

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 22ND DAY OF SEPTEMBER 2015/31ST BHADRA, 1937

OP(C).No. 687 of 2015 (O)

AGAINST THE ORDER/JUDGMENT DATED 28.11.2014 IN CMA 24/2013 of
SUB COURT, CHERTHALA AGAINST ORDER/JUDGMENT IN IA 451/2012 IN
O.S.695/2008

PETITIONER(S) :

VAVACHAN AGED 80 YEARS
S/O.SANKU, ELANJITHARA NIKARTHIL, CHANDIROOR P.O.
AROOR VILLAGE, CHERTHALA TALUK, ALAPPUZHA.

BY ADVS.SRI.JIJI THOMAS PAMBACKAL
SMT.SMITHA MATHEW
SRI.P.R.ASHOK KUMAR

RESPONDENT(S) :

SASI, S/O.LATE CHEERAN
KAIPPURATH, CHANDIROOR P.O., AROOR VILLAGE
CHERTHALA TALUK, ALAPPUZHA, PIN - 688 534.

BY ADV. SRI.SHAJI THANKAPPAN

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 22-09-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS

EXT.P1: COPY OF THE SALE DEED NO.3307/2006.

EXT.P1(a): COPY OF THE SALE DEED NO. 3308/2006.

EXT.P1(b): COPY OF THE SALE DEED NO. 3309/2006.

EXT.P2: COPY OF THE LAND TAX RECEIPT DATED 30/05/2014.

EXT.P2(a): COPY OF THE LAND TAX RECEIPT DATED 10/12/2014.

EXT.P2(b): COPY OF THE LAND TAX RECEIPT DATED 11/12/2014.

EXT.P3: COPY OF THE PLAINT IN OS 695/2008 DATED 07/10/2008

EXT.P4: COPY OF THE INJUNCTION PETITION IN OS NO. 695/2008.

EXT.P5: COPY OF THE INJUNCTION ORDER DATED 10/10/2008.

EXT.P6: COPY OF THE JUDGMENT IN OS NO. 695/2008 DATED
03/03/2011.

EXT.P7: COPY OF THE IA NO. 451/2012 DATED 01/02/2012.

EXT.P8: COPY OF THE MEDICAL CERTIFICATE DATED 11/01/2012.

EXT.P9: COPY OF THE OBJECTION IN IA NO. 451/2012 DATED
10/09/2012.

EXT.P10: COPY OF THE DEPOSITION OF PETITIONER DATED
29/11/2012.

EXT.P11: COPY OF THE DEPOSITION OF DOCTOR DATED 30/01/2013.

EXT.P12: COPY OF THE ORDER DATED 05/07/2013 IN IA NO.
451/2012.

EXT.P13: COPY OF THE JUDGMENT IN CMA 24 OF 2013 DATED
28/11/2014.

EXT.P14: COPY OF THE SITE PLAN ISSUED BY THE SURVEY
DEPARTMENT.

RESPONDENT(S) ' EXHIBITS

NIL

//TRUE COPY//

PA TO JUDGE.

THOTTATHIL B.RADHAKRISHNAN, J.

OP(C) No.687 of 2015

Dated this the 22nd day of September, 2015

J U D G M E N T

- 1.The plaintiff in a suit for perpetual prohibitory injunction in relation to an item of immovable property as claimed by him is the petitioner in this petition under Article 227 of the Constitution of India.
- 2.Heard the learned counsel for the petitioner and the learned counsel for the respondent/defendant.
- 3.During the course of the suit, the plaintiff filed I.A.No.4243 of 2009 for survey and measurement of the property. The commissioner appointed in terms of the order in that interlocutory application later on reported to the court that he is unable to execute the commission in view of the fact that survey plan is not available. The plaintiff was directed to have the survey plan produced. It appears that he took certain steps. Later on, since the survey plan was not produced, the

trial court dismissed the commission application and also dismissed the suit for default. Later on, the plaintiff filed an application for restoration of the suit along with an application seeking condonation of delay of 304 days in applying to restore the suit to file. The trial court did not accept the version of the plaintiff that he was undergoing treatment and that he was incapacitated owing to physical disabilities for prosecuting the suit by having the survey plan produced and also taking further steps. Accordingly, the trial court dismissed the application seeking condonation of delay and, consequentially, the application to restore the suit to file. The appellate court has confirmed that on the specious premise that the survey plan is not yet available with the plaintiff. It also did not find its way to hold that the decision of the trial court warranted interference in the appeal.

4. One thing is certain; the plaintiff took effective steps in prosecuting the suit by filing an application for issuance of commission for local inspection and for measurement with the aid of survey plan. Obviously, if the advocate commissioner

could not execute the commission warrant, it would have been open to the trial court to ensure that the survey plan is made available to give effect to its first order appointing commission for measurement by survey. This is how the judicial process has to go forward and ensure that a litigation ends with conclusion on disputed questions. The trial court had, within its authority, ample powers in terms of the provisions of the Code of Civil Procedure to issue summons or other distress proceedings to ensure that the Revenue authorities behave by providing necessary survey plan and also assist in survey and measurement, if necessary. The courts cannot throw their hands up in despair in situations where individual citizens are unable to have a litigation appropriately adjudicated for want of necessary assistance from other limbs of governance. On the totality of the facts and circumstances, I am satisfied that this is a case where there is total failure of justice in the action of the trial court having dismissed the commission application for nonavailability of the survey plan and also, consequentially, dismissing the suit for default. Even if there was no attributable reason referable to the physical disabilities of the

plaintiff as was projected by him in his application seeking condonation of delay, the trial court ought to have taken the view that substantial justice has to be rendered to the litigants by restoring the suit to file and proceeding with the adjudication, after giving effect to the order that was initially issued on I.A.No.4243 of 2009. I have also perused the materials, on the basis of which the plaintiff showed that there was sufficient cause which prevented him from appearing before the trial court on the date on which the case stood posted and also in applying within time to have the suit restored. On the basis of the affidavit and materials filed in support of the application for restoration, there were sufficient reasons to restore the suit to file. This way also, this original petition is eligible to be succeeded.

In the result, this original petition is allowed setting aside the impugned orders and restoring O.S.No.695 of 2008 on the file of the Munsiff's Court, Cherthala to file with direction that it shall proceed from the stage at which I.A.No.4243 of 2009 stood allowed. The trial court will thereupon carry forward

proceedings in terms of its order dated 25.01.2010 on I.A.No.4243 of 2009 and proceed with the suit, in accordance with law, after giving necessary opportunity to both sides. Parties are directed to mark appearance before the court below on 26.11.2015.

(THOTTATHIL B. RADHAKRISHNAN, JUDGE)

jjg-22/9