

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

MONDAY, THE 8TH DAY OF JUNE 2015/18TH JYAISHTA, 1937

OP(C).No. 913 of 2015 (O)

OS.NO. 39/2013 OF SUB COURT, CHAVAKKAD

PETITIONER:

**K.KALAYANIKUTTY AMMA, AGED 85 YEARS,
W/O. LATE KALAPURAKKAL BHASKARAN NAIR,
KARAKKATTU HOUSE, PAVARATTY P.O.,
THRISSUR DISTRICT.**

BY ADV. SRI.B.RAMACHANDRAN

RESPONDENT:

**MINI K., AGED 43 YEARS,W/O.ARAVINDAKSHAN,
KALAPURAKKAL HOUSE, VENGIDANGU P.O.,
THRISSUR- 680 510 AND RESIDING AT "THIRUVATHIRA"
MAMBULLI LANE, EROOR SOUTH, TRIPUNITHURA,
KOCHI-682 031.**

BY ADV. SRI.P.MARTIN JOSE

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD
ON 08-06-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

sts

OP(C).No. 913 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

**EXHIBIT P1- TRUE COPY OF SETTLEMENT DEED NO. 469/2000 OF S.R.O.,
MULLASSERY.**

**EXHIBIT P2- TRUE COPY OF PRELIMINARY JUDGMENT DATED 19-1-2004 IN O.S.NO.
648/2000.**

**EXHIBIT P3- TRUE COPY OF FINAL DECREE DATED 31-7-2009 PASSED IN I.A.NO.
2733/2004 IN O.S.NO. 648/2000.**

**EXHIBIT P4- TRUE COPY OF ORDER DATED 19-2-2015 IN I.A.NO. 999/2014 IN I.A.NO.
913/2014 IN O.S.NO. 39/2013.**

**EXHIBIT P5- TRUE COPY OF THE ORDER DATED 23-2-2015 IN I.A.NO. 913/2014 IN
O.S.NO. 39/2013.**

RESPONDENT(S)' EXHIBITS:

NIL

/TRUE COPY/

P.A.TO JUDGE

sts

B. KEMAL PASHA, J.

.....
O.P.(C) No.913 of 2015
.....

Dated this the 8th day of June, 2015

J U D G M E N T

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I.A.913/2014 and I.A.999/2014 have seen filed in OS.39/2013 of the Subordinate Judge's Court, Chavakkad. IA.999/2014 was filed by the petitioner herein for the stay of the proceedings in OS.39/2013 on account of the pendency of OS.373/2011. OS.373/2011 is filed as a suit for partition. By taking up a plea that the plaintiff in the said suit had obtained right by birth for a share in the properties in the said suit which were also the subject matter in OS.648/2000. OS.39/2013 has been filed in order to get the judgment and decree in OS.648/2000 set aside on the ground of fraud and collusion and also for fixation of boundary. There are common properties also in both the suits.

2. I.A.913/2014 was filed by the respondents herein

as petitioners seeking issuance of a Commission with the assistance of a surveyor. Through Ext.P4, the court below has dismissed IA.999/2014. Vide Ext.P5 order, the court below has allowed IA.913/2014. These orders are under challenge.

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

4. On hearing the question of Section 10 CPC, it seems that presently, there is nothing to show that Section 10 CPC can be pressed into service in these matters. The relief sought for in both the suits are totally different. OS.373/2011 is one for partition filed by the plaintiff claiming that they have acquired a right by birth over the property in question. According to them, they were not made parties in OS.648/2000. They have in fact alleged that they were not in the know-how of the existence of the earlier suit also. OS.39/2013 is one for fixation of boundary and also for getting the judgment and decree in OS.648/2000 set aside.

The relief sought for in both the suits are totally different. The cause of action are also totally different. It cannot be said that all the properties involved in both the suits are the same. The issues involved in OS.373/2011 are not directly and substantially in question in OS.39/2013. Matters being so, there is absolutely nothing to take a different view than what has been taken by the court below in Ext.P4 order.

5. Regarding the issuance of a commission, the only argument that has been set up by the learned counsel for the petitioner is that the petitioner is a old woman of 85 and she would be put to the ordeal of participating in the measurement of the property which has a total extent of around 7 acres. That does not mean that the property in the suit should not be identified, especially when a relief of fixation of boundary has been sought for in the suit. Without a survey plan, a valid decree cannot be passed even if the plaintiff in the suit is entitled to get a decree. An attempt to consider the question of maintainability of both the suits

cannot be made in these proceedings as the same has to be decided by the court below in both the suits. Of course, the petitioner can take up the question of maintainability in both the suits before the court below and in such case, the court below shall decide those questions. Presently, I do not find anything to interfere with Ext.P4 and Ext.P5 orders. Matters being so, this OP(Civil) is devoid of merits and is only to be dismissed, and I do so.

In the result, this OP(Civil) is dismissed.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/08/06

// True Copy //

PA to Judge