

IN THE COURT OF THE MUNSIFF, KOCHI

Present :-

Smt. Simi P Siju, Additional Munsiff

Friday the 18th day of July 2025/ 27th Ashada, 1947

IA No.2/2024 in O.S. No. 97/2016

Petitioners/Defendant/Additional Defendants:-

- 1 I J Devassy, aged 87 years, S/o.Joseph, Irumpanathu House, Ochamthuruth PO, Kochi-682508 (Died)
- 2 Thankamma, D/o.I J Devassy, aged 57 years, W/o.Seavy, Kuttiveettil House, Ochamthuruth PO, Kochi-682508
- 3 Joseph Denny, S/o.I J Devassy, aged 53 years, Irrumpanathu House, Pizhala PO, Ernakulam-682027
- 4 Sabu, S/o. I J Devassy, aged 51 years, Irumpanathu House, Ochamthuruth PO, Kochi-682508
- 5 Philomina Shibi Rijo, D/o.I J Devassy, aged 40 years, W/o.Rijo Raphel, Puthenchakkaalakkal House, Varapuzha PO, Ernakulam-683517

P1 Died

Addl D2 to D5 By Adv. Sajan Puthenveetil, Anju Gireesh & Harsha C

Respondent/Plaintiff :-

I J George, aged 77 years, S/o.Joseph, Irumpanathu House, Ochamthuruth PO, Kochi-682508

By Advs. P G Jayashankar, P Sreelakshmi & V Sreejayan

This petition is come up for hearing before me on 16.07.2025 and the court on 18.07.2025 passed the following:-

ORDER

The present application is filed by the petitioner seeking appointment of advocate commissioner to fresh inspection.

2. **The petition averments, in brief, is as follows:-** The petitioners are the defendants in the above suit. The original suit was filed by the plaintiff for a permanent prohibitory injunction against the defendant, alleging a right of way over the defendant's property via the plaint B schedule pathway. In response, the defendant filed a counterclaim, asserting that the plaintiff actually has a right of way only through a different route — the counterclaim B schedule pathway, which lies along the northern boundary of the defendant's property. This court decreed in favour of the plaintiff, allowing the original suit and dismissing the counterclaim through a judgment and decree dated 31.08.2019. Aggrieved by the same, the defendant preferred two appeals — A.S. No. 3/2020 and A.S. No. 4/2020 — before the Hon'ble Sub Court, Kochi. These appeals were allowed through a common judgment dated 20.07.2024, and the case was remanded for fresh disposal of both the suit and the counterclaim. The dispute essentially revolves around the appropriate pathway to be used by the plaintiff to access his property. The respondent claims a right of way over the plaint B schedule pathway that traverses the defendant's land. However, the

petitioner's argue that this pathway causes significant and unreasonable damage by passing through the middle of the petitioner's 5 cents of land. They contend that the counterclaim B schedule pathway, located on the northern boundary of the property, is the actual and historically used pathway. A commission report was previously submitted by an advocate commissioner appointed in I.A. No. 883/2016, filed by the plaintiff. This report seemingly supported the respondent's claim. However, the defendants dispute the fairness and completeness of the commissioner's inspection. According to the petitioners, the commissioner was appointed by this Court on 16.03.2016, the same date the suit was filed, and he inspected the site the very next day on 17.03.2016 at 5:00 PM. At that time, the petitioner was not present, and the notice of inspection was handed only to the daughter-in-law of the respondent, moments before the inspection. The daughter-in-law, being unaware of the full legal implications, requested a postponement of the inspection to allow the respondent's presence, but the commissioner refused and carried out the inspection immediately. This denied the petitioners, an opportunity to be present and explain the existence of the alternate counterclaim B schedule pathway. The commissioner's failure to give proper notice and accommodate the presence of the respondent has been cited as a violation of the principles of natural justice. It is further submitted that the previous commission report failed to examine the

counterclaim B schedule pathway, which was in existence and in use by the predecessors of both parties. The report, therefore, does not provide a complete or accurate picture of the factual situation on the ground. The petitioners contend that the earlier omission to move for a commission to inspect the counterclaim B schedule pathway was not intentional but due to the ill health and advanced age of the original defendant (father of the present petitioner), who was over 80 years old at the time and was unable to properly instruct counsel. The earlier counsel also failed to take necessary steps due to inadvertent error and not due to negligence or delay. Further, it is contended that the trial court failed to frame an issue regarding the identification and existence of the counterclaim B schedule pathway, which was properly described in the counterclaim. This omission, combined with the incomplete commission report and the defendant's absence during inspection, resulted in an unjust judgment and significant hardship to the defendant. The petitioners assert that they have a legal and equitable right to protect their property from unreasonable damage caused by the claimed pathway. They emphasize that permitting the respondent to use the plaintiff B schedule pathway will irreparably damage the defendant's land and severely restrict their enjoyment of the property. The counterclaim B schedule pathway is presented as a more suitable and equitable alternative that has historically served as the access route and would serve the interests of both

parties without causing harm. Accordingly, the defendants urge the court to permit the adducing of further and satisfactory evidence with respect to the existence, location, and usability of the counterclaim B schedule pathway. They submit that unless such evidence is admitted and properly adjudicated upon, irreparable loss, injury, and prejudice would be caused to the petitioners. Hence the petition.

3. The respondent /plaintiff filed objection to the above petition in the following manner :- The subject matter of the petition is not maintainable for the reason that the above suit was challenged in appeal by the petitioners herein and the same was remanded to this court for fresh disposal of the above suit and the counter claim preferred by the petitioners. The petitioners have preferred the above application by contending that this court allegedly omitted to frame an issue regarding the identification of the counter claim B schedule property. However, the appellate court, while considering the appeal, has observed that upon perusal of records, even though no specific issue regarding the counter claim B schedule property was framed by the trial court, the trial court raised an issue to the effect of determining whether the defendant/respondent herein is entitled to seek counter claim relief in the form of a permanent prohibitory injunction against the plaintiff. While considering the said issue this court categorically held that the defendant is not entitled to such an injunction. It is submitted

that it cannot be contended that this court has entirely omitted the issue relating to B schedule property. However, the appellate court for want of better clarity regarding the identification of B schedule property has remanded the suit for fresh consideration not only for framing issues regarding counter claim B schedule property, but also for considering the basic principles of easement right. In the light of this, the petitioner's attempt to seek the appointment of an advocate commissioner through the above application is a deliberate endeavor to delay the trial of the suit, contrary to the clear and specific directions of the appellate court to frame and decide issues concerning the counter claim B schedule property. IA.883/2016 in OS.97/2016 the advocate commissioner clearly reported all the facts necessary to determine the facts in the suit. The petitioner has not chosen to challenge the report of the commissioner. Hence at this stage, the appointment of advocate commissioner is not necessary. The contention that the advocate commissioner was appointed in the aforementioned suit without prior notice to the petitioners is entirely false and unfounded. The petitioners themselves acknowledge that the commission report, prepared by the commissioner, reflects that the site was inspected on the very next day, and that notice was properly served to a family member of the petitioners. Accordingly it appears the petitioners are attempting to mislead this court with the aim of rendering the commission report, which is already on record,

null and void, and to seek the appointment of a new advocate commissioner at their behest, which is nothing more than an attempt to delay the proceedings in the aforementioned suit. This court was already empowered to ascertain the issues pertaining to the B schedule property and easement rights based on the pleadings, evidence and directions from the appellate court. The petitioner's application appears to be an attempt to protract the matter. Hence the petition is liable to be dismissed.

4. Heard both sides.

5. **Point to be considered:**

a) Whether the petition can be allowed?

6. **Point No.1:-** The thrust of the averments in the petition is with regard to the counter claim B schedule pathway, which according to the petitioner no evidence was adduced in the earlier trial because of an error happened from the part of the petitioner. Admittedly, the respondent filed the suit for permanent prohibitory injunction restraining the 1st petitioner(died) and his men, successors or other agents from interfering or obstructing the respondent from plaint B schedule property, which is a pathway having a width of 5 ½ links. The petitioner herein also filed counterclaim seeking permanent prohibitory injunction restraining the respondent their men and agents from trespassing into the counterclaim A schedule property except counter claim B schedule property or obstructing

the petitioners from putting up any construction or fence or compound wall around the said property except counterclaim B schedule property.

7. At the instance of the respondent an Advocate Commissioner was appointed by this court and the Advocate Commissioner filed the report on 01.04.2016. The petitioners filed an objection to the commission report belatedly. The suit filed by the respondent resulted in passing of a decree in favour of the respondent herein and consequently the counterclaim of the petitioners was dismissed. Assailed by the said judgment, the petitioners had preferred two separate appeals numbered as A.S 3/2020 and A.S 4/2020, challenging the granting of injunction in favour of the respondent and the dismissal of counter claim of the petitioner respectively. The Hon'ble Sub Court allowed the appeals by remanding the matter to the trial court for fresh consideration specifically pointing out the framing of issues regarding counter claim B schedule pathway and also for considering basic principles regarding easement right. The Hon'ble Sub Court also outlined the necessity for adducing additional evidence and pointed out the necessity of identifying counterclaim B schedule property. On remanding the matter for fresh consideration, the petitioner filed the present application seeking appointment of Advocate Commissioner for the purpose of local inspection with an intent to identify counterclaim B schedule pathway. The respondent filed the objection to this application mainly on the premise that the 1st

Advocate Commissioner clearly reported all the facts necessary to determine the fact in the suit and filing of the present application is only to tardy the proceedings. The respondent also stated that the petitioners had not chosen to file any objection to the first commission report. On a perusal of the court documents, this court finds the objection filed by the petitioner to the first commission report.

8. Apart from that, the appellate court specifically pointed out the necessity of identification of counterclaim B schedule property. In such circumstances, appointment of an Advocate Commissioner is necessary to find out the fact regarding the existence or non-existence of counterclaim B schedule property. Moreover, on a perusal of the first commission report it is clear that the 1st petitioner (died) who was the sole defendant in the suit, was not served with any notice regarding the inspection of property by the Advocate Commissioner. Instead the Advocate Commissioner reported that notice was served to the daughter in law of the respondent(first petitioner herein) as the respondent therein was not at home and had gone out. This clearly shows that the Advocate Commissioner inspected the property in the absence of the 1st petitioner. Also, no prejudice will be caused to the respondent in appointing an Advocate Commissioner and inspecting the property once again. Accordingly, point No.1 is found in favour of the petitioner.

In the result,

- a) Petition is allowed. Adv.Sreelekha.V.J is appointed as the Adv.Commissioner to fresh inspection.**
- b) The petitioner shall deposit Rs.3500/- (Rupees Three thousand five hundred only) as commission batta.**
- c) The Adv.Commissioner shall also consider the work memo, if any filed by the respondent/plaintiff.**

(Dictated to Confidential Assistant, transcribed by her, corrected and pronounced by me in the open court on this the 18^h day of July 2025.)

Sd/-
Simi P Siju
Additional Munsiff

APPENDIX : Nil

Id/-
Additional Munsiff

// True Copy//

Fair Copy Superintendent

Carbon copy issued as per order in I.A 3/2025 dated 19.07.2025.

O R D E R

I.A. No.2/2024

O.S. No.97/2016

Dated : 18.07.2025