

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

WEDNESDAY, THE 5TH DAY OF AUGUST 2015/14TH SRAVANA, 1937

OP(C).No. 2572 of 2013 (O)

**I.A.NO.1793 OF 2012 IN O.S.NO.289 OF 2011 OF THE MUNSIF COURT,
MUVATTUPUZHA**

PETITIONER(S) :

**SHAJI GEORGE,
S/O.M.J.GEORGE, MUKALIL HOUSE, MANNATHOOR KARA,
THIRUMARAY VILLAGE, MUVATTUPUZHA TAULK,
ERNAKULAM DISTRICT-686 723.**

**BY ADVS.SRI.SAJI MATHEW
SRI.DENU JOSEPH**

RESPONDENT(S) :

- 1. SMT.BETTY CHARLEY,
W/O.SRI.CHARLEY GEORGE, NELLAKKAVUMKAL HOUSE,
MANNANTHOOR KARA, THIRUMARAY VILLAGE,
MUVATTUPUZHA TALUK, ERNAKULAM DISTRICT, PIN-686 723.**
- 2. SRI.CHARLEY GEORGE,
S/O.ISAHACH GEORGE, NELLAKKAVUMKAL HOUSE,
MANNANTHOOR KARA, THIRUMARAY VILLAGE,
MUVATTUPUZHA TALUK, ERNAKULAM DISTRICT, PIN-686 723.**
- 3. SRI.SIMON,
S/O.IYPE, ELAVUMTHADATHIL HOUSE, SOUTH MARADI KARA,
MARADI VILLAGE, MUVATTUPUZHA TALUK, ERNAKUALM DISTRICT,
PIN-686 673.**

BY ADV. SRI.BOBBYMATHEW KOOTHATTUKULAM

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 05-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS :

- P1: TRUE COPY OF THE AMENDED SUIT FILED BY THE PETITIONER AS O.S NO.289/2011.**
- P2: TRUE COPY OF THE COMMISSION APPLICATION FILED AS I.A NO.1931/2011 IN O.S NO.289/2011 BY THE PETITIONER BEFORE THE MUNSIFF COURT, MUVATTUPUZHA.**
- P3: TRUE COPY OF THE COMMISSION REPORT DATED 12/07/2011 IN O.S NO.289/2011 ON THE FILE OF MUNSIFF COURT, MUVATTUPUZHA.**
- P4: TRUE COPY OF THE COMMISSION REPORT DATED 11/01/2011 IN O.S NO.504/2010 ON THE FILE OF THE MUNSIFF COURT, MUVATTUPUZHA**
- P5: TRUE COPY OF THE 2ND COMMISSION REPORT DATED 27/06/2011 FILED IN O.S NO.504/2010 ON THE FILE OF THE MUNSIFF COURT, MUVATTUPUZHA.**
- P6: TRUE COPY OF THE OBJECTION, DATED 16/08/2011 FILED BY THE PETITIONER IN EXHIBIT P3 COMMISSION REPORT IN O.S NO.289/2011 ON THE FILE FO THE MUNSIFF COURT, MUVATTUPUZHA**
- P7: TRUE COPY OF THE COMMISSION APPLICATION AS I.A NO.1793/2012 ALONG WITH THE SKETCH DATED 19/06/2012 IN O.S NO.289/2011 ON THE FILE OF MUNSIFF COURT, MUVATTUPUZHA.**
- P8: TRUE COPY OF THE ORDER DATED 25/05/2013 PASSED IN I.A.NO.1793/2012 IN O.S NO.289/2011 ON THE FILE OF THE MUNSIFF COURT, MUVATTUPUZHA.**

RESPONDENT(S)' EXHIBITS :

EXHIBIT R1(A): TRUE COPY OF THE OBJECTION.

//TRUE COPY//

P.A.TO JUDGE.

Msd.

B.KEMAL PASHA, J.

=====

O.P.(C).No.2572 of 2013

=====

Dated this the 5th day of August, 2015

J U D G M E N T

Through Exhibit P8, the court below has dismissed Exhibit P7 I.A.No.1793 of 2011. The said I.A. was filed for the appointment of a Commissioner with the assistance of a surveyor.

2. The said suit is one for declaration of an easement right claimed over B schedule pathway, for perpetual injunction from reducing the width of the B schedule pathway, etc. Initially, a Commissioner was appointed. The Advocate Commissioner prepared a report and a rough sketch prepared by him. According to the petitioner, who is the plaintiff, the said Commissioner's report is self contradictory. The petitioner has filed Exhibit P6 detailed objection in respect of the Commissioner's report. It seems

that the court below has not passed orders with regard to the acceptability or otherwise of the said Commissioner's report.

3. In the meantime, Exhibit P7 commission application was filed by the petitioner/plaintiff. It was the said application, which was dismissed by the court below through Exhibit P8 order.

4. Heard the learned counsel for the petitioner and the learned counsel for the respondents.

5. It seems that the court below has not taken a decision so far with regard to the acceptability or otherwise of the Commissioner's report in the matter. Without setting aside the said report, another Commissioner cannot be appointed for ascertaining the very same matters. Therefore, the court below ought to have taken a decision with regard to the acceptability or otherwise of the other Commissioner's report.

6. It seems that when the width of plaint B schedule item is in question, a survey of the said property and a plan

showing the lie of plaint B schedule item with measurements is required in the matter for passing an executable decree. Therefore, the visit of the Commissioner with the assistance of a Surveyor is required. Matters being so, the dismissal of Exhibit P7 I.A. has resulted in substantial miscarriage of justice and therefore, Exhibit P8 order is liable to be set aside.

7. At the same time, when the other Commissioner's report has not been set aside and the very same matters are sought to be ascertained through another Commissioner, the court below has to take a decision as to whether the earlier Commissioner's report has to be set aside, remitted, or accepted. In case, the court below takes a decision that the other Commissioner's report has to be set aside, then the court below has to appoint a fresh Commissioner with the assistance of a Surveyor. In case the court below takes a decision to remit the earlier report to the very same Commissioner, without setting aside it, or the court below takes a decision to it, the court below has to

appoint the very same Commissioner once again with the assistance of a Surveyor to note down the matters requested to in Exhibit P7.

In the result, this Original Petition (Civil) is allowed to the above extent, and Exhibit P8 stands set aside. The court below is directed to take a decision with regard to the acceptability or otherwise of the earlier Commissioner's report and then to act in accordance with the aforesaid directions.

Sd/-

B.KEMAL PASHA
JUDGE

DSV/5/8/15

The word "**accept**" is inserted after the words "**decision to**" occurring in the last line at page 3 of the judgment date 05.08.2015 in O.P.(C)No.2572 of 2013 as per order dated 09.10.2015 in I.A.12406/2015.

Sd/-

Registrar (Judicial)