

Nandakumara Varma Vs. Usha Varma

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Court : Kerala

Decided On : Dec-11-2014

Judge : Honourable Mr. Justice K.Abraham Mathew

Appellant : Nandakumara Varma

Respondent : Usha Varma

Judgement :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW THURSDAY,THE11H DAY OF DECEMBER201420TH AGRAHAYANA, 1936 FAO.No. 213 of 2010 ----- AGAINST THE

JUDGMENT

AND DECREE IN AS892008 of DISTRICT COURT, THIRUVANANTHAPURAM DATED2302-2010 AGAINST THE

JUDGMENT

AND DECREE IN OS6262006 OF MUNSIFF COURT, THIRUVANANTHAPURAM DATED1303-2008 APPELLANTS/RESPONDENTS2& 3/DEFENDANTS2& 3 :

----- 1. NANDAKUMARA VARMA, AGED69YEARS, S/O.KOCHUKUTTAN THAMPURAN, RAVEENA, BAPUJI NAGAR PONGUMMOODU, MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM.

2. LEKHA VARMA, AGED63YEARS, D/O.SNEHALATHAAMMA, RAVEENA, BAPUJI NAGAR PONGUMMOODU, MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM. BY ADV. SRI.G.S.REGHUNATH RESPONDENTS/APPELLANT & 1ST RESPONDENT/PLAINTIFF & 1ST DEFENDANT:

1. USHA VARMA, AGED65YEARS, W/O.RAVI VARMA, X/101 G, UDAYAMPEROOR THRIPPUNITHURA, ERNAKULAM DISTRICT.

2. DR.OOMMAN THOMAS, AGED48YEARS, S/O.THOMAS, HARISREE, MANNANTHALA P.O. THIRUVANANTHAPURAM. BY ADVS.SRI.L.MOHANAN SMT.LIGEY ANTONY R2 BY ADV. SRI.VPK.PANICKER THIS FIRST APPEAL FROM

ORDER

S HAVING BEEN FINALLY HEARD ON1112-2014, ALONG WITH FAO. 299/2010, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:
cms K.ABRAHAM MATHEW J.

----- F.A.O.Nos.213 & 299 of 2010
----- Dated this the 11th day of December, 2014

JUDGMENT

Remand for the sake of remand. Remand though the calls of justice do not demand remand. This is actually what has happened in this case. Waste of time and energy, prejudice to the parties and loss of confidence of the public in the judicial process are the result of unjustified remand, the loss of which is fatal. It is very settled that the power to remand a case shall be exercised only sparingly and the appellate court should make earnest efforts to dispose of the case on merits if evidence on record is sufficient to make an adjudication.

2. The plaintiff is the owner of 7 ares 78 sq.links described in the plaint schedule. The first defendant is the owner of the adjoining eastern property. Defendants 2 and 3 are the owners of the northern property adjoining the plaintiff's property. There is no boundary separating the properties of the plaintiff and the defendants.

The defendants attempted to put up boundary and to construct a road along the northern boundary of the plaintiff's property. These are the allegations on the basis of which the plaintiff sought for fixation of the boundary of her property. The first defendant contended that there is a wall separating his property from the property of the plaintiff. The second and third defendants raised a contention that for more than 15 years a road has been in F.A.O.Nos.213 & 299 of 2010 2 existence between their property and the plaintiff's property and that there is a wall separating the road and the property of defendants 1 and 2.

3. Ext C1 commission report proves that there is a wall separating the properties of the plaintiff and the first defendant. The plaintiff has given up her claim for fixation of the boundary between her property and the property of the first defendant. This issue does not survive now.

4. The report of the Commissioner that there is a 5 metre wide road separating the properties of the plaintiff and of defendants 2 and 3 stares at her. The case of defendants 2 and 3 their property has a compound wall on all its boundaries stands confirmed by the admission the plaintiff (PW1) made in the box.

5. The trial court allowed the plaintiff "to put up boundary of her choice on the northern side of her property along AHG line in Ext C1(b) plan" which is the line separating her property and the northern road. The learned District Judge has made the following observation in his judgment: "Though the defendants raised a contention that a portion of the property owned by the plaintiff on its northern side now lying as a way having a width of 5 metre. They have not produced by document in order to show that it is a public way. On the other hand even according to them the user of the said way is limited for a period of 15 years. Neither the first defendant nor the defendants 2 and 3 have any case that they have F.A.O.Nos.213 & 299 of 2010 3 got any right, title and interest over the property owned by the plaintiff herein. Even for perfection of prescriptive easement right at least a user as of right for a period of 20 years ending within two years is necessary." The learned District Judge has observed that the defendants have no right over the road. I.A.No.205 of 2010 allowed by the plaintiff for amendment of the plaint incorporating relief of recovery of possession. He set aside the judgment

and the decree of the lower court and remanded the case. The first defendant, and defendants 1 and 2 have filed separate appeals.

6. In a suit for fixation of boundary it is not the boundary of the plaintiff alone that is fixed. It is the boundary between the property of the plaintiff and the defendant that is fixed. This necessitates description of the properties of both parties in separate schedules in the plaint and the plaintiff making a prayer for fixation of the boundaries between the properties. This has not been done in this case.

7. To maintain a suit for fixation of boundary it is necessary that properties of the parties to the suit are adjoining properties, which means that the two properties should be in contact with each other. In this case there is a 5 metre wide road in between the properties of the plaintiff and the second and third defendants. There is no dispute between them with regard to their boundary. There is already a wall separating the property of defendants 1 and 2 from the southern road, beyond which is the plaintiff's property. F.A.O.Nos.213 & 299 of 2010 4 8. The absence of boundary mark alone will not give the plaintiff a cause of action to institute a suit for fixation of boundary. Existence of a dispute as to the boundary, apprehension that if that the defendant would trespass into the property taking advantage of the absence of the boundary mark or that a dispute will arise if the plaintiff puts up a boundary mark are some situations in which the plaintiff may file a suit for fixation of boundary. A cause of action is necessary even to institute a suit for fixation of boundary as observed in Bapputty(a) Sydali & others v. Cheriakutty(a) Veerankhani Rawther (1990(1) KLJ218. The observation of the learned Judge is relevant: "If it is merely for ascertaining and fixing the boundaries of his property without any dispute or at least apprehension of disputes his remedy may not be before the Civil Court, but under the Survey and Boundaries Act". In P.Narayanan Nair v. Achuthan Nair and another (1973 KLT2999 a Division Bench of this court had occasion to deal with a similar situation. The Division Bench has observed: "when he seeks to protect his property by having the boundaries of his property demarcated from that of his neighbour apprehending that the neighbour would otherwise trespass upon his property claiming it as his own it appears to be in the category of suits where such person seeks to protect his rights to property." 9. If the learned District Judge taken pains to examine whether the plaintiff has a cause

of action against the defendants 2 and 3, he would not have committed the error he has committed. F.A.O.Nos.213 & 299 of 2010 5 10. The District Judge has allowed I.A.No.205 of 2009 filed by the plaintiff for amendment of her pleadings incorporating relief of recovery of possession. The averments sought to be incorporated by the amendment do not disclose a cause of action for claiming relief of recovery of possession. The property sought to be recovered is admittedly a road which the defendants alleged is used by the public. Moreover, the amendment will change the nature and character of the suit. That apart the property sought to be recovered is not described in the schedule. Total non application of mind to these facts on the part of the learned District Judge is evident. He has gone awry in allowing the amendment application.

11. Not only that the learned District Judge has failed to address the relevant issues. But examined irrelevant facts on the basis of which he made the order of reference. The order of remand which is unjustified for more than one reason is liable to be set aside.

12. This is not a suit in which the defendant claim any right over the road running along the northern boundary of the plaintiff's property. The question of their right over it is beyond the scope of the suit, it being irrelevant to the issues which have come up for determination. Still, it is very surprising, the learned District Judge has made observations of about defendant's right over it. F.A.O.Nos.213 & 299 of 2010 6 In the result, these appeals are allowed. The impugned judgment is set aside. The District Judge is directed to dispose of the matter on merits. K.ABRAHAM MATHEW JUDGE cms F.A.O.Nos.213 & 299 of 2010 7 12. There is also no justification for the District Judge's allowing I.A.205 of 2010 filed for amendment of the plaint incorporating relief of recovery of possession. The averments sought to be incorporated by the amendment do not disclose a cause of action for claiming the relief of recovery of possession. The property sought to be recovered is admittedly a road, which the defendants alleged is used by the public for the cause of action for claiming the said relief does not find a place. Mere existence of a road on the northern boundary of the plaintiff's property will not give rise to a cause of action against defendants 2 and 3. The amendment will change the nature and character of the suit. The property sought to be recovered

is not described in a schedule. Non application of mind on the part of the learned District Judge is evident. He was wrong in allowing the amendment application. The consequential order of remand also is vitiated. It is liable to be set aside.

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