

Yudathadevus vs Joseph

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Court : Kerala

Decided On : Oct-01-2021

Judge : Honourable Mr. Justice a. Badharudeen

Appeal No. : OP(C)/2825/2015

Appellant : Yudathadevus

Respondent : Joseph

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN
FRIDAY, THE 1ST DAY OF OCTOBER 2021 / 9TH ASWINA, 1943
AGAINST THE ORDER IN IA 346/15 IN OS 118/2012 OF PRINCIPAL
MUNSIFF COURT , KOCHI PETITIONER/PETITIONER
YUDATHADEVUS AGED 50 YEARS S/O. XAVIER, KOOTUNKAL
HOUSE, VADAKKE CHELLANAM DESOM, CHELLANAM VILLAGE,
KOCHI TALUK. BY ADV SRI.K.S.AJAYAGHOSH
RESPONDENT/RESPONDENT: JOSEPH AGED 62 YEARS S/O.
XAVIER, KOOTTUNKAL HOUSE, PALLURUTHY DESOM,
RAMESWARAM VILLAGE, KOCHI TALUK 682 004 BY ADVS.
SRI.A.ANTONY SMT.LEELAMMA ANTONY SRI.MATHEW SKARIA

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 24.9.2021, THE COURT ON 1.10.2021, DELIVERED THE FOLLOWING: C.R

A. BADHARUDEEN, J.

===== O.P.(C) No.2825 of
2015 ===== Dated this the
1st day of October, 2021

JUDGMENT

Ext.P5 order dated 7.10.2015 in I.A. No.346/2015 in O.S.No.118/2012 on the file of the Munsiff Court, Kochi is the subject matter in this original petition. The petitioner herein is the plaintiff in the above suit. The respondent herein is the sole defendant therein.

2. I shall refer the parties in this petition as 'plaintiff' and 'defendant' hereinafter, for brevity and easy discussion.

3. The brief facts:

The plaintiff filed Original Suit No.118/2002 before the Munsiff Court for fixation of the southern boundary of the plaint 'A' Schedule property based on the title deed, viz. Will deed, executed by his father. The defendant therein is the brother of the plaintiff. The specific case put up by the plaintiff before the trial court is that, as per the Will deed executed by the father, a total extent of 15.300 cents of property owned by the father was allotted to the plaintiff and the defendant by way of a Will. As per the Will deed defendant was given seven cents on the south and 8.300 cents on its north was allotted to the plaintiff with a building. According to the plaintiff, he has been enjoying 8.300 cents with excess land and the building therein.

4. Since the Suit was one for fixation of boundary, a commissioner

with the aid of Surveyor was deputed on the application of the plaintiff. Accordingly, Advocate Commissioner, M.K.Murari filed Ext.P2 report along with the survey sketch. The defendant, who was aggrieved by the commission report and sketch, filed application, I.A. No.346/2015 to set aside the commission report and plan.

5. The learned Munsiff examined the commissioner and surveyor

as PW1 and PW2 and finally set aside the commission report and plan holding that the commissioner did not remember as to whether measurement was done and fixed the north-western boundary and the commissioner alone would say the same etc. The observation made by the Munsiff appears in Paragraph 8 of Ext.P5 order is as follows:

The evidence shows that the properties were measured exclusively as per the will. PW1, the Commissioner deposed that he does not remember as to whether measurement was done after fixing the north-western boundary. According to him, only the surveyor could say whether the north-western boundary was seen 30 cm away. He deposed that there is a projection to the west of the western boundary. PW2, the surveyor also could not recollect as to whether the northern boundary situates 30 cm away. To a question as to whether there is a projection as aforesaid, PW2 pleaded ignorance. One must note that Ext.P1 sketch clearly depicts such a projection on the western boundary. PW2's evidence shows that the excess land is shown I survey numbers 51/1 and 51/2. The question as to how excess land happened to be included in different survey numbers necessarily remains unanswered. Neither PW1 nor PW2 could give a proper explanation for the aforesaid shortcomings. Defendant has also pointed out that in the second sketch, though the extent of the A schedule property is shown as 3.36, when measured, it would be 3.39 ares. It is also stated that the actual extent of B schedule property is only 2.73 ares instead of 2.83 ares. The above circumstances show that the report and plan do not reflect the real state of affairs and are not acceptable.

6. Relying on a decision reported in [2008 (4) KHC 203

Bhaskaran v. Kamalakshi & Others], learned Munsiff set aside Ext.C1 report and C1 (2) plan, which is Exhibit P2 herein. The operative portion of the order is as under: The petition is allowed and Ext.C1 and C1 (2) plan are set aside.

7. Aggrieved by the said order, Ext.P5, the plaintiff approached this Court under Article 227 of the Constitution of India.

8. Heard Sri.K.S.Ajayaghosh , learned Counsel appearing for the

petitioner/plaintiff and Sri.Antony Mathew Skaria, learned Counsel appearing for the respondent/defendant. Perused the records of the trial court produced along with the original petition.

9. It is argued by the learned Counsel for the plaintiff that the

Munsiff went wrong in setting aside the commission report and survey plan merely relying on the evidence of PW1, the Advocate commissioner since he deposed that he did not remember as to whether measurement was done after fixing the north-western boundary and Surveyor, who was examined as PW2, could not recollect as to whether the northern boundary situated 30 cm away. It is argued further that the plaintiff obtained 8.300 cents of property on the northern side from the total extent of 15.300 cents owned by his father after allotting 7 cents of property on the eastern side of the said plot to the defendant, and has been possessing and enjoying the entire extent of land excluding 7 cents on the southern side. Since no physical boundary was fixed separating the property of the plaintiff

and the defendant, suit was filed. It is submitted further that, accordingly, commission report with sketch No. 1 and 2 was obtained specifically demarcating the property of the plaintiff and the defendant based on the Will deed. According to the learned Counsel, learned Munsiff set aside commission report and plan and put the plaintiff into anarchy without redressing the grievance in the matter of fixation of boundary, and therefore, he was forced to approach this

Court as Ext.P5 order of the learned Munsiff is against the law, facts

and evidence and therefore, the order is liable to be set aside.

10. Controverting this argument, learned counsel for the defendant

would submit that an application to set aside Ext.C1 and C1 (2) plan (Ext.P2 herein) was filed and the same resulted in Ext.P5 order. According to the learned Counsel, the order of the Munsiff is perfectly in order and the same does not call for any interference.

11. A cursory reading of the order impugned would indicate that

in a Suit for fixation of boundary, the learned Munsiff set aside the Commission report and sketch without any further orders. The decision in Bhaskaran's case (supra) has been given reliance in this regard.

12. I have perused the decision in Bhaskaran's case (supra). In the said case, an application to set aside a Commission report and

plan before recording evidence was considered wherein, it was held

that in a petition filed to set aside the report and plan, before recording the evidence in the Suit, Munsiff has to dispose the application. If the report is liable to be set aside, learned Munsiff necessarily has to set aside the report and if not, the application is to be dismissed. In such circumstances, learned Munsiff was directed to pass orders in IA No.1446/ of 2008 therein in accordance with law. But the decision does not lay down a principle that the Munsiff shall set aside Commission report and plan without any further orders, so as to put the plaintiff in a remediless position.

13. Before dealing with the question as to whether Ext.P5 order

suffers from illegality, it is necessary to advert 5 questions of subtle importance, viz.

(i) What is the course of action available to a court, when an application to set aside the commission report and plan is moved?

(ii) Can a petition for setting aside a commission report be allowed?, if so what is the source of power?

(iii) If an application to set aside a commission report can be allowed without any further orders?

(iv) Whether it is necessary to set aside the earlier commission report before getting another report?

(v) If a conflict arose in between 2 co-equal Bench whether earlier decision or later decision will prevail?

14. At this juncture it is essential to refer Order 26 Rule 9 and 10

of Code of Civil Procedure, dealing with appointment of commission to make local investigation and sanctity of the report. Order 26 Rule 9 CPC provides as under:

9. Commissions to make local investigations:- In any suit in

which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

15. Order 26 Rule 10 (2) provides as under : *****

(2) Report and depositions to be evidence in suit : The report of

the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

16. Even on repeated reading of Order 26 and the Rules there

under, no specific provision is incorporated to set aside commission report. However, order 26 Rule 10 (3) provides the course of action available to a court, where the court for any reason dissatisfied with the proceedings of the Commissioner. For clarity, Order 26 Rule 10 (3) is also extracted hereunder:

(3) Commissioner may be examined in person- Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

17. This Court in an earlier decision reported in [1985 KLT 144], Swami Premananda Bharathi v. Swami

Yogananda Bharathi, a Division Bench of this Court held

that the appointment of the second commissioner and the reports filed by him without setting aside the first commissioner's report is wholly illegal and without jurisdiction. The relevant portion of the decision is as extracted hereunder :

That the first commissioner's report and proceedings should be set aside for reasons to be recorded and then only the court can proceed to appoint another commissioner to do the work is a wholesome rule of law based on public policy,. The proceedings in the court below could be expedited, without waste of time and money. We are of the view, that only if the court has reason to be dissatisfied with the proceedings and

report of the first commissioner for reasons stated, it can appoint a second commissioner for further inquiry. This is a condition precedent. The provision contained in Order XXVI, Rule 12. C.P.C. is "vital". Strict adherence alone will facilitate speedier, effective and cheaper administration of justice. Therefore, the appointment of the second Commissioner and the reports filed by him without setting aside the first Commissioner's report is wholly illegal and without jurisdiction.

18. In a subsequent decision reported in [AIR 1993 Ker 218], Balakrishna Menon & anr. v. Padmavathy Amma & anr., a second commission issued when the parties agreed for appointment of

the same, after eschewing the first commission report for consideration, the decision in Swami Premanda Bharathi's case (supra) has been distinguished and held as under :

When both parties to a litigation agree to take out a second commission for obvious reasons the evidentiary value of the first report is automatically detached. In that situation the Court need not pass separate orders setting aside the first Commission report because it is implied when the order for appointment of second commission is passed. What is necessary under sub-rule (3) of Rule 10 is that the Courts shall be dissatisfied for any reason for reasons to be recorded.

19. However, in a subsequent decision reported in [2009 (3) KLT 64], Joy Cherian v. George Cherian, the following two questions were answered as under: Questions:

(i) Whether a fresh Commission can be appointed without setting aside earlier report?

(ii) When an earlier report suffers from some deficiency,

Court if can direct same Commissioner or appoint a fresh Commissioner without setting aside previous report even by Appellate Court? Answers: Suit for fixation of boundary and perpetual prohibitory injunction. Munsiff dismissed the suit holding that it was not possible to identify the property. In appeal, appellant/plaintiff moved an application for appointing a Commission to identify suit property. Same was allowed and an Advocate Commissioner was appointed to measure suit property and identify the properties of the parties. Impeaching correctness of that order, it is contended that it is illegal to appoint a fresh Commission, without setting aside the Commission report and plan already prepared in the trial. High Court held that a second Commission to note details which have been omitted by Commission in his previous report is permissible even without setting aside earlier report and this can be even done by Appellate Court.

20. In Joy Cherian's case (supra), a Division Bench judgment

of this Court in [1987 (1) KLT 714], State v. Kodakkat Pocker & Ors. is followed. In this case it was held as follows:

'An analysis of the question whether the appointment of a Commission without setting aside the previous report is permissible, leads to a proposition that, generally, if the previous report is found unacceptable, then without setting it aside, a fresh Commission cannot be appointed, but, if the earlier report suffered from some deficiency, which could be supplied by further enquiry and it is not vitiated by serious infirmities, the court is competent to pass appropriate orders resorting to O.XXVI R.10(3) of C.P.C. directing the same Commissioner or appointing a fresh Commissioner, without setting aside the previous report to note the details which have been omitted. There cannot be any doubt as to the competency of the appellate court when it is satisfied from the materials produced that the Commission report is unacceptable or it suffers from some deficiency to pass appropriate orders for setting aside that report

or directing a further enquiry to note the details, which were omitted in the earlier report. The endeavour of the court should be to arrive at a correct decision in a given case, and that being so, whether or not, any objection is filed, the acceptability of the Commission report has to be examined and appropriate orders have to be issued for appointment of a fresh Commission if the previous report is found unacceptable, and such power can be exercised by the Appellate Court also in appropriate cases. So, essentially, whether it be the Trial Court or the Appellate Court, when any objection is raised to the acceptability of the report, it has to examine whether the report is liable to be set aside on account of serious infirmities or if it has some deficiency, which does not call for setting it aside as a whole but only for a further enquiry to note the details to cure the deficiencies in the previous report.

21. In a case where the court finds that the commission report is

totally unacceptable as it is not in accordance with the true state of affairs, it can always attempt to get at the truth by deputing another commissioner and its power to act under sub rule (3) cannot be minimised or overlooked on the ground that the contesting party has not filed any objection to it. It is always the endeavour of the court to arrive at the correct decision in a given case and whenever it is found that the commission report is unacceptable for any valid reason it can legitimately exercise its power under sub rule (3). It is well within the competence of the appellate court also to exercise in appropriate cases power under Order 26 Rule 10(3) to set aside the commission report and call for fresh report by deputing another commissioner.

22. Though as early in the year 1987 and 1987 two Division

Benches of this Court hold the view that a commission report can be set aside and a fresh commission can be appointed, another Division Bench of this Court took a contra view in the decision reported in [2017 KHC 15, 2017 (1) KLT 1041], *Francis Assissi v. Sr. Breesiya & Ors.* after referring *Swami Premananda Bharathi's* case (*supra*) and without referring *Kodakkat Pocker's* case (*supra*). In this decision, while examining the power of a court to set aside the deposition recorded by the

commissioner and the report thereof, the Division Bench held that there is no provision to do so. At the same time, it was held that there is no provision for setting aside the report submitted by the commissions issued for local inspection under Rule 9 to 10(3) of Order 26 C.P.C. It was further held that the authority to set aside commission's report or to vary the commission's report is engrafted only in sub-rule (2) of R.14 which stands for commission to make partition. On applying a plain reading and strict interpretation to R.1 to 14 to Order 26, the resultant effect is that a report submitted by the Commissioner can be varied or set aside by the Court only under R.14 sub-rule (2) of Order 26, which stands for commission to make partition and it is a condition precedent for issuing a second commission. But the finding in Francis Assissi's case (supra) is without distinguishing or referring the issue to a larger Bench.

23. This is the context in which reference to law of precedents in

a precise form is mandated. In this connection I would like to refer a constitutional Bench decision reported in [(2002) 1 SCC 1], Pradip Chandra Parija & Ors. v. Pramod Chandra Patnaik & Ors. In this decision the constitution Bench held that if the Bench of 3 Judges comes to the conclusion that the earlier judgment of a Bench of 3 Judges is incorrect, reference to a Bench of 5 learned Judges is justified.

24. That apart in the decision reported in [(2005) 2 SCC 673],

Central Board of Dawoodi Bohra Community & anr. v. State of Maharashtra & anr., by another constitution Bench of the Apex Court, a question had arisen whether the law laid down by a Bench of a larger strength is binding on a subsequent Bench of lesser or equal strength. After considering a number of judgments, the constitution Bench (5 Judges Bench), observed as under:

'12. Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:--

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

(2) A Bench of lesser quorum cannot disagree or dissent from

the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.'

25. In the decision reported in [AIR 2016 SCC 91], *Dr. NTR University of Health Sciences v. L.Prakasam Reddy*, the

Hon'ble Supreme Court reiterated the same principle. In another constitution Bench decision reported in [(2017) 16 SCC 680], *National Insurance Company Ltd. v. Pranay Sethi & Ors.*, it was held as under:

On bindingness of prior coordinate Bench judgment; concept of binding precedent An earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier

judgment may seem to be not correct yet it will have the binding effect on the

later Bench of coordinate jurisdiction. The easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways--either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits. The doctrine of bindings precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of the Supreme Court. Discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible

to reconcile its ratio with that of a previously pronounced judgment

of a co-equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength.

26. Thus the law is no more res integra on the point that a decision or

judgment can also be per incuriam if it is not possible to reconcile its ratio with

that of a previously pronounced judgment of a co-equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Therefore, the earlier decision by a larger Bench or a co-equal Bench to be followed as the binding precedent by a Bench of co-equal strength later, until the same is overruled by a larger Bench or by the Apex Court. If so, the

decision in Swami Premananda Bharathi's case (supra) rendered by a Division Bench of this Court will hold the field unless and until the same is overruled by a larger Bench of this Court or by the Apex Court. Similarly, the decision in Kodakkat Pocker's case (supra), will be binding in so far as the same affirms the view that a commission report can be set aside on account of serious infirmities, but such a course of action is permissible only when the earlier report would be set aside following the ratio in Swami Premananda Bharathi's case (supra). Question No.(v) is answered accordingly.

27. Thus the legal position emerges from the above discussion in

answer to question Nos.(i) and (ii) is that a court can very well set aside a commission report as well as plan following the ratio in Kodakkat Pocker's case (supra) when an application is filed to set aside the same if for reasons elicited to dissatisfy with the report and plan or to dismiss the application if no reasons elicited to dissatisfy

with the report and plan. The source of power is the inherent discretion as settled by judicial precedent by interpreting Rule 10(3) of Order 26 C.P.C though such power is not specifically worded in

Order 26 or any rules thereunder. To be on the third question, the

answer is; if a commission report and plan are set aside, a further

order to remit back the same for getting a fresh report and plan as

prayed for in the petition after ascertaining the matters afresh shall be obtained and the court shall not simply set aside a commission report without any further orders to get a fresh report to resolve the controversy, more particularly, in a case of fixation of boundary.

28. Thus, following the spirit of Order 26 Rule 10 (3), the

answer to question No.(iv) is; if a court is dissatisfied with the proceedings of the commissioner, the court can direct further inquiry to be made as it shall think fit after setting aside the commission report and plan to get the mistakes or the defects rectified. To be more explicit, when a Commission report is set aside, the court has to remit it back to the Commissioner for getting a fresh report in relation to the matters sought for in the commission application in accordance with the prayers in the commission application.

29. Coming to the facts of this case, here the Commission report

and plan were set aside by the learned Munsiff, holding that the Commissioner, who was examined as PW1, did not remember as to whether measurement was done after fixing the north-western boundary and also whether the north western boundary was seen 30 cm away. Further, the Surveyor, who was examined as PW2, could not recollect as to whether the northern boundary situated 30 cm away.

30. Similarly, when a question regarding a projection in the property was asked, PW2 pleaded ignorance, despite the fact that Ext.P1 sketch clearly indicates a projection on the western boundary.

31. On analysing the order impugned, the trial court set aside

commission report and plan, since the trial court was dissatisfied with the proceedings of the commissioner for the afore said reasons. Therefore, I am not inclined to interfere with the said finding. However, it is anxious to note that when the plaintiff approached the learned Munsiff for fixing the southern boundary of his property, the Munsiff is bound to adjudicate the dispute and to give a verdict. If the commission report and plan obtained for doing so, as such was set aside without any further order, that would in turn, put the plaintiff in a remediless position or in darkness.

32. The learned Munsiff ought to have understood the situation

and should have ordered remittance of the report for getting a report as prayed for in the petition to resolve the matter in controversy. Therefore, a blanket order

setting aside the commission report alone is bad in law and its consequence is to put the parties in darkness.

33. In view of the matter, it is necessary to interfere with Ext.P5

order to the extent, the same does not order remittance of the report

and for getting a fresh report and plan.

34. It is submitted by the learned Counsel for the defendant that,

the defendant put up claim for half right over 38 Sq.mts property found in excess of 15.300 cents, owned by their father and also right of way through a portion of the property owned by the plaintiff. So, a comprehensive plan including location of the way, if any, and allotting the excess land in between the plaintiff and defendant in equal shares also is necessary to allay the dispute. Though the submission was made by the learned Counsel for the defendant, he fairly conceded that no counter claim in this regard was raised, nor any application was filed at the instance of the defendant to get a plan allotting the excess 38 Sq.mtrs of land equally in between the plaintiff and the defendant. It is submitted further that the defendant may be permitted to file an application to locate the same also, when the commissioner inspects the property to prepare mahazar and plan. This submission appears to be convincing to resolve the actual dispute in between two siblings.

35. In view of the discussion held above, the order passed by the learned Munsiff, setting aside Ext.C1 and C1 (2), Ext.P2 herein, is confirmed and the same is interfered and modified as indicated below.

36. In the result, this O.P is allowed in part.

Ext.C1 and C1 (2), Ext.P2 herein, are ordered to be returned to the same commissioner for remeasuring the property and for submitting report and plan as sought for in the petition filed by the plaintiff. It is ordered further that the defendant can also file an application to get the details in the

commission report and plan in support of his contention as argued by the learned Counsel for the defendant through the same Commissioner. It is specifically ordered that the defendant shall file such an application within two weeks from the date of receipt or production of a copy of this judgment before the trial court. Considering that the matter is of 2012, the learned Munsiff is directed to expedite the trial of the case after getting fresh report and plan, as directed above, within a period of four months from the date of receipt of a copy of this judgment or its production by the parties concerned. Registry is directed to forward a copy of this

judgment to the trial court within 7 days.

sd/- A. BADHARUDEEN, JUDGE jm/ APPENDIX OF OP(C) 2825/2015
PETITIONER EXHIBITS

P1 - A TRUE COPY OF THE WILL DEED NO. 54/1994 DT. 22.3.1994, SRO, KOCHI. P2 - A TRUE COPY OF COMMISSION REPORT DT. 14.11.2014 WITH SKETCH. P3 - A TRUE COPY OF IA NO. 346/2015 DT. 02.02.2015 FOR SETTING ASIDE COMMISSION REPORT. P4 - A TRUE COPY OF COUNTER AFFIDAVIT D.T 11.2.2015 AGAINST THE PETITION TO SET ASIDE COMMISSION REPORT FILED BY THE PLAINTIFF. P5 - ORDER DT. 07.10.2015 IN IA NO. 346/2015 IN OS NO. 18/2012 ON THE FILE OF MUNSIFF COURT, KOCHI.

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