

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 24TH DAY OF MARCH 2015/3RD CHAITHRA, 1937

RFA.No.94 of 2004

**(AGAINST THE JUDGMENT AND DECREE IN OS 588/1993 OF THE 1ST
ADDITIONAL SUB COURT,THRISSUR DATED 10-07-2003).**

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APPELLANT/DEFENDANT IN O.S.NO.588/93:

**THRISSUR CORPORATION,REPRESENTED BY THE
SECRETARY.**

**BY ADVS.SRI.K.P.VIJAYAN
SRI.V.M.SYAM KUMAR
SRI.K.A.SREEJITH
SMT.KRIPA ELIZABETH MATHEWS
SRI.V.N.HARIDAS**

RESPONDENT PLAINTIFF IN O.S.NO.588/93:

**SMT.DAISY,W/O.DR.ANTONY J.MALIAKKAL,
RESIDING AT UDAYA NAGAR,MYLIPPADAM,
THRISSUR.**

BY ADV.SRI.DILIP J. AKKARA

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 24-03-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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P.B.SURESH KUMAR, J.

R.F.A.No.94 OF 2004
&
Cross Objection No.7 of 2006

Dated this the 24th day of March, 2015

JUDGMENT

The decision in O.S.No.588 of 1993 on the file of the Court of the First Additional Sub Judge, Thrissur is under challenge in this appeal. The defeated defendant is the appellant.

2. The case of the plaintiff is that she obtained an extent of 3.394 cents of property comprised under Survey Nos.389/1, 407/5 and 408/1 of Thrissur Village by virtue of Exts.A1 and A2 assignment deeds and on 2.1.1993, the defendant Municipality trespassed into the said property and formed a public pathway through the same. According to the plaintiff, the Municipality is obliged under law to make good the loss caused to her on account of the trespass committed by them. The suit was therefore filed for realisation of the value of the property amounting to Rs.90,000/- by way of damages from the Municipality.

3. The Municipality contested the suit. According to them, on

17.8.1982, the Municipality decided to construct a canal in the vicinity of the property of the plaintiff by acquiring the land required for the same and pursuant to the said decision, a requisition was made to the authorities under the Land Acquisition Act and pursuant to the said requisition, an extent of 0.0167 hectares of land including lands comprised under Survey Nos.389/1, 407/5 and 408/1 of Thrissur Village was acquired for the said purpose. It is their case that the land acquired on their behalf was taken possession by the Municipality after paying compensation to its owners and the canal was constructed through the acquired land. According to the Municipality, a lane was in existence even at the time when the proposal for acquisition was made. It is their case that the canal was constructed by the Municipality only through the land acquired for the said purpose and the Municipality has not trespassed into the property of the plaintiff as alleged by her.

4. The plaintiff gave evidence as PW1. Two witnesses were examined on her side as PW2 and PW3. Two witnesses were examined on the side of the Municipality also as DW1 and DW2.

5. On the basis of the materials on record, the court below found that the property of the plaintiff has been made use of by the

Municipality for forming a road and consequently, a decree was passed permitting the plaintiff to realise a sum of Rs.50,910/- from the Municipality by way of damages. Aggrieved by the said decision, the defendant Municipality has come up in this appeal. The plaintiff has also filed a Cross Objection claiming an enhanced amount by way of damages.

6. Heard the learned counsel for the appellant and also the learned counsel for the respondent.

7. The learned counsel for the appellant, relying on the evidence tendered by the Advocate Commissioner and the Village Officer who assisted him, contended that the property of the plaintiff has not been identified correctly by the Advocate Commissioner and as such the decree passed in favour of the plaintiff is unsustainable.

8. Ext.C1 is the report of the Advocate Commissioner dated 12.12.2001. Ext.C2(a) is the sketch appended to Ext.C1 report. Ext.C1 (a) is a sketch prepared by DW1. Ext.C2 is an interim report submitted by the Advocate Commissioner on 2.3.2001. Ext.C3 is another interim report submitted by the Advocate Commissioner on 9.4.2001. In Ext.C2 report, it is stated by the Advocate Commissioner that though he

attempted to identify the property of the plaintiff on 23.11.2000 with the aid of the Taluk Surveyor, he could not identify the same. In Ext.C3 report also, the Advocate Commissioner has stated that though he attempted to identify the property again with the aid of the Taluk Surveyor on 31.3.2001, he could not succeed. A letter dated 31.3.2001, given by the Taluk Surveyor who assisted the Advocate Commissioner, stating the reasons for his inability to help the Advocate Commissioner to identify the property was also enclosed along with Ext.C3 report. In the said letter, the Taluk Surveyor has stated that the property shown by the plaintiff as her property at the time of inspection was a property comprised under Survey Nos.389/1, 407/5 and 408/4. It is also stated in the said letter that the property of the plaintiff has not been brought under any sub division and that the side measurements of the property are not shown completely in the documents. However, it is seen that in Ext.C1 report, the Advocate Commissioner has stated that he has identified the property of the plaintiff with the aid of the Village Officer on 9.11.2001. DW1 is the Village Officer who assisted the Advocate Commissioner in identifying the property on 9.11.2001. The Advocate Commissioner was examined in the suit as PW3. In cross examination

PW3 has stated that he has neither located the survey boundaries of the properties of the plaintiff nor its sub division boundaries. Though he has admitted that a property covered by a document cannot be located without locating its survey and sub division boundaries, he has not offered any explanation as to how he has located and identified the property of the plaintiff. He has also stated that he is unable to confirm whether the boundaries of the property of the plaintiff as shown in her title deeds are the boundaries of the property identified by him. To the specific suggestion put to the Advocate Commissioner in cross examination that the properties in survey Nos.407/5 and 389/1 are not lying contiguously, his answer was that he has nothing to say. It is not discernible from Ext.C1 report and the deposition of the Advocate Commissioner as to how he has identified the property of the plaintiff. In Ext.C1 report, the Advocate Commissioner has stated that the property of the plaintiff has been identified with the help of DW1. DW1 has deposed in cross examination that though he has signed on Ext.C1 (a) plan, he has not even verified the survey numbers of the property. He has also stated that he has neither seen the title deeds of the plaintiff nor did he verify the survey records. He has also stated that he has not

measured the property. According to him, Ext.C1(a) is only a sketch of the property shown to him by the Advocate Commissioner. Thus, it is clear beyond doubt that the property of the plaintiff has not been correctly identified by the Advocate Commissioner. The impugned judgment indicates that it is solely based on Ext.C1 report of the Advocate Commissioner, the court below found that the property of the plaintiff is lying as part of the public road maintained by the Municipality. It is based on the said finding, the impugned judgment is passed. Since it is found that the property of the plaintiff has not been correctly identified by the Advocate Commissioner, the impugned judgment is liable to be set aside.

9. Be that as it may, the Municipality has no case that the property covered by the sale deeds relied on by the plaintiff is not in existence nor did they maintain that the said property is lying elsewhere. The Municipality has also no case that the property of the plaintiff has not been acquired for construction of the canal. Instead, the stand of the Municipality in the written statement was that the canal was constructed only through the acquired property and the road on the side of the canal was in existence even at the time when the

proposal for the land acquisition was made. The written statement indicates that the properties acquired on behalf of the Municipality includes the properties in Survey Nos.389/1, 407/5 and 408/1. The particulars of the properties acquired and its owners are not available on record. The authorities under the Land Acquisition Act who have been instrumental for the acquisition of the property were not made parties to the suit. The issue whether the property of the plaintiff has been acquired or not for the construction of the canal referred to in the written statement is relevant in the matter of deciding the dispute between the parties to the suit. The said issue cannot be decided without the authorities under the Land Acquisition Act on the array of parties in the suit. In the said circumstances, according to me, the interest of justice demands that the plaintiff shall be given yet another opportunity to identify her property covered by the title deeds referred to in the suit. As stated above, for a complete adjudication of the dispute, the plaintiff shall also be given an opportunity to implead the authorities under the Land Acquisition Act in the suit.

10. In the result, the impugned judgment and decree are set aside and the court below is directed to dispose of the suit afresh after

affording the plaintiff an opportunity to implead the authorities under the Land Acquisition Act and to identify the property. Since it is found that the property of the plaintiff has not been identified in the suit, the issue raised in the Cross Objection does not arise for consideration.

The appeal and the Cross Objection are disposed of as above.

P.B.SURESH KUMAR, JUDGE.

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