

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

MONDAY, THE 2ND DAY OF FEBRUARY 2015/13TH MAGHA, 1936

OP(C).No. 2821 of 2014 (O)

AGAINST THE ORDER IN IA NO.4989/2014 IN A.S.NO. 9/2014 of ADDITIONAL DISTRICT
AND SESSIONS COURT - VII, ERNAKULAM DATED 06.11.2014

PETITIONER(S)/RESPONDENTS:

1. FRANCIS, AGED 69,
S/O.PAILY, MONAPPILLIL HOUSE, KEECHERY DESOM
KEECHERY VILLAGE, KULAYETTIKARA P.O., KANAYANNUR TALUK
ERNAKULAM DISTRICT, PIN CODE -682 315.
2. M.P.JOSEPH AGED 83,
S/O.LATE OUSEPH, ADHAPPILLIL HOUSE, PLAPPILLY DESOM
KEECHERY VILLAGE
KULAYETTIKARA P.O., KANAYANNUR TALUK
ERNAKULAM DISTRICT, PIN CODE - 682 315.

BY ADVS.SRI.P.VISWANATHAN
SRI.P.GEORGE VARGHESE

RESPONDENT(S)/PETITIONER:

SASANKAN, AGED 48,
S/O.NARAYANAN, NADUVELIKUNNEL HOUSE, PLAPILLY DESOM
KEECHERY VILLAGE, KULAYETTIKARA P.O., KANAYANNUR TALUK
ERNAKULAM DISTRICT, PIN CODE - 682 315.

BY ADV. SRI.PAUL K.VARGHESE

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 02-02-2015, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

OP(C).No. 2821 of 2014 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P-1: THE TRUE PHOTOSTATCOPY OF THE COMMISSION REPORT
EXT.P-1(a): THE TRUE PHOTOSTATCOPY OF THE SKETCH
EXT.P-2: THE TRUE PHOTOSTATCOPY OF THE FIELD SKETCH NO.122
EXT.P-2: THE TRUE PHOTOSTATCOPY OF THE FIELD SKETCH NO.123.
EXT.P-3: THE TRUE PHOTOSTATCOPY OF THE ORAL TESTIMONY OF THE ADVOCATE
COMMISSIONER
EXT.P-4: THE TRUE PHOTOSTATCOPY OF THE ORAL TESTIMONY OF THE VILLAGE
OFFICER.
EXT.P-5: THE TRUE PHOTOSTATCOPY OF THE JUDGEMENT PASSED BY THE TRIAL
COURT.
EXT.P-6: THE TRUE PHOTOSTATCOPY OF THE APPEAL MEMORANDUM.
EXT.P-7: THE TRUE PHOTOSTATCOPY I.A.NO.4989 OF 2014
EXT.P-8: THE TRUE PHOTOSTATCOPY OF THE COUNTER AFFIDAVIT FILED BY THE
PETITIONERS HEREIN IN EXHIBIT P7.
EXT.P-9: THE TRUE PHOTOSTATCOPY OF THE ORDER DATED 6.11.2014 PASSED IN
I.A.NO.4989 OF 2014.

RESPONDENT(S)' EXHIBITS: NIL

//TRUE COPY//

A.HARIPRASAD, J.

O.P.(C) No.2821 of 2014

Dated this the 2nd day of February, 2015

JUDGMENT

Petition under Article 227 of the Constitution of India challenging Ext.P9 order passed by the learned Additional District Judge, Ernakulam, which reads as follows:

“As it is essential for the right determination of the real disputes between the parties, I allowed this petition. Adv. Manu Tom is appointed as Adv. Commissioner. Pay betha Rs.3000/- directly to the commissioner with the help of Surveyor Sri Omanakuttan pay betha directly. He is directed to note the points included in the I.A. As well as in the work memo filed by the plaintiff/respondent. For commission report to 24.11.2014.”

2. Heard the learned counsel for the petitioners and the respondent.

3. The suit is one for a permanent prohibitory injunction. Plaintiffs are the petitioners herein. Respondent is the defendant in the suit. The trial court decreed the suit in favour of the petitioners. Aggrieved by

that judgment and decree, the respondent preferred A.S.No.9 of 2014. Ext.P5 is the judgment passed by the trial court and Ext.P6 is the appeal memorandum filed before the first appellate court. It is the grievance of the petitioners that the first appellate court without application of mind and without considering the scope of Order 41 Rule 27 of the Code of Civil Procedure (in short, "CPC") allowed Ext.P7 application, whereby a fresh commissioner's plan and report are now sought to be obtained without setting aside the commissioner's plan and report relied on by the trial court. Precedents on this point in **Swami Premananda Bharathi v. Swami Yogananda Bharathi(1985 KLT 144)**, **Sivaraman v. Narayanan (1986 KLT 578)** and **Kalukurumban v. Sarojini Amma(1997 (1) KLT 481)** are relied on by the learned counsel for the petitioners to contend that the court below committed a grave error in allowing Ext.P7 application.

4. Per contra, learned counsel for the respondent/defendant would contend that the commissioner's plan and report submitted before the trial court were not in accordance with the survey demarcations and that there was no request to inspect the property in terms of survey records. According to the learned counsel for the respondent, the obtainment of a fresh plan and report in terms of survey demarcations is highly essential for the effective adjudication of the case. Whatever that

be, the propriety of the order is under challenge contending that the learned Additional District Judge did not apply her mind to the facts and circumstances of the case. Normally, additional evidence cannot be adduced in appeal as a matter of course. It is a discretion given to the appellate court under Order 41 Rule 27 CPC, which should be exercised very sparingly and only for an effective adjudication. The impugned order does not reveal application of mind and a finding by the learned Additional District Judge that the evidence available in the records was considered and was found insufficient for effective adjudication of the case. In the absence of any specific finding to that effect, the impugned order cannot be sustained. Further, what was the purpose for which the additional evidence sought to be obtained is also not mentioned in the impugned order. Therefore, I am of the view that the impugned order suffers very legal infirmity.

In the result, original petition is allowed. Ext.P9 order set aside. However, it is made clear that during the course of hearing, if the first appellate court feels that additional evidence is to be obtained in the form of a commissioner's plan and report in accordance with survey demarcations, the court below is free to do so. But, it is further clarified that the parties should be heard in the matter specifically and there must be a speaking order with reference to the insufficiency of evidence available

in the records and also about the requirement of such a plan and report.

With these observations, this original petition is allowed.

A. HARIPRASAD, JUDGE.

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