

IN THE COURT OF MUNSIFF, THIRUVALLA
 Present:-Sri. Aravind S.J, Munsiff, Thiruvalla.
Thursday the 04th day of July 2024/ 13th day of Ashada 1946 SE.

IA 04/23 in OS 466/2013

BETWEEN

Suma Thankappan, Vengalathu Veedu, } Petitioner
 Ezhumattoor Village & Muri, Mallappally } 4th defendant
 Taluk.
 (By Adv. V.Jinachandran)

AND

1. Cicily, W/o John, Thakidiyel Veedu, Ezhumattoor Village. }
 2. Thankappan, Vengalathu Veedu, Ezhumattoor Village. }
 3. Thankamma Thankappan, W/o Thankappan, Vengalathu Veedu, Ezhumattoor Village. }
 4. Sumesh V.T, S/o Thankappan, Vengalathu Veedu, Ezhumattoor Village. }
- } Respondents
 Plaintiff &
 Defendant 1 to 3
- (Adv. Rajesh Chathenkary)

This petition is filed U/o 26 Rule 10 of Civil Procedure Code.

This petition is having been finally heard on 06.06.2024 and stood over for consideration on 31.05.2024 and the same day the court passed the following:-

ORDER

The afore numbered petition filed to set aside the commissioner's report and survey plan.

2. Petition averments in brief are stated as follows:- The petitioner is the 4th defendant in O.S. NO. 466/2013. The suit is filed for fixation of boundary. An Advocate commissioner and surveyor were deputed to identify and measure out the

property and to furnish commission report and survey plan. The commission report and survey plan produced is against the actual facts in the case. The Advocate commissioner and surveyor have identified the property of the defendant within 'MGHIJKLM' letters and has reported that the same has an extent of 3.65 Ares. The said measurement was taken without perusing the documents of the petitioner. The property of the petitioner has an extent of only 2.20 Ares. The property of the petitioner was reported without measuring out the same. 'MLKJ' line was fixed as the boundary without proper measurements. Hence the report and plan is liable to be set aside.

3. The respondent filed objection contending as follows:- The petition is not maintainable either under law or on facts. The Advocate commissioner has visited the property after giving notice to both sides. There is no error in the commission report and survey plan. The intention of the petitioner is only to protract the trial of the case. Hence the present petition is liable to be dismissed.

4. For adjudicating this application, the advocate commissioner and surveyor were examined as PW1 and PW2 and Ext.C1 and C1(a) were marked. Heard both sides.

5. Points that arise for consideration are:-

1. *Whether the report and the survey plan filed by the commissioner dated 03/11/2022 is liable to be set aside?*
2. *What is the order as to costs?*

6. **Point No.1:-** The present application is filed to set aside the commissioner's report and plan and to appoint another Advocate Commissioner and Surveyor. An Advocate commissioner and surveyor were appointed as per the order of this court in I.A No. 2/2022 to identify and measure out the plaint schedule properties. The Commission report and plan are marked as Ext. C1 and C1(a) respectively for the purpose of this I.A. The suit is filed by the plaintiff for fixation of boundary

separating plaint schedule item No. 1 and 2 properties. A perusal of the plaint would show that plaint schedule item No. 1 property belongs to the plaintiff and item No. 2 belongs to the defendant and that item no. 2 is said to be situated at the eastern side of item No. 1 property.

7. The Advocate commissioner in the case was examined as PW1. PW1 has stated that there was no prayer to measure out the property of the defendant. Neither in the commission report nor in the deposition of PW1 is it evident that the property of the petitioner was also measured. The plaint averments and the contentions of the petitioner would show that plaint schedule item No. 2 property has an extent of only 2.20 Ares. Plaint schedule item No.2 property was shown to have an extent of 3.65 Ares which is against the plaint schedule description. There is nothing in the report to show the documents relied on by the Advocate commissioner to ascertain the said extent. It is not in dispute that the petitioner had purchased certain extent of property as per deed no. 292/2021. The Advocate commissioner was duty bound to measure out item No. 2 property on the basis of the title deed and other survey records. Without measuring the property of the petitioner as per their title deed and revenue records, it is not possible to fix the boundary separating plaint schedule item No. 1 and 2 properties. Therefore this court is of the opinion that Ext. C1 report and C1(a) plan. Are not satisfactory.

8. Then the question to be pondered is whether the commission report is liable to be set aside. A Division Bench of the Hon'ble High Court of Kerala in **Francis Assissi V. Sister Breeziya** (2017 (1) KLT 1041) had held that the power to set aside the commission report or to wipe out of record is not included in R. 10 or R. 12 of O. 26. It is further held that the court has power to direct a further enquiry when the court has reason to dissatisfy with the proceedings of the commissioner. However a single bench of the Hon'ble High Court in **Yudathadevus V. Joseph** (2021 (5) KHC 668) had held that if a court is dissatisfied with the proceedings of the commissioner, it can direct further enquiry to be made as it shall think fit after setting aside the commission

report and plan to get the mistakes rectified. The said view was upheld by the Division Bench of the Hon'ble High court in **Laly Joseph V. Francis** (2023 (2) KLT 516). However a single bench of the Hon'ble High court in **Shajitha V. Akbar** (2023 (5) KLT 503) had held that the aforesaid judgments cannot claim the sanctity of binding precedent and that the judgment rendered in Francis Assisi (supra) would still hold the field. Thus if this court is dissatisfied with the proceedings of the advocate commissioner, the court ought to remit the same. Thus the commission report and survey plan is to be remitted to the Advocate commissioner to identify and measure out the plaint schedule properties as per the title deeds and possession. Thus point no. 1 is found accordingly.

9. **Point No.2:-** There is no order as to costs.

In the result, Ext. C1 and C1 (a) are remitted to the Advocate Commissioner and Surveyor to identify and measure the plaint schedule properties based on the title deeds and survey records. Sri. Vijayakumar is deputed as the Surveyor to assist the Advocate commissioner. Commissioner shall give notice to both parties and shall execute the work at the earliest and file commission report and survey plan. Plaintiff shall deposit commission batta of Rs. 4000/- and surveyor batta of Rs. 2000/-. The defendant is also directed to furnish copy of his title deed to the Advocate commissioner without fail.

Dictated to the Confidential Assistant, transcribed, and typed by her, corrected, and pronounced by me in open court on this the 04th day of July, 2024.

Sd/-
ARAVIND S.J.
MUNSIFF

APPENDIX

Witness examined for Plaintiff:-

PW1-Adv. M.T.Mini

PW2-Sali Bai.D, Surveyor

Court Exhibit:-

C1, C1(a)- Commission Report and Plan filed by Advocate Commissioner.

Id/-

MUNSIFF

Fair/Copy of order in
I.A.04/23 in OS 466/13
Dated: 04.07.2024