

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 9TH DAY OF NOVEMBER 2015/18TH KARTHIKA, 1937

SA.No. 799 of 1999 AND CROSS OBJECTION (C)

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(AGAINST THE JUDGMENT AND DECREE IN AS.NO. 5/1994 OF SUB COURT,
THIRUVALLA DATED 29-01-1999)**

**(AGAINST THE JUDGMENT AND DECREE IN OS.NO. 321/1987 OF MUNSIF COURT,
THIRUVALLA)**

APPELLANT/APPELLANT/3RD DEFENDANT :

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ABDUL KHADER, PUTHUVATHRA VEEDU,
PADINJAREKKARA MURI, NEDUMPRAM VILLAGE,
THIRUVALLA, REPRESENTED BY POWER OF ATTORNEY HOLDER,
M.K.RAGHAVAN, AGED 57 YEARS, THEVILAZHATHU VEEDU,
-DO- -DO-**

**BY ADVS.SRI.V.V.ASOKAN
SMT.S.AMINA**

RESPONDENT(S)RESPONDENTS/PLAINTIFF & DEFENDANTS 1,2,4 TO 11 :

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- *1. PICHAKANNU RAWTHER, THYKKOOTTATHIL VEEDU,
PUZHAVATHU MURI, CHANGANASSERY VILLAGE.
(DIED, LHS ARE RECORDED)**
 - 2. ABDULKHADAR, PUTHUVATHRA KIZHAKKETHIL,
PADINJAREKKARA MURI, NEDUMPRAM VILLAGE,
THIRUVALLA.**
 - 3. AHAMMADKUTTY, THONDUPARAMBIL VEEDU, DO- (DIED)**
 - 4. AHAMMED BEEVI AMMA OF -DO-**
 - 5. ZEENATHU OF -DO-**
 - 6. THAMPI OF -DO-**
 - 7. JAMEELA OF -DO-**
 - 8. MUMTHAS OF -DO-**
 - 9. RAJI OF -DO-**

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10. EPHATHIKKAR AHAMMADKUTTY OF -DO-
11. SABITHA OF -DO-
12. KHADEEJA BEEVI, W/O.1ST RESPONDENT,
THYKKOOTTATHIL VEEDU, PUZHAVATHU MURI,
CHANGANASSERY.
13. ABDUL HAMEED, S/O. -DO-
PRESENT ADDRESS IS ABDUL HAMEED,
SALE TAX SPECIAL CIRCLE, KOTTAYAM.
14. MEHABOOB, S/O. 1ST RESPONDENT,
THYKKOOTTATHIL, PUZHAVATHU, CHANGANASSERY,
PRESENT ADDRESS IS MEHABOOB, AGRICULTURAL
GRAMAVIKASANA BANK, KOTTAYAM.
15. LILA, D/O. 1ST RESPONDENT, C/O.ABDUL MAJEED,
ASST. EXECUTIVE ENGINEER, K.S.E.B., GANDHINAGAR,
KOTTAYAM.
16. JAMEELA, D/O.1ST RESPONDENT, C/O. HAMSA RAWTHER,
ASST. ENGINEER, K.S.E.B., PATTOM, KOTTAYAM.

***AS PER THE ORDER DATED 22/8/2014 VIDE MEMO C.F. 4751/2014 DATED 09/8/2014 IT IS RECORDED THAT THE FIRST RESPONDENT DIED DURING THE PENDENCY OF THE FIRST APPEAL AND ALL HIS LHRS ARE ALREADY PARTIES IN THIS APPEAL AND NO FURTHER STEPS ARE NEEDED IN THE MATTER.**

**R2 BY ADV. SRI.M.KRISHNAKUMAR
R4 & R10 BY ADV. SMT.V.SETHUKUTTY AMMA
R4,R7 & R10 BY ADV. SRI.S.SUBHASH CHAND
R12 TO R16 BY ADVS. SRI.P.R.VENKETESH
SRI.P.R.RAJA**

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 09-11-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

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P.B.SURESH KUMAR, J.

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S.A.No.799 of 1999

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Cross Objection

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Dated this the 9th day of November, 2015.

J U D G M E N T

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

2. There are three items of properties in the suit. Item No.1 is a property having an extent of 1.54 acres in survey No.227/13 and 227/12 of Nedumpuram village. Item No.3 is a property having an extent of 30 cents in survey No.227/5 of the said village. Item No.2 is the building in item No.1 property. The plaint schedule properties originally owned by the father of the plaintiff and on his death, the same along with other properties devolved on the plaintiff, his brother Bappukannu Rawther and their

mother. Later, on the death of the mother, the properties were partitioned among the plaintiff and Bappukannu Rawther as per Ext.A2 partition deed. According to the plaintiff, item No.3 property is the property allotted to the plaintiff as per Ext.A2 partition deed. The case set up by the plaintiff in the plaint is that the defendants have trespassed into the plaint schedule properties. The plaintiff has, therefore, claimed a declaration of his title over the plaint schedule properties and a decree for recovery of possession of the properties trespassed upon by the defendants. The defendants resisted the suit. Among them, the third defendant contended that as per Ext.A2 partition deed, Bappukannu Rawther obtained 20 cents of property in survey No.227/5 lying on the northern side of the road formed in the meanwhile and he purchased the said 20 cents of property from Bappukannu Rawther as per Ext.A4 assignment deed and that he is in possession of the same. In the course of trial, an Advocate Commissioner was

appointed to conduct a local inspection to identify the suit properties. The Advocate Commissioner appointed by the court identified the suit properties with the aid of a Surveyor and filed Ext.C1 report. The plan appended to Ext.C1 report prepared by the Surveyor who assisted the Advocate Commissioner is Ext.C1(a). The trial court found that the total extent of property originally held by the father of the plaintiff in Sy.No.227/5 is 70 cents; that out of the said 70 cents, 8.125 cents of property was made use of for the formation of the road and that the balance property is in the possession of the defendants. Accordingly, the trial court permitted the plaintiff to recover the balance property excluding the 20 cents sold by Bappukannu Rawther, viz., 41.875 cents from the defendants. The trial court also permitted the plaintiff to recover 10.140 cents of property identified by the Commissioner as part of plaint schedule item No.1 from the defendants. The matter was taken up in appeal by the third defendant alleging that the property

purchased by him has not been correctly identified by the Advocate Commissioner. In the appeal, the plaintiff has filed a cross objection. The appellate court, on a re-appraisal of the evidence on record, confirmed the decision of the trial court. The third defendant has thus come up in this second appeal.

3. In this second appeal also, the legal representatives of the plaintiff has filed a cross objection, contending that the courts below should have permitted the plaintiff to recover 24 cents of property in survey No.227/12 as well from the defendants.

4. Heard the learned counsel for the parties.

5. After hearing the parties, the questions of law on which notice was issued to the parties were recast as follows :

1. Were not the courts below justified in ignoring the boundaries of the property obtained by the third defendant as per Ext.A4 sale deed while accepting Ext.C1 (a) plan prepared by the Advocate Commissioner?

2. Have not the courts below acted illegally in rendering the impugned decisions based on Ext.C1(a) plan?

6. The fact that the father of the plaintiff had 70 cents of property in survey No.227/5 is beyond dispute. Ext.A2 partition deed executed between the plaintiff and Bappukannu Rawther proceeds on the basis that 20 cents of property out of the said 70 cents was made use of for the formation of the road. It is seen that the plaintiff has been given 30 cents of property in survey No.227/5 on the southern side of the road and Bappukannu Rawther has been given 20 cents of property on the northern side of the road as per Ext.A2. Ext.C1(a) plan does not indicate that the Advocate Commissioner has identified plaint schedule item No.3 property. Instead, the Advocate Commissioner has identified the portion of the property in survey No.227/5 which was made use of for the formation of the road. According to the Advocate Commissioner, the extent of the

property made use of for the formation of the road is only 8.125 cents. The Advocate Commissioner located the 20 cents of property sold by Bappukannu Rawther to the third defendant. The remaining 41.875 cents property in survey No.227/5 was also located by the Advocate Commissioner. Ext.C1(a) plan indicates that excluding a trivial portion, the rest of the property in survey No.227/5 is on the northern side of the road. As per Ext.A2, Bappukannu Rawther has been allotted 20 cents of property in Sy.No.227/5 on the northern side of the road and the third defendant has purchased the said property as per Ext.A4 sale deed. In the description of the property in Ext.A4 sale deed, it is stated that the southern boundary of the property covered by Ext.A4 is a road. In other words, the property purchased by the third defendant covered by Ext.A4 assignment deed is a property having a road frontage. The property located by the Advocate Commissioner as the property purchased by the third defendant does not have a

road on its southern side. It is thus clear that the property allotted to Bappukannu Rawther as per Ext.A2 partition deed has not been correctly located by the Advocate Commissioner. As noticed above, the property allotted to the plaintiff in Sy.No.227/5 as per Ext.A2 partition deed has also not been located by the Advocate Commissioner. Instead, the impugned judgments are rendered on the premise that since Bappukannu Rawther has sold the property obtained by him, the rest of the property in Sy.No.227/5 belongs to the plaintiff. It is now settled that the boundaries of the properties are to be preferred over survey numbers in cases of disputes as to the identity of property. Since it is found that the properties have not been identified by the Advocate Commissioner with reference to the boundaries shown in the title deeds of the parties, according to me, the matter has to go back to the trial court for fresh disposal. The questions of law formulated for decision are thus answered in favour of the appellant.

In the result, the impugned judgements are set aside and the second appeal as also the cross objection are disposed of directing the trial court to decide the suit afresh after affording the parties an opportunity to identify their respective properties. The suit being one instituted as early as in the year 1987, I deem it appropriate to direct the trial court to dispose of the same on or before 31.3.2016. All the interlocutory applications in the appeal are closed.

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

Kvs/-

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P.A. TO JUDGE.