

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 12TH DAY OF JANUARY 2015/22ND POUSHA, 1936

OP(C).No. 45 of 2015 (O)

(AS 71/2007 of I ADDL.SUB COURT,TRIVANDRUM)

PETITIONER:

FRANCIS ROZARIO, S/O.LATE BENNIS ROZARIO,
PLAUL VILLA, VALIATHOPPU,
THIRUVANANTHAPURAM.

BY ADV. SRI.J.HARIKUMAR

RESPONDENT:

MARY ZETA SUSAN
W/O. SUSAN LEON CRUZ, D-2/33&34, OPP. FANTASY LAND
GREEN FIELDS CAMPUS, MAHAKALI CAVES ROAD, ANDHERI EAST
MUMBAI PRESENTLY RESIDING AT SANJOSE HOUSE
NEAR KOCHUKURISADI, NALANCHIRA,
THIRUVANANTHAPURAM - 695 015.

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON
12-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP(C).No. 45 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS :

- P1 - TRUE COPY OF THE PLAINT IN OS NO. 854/04 ON THE FILE OF THE FIRST ADDITIONAL MUNSIFF' COURT, THIRUVANANTHAPURAM.
- P1(A) - TRUE COPY OF THE APPLICATION FOR AMENDMENT OF THE PLAINT.
- P2 - TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE PETITIONER IN OS NO.854/04 ON THE FILE OF THE FIRST ADDITIONAL MUNSIFF'S COURT, THIRUVANANTHAPURAM.
- P3 - TRUE COPY OF THE JUDGMENT IN OS NO. 854/04 ON THE FILE OF THE FIRST ADDITIONAL MUNSIFF'S COURT, THIRUVANANTHAPURAM.
- P4 - TRUE COPY OF MEMORANDUM OF APPEAL IN AS NO. 71/2007 BEFORE THE FIRST ADDL. SUB COURT, THIRUVANANTHAPURAM.
- P5 - TRUE COPY OF THE AFFIDAVIT AND PETITION IN IA NO. 4022/12 IN AS NO. 71/07 BEFORE THE FIRST ADDITIONAL SUB COURT, THIRUVANANTHAPURAM.
- P6 - TRUE COPY OF THE ORDER IN IA NO. 4022/12 OF THE FIRST ADDITIONAL SUB JUDGE, THIRUVANANTHAPURAM.

RESPONDENT(S)' EXHIBITS: NIL.

// True Copy //

P.A. to Judge.

smp

P.BHAVADASAN, J.

Original Petition (Civil) No.45 OF 2015

Dated this the 12th day of January, 2015.

J U D G M E N T

Aggrieved by Ext.P6 order dated 15.10.2014 in I.A.No.4022/2012 in A.S.No.71/2007, the petitioner before the court below has come up with this original petition under Article 227 of the Constitution of India.

2. The petitioner was the 2nd defendant in a suit for declaration of title, recovery of possession, putting up of boundary and various other reliefs. In the written statement filed by the 2nd defendant, in paragraph 22, he had pointed out that the court fee paid is not proper and suit valuation is also improper and incorrect.

3. The parties went to trial. No issue was raised regarding inadequacy of court fee and valuation made by the plaintiff. Ultimately, after trial, the suit was decreed partly. The prayer for declaration of title and recovery of possession was declined and the decree remains confined to putting up of boundary along LK

line on the west and KI line on the south of her property separating the property of the 2nd defendant after leaving space on the western side of her property for B schedule pathway at a width of 5 feet adjacent to the eastern side of AI line in Ext.C4(a) plan. Aggrieved by the refusal of the prayer for declaration of title and recovery of possession, the plaintiff preferred appeal as A.S.No.71/2007 before the District Court, Thiruvananthapuram. Therein, the 2nd defendant filed I.A.No.4022/2012 raising the question of inadequacy of court fee and wanted the lower appellate court to go into that question. The said prayer was opposed by the respondent-appellant. The court below observing that even though such a contention was taken in the written statement, no steps were taken to have such question raised and having not agitated the same, he cannot be heard to say that the said question needs to be gone into at the appellate stage. The court below was of the opinion that objection should have been taken at the first instance itself. Relying on the decision of this Court referred to in the order, the court below dismissed the Interlocutory Application.

4. Learned counsel appearing for the petitioner invited the attention of this Court to Order 41 Rule 25 of the Code of Civil Procedure and pointed out that the lower appellate court can raise additional issues if it is found that proper issues have not been raised by the trial court. Further it is pointed out that the court below is competent to raise additional issues at any point of time. Learned counsel also relied on Section 12(5) of the Kerala Court Fees and Suits Valuation Act.

5. Though the argument may look attractive at the first blush, it lacks merits. Even if the question of payment of court fee is agitated in written statement, still the court must be called upon to decide the issue before evidence of defendant begins. If it is found that the valuation shown is not proper and court fee paid is not sufficient, the plaintiff can be called upon to amend the plaint. That is why it is held that such issues have to be raised at the preliminary stage and the decision invited thereon.

6. In the case on hand, it would appear that there is no issue raised regarding inadequacy of court fee. During the trial of the suit also, there was no attempt from the side of the

defendants to have such an issue raised. As rightly noticed by the lower appellate court, except for taking a vague allegation in the written statement, it would appear that the 2nd defendant was not serious about the issue.

7. Going by Section 12(4) of the Court Fees & Suits Valuation Act, the lower appellate court is empowered to consider the sustainability of the finding entered into by the trial court regarding valuation and payment of court fee. If the lower appellate court finds that the court fee paid is not sufficient, a decision has to be rendered in that regard. The appellate court can go into that question only if it had been agitated before the trial court. In the absence of any such issues and finding in that regard by the trial court, the appellate court for the first time cannot consider that question. In the case on hand, as rightly noticed, there is no such attempt from the side of the defendants to raise such an issue. Therefore, Section 12(4) can have no application.

8. Order 41 Rule 25 CPC reads as follows:

"25. Where Appellate Court may frame issues and refer them for trial to Court whose

decree appealed from.- Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time”.

9. A plain reading of the provision shows that the lower appellate court is entitled to raise issues which are essential to decide the suit on merits. It is therefore clear that the jurisdiction of the lower appellate court to raise additional issues is restricted to those issues which are necessary to decide the case on merits and which the trial court has omitted to raise. The issue regarding suit valuation and court fee cannot be said to be one affecting the merits of the case and if that be so,

Order 41 Rule 25 CPC cannot come to the aid of the petitioner.

For the above reasons, it is found that this petition is without merits. It is accordingly dismissed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp