

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 22ND DAY OF MAY 2015/1ST JYAISHTA, 1937

FAO (RO).No.211 of 2014

**AS NO.50/2010 of SUB COURT,CHERTHALA.
OS NO.861/2007 of PRL.MUNSIFF COURT,CHERTHALA.**

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APPELLANT/RESPONDENT/PLAINTIFF:

**SEETHA DEVI,AGED 56 YEARS,D/O.KARTHIYAYINI AMMA,
CHAMBARAYIL,AROOR MURI,AROOR VILLAGE.**

BY ADV.SRI.B.PRAMOD

RESPONDENT/APPELLANT/DEFENDANT:

**DILEEP,S/O.VELU,CHAKKANTHARA,
AROOR MURI,AROOR VILLAGE.**

**BY ADVS.DR.V.N.SANKARJEE
SRI.S.SIDHARDHAN**

**THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING BEEN
FINALLY HEARD ON 22-05-2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:**

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P.B.SURESH KUMAR, J.

F.A.O.(R.O.) No. 211 of 2014

Dated this the 22nd day of May , 2015

JUDGMENT

The decision in A.S No.50 of 2010 on the file of the Court of the Subordinate Judge of Cherthala is under challenge in this appeal.

2. A.S No.50 of 2010 is an appeal preferred by the defendant in O.S No.861 of 2007 on the file of the Court of the Munsiff, Cherthala, challenging the decision in the said suit. The appellant is the plaintiff in the suit. She obtained the plaint schedule property by virtue of Ext.A1 preliminary decree in O.S No.1/1955 on the file of the Sub Court, Vaikom. The plaint schedule property comprises in Sy.No. 429/3 of Aroor Village. According to the plaintiff, the defendant who is the owner of the property in Survey No.1/1 of Aroor Village, lying on the south of the plaint schedule property, was attempting to erect some structures in the plaint schedule property, taking advantage of the fact

that there is no boundary demarcation in a portion of the boundary separating the plaintiff schedule property with the property of the defendant. The plaintiff, therefore, claimed a decree of permanent prohibitory injunction restraining the defendant from trespassing into the plaintiff schedule property, interfering with the possession of the plaintiff over the plaintiff schedule property and committing waste therein.

3. The defendant has filed a written statement contending, inter alia, that he has not trespassed into any portion of the plaintiff schedule property nor does he propose to erect any structures encroaching upon the plaintiff schedule property. According to him, he is erecting a structure in his property comprised in Survey No.1/1 of Aroor Village.

4. In the course of the trial, an Advocate Commissioner was deputed to locate and identify the plaintiff schedule property. The Advocate Commissioner initially submitted Ext.C1 report and C1(a) plan. Later, on a

reference by the court, the Advocate Commissioner inspected the property again and submitted Ext.C2 report, C2(a) plan and C2(b) enlarged sketch. Exts.C2 report, C2(a) plan and C2(b) enlarged sketch, which were made available at the time of hearing, reveal that the Commissioner had identified and indicated in Ext.C2(b) enlarged sketch the survey demarcation line separating the properties in Sy.No.429/3 and Sy.No.1/1. A B C D E F G P line in Ext.C2 (b) enlarged sketch is the survey demarcation line separating the properties in the aforesaid survey numbers. In Ext.C2 report, the Commissioner stated that the defendant had trespassed into a portion of the plaint schedule property in Survey No.429/3 and erected a structure. The portion of the property trespassed into by the defendant is shown in Ext.C2(b) enlarged sketch as CDMC.

5. The trial court, on an elaborate consideration of the entire materials on record, accepted Ext.C2 report and held

that the defendant has trespassed into the portion of the plaint schedule property shown as CDMC in Ext.C2(b) enlarged sketch and erected a structure therein. Consequently, the trial court decreed the suit directing the defendant by way of a mandatory injunction to remove the structure erected by the defendant from the plaint schedule property. The defendant was also restrained by the trial court by a decree of permanent prohibitory injunction from trespassing into the plaint schedule property, interfering with the possession of the plaintiff over the same and committing waste therein.

6. The defendant challenged the decision of the trial court in appeal. The appellate court found that the trial court was not justified in holding that the defendant has trespassed into the plaint schedule property without measuring and identifying the property of the defendant. The appellate court also found that the trial court was not justified in granting a decree of mandatory injunction

directing the defendant to remove the structure without there being a prayer for the same in the suit. The appellate court further found that the trial court should have framed an issue with regard to the identity of the plaint schedule property. In the light of the said findings, the appellate court set aside the decision of the trial court and remitted the suit for fresh disposal as per the judgment impugned in this appeal.

7. It is evident from the decision of the trial court that there was no construction encroaching upon the plaint schedule property at the time of institution of the suit and the objectionable construction was made during the pendency of the suit. It is trite that the court trying a suit is obliged to take note of the events after the institution of the suit and mould reliefs to the parties accordingly, as otherwise, a party to a suit would be able to defeat the rights of others by his ingenious conducts, during the pendency of the suit. In this context, it is worth referring to

the decision of the Apex Court in **Jai Prakash vs Riyaz Ahamad and another** [(2009) 10 Supreme Court Cases 197]. Paragraph 20 of the said judgment reads as follows:

“It is true that a suit or an original proceeding is to be tried in all its stages on the cause of action as it existed on the date of its commencement. The only exception to this rule is that a court may take notice of events, which have happened since the institution of the suit or the original proceeding and grant relief to the parties on the basis of the altered condition, (sic which) is applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the court on the altered circumstances in order to shorten litigation or to do complete justice between the parties (See Rai Charan Mandal v. Biswanath Mandal, AIR p.104). This was the view expressed by Sir Ashutosh Mookerjee, J. (as His Lordship then was) on this question when subsequent developments should be taken into consideration by the court during the pendency of a proceeding or of a suit or even at the appellate stage.”

The view of the lower appellate court that the trial court was not justified in granting the decree of mandatory injunction without there being a prayer for the same in the suit, is therefore, unsustainable. Coming to the finding of the trial court that the plaintiff should have taken steps to measure and identify the property of the defendant, I must say that

such a course was not necessary at all in a case like this. As noticed above, the property of the plaintiff comprises in Sy.No.429/3 and the property of the defendant comprises in Sy.No.1/1. In Ext.C2(b) enlarged sketch, the Commissioner, with the aid of the Surveyor, has fixed the boundary line of the properties in the aforesaid survey numbers. The defendant though filed an objection to Ext.C2 report and C2 (b) sketch of the Commissioner, he has not disputed the fixation of the boundary line A B C D E F G P separating the properties in the aforesaid survey numbers. As such, it has to be taken that the defendant is not disputing the determination of the survey boundary made by the Commissioner in Ext.C2(b). Ext.C2(b) sketch indicates that the defendant has trespassed into a portion of the plaintiff schedule property shown in Ext.C2(b) sketch as CDMC and erected a structure therein. As such, as far as the present case is concerned, the measurement and identification of the property of the defendant was not necessary to decide

the question as to whether there has been any encroachment by the defendant into the property of the plaintiff. The impugned decision of the appellate Court is therefore, unsustainable.

In the result, the appeal is allowed, the impugned judgment is set aside and the matter is remitted to the appellate court for fresh disposal in accordance with the findings and observations made in this judgment. The appeal being one filed in the year 2010, I deem it appropriate to direct the appellate court to dispose of the same as expeditiously as possible, at any rate, within a period of three months from the date of receipt of a copy of this judgment. All the interlocutory applications in the appeal are closed.

P.B.SURESH KUMAR, JUDGE.

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