

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

WEDNESDAY, THE 29TH DAY OF JULY 2015/7TH SRAVANA, 1937

OP(C).No. 1008 of 2014 (O)

CMA.NO. 3/2013 OF SUB COURT, VADAKARA

PETITIONERS:

1. **BROTHERS ARTS AND SPORTS CLUB,
REGISTERED UNDER THE SOCIETIES REGISTRATION ACT
HAVING REGISTRATION NO.277/89, VANIMEL,
VELLIYODE AMSOM, BHOOMIVATHUKKAL DESOM, KODIYURA.P.O,
VADAKARA TALUK, REPRESENTED BY ITS SECRETARY MR.MOHAMMED.**
2. **MR.MOHAMMED, S/O.ABDULLA HAJI, SECRETARY,
BROTHERS ARTS AND SPORTS CLUB,
RESIDING AT MAVULLA PARAMBATH, VELLIYODE AMSOM,
BHOOMIVATHUKKAL DESOM, KODIYURA.P.O, VADAKARA TALUK.**
3. **BASHEER POYIL,S/O.MAMMU HAJI, AGED 28 YEARS,
PRESIDENT, BROTHERS ARTS AND SPORTS CLUB,
RESIDING AT KUNHIPARAMBATH, VELLIYODE AMSOM,
BHOOMIVATHUKKAL DESOM, KODIYURA.P.O, VADAKARA TALUK.**
4. **SAHEER, S/O.MAMMOOTTY,AGED 26 YEARS,
RESIDING AT PEEDIKAKANDI,VELLIYODE AMSOM,
BHOOMIVATHUKKAL DESOM, KODIYURA.P.O.,
VADAKARA TALUK.**
5. **AMMAD,S/O.KUNHALI, AGED 29 YEARS,
RESIDING AT PADINJARAPARAMBATH,
VELLIYODE AMSOM, BHOOMIVATHUKKAL DESOM,
KODIYURA.P.O., VADAKARA TALUK.**

**BY ADVS.SRI.V.RAMKUMAR NAMBIAR
SRI.T.K.KUNHABDULLA**

RESPONDENT(S) :

1. **MAYANKUTTY.N.K., S/O AMMAD HAJI,AGED 53 YEARS,
RESIDING AT NARAYANKANDIYIL,VELLIYODE AMSOM,
BHOOMIVATHUKKAL DESOM, KODIYURA.P.O,
VADAKARA TALUK, PRESENTLY EMPLOYED AT DOHA,
P.B.NO.2535, QATAR, REPRESENTED BY POWER OF ATTORNEY HOLDER,
KUNHABDULLA.N.K, AGED 50 YEARS, S/O.AMMAD HAJI,
RESIDING AT NARAYANKANDIYIL, VELLIYODE AMSOM,
BHOOMIVATHUKKAL DESOM, KODIYURA.P.O, VADAKARA TALUK.**

OP(C).NO.1008/2014

2. KUNHALI, S/O.AMMAD HAJI,AGED 44 YEARS,
RESIDING AT NARAYANKANDIYIL,
VELLIYODE AMSOM, BHOOMIVATHUKKAL DESOM,
VANIMEL VILLAGE, KODIYURA.P.O., KALACHI VIA,
VADAKARA TALUK,PRESENTLY EMPLOYED AT AL-GHARIYA RESORT,
P.B.NO.70345, DOHA, QATAR,
REPRESENTED BY POWER OF ATTORNEY HOLDER,
KUNHABDULLA.N.K, AGED 50 YEARS, S/O.AMMAD HAJI,
RESIDING AT NARAYANKANDIYIL, VELLIYODE AMSOM,
BHOOMIVATHUKKAL DESOM, KODIYURA.P.O, VADAKARA TALUK.
3. MOIDU, S/O.KUNHALI, AGED 58 YEARS,
RESIDING AT KUMULLAPARAMBATH,
VELLIYODE AMSOM, BHOOMIVATHUKKAL DESOM,
KODIYURA.P.O., VADAKARA TALUK.

R2 BY ADV. SRI.M.P.SREEKRISHNAN

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD
ON 29-07-2015,ALONG WITH OP(C).NO.1254 OF 2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

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OP(C).No. 1008 of 2014 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1 COPY OF THE PLAINT IN O.S.48 OF 2011 FILED BY RESPONDENTS 1 AND 2 BEFORE THE MUNSIF'S COURT, NADAPURAM.
- EXT.P2 COPY OF THE AFFIDAVIT AND INTERLOCUTORY APPLICATION IN I.A.171/2011 IN O.S.48/2011 BEFORE THE MUNSIF'S COURT, NADAPURAM.
- EXT.P3 COPY OF THE COUNTER STATEMENT FILED BY THE PETITIONERS HEREIN IN I.A.171/2011 IN O.S.48/2011 BEFORE THE MUNSIF'S COURT, NADAPURAM.
- EXT.P4 COPY OF THE ORDER OF THE MUNSIF'S COURT,NADAPURAM IN I.A.171/2011 IN O.S.48/2011 DATED 05.02.2011
- EXT.P5 COPY OF THE JUDGMENT IN C.M.A.1/2011 RENDERED BY THE LEARNED SUBORDINATE JUDGE,VADAKARA DATED 10.07.2012.
- EXT.P6 COPY OF THE AFFIDAVIT AND PETITION IN I.A.98/2013 IN O.S.48/2011 FILED BY THE RESPONDENTS BEFORE THE MUNSIF'S COURT, NADAPURAM
- EXT.P7 COPY OF THE COUNTER STATEMENT FILED BY THE PETITIONERS HEREIN IN I.A.98/2013 IN O.S.48/2011 OF THE MUNSIF'S COURT,NADAPURAM
- EXT.P8 COPY OF THE ORDER IN I.A.98/2013 IN O.S.48/2011 OF THE MUNSIF'S COURT, NADAPURAM
- EXT.P9 COPY OF THE JUDGMENT IN C.M.A.3/2013 DATED 17.02.2014 PASSED BY THE SUBORDINATE COURT,VADAKARA.

RESPONDENT(S)' EXHIBITS:

NIL

/TRUE COPY/

P.S.TO JUDGE

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B. KEMAL PASHA, J.

.....
O.P.(C) Nos. 1008 of 2014 &
O.P.(C) Nos. 1254 of 2015
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Dated this the 29th day of July, 2015

J U D G M E N T

It seems that a Commissioner was appointed in the suit and the Commissioner has filed Ext.P2 report. In the last paragraph of Ext.P2 Commissioner's report, the Commissioner has clearly mentioned about the CD containing the still photographs, and also another video CD which show the then nature of the property, the trees thereon and the bamboo posts planted there, which were prepared and produced before the court below by the commissioner along with Ext.P2.

2. It seems that while dealing with the interlocutory application, the court below has placed reliance on the CD containing photographs produced by the Commissioner, along with Ext.P2. When finally the Commissioner was examined before the court below, it seems that strangely the Commissioner has deviated from his earlier stand and has disowned the CD containing the photographs as well as the video CD. It seems that the Commissioner has gone to the extent of stating before the court below that the CD containing the still photographs and the video CD were not recorded in his presence.

3. The learned counsel for the petitioners wanted to put questions under Section 154 of the Indian Evidence Act to the Commissioner, as the Commissioner had explicitly exhibited a hostile stand. The learned counsel for the petitioner wanted to put certain questions, which could be put in cross-examination to the Commissioner, for challenging the stand taken by the Commissioner, for which

the CD containing the still photographs as well as the video CD were to be made use of. The court below was not prepared to permit the petitioners to adopt such a method and denied such an opportunity to the petitioners through Ext.P8 order.

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

5. Learned counsel for the respondents opposes the Original Petition on the ground that the petitioners ought to have filed an application for getting the evidence in the matter reopened. It seems that Ext.P2 Commissioner's report has already been marked before the court below. Ext.P2 clearly states that such a CD containing photographs and the video CD were prepared by the Commissioner, or at least in the presence of the Commissioner and he had produced that CD containing the still photographs as well as the video CD before the court below along with Ext.P2 report. The Advocate Commissioner appointed by the court

below ought not to have deviated from the stand taken by him in Ext.P2. When he was examined before the court below, quite unexpectedly, it seems that the Commissioner had turned hostile to his own stand, which is unbecoming of an officer of the court. The petitioners have reproduced the versions made by the Commissioner when examined before the court below, in Ext.P7 application. The said versions clearly show that those versions made by the Commissioner are not expected from an Advocate Commissioner appointed by a court. In such a context, the court below ought to have permitted the learned counsel for the petitioner to have recourse to section 154 of the Indian Evidence Act.

6. Adding insult to the injury, it seems that the court below has passed Ext.P8 order, which cannot be justified at all. Ext.P8 is totally misconceived. When those CDs were produced by the Commissioner along with Ext.P2 Commissioner's report, the court below ought to have permitted the petitioners to make use of the said CD

containing the still photographs as well as the video CD, to confront the said witness as contemplated under Section 154 of the Indian Evidence Act.

7. When the Commissioner's report has been marked in evidence, separate proof of CD containing the still photographs as well as video CD are not required. When the CD and the video CD were produced by the Commissioner along with the Commissioner's report by specifically mentioning the same in the report as evidences collected by him during his visit of the property in execution of the Commission Warrant, the said CD and the video CD stand automatically proved on the proof of the Commissioner's report. The court below is bound to look into the contents of the CD containing the still photographs as well as the video CD, when the Commissioner's report has already been marked in evidence.

8. In fact, the attempt of the court below through Ext.P8 is nothing but to shutout evidence. The effect of the

said order is nothing but aiding a witness of the above kind to depose anything according to his whims and fancies before a court of law. The Commissioner ought to have understood that by collecting evidence through local inspection as authorised and appointed as an officer of the court, he was discharging a solemn function. Ext.P8 order passed by the court below is wholly erroneous, illegal and improper and therefore, the same is liable to be set aside.

9. On going through the contents of OP(C)1008/2014 and on hearing the learned counsel for both parties, it seems that the said OP has become virtually infructuous. Hence, OP 1008/2014 is dismissed as infructuous.

10. In the result, O.P.No.1254 of 20015 is allowed, and Ext.P8 order stands set aside. The court below is directed to reopen the evidence, and re-summon the Commissioner for enabling the petitioners to examine the Commissioner under Section 154 of the Indian Evidence Act. The court below shall give sufficient opportunity to the

O.P.(C) 1008/14 & 1254/15

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petitioners to confront the Commissioner/witness with the contents of the CD containing the still photographs as well as the video CD.

ul/-

Sd/- B.KEMAL PASHA, JUDGE

[True copy]

P.S. to Judge