

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

RSA.No. 1104 of 2014

RFA.NO.150/2003 OF SUB COURT, KOTTARAKKARA

O.S.NO.341/1994 OF MUNSIF'S COURT, PUNALUR

APPELLANT(S)/(APPELLANTS & DEFENDANTS 2 AND 3) :

1. ALIYAR KANNU RAWTHER,
S/O.ISMAIKL RAWTHER, PEZHUVILA VEEDU, SATHRAMMUKKU,
EDAMON VILLAGE, EDAMON MURI.
2. JALALUDHEEN RAWTHER,
S/O.ALIYAR KANNU RAWTHER, PEZHUVILA VEEDU,
SATHRAMMUKKU, EDAMON VILLAGE, EDAMON MURI.
3. A.MUHAMED RAWTHER,
S/O.ALIYAR KANNU RAWTHER, PEZHUVILA VEEDU,
SATHRAMMUKKU, EDAMON VILLAGE, EDAMON MURI.
4. A.SAINALABDEEN RAWTHER,
S/O.ALIYAR KANNU RAWTHER, PEZHUVILA VEEDU,
SATHRAMMUKKU, EDAMON VILLAGE, EDAMON MURI (DIED).
5. A.SHAJAHAN RAWTHER,
PEZHUVILA VEEDU, SATHRAMMUKKU, EDAMON VILLAGE,
EDAMON MURI, PATHANAPURAM TALUK.
6. A.SALIM RAWTHER,
PEZHUVILA VEEDU, SATHRAMMUKKU, EDAMON VILLAGE,
EDAMON MURI, PATHANAPURAM TALUK.

BY ADV. SRI.T.M.ABDUL LATIFF

RESPONDENT/(IST RESPONDENT/PLAINTIFF) :

SEKHAR, S/O.CHUDALA MUTHU,
THUNDUVILA MANI VILASOM VEEDU, SATHRAMMUKKU,
EDAMON VILLAGE, EDAMON MURI,
PATHANAPURAM TALUK - 691 307.

BY ADV. SRI.B..KRISHNA MANI (CAVEATOR)

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 12-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P.B.SURESH KUMAR, J.

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R.S.A.No.1104 of 2014.

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Dated this the 12th day of November, 2015.

J U D G M E N T

Defendants 1 to 6 in a suit for fixation of boundary and injunction, prohibitory as also mandatory, are the appellants in this second appeal.

2. The respondent instituted the suit alleging that the defendants who own the property on the western side of the plaint schedule property have trespassed into a portion of the plaint schedule property and erected some structures. The defendants contested the suit. The contention raised by the defendants in the suit was that they have not trespassed into any portion of the plaint schedule property and that the structures are situated within their property situated on the west of the plaint

schedule property. In the course of the proceedings, an Advocate Commissioner was appointed to conduct a local inspection. The Advocate Commissioner appointed by the court, after inspecting the property filed Ext.C1 mahazar, Ext.C2 plan and Ext.C3 report. The trial court accepted the report and plan submitted by the Advocate Commissioner and decreed the suit. The operative portion of the decree reads thus:

“In the result, the suit is decreed and the plaintiff is allowed to fix the western boundary of the plaint schedule property separating it from the defendants' property through the red ink line as shown in Ext.C2 plan, through court. The defendants are restrained from trespassing into the plaint schedule property or committing any sort of waste therein or doing any construction work or putting up boundaries therein. The defendants are directed by a mandatory injunction to remove the structures put up by them in the plaint schedule property within three months from the date of this decree, failing which, the plaintiff is allowed to remove such structures and allowed to realise the cost thereof from the defendants. Considering the facts and circumstances of the case, the plaintiff is allowed cost of the suit from the defendants. Ext.C2 plan forms part of the decree.”

The defendants 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 defendants who are aggrieved by the concurrent decisions against them have thus come up in this second appeal.

3. Heard the learned counsel for the appellants.

4. The learned counsel for the appellants contended that since the plaintiff has approached the court with the averment that the defendants have trespassed into a portion of the plaint schedule property, the plaintiff should have sought a decree for recovery of possession of the portion of the property trespassed upon by the defendants and without a prayer for recovery of possession, the decree for fixation granted by the trial court in accordance with Ext.C2 plan is unsustainable in law.

5. True, it is alleged by the plaintiff that the defendants have trespassed into a portion of the plaint

schedule property and erected structures protruding into the plaintiff schedule property. However, it is seen that the contention of the defendants in the written statement filed by them is only that they are in possession of the property which they own. In other words, they have no case that they are in possession of any portion of the plaintiff schedule property. In so far as the defendants have no case that they are in possession of any portion of the property claimed by the plaintiff by virtue of Ext.A1 sale deed, it was not obligatory for the plaintiff to claim recovery of possession of the property which the defendants have trespassed upon on the basis that it belongs to them. In that view of the matter, there is no illegality in the impugned decisions warranting interference by this Court invoking the jurisdiction under Section 100 of the Code of Civil Procedure. There is no question of law, much less any substantial question of law involved in this matter. The second appeal is devoid of merits and the same is

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accordingly dismissed. All the interlocutory applications in the appeal are closed.

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

Kvs/-

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PA TO JUDGE.