

IN THE COURT OF THE MUNSIFF, KAYAMKULAM

Present: Smt.Aneesa.A, Munsiff

Friday the 13th day of December 2024/22nd Agrahayana, 1946

IA. 11/2024 in ORIGINAL SUIT.110/2021

(Filed on 18.11.2024)

Petitioner/Plaintiff:

Jayaprasad, aged 51 yrs,
S/o.Padmanabha Pillai,
Kuttitharayil,
Peringala muri,
Kayamkulam Village.

(By Adv.S.Remanan Pillai)

Cr. Petitioner/Defendant:

Travancore Devaswom Board,
Rep.by its Secretary,
Head Quarters of TDB,
Kawdiar, Nandancodu,
Thiruvananthapuram.

(By Adv.R.Raveendranath)

This petition is filed Under Order 26 Rule 9 r/w Section 151 of the Civil Procedure Code 1908 and coming on for hearing on 13.12.2024 and the court on the same day passed the following.

ORDER

This is an order in a petition filed under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 to appoint an urgent commission for preparing a report and mahazar in respect of the plaint schedule property.

2. The gist of averments in the petition are as follows:-
Petitioner is the plaintiff in the suit. The suit is filed for declaration and permanent prohibitory injunction against the defendant. The plaint schedule property having an extent of 1.62 ares formed part and parcel of 12 cents of property comprised in old survey No. 157/14. The said 12 cents of property was originally owned by one Kanakku Govindan Velayudhan S/o Kanakku Govindan Krishnan, Peringala, Kayamkulam Village. The said 12 cents of property was lying in east-west direction in rectangular shape on the northern side of the property of Travancore Devaswom Board. Out of the 12 cents of property, the eastern portion of the 8 cents is in the possession of other three families and they are residing therein separately. The remaining 4 cents of property in the possession of the petitioner and the petitioner has inherited from his father viz; Padmanabha Pillai and they are in possession for more than

50 years. The said 1.62 ares of property is lying contiguously with the other properties of the petitioner comprised in re-survey No. 117/45, 117/32 and 117/31 of Kayamkulam Village lying within the same boundaries. The property owned by the 1st defendant Devaswom Board situates on the southern side of the plaint schedule property wherein Karimuttam Devi Temple situates. The said property is separated with two pillars and erected two layer iron gate therein by the petitioner. The old survey number of the property of Devaswom is comprised in 158/1. The plaint schedule properties are in survey No. 157/14. The properties are lying separately with definite boundary line. The Devaswom Board had never been any right, title and possession in the property in re-survey No. 157/14. In the process of re-survey, by mistake, the above said 1.62 ares of property happened to be included in the thandaper of Devaswom and in the re-survey plan. Since in the re-survey records, the said 1.62 ares of property is shown as the property of Devaswom board, the concerned authorities of the board unauthorisingly claiming the right over the said property. In fact, Devaswom has no right or possession over the said property. The defendant contended that the plaint schedule property is a part and parcel of re-survey No. 117/45, 73 ares corresponding to old survey No. 158/1 of Kayamkulam Village

against the settlement register. In the settlement register, it is specifically stated that the devaswom property is lying in old survey 158/1. There is no document to show that the devaswom has any right in properties covered in old survey No. 158/14. It is also contended that the northern portion of the temple property is not protected by any boundary wall which helps the petitioner for claiming the title of plaint schedule property. Defendant also contended that the plaint schedule property is not lying contiguously with the other properties of the petitioner and portion of it is not used as way of the petitioner. In the chief affidavit of the defendant, it is averred that from the very inception, the plaint schedule property is lying as a raised land and not lying as "Nilam." All the above contentions are against real facts. In the above circumstances, for proving the fact that the plaint schedule property is separated with Devaswom property with aged two pillars with iron gate therein and also to prove that a portion of the plaint schedule property is lying as nilam and also to prove that the said land lies contagiously with the other property and it is being used as a way, a commission report and mahazar is highly necessary for deciding the matter in dispute in the suit. For the last two years, the petitioner has been working as Assistant Engineer in KSEB at Nilambur and hence the

petitioner was not able to contact the advocate in time and the petitioner was not able to file the commission application in the earlier proceedings of the case. For the just decision of the case, it is highly necessary to bring a commission report and mahazar in respect of the plaint schedule property. The delay caused for filing the application was not due to the wilful negligence or laches on the side of the petitioner and this application is filed not for delaying the decision in the case. The petitioner was examined as PW1 and documents A1 to A8 were marked and plaintiff's evidence was closed. In the above said circumstances, the petitioner filed an application for appointment of an urgent commission to prepare a mahazar and report in respect of the plaint schedule property and that application is to be allowed, otherwise it would cause irreparable loss and injury to the petitioner. Thus, this petition.

3. The respondent/ defendant filed objection contending *inter alia* as follows:- All the averments in the affidavit filed in support of the petition to appoint advocate commissioner to ascertain the matters stated in the petition are denied and it is not maintainable and allowable at this state of the suit. It is a highly belated application. The suit is for declaring the right, title and possession of the plaintiff over the plaint schedule property and also for a decree of permanent

injunction restraining the defendant from taking possession of the plaint schedule property and evicting the plaintiff from it. The pleadings in the plaint for the above reliefs, the case of the plaintiff is that schedule property was purchased by the father of the plaintiff by paying an amount of Rs. 80/- to the original owner though no document was executed for this, but he obtained possession in 1970 December and it is inherited to the plaintiff by the death of his father. According to the plaintiff as stated in the plaint, it is owned and possessed by the plaintiff. The defendant had filed written statement denying the right of plaintiff as claimed in the plaint and not entitled for any of the reliefs claimed in the suit. Subsequently, the suit was included in the special list on 03.09.2024 on which day, the plaintiff was absent, but filed an application for adjournment stating that he was on special duty away Wayanad. This application was allowed and the case was adjourned to 23.09.2024 for the evidence of the plaintiff and on 24.09.2024, the plaintiff was examined as PW1 and documents were marked from his side. On the basis of the submission made, plaintiff's evidence was closed and the case was adjourned to defendant's evidence to 10.10.2024. On which day under the authorization of defendant, the Sub Group Officer was present before this court and filed the chief

affidavit. Document also were produced. The case was then posted to 19.10.2024. On this day, the plaintiff filed petition to amend the plaint schedule as I.A.Nos. 8/2024 and 9/2024 and this petition was allowed by this court and the case is posted for production of amended copy of the plaint. It is at this stage, the plaintiff is coming with the two petitions, one for reopening the case for evidence and for appointing advocate commissioner to prepare mahazar and report, rough sketch and other matters. These two petitions are not allowable at the stage in any aspect. The matters sought to be ascertained are not in any way necessary for the disposal of the case. There is no pleading in the plaint regarding the matters now sought to be ascertained. As far as the defendant is concerned, it is highly belated application through which the plaintiff is trying to adduce evidence in the case after the completion of the plaintiffs evidence. It is settled law that after the plaintiff's evidence is closed, a commission application cannot be made to fill up the lacuna of the evidence of the plaintiff. It is also settled that the object of the local investigation is not to collect evidence for the plaintiff after his examination in the court. The matters sought to be ascertained are not supported by pleadings or evidence from the side of the plaintiff. In the circumstance of this case, a commissioner cannot be appointed for

collecting evidence to be adduced in the case by the plaintiff. A commissioner cannot be appointed for ascertaining how the property is being used as it amounts to collecting evidence. The physical features of the plaintiff schedule property are not relevant in this case in the nature of the pleadings in the plaint and the issues that arise for consideration. There is no averment in the plaint regarding the existence of a gate, pillars and that portion of schedule property is being used as a pathway and that portion of it lies as "nilam" etc. They are all new matters sought to be adduced as evidence through a commissioner's report which do not have a place in the pleading. Hence any of the reasons stated in the affidavits in paragraphs Nos. 5 and 6 are not sufficient to get an advocate commissioner appointed in this case on the basis of the commission application filed by the plaintiff and if it is allowed, it will cause much prejudice to the defendant only. It is not believable to say that he could not contact his advocate for the past two years since he was working in Nilambur. The attendance register of the plaintiff's office KSEB Nilambur for the past two years if produced could reveal the fact. The mere statement in para 6 of the affidavit is not sufficient to substantiate this before a court of law. Hence there is no merit in filing a petition of this nature in a highly belated state and it is liable to be

dismissed only.

4. The following points were formulated for consideration:-

1. Whether the petition is allowable ?

2. What shall be the order as to reliefs and costs?

5. Heard both sides.

6. **Point No. 1**:- The above numbered suit is filed for declaration of title and possession of the plaintiff over the plaint schedule property and consequential injunction. Now, the evidence of the plaintiff is closed and the case is adjourned for the evidence of the defendant. Only after the closure of the evidence of the plaintiff, the petitioner filed this petition for appointment of a commissioner for ascertaining the matters sought in this petition. According to the petitioner, for proving the fact that the plaint schedule property is separated with the property of Devaswam with aged two pillars with two iron gates therein and also to prove that a portion of the plaint schedule property is lying as nilam and also to prove that the said land lies contiguously with other properties of the plaintiff and it is being used as a way, a commission report and mahazar are highly necessary for deciding the matter in dispute in the suit. According to the respondents, this petition cannot be allowed at this stage and the

commission report sought for is not necessary for the just disposal of the case. It is highly belated application and will cause prejudice to the respondents. On perusal of records, the plaintiff is examined as PW1 and he was vehemently cross-examined by the learned counsel for the defendants. Now, only for filling the lacuna of evidence come on record, he filed this petition for appointment of a commissioner. On perusal of the evidence, no such application is allowable at this stage as it will cause prejudice to the opposite side. Hence the court is of the opinion that there is no need to allow this application at this stage. Hence point No. 1 is found against the petitioner.

7. **Point No. 2:-** In view of my discussions and findings on point No. 1, the petition is liable to be dismissed.

In the result, the petition stands dismissed. There is no order as to costs.

(Dictated to the confidential assistant, transcribed and typed by her, corrected and pronounced by me in open court on 13th day of December, 2024.)

Sd/-
ANEESA.A
MUNSIFF

APPENDIX:

Nil.

Sd/- MUNSIFF

// True copy //

Typed by :Shafeek.
Compd by:

MUNSIFF

Order in IA.11/2024
in OS No.110/2021,
Dated.13/12/2024