

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 17TH DAY OF AUGUST 2015/26TH SRAVANA, 1937

RFA.No. 482 of 2005

O.S.NO.714 OF 1995 OF 1ST ADDITIONAL SUB COURT, ERNAKULAM

APPELLANT(S)/DEFENDANT :

P.R.NARAHARI RAO, AGED 59 YEARS,
S/O.RAMAKRISHNA RAO, DOOR NO.XL/293, LAYAM ROAD,
ERNAKULAM VILLAGE, KANAYANNUR TALUK, KOCHI-11.

BY ADV. SRI.DINESH R.SHENOY

RESPONDENT(S)/PLAINTIFF :

- * 1. P.N.RAMACHANDRA RAO, AGED 80 YEARS,
S/O.LATE P.NARAYANA KUKKILIYA, BUSINESSMAN,
WOODLANDS HOUSE, WARRIAM ROAD, ERNAKULAM VILLAGE,
KANAYANNUR TALUK.(DIED)

* ADDITIONAL R2 TO R9 IMPEADED

2. SMT.SEETHA, W/O.LATE P.N.RAMACHANDRA RAO,
WOODLANDS HOUSE, WARRIAM ROAD, KOCHI-16.
3. P.R.VENKATESH, S/O.LATE.P.N.RAMACHANDRA RAO,
-DO- -DO-
4. P.R.GIREESAN, S/O.LATE P.N.RAMACHANDRA RAO,
'RAMKRUPA', NO.267. 11TH B CROSS, 20TH MAIN,
2ND PHASE, J.P.NAGAR, BANGALORE- 78.
5. P.R.MURALI, S/O.LATE P.N.RAMACHANDRA RAO,
WOODLANDS HOUSE, WARRIAM ROAD, KOCHI- 16.
6. P.R.DINESH, S/O.LATE P.N.RAMACHANDRA RAO,
FLAT NO.406, PIONEER TOWERS, SHANMUGHAM ROAD,
ERNAKULAM, KOCHI.
7. JAYA VASUDEVA RAO, D/O.LATE P.N.RAMACHANDRA RAO,
'JAYDEV', 316 H, 9TH A MAIN, 5TH BLOCK, JAYA NAGAR,
BANGALORE- 11.

8. MALA BHAT, D/O.LATE P.N.RAMACHANDRA RAO,
'DWARAKA', ARYASAMAJ ROAD, BELMATTA, MANGALORE-3.

9. PRIYA GURURAJ, D/O.LATE P.N.RAMACHANDRA RAO,
1217, 21ST CROSS, 2ND BLOCK, RAJAJI NAGAR, BANGALORE- 10.

* LEGAL HEIRS OF THE DECEASED SOLE RESPONDENT ARE IMPEADED AS
ADDITIONAL RESPONDENTS 2 TO 9 VIDE ORDER DATED 09.12.2009 IN
I.A.NO.3263 OF 2009.

R2 TO R9 BY SRI.P.G.PARAMESWARA PANICKER (SENIOR ADVOCATE)
BY ADV. SRI.M.P.RAMNATH

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 17-08-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

Msd.

P.B.SURESH KUMAR, J.

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R.F.A.No.482 OF 2005

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Dated this the 17th day of August, 2015

J U D G M E N T

The defendant in a suit for recovery of possession is the appellant. The respondent is the plaintiff.

2. The plaintiff is the younger brother of the father of the defendant. He owns 41.434 cents of property in survey No.710/1, 707/3 and 257/1 of Ernakulam Village as per various title deeds. The defendant owns 16.5 cents of property in survey No.701/1 as per Ext.B2 sale deed. The property of the defendant is situated on the immediate west of the property of the plaintiff. There was an earlier suit O.S.No.17 of 1995 by the defendant against the plaintiff seeking a decree of prohibitory injunction restraining the plaintiff from erecting structures in his property otherwise than in accordance with the Building Rules. An Advocate Commissioner was appointed in the said suit for local inspection and the said Advocate Commissioner, after measuring the properties of the parties with the aid of the Taluk

Surveyor, submitted a report and plan stating, among others, that the plaintiff and the defendant are in possession of only 36.440 cents and 14.628 cents respectively. It was also stated by the Advocate Commissioner in his report in the said suit that the defendant is in possession of the plaint schedule property, measuring 0.29 cents, lying in between the properties of the parties and that the plaint schedule property is not part of the property covered by his title deed. The suit was filed thereupon by the plaintiff for recovery of possession of plaint schedule property alleging that the same is part of his property which is lying on the east of the plaint schedule property. It was alleged by the plaintiff in the suit that the eastern compound wall of the property of the defendant was reconstructed by the defendant during 1985; that the defendant had enclosed the plaint schedule property with his property while reconstructing the said compound wall and that the said fact was revealed to him only from the report of the Advocate Commissioner appointed in O.S.No.17 of 1995.

3. The defendant resisted the suit by filing a

written statement contending, among others, that the plaint schedule property is part of his property covered by Ext.B2 sale deed.

4. The evidence in the case consists of the oral testimonies of PWs.1 to 3 and Exts.A1 to A16 on the side of the plaintiff and the oral testimonies of DWs.1 and 2 and Exts.B1 to B33 on the side of the defendant. Among the documents produced by the plaintiff, Ext.A5 is the report of the Advocate Commissioner in O.S.No.17 of 1995 and Ext.A5(a) is the plan prepared by the Taluk Surveyor as produced by the Advocate Commissioner along with Ext.A5 report.

5. The trial court found that the plaintiff has established title to the plaint schedule property and consequently decreed the suit, permitting the plaintiff to recover possession of the same from the defendant. A decree of permanent prohibitory injunction restraining the defendant from putting up any compound wall on the eastern side of the plaint schedule property was also granted in favour of the plaintiff. The defendant is aggrieved by the said decision of the

trial court. Hence this appeal.

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

7. As stated above, the plaint schedule property is lying in between the properties of the plaintiff and the defendant. Ext.B34 is the prior document of the title deed of the defendant. As per Ext.B34, the vendor of the defendant had obtained only 21 cents of property in survey No.710/1. Out of the said 21 cents, the vendor of the defendant had sold 6.5 cents to one Ambatt Nythyaramma as per Ext.B1 sale deed in the year 1962. It was thereafter, he executed Ext.B2 sale deed in favour of the defendant purporting to sell 16.5 cents of property to him, while he was holding only 14.5 cents, going the extent of the property shown in Ext.B34. In Ext.A5 report, the Advocate Commissioner had stated that the defendant is in possession of 14.628 cents, excluding the plaint schedule property. Further, the eastern boundary obtained by the defendant as per Ext.B2 sale deed is the property of the plaintiff. It is in the said circumstance, the court below came to

the conclusion that the plaint schedule property is part of the property of the plaintiff.

8. There cannot be any dispute to the fact that in the nature of the present suit, it was for the plaintiff to establish his title over the plaint schedule property. The case of the plaintiff is that the plaint schedule property is part of the property covered by his title deeds and that he enclosed the plaint schedule property with his property during 1985 while reconstructing the eastern compound wall of his property. The case of the defendant on the other hand is that the plaint schedule property is part of the property obtained by him as per Ext.B2 sale deed. As noticed above, the vendor of the defendant had obtained only 21 cents of property as per Ext.B34 partition deed. Out of the said 21 cents, he sold 6.5 cents to Ambatt Nythyaramma as per Ext.B1 sale deed. What was sold to the defendant as per Ext.B2 sale deed thereafter was only the property remaining with him after Ext.B1 sale deed. Going by the extent of the property shown in Ext.B34 partition deed, the vendor of the defendant had only 14.5 cents

after Ext.B1 sale deed. But, it is seen that 16.5 cents of the property was purportedly sold by the prior owner to the defendant as per Ext.B2 sale deed. Further, the description of the property conveyed to the defendant as per Ext.B2 reads thus:

""....`°¥ f}rORWLaO¾fO Wu] \ÿO mL"] WLeOÐ vzW¥
oOuOvjOU CT BiLq¾L¤ j]°¥" O f}rOfÐfO RWL°O Atv]¤
WLeOÐ WPaOf¤ WOrvO v]ñ}; 1¾]R£ SpLY|
nLY|U j]°¥ fRÐ vz] \ÿORWLSç°fLReÐO yo¾] \ÿOU
vzWRt yUmì] \ÿ sf|°¥ WPÿLWpL¤"

From the description of the property shown in Ext.B2 sale deed, the exact extent of the property obtained by the plaintiff cannot be inferred. True, Ext.B2 contains the side measurements of the property sold to the defendant. But, the side measurements of the property shown in Ext.B2 do not tally with the side measurements in Ext.B34 partition deed. In other words, if the defendant had obtained any property in excess of 14.5 cents over which his vendor had title as per Ext.B2, the plaintiff cannot recover the same from him on the ground that he is not in possession of the whole extent of the property

covered by his title deeds, especially when his case is that the defendant had enclosed the plaint schedule property during 1995 while reconstructing the compound wall on the eastern side of his property. The plaintiff, in the circumstances, can succeed in the suit only if he is able to establish that the plaint schedule property is part of the property covered by his title deeds.

9. The plaintiff has not taken out a commission to locate and identify the properties obtained by the parties as per their respective title deeds. Instead, he had produced the report and plan of the Advocate Commissioner appointed in O.S.No.17 of 1995 to establish his title over the plaint schedule property. In Ext.A5 report, the Advocate Commissioner only recites that the properties have been identified by the Taluk Surveyor. In Ext.A5(a) plan, the Taluk Surveyor recites that the properties have been identified by him based on the title deeds and the possession of the parties. True, in Ext.A5(a) plan, the Taluk Surveyor had stated that the plaint schedule property is not part of the property obtained by him as per his title deed. It

is not discernible from Ext.A5(a) plan as to how the Taluk Surveyor had come to the said conclusion. The Taluk Surveyor who prepared Ext.A5(a) plan was examined. It is conceded by the parties that the property of the defendant was identified based on Ext.B2 sale deed. I have already indicated that Ext.B2 does not contain the true particulars of the property obtained by the defendant. As such, according to me, the materials on record are not sufficient to hold that the plaintiff has established title to the plaint schedule property.

10. The learned counsel for the appellant has drawn my attention to the description of property in Ext.B34 partition deed. On a perusal of the description of the property contained in Ext.B34 partition deed, I find that the side measurements shown therein are more precise. In so far as the defendant is not claiming any right over the properties obtained by the plaintiff as per the title deeds referred to in the plaint, I am of the view that if the property of the defendant is identified with reference to the description contained in Ext.B34 partition deed, a correct decision as to whether plaint schedule property

is part of the title deeds of the plaintiff can be arrived at.

In the result, the appeal is allowed, the impugned judgment is set aside and the suit is remitted to the trial court for fresh disposal, after affording the plaintiff an opportunity to establish his case. He is also given liberty to establish the identity of the property of the defendant based on the description of the property covered by Ext.B34 partition deed through the very same Advocate Commissioner, if available or through a fresh commissioner. All the interlocutory applications in the appeal are closed.

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

kvs

// true copy //

PA TO JUDGE.