

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

FAO (RO).No. 234 of 2015 ()

AGAINST THE DECREE & JUDGMENT IN AS.NO. 51/2009 OF SUB COURT,
MUVATTUPUZHA DATED 30-06-2015
AGAINST THE DECREE & JUDGMENT IN OS 176/2006 OF MUNSIFF COURT,
MUVATTUPUZHA DATED 31-03-2009

APPELLANTS/RESPONDENTS 2, 3, 5 AND 6/DEFENDANTS 2, 3, 7 AND 8 :

- 1. E.P. PAULOSE**
S/O.PAILY, AGED ABOUT 62 YEARS, IRAMANGALATHU HOUSE
ADOOPARAMBU KARA, MUVATTUPUZHA, PIN – 686 661.
- 2. GRACY,**
D/O.PAILY, AGED ABOUT 54 YEARS, IRAMANGALATHU HOUSE
NOW RESIDING AT KIZHAKKEDATHU HOUSE
PERUMBALLOOR KARA, PIN – 686 660.
- 3. DINU,**
D/O.SEBASTIAN, AGED ABOUT 22 YEARS
RESIDING AT ROSE HOUSE, PONNUKKARA KARA
THRISSUR VILLAGE, MUKUNDAPURAM TALUK
PIN- 680 014.
- 4. DISTIN,**
S/O.SEBASTIAN, AGED ABOUT 19 YEARS
RESIDING AT ROSE HOUSE, PONNUKKARA KARA
THRISSUR VILLAGE, MUKUNDAPURAM TALUK
PIN – 680 014.

BY ADVS.SRI.A.BALAGOPALAN
SRI.A.RAJAGOPALAN
SRI.M.N.MANMADAN
SRI.M.S.IMTHIYAZ AHAMMED
SMT.P.SEENA

RESPONDENTS/APPELLANTS 1 TO 5/PLAINTIFFS AND DEFENDANTS 2, 6 AND 9 :

- 1. M/S.MARIYA TOURIST HOMES**
RAMANGALAM KARA, MARADY VILLAGE
REPRESENTED BY ITS MANAGING PARTNER JOHN POTTACKAL
PIN – 686 673.

2. JOHN POTTACKAL
S/O.VARKEY, AGED 58 YEARS, POTTACKAL HOUSE
MEENKUNNAM, MUVATTUPUZHA
(PARTNER M/S.MARIYA TOURIST HOMES)
PIN – 686 661.
3. MERCY JOHN,
W/O.JOHN, POTTACKAL,
AGED 49 YEARS, POTTACKAL HOUSE
MEENKUNNAM, MUVATTUPUZHA
PIN – 686 661.
4. BIJU GEORGE,
S/O.VARKEY, AGED 39 YEARS,
THOZHALAY HOUSE, MEENKUNNAM
MUVATTUPUZHA, PIN – 686 661.
5. ULAHANNAN VARKEY
S/O.ULAHANNAN, AGED 87 YEARS, POTTACKAL HOUSE
MEENKUNNAM, MUVATTUPUZHA, PIN – 686 661.
6. BABU PAUL,
S/O.PAILY, AGED ABOUT 45 YEARS, IRAMANGALATHU HOUSE
RAMANGALA KARA, MARADY VILLAGE, MUVATTUPUZHA
PIN – 686 661.
7. SEBASTIAN (DARLEY)
S/O.VARGHESE, AGED ABOUT 57 YEARS
RESIDING AT ROSE HOUSE PONNUKKARA KARA
THRISSUR VILLAGE, MUKUNDAPURAM TALUK
PIN – 680 014.
8. JOSE,
S/O. ANTONY, AGED 55 YEARS,
AVIRAPPATTU HOUSE, KEERAMPARA
KONDIMATTOM KARA, KOTHAMANGALAM
PIN – 686 691.

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING COME UP
FOR ADMISSION ON 04-12-2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

Mn

P.B.SURESH KUMAR, J.

F.A.O.(RO) No.234 of 2015

Dated 4th December, 2015.

J U D G M E N T

The decision in A.S.No.51 of 2009 on the file of the Sub Court, Muvattupuzha, by which the suit O.S.No.176 of 2006 on the file of the Munsiff Court, Muvattupuzha was remitted for fresh disposal is under challenge in this appeal.

2. The suit properties originally belonged to defendants 1 to 5. The total extent held by defendants 1 to 5 was 59 cents. Defendants 1 to 5 sold 35 cents out of the said 59 cents to the plaintiffs as per Ext.A11 sale deed. The property covered by Ext.A11 sale deed was shown in the plaint as plaint A schedule and the remaining 24 cents of property retained by defendants 1 to 5 was shown in the plaint as plaint C schedule. According to the plaintiffs, there is a dispute as to the western boundary of plaint A schedule property and hence, the suit for fixation of the western boundary of plaint A

schedule property. Defendants 1 to 5 contested the suit, contending among others, that there cannot be any dispute as to the western boundary of plaintiff A schedule property as the western boundary separating the properties has been clearly demarcated in the plan appended to Ext.A11 document. According to them, since the boundary separating the properties was clearly demarcated and shown in the plan appended to the document, even if there is any deficit in the extent, the plaintiffs have to suffer.

3. The trial court deputed an Advocate Commissioner for local inspection. The Commissioner reported deficiency in the extent of property in the possession of the plaintiffs. Nevertheless, the trial court took the view that in a matter like this, the plaintiffs should have sought a declaration of their title and recovery of possession of the land which they are entitled to and since the suit is not framed in that fashion, the plaintiffs cannot succeed. The matter was taken up in appeal by the plaintiffs. In the appellate court, the plaintiffs filed I.A.No.1951 of 2012 seeking leave to amend the plaint to

incorporate a prayer for declaration of title and recovery of possession of the portion of their property in the possession of the defendants. Appropriate changes were sought to be incorporated in the description of the properties in the plaint as well. Having regard to the facts and circumstances of the case, the appellate court thought it fit to remit the suit for fresh disposal and accordingly, the suit was remitted to the trial court for fresh disposal. Aggrieved by the said order of remand, the defendants have come up in this appeal.

4. Heard the learned counsel for the appellants.

5. The learned counsel for the appellants contended that since the boundary separating the properties was clearly demarcated and shown in the plan appended to Ext.A11 document, a suit for fixation of boundary is not maintainable. The learned counsel also pointed out that a plea of limitation raised by them before the appellate court has not been considered by the appellate court.

6. As noticed above, the suit properties belonged to defendants 1 to 5 and the plaint A schedule property was sold

by them to the plaintiffs showing the extent of property as 35 cents. As such, when defendants 1 to 5 maintain the stand that the plaintiffs are in possession of the property shown as conveyed to them as per Ext.A11, the suit should have been filed as indicated by the trial court. In so far as the suit was filed otherwise than as indicated by the trial court, it cannot be said that the decision taken by the trial court is incorrect. At the same time, when it is asserted by the plaintiffs that they are not in possession of 35 cents and what was conveyed to them by the defendants is 35 cents of property, the decision of the appellate court in remitting the suit for fresh disposal permitting the plaintiffs to make appropriate amendments in the plaint cannot be said to be illegal. Such a power is available with the appellate court under Rule 23 of Order 41 of the Code of Civil Procedure. The contentions raised by the learned counsel for the appellants before this Court to impugn the decision of the appellate court are contentions to be raised before the trial court after the remand. In the said view of the matter, I do not find any infirmity in the impugned decision of

the appellate court.

In the result, the appeal is dismissed. It is made clear that the parties will be at liberty to adduce further evidence in the matter. Needless to say that the suit shall be decided by the trial court afresh untrammelled by the observations made by the appellate court. All the interlocutory applications in the appeal are closed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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