IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

THURSDAY, THE 16TH DAY OF JULY 2015/25TH ASHADHA, 1937

OP(C).No. 2040 of 2014 (O)

OS 1670/2007 OF PRINCIPAL MUNSIFF'S COURT, THIRUVANANTHAPURAM

PETITIONER(S)/PLAINTIFF:

BAHULEYA PANICKER,
S/O.THANKAPPAN, RESIDING AT ANUPAMA, JAIPURAM,
POWDIKONAM PO,
THIRUVANANTHAPURAM FROM SHOBHANAVILASAM,
KARIPRATHALA MURI, POWDIKONAM PO, THIRUVANANTHAPURAM.

BY ADV. SRI.G.S.REGHUNATH

RESPONDENT(S)/DEFENDANTS:

1. SUDHAKUMARI,
D/O.PRABHAVATHY, RESIDING AT SUDHA BHAVAN, VNRA-102,
VISHNU NAGAR, MANKOTTUKONAM, POWDIKONAM PO,
THIRUVANANTHAPURAM 695 126.

2. P.UDAYAKUMAR,
H/O.SUDHAKUMARI, RESIDING AT SUDHA BHAVAN, VNRA-102,
VISHNU NAGAR, MANKOTTUKONAM, POWDIKONAM PO,
THIRUVANANTHAPURAM 695 126.

R1 BY ADVS. SRI.M.R.ANANDAKUTTAN
SMT.M.A.ZOHRA
SRI.MAHESH ANANDAKUTTAN

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 16-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PJ

OP(C).No. 2040 of 2014 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1	COPY OF THE PLAINT IN OS NO.1670/2007 ON THE FILE OF THE PRINCIPAL MUNSIFF COURT,THIRUVANANTHAPURAM.
EXHIBIT P2	COPY OF THE SETTLEMENT DEED NO.1869 OF 1990 DATED 18/4/1994
EXHIBIT P3	COPY OF THE JUDGMENT IN FAO NO.11/2013 AND FAO 13/2013 DATED 17/1/2014
EXHIBIT P4	COPY OF THE SETTLEMENT DEED DATED 8/1/1998
EXHIBIT P5	COPY OF THE ORDER DATED 9/1/2013 INIA NO.122/2013 IN OS 1670/2007 OF THE PRINCIPAL MUNSIFF'S COURT, THIRUVANANTHAPURAM
EXHIBIT P6	COPY OF THE SETTLEMENT DEED EXHIBIT B1 WHICH IS THE TITLE DEED OF DEFENDANTS/RESPONDENTS DATED 24/8/1990 NO.1869/1990
EXHIBIT P7	COPY OF THE REPORT AND PLAN SUBMITTED BY THE ADVOCATE COMMISSIONER IN OS NO.1670/2007
EXHIBIT P8	COPY OF THE COMMISSION APPLICATION IS NO.3954/2014 IN OS NO.1670/2007 DATED 28/5/2014
EXHIBIT P9	COPY OF THE OBJECTION DATED 9/6/2014 TO IA NO.3954/2014 IN OS NO.1670/2007
EXHIBIT P10	COPY OF THE ORDER DATED 6/8/2014 IN IA NO.3954/2014 IN OS NO.1670/2007 OF THE PRINCIPAL MUNSIFF'S COURT, THIRUVANANTHAPURAM

RESPONDENT(S)' EXHIBITS

EXHIBIT R1(A): COPY OF THE IA.1222013 DATED 3/1/13 IN OS.1670/07 OF THE HON'BLE MUNSIFF'S COURT-I, THIRUVANANTHAPURAM.

/ TRUE COPY /

P.S. TO JUDGE

PJ

B. KEMAL PASHA, J.

O.P.(C) No.2040 of 2014

Dated this the 16th day of July, 2015

J U D G M E N T

Ext.P10 order passed by the court below by which a fresh Commissioner was appointed on the request forwarded by the respondent herein, is under challenge. Petitioner is the plaintiff in O.S.No.1670/2007 of the court below, which is a suit filed for declaration of title of the petitioner over the plaint B schedule property and for recovery of possession of the same. The petitioner has alleged that he has got 14 cents of property, which is the southernmost portion of the properties owned by one Ambujakshi. The property of the respondent is situated just at the northern side of the property of the petitioner. It is the case of the petitioner that the respondent has trespassed into the northernmost portion of the property of the petitioner and reduced such a portion into her possession. The petitioner wants to get recovery of possession of that portion which is scheduled as plaint B schedule item. It seems that the respondent as plaintiff has filed O.S.No.1853/2007 before the court below for getting the southern boundary of her property fixed.

2. Originally, Ambujakshi was having 57 cents of property out of which, she had disposed of 20 cents from the northernmost portion and retained 37 cents lying at the southern side of that 20 cents. Out of that 37 cents property, she retained 5 cents from the north-western portion, and then settled 18 cents of property to her daughter Prabhavathy and 14 cents of property, which is the southernmost portion of that 37 cents, to her son Sreekumar. The petitioner herein is the transferee of the said 14 cents from the said Sreekumar.

3. From the 18 cents of property given to Prabhavathy, she sold 8 cents of property from the north-

eastern portion to a stranger. Further, she settled the remaining 10 cents of property in favour of her daughter, who is the 1st respondent herein.

4. From what is discussed above, it is evident that the request from either side is precisely the fixation of the boundary separating the 10 cents of property belongs to the 1st respondent and the 14 cents of property belongs to the petitioner. Initially, a Commissioner was appointed, who prepared Exts.C2 report and C2(a) plan. Based on Exts.C2 and C2(a), O.S.No.1670/2007 filed by the petitioner was dismissed and O.S.No.1853/2007 filed by the 1st respondent was decreed. The petitioner preferred two appeals before the district court as AS No.199/2011 and AS.200/2011. Both the appeals were disposed of by the District court and remitted the suits for fresh consideration to the court below. In the remand order, Exts.C2 and C2(a) were not set aside. Aggrieved by the remand order, the 1st respondent herein

has preferred FAO Nos.11/2013 and 13/2013 before this Court. This Court, through Ext.P3 judgment, has upheld the remand order with modifications. Through Ext.P3, this Court has set aside Exts.C2 and C2(a) Commissioner's report and plan prepared by the Commissioner and has directed the court below to issue a fresh Commission for identifying the properties and to determine the boundary line separating the property of the 1st respondent and the property of the petitioner.

5. In paragraph 4 of Ext.P3, this Court has observed that measurement of the properties involved in the two suits has to be done in accordance with the measurements given in Ext.A3 with reference to Ext.A1 and Ext.B1 title deeds of the parties.

6. Even prior to the passing of Ext.P3, the petitioner has filed an application for the issuance of a Commission. Ext.P3 was passed on 17.01.2014. Ext.R1(a) Commission

application was filed by the petitioner on 03.01.2013. It was through Ext.P5 order, the court below had allowed Ext.R1(a) on 09.01.2013. Therefore, it seems that the Commissioner was appointed through Ext.P5, even prior to the passing of Ext.P3. The Commissioner has filed Ext.P7 report, which is appended with the plan prepared by a retired Deputy Director of Survey.

7. By alleging that the 1st respondent is dissatisfied with Ext.P7, she has chosen to file Ext.P8 Commission application for appointing another Commissioner for ascertaining the matters noted in Ext.P8. Even though it was strongly resisted by the petitioner through Ext.P9 counter affidavit, the court below has chosen to appoint a Commissioner with the assistance of the Taluk Surveyor as sought for in Ext.P8, through Ext.P10 order. The said order is under challenge.

8. Heard learned counsel for the petitioner

Sri.G.S.Raghunath and learned counsel for the respondent Smt.M.A.Zohra.

9. According to the learned counsel for the petitioner, all the matters sought to be ascertained by the 1st respondent through Ext.P8 have already been ascertained and reported by the Commissioner through Ext.P7 and, therefore, the present attempt of the 1st respondent to get a Commissioner once again deputed with the assistance of the Taluk Surveyor is in order to get over the legitimate findings entered by the Commissioner in Ext.P7.

10. *Per contra*, learned counsel for the respondent has argued that the Commissioner was appointed through Ext.P5 even prior to the passing of Ext.P3 and, therefore, the said appointment could not be treated as one in conformity with Ext.P3. Further, it is argued that even though this Court had directed through Ext.P3 that the properties involved in the two suits have to be measured out

in accordance with the measurements given in Ext.A3 with reference to Ext.A1 and B1 title deeds of the parties, the Commissioner has relied on Ext.A3 alone and has given a go by to Exts.A1 and B1 title deeds of the parties, for preparing Ext.P7. Therefore, according to the learned counsel for the 1st respondent, another Commissioner has to be appointed in tune with the directions contained in Ext.P3 and, therefore, Ext.P10 order is not liable to be interfered with.

11. As I have stated earlier, the question to be decided in both the suits is precisely the location of the boundary line separating the 18 cents of property allotted to Prabhavathy and the 14 cents of property allotted to Sreekumar. True that out of the 18 cents, Prabhavathy disposed of 8 cents from the northern portion and retained the remaining 10 cents from the southern portion, which has been presently given to the 1st respondent. Similarly, the 14

cents of property settled to Sreekumar was later purchased by the present petitioner.

12. Learned counsel for the petitioner has invited the attention of this Court to the recitals in Ext.A3, which is produced as Ext.P4. Ext.A3 gives clear measurements of both the properties i.e., 18 cents in its A schedule and 14 cents in its B schedule. In A schedule description of Ext.A3, it has been clearly mentioned that the said 18 cents of property with all its side measurements clearly noted therein is lying at the northern side of B schedule property. Similarly, B schedule property is also described in detail with all its side measurements as the 14 cents of property lying at the southernmost portion of the 32 cents and the same is situated at the southern side of the A schedule property. Therefore, the crux of the matter is with regard to the separating boundary line of A and B schedule properties as contained in Ext.A3.

13. It is true that from A schedule property covered by Ext.A3, Prabhavathy had disposed of 8 cents of property from its northern portion. There is no direction by this Court that the said 8 cents of property has to be located with its side measurement. At the same time, it seems that the remaining 10 cents of property was settled by Prabhavathy in favour of the 1st respondent through Ext.P6. It is true that in Ext.P6, which is Ext.B1, it has been clearly mentioned that the said 10 cents is the southernmost portion of the 18 cents of property, after excluding the 8 cents which was sold away from its northern side. A further description of the said 18 cents of property as noted in the A schedule to Ext.A3 has been reproduced in Ext.B1 also. At the same time, the said descriptions do not contain any of the side measurements of the said 10 cents of property.

14. Similarly, the 14 cents of property allotted to Sreekumar as B schedule in Ext.A3 was purchased by the

petitioner through Ext.A1 sale deed. Ext.A1 schedule descriptions show that the said property is the very same property described as B schedule in Ext.A3 with the very same links measurements as noted in Ext.A3. True that it is noted that there is a pathway lying through the southern portion of the said 14 cents of property and the said 14 cents is inclusive of that pathway also.

15. The main argument forwarded by the learned counsel for the 1st respondent in support of Ext.P10 is that the Commissioner has not considered either Exts.B1 or A1 in executing Ext.P5 order and, therefore, the Commissioner has failed to comply with the directions contained in Ext.P3 judgment of this Court. On going through the directions given by this Court through Ext.P3, it is evident that this Court has directed to measure out the properties involved in the two suits in accordance with the measurements given in Ext.A3 with reference to Ext.A1 and B1 title deeds.

16. It seems that in Ext.P7 the Commissioner has scrupulously followed all the measurements given in Ext.A3. The complaint forwarded by the learned counsel for the 1st respondent that the Commissioner has not considered Ext.A1, has no legs to stand because of the fact that it does not give any side measurements of the said 10 cents. In such case, the Commissioner can rely on all the side measurements given in Ext.A3 alone in order to demarcate the 18 cents of property and also the 14 cents of property allotted to Prabhavathy and Sreekumar respectively. It was out of that 18 cents, the 1st respondent got 10 cents of property from the southern portion. Similarly, Ext.A1 also clearly adopts all the side measurements as given in Ext.A3 and, therefore, any separate consideration of either Ext.A1 or Ext.B1 for locating the said two properties does not arise at all. The question to be looked into is whether the 10 cents of property presently belongs to the 1st respondent

and the 14 cents of property presently belongs to the petitioner can be identified from Ext.P7. If those two properties can be identified and the separating boundary line of the said two properties is there in Ext.P7, there cannot be any complaint as forwarded by the learned counsel for the 1st respondent in respect of Ext.P7. True that the Commissioner was appointed through Ext.P5 even prior to the directions in Ext.P3. At the same time, it seems that the Commissioner has executed Ext.P5 order and prepared Ext.P7 on 04.04.2014 only. The FAO was disposed of on 17.01.2014. Therefore, what has to be decided is whether the Commissioner has complied with the directions in Ext.P3 in executing Ext.P5 order. The fact that the Commissioner was happened to be appointed even prior to the passing of Ext.P3 does not assume any importance at all. If he has complied with the directions in Ext.P3 in preparing Ext.P7, there could not be any room for complaint from the part of the 1st respondent.

17. The learned counsel for the petitioner has pointed out that in Ext.P7, which contains the plan prepared by a retired Deputy Director of Survey, all the items of properties are shown in detail with precision. The learned counsel for the petitioner has pointed out that plot ABCD in the plan denotes the 14 cents of property, which is B schedule as contained in Ext.A3, which was subsequently transferred to the petitioner through Ext.A1. Similarly, he has pointed out that item No.CDEFGHI in the plan is the 18 cents of property scheduled as A schedule in Ext.A3 out of which, the 1st respondent has got 10 cents of property from its southern portion. Over and above it, in the plan, the Commissioner has separately plotted out plot No.FOIH as the property sold away from the northern portion of the said 18 cents. Apart from that, all the side measurements of the said plot are shown. The 10 cents of property belongs to the 1st

respondent is clearly plotted out as CDEFO. All the side measurements are also shown from which it is evident that the said plot is the property given to the 1st respondent through Ext.B1. Of course, it is true that certain portions of the 14 cents belongs to the petitioner and the 10 cents belongs to the 1st respondent have been lost for the widening of the road at the eastern side. It seems that only a small portion has been lost to the petitioner as the width of the property is less when compared to the width of the 18 cents of property. It seems that the said portion lost from these properties for the widening of the road are also clearly shown in Ext.P7 plan. It was after carrying out the survey measurements as contained in Ext.A3, the Commissioner has clearly plotted the plot No.DLMN as plaint B schedule property having an extent of 2.20 cents.

18. From all these, it is evident that another Commissioner's report is quite uncalled for, in order to

ascertain the properties of the 1st respondent and the petitioner. Both the properties have been clearly identified by the Commissioner and the boundary line separating these two properties has been clearly shown as the CD line, without any ambiguity.

19. On going through the request forwarded by the 1st respondent in Ext.P8, it seems that all the matters sought to be ascertained through Ext.P8 have been clearly identified and ascertained by the Commissioner in Ext.P7. Therefore, Ext.P10 order is liable to be set aside.

In the result, this O.P.(Civil) is allowed and Ext.P10 order is set aside.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/17/07

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PA to Judge