

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

WEDNESDAY, THE 10TH DAY OF JUNE 2015/20TH JYAISHTA, 1937

OP(C).No. 1771 of 2014 (O)

AGAINST THE ORDER IN E.A.NO. 78/13 IN E.P. NO. 112/12 IN OS 335/2001
OF MUNSIF COURT, MUVATTUPUZHA DATED 05-07-2014

PETITIONER/RESPONDENT/JUDGMENT DEBTOR :

PATHROSE,
S/O.ULAHANNAN, AGED 65 YEARS
CHERIKAKALAYIL HOUSE, PIRAVAM KARA
ERNAKULAM DISTRICT-686664,
PIRAVAM VILLAGE, MUVATTUPUZHA TALUK.

BY ADV. SRI.BIJU ABRAHAM

RESPONDENT/PETITIONER/DECREE HOLDER :

K.GEORGE,
S/O.KURIAKOSE KATHANAR,
AGED ABOUT 76 YEARS, NADUVAPILLIL HOUSE
PIRAVAM KARA-686 664, PIRAVAM VILLAGE,
MUVATTUPUZHA TALUK.

BY ADVS. SRI.A.C.THOMAS ADHIKARAM
SRI.M.S.UNNIKRISHNAN
SRI.JITHIN PAUL VARGHESE

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 10-06-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONERS' EXHIBITS :

- EXT.P1 COPY OF THE JUDGMENT IN O.S. NO.335/2011 OF THE MUNSIF COURT, MUVATTUPUZHA DATED 28-09-2004.
- EXT.P2 COPY OF THE DECREE IN O.S.NO.335/2011 OF THE MUNSIF COURT, MUVATTUPUZHA DATED 28-09-2004.
- EXT.P3 COPY OF THE JUDGMENT IN O.S.520/2007 DATED 30-11-2012 ON THE FILES OF MUNSIF COURT, MUVATTUPUZHA.
- EXT.P4 COPY OF THE EXECUTION PETITION FILED AS E.P.112/2012 IN O.S.335/2011 ON THE FILES OF MUNSIF COURT, MUVATTUPUZHA.
- EXT.P5 COPY OF THE COMMISSION APPLICATION FILED AS E.A.78/2013 IN E.P.112/2012 IN O.S.335/2001 ON THE FILES OF MUNSIF COURT, MUVATTUPUZHA.
- EXT.P6 COPY OF THE OBJECTION IN E.A.78/2013 IN E.P.112/2012 IN O.S.335/2001 ON THE FILES OF MUNSIF COURT, MUVATTUPUZHA.
- EXT.P7 COPY OF THE ORDER E.A.78/2013 IN E.P.NO.112/2012 IN O.S.335/2001 ON THE FILES OF MUNSIF COURT, MUVATTUPUZHA DATED 05-07-2014.

RESPONDENT(S)' EXHIBITS :

- EXT. R1(a) COPY OF THE SURVEY PLAN OF SY.NO.713/3.
- EXT. R1(b) COPY OF THE SURVEY PLAN OF SY. NO. 713/5.
- EXT. R1(c) COPY OF THE REPORT DATED 26.7.2001 SUBMITTED BY THE ADVOCATE COMMISSIONER.
- EXT. R1(d) COPY OF THE REPORT DATED 14.11.2012 SUBMITTED BY THE ADVOCATE COMMISSIONER.
- EXT. R1(e) COPY OF THE JUDGMENT IN R.S.A. NO. 1492 OF 2012 DATED 12-12-2012.
- EXT. R1(f) COPY OF THE LIST OF DOCUMENTS DATED 19.7.2013.

//TRUE COPY//

P.A. TO JUDGE

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B.KEMAL PASHA, J.

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O.P.(C). No.1771 of 2014

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Dated this the 10th day of June, 2015

J U D G M E N T

What is under challenge herein is Exhibit P7 order, by which the Munsiff's Court, Muvattupuzha has passed an order appointing the Commissioner with the assistance of a Surveyor along with an expert Engineer.

2. Originally, Exhibit P1 suit was filed as O.S.No.335 of 2001 as a simple suit for injunction, seeking a decree of perpetual injunction, restraining the defendant, who is the petitioner herein, from trespassing into the property of the plaintiff, alleging that the property of the petitioner is relying at the southern side of the property of the plaintiff. The petitioner contended that there is a thondu in between these two properties and the same is vested with the Panchayath and the Panchayath was not made a party. Even though it seems that the parties had never attempted to get their

properties identified in Exhibit P1 suit, ultimately, Exhibit P1 suit was decreed by granting a decree of perpetual injunction as prayed for as against the petitioner. At the same time, a reservation was made in Exhibit P1 judgment that the passing of the decree would not affect the right of the Panchayath over the thondu situated in between these two properties.

3. Subsequently, the respondent herein filed another suit as O.S.No.520 of 2007 for a decree for the fixation of the southern boundary of the property of the respondent. The said suit was dismissed through Exhibit P3 judgment. According to the respondent, an appeal has been filed on Exhibit P3 and the same is presently pending.

4. In the meantime, it seems that the petitioner herein had filed a writ petition as W.P.(C) No.7673 of 2007 for getting the boundaries of the thondu in between these two properties fixed. As per the order in W.P.(C), the Taluk Surveyor measured out the said properties. The boundaries of the thondu were fixed.

5. In the meantime, the petitioner wanted to construct a building in his property. As no permit was issued, he had filed O.S.No.106 of 2008. The said suit was initially dismissed. Challenging the judgment and decree, the petitioner filed A.S.No.75 of 2009 before the Subordinate Judge's Court, Muvattupuzha. The appeal was allowed and the judgment and decree was reversed and the suit was decreed.

6. The respondent herein filed R.S.A.No.1492 of 2012 challenging the decree passed in A.S.No.75 of 2009. The said R.S.A. was dismissed through Exhibit R1(e), by making it clear that "it is open to the parties in O.S.No.335 of 2001 to raise appropriate contentions as are available to them under the law and on facts so far as execution of that decree is concerned."

7. Presently, the decree in O.S.No.335 of 2001 has been sought to be executed by the respondent alleging that the petitioner has committed trespass into his property and has occupied a substantial portion of his property. Exhibit

P5 application for the issue of a commission as E.A.No.78 of 2013 has been filed in E.P.No.112/12, seeking the appointment of a Commissioner with the assistance of the Taluk Surveyor and an expert Engineer. Through Exhibit P7 order, the court below has allowed the said E.A. and appointed a Commissioner with the assistance of a Surveyor and an expert Engineer.

8. On a perusal of Exhibit P5, it seems that the present attempt of the respondent in getting a Commissioner appointed with the assistance of the Taluk Surveyor and an expert Engineer is nothing but to get the boundaries of his property fixed as well as the boundaries of the property of the petitioner also fixed. It has to be noted that O.S.No.520 of 2007 fled by the present respondent for fixation of the southern boundary of the property stands dismissed through Exhibit P3. According to the respondent, an appeal has been filed and the appeal is pending. The only way out at present is to proceed with the appeal and to get his grievances redressed. It seems that the properties

involved in O.S.No.335 of 2001 were not identified. What is available in the matter is only a commissioner's report and a rough sketch prepared by the Commissioner. Over and above it, it seems that there is a mention in the judgment with regard to the existence of a thondu in between these two properties. As per the order in W.P.(C) No.7673 of 2007, it seems that the Taluk Surveyor had identified the thondu and its boundaries. When those matters are there, it is not permissible for the respondent at present to get a Commissioner appointed with the assistance of the Taluk Surveyor and an expert Engineer to get his property identified. Precisely, it seems that the present attempt is to get boundaries of the property of the respondent fixed. The court below has gone beyond the scope of the decree in Exhibit P1 suit in passing Exhibit P7 order. The court below ought not have appointed a Commissioner for the said purpose. All matters sought to be ascertained through the Commissioner, are beyond the scope of the decree in Exhibit P1 suit. Matters being so, Exhibit P7 order is liable

to be set aside, and Exhibit P5 E.A. is liable to be dismissed.

In the result, this Original Petition (Civil) is disposed of as above.

This judgment as well as the observations contained herein will not stand in the way of the Appellate Court in deciding the appeal allegedly pending on Exhibit P3 suit.

The observations contained in this order will not stand in the way of the continued execution of Exhibit P1, if possible, as per law.

Sd/-

B.KEMAL PASHA
JUDGE

DSV/10/6/15