

Johny vs Thomas @ Thomachan

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SooperKanoon Citation : sooperkanoon.com/1628793

Court : Kerala

Decided On : Sep-30-2021

Judge : Honourable Mr.Justice V.G.Arun

Appeal No. : OP(C)/1591/2018

Appellant : JOHNY

Respondent : Thomas @ Thomachan

Judgement :

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE V.G.ARUN THURSDAY,
THE 30TH DAY OF SEPTEMBER 2021 / 8TH ASWINA, 1943 OP(C)
NO. 1591 OF 2018 AGAINST THE ORDER/JUDGMENT IN OS 83/2009
OF MUNSIFF COURT,ALUVA, ERNAKULAM PETITIONER/S: JOHNY
S/O.PAILY, THETTAYIL HOUSE, ANGAMALY KARA & VILLAGE,
ALUVA TALUK. BY ADVS. SRI.MATHEW JOHN (K) SRI.ABY J
AUGUSTINE SRI.K.M.MOHAMMED YUSUFF M-1323
RESPONDENT/S:

1 THOMAS @ THOMACHAN S/O.OUSEPH, PUTHENPURACKAL HOUSE, ANGAMALY KARA & VILLAGE, ALUVA TALUK, PIN-683572. 2 GEORGE S/O.OUSEPH, ELAVUMKUDY, ANGAMALY KARA & VILLAGE, ALUVA TALUK, PIN-683572. 3 ELIAMMA W/O.GEORGE, ELAVUMKUDY, ANGAMALY KARA & VILLAGE,ALUVA TALUK, PIN-683572. 4 PAULOSE S/O.OUSEPH, ELAVUMKUDY, ANGAMALY KARA & VILLAGE,ALUVA TALUK, PIN-683572. 5 DEVASSIKUTTY S/O.OUSEPH, ELAVUMKUDY, ANGAMALY KARA & VILLAGE,ALUVA TALUK, PIN-683572. OP(C).1591/18 2 6 RENUKA W/O.SUDHAKARAN, THENNURUVEETIL, PARAPPURAM KARA, KIZHAKKUMBHAGAM VILLAGE, ALUVA TALUK, PIN-683575. BY ADVS. SRI.M.MOHAMED NAVAZ SRI.P.SANTHOSH KUMAR (TR) SRI.B.PRASANTH SRI.T.P.SAJAN

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 30.09.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:
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V.G.ARUN, J.

----- O.P(C).No.1591 of 2018
----- Dated this the 30th day of
September, 2021

JUDGMENT

The petitioner is the 2nd defendant in O.S.No. 83 of 2009 on the files of the Munsiffs Court, Aluva. The suit is filed seeking a decree of permanent prohibitory injunction, restraining the defendants from encroaching upon or reducing the width of plaint E schedule way, which is the only access to the properties of the plaintiffs, is lying in

between the properties of the defendants. At the instance of the plaintiffs, an Advocate Commissioner was appointed to conduct local inspection and to report about the lie and nature of E schedule way. Contrary to the plaintiffs' expectation,

the Commission report did not support their case. Thereupon, the 1st defendant in the suit/6th respondent herein filed an application for remitting the Advocate Commissioners report and to call for a fresh report. The petitioner was not made a party to that application, nor served with a copy of the application. The trial court allowed the application and appointed an Advocate Commissioner. On coming to know about the order, the petitioner filed Exhibit P11 application and the order was recalled.

OP(C).1591/18 4 The petitioner also filed objection to the Commission report and the court below remitted the Commissioners report to the very same Advocate Commissioner. At that juncture, respondents 1 to 5 filed Exhibit P15 application requiring the Advocate Commissioner to measure the property on the basis of the prior title deed. To the said application also, the petitioner filed detailed objections. The court allowed Exhibit P15 application by Exhibit P17 order. Hence, this original petition.

2. Learned counsel for the petitioner submitted that O.S.No.83

of 2009 is barred by res judicata. Referring to Exhibits P1 judgment, Exhibit P2 decree and Exhibit P3 Advocate Commissioner report in an earlier suit (O.S.No.89 of 2006) filed by the petitioner, it is contended that the issue with respect to the boundaries of the property of the petitioner has become final and the instant suit is an abuse of process of court. It is pointed out that Identical contentions with respect to E schedule way was urged in the earlier suit and the defendants therein had raised a counter claim. Rejecting those contentions, the suit was decreed and the counter claim dismissed. Thereupon, defendants preferred appeals against the judgment and decree. During the pendency of the appeals, the instant suit was filed and the appeals withdrawn. The 1 st defendant in the present suit is hand-in-glove with the respondents, as would be evident from

OP(C).1591/18 5 the fact that Exhibit P10 application was filed by the 1 st defendant without making the petitioner a party. The court below having recalled the order passed in Exhibit P10, appointing an Advocate Commissioner, committed gross illegality in appointing an Advocate Commissioner to measure the properties, at the instance of the plaintiffs. Moreover, the impugned order is liable

to be set aside, being bad for non-application of mind and absence of reasons.

3. Learned counsel for the respondents submitted that the impugned order was passed after taking into consideration all relevant aspects, including the objections raised by the petitioner.

4. A perusal of Exhibit P17 order shows that, except a bald

statement of the learned Munsiff being satisfied that it is necessary to measure the property based on the document mentioned in the petition for determination of the real dispute, the reasons which prompted the court to arrive at such satisfaction are not stated. The

order is hence liable to be set aside for complete absence of

reasons. As has been repeatedly held by the Apex Court, the hallmark of a

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and exercise of judicial power is disclosure of the reasons for the decision. Giving reasons is one of the fundamentals of justice delivery. It is the reasons that make known whether there had been proper and due application of mind to the issue before the court. Needless to say that judicial power has

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In the result, the original petition is allowed. Exhibit P17 order

is set aside. The trial court shall reconsider I.A.No.444 of 2018 in O.S.No.83 of 2009 and pass a reasoned order thereon, after affording an opportunity of hearing to the parties. The suit being of the year, 2009, the learned Munsiff shall take earnest efforts to dispose of the suit as expeditiously as possible and at any rate, within six months of receipt of a copy of this judgment.

Sd/- V.G.ARUN, JUDGE vgs OP(C).1591/18 7 APPENDIX OF OP(C) 1591/2018
PETITIONER EXHIBITS EXHIBIT P1 A TRUE COPY OF JUDGMENT IN
O.S.NO.189 OF 2006 DATED 20.2.2009, MUNSIFF'S COURT, ALUVA. EXHIBIT
P2 A TRUE COPY OF THE DECREE IN O.S.NO.189 OF 2006 DATED 20.2.2009,
MUNSIFF'S COURT, ALUVA. EXHIBIT P3 A TRUE COPY OF THE
COMMISSIONER'S REPORT & SKETCH DATED 6.3.2008. EXHIBIT P4 A TRUE
COPY OF THE JUDGMENT IN A.S.NO.67 OF 2009 DATED 12.8.2010, ADDL.
DISTRICT COURT, N.PARAVUR. EXHIBIT P5 A TRUE COPY OF THE PLAINT
IN O.S.NO.83 OF 2009 DATED 28.2.2009, MUNSIFF'S COURT, ALUVA.
EXHIBIT P6 A TRUE COPY OF THE WRITTEN STATEMENT OF THE
PETITIONER DATED 28.2.2009. EXHIBIT P7 A TRUE COPY OF THE INTERIM
REPORT DATED 13.8.2012 BY ADVOCATE COMMISSIONER BOBY
VARGHESE. EXHIBIT P8 A TRUE COPY OF THE OBJECTION FILED BY THE
PETITIONER DATED 3.9.2012. EXHIBIT P9 A TRUE COPY OF THE REPORT
AND THE SURVEY SKETCH DATED 15.3.2013. EXHIBIT P10 A TRUE COPY
OF THE APPLICATION AND THE ACCOMPANYING AFFIDAVIT FILED BY THE
6TH RESPONDENT DATED 23.9.2013. EXHIBIT P11 A TRUE COPY OF THE
AFFIDAVIT AND THE

APPLICATION FILED BY THE PETITIONER SEEKING TO SET ASIDE THE
ORDER IN EXT.P10 DATED 21.7.2014. OP(C).1591/18 8

EXHIBIT P12 A TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER
DATED 25.9.2014. EXHIBIT P13 A TRUE COPY OF THE ADDITIONAL
OBJECTION DATED 17.3.2015 FILED BY THE PETITIONER. EXHIBIT P14 A
TRUE COPY OF THE INTERIM REPORT DATED 2.6.2018 FILED BY THE
ADVOCATE COMMISSIONER. EXHIBIT P15 A TRUE COPY OF THE
APPLICATION FILED BY RESPONDENTS 1 TO 5 AS I.A.NO.444 OF 2018 ON
28.2.2018. EXHIBIT P16 A TRUE COPY OF THE OBJECTION FILED BY THE
PETITIONER DATED 12.5.2018. EXHIBIT P17 A TRUE COPY OF THE ORDER
DATED 8.6.2018 IN I.A.NO.444 OF 2018 IN O.S.NO.83 OF 2009.