

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

WEDNESDAY, THE 29TH DAY OF JULY 2015/7TH SRAVANA, 1937

OP(C).No. 2685 of 2014 (O)

I.A.NO.2968/2012 OF O.S.NO.45/2009 OF THE PRINCIPAL MUNSIF'S COURT, KANNUR

PETITIONER(S) :

1. THOLICHI SHAHEETH, AGED 41 YEARS,
S/O.LATE ABDULLA MUSALIYAR AND THOLICHI KUNHAYISSU,
BUSINESS, RESIDING AT PUTHIYA VALAPPIL HOUSE,
KAPPAKADAVU, AZHIKKAL, KANNUR - 9.
2. THOLICHI SHERIFFA, AGED 28 YEARS,
D/O.LATE ABDULLA MUSALIYAR AND THOLICHI KUNHAYISSU,
NO OCCUPATION, RESIDING AT PUTHIYA VALAPPIL HOUSE,
KAPPAKADAVU, AZHIKKAL, KANNUR - 9.
3. THOLICHI FATHIBI, AGED 26 YEARS,
D/O.LATE ABDULLA MUSALIYAR AND THOLICHI KUNHAYISSU,
NO OCCUPATION, RESIDING AT PUTHIYA VALAPPIL HOUSE,
KAPPAKADAVU, AZHIKKAL, KANNUR - 9.

BY ADV. SRI.V.RAMKUMAR NAMBIAR

RESPONDENT(S) :

1. THARAYIL PEEDIKAYIL KAZHUNGIL KUNHAMINABI, AGED 60 YEARS,
D/O. ABDULLA, NO OCCUPATION, RESIDING AT POOTHAPARA,
AZHIKODE, KANNUR - 9.
2. THOLICHI MUSTHAFFA
S/O. LATE ABDULLA MUSALIYAR AND THOLICHI KUNHAYISSU,
RESIDING AT PUTHIYA VALAPPIL HOUSE, KAPPAKADAVU,
AZHIKKAL, KANNUR - 9.
3. THOLICHI JAFFAR,
S/O. LATE ABDULLA MUSALIYAR AND THOLICHI KUNHAYISSU,
RESIDING AT PUTHIYA VALAPPIL HOUSE, KAPPAKADAVU,
AZHIKKAL, KANNUR - 9.
4. THOLICHI RAFI,
S/O. LATE ABDULLA MUSALIYAR AND THOLICHI KUNHAYISSU,
RESIDING AT PUTHIYA VALAPPIL HOUSE, KAPPAKADAVU,
AZHIKKAL, KANNUR - 9.

R1 BY ADV. SRI.K.R.AVINASH (KUNNATH)
R1 BY ADV. SRI.ABDUL RAOOF PALLIPATH
R1 BY ADV. SRI.E.MOHAMMED SHAFI

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 29-07-2015,
ALONG WITH OP(C).No.3026 OF 2014, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS :

- P1: TRUE COPY OF THE PLAINT IN O.S NO. 45/2009 BEFORE THE MUNISFF'S COURT, KANNUR.
- P2: TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE PETITIONERS.
- P3: TRUE COPY OF THE ISSUES FARMED FOR TRIAL BY THE PRINCIPAL MUNSIFF'S COURT, KANNUR IN O.S NO.45/2009 DATED 04.06.2009.
- P4: TRUE COPY OF THE ORDER DATED 30.11.2011 ALONG WITH THE PROCEEDINGS OF THE PRINCIPAL MUNSIFF'S COURT, KANNUR IN O.S NO.45/2009 FROM 28.02.2009 TO 11.01.2012.
- P5: TRUE COPY OF THE ORDER IN I.A NO. 4158/2011 IN O.S NO.45/2009 OF THE PRINCIPAL MUNSIFF'S COURT, KANNUR DATED 19.12.2011.
- P6: TRUE COPY OF THE JUDGMENT OF THIS HON'BLE COURT IN OP(C).No.353/2012 DATED 05.06.2012.
- P7: TRUE COPY OF THE AFFIDAVIT AND PETITION FILED BY THE FIRST RESPONDENT IN I.A.NO.2968/2012.
- P8: TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE PETITIONER'S HEREIN IN I.A NO.2968/2012.
- P9: TRUE COPY OF THE ORDER IN I.A NO.2968/2012 DATED 22.09.2014.
- P10: TRUE COPY OF THE ADVOCATE COMMISSIONER'S REPORT AND PLAN WHICH WAS MARKED AS EXHIBIT C-1 AND C-1(A) BEFORE THE TRIAL COURT.
- P11: TRUE COPY OF THE REMITTED REPORT AND PLAN SUBMITTED BY THE ADVOCATE COMMISSIONER.

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msd.

B. KEMAL PASHA, J.

.....
O.P.(C) Nos.2685 & 3026 of 2014
.....

Dated this the 29th day of July, 2015

J U D G M E N T
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The very same order is under challenge in both the original petitions. Two Commissioner's reports appended with plans are there in the suit. Even though the suit is one for perpetual injunction, the court, later, found that the question of title of the plaintiff has also to be decided, for which court fee was levied under Section 27(a) of the Kerala Court Fees and Suits Valuation Act, 1959. Even though an amendment was initially allowed by the court below, the same was challenged by the defendants before this Court, and the said IA was dismissed, after setting aside the order passed by the court below allowing the amendment.

2. According to the plaintiff, the second Commissioner's report and plan are erroneous and, therefore, the same are liable to be set aside. Seeking such a relief, IA No.2968/2012 was filed before the court below. The court below has allowed

the IA in part and instead of passing an order to set aside the Commissioner's report, the court below has passed Ext.P9 order in O.P.(C) No.2685/2014, by which the court below has chosen to remit the Commissioner's report for clarifying the mistakes occurred in Ext.C2 Commissioner's report. Through O.P.(C) No.3026/2014, the plaintiff has come up by challenging the said order by pointing out that the court below ought to have set aside the Commissioner's report instead of remitting it. The defendants have come up through O.P.(C) No.2685/2014, thereby challenging the said order by which the Commissioner's report was remitted. According to the defendants, there is no reason for remitting Ext.P11 Commissioner's report.

3. Heard the learned counsel for either side. It seems that the plaintiffs have a case that the measurements were not carried out on the basis of the field measurement book. According to the learned counsel for the plaintiffs, serious errors have been crept in the Commissioner's report and plan as the property was not properly measured out. Therefore, according to the learned counsel for the plaintiffs, the court below ought to

have set aside the Commissioner's report and plan instead of remitting it to the Commissioner.

4. *Per contra*, the learned counsel for the defendants has argued that there is no reason at all to remit the Commissioner's report. It seems that even according to the court below, there are some errors in the Commissioner's report. According to the court below, the same has to be re-examined by the very same Commissioner for clarification and correction. It seems that the main quarrel is with regard to the measurement of the property conducted by the Surveyor, who had assisted the Advocate Commissioner. When there is an allegation that the measurements were not carried out on the basis of the measurements contained in the field measurement book, it is only just and proper in the interest of justice to measure out the property once again, on the basis of the measurements contained in the field measurement book. The entire Commissioner's report need not be set aside. At the same time, another Surveyor can be appointed to assist the Commissioner to carry out the measurement properly. This Court is of the view

that with the said modifications, the order passed by the court below can be sustained.

5. It has been reported that the learned Lawyer, who was appointed as the Commissioner, has stopped his practice and is presently employed somewhere. His services may not be available once again for the execution of the warrant. In such case, it is better to appoint another Advocate Commissioner in the matter.

In the result, these original petitions are disposed of by directing the court below to appoint another Advocate Commissioner assisted by another Surveyor, who was not the Surveyor who had assisted the Advocate Commissioner earlier.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/29/07

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PA to Judge