

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

TUESDAY, THE 20TH DAY OF OCTOBER 2015/28TH ASWINA, 1937

RFA.No. 495 of 2009 ()

**AGAINST THE ORDER/JUDGMENT IN OS 116/1990 of PRINCIPAL SUB COURT,
THALASSERY DATED 20-12-2008**

APPELLANT(S)/DEFENDANTS:

- 1. K.K.JAMALUDHEEN, S/O.KOCHU MOIDU, AGED 64 YEARS
PIONEER LATEX INDUSTRIES, KUTHUPARAMBA AMSOM
NARAVOOR DESOM, P.O.PALAPARAMBA, THALASSERY TALUK
KANNUR DISTRICT.**
- 2. K.K.HYDER,S/O.KOCHU MOIDU,AGED 58 YEARS,
PIONEER LATEX INDUSTRIES, KUTHUPARAMBA AMSOM
NARAVOOR DESOM, P.O.PALAPARAMBA, THALASSERY TALUK
KANNUR DISTRICT.**
- 3. PARAMBATHKANDY V.K.SHANAVAS,
S/O.MOHAMMAD, AGED 52 YEARS, PIONEER LATEX
INDUSTRIES, KUTHUPARMBA AMSOM, NARAVOOR DESOM
P.O.PALAPARAMBA, THALASSERY TALUK, KANNUR DISTRICT.**

BY ADV. SRI.R.SURENDRAN

RESPONDENT(S)/PLAINTIFFS NO.2 AND SUPPLEMENTAL PLAINTIFFS NO. 3 TO 6:

- 1. M/S.AYSHA HOSIERY FACTORY (P) LTD.,
PALAPARAMBA REPRESENTED BY THE MANANGING DIRECTOR
AYSHA HOSIERY FACTORY(P)LTD., PALAPARAMBA.**
- 2. P.K.KAMORUNNISSA,W/O.LATE P.K.MOIDU,
AGED 54 YEARS, HOUSEWIFE, RESIDING AT 5C
CRESCENT, MANOR APARTMENTS, NEAR BALMATTAROAD
MANGALORE, KARNATAKA.**
- 3. P.K.FAIZAL MOIDU,S/O.LATE P.K.MOIDU,
AGED 34 YEARS, RESIDING AT 5C, CRESCENT MANOR
APARTMENTS, NEAR BALMATTAROAD, MANGALORE
KARNATAKA.**
- 4. P.K.FARZANA MOIDU,D/O.LATE P.K.,MOIDU,
AGED 30 YEARS, RESIDING AT 5C, CRESCENT MANOR
APARTMENTS, NEAR BALMATTAROAD, MANGALORE
KARNATAKA.**

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**5. P.K.FAHAD MOIDU,S/O.LATE P.K.MOIDU,
AGD 21 YEARS, RESIDING AT 5C, CRESCENT MANOR
APARTMENTS, NEAR BALMATTA ROAD, MANGALORE
KARNATAKA.**

**R1 TO 5 BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.)
R1 TO 5 BY ADV. SRI.JAYANANDAN MADAYI PUTHIYAVEETIL
R1 BY ADV. SRI.B.KRISHNAN
R1 BY ADV. SRI.R.PARTHASARATHY
R1-R5 BY ADV. SRI.K.V.PAVITHRAN**

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
20-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

R.AV

K. ABRAHAM MATHEW, J.

R.F.A.No.495 of 2009

Dated this the 20th day of October, 2015

J U D G M E N T

This appeal arises from the judgment and the decree in O.S.No.116 of 1990 on the file of Prl Sub Court, Thalassery. The appellants are the defendants. Plaint A schedule property was part of 6.92 acres which belonged to Randupura tarawad. It was in the possession of one Ummayya Hajjumma under a 'Kettiyatakkam kanam' deed of 1934. In a court auction she purchased the jenmom right also. Out of the 6.92 acres she leased out 6.14 acres to Payyanadan Mannan in 1935 by a registered 'marupat' deed. Later, he surrendered 1.07 acres for the purpose of construction of a road. Thus Ummayya Hajjumma had 1 acre 85 cents in her ownership and possession. This is the plaint A schedule property. In 1971 she leased out 358.19 acres including 78 cents which is a part of the plaint A schedule property to the second plaintiff company for industrial purposes. The company continues to be a tenant. On the death of Ummayya Hajjumma in 1979 her property devolved on her children including the first

plaintiff, who was the full time director of the second plaintiff company. He was in possession of the plaintiff schedule property on behalf of all the legal heirs of Ummayya Hajjamma and as director of the second plaintiff company. Recently defendants purchased a small extent adjoining the plaintiff A schedule property from the legal heirs of Mannan. There is no boundary separating the two properties. After the institution of the suit the defendants trespassed into a portion of the plaintiff A schedule property and constructed 4 buildings and a tank and put up two pillars. On these allegations the plaintiffs prayed for declaration of title to and possession of plaintiff A schedule property. As an alternative relief they prayed for a recovery of the trespassed area which is described in the plaintiff B schedule. They also prayed for a mandatory injunction directing the defendants to demolish and remove the constructions they made and the pillars they put up and for a perpetual injunction prohibiting from trespassing into the plaintiff schedule property. In the written statement the defendants raised a contention that the allegation of the plaintiffs having possession of plaintiff A schedule property is false. According to the defendants, the

second plaintiff company is in possession of 78 cents, but the remaining extent claimed by the plaintiff is in the ownership and possession of the third defendant. They further contended that the properties of the plaintiffs and the defendants are separated by a public road which was part of the plaintiffs property and there is a mud wall along the boundary of the defendants' property. Their case is that plaint B schedule property is in their ownership and possession and the allegation of trespass is false. Learned Sub Judge accepted the plaintiffs' case and declared their title to the plaint B schedule property and allowed them to recover it from the defendants. He also directed the defendants by a mandatory injunction to demolish the constructions they made in it.

2. When the matter was taken up for hearing the learned senior counsel appearing for the respondents submitted that the second plaintiff company does not claim any right in the property.

3. Properties claimed by the parties concerned are adjoining properties. The plaintiffs' property is situated to the north of the defendants' property. The two properties are comprised in re-survey No.151 of Kaivelly village. The

total extent in that survey No is 6.92 acres, which is not disputed. The answers to the questions arising for consideration depend upon the identification of the properties on the basis of the title deeds of the parties and the survey plan. The commissioner deputed by the trial court for the said purpose filed his report along with Ext.C3 plan. The trial court accepted it as correct and on the basis of it passed the decree in favour of the plaintiffs.

4. No application had been filed by any of the parties to set aside the report. But it is settled law that even if any of the parties does not file application to set aside the report, the court can set it aside if there are grounds to reject it.

5. Ext.A1 kanam deed of 1934 is the earliest document in respect of the properties involved in the suit. Thereafter, there have been several transactions. The properties claimed by the first plaintiff consisted of two plots ('taks'). The description of the properties given in the documents produced in the case shows that it is difficult to know the exact situation of the two plots; there are some discrepancies in the description of the properties. The measurements are given in '6 foot kole'

A pathway is shown as the northern boundary of the plot No.1. It appears that this pathway ran along the northern boundary of plot No.2 also. But that will not help to solve the problem. At present there is a public road in the locality. There is no material either to accept or reject the argument that the pathway mentioned in the title deeds is the present road.

6. Coming to the property covered by the title deed of the defendants, it also does not help the court to correctly identified the property. So the identity of the property depends upon other factors.

7. Ext.C3 is the plan accepted by the trial court. In it, the northern boundary of the plaintiffs' properties is shown as road, which now exists in the locality. The plaintiffs and the defendants are shown to be in possession of 1 acre 7 cents each in re-survey No.151. If the plan is correct, it will prove the plaintiffs' allegation of trespassed by the defendants.

8. The basis of measurement is the yellow line shown in Ext.C3, which is said to be the line separating the properties of the plaintiffs and the defendants. It is given in 'kole' measurements. But how the commissioner

determined this line is not known. Moreover, it has been brought to the notice of the court that the total extent of plots A and B, which are said to be the properties of the plaintiffs and the defendants respectively, is only 115 cents. It means that the extent of the property shown in Ext.C3 plan is wrong. This certainly affects the identity of the properties. It follows that on the basis of Ext.C3 plan the court cannot take a decision. Necessarily, the matter has to be sent back to the court so that the parties may take out a fresh commission to measure the properties on the basis of available documents.

In the result, this appeal is allowed. The impugned judgment and the decree are set aside. The trial court is directed to depute a commissioner again or to appoint a new commissioner to measure the properties on the basis of survey plan and the title deeds. The court fees paid on the appeal memorandum will be refunded. The parties will bear the costs.

sd/-

K. ABRAHAM MATHEW
JUDGE

R.AV

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PA to Judge