

# KERALA HIGH COURT

Hon'ble Justice V. R. Krishna Iyer.

Kurian Chocko v. Varkey Ouseph

Citation: 1969 KLT 196 : AIR 1969 Ker. 316

## JUDGMENT

1. The plaintiff, unsuccessful in two courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.

2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation. Shri. Varkey, learned counsel for the respondent, feels that his client has a strong case not merely regarding possession but regarding title and wants me to remember that the burden is on the plaintiff to establish a subsisting title and this implies possession within 12 years of the suit. The learned Subordinate Judge, after stating a few facts, has wound up with the following observations:

*“There was also no satisfactory explanation by the appellant for the delay of about three weeks to file the suit.”*

I may state in parenthesis that a suit for possession on title does not depend upon a few weeks' delay, after the trespass had occurred, in bringing the suit. The crucial question is as to whether the plaintiff has title at all which, in this context means a subsisting title. The Court cannot side

tract itself by minor questions like whether the trespass was a week ago or two weeks ago and whether the cock and bull story seeking to explain the 2 or 3 weeks' delay in bringing any suit is true or not. The Subordinate Judge continued:

*"In this context we cannot help remarking that the appreciation by the Court below of the evidence of possession on the side of the respondent cannot be usefully supplemented."*

No supplementing of appreciation is contemplated at the appellate stage. But, an independent appraisal of the evidence is the duty of the Court at that level. Failure to do that is an abdication of appellate power. Unfortunately, there is no consideration of the evidence in the case in appeal.

The Subordinate Judge concluded still more erroneously, by stating:

*"No factual error or perversity has also been pointed out by the appellant's counsel."*

It is the appellate Court's function not to find out whether there is perversity in the Trial Court's judgment but whether it is wrong. There is very wide difference between a wrong conclusion and a perverse conclusion. A restricted revisional jurisdiction may be invoked under certain statutes only where there is perversity in the findings but the wider appellate jurisdiction conferred under S.96 of the Civil Procedure Code demands a little more effort on the part of the appellate Court in going into the evidence to come to its own conclusion and reversing the Trial Court's decision if it is found to be wrong. Far be it from me to suggest that I even hinted at the Trial Court's judgment being wrong in this case. That is a matter entirely for consideration by the appellate Court. The interests of justice, therefore, require that the judgment and decree of the Court below should be set aside and the appeal sent back for fresh disposal by the Sub Court of Kottayam. The court fee paid on the memorandum of second appeal will be refunded. Costs of this appeal will be costs in the cause.