

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

RSA.No. 583 of 2015

**JUDGMENT DATED 16-07-2014 IN AS 189/2012 OF II ADDITIONAL DISTRICT COURT,
ERNAKULAM**

**JUDGMENT DATED 28-01-2012 IN OS 1049/2010 OF I ADDITIONAL MUNSIF COURT,
ERNAKULAM**

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APPELLANT(S)/APPELLANT/PLAINTIFF:

**K.V.GEORGE, AGED 67 YEARS,
S/O. VARGHESE, KALLARACKAL HOUSE, N.M.ROAD,
MULANTHURUTHY, ERNAKULAM DISTRICT - 682 314.**

**BY ADVS.SRI.PAUL K.VARGHESE
SMT.A.A.GEETHA**

RESPONDENT(S)/RESPONDENTS/DEFENDANTS:

- 1. MULANTHURUTHY GRAMA PANCHAYATH,
MULANTHURUTHY,
REPRESENTED BY ITS SECRETARY - 682 314.**
- 2. A.U.BOSE,
S/O. UTHUP, AMBATTU HOUSE, AMBATT MICRO PRODUCTS,
MULANTHURUTHY - 682 314.**
- 3. MARY,
W/O. A.U.BOSE, AMBATT HOUSE, AMBATT MICRO PRODUCTS,
MULANTHURUTHY - 682 314.**

**R1 BY ADVS. SRI.S.SREEKUMAR (SR.)
SRI.P.MARTIN JOSE
SRI.PPRIJITH
SRI.THOMAS P.KURUVILLA**

**R2 & R3 BY ADVS. SRI.C.T.JOSEPH
SRI.JOE POLLAYIL
SRI.ROSHIN IPE JOSEPH**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
28-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

msv/

P.B.SURESH KUMAR, J.

R.S.A.No.583 of 2015

Dated this the 28th day of September, 2015

JUDGMENT

The plaintiff in a suit for injunction is the appellant.

2. The father of the plaintiff Varkey purchased 50 cents of property in Sy.No.51/2 and 47 cents of property in Sy.No.53/2 of Mulanthuruthy village as per Ext.A6 sale deed. Out of the 47 cents of property acquired by Varkey in Sy.No.53/2, he sold $44 \frac{3}{8}$ cents to one Jacob as per Ext.A7 sale deed. Jacob in turn sold 43.186 cents out of the property purchased by him from Varkey to Johny as per Ext.A8 sale deed. Defendants 2 and 3 have purchased portions of the said property from Johny. The case of the plaintiff is that the plaint A schedule property, measuring 10

sq. metres, is the balance property retained by Varkey while executing Ext.A7 sale deed in favour of Jacob. According to the plaintiff, he is using the plaint A schedule property as a pathway to Chottanikkara - Mulanthuruthy road from plaint B schedule property owned by him. The plaintiff, therefore, claimed in the suit a decree of permanent prohibitory injunction restraining the defendants from causing obstructions to the use of plaint A schedule property as a pathway to plaint B schedule property. The defendants resisted the suit by filing a written statement. The contention raised by the defendants in the written statement is that Varkey had sold the entire property held by him in Sy.No.53/2 while executing Ext.A7 sale deed and he did not retain any portion of the property in Sy.No.53/2. According to them, the strip of land shown as plaint A schedule property is the property retained by Jacob out of the property purchased by him from Varkey.

3. The trial court accepted the contention raised by the defendants and dismissed the suit. The plaintiff challenged the decision of the trial court in appeal. The appellate court, on a reappraisal of the materials on record, confirmed the decision of the trial court. Hence this second appeal by the plaintiff.

4. Heard the learned counsel for the appellant.

5. As noticed above, going by the pleadings in the plaint, the total property held by Varkey in Sy.No.53/2 was 47 cents. Ext.A7 sale deed executed by Varkey in favour of Jacob indicates that Varkey had sold only $44 \frac{3}{8}$ cents to Jacob. It is on this basis that the plaintiff has set up the case that plaint A schedule property is the remaining property held by Varkey in Sy.No.53/2. Ext.A7 sale deed does not indicate that any portion of property in Sy.No.53/2 has been retained by Varkey while executing the said document. When the defendants have specifically contended

that Varkey did not retain any portion of the property in Sy.No.53/2 while executing Ext.A7 sale deed, it was obligatory for the plaintiff to take out a commission to identify the 47 cents of property originally held by Varkey in Sy.No.53/2 and establish that plaint A schedule property is part of the said 47 cents. The plaintiff has not taken out any commission to identify the property as indicated above. In other words, the plaintiff has not established his right over plaint A schedule property. In the appeal, the plaintiff produced an additional document which was accepted in evidence and marked as Ext.A17. Ext.A17 is the communication sent by Ernakulam District Survey Superintendent to the wife of late Varkey on 26.2.2014. The learned counsel for the appellant pointed out that the wife of Late Varkey submitted a representation to the District Survey Superintendent, Ernakulam requesting him to take appropriate action to mutate plaint A schedule

property in her name and Ext.A17 is the reply to the said representation. Ext.A17 indicates that the request made by the wife of late Varkey to mutate plaint A schedule property in her name was turned down by the Survey Department. Further, as noticed above, the case of the plaintiff is that Varkey had purchased 47 cents of property in Sy.No.53/2; that he sold only $44 \frac{3}{8}$ cents to Jacob and that the plaint A schedule property is the property retained by Varkey. If Varkey had 47 cents as claimed by the plaintiff, the remaining property after Ext.A7 sale would be $2 \frac{3}{8}$ cents and not 10 sq.mts as claimed by the plaintiff. Above all, the appellate court found on facts that the plaint A schedule property is the property retained by Jacob while transferring the property purchased by him from Varkey to Johny. The learned counsel for the plaintiff, relying on Ext.A1 possession certificate, contended that the plaint A schedule property is part of the property retained by Varkey. There is

no merit in this contention. When the very existence of plaint A schedule property as claimed by the plaintiff is in dispute, it was the duty of the plaintiff to establish that the property exists as claimed by him. Documents in the nature of Ext A1 cannot be relied on to establish the existence of the disputed property. In the said view of the matter, there is no merit in the second appeal and the same is accordingly dismissed *in limine*. All the interlocutory applications in the appeal are closed.

P.B.SURESH KUMAR, JUDGE.

smm