

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

RSA.No.587 of 2007 (C)  
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AGAINST THE JUDGMENT IN AS 3/2001 of PRL.SUB COURT,  
THIRUVANANTHAPURAM DATED 12-10-2006

AGAINST THE JUDGMENT IN OS 1017/1998 of II ADDL. MUNSIFF COURT,  
THIRUVANANTHAPURAM DATED 13-11-2000

APPELLANT/APPELLANT/PLAINTIFF:  
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SAVITHRI, D/O.NANI  
RESIDING AT GEETHA BHAVAN, MOONNUMUKKU,  
PETTAH P.O., THIRUVANANTHAPURAM.

BY ADV. SRI.B.KRISHNA MANI

RESPONDENT/RESPONDENT/DEFENDANT:  
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THE CITY CORPORATION OF THIRUVANANTHAPURAM,  
REPRESENTED BY ITS SECRETARY  
OFFICE OF THE CITY CORPORATION  
THIRUVANANTHAPURAM.

BY SRI.N.NANDAKUMARA MENON, SENIOR ADVOCATE.  
BY ADV. SRI.P.K.MANOJKUMAR  
BY ADV. SMT.SUSHYA RAJAN

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 19-  
11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ALEXANDER THOMAS, J.

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R.S.A.No.587 Of 2007  
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Dated this the 19<sup>th</sup> day of November, 2015.

J U D G M E N T

This Regular Second Appeal is directed against the impugned judgment and decree dated 12.10.2006 of the Principal Sub Judge, Thiruvananthapuram, in Appeal Suit, A.S.No.3/2001, which in turn arose out of the impugned judgment and decree dated 13.11.2000 rendered by the II<sup>nd</sup> Addl. Munsiff, Thiruvananthapuram, in Original Suit, O.S.No.1017/1998. The appellant herein had instituted the Original Suit, O.S.No.1017/1998 before the Munsiff's Court, Thiruvananthapuram, seeking a decree of permanent prohibitory injunction restraining the defendant from preventing the plaintiff's entry and passage through plaint B schedule property and also from causing any obstruction to the plaintiff's right over the plaint B schedule as a lessee under the Government of Kerala and from doing anything, which will prevent her rights over plaint B schedule in any manner. The suit was dismissed by the trial

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court. Aggrieved by the same, the appellant herein had approached the Court of Principal Sub Judge, Thiruvananthapuram, by filing Appeal Suit, A.S.No.3/2001, which was also dismissed affirming the judgment and decree of the trial court. It is aggrieved by this, that the appellant has preferred the instant Regular Second Appeal.

2. The case set up by the plaintiff is as follows:- That the plaintiff A schedule property belongs to the plaintiff as per Ext.A-1 sale deed No.478/75 dated 15.2.1975 having an extent of 4.995 cents. The said A schedule property is comprised in Sy.No.158/1 of Vanchiyoor Village, Thiruvananthapuram district. That there is a Government puramboke land having an extent of 1.575 cents comprised in Sy.No.158/2 of Vanchiyoor Village, which is on the north side of A schedule property and it is referred to as plaintiff B schedule property. Further to the north of B schedule puramboke property there is a public road (viz. Pattoor-Pettah road). It is averred that the only ingress and egress to A schedule property to the public road is B schedule puramboke property, which is necessary for the beneficial enjoyment of plaintiff A schedule

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property. That after the purchase of A schedule property, the plaintiff had taken possession of B schedule property in continuation of the possession enjoyed by her predecessor-in-interest. That she planted coconut saplings in the property and also constructed compound wall on the south and east of A schedule and in continuation to it, she constructed a compound wall on the east and north of the plaintiff B schedule property. That a gate is also provided on the northern boundary of B schedule property and the said compound wall and gate are more than 20 years old, etc. That the plaintiff's husband owns the property, which is lying on the west of A schedule property. That the plaintiff had applied to the Government to lease out B schedule property and after a full-fledged enquiry, the Government had issued Ext.A-2 G.O(Ms)No.299/89/RD dated 17.4.1989 initially granting lease of B schedule property for a period of ten years, subject to the usual terms and conditions regarding payment of lease fee, etc. That the plaintiff is regularly remitting the amount of Rs.150/- per year stipulated in Ext.A-2 lease grant. That water, electricity and drainage connection to the plaintiff's property have

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been drawn through B schedule property. That without B schedule property, it is impossible to enter into A schedule property from the public road. When the defendant used to claim right over B schedule land, the defendant Corporation's subordinate officials had placed a board in 1997 displaying that B schedule property is proposed by them for construction of a commercial complex. That the defendant on 5.6.1998 had tendered a notice to the plaintiff and had fixed a temporary barbed-wire fencing on the south and west of B schedule and had locked the gate, so as to prevent entry into A schedule. That the defendant had no right whatsoever to do any such act in B schedule property. It is in view of this conspectus of the facts and circumstances that the plaintiff had instituted the above said suit on 10.6.1998.

3. The defendant had resisted the pleas of the plaintiff by filing a written statement. It is averred that the defendant is owning 7.353 cents of land in Sy.No.158/2 in Vanchiyoore Village. It is lying in between the property of the plaintiff and her husband, comprised in plaint A schedule property and Pattur-Pettah public road. That the said 7.353 cents of land was transferred to the

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defendant Corporation from the Land Revenue Department as per order dated 22.2.1955 for the purpose of a rubbish depot. That the Corporation had constructed boundary walls on four sides to prevent encroachment. That one Smt.B.Saraswathy Devi, the adjacent eastern property owner had made an attempt in 1988 to encroach and take forcible possession of a portion of the above said property owned by the defendant and the said illegal attempt was prevented by the Corporation. That through the western side of the land owned and possessed by the Corporation, a small pathway running from the public road towards the property of the plaintiff and her husband, was in existence. The plaintiff's husband had made an attempt to take forcible possession of a portion of the above said 7.353 cents of land owned by the defendant. The plaintiff's husband had filed a suit as O.S.No.2114/1987 against the Corporation. It is contended that since the property belongs to the defendant, the Revenue Department is incompetent to lease out the land to anyone. That the plaintiff and her husband had filed a Writ Petition as O.P.No.4040/1990 before this Court alleging that the plaintiff's husband got 1.425 cents of land in Sy.No.158/2 as

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Kuthakapattam from the Government and seeking the prayers for a direction to the respondents therein (Governmental authorities and the Thiruvananthapuram Corporation) not to interfere with the right of possession and enjoyment of the aforesaid 1.425 cents of land leased out by the Government to the husband of the plaintiff herein. During the pendency of the said Original Petition, the plaintiff's husband had filed another suit, as O.S.No.242/1994, which was decreed in favour of the plaintiff therein in terms of Ext.B-1 decree. That the plaint B schedule property in O.S.No.242/1994 is not being possessed by the plaintiff and her husband. The alleged kuthakapatam lease in favour of the plaintiff herein as per Ext.A-2 herein with respect to B schedule property in this suit is void. That the plaint B schedule property is owned and possessed by the defendant. That the age of the barbed-wire fencing and gate are more than 20 years old. That the plaintiff has no cause of action, etc. and accordingly, prayed for the dismissal of the suit.

4. The trial court framed the following issues for determination.

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- “1. Whether the right of ownership of the plaint B schedule property is vested with the Government or with the defendant corporation?
2. Whether the plaintiff was a lessee in respect of the B schedule as on the date of the suit?
3. Whether the prohibitory injunction prayed for is allowable?
4. Relief and cost?”

5. The plaintiff examined PWs 1 & 2 on her side and marked Exts.A-1 to A-3 documents. The defendant examined DW1. Exts.B-1 to B-3 were marked on the side of the defendant. Ext.C-1 is the Advocate Commissioner's report.

6. While admitting this Regular Second Appeal, this Court as per order dated 12.9.2007 had framed the following substantial question of law which reads as follows:

- “1. When the Public Road is lying to the North of the Plaintiff B Schedule Property, whether plaintiff is entitled to a right of entry from plaintiff A schedule property through B schedule property from every point to the public road.”

7. Heard Sri.B.Krishnamani, learned counsel appearing for the appellant and Sri.N.Nandakumara Menon, learned Senior Counsel, instructed by Sri.P.K.Manoj Kumar, learned counsel appearing for the respondent-Corporation.

8. The specific and cogent case put up by the plaintiff is

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that A schedule property is absolutely owned and possessed by the plaintiff as per Ext.A-1 sale deed dated 15.2.1975 and that B schedule property is Government puramboke land which lies to the north of A schedule property having an extent of 1.575 cents. Further that the said B schedule property coming to the extent of 1.575 cents has been leased out by the Government of Kerala to the plaintiff as per Ext.A-2 G.O(MS)299/89/RD dated 17.4.1989 initially for a period of ten years subject to the usual terms and conditions regarding the payment of lease fee, etc. That B schedule property is essential for the beneficial enjoyment of A schedule property and that the same is the only access from A schedule property to the public road (Pattoor-Pettah road). In support of this claim, the plaintiff has produced the original of the lease order as communicated by the Government of Kerala to the plaintiff which is Ext.A-2. A perusal of Ext.A-2, as authenticated by the authorised officer of the Government of Kerala, it is clearly stated in Ext.A-2 that the same is pursuant to letter No.B4-79201/88 dated 29.11.1988 of the District Collector, Thiruvananthapuram. The initial period of Ext.A-2 was for 10 years from 17.4.1989 which is

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up to 16.4.1999. The instant suit has been filed on 10.6.1998. Therefore, as on the date of institution of the suit, the lease in favour of the plaintiff, granted by the Government of Kerala, was in force. The defendant-Corporation is mainly resisting the plea of the plaintiff by raising the plea in paragraph 6 of the written statement which reads as follows:

“This defendant is the owner of 7 cents and 353 Sq. links of land in Survey Number 158/2 of Vanchiyoor village which is lying in between the property of the plaintiff and her husband comprised in the plaint A schedule survey and the Pattoor-Pettah public road.”

Further it is averred in paragraph 18 of the written statement as follows:

“The alleged Kuthakapattam in favour of the plaintiff with respect to the plaint B schedule property is void as the Tahsildar is incompetent to give Kuthakapattam of the property owned and possessed by the defendant, more specifically in the light of the Kerala Municipality Act of 1994.”

There is no averment in simple, clear and explicit terms in the written statement that 1.575 cents of B schedule property forms part of 7.353 cents of land said to have been assigned by the authorities concerned to the defendant-Corporation. The only evidence adduced by the defendant in this case in support of their

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plea was that they have title and ownership of the aforestated 7.353 cents of land in Sy.No.158/2 of Vanchiyoor Village as per Ext.B-3, which is a certified copy of the relevant page of the Register of Properties and Buildings maintained by the defendant-Corporation. It is mainly recorded therein that survey number of the property is 158/2. As regards the entry in respect of pakuthy, Vanchiyoor is shown. As against column for area, the entry is 7 cents, 353 Sq. links. As against the column of date of taking charge of the properties from the Land Revenue Department is shown as 10.5.1955. As against the entry for number and date of Government sanction the entry is L.Dis. 8818/54/D.D dated 22.2.1955. As against the column for name of owner, the entry is puramboke. No evidence other than Ext.B-3 has been produced by the defendant to establish their claim of title and ownership over the aforestated 7.353 cents of land. The defendant has not produced the original of the land assignment order and patta to prove that they secured ownership of 7.353 cents of property by assignment from the Governmental authorities. The certified copies of those vital documents are also not produced by the defendant. The

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defendant has not even endeavoured to adduce evidence through an Advocate Commissioner with the assistance of Taluk Surveyor concerned to ascertain whether 1.575 cents of B schedule property forms part of 7.353 cents of property mentioned in Ext.B-3. The defendant could have easily adduced necessary documentary evidence by calling for the official records in relation to the proceedings whereby 7.353 cents of land was said to be assigned to them. So, as things stand, the plaintiff has not produced the original of the lease granted to her by the Government as per Ext.A-2. The only piece of evidence produced by the defendant to establish their plea of title and ownership of the property is Ext.B-3, which is only a certified copy of the property register. The boundaries of the properties are not mentioned in Ext.B-3. Merely on the basis of Ext.B-3, it cannot be concluded that the 1.575 cents of B schedule property comprised in Sy.No.158/2 forms part of 7.353 cents of property mentioned in Ext.B-3. Merely because the survey number is the same, it does not lead to any necessary and clear conclusion that the properties are same. There is no clear and unambiguous indication in Ext.B-3 that the entry is necessarily one

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relatable to land assignment proceedings. That apart, it would also be relevant to note that this Court has held in rulings as in *Kunhaliumma v. Rabiumma* reported in 1997 (2) KLT 936 that it is too well settled that even an admission by itself would confer title to the property and that an admission of a preexisting title where none in fact existed does not create a title. This Court in the said ruling in paragraph 4 thereof held as follows:

“4. It is true that the allowing of the amendment prayed for would entail a trial of an issue regarding that item. But, it is well settled that an admission by itself cannot confer title to property. An admission of a preexisting title where none in fact existed, is not sufficient to create title on Moyi Haji in this case. This position is clear from the decision of the Supreme Court in *Neelakantan v. Velayudhan* (AIR 1958 SC 832) and the decision of this Court in *Sarojini v. Santha Trading Co.* (1969 KLT 412). It is also clear from *Ambika Prasad v. Ram Ekbal Rai* (AIR 1966 SC 605 at 612) that admission cannot convey title. I refer to this aspect because, the main contention of Sri. P. Sukumaran Nair, Senior counsel appearing for defendant No. 2 is that defendants 16 to 26 are not entitled to withdraw their admission that the title to property is that of the estate of Moyi Haji and is available for partition and to introduce in its place, a plea that the title is that of their predecessor Mammu Haji, the son of Moyi Haji. If the position of law is that such an admission by itself cannot confer any title on Moyi Haji, why could not defendants 16 to 26 be permitted to set up the plea that the title is really with Mammu Haji, their predecessor, by way of an amendment of the written statement, even if it be, by withdrawing the earlier admission? In my view, they can be permitted since their prior admission by itself cannot be confer any title on Moyi Haji, if in fact none existed in him.

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In such a situation, the contention that an admission cannot be permitted to be withdrawn and a contrary plea permitted to be introduced by way of amendment cannot have application. In such cases, an amendment of this nature can be allowed.”

Therefore it has to be held that the defendant had not let in sufficient and convincing evidence to establish their claim of title and ownership of the property on the basis of the assignment said to have been made by the Government. It is also to be borne in mind that Ext.A-2 lease has been issued to the plaintiff by the Government of Kerala and not by the Tahsildar as erroneously noted by the trial court. When the original of the lease granted by the Government of Kerala as per Ext.A-2 is before the Court, the defendant was obliged to lead concrete, clear and cogent evidence to prove their contra case of title to the property on the basis of assignment said to have been made by the Government in the year 1955. Both the courts below have proceeded on the main premise that there is nothing to disbelieve about Ext.B-3 which a Register maintained by the defendant-Corporation and on this basis both the courts below proceeded as if the defendant-Corporation has established their contra case of title over the property on the basis of

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assignment said to have been made by the Government. It is on this basis, that both the courts below proceeded that since the assignment in favour of the defendant-Corporation was made on 10.5.1955, the subsequent grant of lease by the Government to the plaintiff on 17.4.1989 was improper inasmuch as Government could not have leased out a portion of the said land to the plaintiff at a later point of time after the assignment made in favour of the defendant-Corporation in the year 1955. In view of the aforesaid reasons, the courts below have gone totally wrong in their approach in regard to this crucial aspect of the matter. In this aspect of the matter, the said concurrent findings are patently wrong and erroneous and are liable to be reversed by this Court.

9. There is yet another aspect of the matter that the courts below, more particularly the lower appellate court finds (in pages 11 & 12 of the impugned judgment in the Appeal Suit) that in view of the judgment which led to Ext.B-1 decree in O.S.No.242/1994 and in view of the judgment in O.P.No.4040/1990 of this Court, the appellant is estopped from claiming any relief over plaintiff B schedule property. O.S.No.242/1994 was filed by the plaintiff's husband. Prior

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to that, the plaintiff's husband and the plaintiff herein had filed a Writ Petition before this Court as O.P.No.4040/1990 praying for a direction to the respondents therein (Governmental authorities concerned and the Thiruvananthapuram Corporation) not to interfere with the right of possession and enjoyment of the property coming to 1.425 cents of land in Sy.No.158/2 of Vanchiyoor Village given on lease to the plaintiff's husband by the Government. From a reading of the judgment in O.S.No.242/1994 it is referred to therein that interim order was passed by this Court in C.M.P.No.7062/1990 in O.P.No.4040/1990 restraining the Thiruvananthapuram Corporation and the Commissioner of Police at least from interfering with the right, possession and enjoyment of the plaintiff therein over the aforestated 1.425 cents of land leased out to the husband of the plaintiff herein. It is during the pendency of that Writ Petition, that the plaintiff's husband had filed the aforementioned O.S.No.242/1994. In that case also, the plaintiff B schedule property therein was situated on the northern side of the plaintiff's husband's property (schedule A therein). The plaintiff A schedule property in O.S.No.242/1994 appears to be the property of the

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husband of the plaintiff herein which is said to be on the western side of the plaintiff A schedule property in this suit. Therein also it was claimed that the only access and entry from plaintiff A schedule property therein to the Pattoor-Pettah public road is the said B schedule property therein comprising of 1.425 cents of land. It was also the case therein that the said 1.425 cents of land in B schedule therein was granted by way of lease by the Government to the plaintiff's husband. The defendant therein (Thriuvananthapuram Corporation) contended that the said plaintiff B schedule property formed part of the land already assigned to them by the Government in the year 1955. The trial court held that in view of the grant of lease by the Government for 1.425 cents of land in plaintiff B schedule property therein, the plaintiff therein (husband of the plaintiff herein) is entitled to succeed and accordingly decreed the suit in favour of the husband of the plaintiff herein as evident from Ext.B-1 decree dated 12.3.1997. Since Ext.B-1 decree is in favour of plaintiff's husband, it is not understandable as to on what basis the courts below have held that the plaintiff is estopped from having any claim over the plaintiff schedule

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property herein in view of Ext.B-1 decree secured in favour of plaintiff's husband. That apart, the plaintiff is the exclusive owner of plaint A schedule property herein and she is the sole beneficiary of Ext.A-2 lease herein granted by the Government. So also, it is evident from a reading of the judgment in O.S.No.242/1994 of the I Additional Munsiff's Court, Thiruvananthapuram (which led to Ext.B-1 decree) that the plaintiff therein (husband of the plaintiff herein) is the sole owner of plaint A schedule property therein and so also, the plaintiff in O.S.No.242/1994 (husband of the plaintiff herein) is the sole beneficiary of the lease granted by the Government in respect of plaint B schedule property therein coming to 1.425 cents. Therefore, by no stretch of imagination, can it be conceived that in the light of Ext.B-1 decree, that the plaintiff herein is in any way estopped from having any claim over plaint B schedule property herein. On the other hand, the specific contention raised by the learned counsel for the plaintiff is that the facts in O.S.No.242/1994 and the instant suit are almost identical or similar and therefore the reasonings and the course of action adopted by the trial court in O.S.No.242/1994 filed by the husband of the

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plaintiff herein should have been adopted in the instant suit also. Be that as it may, in the light of the view that this Court is proposing to take to dispose of this appeal, there is no necessity to examine on merits the aforestated contention of the learned counsel for the appellant. Suffice it to say that the findings of the courts below that the plaintiff is estopped from having any right over the plaint B schedule property in view of Ext.B-1 decree granted in favour of the husband of the plaintiff herein, is untenable and unsustainable.

10. But it is to be noted that the specific plea made by the appellant in paragraph 14 of the plaint is that the defendant on 5.6.1998 at 11:00 a.m. had tendered a notice to the plaintiff and had fixed a temporary barbed-wire fencing on the south and west of B schedule and had locked the gate, so as to prevent entry into A schedule. The Advocate Commissioner in Ext.C-1 report has also reported that there was a fencing on the southern and western boundaries of plaint B schedule property and there was a compound wall on the northern side and that the gate which is situated on the western side of the aforestated northern boundary is seen closed

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with a lock, etc. Even after the submission of the commission report, the plaintiff has not chosen to amend the prayer in the plaint seeking the relief of appropriate mandatory injunction.

11. Faced with this situation, both sides submitted that this Court may remand the matter back to the trial court to enable both sides to make appropriate amendments to the pleadings and with liberty to adduce necessary documentary and oral evidence. In the light of the aforestated aspects, this Court is also of the considered opinion that consideration of the entire matter at the hands of the trial court afresh will be necessary so as to do full justice to both sides.

12. The question of law framed in this case is as follows:

“1. When the public road is lying to the north of the plaintiff B schedule property, whether plaintiff is entitled to a right of entry from plaintiff A schedule property through B schedule property from every point to the public road.”

In that aspect of the matter, the learned counsel for the appellant had relied on the rulings of this Court in the case *Vavvakkavu Muslim Thaikkavupally v. Narayanan Purushan* reported in 1991 (2) KLT 77 = 1991 (2) KLJ 526. The learned counsel for the

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appellant has also submitted that as held by the civil court in the aforestated O.S.No.242/1994 in a similar situation, that if there is any impropriety or illegality in the Government leasing out the property as per Ext.A-2 herein, it is for the defendant to resort to appropriate remedies in that regard and that so long as that is not resorted, then the question whether or not the lease was proper and legal does not arise for consideration in this suit. In the light of the aforestated aspects and in the light of the submissions on both sides, there is no necessity to decide the aforestated question of law and the other contentions. It is for the trial court to consider all such contentions.

13. Accordingly, it is ordered that the impugned judgment and decree of both the courts below are set aside. The instant suit, O.S.No.1017/1998 will stand remitted back to the trial court for disposal afresh. It is made clear that both sides will be at liberty to make appropriate amendments to their pleadings and to adduce necessary additional evidence by way of oral and documentary evidence. The parties will appear before the trial court on 20.12.2015 at 11:00 a.m. As the suit was filed as early as on

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10.6.1998, it is imperative in the interest of justice that the trial court should finally dispose of the suit afresh without any further delay giving it top priority. Accordingly, it is ordered that the trial court will ensure that the Original Suit shall be finally disposed of as expeditiously as possible and without any further delay, at any rate, well before the end of September, 2016. It is also made clear that both sides will be at liberty to seek appointment of Advocate Commissioner to identify and report on the lie and nature of the properties with the assistance of the Taluk Surveyor concerned on the basis of the relevant records including survey records and to report on any other matters relevant for determination in this case.

With these observations and directions this Regular Second Appeal stands finally disposed of. The Registry will forward the entire records to the courts below.

ALEXANDER THOMAS,  
Judge.

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