
(2010) 06 KL CK 0002
In the High Court Of Kerala
Case No : W. P. (C) No. 566 of 2008 (P)

Shantilal Babulal Jain

APPELLANT

Vs

Naroon Abubacker Kasam and Others

RESPONDENT

Date of Decision : 17-06-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 16, Order 26 Rule 13, Order 26 Rule 14(2), Order 6 Rule 4, 151
Evidence Act, 1872 — Section 44

Citation : (2010) 2 KLJ 628

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : V. Chitambaresh, T.C. Suresh Menon, Jibu P. Thomas and P.S. appu, for the Appellant; K.V. Pavithran and Jayanandan Madayi Puthiyaveetil, for the Respondent

Judgement

Thomas P. Joseph

1. These writ petitions arise from the order passed by learned Principal Sub Judge, Thalassery in the final decree proceedings in OS.No.414 of 1982 of that court. For convenience parties before me are referred to as petitioner, plaintiff and defendants as in the court below. Plaintiff and defendant Nos.1 and 2 are children of the late Kassam Hussain and defendant No.3, his wife. Defendant No.4 is the wife of defendant No.2. Plaintiff sued defendant Nos. 1 to 4 for partition and separate possession of his 7/24 shares in three items of properties - item No.1 being a property situated at Karjat in Raigard district, Maharashtra and item Nos. 2 and 3 being properties situated within the jurisdictional limits of learned Principal Sub Judge, Thalassery. He claimed that the late Kassam Hussain acquired item No.1 from its jenmi, constructed a building thereon and started a hotel in the name and style "Islamic Hotel". The said Kassam Hussain, it is not disputed breathed his last on 27-03-1936. Plaintiff claimed that he was in the womb of his mother at the time of death of his father and defendant Nos.1 and 2 were minors, Hence the hotel business was continued on their behalf by

their uncle. Assainar. When defendant Nos. 1 and 2 became major they took over management of the hotel and changed its name to "Malabar Hotel". According to the plaintiff, himself and defendant Nos.1 and 2 are co owners of item No.1. About 10 years before institution of the suit, plaintiff started business on the veranda of building in item No.1. As regards item Nos.2 and 3 plaintiff claimed that said properties were acquired by defendant Nos.1 and 2 from the profits derived from the hotel business in the building in item No.1 and hence those items are also partible. Before institution of the suit plaintiff had issued notice to defendant Nos.1 and 2 on 11-01-1982 demanding partition but the demand was refuted by them vide reply notice. Defendant Nos.1 to 3 contended that the late Kassam Hussain had no right over item No.1. He was doing business in a shed in the said property. That business was later taken over by Assainar, uncle of plaintiff and defendant Nos.1 and 2. Assainar stopped that business and surrendered the land to the jenmi. Later defendant Nos. 1 and 2 got entrustment of the said land from the Jenmi, constructed building and started "Malabar hotel". It is incorrect to say that plaintiff has any partible right over item No. 1. They contended that item Nos.2 and 3 were acquired by defendant Nos. and 4 and it belonged to them. They disputed territorial jurisdiction of the court to entertain a suit in respect of item No.1 situated at Karjat. Learned Principal Sub Judge passed a preliminary judgment and decree on 21-08-1987. As per that, the suit to the extent it concerned item Nos.2 and 3 was dismissed and in respect of item No.1 plaintiff was given a preliminary decree for partition allowing him to have separate possession of his 7/24 shares while the remaining shares in that item went to defendant Nos. 1 to 3. Plaintiff filed application for passing a final decree. In that proceeding, petitioner who is a pendants lite assignee of item No.1 from defendant Nos.1 and 2 was impleaded as additional respondent No.3 but, there was no direct service of notice on him. Instead notice was allegedly served by publication in an English daily. Petitioner remained absent in the final decree proceedings. The Advocate Commissioner inspected the property at Karjat and suggested division. In the final decree proceeding, as against the direction in the preliminary decree that plaintiff is entitled to have 7/24 shares and defendants Nos. 1 to 3 are to have the remaining shares, the latter agreed to be satisfied with owelty of Rs.4,11,480/-each for defendant Nos. 1 and 2 and the entire item No.1 was allotted to the share of plaintiff. Final decree was passed. As item No.1 is situate at Karjat, the decree certificate was transmitted for execution to the court of civil Judge, Junior Division, Karjat. At that stage petitioner, getting information about the preliminary and final decrees concerning item No.1 filed I.A.Nos.295 and 298 of 2001 in the court of learned Principal Sub Judge, Thalassory to set aside final decree and to condone the delay in filing that application. He claimed that he being a permanent resident of Karjat was not aware of the pendancy of the suit. He is not conversant with English language and the English daily in which notice was published had no circulation at his native place. He was served with notice on 22-11-2000 under Order 21 Rule 16 of the CPC (for short, "the Code") on E.A.No.5 of 2000 from the court of learned Civil Judge (Junior Division), Karjat. Those applications were

opposed by me plaintiff. Learned Principal Sub Judge dismissed the said applications. Petitioner challenged that common order in this court in F.A.O.No.1 of 2005. It was contended on behalf of petitioner that the whole proceeding which culminated in the preliminary and final decrees was vitiated by fraud and collusion between plaintiff and defendant Nos.1 to 4 and that petitioner never had information about the pendency of the suit. He also contended that notwithstanding that item Nos.2 and 3 were not available for partition as found by the learned Sub Judge those items were fraudulently included in the plaint schedule with the sole object of conferring jurisdiction for the learned Principal Sub Judge, Thalassery to direct partition of item No.1 situated at Karjat. It was also contended by petitioner that Kassam Hussan, predecessor-in-interest of plaintiff and defendant Nos.1 to 3 under whom plaintiff claimed right, title and interest and possession over item No.1 had expired on 27-03-1936 while, defendant Nos. 1 and 2 acquired item No.1 only as per assignment deed No. 1335 of 1964 dated 22-11-1964 of SRO, Karjat and that defendant Nos.1 and 2 had in turn assigned their right over item No.1 in favour of petitioner and one Himathlal Oswal as per sale deed Nos.417 of 1985 and 418 of 1985 dated 25-03-1985, both of SRO. Karjat. The said Himathlal Oswal released his right over item No.1 to the petitioner as per document No. 1726 of 1988 dated 07-07-1988 of the SRO, Karjat. Petitioner denied that Kassam Hussain had any conceivable right even over item No.1 to devolve on plaintiff and defendant Nos.1 to 3. This court while deciding F.A.O.No.1 of 2005 held that in so far as there is no challenge in that appeal against the preliminary decree, it was not necessary for this court to go into the question whether institution of the suit and passing of preliminary decree are vitiated by fraud and collusion but held that the final decree was obtained by fraud and collusion between plaintiff and defendant Nos.1 and 2 as indicated by the fact that notwithstanding that the major share of item No.1 was to go to defendant Nos.1 and 2 as per the preliminary decree, they were generous enough to be satisfied with owelty leaving the entire property to the plaintiff to whom the preliminary decree provided only 7/24 shares. Holding so, notwithstanding the length of delay in petitioner seeking to set aside the final decree this court allowed the appeal and I.A.Nos. 295 and 296 of 2001, set aside final decree and remitted the case to the learned Principal Sub Judge for fresh decision. After remand, parties adduced evidence. Petitioner concentrated on his contention regarding fraud and collusion between plaintiff and defendant Nos.1 and 2 in the institution of the suit and obtaining the preliminary and final decrees. He gave evidence as RW1 and produced Exts.B1 to B9. Plaintiff gave evidence as PW1, concentrating on the issue regarding passing of the final decree, of course denying the allegation regarding fraud and collusion. Exts.C1 to C5, reports. and plans of the Commissioner were also marked in evidence. Learned Principal Sub Judge held that though argument was advanced on behalf of petitioner that institution of the suit itself, and not to say about the preliminary decree are vitiated by fraud and collusion between plaintiff and defendant Nos.1 and 2, it was not permissible for the(c) learned Principal Sub Judge to go into that question since this court while deciding F.A.O.No.1 of

2005 had only set aside the final decree and directed enquiry into that matter. The contention raised by petitioner regarding fraud and collusion was therefore not considered. Learned Principal Sub Judge found that division made by Advocate Commissioner as per Exts.C1 to C5 was not just or equitable and directed fresh division by another Advocate Commissioner. Both sides are aggrieved though, in different ways. Petitioner still claiming that institution of the suit and obtaining preliminary decree are vitiated by fraud and collusion between plaintiff and defendant Nos.1 and 2 has filed W.P.C.No.566 of 2008 while order of learned Principal Sub Judge appointing Advocate Commissioner for fresh division of item No.1 is challenged by the plaintiff in W.P.C.No.36289 of 2007.

2. Learned Senior Advocate appearing for petitioner (W.P.C.No.566 of 2008) asserted that the very institution of suit is the result of fraud and collusion between plaintiff and defendant Nos.1 and 2 in that, item Nos.2 and 3 which were negligible in extent when compared to item No.1 and which were not available for partition as held by learned Principal Sub Judge also and which plaintiff did not challenge at any point of time. Item Nos.2 and 3 were fraudulently incorporated in the plaint with the only object of conferring jurisdiction for the learned Principal Sub Judge to entertain the suit for partition of item No.1 which is situated in Karjat, the intention being to avoid assignees getting information about pendency of suit if filed at Karjat. It is also the contention of learned Senior Advocate that evidence and circumstances on record eloquently indicated fraud and collusion between plaintiff and defendant Nos.1 and 2 to defeat the interest of petitioner who purchased item No.1 for valid consideration from defendant Nos.1 and 2. Learned Senior Advocate contends that fraud vitiated anything and everything including the solemn proceedings of the court which led to passing of the preliminary decree and that once it is shown that proceeding is vitiated by fraud and collusion nothing should stand in the way of the court recalling preliminary judgment and decree and reopening the case even invoking its inherent power u/s 151 of the Code. Learned Senior Advocate has placed reliance on the decisions in Rama Chandra Singh Vs. Savitri Devi and Ors. (2003(8) SCC 3191 Haji Vs. State of Kerala (2006(3) KLT 941), Jai Narain Parasrampur (Dead) and Others Vs. Pushpa Devi Saraf and Others, and A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, . Learned counsel for plaintiff (respondent in W.P.C.No.566 of 2008 and petitioner in W.P.C.No.36289 of 2007) contend that there is absolutely nothing on record to show fraud or collusion between plaintiff and defendant Nos.1 and 2 either in the institution of suit or in the matter of preliminary decree. On the other hand evidence and circumstances show that defendant Nos.1 and 2 had put up a vigorous fight against the suit and they had produced documentary evidence to support their contention that item Nos.1 to 3 are not partible. According to the learned counsel finding entered by this court in F. A.O.No.1 of 2005 is confined to the final decree alone which was set aside and remitted for fresh decision. So much so, learned Principal Sub Judge was only concerned with the issue of passing a proper final decree and hence learned

Principal Sub Judge was right in not going into the allegation regarding fraud and collusion in the institution of suit and obtaining preliminary decree. It is also contended by learned counsel that learned Principal Sub Judge was not correct in directing appointment of fresh commission for division and Exts.C1 to C5 were sufficient to directed division of item No.1 among plaintiff and defendant Nos.1 to 3.

3. I have gone through the judgment of this court in F.A.O.No.1 of 2005 and the order under challenge. It is not as if this court had refused to accept the contention of petitioner regarding fraud and collusion in the institution of suit and obtaining of preliminary judgment and decree. This court while disposing of F.A.O.No.1 of 2005 did not go into the argument concerning fraud and collusion in the institution of the suit and obtaining preliminary decree since the prayer in the appeal was only against final decree and hence it was not necessary for this court to go into the preliminary decree and matters prior to that. Learned Principal Sub Judge has refused to go into the said question for the reason that there was no application to recall the preliminary decree or, to pass any order with respect to the said decree and since this court also did not go into the question of fraud and collusion (in F.A.O.No.1 of 2005) in the institution of the suit and passing of preliminary decree and the remand judgment of this court only concerned the final decree. Therefore it is not correct to contend that this court had found against the plea of fraud and collusion in the matter of institution of the suit and obtaining the preliminary decree. That is still a matter relevant for consideration.

4. It is apposite to refer to the decisions relied on by learned Senior Advocate for petitioner. In Hamza Haji Vs. State of Kerala (supra) it is held,

When seeking to question the decision as vitiated by fraud, the proper course to adopt was to move the court that had tendered the decision, by an application.....The basic principle obviously is that a party who had secured a judgment by fraud should not be enabled to enjoy the fruits thereof.

As to how fraud and collusion could vitiate a proceeding of court, it is held in Ram Chandra Singh Vs. Savitri Devi and Ors.

15. commission of fraud on court and suppression of material facts are the core is (sic) involved in these matters. Fraud as is well known vitiates (sic)every solemn act. Fraud and justice never dwell together.

16. Fraud is a conduct either by letter or words, which induces the other person or (sic)W.R.C.Nos.36289 of 2007 and 566 of 2008 authority to take a definite determinative stand as a response to the conduct of the former either by word or letter.

That was a case where challenge was to the preliminary decree on the ground of fraud and collusion. An application was filed under Order 26 Rules 13 and 14(2),

Order 20 Rule 18 and Order 6 Rule 4 of the Code. The Supreme Court in paragraph 30 of the judgment observed that

once the principles laid down (as to fraud and collusion vitiating the decision of court) are to be given effect to, indisputably the court must be held to have inbreat-jurisdiction in relation thereto.

(Emphasis supplied)

In *Jai Narain Parasrampuriah and Ors. Vs. Pushpa Devi Saraf and Ors.*(supra), the same issue was dealt with at length. It is stated,

the judgment and decree if vitiated by fraud, the same would be nullity and in such situation, Section 44 of the Evidence Act would be attached. As a plea of fraud can be raised even in a collateral proceeding and the trial court having recorded a specific finding that the jurisdiction of the Delhi Court was created artificially by including a Delhi property, in respect whereof there was no dispute, the said decree must be held to have been obtained by fraud and collusion. In paragraph 55 it is observed that it is now well settled that fraud vitiates every solemn act. Any order or decree obtained by practicing fraud is a nullity."

In *A.V. Papayya Sastry and Ors. Vs. Govt, of A.P and Ors.*, it is held that,

it is possible to challenge even in collateral proceeding that a judgment, decree or order have been obtained by fraud and collusion and that if it is shown that judgment, decree or order is obtained by fraud and collusion it is non eat and is a nullity."

5. It therefore follows that once the proceeding of court and its order are found to be vitiated by fraud and collusion, it has no force or sanctity and the court has the power, nay the duty to set things right by recalling it or passing such other appropriate orders as circumstances warranted and for the said purpose the court can exercise its inherent power. If proceeding or order are found to be thus vitiated, it is a nullity and a motion to re-open the proceedings or cancel it can be moved by the party aggrieved in the court concerned in the same proceeding at any time. The proceeding or order which is vitiated by fraud and collusion can be challenged even in collateral proceedings. To such an action rules of estoppel, res judicata or lis pendens are no bar. I shall refer to the circumstances urged by learned counsel on both sides in support of their respective contentions bearing in mind the above principles. According to the learned Senior Advocate appearing for petitioner, as found by the learned Principal Sub Judge also item Nos.2 and 3 were not available for partible as the said properties were acquired by defendant Nos.1 and 4. Though, plaintiff made an allegation that item Nos.2 and 3 were purchased from the funds from the business carried on in item No.1, plaintiff was not able to produce any evidence worth the name. Even the evidence of PW1 is that he had no direct information about any of those matters. It is pointed out that though plaintiffs claim for partition of item Nos. 2 and 3 was disallowed by the learned Principal Sub Judge, he did not challenge it by way of an appeal,

instead he was satisfied with the preliminary decree for partition of item No. 1 which by then had been transferred by defendant Nos.1 and 2. Exts.A12 and A13 produced by plaintiff in suit revealed that after 25-03-1985 defendant Nos.1 and 2 had no right, title, interest or possession of item No.1 which remained with petitioner and Himathlal Oswal who released his right to the petitioner as per document No. 1726 of 1988 dated 07-07-1988 (after the preliminary decree dated 21-08-1978). It is pointed out that it is after the transfer of item No.1 in favour of petitioner and Himathlal Oswal on 25-03-1985 that defendant No.1 gave evidence as DW1 in the suit. It is further pointed out from the preliminary judgment that though it was contended by defendant Nos.1 to 3 in their written statement that Kassam Hussain had no right over item No.1, Kassam Hussain was only conducting a small business in a shed in the property which after his death was managed by Assainar who later surrendered that right to the Jenmi and thereafter defendant Nos.1 and 2 got entrustment of item No.1 where they constructed the building and started business, DW1 was geuorous enough to make certain admissions in the course of his evidence which ultimately helped the plaintiff in getting a preliminary decree for partition of item No.1. Learned Senior Advocate contended that the so called admission were made by DW 1 after he and defendant No.2 transferred their right, title, interest and possession of item No.1 in favour of petitioner and Himathlal Oswal. Evidence revealed that Kassam Hussain died on 27-03-1936 while defendant Nos.1 and 2, assignors of petitioner acquired right over item No.1 only as per assignment deed No. 1335 of 1964 dated 22-13-1964 and the evidence relied on by plaintiff to prove that Kassam Hussain had right over the property are some receipts passed on by the counsel who conducted the tax case, that plaintiff was running some business on the veranda of the building in item No.1 and the so called admissions made by defendant No1 as DW1. It is pointed out by learned Senior Advocate that though, defendant Nos.1 and 2 put up a semblance of a fight against the plaintiff concerning division of item No.1 and filed A.S.No.89 of 1988, they left that appeal on the way side resulting in its automatic death on 05-08-1998. But, no steps were taken by defendant Nos.1 and 2 to resurrect that appeal and prosecute it Defendant Nos.1 and 2 never informed petitioner about pendancy of the suit. Defendant Nos.1 to 3 may have challenged jurisdiction of learned Principal Sub Judge to entertain the suit in their eagerness to save item Nos.2 and 3 but they were not concerned with the partibility of item No.1. Ah* the proceedings were taken at Thalassery while a bonafide purchaser who had no reason to doubt the title of defendant Nos.1 and 2 over item No.1 and the bonafides of defendant Nos.1 and 2 was away at Karjat. Along with that, it is also pointed out that this court while deciding F.A.O.No. 1 of 2005 stated in specific terms that there was fraud and collusion between plaintiff and defendant Nos.1 and 2 in the matter of procurement of the final decree regarding item No.1 leaving it completely to the plaintiff. According to the learned Senior Advocate fraud and collusion are writ large on the face of proceedings as this court also held though in the matter of the final decree, that having regard to all relevant facts, evidence and circumstances it is evident that institution of the suit and

obtaining the preliminary decree keeping an innocent, bonafide purchaser for valid consideration at Karjat unaware of all the proceedings it must be held that proceedings are vitiated by fraud and collusion. It is inequitable and unethical to sustain the preliminary decree for a moment. Learned Senior Advocate prayed that the preliminary judgment and decree may be set aside invoking inherent power of this court.

6. Learned counsel for plaintiff in response contended that even before institution of the suit in the year 1982, plaintiff had issued a legal notice to defendant Nos.1 to 3 seeking partition of item Nos. 1 to 3 and they had replied to it stating that properties are not partible. Defendant Nos.1 to 3 had raised the very same contention in the suit and challenged jurisdiction of learned Principal Sub Judge but those contentions were found against in spite of vigorous fight put up by defendant Nos.1 and 2 by adducing oral and documentary evidence. Learned counsel contended that petitioner was aware of the proceeding pending in the court of learned Principal Sub Judge, Thalassery even during 1989 as revealed from the report of Advocate Commissioner. Still, he did not move. It is contended that there is absolutely no evidence of any fraud or collusion between plaintiff and defendant Nos.1 and 2 and that there is also no occasion or possibility for the same. Petitioner as a pendente lite assignee of defendant Nos.1 and 2 cannot assume a different character and cannot challenge jurisdiction of learned Principal Sub Judge as the issue regarding lack of territorial jurisdiction though raised by defendant Nos.1 and 2 in the written statement was not taken up at the appropriate time. Learned counsel referred me to Section 21 of the Code of Civil Procedure. It is contended by learned counsel that sufficient evidence was let in by plaintiff regarding right of the late Kassam Hussain in item No.1. Defendant Nos. 1 and 2 had challenged the preliminary decree regarding item No.1 but that appeal happened to be dismissed for default after about ten (10) years. Learned counsel points out that even in F.A.O.No.1 of 2005 there was no challenge to the preliminary decree and at any rate, no application was filed by petitioner to recall the preliminary decree. I find from the order under challenge that learned Sub Judge has declined to go into the question for the reason that there was no application preferred by petitioner challenging the validity of final decree and the proceeding which led to that decree. Learned Principal Sub Judge observed that this court also had declined while deciding F.A.O.No.1 of 2005 to go into the allegation of fraud and collusion in obtaining the preliminary decree. In spite of the fact that petitioner has adduced some evidence regarding his case of fraud and collusion learned Principal Sub Judge has refused to go into the question for the reason that there was no formal application moved by petitioner to recall the preliminary judgment and decree. It is not as if learned Principal Sub Judge after referring to the material on record has come to any conclusion about fraud or collusion. I referred to the decision in Hamza Haji Vs. State of Kerala (supra) where it is stated that when a decree or order is challenged as vitiated by fraud and collusion the proper course to adopt is to move the court that had rendered the impugned decision, by an application.

Admittedly, no such application was preferred by the petitioner but I must bear in mind that even in the absence of such a formal application evidence of petitioner on fraud and collusion was allowed to be let in by the learned Principal Sub Judge. Fact remained that predecessor-in interest of plaintiff and defendant Nos. 1 to 3 expired on 27-03-1936 and defendant Nos.1 and 2 acquired title over item No.1 only as per assignment deed No. 1335 of 1964 dated 22-11-1964. I do not forget that before the learned Principal Sub Judge (in the course of the preliminary decree proceedings) plaintiff produced certain receipts. I also do not forget that defendant No.1 had made certain admissions in favour of plaintiff when examined as DW1 but that was all after defendant Nos.1 and 2 transferred their right over item No.1 in favour of petitioner and Himatlal Oswal. The preliminary judgment states that finding that item No.1 was originally acquired by Kassam Hussain from the jenmi was based on the said receipts, the so called admissions made by DW1 and the fact that plaintiff had been doing some business on the veranda of the building in item No.1. I am not at the question whether the said evidence was sufficient to enter a finding that item No.1 of the plaint schedule was acquired by Kassam Hussain. I am also not sitting in appeal over that finding. I only point out that there was no successful challenge to the preliminary judgment and decree by defendant Nos.1 and 2 in spite of the fact that according to them they acquired item No.1 in the year 1964, Kassam Hussain had no right, title, interest or possession of the property and asserting absolute right over item No.1, defendant Nos.1 and 2 transferred item No.1 for valid consideration to the petitioner and Himatlal Oswal as per document No.417 of 1985 and 418 of 1985 dated 25-03-1985. In these circumstances, question whether institution of suit leading to the passing of preliminary judgment or decree or, at any rate even after the institution of the suit demanding partition of all items plaintiff was confining his claim to item No.1 (after its transfer to petitioner and Himatlal Oswal) and defendant No.1 made the so called admissions as DW1 in favour of plaintiffs claim over item No.1 deviating from the contentions raised in the written statement, whether there was any meeting of minds between the brothers in plaintiff not pursuing his claim against defendant Nos.1 and 2 in respect of item Nos.2 and 3, whether defendant Nos.1 and 2 were that much earnest in prosecuting their appeal against the preliminary decree regarding item No.1 or as learned counsel for plaintiff puts it, no question of fraud or collusion is involved and as pendente lite transferee petitioner is bound by the preliminary decree require deeper consideration. If not filing a formal application to recall the preliminary decree or for such other reliefs against that decree as circumstances warranted is a formal defect, having considered the rival contentions raised by the learned counsel on both sides I am persuaded to think, notwithstanding that litigation started almost three decades back to be precise 28 years back, that petitioner has to be given an opportunity to rectify that defect. Having regard to the facts and circumstances of the case and the nature of contentions parties have raised before me I consider it necessary, just and proper that petitioner is given an opportunity to file a formal application seeking appropriate reliefs against the institution of the suit and the

preliminary decree on the grounds he has urged in these proceedings. It follows that in the above circumstances the order under challenge cannot stand and is liable to be set aside. Resultantly,

(i) W.P.C.No.566 of 2008 is allowed. The order under challenge is set aside and the case is remitted to the court of learned Principal Sub Judge, Thalassery. It will be open to the petitioner to file a formal application challenging institution of the suit and passing of preliminary judgment/decreed and/or other proceedings if any in the matter on the ground he has urged in this proceeding. Needless to say that plaintiff and other contesting defendants will get an opportunity to file counter to such application if filed. Petitioner shall file such application within one month from this day. On such application and counter being filed, it will be open to the parties to adduce evidence/ further evidence on the issue. The question of passing final decree will follow the result of that application.

(ii) In the light of disposal of W.P.C.No.566 of 2008 as above stated it is not necessary to pass separate order on W.P.C.No.36289 of 2007 and hence that writ petition is closed.

(iii) I make it clear that I have only referred to the contentions urged before me by the learned counsel on both sides and that any observation in this order shall not be taken by learned Principal Sub Judge as indicating the mind of this court or as binding or persuading him in deciding the issue. Learned Sub Judge shall decide the issue untrammelled by any observation contained herein on the merit of the contention raised by the parties.

(iv) Parties shall appear in the court of learned Principal Sub Judge, Thalassery on 30-07-2010.