

IN THE COURT OF THE MUNSIFF OF HOSDRUGPresent: **Smt. Aiswarya Ravikumar**, MunsiffSaturday, the 6th day of July, 2024/ 15th Ashadha, 1946**ORIGINAL SUIT No. 30/2020**

Between:

1. P.K.Vasumathi, Aged 69 years,
 2. P.K.Sajith, Aged 38 years, 1st plaintiff is the wife of Late Damodharan Nair, House hold and 2nd Plaintiff is the son of Late Damodharan Nair and 1st Plaintiff, Government employee, All residing at 'Kaustubham, Vallikkadavu, Maloth Village, P.O. Vallikkadavu, Pin 671533, Hosdurg Taluk, Kasaragod District.
- } Plaintiff.

AND

1. Madhanan P.R., Aged 55 years (Dead)
 2. Thomas K.J., Aged 65 years, S/o. Joseph, Agriculturist, Residing a Kizhakkanathu House, Vallikkadavu, Maloth Village, Post Vallikkadavu – Pin 671533, Hosdurg Taluk, Kasaragod District.
- } Defendants.
- Supplemental
3. Konoth Kuruvattu Vilasiny, Wife of deceased 1st Defendant Madhanan, P.R., Residing at Shankers Farm, Vallikkadavu, Maloth Village, Vallikkadavu P.O., Vellarikundu Taluk, Kasaragod District - Pin 671533.

Implead and amended as per order in I.A. 1/2023 and 2/2023 dated 07.11.2023.

This suit after restoration coming on this day for hearing before me in the presence of Sri. John Thomas, Advocate for the Plaintiff; of Sri. K.Rajeevan Advocate Defendants No. 2 and 3; and 1st Defendant being reported dead, the court delivered the following:-

JUDGMENT

Suit is for surrender of possession.

2. Brief averments in the plaint are as follows:- Item No.1 of the A schedule properties along with other extents in all 3.57 acres originally belonged to P.S.Damodharan Nair, the husband of the 1st plaintiff and father of the 2nd plaintiff on jenm right as per item No.1 of schedule 'B' of the registered partition deed bearing No.1936/1974 of SRO Nileshtar. Later Damodharan Nair died and his right over the plaint schedule property devolved up on his wife, son, the plaintiffs and his mother namely Kalathinkal Karthiyani Amma, as the sole legal heirs and they were in joint possession of the property on jenmam right. Later Kalathinkal Karthiyani Amma died and her undivided right over the devolved up on the plaintiffs as per the registered will, dated 29-01-2008, bearing No.21/2008 of SRO Balal, executed by Kalathinkal Karthiyani Amma in favour of the plaintiffs. Item No.2 of the plaint schedule properties originally belonged to A C Divakaran Nambiar on jenmam right and the same was in the possession of the 1st plaintiff on kuzhikkanam right. Later the 1st plaintiff purchased the jenmam right of the property as per the orders of Land Tribunal Nileshtar in SM No.148/1988 and a purchase certificate bearing No.83/1989 was issued in favour of the 1st plaintiff. Thus item No.1 of the plaint schedule properties belong to the plaintiffs No.1 and 2 and item No.2 of the properties belong to the 1st plaintiff alone on absolute jenm right. The plaint schedule properties together forms a compact plot which contain 14 yielding coconut trees and 6 months old rubber plants. The plaintiffs were managing the properties. Thus the plaintiffs had been in possession of the properties on jenmam right making improvements and paying assessment to the Government.

3. On the Southern side of the 'A' schedule properties the 1st defendant's mother PS Santhakumari has got property as per schedule 'D' of the partition deed bearing No.1936/1974 of SRO Nileshtar. The 1st defendant is managing the said properties on behalf of his mother. The 2nd plaintiff and the 1st defendant are on logger heads due to disputes with regard to the properties in their possession. The 1st defendant always had an eye over the 'A' schedule properties and he was very much

eager to reduce the same into his illegal possession. Recently the 1st defendant spread a false news in the locality that the plaintiffs are not having any right over the 'A' schedule properties and the same belonged to one Madhavi and he purchased the property from the said Madhavi. The motive behind the said false news was to trespass into the plaint schedule properties and to reduce the same into his illegal possession.

4. The plaintiffs have constructed a house at Vellur in Vellur village of Thaliparamba Taluk. The housewarming was on 08- 09-2013 and the plaintiffs have resided there for one month along with other family members. During the period when the plaintiffs were residing at their new house at Vellur they could not visit the suit properties. On 12-09-2013 when the plaintiffs were at Vellur one of the relatives of the plaintiffs informed the 2nd plaintiff through phone that the defendants along with some workers trespassed into the 'A' schedule properties and they are tilling the properties. The Plaintiffs could not prevent the defendants from their illegal acts since they were not in the locality. On the very next day at about 9.00 AM when the 2nd plaintiff visited the 'A' schedule properties he saw the 2nd defendant and some of his workers inside the property and they were making soil platforms in the property for the purpose of planting rubber seeds. He also noticed fence made off bamboo and plastic sheets on the eastern and northern side of the 'A' schedule properties. When the 2nd plaintiff questioned about the illegal acts, the 2nd defendant told the 2nd plaintiff that the property belongs to the 1st defendant and he obtained the property from the 1st defendant on the basis of a lease agreement for the purpose of forming a rubber nursery there. The Plaintiffs have got valid title over the suit properties. The Defendants do not have any right, interest or title over the 'A' Schedule properties.

5. On 12-09-2013 the defendants colluded together and trespassed into the suit property and reduced the same into their illegal possession. The defendants illegally put temporary fence on the northern and eastern side of the suit properties. Though the plaintiffs came to know about the trespass they could not do anything since 1st defendant has got the backing of a leading political party and men and

money at his disposal. The Plaintiffs have made many attempts to evict the defendants from the 'A' schedule properties in a peaceful manner. But the plaintiff could not succeed. The defendants are in illegal possession of 'A' schedule properties. The defendants are bound to surrender vacant possession of the 'A' schedule properties. Therefore the suit is filed.

6. The defendants filed Written statement with the following contentions:

The extent, boundaries and description of suit property are incorrect and therefore subject to strict proof. The plaintiff has not taken out a plan commission to survey the property and thereby to prove the identification. The suit is nothing but the result of afterthought arose since the Judgment dated 7.1.2012 in A.S.No.45/1997 before the Hon'ble Subordinate Judge of Hosdurg. The said appeal was filed by the mother of the 1st defendant against the judgment in O.S.No.445/1995. The said suit is filed by the 1st defendant's mother P.S.Santhakumari against Karakkakuzhiyil Madhavi and Suresh before the Court and the Court was pleased to dismiss the same as per decree and judgment dated 10.4.1997. The said decree and judgment was challenged by P.S.Santhakumari in A.S.No.45/97 which was went to the Hon'ble High Court of Kerala as S.A.Mo.345/2000 which was subsequently remanded to the Hon'ble Subordinate Judge for further and fresh enquiry. During the enquiry the matter was settled between the parties as per L.A.No.25/2012.

7. The Hon'ble Subordinate Judge passed decree and judgment in the above appeal dated 07.01.2012 on the basis of the compromise petition as IA No.25/2012 and Exts.C2 plan therein. As per the I.A.No.25/2012 Santhakumari purchased the properties claimed by the defendants and the defendants have relinquished their claim of right and possession of the suit properties therein. Those properties are plot No.C, D, E, F in commissioner's plan (Ext.C2) foiled O.S.No.445/1995. Santhakumari's son 1st defendant had paid a consideration of Rs.12, 00,000/- to execute jenm sale deed No.3338/2012 of S.R.O.Balal dated 8.11.2012 in favour of the 1st defendant. The compromise petition as I.A.No.25/2012 is explicit on the point that the said jenm sale

deed is to be read along with judgment dated 7.1.2012 in A.S.No.45/1997. Therefore the said Santhakumari and her son the 1st defendant have been in exclusive possession of the properties situated in R.S.No.588/2 of Malom Village of Hosdurg Taluk (present Vellarikundu Taluk) along with other extents of properties. The plaintiff cannot challenge the right, interest, possession of the properties by any means. The plaintiffs have already filed a suit in respect of the very same property as O.S.No.417/1995. The suit property therein is the 2nd item of the suit property in the above suit. The suit was filed by the 1st plaintiff herein and the same was not pressed by the said plaintiff and the Court was pleased to dismiss the suit as per judgment dated 2.11.1996. The contentions of the plaintiffs in whatsoever manner are estopped from rising solely on the very same ground.

8. Defendants filed additional written statement with the following contentions: The suit property is still subject to strict proof and is to be identified. The extent, boundaries and description of the suit properties are incorrect and the plaintiff have to take out a plan commission to prove the identity of the suit property especially when the plaintiffs have been, vacillating their from one to another. The inconsistent plea and instance is intended to exercise fraud on court and thereby to grab the property of these defendants. Moreover the suit is bad for nonjoinder of necessary parties. The second defendant is a misjoinder as well. Since he had vacated the property long ago. The suit is not maintainable under order 2 Rule 2 of C.P.C as well since the relief has sought had been settled long go in pursuance of the terms of settlement arrived at between the parties in SA No. 345/2000. The said second appeal by the Hon'ble High Court of Kerala is the culmination of OS No.445/95 suit dismissed by the Munsiff court of Hosdurg and AS No.45/97 disposed of by the Hon'ble Subordinate Judge Court, Hosdurg. Therefore the above suit is barred by constructive resjudicata as contemplated under Section 11 explanation IV of C.P.C.

9. The plaintiffs have been continuing the litigation under the very same title of their predecessor by dragging these defendants into untold hardships for quite

long time. The above suit itself is an afterthought, generated after recording the terms of compromise, in full satisfaction and the above suit is filed to harass these defendant. The suit is barred by the Limitation Act. Therefore the plaintiffs are liable to pay to compensatory costs to the defendants under Section 35A of C.P.C.

10. Supplemental defendant no.3 filed written statement with the following contentions: There is no cause of action against these defendant No.3. It is therefore prayed that the Court may be pleased to dismiss the suit with cost in the interest of justice.

11. From the rival pleadings following issues were settled for trial:-

- 1 Is the extent, boundaries and description of plaint schedule property is correct?
- 2 Whether the plaintiffs have right title and interests over plaint schedule property ?
- 3 Is the plaintiff entitled to get a decree as prayed for ?
- 4 Reliefs and costs?

12. Heard both sides.

13. **Issue Nos. 1 and 2:** The case of plaintiff is that item no.1 of suit property originally belonged to Damodharan Nair who is the father of second plaintiff and subsequent to his death, the property devolved upon his mother, deceased first plaintiff and himself and after the death of first plaintiff, the property devolved upon second plaintiff. Item no.2 of plaint schedule property belonged to Divakaran Nambiar on jenm right and first plaintiff purchased the jenm right as per proceedings in SM 148/1988. According to the plaintiff both item no.1 and item no.2 of plaint schedule properties belongs to the plaintiff as per the aforesaid right. Plaintiff has produced registration copy of partition deed bearing No.1936/1974 of SRO Hosdurg as Ext.A1. According to the plaintiff schedule B of Ext.A1 would show the right acquired by deceased Damodharan Nair over plaint A schedule property. According to the plaintiff item No.1 of plaint A schedule property is included in the B schedule

of Ext.A1 partition deed. Ext.A2 is the death certificate of the grandmother of plaintiff and Ext.A3 is the Will as per which said grandmother of second plaintiff namely Kalathingal Karthyayani amma gave right with respect to three items of property as seen in the schedule of Ext.A3 in favour of first and second plaintiff. Ext.A4 is the death certificate of first plaintiff. Ext.A5 is the proceedings in SM 148/1988 as per which the first plaintiff was given right over 25 cents of property in RS No.588/2 in Hosdurg Taluk. Ext.A7 series are the basic tax receipts with respect to 25 cents of property in RS no.588/2 and property in RS 189/pt. According to the plaintiff out of the 2.70 acres of land in which his mother received jenm right as per SM 149/1988, his mother had sold 25 cents of property to the wife of first defendant and the registration copy of the said document is Ext.A8.

14. The defendants had taken up a case that AS 45/1997 was filed by mother of first defendant against the decree and judgment in OS 445/1995. The matter went up to Hon'ble High Court and the Hon'ble High Court remanded back the matter to Hon'ble Sub court. When the matter reached the Sub court, parties entered into a compromise petition and decree and judgment was passed accordingly. Shanthakumari purchased the properties claimed by the defendants therein and defendants in that suit relinquished their claim over plots C, D, E and F in Ext.C2 in OS 445/1995. Shanthakumari's son first defendant paid Rs.12 lakhs in favour of first defendant to execute jenm sale deed no.3338/2012.

15. According to the defendant initially OS No.445/1995 of Munsiff Court Hosdurg was filed by Shanthakumari, mother of defendant against Karakkuzhiyil Madhavi and Suresh and the court dismissed the suit. The said decision was challenged and thereafter Hon'ble High court of Kerala remanded back the matter to Sub Judge and as per the compromise petition, Shanthakumari purchased the property claimed by the defendants and defendants relinquished their claim over the suit properties. Shanthakumari's son, the first defendant paid a consideration of Rs.12

lakhs to execute sale deed No.338/2012 of SRO Hosdurg. Thereafter the said property was in exclusive enjoyment of defendants by virtue of Ext.B1 document.

16. So according to the defendant the plaint schedule property is the property comprised in Ext.B1. The defendant had produced Ext.B1 which is the document executed by Madhavi in favour of Madanan. According to the defendants Ext.B1 was executed as a part of compromise entered in AS 45/97 suit. Ext.B5 is the compromise petition entered between the parties, which was made part of Ext.B3 decree. Ext.B1 was made in pursuance of Ext.B3 decree. As per Ext.B5, plaintiff therein (Shanthakumari, mother of 1st defendant in the suit) had agreed to purchase property namely plots C,D, E, F in the commissioner's plan filed as Ext.C2 in OS 445/95 from Karikkakuzhiyil Madhavi and Suresh. According to the defendants this plot which the defendants purchased as per Ext.B1 (plots C,D, E, F in the commissioner's plan filed as Ext.C2 in OS 445/95) includes item No.2 of plaint schedule property.

17. The defendants claim that Karikkakuzhiyil Madhavi and Suresh who were the respondents (defendants) in that suit had sold the property to the defendants in this suit as per Ext.B1, and therefore the plaintiff cannot question the right of the defendant in the suit property. However it is pertinent to note that none of the plaintiffs were parties to the said suits and any decree in such suit will not be binding upon him.

18. Ext.C1 is the report filed by the commissioner in the instant suit. Commissioner has identified plots C and D in Ext C2 plan in OS 445/95, (the plots purchased by defendant No 1 as per Ext B1) in connection with compromise decree in AS 45/1997 as plots D and E in Ext C2 plan herein.

19. Commissioner had measured 3.57 acres of property along with northern item No.2 property having an extent of 99 cents and has prepared plan of the properties. According to the commissioner item Nos.1 and 2 of schedule B of Ext.A1 partition deed is plot A and plot B marked in Ext.C2 plan. Commissioner has

measured plot C and found it to be having an extent of 25 cents. The commissioner has identified the property of plaintiff as per Ext A1 and Ext A5 to be plots A,B and C in Ext C2. He has identified the properties of defendant as per Ext.B1 (obtained in pursuance of Ext.B3 decree) to be plots D and E. So, as per Ext C1 and C2, the properties of defendants obtained as per Ext B1 are lying separate from plaintiff A schedule property and they do not overlap. Commissioner has identified that plot B and C has no demarcating boundaries and plot B and C are similarly improved. This would also make it clear that the said properties are in the possession of same person, the plaintiff herein.

20. Now, the next contention of the defendant is that the plaintiffs had already filed OS 417/1995 and the suit property therein is the second item of suit property in the instant suit. Since the suit was not pressed, plaintiff cannot raise the contentions in this suit. According to the defendant, in this light the suit is barred by constructive resjudicata and also under Order 2 Rule 2. Defendant's case is that, OS 417/95 was filed by the plaintiff against Karikkakuzhiyil Madhavi who was the predecessor in interest of the defendant as per Ext.B1 and therefore the suit is barred by constructive resjudicata. According to the plaintiff, the suit was not pressed against such Karikkakuzhiyil Madhavi and therefore now the plaintiffs cannot file a suit for recovery of possession against her successors in title. Defendant has produced Ext.B7 decree in OS 417/95 to show the same. Defendants rely on the report of commissioner that the suit property in OS No.417/95 and the 2nd item of plaintiff schedule property in the instant suit is same to bank upon this defense.

21. However it is clear from Ext.B6 that the suit was filed for a permanent prohibitory injunction for restraining the defendants from entering into second item of plaintiff schedule property herein and from interfering with plaintiffs possession thereof. The court fee was paid under section 27(c) of Kerala Court fee and Suit Valuation Act as seen from Ext.B6. So the suit was for injunction simplicitor based on possession. There was no question of the court adjudicating upon title therein and the remedy was sought simply upon the basis of possession of plaintiff. Here OS

30/20 is a suit for surrender of possession based on the title of the plaintiff. Defendant alleges that he has title over the property and therefore there is a cloud cast over the title of the plaintiff and the court is called upon to decide the question of title. The second issue framed in the suit also points to the same. PW1 while at the box reiterated the same. He stated that he had not pressed that suit because there was no further apprehension from the part of Karikkakuzhiyil Madhavi against the item No.2 suit property herein and that was only an injunction suit. Since the matters substantially in issue are at variance, I am of the view that the plea of constructive resjudicata will fail.

22. Now the defendants rely upon Ext.A8 document to claim that plaintiff had already sold an extent of 25 cents in RS No.588/2 in favour of defendant No.3 and item No.2 of suit property is part of such 25 cents sold as per Ext.A8. Now there is clear recital in Ext.A8 to the tune that the antecedent document to Ext.A8 is as per proceedings before land tribunal numbered 149/1988. Plaintiff had produced the antecedent title deed of item No.2 of plaint schedule property as per Ext.A5. It is seen that the LA proceedings are numbered 148 of 1988. The plaintiff had clarified the same in his cross examination. He had stated that excluding this 25 cents seen in Ext.A5 he had obtained another 2.70 cents in RS No.588/2 by virtue of separate SM proceedings. He had not produced the same as the dispute was pertaining to 25 cents of land obtained as per Ext.A5 in RS 588/2.

23. It is pertinent to note that none of the documents produced by the defendant pertain to the first item of plaint schedule property. Their entire dispute is surrounded around item No.2. None of the documents would show that the defendants have any right over any property situated in RS No.189/pt. Even with respect to second item as discussed earlier, the three major defences raised by the defendants would fail. Their next defence is that plaintiff could not prove Ext.A3 Will as per which Karthyayani had bequeathed the property in favour of plaintiff

Nos.1 and 2. She had identified her signature as second witness to Ext.A3 and stated that the first witness, her brother had expired and she had signed the same after Karthyayani amma had signed the same. When she was cross examined, she could not depose as to from where was the said document prepared. She had further stated that Ext.A3 was prepared when Karthyayani was ill. However in her deposition she had stated that the document was read over to Karthyayani amma and she was a literate person. Counsel for defendant relies upon the demeanor of PW2 when she was asked about whether it was a document made as per the interest of plaintiff No.2. When such question was put to the witness, she had nodded her head and had not stated a clear yes or no. Hence, counsel for defendant submits that the said Will cannot be relied upon. However, as much as it is true that she had not stated that the document was not prepared in accordance to the interest of Mr.Sajith, it is true that she had not stated that the document was prepared in accordance with the interest of Mr. Sajith. Hence her demeanor which is unclear cannot be relied upon to reject the Will in toto when her examination in chief is clear that she had signed the Will after Karthyayani amma had signed the same and her deposition in cross examination that the Will was read over to her and she was aware of its contents. Hence there is nothing to suggest that there was such undue influence upon Karthyayani amma although the witness had deposed that she was ill when the Will was made.

24. The defendants further point out that as per the plaint the northern boundary of plaint schedule property is the property of Mr.Radhakrishnan Nair. The commissioner has noted that the northern boundary is the property of Radhakrishnan Nair and the plaintiff as per Ext.C1. Hence, there is no clarity in the identification although the other boundaries in the plaint description and commission report would tally. It is pertinent to note that the commissioner has noted that the plaint schedule property is lying in a lower level by 1 to 3 feet and plot B is lying lower in level than plot A. Hence the property is a slanting property and plot A and plot B are not lying in the same level. Even the chal which is the western boundary of the suit property as per the plaint and the commission report is in a curved pattern. So the north of plot B

and plot C as indicated considering that the properties are not in the same level as shown by the commissioner could comprise the property of plaintiff as well as Radhakrishnan Nair. Ext.A5 would reveal that plaintiff has property to the northern side of item No.2 of plaint schedule property. So this alone cannot create a cloud over the identification of plot C as per the commission report.

25. It is trite that in a civil case the standard of proof is preponderance of probability and not proof beyond reasonable doubt. As per the aforesaid discussion, it is seen that the case of plaintiff is more probable than the case of defendant and therefore issue Nos.1 and 2 are decided in favour of the plaintiff.

26. **Issue Nos.3 and 4:** As per the findings in issue Nos.1 and 2, it is found that plaintiff is entitled to decree for recovery of possession of plaint schedule property as prayed for. The plaintiff has also sought for future mesne profit, for which the courts directs an enquiry from the institution of the suit until the delivery of possession to decree holder and a final decree with respect to such mesne profit shall be passed in accordance to the result of such enquiry as per Order 20 Rule 12 of Civil Procedure Code.

In the result,

The suit is decreed with costs and the court passes a preliminary decree as follows:

1. *The defendant do put the plaintiff in possession of the plaint schedule property. Failing which the plaintiff shall be entitled to recover the same by process established by law.*
2. *That an enquiry be made as the account of mesne profits which have accrued due prior to the institution of the suit.*
3. *That an enquiry be made as to the amount of mesne profits from the institution of the suit until delivery of possession to the plaintiff by the defendant.*

Dictated to the Confidential Assistant, typed by her, corrected and pronounced by me in open Court, this the 6th day of July, 2024.

Sd/-

MUNSIFF

APPENDIX OF EVIDENCE

Exhibits marked for plaintiff:

A1	03.06.1974	Registration copy of registered partition deed (No.1936/1974).
A2	30.01.2012	Death Certificate of K.P.Karthyani Amma issued from Balal Grama Panchayath.
A3	29.01.2008	Registered Will executed by Kalathinkal Karthyayani Amma.
A4	21.08.2019	Legal Heir Certificate issued by the Tahsildar, Payyannur.
A5	27.04.1989	True copy of Purchase Certificate issued by Land Tribunal, Nileshtar.
A6	29.04.1989	Certified copy of the Order of the Land Tribunal, Nileshtar.
A7	29.01.2000	Basic tax receipt issued by the Village Officer, Maloth.
A7(a)	23.02.2008	Basic tax receipt issued by the Village Officer, Maloth.
A7(b)	31.05.2011	Basic tax receipt issued by the Village Officer, Maloth.
A7(c)	08.05.2013	Basic tax receipt issued by the Village Officer, Maloth.
A7(d)	29.04.2021	Basic tax receipt issued by the Village Officer, Maloth.
A8	22.09.2004	Registered jenm sale deed executed by P.K.Vasumathi in favour of Kuruvatt Vilasini. (Document No.3097/2004).
A9	15.12.1995	Certified copy of the plaint in OS. No.445/1995 on the file of this court.

Exhibits marked for defendants:

B1.	08.11.2012	Registration copy of Jenm sale deed executed by Madhavi in favour of Madhanan P.R. as per document No. 3338/12.
B2	27.10.1999	Copy of judgment in A.S. No. 45/1997 passed by Hon'ble Subordinate Judge, Hosdurg.
B3.	07.01.2012	Certified Copy of the Decree in A.S. No. 45/1997 of Subordinate Court, Hosdurg.

- B4. 07.01.2012 Certified Copy of judgment in A.S. No. 45/1997 passed by Hon'ble Subordinate Judge, Hosdurg.
- B5. 07.01.2012 Certified copy of Compromise petition filed in A.S. 45/1997.
- B6. 02.11.1996 Certified Copy of Decree in O.S. 417/95 of Munsiffs Court, Hosdurg.
- B7. 02.11.1996 Certified Copy of Judgment in O.S. 417/95 of Munsiffs Court, Hosdurg.

Court Exhibits:

- C1 19.08.2016 Report filed by Sri.M.Mathew Varghese, Advocate Commissioner.
- C2 19.08.2016 Plan prepared and submitted by Sri.M.Mathew Varghese, Advocate Commissioner.

Witness examined for plaintiff:

PW1 : Sajith.P.K.

PW2 :Sobhana Kumari

Witness examined for defendants: None.

Sd/-

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// True Copy //

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Fair/ Copy of Judgment in
O.S. No. 30/2020
Dated : 06.07.2024.