IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

TUESDAY, THE 19TH DAY OF AUGUST 2014/28TH SRAVANA, 1936

FAO (RO).No. 364 of 2013 ()

AGAINST THE JUDGMENT IN AS 255/2010 of III ADDL.SUB COURT, ERNAKULAM DATED 18-06-2013

AGAINST THE JUDGMENT IN OS 1226/2007 of I ADDL.MUNSIFF'S COURT, ERNAKULAM DATED 20-11-2010

APPELLANTS/RESPONDENTS 1 & 2/DEFENDANTS 1 & 2:
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1. KAPIL NAGPAL
   CHAIRMAN, NAGPAL BUILDERS, 33/2155-B5
   N.H. BYE-PASS, NEAR MEDICAL CENTRE, VENNALA PO
   KANAYANNUR TALUK, ERNAKULAM 682 028.

2. NAGPAL BUILDERS
   33/2155-B5, N.H. BYE-PASS, NEAR MEDICAL CENTRE
   VENNALA PO
   KANAYANNUR TALUK ERNAKULAM 682 028 REPRESENTED
   BY ITS OFFICER N.VIJAYAKUMAR.

   BY ADV. SRI.TOM K.THOMAS

RESPONDENTS/APPELLANT/RESPONDENTS 3 TO 5/PLAINTIFF & ADDL. PLAINTIFFS:
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1. T.M.KALAM, AGED 40 YEARS
   S/O.MUSSA, SELMA MANZIL, MARADU
   KANAYANNUR TALUK PIN.682 304.

* 2. SHAMEER SULAIMAN, AGED 22 YEARS (DELETED)
   S/O.LATE T.M.SULAIMAN, SELMA MANZIL, MARADU
   KANAYANNUR TALUK
   ERNAKULAM DISTRICT, PIN.682 304.

* 3. LAILA SULAIMAN, AGED 42 YEARS (DELETED)
   W/O.LATE T.M.SULAIMAN, SELMA MANZIL, MARADU
   KANAYANNUR TALUK
   ERNAKULAM DISTRICT, PIN.682 304

* 4. SHAMEENA SULAIMAN, AGED 19 YEARS (DELETED)
   D/O.LATE T.M.SULAIMAN, SELMA MANZIL, MARADU
   KANAYANNUR TALUK
   ERNAKULAM DISTRICT, PIN.682 304

(RESPONDENTS 2 TO 4 ARE DELETED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANTS VIDE ORDER DTD 7.4.2014 IN IA.475/14)

R1 BY ADV. SRI.M.P.RAMNATH
R1 BY ADV. SRI.P.RAJESH (KOTTAKKAL)
R1 BY ADV. SMT.UMA R.KAMATH
R1 BY ADV. SMT.S.SANDHYA

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING COME UP FOR ADMISSION ON 19-08-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

B. KEMAL PASHA, J.

F.A.O. (RO) No.364 of 2013

Dated this the 19th day of August, 2014

J U D G M E N T

Challenging judgment and decree dated 18.06.2013 passed by the Subordinate Judge's Court, Ernakulam in A.S. No.255/2010, respondents 1 and 2 before the court below, who are the defendants in O.S. No.1226/2007 of the I Additional Munsiff's Court, Ernakulam, have come up in appeal.

2. O.S. No.1226/2007 was filed by respondents 1 and 2 herein as plaintiffs for recovery of possession, mandatory injunction, and perpetual injunction. The case of the plaintiffs is that an extent of 14 cents of landed property, which is the western portion of a property having a total extent of 27 cents covered by Ext.B6 sale deed, was purchased by them through Exts.A1 and A2 sale deeds dated 19.11.1990. The plaintiffs have been paying basic tax

in respect of the property and mutation was also effected in their favour. The vendor of the plaintiffs is one P.P.Cherian Tharakan, who had purchased the said 27 cents covered by Ext.B6 sale deed. While the plaintiffs were away at Madras in connection with their business, the defendants purchased the property on the eastern side of the properties purchased by the plaintiffs. According to the plaintiffs, the defendants wanted to snatch away their property also and they were threatened by the defendants that they would be dispossessed of the property in case the said properties also were not sold to them. As the plaintiffs wanted to preserve their property, by expressing their apprehension, the suit was initially filed as one for perpetual injunction against trespass. It is alleged that after the institution of the suit, the defendants had trespassed into the portion of the plaint schedule property at its eastern side and constructed a compound wall by encroaching into a portion of the plaint schedule property having an extent of 1.575 cents. By

describing the said encroached portion as 'plaint A' schedule property, the plaintiffs amended the plaint thereby seeking recovery of possession of 'plaint A' schedule property with its mesne profits and also for mandatory injunction for the removal of the compound wall constructed by the defendants.

3. The defendants filed a joint written statement contending, *inter alia*, as follows:-

“The description as well as the boundaries in respect of plaint schedule properties are incorrect and misleading. The defendants have purchased the properties having an extent of 33.213 cents which is lying as 13 cents in re-survey No.377/9 and 20.213 cents in re-survey No.377/1 in Block No.13 of Maradu village, through Ext.B5 sale deed. At the time of purchase of the property by the defendants, there was a boundary wall on the western side of the said 13 cents which was more than 20 years old. The said boundary wall was the eastern boundary wall of the 14 cents

of the plaintiff. After the purchase of the property by the defendants, the first plaintiff approached the first defendant on several occasions requesting for the sale of that portion of the property so that the plaintiff could take bigger vehicles to his residence through the eastern side of their property. As the road frontage of the property of the defendants is only 11.7 metres, the first defendant was not inclined to accept the proposal forwarded by the plaintiffs. During October 2007, the plaintiffs demolished a portion of the eastern compound wall of their property with a view to encroaching into the portions of the property of the defendants. As a compound wall at western side of the property of the defendants was required, the defendants had no other go than to construct a compound wall to their property at the western boundary of their property. According to the defendants, the plaintiffs had removed the compound wall at the eastern boundary of their property with a view to showing that both the properties were lying

contiguously.

4. After the amendment of the plaint, an additional written statement was also filed denying all the claims of the plaintiffs. On the side of the plaintiffs, PWs 1 to 3 were examined and Exts.A1 to A13 were marked. On the side of the defendants, the first defendant was examined as DW1 and another witness was examined as DW2, and Exts.B1 to B17 were marked. Exts.X1, X2 and X3 were also marked. The Commissioner and the surveyor, who accompanied the Commissioner, were examined as CW1 and CW2 and Exts.C1 and C2 series were also marked. The second plaintiff died during the pendency of the suit and his Legal representatives were impleaded. The trial court, after hearing both sides, found that the first plaintiff is not entitled to the decree prayed for. Consequently, the suit was dismissed with costs. Aggrieved by the said judgment and decree, the first plaintiff filed A.S. No.255/10 before the Subordinate Judge's Court, Ernakulam.

5. The learned Subordinate Judge, after hearing both sides, has allowed the appeal by setting aside the judgment and decree in O.S. No.1226/2007 and remitted the matter to the trial court for giving an opportunity to the plaintiffs to file a fresh commission application in order to locate the plaint schedule property as per the title deed and old survey sketch in respect of the property. Aggrieved by the said remand order, respondents 1 and 2 in the appeal before the lower appellate court have come up in appeal.

6. Heard the learned counsel for the appellant Sri.Tom K. Thomas and the learned counsel for the first respondent Sri. M.P. Ramnath. The other respondents were deleted from the party array as the first respondent has purchased the portions of properties of the other respondents also.

7. The learned counsel for the appellants has argued that the remand order passed by the court below is not at all warranted and that the court below ought to have

considered and dismissed the appeal on merits. It is also argued that there is no question relating to the identity of the properties arise for consideration in the matter as the plaintiffs had willingly purchased the property having an extent of 14 cents, after ascertaining its western boundary and they purchased a property having an extent of 14 cents which is lying just east to the then existing western boundary of that property. It is also argued that the present attempt on the part of the plaintiffs is to grab portions of the property of these appellants by making it to appear that there is '*purampoke'* land at the western portion of the said 14 cents being possessed by the plaintiffs.

8. *Per contra*, the learned counsel for the first respondent herein has argued that being the first purchaser of 14 cents of property out of the 27 cents of property owned and possessed by the vendor, the first respondent is entitled to get 14 cents covered by EXts.A1 and A2 and the same cannot include any portions of '*thodu purampoke'* situated

at the western most portion of the said property. The learned counsel for the first respondent has taken a stand that there was no compound wall at the eastern boundary of the property of the first respondent and what was demolished was the wall of a building which was in existence in the property. It is also argued that the first respondent has lost possession over an extent of 1.575 cents of property through revenue records as such a portion lying at the western extremity of the said 14 cents being possessed by the first respondent at present is styled as *'thodu purampoke*' by the revenue authorities and, therefore, the first respondent is entitled to get such a portion recovered from the property being presently possessed by the appellants.

9. Admittedly, the first respondent is the first purchaser from the vendor of the first respondent as well as the appellants. It is also true that he had purchased an extent of 14 cents of property. The said 14 cents is situated

in survey Nos. 573/1 and 574/2. As per Exts.A1 and A2, the plaintiff had purchased the entire extent of 12 cents coming in survey No.574/2 and 2 cents from survey No.573/1. The total extent of property which the vendor was having in survey No.573/1 was 15 cents. After excluding the 2 cents purchased by the first respondent from that property, the appellants purchased the remaining 13 cents from survey No.573/1. According to the lower appellate court, it has come out through Ext.C2(a) plan that there was no such actual extent of 27 cents available with the vendor and that two plots marked as 'K' and 'L' shown at the western portion of the property in the possession of the first respondent are '*purampoke*' land on which the first respondent cannot claim title. It is based on the said contents of Ext.C2(a), the lower appellate court has taken the view that the properties purchased for the first respondent as well as the appellants as per their title deeds are to be located with reference to the survey numbers, for which the lower appellate court has

set aside the judgment and decree passed by the trial court and remitted the matter to the trial court. According to the learned counsel for the appellants, the remand is quite unnecessary and the remand has been made just for the sake of a remand.

10. The learned counsel for the appellants has taken this Court to the evidence adduced by the parties. The specific case of the appellants is that it was the first respondent who demolished the then existing compound wall at the eastern boundary of the property of the first respondent, in order to make it appear that there was no compound wall at all and these two properties were lying contiguously. According to the appellant, it was with a view to getting sufficient width for getting bigger vehicles to the residence of the first respondent, such a mischief was done by the first respondent by demolishing his own compound wall. On going through the records and on going through Exts.B1 to B4 photographs, it seems that the said argument

forwarded by the appellants is correct. It cannot be said that the said compound wall was demolished by the appellants. Over and above it, even the first respondent has no case that compound wall at the eastern boundary of the property of the first respondent was demolished by the appellants. The specific stand of the appellants is that there was no compound wall separating these two properties, and by force the appellants trespassed into the portions of the property of the first respondent at the eastern portion of that property and reduced a portion of that property into the possession of the appellants by constructing a compound wall.

11. PW1 is the first plaintiff. In his cross examination on 11.06.2010, he has admitted that the western compound wall to his property was constructed by him. When he was asked as to when that compound wall was constructed, he answered that he constructed that compound wall at the western boundary of his property just after two years from

the date of its purchase. Further, he has admitted that the said compound wall was constructed after ascertaining the western boundary of his property through a properly conducted survey and measurement. He has further specifically admitted that the said compound wall at the western side was the said western boundary of his property even at the time when he purchased it. The two plots allegedly styled as '*thodu purampoke*' marked as 'K' and 'L' are coming at the eastern side of the western compound wall. Admittedly, PW1 purchased his property having an extent of 14 cents by identifying and agreeing the present western boundary, as the western boundary of the said 14 cents. Therefore, the first respondent cannot claim that he had purchased such 14 cents of property excluding any '*thodu purampoke*'. He had no case that at the time when he purchased the property, *'thodu purampoke'* was also purchased by him and the same was included in that plot of property purchased by him. The first respondent has no

case that the plot of property purchased by him was 14 cents with any excess land of '*thodu purampoke*'. When admittedly he had purchased the property having an extent of 14 cents lying at the eastern side of his western compound wall, he cannot claim mere extent than what he had purchased. It seems that the lower appellate court has lost sight of the said clear admissions by PW1 in his cross examination.

12. When PW1 was asked in cross examination whether the plot marked as 'K' and 'L' in Ext.C2(a) are lying at the eastern side of his western compound wall in his possession, he had no answer at all. His further specific case in cross examination is that he does not know whether any '*thodu purampoke*' is there in his possession. He had admitted that he has never received any notice from the revenue authorities that he had encroached into any portions of the *'thodu purampoke*'. It has clearly come out that there is an eastern retaining wall to the '*thodu'* lying at

the western side of the property of the first respondent. He has admitted that his western compound wall is constructed on the eastern retaining wall of the said canal.

13. When there is any discrepancy with regard to measurements, survey number and boundaries, the boundaries will prevail. When the first respondent had purchased his 14 cents by identifying the present western compound wall as the western boundary of that 14 cents of property, he can claim only an extent of 14 cents of property lying at the eastern side of that western compound wall and nothing more. If at all, any *'thodu purampoke*' is there, within that plot of property, it is for him to suffer as he ought to have got it identified at the time of purchase of the property. Admittedly, he had purchased the property and he had constructed the said compound wall after ascertaining that portion as his western boundary through a properly conducted survey and measurement. The learned counsel for the appellants has argued that Ext.C2(a) plan is

manipulated in such a way to show that some '*purampoke*' land is also coming within the property in the possession of the first respondent with a view to enabling him to grab portions of the properties of the appellants. On going through the specific admissions of PW1, the said argument forwarded by the learned counsel for the appellants seems to be correct.

14. The learned counsel for the first respondent has pointed out that if recovery of possession is not granted from the portions of the properties in the possession of the appellants, the first respondent will be a loser and he will have to lose 1.575 cents of property. The learned counsel for the first respondent has invited the attention of this Court to Ext.A14 letter No.B9-63082/07 dated 15.01.2008 issued by the District Collector, Ernakulam. It seems that the first respondent had filed an application before the District Collector stating that he had been remitting tax for his 14 cents of property in re-survey No.377/9 of the Maradu

village for the period up to 1999-'00 and presently as per village records, the extent of the property to which he is entitled is reduced to 12 cents and, therefore, he wanted to get back the remaining 2 cents also included in his property to which he has to pay tax. The District Collector has stated that even though the extent of the property in the name of the first *'thandaperu*' holder was shown as 27 cents, actually as per re-survey records, the extent was only 25 cents in survey No.377/9 and that was why the said deficiency in extent had occurred. It is not the look out of the appellants to make good the deficiency, if any, in the properties of the first respondent. As per Ext.A14, it is admitted that the first respondent was paying tax for an extent of 14 cents till 1999-'00. It is only after resurvey, the extent was reduced to 12 cents. Therefore, if at all he wants to have a remedy, it is for him to take necessary steps as per the Survey and Boundaries Act. He cannot point fingers to the appellants, who are having only 13 cents of property purchased by

them. It seems that the records have been manipulated unnecessarily in the resurvey by noting down that the total extent of the property in the possession of the first respondent is 14 cents which is inclusive of 1.575 cents of '*thodu purampoke'* also. So far the revenue authorities are not proceeded against the first respondent under the Land Conservancy Act. He had been paying tax for 14 cents till the resurvey in 1999-'00. There was no reason for denying his opportunity to continue to pay tax for 14 cents even after resurvey. The resurvey authorities ought to have considered the said fact and acted accordingly. Still, the first respondent is in possession of 14 cents of property and he is entitled to pay tax for the said 14 cents of property. It cannot be considered that any '*thodu purampoke*' is there within the said 14 cents of property. When he was permitted to pay tax for 14 cents till 1999-'00, his continued right to pay tax for such an extent of property cannot be curtailed. He shall be continued to pay tax for 14 cents of property, as the

mischief has occurred in the resurvey alone. At the same time, by pointing out such a misfortune fell on him after 1999-'00, he cannot proceed against the appellants to grab the portions of the properties of the appellants.

15. As this Court has considered the appeal field by the first respondent before the lower appellate court as A.S. No.255/2010, there is no scope for any further remand of the matter for the consideration of the first appellate court. The first appellate court ought not to have remitted the matter to the trial court. It seems that the remand order passed by the lower appellate court is unnecessary and it cannot be a remand within the meaning of Order XLI Rules 23, 23A and 25 CPC. The impugned judgment and decree in A.S. No.255/2010 are devoid of merits, and is only to be dismissed, and I do so.

In the result, this appeal is allowed and the impugned judgment and decree are set side. A.S. No.255/2010 stands dismissed. In the nature of this appeal,

there is no order as to costs.

The Registry is directed to forward a copy of this judgment to the District Collector, Ernakulam to act in accordance with the directions contained in paragraph 14 of this judgment.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/22/08

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PA to Judge