

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 6TH DAY OF JANUARY 2015/16TH POUSHA, 19361

OP(C) .No. 3084 of 2014 (O)

IN OS 249/2011 of SUB COURT, OTTAPPALAM

PETITIONER(S)/PETITIONERS /PLAINTIFF:

1. KUNCHAN,
AGED 57 YEARS, S/O KINARATHUMPADI ITTI,
TACHANATTUKARA AMSOM DESOM,
MANNARKKAD, PALAKKAD.
2. KARTHIYAYINI,
W/O KUNCHAN, KINARATHUMPADI,
TACHANATTUKARA AMSOM DESOM, MANNARKKAD, PALAKKAD.
3. SREEJITH,
S/O KUNCHAN, KINARATHUMPADI,
TACHANATTUKARA AMSOM DESOM, MANNARKKAD, PALAKKAD.

BY ADV. SRI.T.K.SANDEEP.

RESPONDENT(S)/RESPONDENT /PLAINTIFF:

SUDHAKARAN
S/O KUNCHAN GUPTHAN, ATHIPATTA KALATHIL
TACHANATTUKARA AMSOM & DESOM, MANNARKKAD
PALAKKAD-678582.

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 06-01-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

rvs.

APPENDIX

PETITIONER(S) ' EXHIBITS :

EXHIBIT P1: A TRUE COPY OF THE PLAINT IN OS NO.249/2011 BEFORE SUBORDIANTE JUDGE, OTTAPPALAM.

EXHIBIT P2: A TRUE COPY OF THE WRITTEN STATEMENT FILED BY DEFENDANTS IN OS 249/2011 BEFORE SUBORDIANTE JUDGE, OTTAPALAM.

EXHIBIT P3: A TRUE COPY OF THE COMMISSIONERS REPORT ALONG WITH THE ROUGH PLAN APPENDED ALONG WITH IT DATED 22.7.2011.

EXHIBIT P4: A TRUE COPY OF THE 2ND COMMISSIONERS REPORT ALONG WITH THE PLAN APPENDED ALONG WITH IT DATED 30.11.2012.

EXHIBIT P5: A TRUE COPY OF THE APPLICATION IA 2022/2013 IN OS 249/2011 TO REMIT THE COMMISSION REPORT.

EXHIBIT P6: A TRUE COPY OF THE ORDER IN IA 2022/2013 IN OS.249/2011 DATED 12.11.2014 OF THE SUBORDINATE JUDGE, OTTAPALAM.

RESPONDENT(S) ' EXHIBITS :

NIL.

/TRUE COPY/

P.A.TO JUDGE

RVS.

P.BHAVADASAN, J.

O.P.(C) No. 3084 of 2014

Dated this the 06th day of January, 2015

J U D G M E N T

Under challenge is Ext.P6 order whereby, the court below dismissed I.A.No.2022/2013 in O.S.No. 249/2011 which was a petition for remitting the Commissioner's report and plan.

2. The suit is one for injunction in which the petitioners are the defendants. Along with the suit, a Commission was taken out as per order in I.A.No. 3285/2011 and the Commissioner filed a report and plan with the help of a private surveyor. Subsequently, the Commissioner's report was remitted and he filed Ext.P4 report. The report was filed as early as on 30.11.2012. On 07.09.2013 the present application has been filed seeking for remission of the Commissioner's report. The court below found that most of the materials that are sought to be noted by the Commissioner are irrelevant for the purpose of the suit and

if at all there is any fact which ought to have been noticed by the Commissioner and has not noticed by him that can be decided at the time of trial and if during the trial, it is found that the Commissioner's report is not acceptable, appropriate direction can be given to the Commissioner.

3. The learned counsel appearing for the petitioners contended that the court below was not justified in observing that the issue regarding the identity of the property could be deferred the trial. According to the learned counsel, his main grievance was that his property which is a neighbouring property of the plaintiff is to be identified with respect to the encumbrance certificate which shows the boundary of the property as identical to that shown in the written statement filed by the defendants. This aspect which has been earlier requested by the petitioner to the Commissioner to be noticed was not done and that is the reason for seeking the remission of the Commissioner's report.

4. On the very face of it, one fails to understand how the property could be identified with respect to an encumbrance certificate. More over, in Ext.P4, the Commissioner has categorically stated that going by the boundaries shown in the encumbrance certificate, the property of the defendant could not be identified and it is also reported by the Commissioner that the property of the defendant is situated in Survey No.32/5 whereas the property of the plaintiff is situated in Survey No.32/4. The Commissioner has also reported that the plaint schedule property and the property of the first defendant which lies on the eastern side are situated at two different levels.

5. On going through the Commissioner's report namely Ext.P4 produced along with this petition, it can be seen that he has noted all those facts which he was asked to do so as per the work memo submitted by the plaintiff as well as the first defendant. As regards the identification of the defendant's property, he has categorically found that it

is not possible to identify the first defendant's property with respect to the encumbrance certificate as the boundaries do not tally. In the petition for remission of the report, the same prayer is repeated and the court below was therefore justified in declining to accept the plea. Further, the petitioner can have no grievance in the sense that the court below was cautious enough to note that if it is found during trial that the Commissioner's report is not acceptable for any reason, appropriate direction can be issued to the Commissioner and necessary proceedings can be taken then. That safeguards the interest of the petitioners.

There is no merit in this Original Petition and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge