



2026:KER:67882

OP(C) NO. 747 OF 2025

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

WEDNESDAY, THE 9TH DAY OF SEPTEMBER 2026 / 18TH BHADRA,

1948

OP(C) NO. 747 OF 2025

AGAINST THE ORDER DATED 13.03.2025 IN IA 15/2025 IN OS
NO.6 OF 1997 OF II ADDITIONAL MUNSIFF COURT, ERNAKULAM
ARISING OUT OF ORDER DATED 10.1.2025 IN IA NO.1/2024 IN OS
NO.6/1997 OF THE II ADDITIONAL MUNSIFF'S COURT, ERNAKULAM

PETITIONER/RESPONDENT IN IA/PLAINTIFF:

S. ABDUL RAZZAK
AGED 74 YEARS
S/O. LATE A.M. SHAHUL HAMEED, RESIDING AT
70/1841, KALOOR, ELAMKULAM VILLAGE, KANAYANNUR
TALUK, KOCHI, PIN - 682017

BY ADVS.
SHRI.R.S.KALKURA
SRI.HARISH GOPINATH
SRI.H.KIRAN
SHRI.P.I.NAJUMAL HUSSAIN

RESPONDENTS/PETITIONERS IN IA/DEFENDANTS:

1 C.B. SURAJA DEVI
W/O. OMAKUMAR, HOUSE NO.27, A C S ROAD, KALOOR
P.O, ELAMKULAM VILLAGE, KANAYANNUR TALUK, KOCHI,
PIN - 682017

2 V.P. OMKUMAR



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ACSRA-LANE 2, A C S ROAD, KALOOR,P.O, ELAMKULAM
VILLAGE, KANAYANNUR TALUK, KOCHI, PIN - 682017

BY ADVS.

SRI.G.RAJAGOPAL FOR R2

SMT.S.LEELALAKSHMI

SHRI.JAYADEEP SAJAN

SHRI.ABDEL BENNET JACOB LAWYER

SMT.ANAGHA V. SANTHOSH

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 05.08.2026,
THE COURT ON 09.09.2026 DELIVERED THE FOLLOWING:

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“C.R”

EASWARAN S., J.**OP(C) No.747 of 2025****Dated this the 9th day of September, 2026****J U D G M E N T**

The plaintiff in OS No.6/1997 on the files of the II Additional Munsiff's Court, Ernakulam, a suit for declaration and injunction, came up with the original petition aggrieved by Exts.P8 and P10 orders passed by the trial court setting aside the report and plan of the advocate commissioner.

2. Brief facts necessary for the disposal of the original petition are as follows:

OS No.6/1997 on the files of the II Additional Munsiff's Court, Ernakulam is a suit for declaration of title and injunction. The suit was initially dismissed against which AS No.10/2003 was filed before the Additional District Court-V, Ernakulam. The appeal was dismissed against which RSA No.54/2006 was filed before this Court. By judgment dated 04.01.2012 (Ext.P3), this Court remanded the matter back for fresh consideration to the trial court. The point of



remand was to the effect that the II Additional Munsiff's Court should appoint a commissioner with the assistance of a surveyor, who should measure out the properties of the appellant and respondents with reference to the respective documents and prepare a report and plan of the disputed pathway and the respective properties. In terms of the directions in the order of remand, the advocate commissioner, who was appointed, filed a report and plan on 5.11.2018 as evident from Ext.P4. On filing of the report, the defendants sought amendment of the written statement raising a counterclaim that a portion of the pathway has been encroached upon by the plaintiff and, therefore, sought an additional prayer for recovery of possession. The application for amendment was allowed, and the same was challenged before this Court in OP(C)No.468/2019, which was allowed by this Court by Ext.P5 judgment dated 23.08.2024. This Court, while rendering Ext.P5 judgment, held that the order of remand was not an open remand and it was a closed remand with specific direction to demarcate the plaintiff's and defendants' properties and also the pathway. That apart, as regards the sustainability of the application for amendment, it was held that since the amendment raising a



counterclaim was filed after the framing of the issues, the amendment could not have been allowed by the trial court. Accordingly, the order was set aside. Once the matter went back before the II Addl. Munsiff's Court, Ernakulam, the 2nd defendant filed another application as IA No.1/2024 seeking to set aside the report of the advocate commissioner and the sketch of the surveyor. The petitioner raised an objection stating that the application is highly belated. However, notwithstanding the objection, the trial court allowed the application (IA No.1/2024) and passed the impugned order, Ext.P8. Aggrieved by Ext.P8, the petitioner filed a review petition as R.P.No.15/2025 (Ext.P9), which was also dismissed by the trial court by Ext.P10 order, and hence this original petition challenging Exts.P8 and P10 orders.

3. Heard Sri.R.S.Kalkura, the learned counsel appearing for the petitioner, and Sri.G.Rajagopal, the learned counsel appearing for the 2nd respondent.

4. Shri R.S.Kalkura, learned counsel appearing for the petitioner submitted that the trial court ought not to have allowed the application for setting aside the report of the Advocate Commissioner. According to the learned counsel, the order of remand being specific



in nature directing the trial court to appoint a Commissioner for measuring out the properties of both the plaintiff and the defendants, the objection raised on behalf of the respondents that the measurements done by the Commissioner are flawed cannot be accepted. He further pointed out that it is nobody's case that the properties are not identifiable. In fact, the properties of the plaintiff as well as the defendants lie within separate compound walls, and therefore there cannot be much dispute regarding its identity. He further pointed out that by proceedings dated 20.11.2024, the court had accepted the commissioner's report in evidence and marked Exts.C3, C3(a), C4 and C4(a). Therefore, once the trial court has exercised its powers under Order XXVI Rule 10(3) of the Code of Civil Procedure, it cannot review the same and strike off the evidence from the record. The exercise now undertaken by the trial court is completely erroneous, and further, it is pointed out that the trial court erred egregiously in relying on the oral testimony of the commissioner and the surveyor. In fact, it is pointed out that if one peruses the oral testimony of the Commissioner as well as the surveyor, it is evident



that the defendants did not raise any objection at the time of measurement of the properties.

5. *Per contra*, Sri.G.Rajagopal, the learned counsel appearing for the 2nd respondent, resisted the plea and contended that the prime contention of the defendants is that there is no pathway as described in the B schedule at any point of time. Even assuming for the sake of argument that there existed a pathway, the further question would be whether the pathway has an 18-link width. Therefore, when the initial burden of proving the existence of the way is on the plaintiff, it was incumbent upon him to prove the same in accordance with law. The reports of the advocate commissioner are seriously flawed, and the respondents had already filed their objection on 16.11.2018. The trial court had only exercised its powers under Order XXVI Rule 10 of the Code of Civil Procedure and tested the report of the commissioner in the light of the oral testimony of the commissioner as well as the surveyor. The court was not satisfied with regard to the sustainability of the findings of the Commissioner and hence was perfectly justified in setting aside the same. He further pointed out that when an advocate commissioner is appointed to



conduct measurement on the basis of the title documents with the assistance of a surveyor, it is the duty of the commissioner to identify the survey numbers in which the property is situated with reference to survey stones before proceeding further. The commissioner failed to adhere to the essential prerequisite for the commencement of the measurement based on survey records. In support of his contention, relied on the decisions of this Court in **Thankmani v. Vasanthi and Others [2020 (5) KLT 129 : 2020 (4) KHC 578]**; **Sumukaran ¹ Chettiyar v. K.Russel [2026 KHC 1922]**; **Vijayakumari T.K. v. Subhash Mohan [2024 KHC 785]**; **Abdul Asees v. Gopinadhan [2024 KHC 695]** and **Sabu v. Sasi [2022 (2) KHC 435]**, and of the High Court of Punjab and Haryana in **Balbir Dewan v. Naveen Chander [1989 KHC 2406]** and of the High Court of Karnataka in **Shadaksharappa v. Kumari Vijayalaxmi [2023 KHC 9755]** and of the Orissa High Court in **Badan Prasad Jaswal v. Bira Khamar and Another [1990 KHC 2103]**.

¹ Corrected as “Sukumaran”



6. I have considered the rival submissions raised across the bar and perused the orders impugned in the original petition and the records of the case.

7. Based on the rival submissions, two issues are required to be addressed. i) whether the objection raised by the defendants is sustainable? ii) At what stage the trial court can set aside the report of the commissioner?

8. To answer the first question, one needs to first decide as to whether the defendants are entitled to raise an objection in the form which is now raised. As regards the scope of the order of remand, this Court had already considered the same in Ext.P5 judgment and held that the order of remand is a closed one and intended only to enable the plaintiff to take out a commissioner to measure out the pathway as well as the respective properties. The further question is whether the defendants would be entitled to raise an objection in the form as has now been raised.

9. The objection of the defendants is primarily directed against the manner in which the commissioner measured the property. According to the defendants, apart from the measurement



based on the title deeds, the measurements should also tally with the survey records. Thus, the defendants contend that the commissioner ought to have identified the survey stone and the starting point and thereafter proceeded to identify the properties covered by the title deeds.

10. Ex facie, this argument is untenable. It must be noted that there was no direction from this Court in Ext.P3 judgment to identify the property in terms of the survey records. It is true that the assistance of the surveyor was also sought for. But then the larger question is whether the action now undertaken by the Commissioner could be termed as a flawed one or not.

11. A perusal of the report of the Commissioner would show that the defendants were present at the property when the commissioner commenced his inspection. At that point of time, the defendants had no case that the measurement done by the Commissioner was improper and they never requested the Commissioner to conduct the measurement in a particular manner. Therefore, the objection raised on behalf of the defendants was certainly an afterthought.



12. That apart, it is also worthwhile to mention that based on the report of the Commissioner, the defendants filed an application for amendment accepting the report of the Commissioner seeking to raise a counterclaim. Though the same was allowed, the order allowing the counterclaim was interdicted by this Court in Ext.P5 judgment. The present application filed after this Court non-suited the claim of the defendants in their endeavor to raise the counterclaim is clearly an afterthought. Hence this court finds that the objection raised by the respondents/defendants is wholly untenable.

13. Coming to the second question this court finds that both sides have their own version as regards the stage in which a report of the commissioner can be set aside by the trial court. According to the learned Counsel for the petitioner, the application filed by the respondents to set aside the report of the commissioner after Ext.P5 judgment is not maintainable. Even if the defendants had filed an objection, the same was not pursued seriously. However, according to the learned counsel for the respondents, the report of the Advocate Commissioner is only a piece of evidence and that it can at any time



be set aside by this Court if it is dissatisfied with the findings rendered by the Commissioner.

14. One cannot have any dispute about the proposition that the report of the commissioner is only a piece of evidence and it is not sacrosanct and the court is not bound by it. However, the question is at what stage the court can exercise the power under Order XXVI Rule 10(3) of the Code of Civil Procedure.

15. The learned counsel appearing for the respondents placed heavy reliance on the decision of this Court in **Sumukaran ² Chettiya**r v. **K.Russel** [**2026 KHC 1922** – authored by ES(J)] to contend that when the report is placed before the court, it is for the court to arrive at a subjective satisfaction and if the court is not satisfied with the report, it is always open for the court to set aside the report and refuse to accept it in evidence.

16. In **Balbir Dewan vs Naveen Chander** [**AIR 1989 P&H 257 : 1989 KHC 2406**], a division bench of the Punjab and Haryana High Court held that there is no provision under Rule 10 of Order 26 enabling the parties to file objection to the report of the commissioner.

² Corrected as “Sukumaran”



When the parties to the suit file their objection, they are merely alerting the court with regard to the discrepancy and that the only option is to examine the commissioner before the court proceeds to accept the report as evidence.

17. In ***Thankmani Vs Vasanthi and other [2020(5) KLT 129]***, the Single Bench of this court held that it is incumbent upon the court to ensure that the commission Report mentions the details necessary to elucidate the issue in dispute, for which the Commission was appointed, irrespective of whether the parties have filed any objection or not to the Commission Report.

18. In ***Vijayakumari T.K. Vs Subahs Mohan [2024 KHC 785]***, a Single Bench of this court held that though sub rule (3) of Rule 10 of Order 26 does not provide for setting aside the report of the commissioner, the principles underlying the operation of Rule 14(2) of Order 26 can be applied.

19. In ***Shadaksharappa Vs Kumari Vijayalakshmi [2023 KHC 9755]***, a Division Bench of the Karnataka High Court held that a person who has filed an objection to the report of the commissioner can cross examine the commissioner and establish that his report is



unacceptable. It was further held that even without cross examination, it is open to the party to establish that the report cannot be accepted.

20. In ***Sumitra Devi and another Vs Dinesh and others [2021 KHC 5467]***, the Single Bench of the Uttarakhand High Court held that when the commissioner is directed to measure out the property with the help of surveyor, he is expected to measure out the property from fixed points so as to locate particular piece of land.

21. In ***Sabu Vs Sasi [2022(2) KLT 722]***, a Single bench of this court held that when a survey measurement is ordered, the commissioner is expected to follow the procedure under the Kerala Survey Manual and identify the property based on ladder measurement.

22. In the considered view of this Court, none of the decisions cited by the learned counsel for the respondents applies to the facts of this case. The learned counsel placed heavy reliance on the decisions of this Court in ***Sabu (supra)*** and ***Sukumaran Chettiyaar (supra)***. Pertinently, the main objection of the respondents to the report of the commissioner was that the measurement was not made with reference to survey records and field measurement book. No



objection whatsoever was taken based on the decision of this court in ***Sabu*** (*supra*). This Court is of the view that in ***Sabu*** (*supra*) this Court had only highlighted the procedure to be followed under the Kerala Survey and Boundaries Act. At any rate, this Court is not persuaded to hold that the decision will give rise to a fresh cause of action to the parties in a case where the commissioner has already returned the findings, and the parties failed to raise any objection. In other words, the decision cannot be understood to have granted a fresh cause of action to the parties to file an application for remitting the report of the commissioner.

23. As regards the factual scenario which arose in **Sumukaran³ Chettiyar** (*supra*), this Court finds that the facts of this case are completely different from the decision cited. In the present case, the record of proceedings in the suit shows that on 20-11-2024, the advocate commissioner was present and examined as DW4 and Exts.C3, C3(a), C4 and C4(a) were marked. Thereafter, the court issued summons to the surveyor, and the surveyor was examined on 02.12.2024 and his evidence was taken as DW5 and Ext.A6 was

³ Corrected as “Sukumaran”



marked. Once the commissioner's report is accepted in evidence, it is impermissible for the court to strike off the same from the evidence. When the commissioner and the surveyor is examined and their reports are accepted then it forms part of the record. The application if any of the defendants to set aside the report of the commissioner or the objections if any ought to have been pressed at that point of time before the court decided to receive the reports in evidence. Once the report is received as evidence, it is impermissible for the court to set aside the same on application or otherwise of the parties.

24. In ***Smt. Rama Ghose V. Madanlal Bothra [AIR 2005 NOC 365 (Cal)]***, the Calcutta High Court held that though the report of the commissioner is not sacrosanct evidence and the same is not binding on the court, but once the report of the commissioner together with evidence taken by him is admitted and form part of the record, the same becomes evidence as a whole in the suit.

25. Thus, when the commissioner and surveyor were examined and, upon a subjective satisfaction, the court had received his report in evidence, it was completely at remiss when it chose to exercise the power under sub-rule (3) of Rule 10 of Order 26 CPC.



Once the report of the commissioner is received in evidence, necessarily, the only option for the parties is to adduce such other evidence to disprove the contents of the report and the court is always at liberty to assess the evidence and arrive at a conclusion as to whether it should accept the report or not.

26. One must also remember that the report of the commissioner is only a piece of evidence before the court. It does not conclusively determine the rights of the parties. It is still open for either party to prove that the finding of the commissioner is flawed based on other cogent evidence.

27. Further, the trial court committed serious procedural irregularity when it chose to accept the application for setting aside the report of the commissioner and entertain the same after the closure of evidence. The record of proceedings further shows that on 02.12.2024 the evidence was closed. The act of the court in entertaining the application for setting aside the report of the Commissioner is wholly impermissible and is a procedural irregularity which requires correction at the hands of this Court in exercise of the powers under Article 227 of the Constitution of India.



In fine, this court concludes that the trial court committed serious infirmity by entertaining the application for setting aside the report of the commissioner after the same was received in evidence and the closure of evidence. Accordingly, the petitioner is entitled to succeed. Hence, the Original Petition is allowed by setting aside Exts.P8 and P10 orders dated 10.1.2025 and 13.3.2025, respectively, of the II Additional Munsiff's Court, Ernakulam. Ext P 6 application (IA 1 of 2024) will stand dismissed. The trial court is directed to analyze the respective evidence and dispose of the suit untrammelled by any of the observations made by this Court in this judgment or in the impugned orders. The parties will be free to raise their respective contentions before the court. The trial court shall expedite the suit and dispose of the same within a period of two months from the date of receipt of the copy of the judgment.

Ordered Accordingly.*

Sd/-
EASWARAN S.
JUDGE



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APPENDIX OF OP(C) NO. 747 OF 2025

PETITIONER EXHIBITS

Exhibit P1	TRUE COPY TITLE DEED DATED 20-7-1982
Exhibit P2	TRUE COPY OF RESPONDENTS' TITLE DEED DATED 11-3-1993
Exhibit P3	TRUE COPY OF THE JUDGMENT DT 04-01-2012 IN RSA NO. 54/ 2006 ON THE FILE OF THIS HON' COURT
Exhibit P4	TRUE COPY OF COMMISSION REPORT AND PLAN DATED 05-11- 2018
Exhibit P5	TRUE COPY OF THE JUDGMENT DT 23.08.2024 IN OPC 468 OF 2019 ON THE FILE OF THIS HON' COURT
Exhibit P6	TRUE COPY OF THE IA NO.1/2024 IN O S NO.6 OF 1997
Exhibit P7	TRUE COPY OF THE OBJECTION DATED 01-10- 2024 ON IA NO.1/2024 IN O S NO.6 OF 1997
Exhibit P8	TRUE COPY OF THE ORDER DATED 10-01-2025 ON IA NO.1/2024 IN O S NO.6 OF 1997
Exhibit P9	TRUE COPY OF THE RP NO.15 OF 2025 DATED 19-02-2025 IN IA NO.1/2024 IN O S NO.6 OF 1997
Exhibit P10	TRUE COPY OF THE ORDER DATED 13-03-2025 IN RP NO.15 OF 2025 IN IA NO.1/2024 IN O S NO.6 OF 1997

* Correction on pages 8, 12 & 15 substituting the word "Sumukaran" with "Sukumaran" has been carried out on 16.9.2026 with the approval of the Hon'ble Judge. The judgment uploaded on 10.9.2026 deleted and the corrected judgment uploaded on 16.9.2026.