
(2018) 02 KL CK 0077
In the High Court Of Kerala
Case No : 390 of 2018

T.B.NIDHI @ NARAYANAN

APPELLANT

Vs

T.B.CHANDRA BOSE & ORS

RESPONDENT

Date of Decision : 09-02-2018

Acts Referred:

[Constitution of India](#), [Article 227](#) -
Power of superintendence over all courts by the High Court

Citation : (2018) 02 KL CK 0077

Hon'ble Judges : Alexander Thomas

Bench : Single Bench

Advocate : V.A.VINOD

Final Decision : Disposed off

Judgement

1. The prayers in this Original Petition (Civil) filed under the enabling provisions contained in Article 227 of the Constitution of India are as follows :

(i) issue an order setting aside Exhibit-P9 order in I.A.No.1245/2018 in O.S.No.2632/2013 dated 31.1.2018 passed by the Hon''ble IInd

Additional Munsiff Court, Thrissur;

(ii) This Hon''ble Court may be pleased to allow Ext.P7 which is necessary for the effective disposal of the case;

(iii) This Hon''ble Court may be pleased to remand the matter for fresh consideration before the court below ; and

(iv) grant other appropriate reliefs that this Hon''ble Court may deem fit and proper.

2. Heard Sri.V.A.Vinod, learned counsel appearing for the petitioner/first defendant. In the nature of the orders proposed to be passed in this

Original Petition (Civil), notice to the respondents will stand dispensed with.

3. The order under challenge in this case is the one at Exhibit-P9 dated 31.1.2018, whereby the trial court concerned (II Additional Munsiff Court, Thrissur) has dismissed the plea made by the petitioner/first defendant on I.A.No.1245 of 2018 to remit the commission report, etc. The operative portion of the impugned Exhibit-P9 order, more particularly paragraphs 4 to 6 thereof read as follows :

4. Point Nos.1 & 2: The petition is filed to remit the commission report to identify B & C schedule property as per Will. It is averred that boundary of plaint A schedule property can be fixed only after measuring the entire property covered by the Will. The respondent/plaintiff on the other hand contended that the petition is filed only with an intention to prolong the matter. The entire petition averments are denied.

5. Obviously, suit is one for fixation of boundary of plaint A scheduled property. The Commissioner has identified the property with the assistance of Taluk Surveyor and filed report and sketch. The petitioner's case is that the entire property covered by the Will has to be measured in order to fix the boundary of plaint A schedule property. But interestingly, the petitioner has no such case in the written statement filed by him. The petitioner has no case that the property is not identified. He is challenging the identification by the Commissioner on the ground that the entire property covered by Will is not measured.

6. A perusal of commission report and sketch show that the property was measured and identified in the presence of the petitioner as well. The petitioner had submitted work memo also. The petitioner has not stated anything mentioned in the petition at that time. So it is clear that the petition is filed without any bonafides. No sufficient ground is made out to remit the commission report. The petitioner is putting up a new case. The commission has complied the direction given to him and filed a report accordingly. The report contain facts necessary to pass an effective decree in this case. The petitioner himself has no contra case. So it is clear that the petitioner has not made out sufficient grounds to remit commission report. That be so, there is no other option but to dismiss the petition. Hence I do so.

4. It is urged by Sri.V.A.Vinod, learned counsel appearing for the petitioner, that the abovesaid findings rendered by the trial court on paragraph-5 of the impugned Exhibit-P9 order that the petitioner states in the I.A. that the

entire property covered by the Will has to be measured in order to fix the boundary of the plaintiff A schedule property, etc., cannot be considered as the petitioner has not raised such a case in the written statement filed by him, etc., is incorrect and factually wrong and that the petitioner has no case that the property is not identified, etc. is factually incorrect correct and wrong, etc. It is pointed out that it is clearly averred by the petitioner in Exhibit-P3 written statement, more particularly in paragraphs 3, 4 and 5 thereof that the property previously owned by the deceased father of the petitioner, first respondent and second respondent, has not been measured and separated, as per the Will of the deceased father, etc. That these aspects are all the more clear from some of the other pleadings in paragraphs 3, 4 and 5 of Exhibit-P3 written statement given on pages 1 and 2 thereof. Further the learned counsel for the petitioner would point out that the petitioner has filed Exhibit-P6 objection to Exhibit-P5 commission report pointing out many irregularities and faults and has contended that as per one of the conditions stipulated in the Will of the deceased father, the property set apart for temple and common use measuring to 7 cents has to be measured out and demarcated at first instance and then only the parties are allowed to divide the property as per the Will. That the Commissioner has only measured out the plaintiff A schedule property of the plaintiff, which, according to the petitioner, goes against the main intention of the testator of the Will and would thereby defeat his intentions while preparing the Will. That the property has devolved upon the plaintiff as per the Will and that being the case for the measurement and division of the property has to be done as per the recitals of the Will, etc. That the Commissioner has not followed the conditions stipulated in the Will and has not measured the other properties and the properties set apart for temple and common use and that it is in the light of these aspects, the petitioner has filed Exhibit-P7 I.A.No.1245 of 2018 for remitting the commission report, so as to measure out the entire plaintiff schedule property as well as the property mentioned in the Will as per the conditions of the Will which has now been misused. It is pointed out by the petitioner that none of these crucial and relevant aspects has been considered in its correct factual and legal perspective.

5. On a consideration of the abovesaid contentions of the petitioner, this Court is

of the view that the abovesaid contentions are not seen adverted to and considered by the trial court by passing the impugned Exhibit-P9 order. Without getting into the merits of the controversy, this Court is of the view that the matter requires reconsideration at the hands of the trial court and for that purpose, the matter could be remitted to the trial court to decide the matter afresh on Exhibit-P7 I.A. For the abovesaid remedy, it is not necessary to issue notice to the respondent as the said party could be heard on the merits of the matter by the trial court while passing fresh orders on Exhibit-P7 I.A.

6. Accordingly, the impugned Exhibit-P9 order will stand set aside and consequently Exhibit-P7 I.A.No.1245 of 2018 in O.S.No.2632 of 2013

will stand restored to the file of the trial court concerned. The trial court will grant reasonable opportunity of being heard to both sides and then

consider the matter afresh and pass orders on Exhibit-P7 I.A. and dispose of that I.A. in accordance with law, without much delay, preferably

within a period of two weeks from the date of production of a certified copy of this judgment. The suit need be taken up for trial only after orders

are passed by the trial court on Exhibit P7 I.A. as directed herein above. The petitioner will produce a certified copy of this judgment before the

trial court concerned for necessary information.

With these observations and directions, the Original Petition (Civil) will stand finally disposed of.