

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

WEDNESDAY, THE 2ND DAY OF SEPTEMBER 2015/11TH BHADRA, 1937

OP(C).No. 1399 of 2015 (O)

(I.A.NO.1949/2014 IN O.S.NO.34/1999 OF PRINCIPAL SUB COURT,
THIRUVANANTHAPURAM)

PETITIONER(S):

1. ADRIAN G. MIRANDA,
S/O.ALFRED H. MIRANDA, HALCYON, PAKATTUVILA,
KUNNUKUZHY, TRIVANDRUM.
2. VINITHA R. PENKAR,
D/O.ADA ELIZABETH MIRANDA, 31-B, 2ND FLOOR,
EAST MARREDPALLY, SECUNDARABAD-5000326.

BY ADV. SRI.SABU S.KALLARAMOOLA

RESPONDENT(S):

1. BRENDA BARBARA FRANCIS,
D/O.ADA ELIZABETH MIRANDA, HALCYON, PAKATTUVILA,
KUNNUKUZHY, TRIVANDRUM, RESIDING 28, JUNIPER BAY,
BRANDON, MANITOBA, CANADA,
NOW RESIDING AT 400 WEBB DRIVE APT 403, MISSISSAUGE,
ONTARIO L5B4A1 CANADA.
2. MARISSA THAYURNAN,
D/O.LATE GWENDOLYN GABRIEL, P.B.NO.1700, DUBAI,
UAE, NOW AT C/O.GERARD GABRIEL, S/O.M.C.GABRIEL,
15/1, EAST MARREDPALLY, SECUNDARABAD - 500 326.
3. GERARD GABRIEL,
S/O.M.C.GABRIEL, 15/1, EAST MARREDPALLY,
SECUNDARABAD - 500 326.
4. KAREN GABRIEL,
D/O.M.C.GABRIEL, 15/1, EAST MARREDPALLY,
SECUNDARABAD - 500 326.
5. DOROTHY MIRANDA,
W/O.LATE HORACE MIRANDA, S-482, AIR INDIA II,
KALINA, SANTA CRUZ (WEST), BOMBAY - 400 029,
NOW AT SAGAR PLAZA, C.H.S., OPP. MALWANI CHURCH,
MALWANI VILLAGE, OFF MARVA ROAD, MALAD WEST -1,
MUMBAI - 400 095

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6. NIGEL MIRANDA,
S/O.LATE HORACE MIRANDA, S-482, AIR INDIA II,
KALINA, SANTA CRUZ (WEST), BOMBAY - 400 029,
10, CARDINAL GRACIS BUILDING, 3RD FLOOR,
COLABA CAUSE WAY, OPP. LEO POLE RESTAURANT,
COLABA, MUMBAI -400 039.
7. KIM MIRANDA,
S/O.LATE HORACE MIRANDA, S-482, AIR INDIA II,
KALINA, SANTA CRUZ (WEST), BOMBAY - 400 029,
NOW AT 11029, 82ND AVENUE, DELTA BC.B4C2B3,
CANADA.
8. ALTHEA AYESHA GOYAL,
D/O.LATE HORACE MIRANDA, S-482, AIR INDIA II,
KALINA, SANTA CRUZ (WEST), BOMBAY - 400 029,
NOW AT 11029, 82ND AVENUE, DELTA BC.B4C2B3,
CANADA.
9. RAMAKRISHNA PILLAI,
KAKKANAD VEEDU, ULOOR,
THIRUVANANTHAPURAM - 695 011.

R1 TO R9 BY SRI.G.ANAND (PARTY IN PERSON)

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD
ON 02-09-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

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OP(C).No. 1399 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

- P1: TRUE COPY OF ORDER IN IA. NO.6443/2009 IN OS NO.34/1999 OF PRL.SUB COURT, TRIVANDRUM.
- P2: TRUE COPY OF COMMON ORDER IN IA NOS.124/12, 360/13 AND 921/14 IN OS NO.34/1999 OF PRL. SUB COURT, TRIVANDRUM.
- P3: TRUE COPY OF IA NO.1949/2014 IN OS NO.34/1999 FILED BEFORE SUB COURT, TRIVANDRUM.
- P4: TRUE COPY OF IA NO.1950/2014 IN OS NO.34/1999 FILED BEFORE SUB COURT, TRIVANDRUM.
- P5: TRUE COPY OF THE SURVEY PLAN PRODUCED AND MARKED AS EXT.C1(A) IN OS NO.34/99.

RESPONDENT(S)' EXHIBITS

- EXT.R1: COPY OF THE ORDER IN RFA NO.744/10 OF HIGH COURT (DB), DATED 25/05/2011
- EXT.R2: COPY OF THE ORDER IN RPNO.1220/12 OF HIGH COURT (DB), DATED 11/01/2013
- EXT.R3: COPY OF THE ORDER IN FAO NO.68/12 OF HIGH COURT (DB) DATED 05/09/2012
- EXT.R4: COPY OF THE CASE DETAILS IN IA 1420 & 1421/14 IN OS.NO.34/99 IN PRINCIPAL SUB COURT THIRUVANANTHAPURAM
- EXT.R5: COPY OF THE POA FOR PLAINTIFF & D4 TO D10 GMAIL DETAILS TO COUNSEL SABU KALLARAMOOLA FOR COPY PETITION ETC, DATED 29/07/15

/TRUE COPY/

PA.TO JUDGE

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A.MUHAMED MUSTAQUE, J.

O.P.(C)No.1399 of 2015

Dated this the 2nd day of September, 2015.

J U D G M E N T

The petitioner in this original petition, aggrieved by the dismissal of an application to appoint an Advocate Commissioner to partition the property as per the supplemental preliminary decree produced as Ext.P2 in I.A.Nos.124/12, 360/13 and 921/14 in O.S.No.34/99, has approached this Court.

2. Though the petitioner has not produced the order of dismissal along with this original petition, now it is made available along with I.A.No.12565/15. The reason for dismissal stated in the order is as follows :

"Already there is a measured plan which forms part of the final decree dated 30.1.2013. Therefore there is no need for allowing any further commission application. Hence this I.A. is dismissed."

3. There is no dispute to the effect that an Advocate Commissioner was sought to be appointed, based on the

supplemental preliminary decree passed in this matter. The court below has proceeded, since there is a Commission report based on the original preliminary decree dated 24.6.2009, it is no necessary to appointment an Advocate Commissioner in terms of Order 26 Rule 13 of CPC. The party respondent who is appearing for the plaintiff and other defendants, objected to the prayer of the petitioner and contended that there is already a Commission report in final decree and therefore, fresh Commission need not be appointed. It is also pointed out that the supplemental preliminary decree is null and void and unsustainable.

4. It is to be noted that there is no challenge against the supplemental preliminary decree. This Court, in an original petition filed against the rejection of Commission application to appoint a Commissioner in terms of supplemental preliminary decree to partition plaint schedule property, need not decide the issue relating to the validity of supplemental preliminary decree, unless there being a challenge to such decree. Therefore, the scope of

issue in this writ petition is very limited for consideration of appointment of an Advocate Commissioner in terms of the supplemental preliminary decree.

5. It appears that in terms of the original preliminary decree, the court below has only allotted shares to the plaintiff and partitioned the properties. The supplemental preliminary decree was ordered as follows :

- "1. Defendant 1 to 3 are entitled to get 1/6 share each in the plaint schedule property.
2. Defendant 4 to 7 together are entitle to get 1/6 share in the plaint schedule property.
3. Defendant 8 to 10 together are entitle to get 1/6 share in the plaint schedule property."

It was also made clear in the supplemental preliminary decree itself that, the share allotted to the first plaintiff in the final decree already ordered will not be affected by the said order; that means, the court has only ordered a partition in respect of the shares of the un-allotted defendants in the original preliminary decree and in final

decree; hence, this Court finds that no person would be aggrieved in view of the declaration of the shares based on the original preliminary decree and the court by supplemental preliminary decree has only ordered to work out the shares of defendants as per the original preliminary decree. In such circumstances, this Court is of the view that the court below erred in declaring appointment of Commissioner to work out supplemental preliminary decree.

6. The court below ought to have exercised its powers in terms of Order 26 Rule 13 to appoint an Advocate Commissioner. The court below committed jurisdictional error in declining the application for appointment of a Commissioner. Accordingly, impugned order produced as Ext.P6 is set aside and the court below is directed to appoint an Advocate Commissioner to work out the supplemental preliminary decree dated 13.3.2014.

7. The parties shall appear before the court below on 22.9.2015 and the court below is directed to dispose of the

entire proceedings in a time bound manner at least on or before 31.12.2015.

The original petition is disposed of as above.

Sd/-
A.MUHAMED MUSTAQUE,
Judge.

ami/

//True copy//

P.A.to Judge