

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

WEDNESDAY, THE 20TH DAY OF MAY 2015/30TH VAISAKHA, 1937

OP(C).No. 1240 of 2014 (O)

O.S.NO.110/2011 OF SUB COURT, PERUMBAVOOR

PETITIONER(S) :

**INDIRA, AGED 68 YEARS,
W/O.LATE BALAKRISHNAN NAIR, RESIDING AT MAYA VILASAM,
(JANAKI MANDIRAM), PERUMBAVOOR.P.O., PERUMBAVOOR KARA,
PERUMBAVOOR VILLAGE, KUNNATHUNADU TALUK,
ERNAKULAM DISTRICT.**

**BY ADVS.SRI.G.RAJAGOPAL
SMT.S.LEELALAKSHMI
SMT.N.RENJINEE DEVI**

RESPONDENT(S) :

**P.A.SUKUMARAN, AGED 49 YEARS,
S/O. ACHUTHAN, PLANKUDY HOUSE, VATTACKATTUPADY BHAGOM,
IRINGOLE KARA, PERUMBAVOOR VILLAGE, KUNNATHUNADU TALUK,
ERNAKULAM DISTRICT, PIN-683 545.**

**BY ADVS. SRI.S.VINOD BHAT
SRI.LEGITH T.KOTTAKKAL**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 20-05-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS

- P1: TRUE PHOTOCOPY OF THE DOCUMENT DATED 25-05-2010 WITH SIGNATURE OF MR. B.RAJAGOPAL.
- P2: TRUE PHOTOCOPY OF THE PLAINT IN O.S. NO. 110 OF 2011 ON THE FILES OF THE SUBORDINATE JUDGES COURT, PERUMBAVOOR.
- P3: TRUE PHOTOCOPY OF THE WRITTEN STATEMENT OF THE 1ST DEFENDANT IN O.S. NO. 110 OF 2011 ON THE FILES OF THE SUBORDINATE JUDGES COURT, PERUMBAVOOR.
- P4: TRUE PHOTOCOPY OF THE WRITTEN STATEMENT OF THE 2ND DEFENDANT IN O.S. NO. 110 OF 2011 ON THE FILES OF THE SUBORDINATE JUDGES COURT, PERUMBAVOOR.
- P5: TRUE PHOTOCOPY OF THE I.A.NO.641 OF 2012 IN O.S.NO.110 OF 2012 ON THE FILES OF THE SUBORDINATE JUDGES COURT, PERUMBAVOOR.
- P6: TRUE PHOTOCOPY OF THE REPORT DATED 11-12-2012 OF THE STATE FORENSIC SCIENCE LABORATORY, THIRUVANANTHAPURAM.
- P7: TRUE PHOTOCOPY OF THE I.A.NO.332 OF 2014 IN O.S. NO.110 OF 2011 ON THE FILES OF THE SUBORDINATE JUDGES COURT, PERUMBAVOOR.
- P8: TRUE PHOTOCOPY OF THE COUNTER AFFIDAVIT FILED BY THE PLAINTIFF IN I.A.NO.332 OF 2014 IN O.S.N.O.110 OF 2011 ON THE FILES OF THE SUBORDINATE JUDGES COURT, PERUMBAVOOR.
- P9: TRUE PHOTOCOPY OF THE ORDER DATED 01-04-2014 IN I.A.NO.332 OF 2014 IN O.S.NO.110 OF 2011 ON THE FILES OF THE SUBORDINATE JUDGES COURT, PERUMBAVOOR.

RESPONDENT(S)' EXHIBITS

NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

B.KEMAL PASHA, J.

.....
O.P.(C) No.1240 of 2014
.....

Dated this the 20th day of May, 2015

J U D G M E N T

The first defendant in O.S.No.110/2011 of the Subordinate Judge's Court, Perumbavoor is the petitioner herein. She is the mother of deceased Rajagopal. Defendants 2 and 3 in the suit are the wife and daughter of deceased Rajagopal. The suit has been filed by the respondent herein as plaintiff seeking a decree for return of the advance money allegedly paid on the basis of an agreement for sale allegedly executed by deceased Rajagopal in favour of the plaintiff.

2. According to the plaintiff, an agreement for sale was executed by deceased Rajagopal on 25.05.2010, the

copy of which is Ext.P1. The case of the plaintiff is that deceased Rajagopal had obtained an amount of Rs.11 lakhs as part of consideration, and he died prior to the execution of the sale deed. The petitioner along with the other defendants have contended that Ext.P1 agreement was not executed by deceased Rajagopal, whereas, the old stamp paper that was obtained by the plaintiff from Rajagopal was made use of by the plaintiff to cook up an agreement for sale. It seems that in paragraph 5 of the written statement, the petitioner has explained some suspicious circumstances being relied by the petitioner to show that deceased Rajagopal would not have executed such an agreement. It seems that the stamp paper on which Ext.P1 was prepared is dated 11.09.2007 even though the agreement is dated 25.05.2010. With a view to bringing out materials to prove the suspicious circumstances surrounding the execution of Ext.P1, the petitioner had filed I.A.No.332/2014 before the court below for the issuance of a Commission for measuring

out the property stands in the name of Rajagopal and for proving the lie and nature of the property. It is the contention of the petitioner that the document in respect of the plaint schedule was executed by the petitioner in favour of Rajagopal, solely for the purpose of procuring a loan from the Bank, and Rajagopal had obtained such financial nursing also. The respondent herein filed Ext.P8 counter in respect of the said IA.

3. It seems that there was no serious resistance from the part of the respondent in allowing the said IA. The Court below has taken the view that when it is a suit for return of the advance money allegedly paid, there is no necessity for issuing such a Commission, and without going much deep into the matter, it seems that the court below has dismissed the IA through Ext.P9 order.

4. Heard the learned counsel for the petitioner and learned counsel for the respondent. Even if such a Commission is issued it cannot be said that it would not

result in any prejudice to the plaintiff. On going through the contentions raised by the petitioner in paragraph 5 of the written statement, it seems that the court below ought to have granted such an opportunity to the petitioner to bring out materials for substantiating the contentions of the petitioner, especially when the so called executant of the agreement is not alive. The dismissal of the IA has resulted in substantial miscarriage of justice and therefore, Ext.P9 order is liable to be set aside.

5. In the result, this Original Petition is allowed and Ext.P9 order is set aside. I.A.No.332 of 2014 in O.S.No.110 of 2011 of the court below stands allowed. The court below shall appoint a Commissioner and a Surveyor as prayed for. The court below shall fix the batta and the petitioner shall deposit the said batta before the court below without fail.

6. The suit is of the year 2011. The matter has to be disposed of at the earliest. The only anguish forwarded by the learned counsel for the respondent is that the trial of the

case would be delayed in case the Commission application is allowed. The court below shall fix a time limit for the Commissioner to file the report. The court below shall make every endeavour to dispose of the suit, as expeditiously as possible, at any rate, within four months from the date of receipt of the Commissioner's report.

Sd/- B.KEMAL PASHA, JUDGE

ul/-

[True copy]

P.S. to Judge