

Sally Thomas Vs. Mathew

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Court : Kerala

Decided On : Jan-22-2013

Judge : Honourable Mr.Justice Thomas P.Joseph

Appellant : Sally Thomas

Respondent : Mathew

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE THOMAS P.JOSEPH TUESDAY, THE 22ND DAY OF JANUARY 2013 2ND MAGHA 193 OP(C).NO. 203 OF 201.(O) ----- I.A. NO.1990 OF 201.IN O.S. NO.48 OF 2011.SUB COURT, PALA PETITIONER(S): ----- SALLY THOMAS, AGED 5 YEARS W/O THOMAS,STEPHEN,ORRAKKANAL HOSUE KURICHITHANAM VILLAGE,MEENACHIL TALUK,KOTTAYAM BY ADVS.SRI.V.RAJENDRAN (PERUMBAVOOR) SRI.GEORGE VARGHESE KIZHAKKAMBALAM RESPONDENT(S): ----- 1. MATHEW,, AGED 5 YEARS S/O CHERIATH,KANJIRATHUNGAL HOUSE,MONIPPALLY P.O 686636,MONIPPALLY VILLAGE,MEENACHIL TALUK KOTTAYAM 2 ELSAMMA MATHEW,, AGED 4 YEARS W/O MATHEW,KANJIRATHUNGAL HOUSE,MONIPPALLY KARA MONIPPALLY P.O,686636,MONIPPALLY VILLAGE MEENACHIL TALUK,KOTTAYAM R BY ADV. SRI.P.C.HARIDAS THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 22-01-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: O.P(C) NO.203 OF

201.APPENDIX PETITIONER(S)' EXHIBITS: EXHIBIT P1 TRUE COPY OF PLAINT IN O.S. NO.48 OF 201.OF SUB COURT, PALA DATED 26 2.2011. EXHIBIT P2 TRUE COPY OF WRITTEN STATEMENT FILED BY THE PETITIONER IN O.S. NO.48 OF 201.ON 8.8.2011. EXHIBIT P3 TRUE COPY OF COMMISSION REPORT AND ROUGH SKETCH SUBMITTED BY ADVOCATE COMMISSIONER IN O.S. NO.260 OF 200.OF MUNSIFF'S COURT, PALA DATED 22 1.2010. EXHIBIT P4 TRUE COPY OF PETITION FOR APPOINTMENT OF COMMISSIONER FILED BY THE RESPONDENTS (I.A. NO.1990 OF 2012.IN O.S. NO.48 OF 201.DATED 20 9.2012. EXHIBIT P5 TRUE COPY OF OBJECTION FILED BY THE PETITIONER TO EXHIBIT P4 ON 24.9.2012. EXHIBIT P6 TRUE COPY OF ORDER IN I.A. NO.1990 OF 201.IN O.S. NO.48 OF 201.OF SUB COURT, PALA DATED 12 12.2012. RESPONDENT(S)' EXHIBITS: NIL TRUE COPY P.S. TO JUDGE THOMAS P.JOSEPH, J.

===== O.P(C) No.203 of 2013
===== Dated this the 22nd day of
January, 2013

JUDGMENT

First defendant in O.S. No. 48 of 2011 of the Sub Court, Pala challenges Ext.P6, order dated 12.12.2012 allowing I.A. No.1990 of 2012 in O.S. No.48 of 2011.

2. Respondents-plaintiffs filed O.S. No.48 of 2011 for a decree for specific performance of an alleged oral agreement dated 01.11.2009 to provide a way to the respondents at a width of 12 feet from the MC road and leading to the property of respondents on payment of Rs.5,50,000/-. Petitioner denied any such agreement.

3. Respondents filed I.A. No.1990 of 2012 to appoint a survey commission to measure property of petitioner and other defendants and identify the 12 feet way (regarding which they claimed that there was an oral agreement on 01.11.2009). That application was allowed vide Ext.P6, order.

4. Learned counsel for petitioner has contended that there was no such agreement and that at any rate, the agreement is not enforceable since it is not supported by

any consideration. O.P(C) No. 203 of 2013 -:

2. :- These matters are to be decided by the trial court.

5. Question is whether at this stage the Advocate Commissioner should measure property of petitioner and other defendants and locate the disputed way? Learned counsel for petitioner submits that unless existence of an oral agreement supported by consideration is proved, question of measurement of property of petitioner and other defendants does not arise.

6. Learned counsel for the respondents submitted that there is nothing wrong in locating the way so that it is easy for the court to pass a decree.

7. Having heard the learned counsel on both sides, I am inclined to think that question of appointment of a survey commission for identification of the disputed way would arise only when the (alleged) oral agreement is accepted and the court grants a decree for specific performance. Until then, there is no reason why property of petitioner and other defendants should be measured. In that view of the matter, Ext.P6, order cannot be sustained. But there is no reason why I.A. No.1990 of 2012 should be dismissed. Instead, that application can be kept alive until the suit is decided and its fate will depend on the result of the suit. O.P(C) No. 203 of 2013 -:

3. :- Resultantly, the Original Petition is allowed as under: (i) Exhibit P6, order dated 12.12.2012 on I.A. No.1999 of 2012 In O.S. No.48 of 2011 of the Sub Court, Pala is set aside. (ii) I.A. No.1990 of 2012 is remitted to the trial court to be taken up for consideration at the appropriate stage in the light of the observation I have made above. THOMAS P. JOSEPH, JUDGE. vsv

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