

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 5TH DAY OF FEBRUARY 2015/16TH MAGHA, 1936

FAO.No. 251 of 2009 ()

**AS.NO. 113/2007 OF III ADDL.DISTRICT COURT, KOLLAM DATED 25-06-2009
O.S.NO.1221/1999 OF PRL.MUNSIFF COURT, KOLLAM DATED 15-12-2006**

APPELLANT(S)/APPELLANTS/DEFENDANTS:

- 1. BENACIOUS, S/O. PETER FERNANDEZ,
AGED 51 YEARS, KAYALTHOPPIL VEEDU,
MENATHU CHERI,SAKTHIKULANGARA VILLAGE,
KOLLAM.**
- 2. JOSEPH, S/O. PETER FERNANDEZ,
OF -DO- DO-**

**BY ADVS.SRI.ALEX N.MATHEW (KOLLAM)
SRI.H.RAMANAN
SRI.JAMES JOSE**

RESPONDENT/RESPONDENT/PLAINTIFF:

**TREESA, D/O. FERNANDEZ,
KAYALTHOPPIL VEEDU, MENATHU CHERI,
SAKTHIKULANGARA VILLAGE, KOLLAM.**

**BY ADVS. SRI.P.GOPAKUMARAN NAIR
SRI.C.S.DIAS
SRI.N.K.SUBRAMANIAN**

**THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION
ON 05-02-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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P.B.SURESH KUMAR, J.

F.A.O. No.251 of 2009

Dated 5th February, 2015.

J U D G M E N T

The decision in A.S.No.113 of 2007 on the file of the Court of the III Additional District Judge, Kollam, by which the suit O.S.No.1221 of 1999 on the file of the Court of the Munsiff, Kollam was remitted for fresh disposal, is under challenge in this appeal. The defendants in the suit are the appellants.

2. O.S.No.1221 of 1999 was filed for fixation of boundary and for ancillary reliefs. The case of the plaintiff is that the plaint schedule property measuring 5 cents was obtained by her by virtue of Ext.A1 gift deed of the year 1969 and the defendants who are the owners of the property on its south have attempted to remove the fencing stumps and the trees on the southern boundary of the plaint schedule property.

3. The defendants filed written statement contending that the description of the plaint schedule property is incorrect and that the trees referred to by the plaintiff in the plaint as standing in the plaint schedule property, are standing in their property.

4. In the course of the trial, the court deputed a

Commissioner to prepare a plan of the properties and a plan was accordingly submitted by the Commissioner. Later, the court directed the Commissioner to prepare a fresh plan and accordingly, yet another plan was prepared and submitted by the Commissioner. Exts.C3 and C6 are the plans submitted by the Commissioner. The plaintiff objected to the plans prepared by the Commissioner. She has also filed I.A.No.1592 of 2006 to set aside Exts.C3 and C6 plans and to depute a new Commissioner to measure out the properties.

5. The trial court, on an appraisal of the materials on record, granted a decree to the plaintiff for fixation of the boundary of the plaint schedule property with the property of the defendants as per Ext.A8 re-survey plan produced by the plaintiff. Ancillary reliefs sought for by the plaintiff were also granted.

6. The defendants challenged the decision of the trial court in appeal. The appellate court noticed that no measurement of the property was conducted on the basis of Ext.A8 plan by appointing a Commissioner and Surveyor. The appellate court also noticed that the boundary of the property was not demarcated and identified based on Ext.A8 plan. The

appellate court further noticed that Ext.A8 is a plan prepared in the year 1972. In the said circumstances, the appellate court found that there cannot be any fixation of boundaries based on Ext.A8. At the same time, the appellate court felt that to resolve the disputes between the parties, the boundary line has to be fixed correctly after measurement of the properties. In the said circumstances, the appellate court set aside the decree and judgment of the trial court and remitted the matter to the trial court for fresh disposal. The plaintiff was also directed to take steps for appointment of a new Commissioner and Surveyor for measurement of the properties for ascertaining the boundary line. It is aggrieved by the said decision of the appellate court that the defendants have come up in this appeal.

7. There exists a dispute between plaintiff on one hand and the defendants on the other hand as to the boundary of their respective properties. As noticed earlier, Exts.C3 and C6 are the plans prepared by the Advocate Commissioner appointed in the suit. According to the plaintiff, both the said plans are incorrect. She has also filed an application to set aside the said plans. I.A.No.1592 of 2006 filed by the plaintiff

for the said purpose was considered along with the suit by the trial court. No reason whatsoever is shown in the order passed on the said interlocutory application to set aside Exts.C3 and C6 plans. It is after setting aside Exts.C3 and C6 plans, the trial court fixed the boundary separating the properties based on Ext.A8 plan produced by the plaintiff. As rightly noticed by the appellate court, no measurement of the property was conducted based on Ext.A8 plan. Likewise, the boundary of the properties was not demarcated and identified based on Ext.A8 plan. It is not disputed that Ext.A8 is a plan prepared in the year 1972 and there is nothing on record to indicate as to whether the same was changed subsequently or not. In the said circumstances, the appellate court cannot be found fault with for having reversed the decision of the trial court in granting a decree for fixation of boundary based on Ext.A8 re-survey plan. Once it is held that there cannot be a fixation of boundaries based on Ext.A8 plan, naturally, a fresh plan has to be prepared for which the matter has to go back to the trial court. In the said view of the matter, I do not find any illegality at all in the decision of the appellate court.

8. The learned counsel for the appellants contended

that Exts.C3 and C6 plans are plans prepared properly by the Commissioner appointed by the court with the aid of the Surveyor and the appellate court should have considered the correctness of the same before remitting the suit for fresh disposal for the purpose of preparing a fresh plan fixing the boundaries of the properties.

9. True, the appellate court could have considered the correctness of the decision of the trial court in setting aside Exts.C3 and C6 plans, based on the materials on record. But, it is seen that since the trial court did not accept those plans, the appellate court thought it fit to direct the trial court to depute a fresh Commissioner to fix the boundaries of the properties. In the said circumstances, the decision of the appellate court cannot be interfered with merely for the reason that the appellate court did not consider the correctness or otherwise of the decision of the trial court in setting aside Exts.C3 and C6 plans.

10. In the said circumstances, I am of the view that since the matter has been remitted to the trial court for fresh disposal, the acceptability or otherwise of Exts.C3 and C6 plans shall also be considered by the trial court in the matter of

determining the boundary of the properties of the plaintiff and defendants. Since I am directing the trial court to consider the correctness or otherwise of Exts.C3 and C6 plans also, the observations/directions made by the appellate court as to the manner by which the boundary of the properties is to be fixed in the instant case are also vacated. The trial court shall treat the order of remand made by the appellate court as an open remand in so far as the fixation of the boundary is concerned.

The appeal is disposed of with the aforesaid direction.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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