception of the documents under Sub-clauses (a) and (aa) of Order XLI Rule 27(1) CPC.

16. Now the question requires consideration is whether the reception of the original partition deed bearing No.2632/1979 produced alongwith I.A.No.03/2019 in additional evidence is required for a proper adjudication of the issues raised before the trial court and for pronouncing a judgment, justified and reasonable in all respects. Or in

otherwords, if the court on it's application of mind to the issues framed by it, finds that a just and proper decision could only be taken with the juncture of the document proposed to be marked in additional evidence, it is empowered to receive it in additional evidence under Sub-clause (b) of Order XLI Rule 27 (1) CPC. Sufficient pleadings are found taken in the plaint by the original plaintiff that he obtained title to the plaint schedule property by a partition deed bearing No.2632/1979 and the plaint schedule property is the 'B Schedule' described therein. Alleging that the said property is acquired without complying with the formalities of acquisition under the Act, the reliefs of declaration and compensation were claimed by the original plaintiff in O.S No.41/2000. Unfortunately he died during the pendency of the suit. The adjudication on the entitlement of the original plaintiff for a decree for declaration of title of the plaint schedule property in respect of which compensation is sought is very much relevant and crucial also. The trial court had framed such an issue and found the evidence on record insufficient to enter into a finding affirmatively on the issue. In I.A.No.03/2019 a

sufficient ground for reception of additional evidence has also not been projected by the appellant. The reason stated therein for the belated production of the partition deed was that the original of it was in the custody of her brother, who though was contesting the suit, on behalf of her, her mother and other siblings, failed to produce it. Being abroad at the relevant time, the appellant was also unaware of the non production of it by her brother. According to her only when the suit was dismissed and the judgment under challenge was received, she was informed that the partition deed was not produced before the trial court. According to her, immediately on coming to know about the non production of the partition deed, it was procured from her brother and I.A.No.03/2019 was filed seeking to receive it in additional evidence.

17. As observed earlier, the document proposed to be received in additional evidence was very much relevant for the court to have a proper adjudication of the issues raised by it in the suit on it's file. The claim of the appellant in the Interlocutory application can be allowed by resorting to the

power under Sub-clause (b) of Rule 27 (1) of Order XLI CPC, since the document proposed for reception now in evidence is relevant for answering the issue of tittle of the original plaintiff over the plaint schedule property and to grant the reliefs of declaration and the compensation sought. Apart from the above, the consent allegedly obtained by the 1st respondent from the original plaintiff is also a document relevant for adjudication of the question of entitlement of original plaintiff for compensation. The specific stand of the 1st respondent was that the original plaintiff has consented for the acquisition, it being for a public purpose. On the contrary, the case of the original plaintiff was that he had consented for the acquisition meant for a public purpose but, subject to observance by the 1st respondent of the provisions in the Act governing the formalities for acquisition. In view of the above, adjudication on the title of the plaint schedule property by the original plaintiff and the consent letter allegedly given by the original plaintiff to the 1st respondent in the matter of acquisition of the plaint schedule property is relevant. It appears from a glance of the impugned judgment that the

issues framed by the trial court does not incorporate one of that nature. Without an issue regarding title of the original plaintiff over the plaint schedule property being framed, the trial court made an observation in the impugned judgment that the additional plaintiffs failed to produce the document referred to in the plaint to establish their title over the plaint schedule property. In the above circumstances, this Court finds it just and reasonable to set aside the judgment under challenge and to direct the trial court to conduct the trial in O.S. No.41/2000 afresh after granting reasonable opportunity to both sides to adduce evidence with reference to the pleadings already taken by them respectively in the plaint and in the written statement. The trial court shall receive the partition deed and consent letter, if produced by the parties before it and mark those in evidence. It is pertinent to note that under the Act issuance of a notification and declaration must precede the acquisition proceedings. It has been contended by the 1st respondent that in view of the consent granted by the original plaintiff, the procedural formalities preceding acquisition of land were omitted to be complied

with. If a bund road was there and was converted to a PWD road as contended by the 1st respondent, the necessity for receiving the consent from the original plaintiff does not arise. The controversy could well be resolved only on receiving the partition deed and consent letter in evidence.

In the result, appeal is allowed. The judgment and decree under challenge is set aside. O.S.No.41 of 2000 is remanded to the trial court for re-consideration in the light of the discussion hereinabove made. Reasonable opportunity shall be granted to the appellant as well as the respondents to adduce additional evidence. The trial shall be completed and judgment shall be passed in the suit within a period of five months from the date of receipt of a certified copy of this judgment there. Parties and their respective counsel shall co-operate with the pursuit of the court to dispose of the case in a time bound manner.

Sd/-
MARY JOSEPH,
JUDGE

NAB