

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

WEDNESDAY, THE 25TH DAY OF JUNE 2014/4TH ASHADHA, 1936

FAO.No. 206 of 2008 ()

AS 376/2004 of ADDL. D.C. KOZHIKODE- II
OS 341/1999 of PRL.M.C.KOZHIKODE-I

APPELLANT/IST RESPONDENT/IST DEFENDANT:

THARAYIL KOYAKUTTY HAJI, AGED 58 YEARS,
S/O. MAMMAD HAJI, KARUVATTOOR AMSOM, CHERUVATTA DESOM
KOZHIKODE TALUK.

BY ADV. SRI.JACOB ABRAHAM

RESPONDENTS/APPELLANT AND 2ND AND 3RD RESPONDENTS:

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1. SHEREEFA, AGED 37, VALLATHU HOUSE,
D/O. UTTTHANKOYA, CHELAVOOR AMSOM AND DESOM
OF KOZHIKODE TALUK.
 2. THARAYIL PATHUMMAI, AGED 76 YEARS,
W/O. MAMMAD HAJI, KARUVATTOOR AMSOM
CHERUVATTA DESOM OF KOZHIKODE TALUK.
 3. O.P. ABDUL NAZAR, AGED 33 YEARS,
S/O. AHAMMED KUTTYHAJI, RESIDING AT
KEDAVOOR AMSOM, PALLIPURAM DESOM OF, KOZHIKODE TALUK.

R1 BY ADV. SRI.R.SUDHISH

R1 BY ADV. SMT.M.MANJU

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 25-06-2014, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P.B.SURESH KUMAR, J.
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F.A.O.Nos.206 & 210 of 2008
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Dated this the 22nd day of January, 2015

JUDGMENT

These appeals are preferred against the common judgment in A.S.Nos.378 and 376 of 2004 on the file of the Court of the District Judge, Kozhikode. A.S.No.378 of 2004 was preferred against the decree and judgment in O.S.No.301 of 1999 on the file of the Court of the Munsiff, Kozhikode and A.S.No.376 of 2004 was preferred against the decree and judgment in O.S.No.341 of 1999 on the file of the said court. The appellant in these appeals is the first plaintiff in O.S.No.301 of 1999 and the first defendant in O.S.No.341 of 1999.

2. The suit O.S.No.301 of 1999 was filed seeking a decree for recovery of possession of plaint C schedule property and for damages. A mandatory injunction for demolition of the structures in plaint C schedule property was also sought for. The case of the plaintiffs in O.S.No.301 of 1999 is that plaint A schedule property, measuring 8 cents, is owned by them and the first defendant, who is the owner of the property on its north, has trespassed into plaint

C schedule property, measuring 0.389 cents, which is part of plaintiff A schedule property and erected a structure therein. O.S.No.341 of 1999 was filed by the first defendant in O.S.No.301 of 1999, seeking a decree of permanent prohibitory injunction restraining the plaintiffs in O.S.No.301 of 1999 from trespassing into the plaintiff schedule property therein measuring 5.05 cents and interfering with their possession and enjoyment of the said property.

3. The trial court, on an appraisal of the materials on record, found that the plaintiffs in O.S.No.301 of 1999 are entitled to the decree sought for by them and accordingly, decreed O.S.No.301 of 1999. In the light of the decision in O.S.No.301 of 1999, O.S.No.341 of 1999 filed by the first defendant in O.S.No.301 of 1999 was dismissed. The first defendant in O.S.No.301 of 1999, who is aggrieved by the decisions in the said suits, preferred the appeals, A.S.No.378 of 2004 against the decision in O.S.No.301 of 1999 and A.S.No.376 of 2004 against the decision in O.S.No.341 of 1999.

4. The appellate court noticed that the trial court passed the decree allowing recovery of plaintiff C schedule property in O.S.No.301 of 1999, without identifying and obtaining a survey plan of plaintiff A and C schedule properties on the basis of title deeds and

survey records and that Exts.C3 and C5 sketches which are directed to be appended to the decree impugned in A.S.No.378 of 2004 are only rough sketches prepared by the Commissioner appointed in the said suit. The appellate court also noticed that the trial court had allowed recovery of plaint C schedule property based on the identification of the said property in Ext.C5 sketch and that the Commissioner who had prepared Exts.C3 and C5 sketches was not examined before the trial court. The appellate court further noticed that Ext.C3 report was filed by the Advocate Commissioner in O.S.No.341 of 1999 and the sketches produced by him along with his report in the said suit are directed to be appended to the decree in O.S.No.301 of 1999. The appellate court further noticed that proper issues were not framed for trial by the trial court. In the said circumstances, the appellate court remitted the matter to the trial court for fresh disposal, after framing the relevant issues and after affording the parties an opportunity to adduce evidence.

5. In so far as a decree for recovery of possession was granted in respect of a disputed item of property, without identifying the same with the aid of the survey plans and the title deeds of the parties, the decision arrived at by the appellate court in remitting the matter for fresh disposal is perfectly in order. There is,

therefore, no merit in these appeals and the same are accordingly dismissed.

Sd/-

**P.B.SURESH KUMAR
JUDGE**

/true copy/

P.A. to Judge

vpv