

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

TUESDAY, THE 2ND DAY OF JUNE 2015/12TH JYAISHTA, 1937

OP(C).No. 925 of 2015 (O)

PETITIONER :

**M.M.JOHN @ BENNY, AGED 49 YEARS,
S/O.MATHAI, PALATHINKAL VEETIL, THAMARACHAIPRAM,
KIZHAKKAMBALAM VILLAGE, ERNAKULAM DISTRICT.**

BY ADV. SRI.SAJEEV KUMAR K.GOPAL

RESPONDENTS :

- 1. ELAMMA,
W/O.THOMAS, KACHAPPILLY VEETIL, THAMARACHALPRAM,
KIZHAKKAMBALAM VILLAGE, ERNAKULAM DISTRICT-PIN-683562.**
- 2. BABY,
S/O.THOMAS, KACHAPPILLY VEETIL, THAMARACHALPRAM
KIZHAKKAMBALAM VILLAGE, ERNAKULAM DISTRICT - PIN-683562.**
- 3. GEORGE,
S/O.THOMAS, KACHAPPILLY VEETIL, THAMARACHALPRAM
KIZHAKKAMBALAM VILLAGE, ERNAKULAM DISTRICT-PIN-683562.**
- 4. SAJU,
S/O.THOMAS, KACHAPPILLY VEETIL, THAMARACHALPRAM
KIZHAKKAMBALAM VILLAGE, ERNAKULAM DISTRICT-PIN-683562.**
- 5. ELIKUTTY,
W/O.ANTONY, KACHAPPILLY VEETIL, THAMARACHALPRAM
KIZHAKKAMBALAM VILLAGE, ERNAKULAM DISTRICT-PIN-683562.**
- 6. MINI,
D/O.ELIKUTTY, KACHAPPILLY VEETIL, THAMARACHALPRAM
KIZHAKKAMBALAM VILLAGE, ERNAKULAM DISTRICT-PIN-683562.**

R1 TO R5 BY ADV. SRI.P.THOMAS GEEVERGHESE

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 02-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

bp

OP(C).No. 925 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1: TRUE COPY OF THE NOTICE ISSUED BY THE ASSISTANT EXECUTIVE
ENGINEER DATED 05.03.2015.

EXT.P2: TRUE COPY OF THE PLAINT IN O.S.78 OF 2015 OF MUNSIFF'S
COURT,PERUMBAVOOR.

EXT.P3: TRUE COPY OF THE ORDER IN I.A.501 OF 2015 IN O.S.78 OF 2015 OF
MUNSIFF'S COURT,PERUMBAVOOR DATED 25-02-2015.

EXT.P4: TRUE COPY OF THE REPORT OF THE ADVOCATE COMMISSIONER IN O.S.78
OF 2015 OF MUNSIFF'S COURT,PERUMBAVOOR DATED 27-02-2015

EXT.P5: TRUE COPY OF THE I.A.647 OF 2015 IN O.S.68 OF 2015 OF MUNSIFF'S
COURT,PERUMBAVOOR DATED 11-03-2015.

EXT.P6: TRUE COPY OF THE OBJECTION OF THE PETITIONER IN O.S.78/2015 OF
MUNSIFF'S COURT,PERUMBAVOOR DATED 13-03-2015.

EXT.P7: TRUE COPY OF THE ORDER PASSED BY THE MUNSIFF'S
COURT,PERUMBAVOOR IN I.A.647 OF 2015 DATED 13-03-2015.

RESPONDENT(S)' EXHIBITS : NIL.

//TRUE COPY//

P.A. TO JUDGE

bp

B.KEMAL PASHA, J.

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O.P.(C). No.925 of 2015

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Dated this the 2nd day of June, 2015

J U D G M E N T

O.S.No. 78 of 2015 is a suit filed by the petitioner herein before the court below seeking a decree of permanent prohibitory injunction restraining the respondents from removing the ordinary earth from either sides of his property, i.e., on its eastern side as well as the western side. He wants to see the lateral support of his property protected.

2. The case of the petitioner is that the respondents have got properties at the eastern side and western side of his property. As they had attempted to excavate soil from the eastern and western sides, he was forced to file the suit. The respondents have not so far preferred any counter

claim in the suit. A canal is passing through the southern side of the properties of the petitioner as well as the respondents. The case of the petitioner is that the respondents have filed I.A.No.647 of 2015 before the court below for getting a Commissioner appointed with the assistance of a Surveyor for cooking up evidence to another case and not to the present suit.

3. Notice has been served on the respondents. There is no representation for the respondents. Heard the learned counsel for the petitioner.

4. The learned counsel for the petitioner has pointed out that the matters in controversy in the suit is with regard to the rights of the respondents to remove soil from the eastern side and the western side of the property of the petitioner. Anything relating to the southern boundary of the plaint schedule property or the existence of any road out side through the southern boundary of the plaint schedule property, is not a matter in controversy in the suit. It seems that Exhibit P5 application has been filed by the

respondents as petitioners, as I.A.No.647 of 2015.

5. The petitioner has filed a detailed objection in respect of Exhibit P5 I.A., contending that the matters requested to be ascertained through the Commissioner in Exhibit P5, are not matters in controversy in the suit and are not matters even related to the suit. It seems that the court below in a casual manner has passed Exhibit P7 order by stating that no objection has been filed. The contentions put forwarded by the petitioner have not been considered by the court below. The impugned order is liable to be set aside.

In the result, this Original Petition (Civil) is allowed and the impugned order is set aside. The matter is left open and is remitted to the court below for fresh disposal, in accordance with the law, by considering Exhibit P6 objection filed by the petitioner.

Sd/-

B.KEMAL PASHA
JUDGE