

(2024) 10 KL CK 0085

High Court Of Kerala

Case No: Original Petition (C) 1029 Of 2024

S.Anantha Viswanathan

APPELLANT

Vs

M.S.Venkitasubramanian

RESPONDENT

Date of Decision: Oct. 29, 2024

Hon'ble Judges: Viju Abraham, J

Bench: Single Bench

Advocate: Jose Kuriakose, Bijo Francis, Luiz Godwin D Couth, Mohan Idiculla Abraham, R.Rajasree, Martin D.Alumkara, Rachel Joseph, Jeevan J. Mathew, Nikhitha T.S., Shyamilipriya P.P

Final Decision: Disposed Of

Judgement

Viju Abraham , J.

1. The above original petition is filed challenging Ext.P12 order dated 03.04.2024 in FDIA No.8066 of 2008 in OS No.621 of 2005 on the file of the

2nd Addl. Sub Court, Ernakulam, whereby the Court appointed the earlier Advocate Commissioner and Surveyor for drawing the sketch pursuant to

the judgment dated 01.03.2024 in OP(C) No.1321 of 2022.

2. As per the averment in the original petition, O.S No.621 of 2005 was filed for partitioning A & B schedule properties. The petitioners herein are

respondents 5 to 8 and are the legal heirs of the 1st defendant in the suit. By judgment dated 31.01.2008, the 2nd Addl. Sub Court, Ernakulam passed

a preliminary decree partitioning plaint A and B schedule properties. Though the preliminary decree was challenged by the 1st defendant who is the

father of the petitioners by filing AS No.111 of 2008 before the District Court, Ernakulam, the said appeal was dismissed by judgment dated

05.12.2008, and again challenging the same RSA No.433 of 2009 was filed which was also disposed of by the Court as per judgment dated

28.05.2010. Pursuant to the disposal of the above appeal, final decree application pending before the 2nd Addl. Sub Court, Ernakulam was proceeded.

An Advocate Commissioner already appointed by the said Court assisted by the Surveyor measured plaint A and B schedule properties and submitted

a report dated 26.10.2015. Since the survey sketch and other details pertaining to the plaint B schedule property were not available for the survey

department, the finalisation of the measurement of the plaint B schedule property was not completed.

3. Thereupon, the Court passed a final decree with respect to plaint A schedule property partitioning the same between the plaintiff and the

defendants, whereby the property was divided into three equal shares and each share was allotted 6.18 ares of land and 1/3rd undivided share over

3.5 metres wide proposed road on the eastern side of plaint A schedule property commencing from the Municipal Road situated on the southern side of

the said property and ending on its northern side. As per the preliminary decree, the residential buildings situated in plaint A schedule property was

allotted to the share of the 1st defendant, the predecessor of the petitioners herein, and a final decree/judgment was passed as Ext.P2. Challenging the

same, an appeal was preferred as AS No.70 of 2018 by the 1st defendant which was ultimately dismissed as per judgment dated 20.03.2019.

Thereafter RSA No.508 of 2019 was preferred by the 1st defendant before this Court, and this Court allowed the appeal and the final decree

application was remanded to the trial Court making it clear that the remand is not an open remand and it is a restricted remand for allotting the portion

of the pathway referred to above to shares of respondents 1 to 4 and payment of owelty as fixed by the trial Court, and also for sharing the cost of

reclamation of pond by all the three sets of allottees and the Commissioner was directed to prepare a fresh plan for allotment as per Ext.P3 judgment.

4. Pursuant to Ext.P3 the Addl. Sub Court-II directed the Advocate Commissioner to measure plaint A schedule property. The Commissioner visited

the property on 19.12.2019 as per the order of the Court passed on 11.12.2019, since there was water logging, and the wife of the one of the parties

has expired, measurement could not be conducted on that date. While so, the 3rd petitioner filed IA No.1 of 2020 in RSA No.508 of 2019 seeking extension of time and this Court as per Ext.P4 order extended the time for disposal of OS No.621 of 2005. Thereafter, the 3rd petitioner filed OP(C) No.1974 of 2020 before this Court for obtaining certified copy of the order, and the further proceedings was stayed for a period of two weeks so as to enable the 3rd petitioner to obtain a certified copy of the order dated 16.12.2020. Thereafter the 3rd respondent filed OP(C) No.171 of 2021 challenging order dated 16.12.2020. The said OP(C) was disposed of as per Ext.P6 setting aside the order dated 16.12.2020, directing the Advocate Commissioner and Surveyor to visit the property again and take physical measurements. The Court made it clear that under no circumstance the execution of commission shall run counter to any of the directions contained in RSA No. 508 of 2019. Subsequently, the Commissioner filed Ext.P7 report, whereby the extent of plaintiff's property was found to be lesser by 0.31 ares than the extent in Ext.P1 plan. Thereupon, objection was filed to Ext.P7 commission report and Ext.P8 order was issued by the 2nd Addl. Subordinate Judges Court, Ernakulam. Thereafter, by Ext.P8 order final decree order/judgment was passed. Challenging Ext.P8 judgment, a review petition was preferred. While the review petition was pending consideration, petitioners filed an appeal before the District Court, Ernakulam against Ext.P8 judgment and the same was allowed by the District Court as per Ext.P9 judgment dated 23.02.2022 setting aside Ext.P8 judgment and remitting the matter back to the Court below for the purpose of obtaining clarification of the Advocate Commissioner and Surveyor about the discrepancies in Ext.C2 series after noting the shortage of 0.31 ares in extent of land in the 1st Commissioner report dated 26.10.2015. It was directed in Ext.P9 judgment that both parties should be given opportunity to examine the Commissioner and Surveyor, and also to produce necessary documents.

5. Pursuant to Ext.P9 judgment 2nd Addl. Sub Court examined the Surveyor and Advocate Commissioner and thereafter by Ext.P10 order allowed the application filed by the petitioners herein for appointment of a new Advocate Commissioner and Surveyor to measure plaintiff's property.

Ext.P10 order was challenged by respondents 1 to 6 filing OP(C) No.1321 of 2022. It is submitted that the Court did not interfere with Ext.P10 order,

but Ext.P7 plan was interfered with and was set aside with a direction to the Commissioner to draw a plan as directed by the Appellate Court in

Ext.P3 judgment. It is the contention of the petitioners that the only direction given by this Court by Ext.P11 order is the direction to the Commissioner

to take assistance from the same Surveyor who rendered assistance in preparing Ext.P1 plan and directed the learned Subordinate Judges Court to

dispose of the matter within a period of three months. Pursuant to Ext.P11 order, the Sub Court without considering the appointment of Adv. K.S. Jijo

as Advocate Commissioner, and P Sethumadhavan Nair as Surveyor, passed an order to issue notice to the earlier Advocate Commissioner O.V.

Abraham and Surveyor Omanakuttan as per Ext.P12 order. It is aggrieved by the same that the present original petition has been filed.

6. It is the contention of the learned Counsel for the petitioners that this Court never allowed the prayer of respondents 1 to 6 to set aside Ext.P10

order, but only directed the present Commissioner to take the assistance of earlier surveyor who prepared Ext.P1 plan. It is submitted that Ext.P10

order was passed by the Sub Court considering the contradictions in the deposition/statement of the Advocate Commissioner and Surveyor and also

considering the allegation of the petitioners regarding the partiality shown by the Advocate Commissioner and Surveyor. It is further contended that

Ext.P10 order was passed without taking into consideration Ext.P11 judgment.

7. In Ext P3 judgment in R.S.A No. 508 of 2019, this Court allowed the appeal remanding the final decree application making it clear that the remand

is not an open remand and the same is a restricted remand for allotting a portion of the pathway referred to in the judgment to the share of

respondents 1 to 6 and payment of owelty as fixed by the trial Court and also for sharing the cost of reclamation of pond and that no other question

shall be open for consideration after remand. The Commissioner was directed to prepare a fresh plan to allot the plot as indicated. Later on, final

decree was passed as per Ext P8 which was challenged in A.S. No. 43 of 2021, which was disposed of as per Ext.P9 setting aside the order and

remanding the matter back for fresh consideration and after giving opportunity to the party to examine the Commissioner and Surveyor and after such

examination if the court finds that fresh sketch is required, Court was permitted to call for another report that too strictly in tune with the observation

and direction of this Court in R.S.A No. 508 of 2019. Thereafter, Ext.P10 order was issued in an application filed for appointment of Advocate

Commissioner. A perusal of Ext.P10 order reveals that the Commissioner and Surveyor were examined and found that the bone of contention is 0.31

Ares of property which was found shortage in Ext.C2(a) report and sketch. Thereafter, a new Commissioner and Surveyor was appointed observing

that the appointment of new Commissioner and Surveyor is necessary to rule out any allegation of bias from the side of the earlier Commissioner and

Surveyor. Ext.P10 order was challenged in OPC No. 1321 of 2022 and Court did not interfere with Ext.P10 except interfering with Ext.P7 plan and

directing that the Commissioner in redrawing the plan as per the directions in R.S.A No. 508 of 2019 shall take the assistance of the same Surveyor

who rendered assistance in preparing Ext.P1 plan. Pursuant to the said direction, the Sub Court as per Ext.P12 order issued notice to the earlier

Commissioner and Surveyor which is impugned in this original petition. A perusal of Ext.P10 order reveals that the Court has taken a decision to

appoint a new Advocate Commissioner and Surveyor to rule out any allegation of bias from the side of the earlier Commissioner and Surveyor and the

said appointment has not been interfered with in Ext.P11 order except to the limited extent of directing the Commissioner in redrawing the plan as per

the direction in R.S.A No. 508 of 2019 shall take the assistance of the same Surveyor who rendered assistance in preparing Ext.P1 plan. In the light

of the said specific direction, the Sub Court ought to have permitted the Commissioner appointed as per Ext.P10 to redraw the plan taking the

assistance of the same surveyor who rendered assistance in preparing Ext.P1 plan.

8. In view of the above, Ext.P12 is set aside directing the IInd Addl. Sub Court, Ernakulam to proceed further in accordance with Ext.P10 order and

Ext.P11 judgment and the observation made in this judgment.

With the above-said direction, the original petition is disposed of.