

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

RSA.No. 841 of 2013

A.S.NO.393/2009 OF II ADDITIONAL DISTRICT COURT, PALAKKAD

O.S.NO.100/2006 OF MUNSIFF COURT, ALATHUR

APPELLANT(S)/APPELLANT/1ST DEFENDANT :

**MANI, AGED 59 YEARS,
S/O.ARUNACHALAM, CHENGARAM, KUNISSERY AMSOM AND DESOM,
ALATHUR TALUK, PALAKKAD DISTRICT.**

**BY ADVS.SMT.JEENA JOSEPH
SRI.G.D.PANICKER**

RESPONDENT(S)/RESPONDENTS/PLAINTIFF-2ND DEFENDANT :

- 1. BHANUMATHI, AGED 67 YEARS,
W/O.LATE RAJAPPAN, CHENGARAM,
KUNISSERY AMSOM AND DESOM, ALATHUR TALUK,
PALAKKAD DISTRICT, PIN-678 681.**
- 2. SANTHA, AGED 48 YEARS,
D/O.LATE CHIPPAN, CHENGARAM, KUNISSERY AMSOM AND DESOM,
ALATHUR TALUK, PALAKKAD DISTRICT, PIN-678 681.**

R1 BY ADV. SRI.BOBY MATHEW

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 02-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

Msd.

P.B.SURESH KUMAR, J.

= = = = =

R.S.A.No.841 of 2013.

= = = = =

Dated this the 2nd day of November, 2015.

J U D G M E N T

The first defendant in a suit for declaration, fixation of boundary, recovery of possession and injunction, is the appellant in this second appeal.

2. The plaint schedule properties belong to the plaintiff. Ext.A1 is the assignment deed in favour of the plaintiff in respect of the plaint schedule properties. The properties situated on the western side of the plaint schedule properties belong to defendants 1 and 2. According to the plaintiff, there is no boundary separating the plaint schedule properties and the properties of defendants 1 and 2. It is also the case of the plaintiff that a portion of her property is in the possession of the defendants. She, therefore, claimed a decree for fixation of

the boundary separating the suit properties and the properties of defendants 1 and 2 and also for recovery of possession of the portion of the suit properties which is in the possession of the defendants. The defendants resisted the suit. According to them, a portion of the suit properties is being used by them as access to their properties situated on the western side of the plaint schedule properties and they are in possession of the same. An Advocate Commissioner was appointed in the suit. The Advocate Commissioner inspected the suit properties with notice to the plaintiff and the defendants. At the time of the inspection of the Advocate Commissioner, the plaintiff has made available the copy of Ext.A1 assignment deed by which she claims title to the suit properties so as to enable the Advocate Commissioner to identify the same. The first defendant has not made available his title deeds to the Advocate Commissioner so as to enable him to locate and identify the suit properties and to fix its boundaries. The

Advocate Commissioner, in the circumstances, identified the suit properties with reference to the title deed of the plaintiff as also the survey records. In the report filed by the Advocate Commissioner, it is stated that a portion of the suit properties measuring 2.06 cents which is being used by the first defendant for access to his property is in the possession of the first defendant. The Advocate Commissioner also reported that an extent of 0.72 cents of property which is part of the plaint schedule properties is in the possession of the second defendant. Since the first defendant has not established that the report and plan prepared by the Advocate Commissioner are incorrect, the trial court accepted the case of the plaintiff and passed a decree in her favour. The operative portion of the trial court judgment reads thus:

"1. That the western boundary of the plaint schedule property which separate properties of the defendants shall be the resurvey sub division line which separate both these properties as drawn in Ext.C1(a) survey plan.

2. That it is declared that the western boundary thus fixed by the court shall be the real and actual western boundary of the

plaint schedule property which separate the defendant's properties.

3. That the defendants are directed to surrender vacant possession of the plaint AB schedule properties to the plaintiff (The orange shaded portion and blue shaded portion in Ext.C1(a) survey plan) within one month failing which the plaintiff is allowed to recover possession of this property from the defendants through the process of court at the expense of the defendants.

4. That the defendants are restrained by a permanent prohibitory injunction from causing obstruction to fence the western boundary of the plaint schedule property and from disturbing the plaintiff's peaceful possession and enjoyment of the plaint schedule property.

5. That the relief granted to the plaintiff will not curtail the right of the 1st defendant and his family to use 3 feet wide way through the northern extremity of the plaint schedule property.

6. That Ext.C1(a) survey plan shall form part of the decree.

7. That the plaintiff is allowed to realise the cost of the suit from the defendants."

The first defendant challenged the decision of the trial court in appeal. The appellate court, on a reappraisal of the evidence on record, confirmed the decision of the trial court. The first defendant, who is aggrieved by the concurrent decisions against him has come up in this second appeal.

3. The learned counsel for the appellant contended that the identification of the suit properties by

the Advocate Commissioner is incorrect. He also contended that the 2.06 cents of property out of the plaint schedule properties found to be in the possession of the first defendant is being used by the first defendant for access to his property lying on the west of the suit properties and that by virtue of the impugned decisions, the properties of the first defendant has become land locked. The learned counsel further contended that the plea of adverse possession raised by the defendants has not been considered by the courts below.

4. There is absolutely no merit in any of the contentions raised by the first defendant. As noticed above, the first defendant has not produced his title deeds either before the trial court or before the appellate court. He has also not made available the title deeds when the Advocate Commissioner inspected the properties. The Advocate Commissioner, in the circumstances, identified the suit properties on the strength of the title deed of the plaintiff

and the survey records. The Advocate Commissioner categorically stated in the report that the 2.06 cents of property which is being used by the first defendant as pathway to his property is part of the suit properties owned by the plaintiff. There was no material on record to indicate that the factual conclusions arrived at by the Advocate Commissioner are incorrect. It is in the said circumstances, the trial court accepted the report of the Advocate Commissioner and passed a decree permitting the plaintiff to recover the said 2.06 cents of property from the first defendant. Though a decree for recovery of possession was granted as claimed by the plaintiff in the suit, having regard to the fact that there is no other access to the property of the first defendant, it was clarified by the trial court in the judgment that the relief of recovery of possession granted to the plaintiff will not preclude the first defendant from using a portion of the suit properties having a width of three feet for access to his property. The questions relating to the

identification of the suit properties being questions of facts, the findings thereon cannot be challenged in a second appeal filed under Section 100 of the Code of Civil Procedure. Coming to the plea of adverse possession, as noticed above, the first defendant does not admit the title of the plaintiff over the disputed portion of the plaint schedule properties. A person who does not admit the title of the real owner cannot claim adverse possession. In the aforesaid facts and circumstances, there is no merits in the second appeal and the same is, accordingly, dismissed. All the interlocutory applications in the appeal are closed.

Sd/-
P.B.SURESH KUMAR,
JUDGE.

Kvs/-

// true copy //

PA TO JUDGE.