IN THE COURT OF THE MUNSIFF, KOCHI

Present:

Sri.Aneesh Chacko. K, Principal Munsiff

Friday, the 29th day of October, 2021/7th Karthika, 1943.

O.S. No. 542/2014

Plaintiffs:-

1. Venu, aged 67 years, S/o Narayanan, Thekketheruvil, Azheekal Desom, Azheekkal Village, Azheekal P.O, Cochin -682 510.

Addl. 2. Sabitha, D/o Venu and W/o Rameshan, aged 43 years, Thekketheruvil, Azheekal Desom Azheekkal Village, Azheekkal P.O, Cochin 682 510.

3. Chandrika, W/o Venu, aged 65 years,Thekketheruvil, Azheekal Desom Azheekkal Village, Azheekkal P.O, Cochin 682 510.

(Addl. P2 and P3 impleaded as per order in IA 2930/2018 dtd. 17.12.2018)

By Adv. Priya P.A

Defendants:-

1. Bhavani, aged 58 years, W/o Raman, Madathiparambil, Azheekal Desom, Azheekal Village, Azheekal P.O,

   Cochin – 682 510.

2. Ajitha, D/o Bhavani, aged 39 years, Madathiparambil, Azheekal Desom, Azheekal Village, Azheekal P.O,

   Cochin 682 510.

3. Ambily, D/o Bhavani, aged 36 years, Madathiparambil, Azheekal Desom, Azheekal Village, Azheekal P.O,

   Cochin 682 510.

By Adv. P.A.Abdul Jabbar and Anand Parathara

This suit having been finally heard on 12.10.2021 and the court on 29.10.2021, delivered the following:-

JUDGMENT

Suit for permanent prohibitory injunction and mandatory injunction.

2. The case of plaintiff in short is as follows:- Plaintiff is the owner in possession of 1.75 cents in Re Survey No.263/1 (old Sy.No.1083/1, 1084/1 of Puthuvypu Village) and there is a residential building therein. Such property is plaint A schedule property. The residential building is constructed by plaintiff's father Gonchan Narayanan in 1950. The property in Sy. No.1083/1 originally belonged to Kuttan Padmanabhan. Father of plaintiff and the plaintiff was in continuous possession of the property from 1950. After the expiry of Kuttan Padmanabhan, his heirs executed a sale deed as document No.3021/2002 of Njarakkal Sub Registrar Office in favour of plaintiff for 0.864 cents along with a portion of the residential building constructed by plaintiff's father in 1950 and maintained by plaintiff thereafter. Plaintiff is in uninterrupted possession of the property received as per such sale deed and the remaining property of 0.889 cents for last 64 years. Defendant No.1 is the owner in possession of 1.54 cents in old Sy. No.1083/1 in Re Survey No.263/7 of Puthuvypu Village, along with a residential building, which is obtained by defendant No.1 as per document number 622/1986 of Njarakkal Sub Registrar Office, which is scheduled as 'B' in the plaint. Plaint B schedule is on the southern side of plaint A schedule. There is a vacant area in the southern portion of plaint A schedule which is a part of A schedule and plaintiff used to store waste materials in such area and the 'erachattom' of residential building in A schedule cover such area. In

September, defendant extended the residential building in B schedule towards north encroaching into A schedule. Plaintiff could not watch the works as he was bedridden. Defendants constructed their building up to the northern boundary, leaving no space between plaint B schedule and A schedule. Defendants made roof for the extended portion by using tiles and for that, defendants further encroached into A schedule and the erachattom constructed by defendants clearly encroaches into A schedule. The rain water from the building of defendants is falling on the walls of building in A schedule, and southern wall and window is in a dilapidated condition. The encroached portion having an approximate width of 2 meters and length of 12 meters is shown as plaint C schedule. Defendants threatened the workers who were brought for the maintenance of the building of plaintiff. There is clear foundation on the boundary in between plaint A schedule and plaint B schedule. Hence the plaintiff prays for permanent prohibitory injunction restraining the defendants and their men from trespassing into plaint schedule property, committing any nuisance and wastes therein and against obstructing peaceful enjoyment, doing maintenance work in A schedule. Plaintiff also prays for mandatory injunction to demolish illegal construction in plaint C schedule.

3. Defendants filed written statement with counterclaim contending as follows:- The plaint schedule properties are not identifiable and the description is incorrect. Plaintiff has title only over the portion of plaint A

schedule and with regard to 0.889 cents, plaintiff has no title. The averment that plaintiff and his father were in exclusive possession of A schedule for the last 64 years is incorrect. Defendant No.1 is the owner in possession of 4.66 cents in old Sy.No.1083/1 as per document number 2386/2000, 622/1986 of Njarakkal Sub Registrar Office. The extent, boundaries and description of B schedule is not correct. There is no vacant area in between plaint A and B schedule. The residential building in A schedule is constructed utilizing the entire A schedule, without leaving any area on southern side. The southern wall of building in plaint A schedule is on the southern boundary of plaint A schedule. The erachattom of such building is projecting to the property of defendant No.1. Defendants did not extend the building for several years. The allegation of extension of building up to the northern boundary, is incorrect. The erachattom of the building in B schedule is in B schedule itself. The erachattom on the southern side of plaintiff's building was renovated three years back and at that time they constructed it at a higher level projecting into plaint B schedule. It is pointed out by defendants that such construction will result in falling the rain water from their erachattom to the northern erachattom of defendants and from there water will fall on the wall and window of plaintiff. It happens due to additional force of water falling from the plaintiff's building on the building of defendant No.1. Two months prior to the suit, plaintiff renovated the roof by using iron sheets, in such a manner

that rain water will fall to the property of defendant No.1. There is no land of plaintiff as stated in plaint C schedule. The area on the northern side of residential house of defendants is part of property of defendant No.1 and plaintiff has no right or possession over plaint C schedule. The allegation that there is clear foundation in between plaint A and B schedule is false. There is no discernible demarcation between the properties. Hence the defendants pray for allowing counterclaim to pass a decree of (1) fixing the northern boundary of counterclaim schedule property of defendant No.1, (2) permanent prohibitory injunction restraining the plaintiff from obstructing defendant No.1 from constructing compound wall or fence on the northern boundary fixed by the court, (3). mandatory injunction to remove portion of erachattom on the southern wall of building of plaintiff to the extent it projects into counterclaim schedule property.

4. Counterclaim defendant (plaintiff) filed written statement contending as follows:- The averments that defendants suggested to measure the properties, that plaintiff was not ready for measurement, that plaintiff is making baseless claims over a portion of counterclaim schedule property, that there is every chance that plaintiff would obstruct construction of compound wall, are false. Counterclaim plaintiff is not entitled to any relief claimed.

5. Defendants filed additional written statement contending that amendments made to the plaint are not bonafide, that extent of property

of defendant No.1 stated is not correct and that defendant No.1 is the owner of 1.33 cents as per document number 622/1986 of Njarakkal Sub Registrar Office.

6. Plaintiff expired and heirs were impleaded as plaintiffs No.2 and 3 as per order in IA 2930/2018.

7. The following issues No.1 to 6 were raised for consideration. Issues No.7 and 8 are additionally framed regarding the relief claimed by counterclaim plaintiffs, in this judgment, since a common issue of relief and costs was framed earlier and since the parties went to the trial knowing well about the reliefs claimed in the counterclaim.

1. Are the plaint schedule properties identifiable?
2. Did the defendant make any construction in plaintiff's property?
3. Is the plaintiff entitled to permanent prohibitory injunction sought?
4. Is the plaintiff entitled to mandatory injunction sought?
5. Is the counterclaim plaintiff entitled to a decree of fixation of boundary? If so, through which line?
6. Relief and costs?
7. Whether the counterclaim plaintiff is entitled to permanent prohibitory injunction from obstructing defendant No.1 in constructing compound wall or fencing on northern boundary of counterclaim schedule property?

8. Whether counterclaim plaintiff is entitled to mandatory injunction to remove the portion of erachattom on the southern wall of residential building of plaintiff to the extent it projects to the counterclaim schedule property?

8. Heard both sides. PW1 was examined on the side of plaintiff and Ext A1 to A4 were marked. DW1 was examined on the side of defendants and Ext B1 and B2 were marked. CW1 to 3 were also examined. Ext C1, C1(a) to C3, C3(a) were marked.

9. **Issues No. 1 to 4** :-Counsel of plaintiff argued as follows:- Property of plaintiff is not scheduled in the counter claim and not measured in the measurement taken out by defendant. In the title deed of defendant, property of father of plaintiff is shown on the northern side. Defendant admitted possession of plaintiff on northern side and defendant does not claim any title there. The commissioner reported that the room is newly constructed. Even excluding the road, the extent of property of defendant is found. Slanting in Ext. C3(a) is wrongly shown. The above are the arguments of counsel of plaintiff.

10. On the other hand counsel of defendant argued as follows:- There is no evidence that there is encroachment in to A schedule. There is no evidence for the alleged C schedule. There is no evidence that any thing is destroyed. Property of plaintiff is scheduled in the plaint and

hence the contention that the property of plaintiff is not scheduled is not much relevant . The above are the arguments of counsel of defendant.

11. Ext C1 and C1(a) are the commission report and survey sketch. It is reported by commissioner that A1, the rose shaded portion in the sketch is the property in the possession of plaintiff. It is also reported by the commissioner that A, the yellow shaded portion is the property of plaintiff as per his title deed. As per plaint, plaintiffs have title over some portion and they claim possession over the remaining portion. As per Ext. C1 and C1(a) the property of plaintiff in his title is on northern side and southern side property is in possession of plaintiff. There is nothing noted by commissioner as to what was there to identify the possession on such southern side. Apart from stating that such portion shown as A1 is in the possession of plaintiff, there is no ground stated, as to on what grounds, such a conclusion was arrived at, by the commissioner. The advocate commissioner in Ext C2 reported that there are no survey stones or visible boundaries seen separating plaint A and B schedule properties. It is to be noted that plaintiff has no title over such area. It is also to be noted that defendants have sought for fixation of such boundary. So there is dispute as to boundary. Commissioner does not provide any information as to on what basis possession has been found. It is pertinent to note that, as per plaint there is a vacant area in the southern side of the plaint A schedule property, which is a part of A schedule.

12. In such Ext C1 (a) plan, the plot A (shown as having 0.889 cents), which is in the title of plaintiffs, and plot A1 (shown as having 1.038 cents), which is stated in the commission report as in the possession of plaintiff, together extends to 1.927 cents. But it is to be noted that plaint A schedule is only 1.75 cents. It is to be noted that property of plaintiff and defendant are allegedly having small extents and that there is dispute regarding boundary. So the extent found by commissioner is exceeding even the plaint claim. It is contended in the plaint that there is clear foundations of the boundary in between A schedule and B schedule. The commissioner in C2 and C2(a) reported that plaint A schedule property has compound wall only on its northern side and other 3 sides are open and lying contiguously with adjoining property without any visible boundary or demarcation . It is also reported that plaint schedule properties are lying adjacent to each other without any compound wall or boundary stones.

13. Because of the above reasons the Ext C1 and C1(a) report and plan cannot be accepted.

14. It is true that northern side of property of defendant is shown as property in possession of Gonjan Narayanan (Gonjan Narayanan Nadappu paramba). But there is dispute as to boundary. Both sides allege that there is encroachment. As per the plaint, the B schedule property of

defendant is extending for 1.54 cents. But as per Ext. A3 title deed of defendant the extent is 1.33 cents.

15. Ext C1 and C1(a) does not specify plaint C schedule. There is no other evidence which shows the measurement of C schedule and what are the constructions in such C schedule. In the plaint it is contended that defendant extended building up to the northern boundary leaving no space between plaint B schedule and A schedule and the roof of the extended portion further encroached to A schedule. In the same paragraph plaintiff alleges that defendants extended the residential house in B schedule towards north encroaching and trespassing in to A schedule. The advocate commissioner in Ext C2 reported that as there are no survey stones or visible boundaries seen separating plaint A and B schedule properties, it is not possible for the commissioner to report that there is any encroachment in to plaint A schedule property. There is no clear evidence to hold that any construction is illegally made in plaint A schedule property. The identity of plaint C schedule is not proved. Hence the plaintiff is not entitled to decree of mandatory injunction.

16. In view of the above discussions, the plaintiff failed to prove the identity of plaint schedule property. There is no clear evidence to hold that defendant made any construction encroaching in to property of plaintiff. Hence the plaintiff is not entitled to permanent prohibitory

injunction and mandatory injunction. The above issues are found against the plaintiff.

17. **Issues no. 5, 7 and 8**:- The counterclaim schedule properties are measured with survey help and Ext C3 and C3(a) report and sketch is filed. The counterclaim is for fixation of boundary and other reliefs. The property of counterclaim defendant (plaintiff) is not scheduled in the counterclaim. The property of counterclaim defendant is not measured also. The property of counterclaim plaintiff alone is measured. Hon'ble High Court of Kerala in Nandakumara Varma and another v. Usha Varma and another 2014 KHC 854 held as follows:- " In a suit for fixation of boundary it is not the boundary of the plaintiff alone that is fixed . It is the boundary between the property of the plaintiff and the defendant that is fixed. This necessities description of the properties of both parties in separate schedules in the plaint and the plaintiff making a prayer for fixation of the boundaries between the properties". Counsel of counterclaim plaintiff argued that property of counterclaim defendant (plaintiff) is scheduled in the plaint. Even then property of counterclaim defendant is not measured. Defendants have stated in the written statement that plaint schedule properties are not identifiable and the description is incorrect. It is true that another surveyor measured the property of counterclaim defendant as per Ext C1 and C1(a). Such measurement conducted by one surveyor does not exactly correlate with

the measurement conducted by another surveyor. Both sides have conducted measurement of their own properties. Counsel of defendant argued that the length of boundary separating both properties is similarly noted in both the sketches. It is not mainly the length of the boundary, but the position of the boundary, is relevant. In Ext.C1(a) the measurement on southern side is shown as 5.4 from M to N and 3.9 from N to O . Whereas in the Ext. C3(a) the northern measurement, which is the southern portion shown in Ext. C1(a), the measurement of 2.9 and 2.6 is shown and the total is shown as 5.4 . The Ext. C3(a) shows a slight downward and upward movement in showing 2.9 and 2.6 , which is not there in Ext. C1(a). Such separation of 2.6 and 2.9 is absent in Ext. C1(a). Objection is filed in the commission report by plaintiff that when the surveyor measured B schedule property the slanting towards the southern portion and thereafter to the northern portion in survey 263/1 is not noted and the same is included in 263/7 and noted as the encroachment. Though 7.2 shown on the southern side of Ext. C1(a) was argued by counsel of defendant that it is the same measurement of 7.2 shown in Ext. C3(a), the surveyor who was examined the CW3 deposed that 7.2 shown by him is the measurement from M to N and the width of the way on western side. The width of the way noted by surveyor in Ext. C3(a) is 1.5 whereas in Ext. C1(a) it is 1.8 . No encroachment is noted by surveyor in Ext. C1(a) where as encroachment is noted as Ext.C3(a). Hence it cannot

be said that both the measurements produced the same result, so as to consider them conjointly. Plaintiff have disputed the measurement conducted with respect to counterclaim schedule properties. So the measurements conducted by both surveyor's cannot be conjointly considered, since they have not entered similar findings.

18. Because of above reasons the measurement conducted with the assistance of surveyor with respect to counterclaim schedule properties cannot be accepted. Hence counterclaim plaintiff is not entitled to relief of fixation of boundary. Since counterclaim plaintiff is not entitled to relief of fixation of boundary, consequential relief of prohibitory injunction against causing obstruction to construction of wall etc also cannot be granted.

19. CW1 Shanti K Pai, advocate commissioner deposed that measurement of erachattom at the top was not scientifically taken and that measurement was done at Earth. CW2 P J John deposed that measurement of erachattom was taken using cross staff. There is no report or evidence that measurement of erachattom was taken from the top. There is no evidence as to how the aerial encroachment if any, has been ascertained. The expert did not say how cross-staff could be used in determining such aerial encroachment. It appears that measurement taken from earth as deposed by commissioner and surveyor, cannot be taken as conclusive in determining encroachment on top. It is pertinent to note that the width of encroachment noted is only 20 cm on one side and 30 cm on another side.

There is every chance that such minor measurements are not correct, since it has been taken from Earth and since there is no evidence of any other scientific methods adopted, in calculating the same. Hence there is no sufficient evidence to hold that there is any encroachment. Hence counterclaim plaintiff is not entitled to relief of mandatory injunction.

20. Issue no. 6:- Hence in the result, the suit and counterclaim are dismissed. Parties shall bear their respective costs.

Dictated to the Confdl. Asst. transcribed by her, corrected and pronounced by me in the open court on this the 29th day of October, 2021.

Sd/-
Aneesh Chacko. K
Principal Munsiff.

APPENDIX:-

Plaintiff's Exhibits:-		
A1.	28.09.2002	Doc. No. 3021/2002 of SRO, Njarakkal.
A2.	17.01.2004	Building Tax.
A2(a)	22.10.2002	Building Tax.
A3	19.03.1986	Certified copy of Doc.No.622/1986.
A4	30.06.2000	Certified copy of Doc.No.2386/2000 of SRO, Njarakkal.
Defendants Exhibits:-		
B1	19.03.1986	Doc.No. 622/1986 of SRO, Njarakkal (original deed)
B2	27.08.2014	Original Tax receipt.
Court Exhibits:-		
C1	11.10.2019	Commission report filed by Adv. Benedicta Vembly
C1(a)	-	Sketch
C2	24.02.2015	Commission report filed by Adv. Sunanda Sukumaran
C2(a)	-	Rough sketch

C3	16.01.2018	Commission report filed by Adv. Santhi.K.pai
C3(a)		Sketch
Plaintiff's Witness:-		
PW1	26.08.2021	Sabitha
Defendants Witness:-		
DW1	20.09.2021	Bhavani
Court Witness:-		
CW1	05.10.2021	Adv. Santhi.K.Pai
CW2	05.10.2021	John.P.J
CW3	05.10.2021	Denishkumar.V.L

Id/-
Principal Munsiff

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compd.by: