

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

MONDAY, THE 22ND DAY OF JUNE 2015/1ST ASHADHA, 1937

OP(C).No. 1053 of 2015 (O)

I.A. NO.515/2015 IN O.S. NO.432/2010 OF ADDITIONAL MUNSIFF COURT, KOCHI.
.....

PETITIONER/PLAINTIFF:

**ST.LOUIS CHURCH, MUNDAMVELI P.O, KOCHI-682 507,
REPRESENTED BY ITS VICAR FR.ANTONY KOCHUKARIYIL,
MUNDAMVELI, KOCHI- 682 507, ERNAKULAM DISTRICT.**

**BY ADVS.SRI.P.K.GEORGE,
SMT.SMITHA GEORGE.**

RESPONDENT/DEFENDANT:

**EASI, S/O.LONAN,
PULICHUMACHAL HOUSE, MUNDAMVELI,
KOCHI- 682 507, ERNAKULAM DISTRICT.**

**BY ADVS. SRI.G.KRISHNAKUMAR,
SRI.B.S.SURAJ KRISHNA.**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 22-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

rs.

OP(C).No. 1053 of 2015 (O)

APPENDIX

PETITIONER'S EXHIBITS:-

- EXT.P1. TRUE COPY OF THE PLAINT OIN O.S.NO.432/2010 ON THE FILE OF THE ADDITIONAL MUNSIFF'S COURT, KOCHI.
- EXT.P2. TRUE COPY OF THE WRITTEN STATEMENT IN O.S.NO.432/2010 ON THE FILE OF THE ADDITIONAL MUNSIFF'S COURT, KOCHI.
- EXT.P3. TRUE COPY OF THE I.A.NO.515/2015 IN O.S.NO.432/2010 ON THE FILE OF THE ADDITIONAL MUNSIFF'S COURT, KOCHI.
- EXT.P4. TRUE COPY OF THE COUNTER AFFIDAVIT IN I.A.NO.515/2015 IN O.S.432/2010 ON THE FILE OF THE ADDITIONAL MUNSIFF'S COURT, KOCHI.
- EXT.P5. TRUE COPY OF THE ORDER DATED 04.04.2015 IN I.A.NO.515/2015 IN O.S.NO. 432/2010 ON THE FILE OF THE ADDITIONAL MUNSIFF'S COURT, KOCHI.

RESPONDENT'S EXHIBITS:- NIL.

//TRUE COPY//

P.S. TO JUDGE

rs.

B.KEMAL PASHA, J.

.....
O.P.(C) No. 1053 of 2015
.....

Dated this the 22nd day of June, 2015

J U D G M E N T

A suit for fixation of boundary is filed by alleging that a portion of the plaint schedule property was trespassed upon by the defendant and that he has kept some materials on such portions and made some constructions also on such portions. For getting those materials and constructions removed, a relief of mandatory injunction has also been sought for. The said suit was initially decreed *ex parte*. Around an year later, the defendant filed an application under Order IX Rule 13 of the Code of Civil Procedure for getting the *ex parte* decree set aside. That application was allowed and the *ex parte* decree was set aside. Thereafter,

the plaintiff filed an application for amending the plaint by incorporating the relief of recovery of possession based on title, instead of the relief of mandatory injunction sought for in the original plaint. It seems that the court below has dismissed that IA through Ext.P5 order.

2. Heard the learned counsel for the petitioner and the learned counsel for the respondent.

3. It seems that in passing Ext.P5 order the court below has not considered the fact that the original suit was decreed *exparte*. It was after one year, the said *exparte* decree was set aside. Immediately after that IA 515/2015 has been filed by the petitioner seeking such an amendment. This is not a case wherein there was no relief sought for; whereas the relief of mandatory injunction sought for, was inadequate. According to the petitioner, true that such a relief could have been asked for only when there was a licence. When there was a forcible dispossession or forcible encroachment into the portion of the property, the

relief sought for should have been one for recovery of possession based on title. The court below has not considered those aspects. Therefore, this Court is of the view that IA 515/2015 requires reconsideration by the court below, for which Ext.P5 order has to be set aside.

In the result, this Original Petition is allowed. Ext.P5 order stands set aside. The court below is directed to reconsider IA 515/2015 and pass appropriate orders in accordance with law, after giving an opportunity of being heard, to both the parties.

Sd/- B.KEMAL PASHA, JUDGE

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[True copy]

P.S. to Judge