

IN THE COURT OF THE MUNSIFF, KOCHI

Present:

Sri.Arun Bechu N.N., B.A., LL.B.(Hons.), LL.M., Principal Munsiff

Monday, the 21st day of May, 2018, 31st Vaisakha, 1940

I.A.No.1416/2017 in O.S.No.155/2013

Petitioner/Plaintiff:-

Joseph, aged 79 years, S/o.Late Kakko, Kannankeril House,
Kumbalangi Desom, Kumbalangi Village, Kochi Taluk.

By Advs.A.Balagopalan, A.Rajagopalan, M.N.Manmadhan &
Sreejith M.S.

Respondents/Defendants:-

1. Shiya, aged about 27 years, D/o.Joshi, Vallomparambil House,
Kumbalangi Desom, Kumbalangi Village, Kochi Taluk.
2. Shimi, aged about 24 years, D/o.Joshi, Vallomparambil House,
Kumbalangi Desom, Kumbalangi Village, Kochi Taluk.

By Adv.O.J.Alfred

The petition filed under section 151 of the code of Civil Procedure to set aside the commission report.

The petition having been finally heard on 07.04.2018 and the court on 21.05.2018, passed the following:-

ORDER

This order is passed in an application filed under section 151 of the code of Civil Procedure.

2. Petitioner is the plaintiff in the suit. Prayer in the application is to set aside the commission report dtd.13.02.17. It is stated that commissioner

has not verified the points sought to be ascertained, as prayed for, in the commission application. Commissioner has not measured property on the basis of partition deed 4454/81. So, also, Commissioner did not measure the property on the basis of prior deeds of the partition deed, Sale deed 448/1111. There are no trees in the major portion of the plot marked as D in the sketch. Nature of stones is not identifiable from commission report and sketch prepared. Without relying on survey records, for the purpose of ascertaining existence of stones, measurements cannot be deemed valid. There is no gap on the northern side of 30 cents of property of plaintiff. The report is to be set aside in the circumstances.

3. Respondent filed counter affidavit contending as follows. The only intention of the plaintiff is to prolong the proceedings. It is not possible to demarcate the property, as per Doc.4454/1981. Doc.448/1111 was not furnished to the Commissioner. The position of the survey stones were verified, with reference to survey stones on nearby fields, as per field map. Commissioner has shown D plot, as shown by the party. The northern gap is the way from the property. The application is only to be dismissed.

4. The following point arises for consideration.

Is the commission report dtd.13.02.17 liable to be set aside?

5. The Commissioner and Surveyor were examined as CW1 and CW2. Commission report was marked as Ext.C1 series. From the plaintiff's side,

Exts.A1 & A2 were marked.

6. **The point:** Suit is filed for fixation of southern boundary of plaint A schedule and also an injunction with respect to plaint B schedule way. Plaint A schedule consists of 40 cents. 30 cents was purchased by Ext.A1 sale deed in 1989. The remaining 10 cents, stated to be situated to the south of 30 cents, is alleged to be obtained by Ext.A2 partition deed, as item 4 of A schedule therein. Defendants are stated to be the southern property owner. Title over 30 cents is admitted. However, it is stated that fence to the south of 30 cents is encroaching into defendants property. Title over 10 cents is disputed.

7. It will be useful to note that there is no dispute regarding the northern, western and eastern boundaries of 30 cents. There are fences on three boundaries. So, fixing the southern boundary of 30 cents, by reference to measurement, in the title deed, could be done easily.

8. Much cross examination was on the detection of survey stones. The plan quite clearly shows survey stones to the east and south. It is true that in the report, the actual starting point of measurement is not mentioned. However, Surveyor has elaborately explained the same, when in the box.

9. It is true that 10 cents of land, as per the partition deed is not located. No fault can be placed on the commissioner for this, as the document of title does not mention any side measurements. Then the only possibility was of identifying the property on the basis of boundaries. Three paramba's

and a thodu feature as boundaries. Unless documents in respect of the same were supplied, no identification could have been done. So also, failure to identify property, as per prior deed is highlighted. It is admitted that this document was not given to the Commissioner.

10. During hearing, it is pointed out that the southern boundary of plot A, in the plan has a bent, which is not there as per the document. No such bent is noted in the plan. Measurement of southern boundary is shown as 18.1 + 37.4, only for the purpose of indicating the northern boundaries of plots B and C.

11. Failure to file the F.M B/Revenue records along with the report is highlighted. Since such a practice does not exist, this is not an infirmity.

12. It is also to be noted that in Francis Assissi V.Sr.Briesiya & others, 2017 KHC 15 it was held that except in partition suits, applications for setting aside the commission report are not maintainable.

For the above mentioned reasons, this application is hereby dismissed.

Pronounced in open court on this the 21st day of May, 2018.

Arun Bechu N.N.
Principal Munsiff.

Appendix:

Petitioner's Exhibits:-

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| A1. | 21.11.1981 | Partition Deed No.4454/1981 of Kochi SRO. |
| A2. | 19.05.1989 | Photocopy of Sale Deed No.1568/1989 of SRO, Kochi executed by Raphael. |

Respondent's Exhibits:- Nil

Witness for both sides:- Nil

Court Exhibits:-

C1. 29.05.2013 Commission report filed by Adv.M.K.Murari.

C1(a) Rough sketch.

Court Witnesses:-

CW1. 10.11.2017 Joseph Edakatt

CW2. 01.12.2017 P.J.John

Principal Munsiff.

sks
compd by: