

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

MONDAY, THE 23RD DAY OF NOVEMBER 2015/2ND AGRAHAYANA, 1937

OP(C).No. 1285 of 2015 (O)

AS 133/2011 OF ADDL.DISTRICT COURT, KOTTAYAM.
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PETITIONER:

**JOY JOHNSON @ CHACKO, AGED 55 YEARS,
MALARICKAL BHAGATH PARUVAKALATHIL,
KILIROOR KARA, THIRUVARPPU VILLAGE,
KOTTAYAM TALUK.**

BY ADV. SRI.MATHEW PHILIP EDAPPALLIL

RESPONDENT:

**MANOJ, AGED 35 YEARS, S/O PAPPAN,
MALARICKAL BHAGATH PARAVAKALATHIL,
KILIROOR KARA, THIRUVARPPU VILLAGE,
KOTTAYAM TALUK - 686 020.**

**BY ADVS. SRI.MATHEW JOHN (K)
SRI.DOMSON J.VATTAKUZH**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 23-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

mbr/

OP(C).No. 1285 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS:

- EXT.P1 : TRUE COPY OF PLAINT IN O.S.128/10 BEFORE MUNSIFF COURT KOTTAYAM.
- EXT.P2 : TRUE COPY OF WRITTEN STATEMENT IN O.S.NO 128/2010 BEFORE MUNSIFF COURT KOTTAYAM.
- EXT.P3 : TRUE COPY OF THE COMMISSION REPORT.
- EXT.P4 : TRUE COPY OF JUDGMENT DATED 22/2/11 IN O.S.NO.128/10 BEORE ADDL. MUNSIFF COURT, KOTTAYAM.
- EXT.P5 : TRUE COPY OF APPEAL MEMORANDUM IN A.S.NO.133/11 BEORE ADDL.DISTRICT COURT, KOTTAYAM.
- EXT.P6 : TRUE COPY OF COMMISSION APPLICATION IN I.A. 117/2015 IN A.S.NO.133/11 BEORE ADDL.DISTRICT COURT, KOTTAYAM.
- EXT.P7 : TRUE COPY OF COMMON ORDER DATED 17/3/2015 IN A.S.NO.133/11 BEORE ADDL.DISTRICT COURT, KOTTAYAM.
- EXT.P8 : TRUE COPY OF CASE LAW REPORTED VIDE 1984 KLT 235.
- EXT.P9 : TRUE COPY OF CASE LAW REPORTED VIDE 1987 (1) KLT 355.

RESPONDENT(S)' EXHIBITS: NIL

//TRUE COPY//

P.S. TO JUDGE

mbr/

K. ABRAHAM MATHEW, J.

O.P.(C)No.1285 of 2015

Dated this the 23rd day of November, 2015

J U D G M E N T

Petitioner is the appellant in AS.133 of 2011 of Additional District Court, Kottayam. In the appeal he filed Ext.P6 application to appoint a commissioner. The learned District Judge posted it to be heard along with the appeal. The petitioner filed an application to review the order. By Ext.P7 order that has been dismissed. This is challenged.

2. Heard.

3. It appears that the petitioner filed commission application on the basis of certain observations in the judgment of the trial court. The learned District Judge has observed that as the commission report already available in the case has not been set aside, a second application cannot be allowed. But he should have noted that a second commission application cannot be allowed only if the prayer is to ascertain the very same facts already ascertained by the first commissioner. To appoint a commissioner to ascertain new facts there is no legal impediment.

4. It is also stated that the trial court has made an observation that measurement of the property was necessary. The suit is for declaration of easement right. The plaintiff admits defendant's title to and possession of the plaint-C schedule property. Measurement on the property on the basis of title deeds and survey plan is unnecessary as question of title is not at all in dispute. On the facts of the case it is sufficient that a direction is issued to the learned District Judge to consider the commission application at the time of hearing of the appeal. If the District Judge feels that the facts sought to be ascertained are necessary for the first decision of the dispute he may allow it with appropriate conditions.

In the result this OP is disposed of with the above observation.

sd/-

**K. ABRAHAM MATHEW
JUDGE**

R.AV

//True Copy//

PA to Judge