

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 1ST DAY OF JUNE 2015/11TH JYAISHTA, 1937

FAO (RO).No. 294 of 2014 ()

(AGAINST THE JUDGMENT AND DECREE IN AS.NO. 37/2013 OF SUB COURT,
VADAKARA DATED 23/07/2014)

(OS.NO. 267/2009 OF MUNSIFF COURT, NADAPURAM)

APPELLANT/1ST RESPONDENT/PLAINTIFF:

MANGALASSERI THAZHAKUNIYL THAMASIKKUM
EDAKKATTUKANDY PATHU, AGED 62 YEARS,
W/O MUHAMMED, VATAYAM AMSOM DESOM, VATAKARA TALUK,
KOZHIKODE DISTRICT.

BY ADVS.SRI.AVM.SALAHUDIN
SMT.A.D.DIVYA
SMT.EMIL STANLEY

RESPONDENTS/APPELLANT & RESPONDENT NOS.2/DEFENDANTS NOS.1& 2:

1. KUNIYIL THAMASIKKUM EDAKKATTUKANDIYIL ABDULLA HAJI,
S/O AMMAD HAJI, AGED 65 YEARS, TRADER, VATAYAM DESOM,
VATAKARA TALUK, KOZHIKODE DISTRICT - 673 101.
2. EDAKKATTUKANDIYIL SOOPY,
S/O AMMAD HAJI, AGED 69 YEARS, TRADER, VATAYAM DESOM,
VATAKARA TALUK, KOZHIKODE DISTRICT - 673 101.

R1 BY ADVS. SRI.B.KRISHNAN
SRI.R.PARTHASARATHY

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING BEEN
FINALLY HEARD ON 01-06-2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

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P.B.SURESH KUMAR, J.

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F.A.O.(RO).No.294 of 2014.

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Dated this the 1st day of June, 2015.

J U D G M E N T

The decision of the Court of the Subordinate Judge, Vadakara in A.S.No.37 of 2013 is under challenge in this appeal.

2. The suit was one for fixation of boundary and recovery of possession. The plaint schedule properties were part of a larger extent of property owned by late Ammad Haji, the father of the plaintiff and the defendants. The property held by Ammad Haji was divided among his children including the plaintiff and defendants as per Ext.A1 partition deed. Plaint C and E schedule properties are the properties allotted to defendants 1 and 2 respectively as per the said partition deed. Plaint D schedule property was though allotted to one Kunjamina as per the partition deed,

the same is presently held jointly by the children of Ammad Haji. Plaintiff E schedule property lies on the extreme west. Plaintiff A schedule property allotted to the plaintiff as per the said partition deed lies on the immediate east of plaintiff E schedule property. Plaintiff C and D schedule properties lie on the east of plaintiff A schedule property, of which plaintiff C schedule property lies on the north and plaintiff D schedule property lies on its south. According to the plaintiff, taking advantage of the fact that there is no boundary separating her property with the property of the first defendant, he has trespassed into a portion of the property allotted to her as per the partition deed. She, therefore, claimed a decree for fixation of the southern, northern and western boundaries of her property and for recovery of possession of the part of her property in the possession of the first defendant.

3. The first defendant filed a written statement contending that there are well defined boundaries separating the property in his possession and the property of the plaintiff and therefore there is no necessity at all to

fix the boundaries separating plaint A and C schedule properties. It was also contended by him that the attempt of the plaintiff is to grab a portion of the property in his possession.

4. In the course of the proceedings, an Advocate Commissioner was appointed to measure the properties and to fix its boundaries. The Advocate Commissioner deputed by the court fixed the boundaries of the properties by measuring the same from the east as also from the west. Ext.C1 is the sketch prepared by the Advocate Commissioner fixing the boundaries by measuring the properties from the east and Ext.C2 is the sketch prepared by the Advocate Commissioner fixing the boundaries by measuring the properties from the west.

5. The trial court found that there exists a clear demarcating boundary on the east of plaint C and D schedule properties. The trial court also found that a road was formed after the partition on the extreme west of the plaint schedule properties and while forming the said road,

the second defendant had to leave a portion of plaintiff E schedule property for the road. The trial court further found that some excess land lies on the north western corner of the properties. Having regard to the said facts, the trial court took the view that it is safe to fix the boundaries by measuring the properties from the eastern side so that the second defendant can retain the extent of property allotted to him. Consequently, the trial court directed to fix the boundaries of the properties as per Ext.C3 plan. As per Ext.C3 plan, a portion of the property which is admittedly in the possession of the first defendant lies within the boundaries of the property of the plaintiff. Consequently, the trial court permitted the plaintiff to recover the said portion from the first defendant also.

6. The first defendant challenged the decision of the trial court in appeal. The appellate court took the view that since the road on the west of the properties was formed after the partition, the second defendant had to suffer the property left for the formation of the road. The

appellate court also found that the first defendant had established possession over a bit of land over and above the extent of property allotted to him as per the terms of the partition deed. The appellate court further found that if the boundaries of the respective properties are fixed directing the second defendant to suffer the bit of land taken for formation of the road, there may not be any shortage in the extent of property of the plaintiff and at the same time, the extent of land in the possession of the first defendant need not be disturbed. Consequently, the appellate court set aside the decision of the trial court with a direction to fix the boundary of the properties taking measurements from the western boundary of plaint E schedule property. The appellate court also directed that the northern portion of the western boundary of plaint E schedule property is to be identified as the existing boundary with the road and the southern portion of the western boundary is to be identified taking into account of the portion left for the road. The appellate court also permitted the plaintiff to take out a

commission to fix the boundaries as directed above. The plaintiff is aggrieved by the said decision of the appellate court.

7. It is seen that though the plaintiff seeks fixation of the southern, northern and western boundaries of the plaint A schedule property, the dispute pertains only to the eastern boundary of plaint A schedule property abutting the property of the first defendant. If the boundary is fixed as directed by the appellate court, the plaintiff will not lose her property and at the same time, the first defendant can retain the excess land in his possession. In the said circumstances, I do not find any reason to interfere with the decision of the appellate court. The appeal is accordingly dismissed. All the interlocutory applications in the appeal are closed.

Sd/-P.B.SURESH KUMAR, JUDGE.

Kvs/-

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