

IN THE COURT OF MUNSIFF, MUVATTUPUZHA

Present:

Sri. Joseph Rajesh K.A., Munsiff.

Monday, the 25th day of November, 2019/4th Agrahayana, 1941

O.S.Nos.32/2012 and 396/2011

O.S.No.32/2012

Plaintiff: E.M.Joy, aged 54 years, S/o.Mathew, residing at Eenthumkattil House, Piravom Kara, Piravom Village, Muvattupuzha Taluk.

By Advocate Ritamma Mathew

Defendants:

1. Simon Mathew, aged 51 years, S/o.Mathew, residing at Eenthumkattil House, Piravom Kara, Piravom Village, Muvattupuzha Taluk.
2. Omana Baby, aged 64 years, W/o.late Baby, Eenthumkattil House, ..do... .do..
3. Simily Baby, aged 35 years, D/o.Baby, ..do...do...
4. Reshmi Baby, aged 30 years, D/o.Baby, ..do...do...

D1 - By Advocate A.C.Thomas Adhikaram.

D2 to D4 - By Advocate G.Suresh.

O.S.No.396/2011

Plaintiff: Simon Mathew, aged 51 years, S/o.Mathew, residing at Eenthumkattil House, Piravom Kara, Piravom Village, Muvattupuzha Taluk.

By Advocate A.C.Thomas Adhikaram.

Defendant: E.M.Joy, aged 54 years, S/o.Mathew, residing at Enthumkattil House, Piravom Kara, Piravom Village, Muvattupuzha Taluk.

By Advocate Ritamma Mathew

These suits coming for hearing on 1.11.2019 and on consideration of evidence of PW1 to PW5, Exts.A1 to A23 series, B1 to B3 and C1 series, the court on 25.11.2019 delivered the following:

Common Judgment

O.S.No.32/2012 is a suit for declaration of title, fixation of boundary and for recovery of possession. O.S.No.396/2011 is a suit for mandatory injunction and prohibitory injunction.

2. **O.S.No.32/2012:-** Averments in the plaint, in brief, are as follows:- plaint schedule item No.1 property is the remaining property of the plaintiff after assignment which he obtained as per deed No.1643/1978 of SRO, Koothattukulam. Plaint schedule item No.2 is obtained by the plaintiff as per deed No.368/1996 of SRO, Piravom. Plaint schedule properties are mutated and the plaintiff is remitting basic land tax for the same. On the western side of the plaint schedule properties, it is the property of the first defendant and other defendants. Apart from their properties, defendants trespassed upon some portion of

the property of the plaintiff and even though plaintiff demanded for handing over possession of the same, they are not ready. Defendants sold out properties obtained by them as per fictitious deeds and encroached portion of plaint schedule properties. Therefore, plaintiff is entitled to recover possession of the portion of plaint schedule properties from the defendants. Defendants are further attempting to trespass upon the properties of the plaintiff and the first defendant has filed O.S.No.396/2011, a suit before this court. Therefore, plaintiff is entitled to get fixation of the boundary and if it is found that the defendants are having possession of any portion of the plaint schedule properties, he is entitled to get recovery of the same from the defendants. Hence, prayed for a decree.

3. First defendant filed written statement contending as follows:-
First defendant obtained title to 25 cents of property in Sy.No.733/7/A2 of Piravom Village, which is plaint B schedule in deed No.1643/1978 of SRO, Koothattukulam. Thereafter, first defendant sold 7 cents to a third party and the remaining extent of 18 cents is belonging to the first defendant. First defendant is in possession and enjoyment of the above said 18 cents of land and old family house is situated in the property. Plaintiff is the brother of the first defendant and there is a way having an average width of 4.5 metres and a length of 15 metres starting from

the panchayat road and leading to the 18 cents of property. Originally, the land through the said way passes was belonging to the plaintiff. Plaintiff granted the first defendant right to use the said way for ingress and egress to the 18 cents of property. The only way for ingress and egress to the said 18 cents of property is the above said way. During 1994, a gate was installed at the entrance of the way. On 31.01.1996, plaintiff transferred his title in respect of the western half portion of the said way having an extent of 1 cent 896½ sq.links in favour of the first defendant as per deed No.369/1996. Upto 1996, plaintiff was also residing with the first defendant in the said 18 cents of property. Plaintiff has been using the entire portion of the way as access to the said 18 cents of property. There was no obstruction or hindrance for the use of the said way as access to the said 18 cents. There is implied grant over the eastern half portion of the said way having an extent of 2 cents for the first defendant to use as access to the said 18 cents of property. Now, the plaintiff is not in good terms with the first defendant and on 24.08.2011, plaintiff locked the gate situated on the northern end of the said way in order to wreak vengeance on the first defendant. At that juncture, first defendant filed O.S.No396/2011 against the plaintiff for mandatory and prohibitory injunctions. As a counter blast, the suit is filed by the plaintiff. 2 cents of property and virivu described in plaint A schedule property is inclusive of the portion of the first

defendant's above said 18 cents of property included in deed No.1643/1978 and the 2 cents of property through which the first defendant obtained right of way by easement by grant from the panchayat road. The plaintiff sought fixation of boundary through the way over which the first defendant obtained right of easement by grant. The intention in fixing the boundary of the 2 cents is to cause obstructions in using the said way for ingress and egress to the first defendant's property from the panchayat road. Actually, there was no property belonging to the plaintiff lying within four boundaries described in plaint A and B schedule properties. The allegation that the plaintiff is remitting property tax as per thandaper No.4499 of Piravom Village in respect of the plaint schedule properties is incorrect. Plaintiff has malafidely included the defendant's property in plaint A and B schedule properties. Plaintiff never demanded to give possession or for fixation of boundary of any property as alleged. Defendants are not in possession of any property belonging to the plaintiff. Plaintiff suppressed material facts and approached the court with unclean hands. There is no cause of action for the suit and it is liable to be dismissed.

4. Defendants 2 to 4 jointly filed a written statement contending as follows:- There is no plaint schedule properties in existence.

Defendants did not trespass upon or encroach upon any property and the plaintiff never requested for handing over of possession of any property. Plaintiff did not claim fixation of boundary on the basis of any document. These defendants are the wife and children of plaintiff's deceased brother Baby. The above said Baby did not get any properties from his parents and which was stealthily obtained by the plaintiff. Plaintiff obtained 25 cents of property from his father as per deed No.1643/1978 and as per sale deed No.1826/1980. Plaintiff assigned 11³/₄ cents in Sy.No.733/7/A2 to Baby and Baby obtained possession of the same after his death and these defendants are in possession and enjoyment of the same. At the time of sale, the property was measured and its boundaries were fixed. On the southern side of the above said property, it is the property of the first defendant and the property of first defendant is situated in a height of 10 feet and the first defendant has constructed DR wall separating the two properties in 1992. The eastern side of the said property is the way in the ownership of the first defendant and the said way portion is also lying about 10 to 3 feet in varying levels from south to north. A DR wall as separating boundary was constructed by the first defendant in 1992. On the northern boundary, it is Kochupally – MKM panchayat road. Separating the above said road and the property, during the life time of Baby he constructed a compound wall having a varying height of 5 to 7 feet. On

the western side of the property is the property of M.I. Joseph and there is a compound wall separating the property in a height of 8 feet. The remaining western boundary is the property of Thampy Maliyekkal and separating his property there is a compound wall having a height of 5 feet. In the said property obtained by Baby he has constructed a house in 1980 and started residence therein and in 1987, the house was renovated. The said Baby died intestate on 24.01.2009 and defendants 2 to 4 are his legal representatives and heirs. These defendants are in possession and enjoyment of 11³/₄ cents of property obtained by Baby as per sale deed No.1826/1980 of SRO, Piravom and no excess extent of property is in the possession of the defendants. The reliefs claimed by the plaintiff are not grantable and the suit is liable to be dismissed.

5. On the basis of the rival contentions of the parties, the following issues were framed:-

- 1) Do the plaintiff has title over the plaint schedule properties?
- 2) Is the plaintiff entitled to get fixation of boundary of plaint schedule properties as claimed?
- 3) Is the plaintiff entitled to recover possession of any property from the defendants?
- 4) Reliefs and costs?

6. **O.S.No.396/2011:-** Averments in the plaint, in brief, are as follows:- Plaintiff became owner of 25 cents of land in Sy.No.733/7/A2 of Piravom Village as per B schedule in deed No.1643/1978 of SRO, Koothattukulam. Thereafter, plaintiff sold 7 cents of property out of it and the remaining 18 cents is in the possession and enjoyment of the plaintiff and it is described as plaint A schedule. There is an old family house situated in plaint A schedule property. Defendant is the brother of the plaintiff and there is a way having an average width of 4½ metres and a length of 50 metres starting from the panchayat road and leading to plaint A schedule property. The said way is described as plaint B schedule. Originally, the land through which plaint B schedule way passes was belonging to the defendant and the defendant granted the plaintiff to use plaint B schedule way for ingress and egress to plaint A schedule property and plaint B schedule is the only way to plaint A schedule property. During 1994, a gate was installed at the entrance of plaint B schedule way. On 31.01.1996, defendant transferred his title in respect of western half portion of plaint B schedule way having an extent of 1 cent 986½ sq. links in favour of the plaintiff as per deed No.369/1996 of SRO, Piravom. Upto 1996, defendant was also residing with the plaintiff in plaint A schedule property. Plaintiff has been using the entire portion of the plaint B schedule way as access to plaint A schedule property without any obstruction or hindrance. There is an

implied grant over the eastern half portion of plaint B schedule way having an extent of 2 cents for the plaintiff to use as access to plaint A schedule property. Now the defendant is not in good terms with the plaintiff. On 24.08.2011, the defendant locked the gate situated on the northern end of plaint B schedule way in order to wreak vengeance upon the plaintiff. Defendant has absolutely no manner of right to lock the gate or to cause any obstruction to the plaintiff's enjoyment of plaint B schedule way. Hence, prayed for a decree directing the defendant to remove the lock of the gate situated at the entrance of plaint B schedule way and restrain the defendant and his men or agents from causing any obstructions to the plaintiff's enjoyment of plaint B schedule way.

7. Defendant filed written statement and the contentions therein, in brief, are as follows:- There is no 18 cents of property for the plaintiff as claimed by him and the family house is not situated in the property of the plaintiff, but it is in the property of grandmother Mariam comprised in Sy.No.733/7/A2. Plaintiff is remitting basic land tax only in respect of 13 cents 327½ sq.links of property and that the plaintiff has trespassed upon the property of the defendant and has made mutations. As per A,B & C plan of Sy.No.733/7, 12 cents of property is included in Sy.No.733/7/C. When the defendant assigned 9.140 cents of property to Ammini Eapen Pappanal as per sale deed No.1822/1980 out of the total property, only 71 links from the eastern point towards west was

assigned. The total northern length of Sy.No.733/7/C is 138 links. But, the defendant is in possession of only 23 links of property from the western point of Ammini Eapen's property. Defendant has erected a gate in the said property and the plaintiff has no right either on the gate or on the way. Plaintiff has no right of easement over the way portion. In order to enter into the property of the plaintiff from the northern panchayat road, defendant has provided a provision for a pathway having a width of 60 centimetres further west of the gate. This way is used by the plaintiff, his family members, defendant and others to access the properties. Commissioner also had entered through the said way. The plaintiff has no right to unlock the gate locked by the defendant and there is no cause of action for the suit. The suit is liable to be dismissed with costs.

8. On the basis of the rival contentions of the parties, the following issues were framed:-

- 1) Whether plaintiff has easement by grant in plaint B schedule?
- 2) Whether the mandatory injunction to remove the lock in the gate in B schedule is allowable?
- 3) Whether the prohibitory injunction prayed for is allowable?
- 4) Reliefs and costs?

9. As per order dated 11.08.2015, both suits were ordered to be tried jointly, taking O.S.No.32/12 as the leading case. Accordingly, evidence is adduced.

10. The status of the parties in the leading case shall be referred to hereinafter for clarity, unless specific reference is made along with the suit number.

11. On the side of the plaintiff, plaintiff and four other witnesses were examined as PWs 1 to 5. Exts.A1 to A23 documents were marked. On the side of the defendant, no oral evidence was adduced. Exts.B1 to B3 were marked. Ext.B3 and Ext.A1 are one and the same and for avoiding confusion Ext.A1 alone shall be referred to in the judgment and would mean Ext.B3 as well. Exts.C1 series were also marked.

12. **Issue Nos.1 and 3 in O.S.No.32/2012:-** It is well settled in law that a party claiming title to an item of immovable property and seeking a relief of declaration and recovery of possession shall plead and prove his title to the item of property with clear and cogent evidence. It is equally settled in law that in such cases, plaintiff cannot rely on the weaknesses in the case of the defendant to substantiate his claim of title. Plaintiff has to prove his case on all fours. Bearing the above said principle of law in mind, I shall now proceed to analyse the evidence adduced by the plaintiff in the case.

13. Plaintiff and first defendant are brothers and defendants 2 to 4 are the wife and children of one other brother of the plaintiff and first defendant. The plaintiff and first defendant obtained title and possession of their respective properties as per Ext.A1 settlement deed executed by their father Mathew in the year 1978. It would be easy for analysis if the derivation of title of properties of plaintiff and first defendant and the predecessor in interest of defendants 2 to 4 is described hereunder. As indicated earlier, father of the plaintiff and first defendant executed a settlement deed thereby giving A schedule property in Ext.A1 to the plaintiff and B schedule therein to the first defendant. Specific survey number descriptions is given in Ext.A1 and the A schedule set apart to the plaintiff is 15 cents in Sy.No.733/7/A2 and 10 cents in Sy.No.733/7/C. The first defendant obtained 25 cents as B schedule in Ext.A1 comprised in Sy.No.733/7/A2. It is important to note that the plaintiff did not plead as to how the assignments were made out of A schedule by him and how plaintiff A schedule property was remaining after alienations. As regards plaintiff B schedule, he has specifically pleaded that B schedule is obtained by Ext.A2 deed executed by the first defendant in his favour. It is important in this context to note that there is no recital in Ext.A1 that the property set apart to the plaintiff and first defendant as A and B schedules respectively in Ext.A1 is inclusive of any virivu or excess land. But, it specifically confined to 25 cents each as narrated earlier. But, in

the plaint A schedule, plaintiff has described plaint A schedule property as 1 cent in Sy.No.733/7/A2 and 1 cent in Sy.No.733/7/C and its virivu. As regards plaint B schedule, no such extent of virivu is included in the plaint descriptions.

14. From the evidence, an attempt could be made to trace the title to the above 2 cents of property claimed as A schedule by the plaintiff. On 16.09.1980, plaintiff assigned 9 cents 353½ sq.links comprised in Sy.No.733/7/A2 to one Ammini Eapen. The description of the property would make it abundantly clear that the extreme eastern side of A schedule in Ext.A1 was assigned to the said Ammini Eapen as per Ext.A5. I may specifically say so, since there is a recital regarding the measurement in respect of the boundaries of the property assigned and there is a claim by the plaintiff on the basis of sub division sketch of A,B & C of Sy.No.733/7. Even though the measurements were stated in Ext.A5, the boundary description is crystal clear that he did not leave any property further east of panchayat road and did not have any property on the north upto the panchayat road. On the western side, it is shown as the remaining property of the assignor, plaintiff and on the southern side, it is described as the property of the first defendant.

15. On the very same day of Ext.A5, plaintiff assigned 11¾ cents to Baby, his brother and predecessor-in-interest of defendants 2 to 4 and that property is comprised in Sy.No.733/7/A2. The description of

boundaries in Ext.A6 would go to show that the western extreme portion of A schedule in Ext.A1 was assigned to Baby and that on the eastern side of the above said 11³/₄ cents he had some property which is the property left after the assignment of 9.353¹/₂ cents as per Ext.A5 deed.

16. Thereafter in the year 1996, plaintiff assigned 1.896 cents to the first defendant as per Ext.B1 sale deed. The said property is recited as one comprised in Sy.No.733/7/A2 and the boundary description would go to show that out of the remaining property in between the properties assigned as per Ext.A5 and Ext.A6 and to be specific, on the western side of property assigned to Baby as per Ext.A6, plaintiff assigned 1.896 cents to the first defendant in north-south direction, ie., from the northern panchayat road upto the property of the first defendant on the south.

17. So, if we go by the total extent of property obtained by plaintiff as A schedule in Ext.A1 and his further assignments as per Ext.A5, A6 and Ext.B1, the availability of property will be as follows.

| | | |
|----------------------------|----------------------------|-----------|
| As per Ext.A1 (A schedule) | 15 cents in Sy.No.733/7/A2 | and |
| | 10 cents in Sy.No.733/7/C | |
| Total | ... | 25 cents. |

Assignments in Sy.No.733/7/A2

| | | | |
|----------------------|---|------------------------|-------------------------|
| As per Ext.A5 | - | 0.353.500 cents | |
| As per Ext.A6 | - | 11.750.000 cents | |
| <u>As per Ext.B1</u> | - | <u>1.896.000 cents</u> | |
| Total | - | 13.999.500 cents | rounded off to 14 cents |

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and the remaining will be 1 cent.

Out of 10 cents comprised in Sy.No.733/7/C, as per Ext.A5, 9 cents assigned and the remaining is 1 cent.

18. So, as per records, the description of A schedule would be matching as 1 cent comprised in Sy.No.733/7/C and 1 cent comprised in Sy.No.733/7/A2 obtained as per A schedule in Ext.A1 deed.

19. As regards plaint B schedule, the first defendant out of the 25 cents of property obtained as B schedule in Ext.A1 in Sy.No.733/7/A2, 7 cents was assigned to the plaintiff as per Ext.A2 deed and that is shown as plaint B schedule. But, as already indicated, there is no description in Ext.A1 regarding virivu and so also when the plaintiff assigned properties out of A schedule in Ext.A1 as per Exts.A5, A6 and B1, he did not mention about any virivu and this will falsify the claim of virivu confining to the remaining 2 cents of property even as per the derivation of title to plaint A schedule property as described before. So, when the documents produced before this court is analysed, it could be seen that the plaintiff

has got title to 1 cent in Sy.No.733/7/A2 and 1 cent in Sy.No.733/7/C of A schedule and not anything excess and 7 cents Sy.No.733/7/A2. Ext.A3 would go to show that the plaintiff is remitting basic land tax for 9 cents of property ie., 8 cents in Sy.No.733/7/A2 and 1 cent in Sy.No.733/7/C. So, this will perfectly tally with the assignments made by the plaintiff subsequent to Ext.A1 deed in his favour.

20. Now the prominent question to be answered is that whether the plaintiff has proved that the A schedule and B schedule described in his plaint is in existence as identifiable items of properties on the spot as per his claim. The plaintiff would rely on the measurement of northern boundary in Ext.A5 deed and the sub division sketch in respect of Sy.No.733/7 marked as Ext.A4 in the case. Ext.A4 is a copy of sketch obtained as per Right to Information Act and shows the A, B and C sub divisions of Sy.No.733/7 of Piravom village. The total property available in sub divisions A, B and C of Sy.No.733/7 of Piravom as per Ext.A4 is 2 Acres and 10 cents. In sub division A of Sy.No.733/7, the total property available is 1 Acre and 08 cents and in B sub division it is 92 cents and in C sub division it is 10 cents. The northern length of sub division C is 138 links and it is the claim of the plaintiff that he alone obtained the property Sy.No.733/7/C and therefore, after assigning 71 links from the eastern point, he is the owner in respect of the remaining extent further towards west. When I discussed about Ext.A5 and derivation of title, I

have specifically stated that the eastern portion of the total property obtained as per Ext.A1 in A schedule was assigned to Ammini Eapen as per Ext.A5 and based on Ext.A4 plan alone the plaintiff cannot succeed to claim that he has got title to the property from 71 links towards west and further east of property as per Ext.B1 deed. It may be true that he is having title to some property on the eastern side of property covered by Ext.B1 deed.

21. The plaintiff did not take out a commission for survey in this particular case to prove that he has got title to specific item of immovable property described as per plaint A and B schedules. I would specifically put emphasis on the property as per the description of the schedule, since it could be seen from analysis of the title documents that he obtained 7 cents as per Ext.B1 and will be having 2 cents remaining after assignments as per Exts.A5, A6 and Ext.B1 documents. But, that is not sufficient to declare his title over plaint A schedule property, which inclusive of virivu and B schedule within the boundary description claimed by the plaintiff. Identification of those properties is inevitable, since plaintiff claims recovery of possession of property claiming to be coming within A and B schedule properties with the defendants.

22. In this context, plaintiff would rely on Ext.A22 commission report Ext.A23 series survey plans prepared in O.S.No.6/2007. The certified copy of plaint in O.S.No.6/2007 is marked as Ext.A13. It can be seen

from Ext.A13 that the first defendant herein filed a suit for recovery of possession of property against one Thampi and Eapen before this court and the recovery was sought in respect of plaint B schedule having an extent of 10.569 s.q links. However, it is admitted that the suit was not prosecuted by the first defendant and resulted in dismissal of the suit. The learned counsel for the plaintiff in the memorandum of arguments filed by her and in her oral submissions, put heavy reliance on Ext.A23 series. The Taluk Surveyor who prepared Ext.A23 series was examined as PW4. The oral evidence of PW4 along with the evidence of PW3, the advocate commissioner who prepared Ext.A22 report would cut the root of claim of the plaintiff based on Ext.A22 and Ext.A23 series. PW4, the then Taluk Surveyor who prepared Ext.A23 series in O.S.No.6/07 in categorical terms deposed that the measurement as per Ext.A23 series was not based on the title documents alone and there were changes of boundaries found on physical inspection and survey of the properties and he could not depose as to what were the changes to the boundaries found on the spot and the description of the boundaries as per the title deeds. There is no measurement ladder shown in Ext.A23 series. The witness further deposed that the physical boundaries found in these plots shown in Ext.A23 series were not marked, but some of the physical boundaries is noted such as the boundary sharing with the panchayat road.

23. PW3, the learned advocate commissioner in O.S.No.6/07 deposed that the properties described in Ext.A1 deed were found different in survey and according to PW3, the difference was in survey number. To a specific question, the learned advocate commissioner deposed that 1 cent in Sy.No.733/7/C and 1 cent in Sy.No.733/7/A2 is not shown separately in the plan. It is her evidence that for the formation of the northern panchayat road, property was taken from the property covered by Ext.A1. So also, there is third party possession coming within the property surveyed through PW4. It is settled in law that a commission report prepared in another case has no sanctity to be read in evidence as per Order 26 Rule 10(2) of CPC. It is nothing but a previous statement and could only be acted upon when it is proved in accordance with law and is sufficient to decide the dispute. It is pertinent to note that the plaintiff has made some effort to measure out the property and he approached the Hon'ble High Court and as per Ext.A11 judgment, a direction was issued to the Tahsildar and Taluk Surveyor in Muvattupuzha to complete the proceedings in the application for survey and Ext.A14 plan is seen prepared by the then Taluk Surveyor, Muvattupuzha. Ext.A14 also will not help this court to arrive at a conclusion that there is a specific item of immovable property as A schedule described in the plaint. The observations made in Ext.A22 report by PW3 advocate commissioner has no relevance at all in this case, since it will not help

this court to find that the plaint A schedule property claimed by the plaintiff is a specific item of immovable property obtained as per A schedule in Ext.A1 deed. Only when A and B schedule properties are ascertained by survey and demarcation, taking into consideration all the assignments made by the plaintiff and purchase made by the defendants the actual extent of property available for the plaintiff on the spot would be identifiable and ascertainable. Therefore, the claim of title of 2 cents and virivu in A schedule and 7 cents in B schedule within the boundaries claimed there in as per Ext.A2 is not proved by the plaintiff. There is absolutely no evidence to show that the defendants trespassed upon the portion of the plaintiff's property and reduced it into their possession. Only when a specified item of immovable property is shown to be in possession of the defendant, its recovery can be ordered. So, on this ground as well the claim for recovery of possession would fall to the ground. Therefore, these issues are found against the plaintiff.

24. **Issue No.2 in O.S.No.32/2012:-** The answer to issue Nos.1 and 3 and the absence of identification of A and B properties would result in declining the relief of fixation of boundary claimed by the plaintiff. It is also settled in law that when plaintiff wants to fix boundaries of an immovable property with the adjacent owners, it is incumbent upon the plaintiff to schedule the properties of the adjacent owners as well and that is also not done in this case. (Please see, **Nandakumara Varma vs.**

Usha Varma reported in **2015 (1) KLJ 73**) Therefore, issue No.2 is also found against the plaintiff.

25. **Issue No.2 in OS No.396/11:-** After the institution of the suit the gate on the northern terminus of B schedule was kept unlocked under the order of this court with the supervision of the advocate commissioner and as such the gate is opened and therefore, the first defendant (plaintiff in the suit) did not press for the relief, since it has become infructuous. Recording the submission and the fact that the gate is now opened, this issue is answered. However, I shall consider the right of the first defendant to get it open and enjoy free access through the B schedule in this suit, while answering issue Nos. 1 and 3.

26. **Issue Nos.1 and 3 in OS No.396/11:-** For brevity and convenience, these issues are answered together. Plaint A schedule property in the suit is described as 18 cents of property comprised in Sy.No.733/7/A2 lying on the western side of the plaintiff's property. The first defendant obtained 25 cents in Sy.No.733/7/A2 as B schedule in Ext.A1 deed and out of the 25 cents, he assigned 7 cents on the eastern side to the plaintiff and the remaining 18 cents is the plaint A schedule property. A serious dispute arose between plaintiff and first defendant as to whether the tharavadu house is situated in the property of the first defendant obtained as per B schedule or it is in the property of the grandmother Mariyam. In order to substantiate the claim of the first

defendant, he relies on the recitals on Ext.A2 deed. Ext.A2 is a deed in between the plaintiff and first defendant and the recitals are binding inter-se as per Section 13 of the Indian Evidence Act. 7 cents was assigned to the plaintiff as per Ext.A2 deed on the eastern side of the total property and there is a specific recital that in the remaining 18 cents the house is situated. In this context, the cross examination of PW1 assumes importance. PW1 deposed that the first defendant is residing in the tharavadu house and that till 1996 PW1 was residing along with Simon in the tharavadu house. According to PW1, the B schedule way in O.S.No.396/2011 is the way used to the tharavadu house and to his residence and that B schedule way is formed by the plaintiff. As to the existence of B schedule, Ext.C1 series are relevant.

27. Ext.C1 series are prepared in O.S.No.396/2011 and the inspection was conducted in the presence of both the parties. The learned commissioner has categorically identified A schedule in O.S.No.396/2011 which is lying demarcated with specific and definite boundaries on all the 4 sides and very old boundaries as well. The learned commissioner has specifically reported as answer to query No.3 that the first defendant is residing in plaint A schedule property in O.S.No.396/2011 and the house therein is aged more than 75 years. This would be corroborative with the recitals in Ext.A2 deed and the evidence of PW1, the plaintiff. As regards B schedule, the learned commissioner has reported as answer to query

No.4 that it is having a length of 84 feet and on the southern terminus it has a width of 22 feet, on the northern terminus it has a width of 16½ feet and on the middle it has a width of 19 feet. The learned commissioner also ascertained its age as 25 years and found that it is a motorable way from the northern panchayat road leading to plaint A schedule property. On its northern terminus a gate was found erected and on the western side of the gate, a small passage was provided and since the gate was locked, commissioner made entry through the passage. It is reported by the commissioner that plaint B schedule is the motorable access to plaint A schedule property and the gate is to be kept open for the free use of B schedule by the first defendant.

28. Even though the issue is framed as to the easement by grant over the entire plaint B schedule, in fact, the first defendant has claimed proprietary right of ownership over the western half of B schedule as per Ext.B1 title deed and over the eastern portion, he claimed easement by implied grant. As per Ext.B1, the plaintiff assigned proprietary title and possession over 1.896 cents out of 3.896½ cents. As discussed earlier, the said portion is starting from the northern panchayat road and leading to the property of the first defendant and on the western side, it is the property of Baby, predecessor-in-interest of defendants 2 to 4, who obtained property as per Ext.A6 deed. So, the plaintiff himself had assigned a strip of land in north-south direction on the extreme western

side of his property after assignments to the first defendant. The existence of B schedule is admitted by PW1 in cross examination and as already pointed out, it is his case that he has formed it and it is used as an access to the property of the first defendant and PW1 himself. There is no doubt that the commissioner has identified B schedule lying on the eastern side of the property obtained by Baby as per Ext.A6 deed. The said boundary is a very age old boundary constructed with kattukal kayyala. It has also come out that a specific item of property as B schedule is in existence and on the eastern point, poles were fixed for gate and in a straight line from the eastern point, a way is identifiable and it can be used by the plaintiff and by the first defendant. There is no identification of property purchased by first defendant as per Ext.B1 and the remaining property on its eastern side forming part of B schedule. When B schedule is found as a way in existence for the last 25 years and when it is shown that the western portion of B schedule was purchased by first defendant in 1996, the use of the eastern portion could only be upon an implied grant by the plaintiff to the first defendant as access to his property on the south and the grant is irrevocable.

29. The very contentions in the written statement filed by the plaintiff in O.S.No.396/2011 and the claims made by him in O.S.No.32/2012 are sufficient to prove a valid cause of action for the suit and the fact that at the time of institution of the suit, the gate of B

schedule was admittedly locked down by the plaintiff would prove the cause of action for the suit. First defendant being proprietary owner in respect of western portion of B schedule as per Ext.B1 deed and a grantee in respect of the remaining portion of B schedule, the plaintiff cannot obstruct the user of first defendant through B schedule way and cannot keep the gate under lock and key. The gate is to be kept open for the use of the first defendant for his free ingress to and egress from plaint A schedule property in O.S.No.396/2011. Issue Nos. 1 and 3 are accordingly answered.

30. **Issue No.4 in O.S.Nos.32/2012 and 396/2011:-** In view of the findings on issue Nos. 1 to 3 in O.S.No.32/2012, the suit is liable to be dismissed. Considering the fact that the plaintiff was contesting the suit on free legal aid provided by the Taluk Legal Services Committee, Muvattupuzha, I feel it appropriate to order the parties to suffer their costs.

31. In view of the findings on issue Nos.1 to 3 in O.S.No.396/2011, the suit is only to be decreed. As regards costs, the parties shall suffer their respective costs as ordered in O.S.No.32/2012.

In the result:-

O.S.No.32/2012:- The suit is dismissed, but without costs

O.S.No.396/2011:- The suit is decreed as follows:-

- 1) Defendant, his men or agents are restrained from causing any obstruction to the plaintiff's enjoyment of plaint B schedule way and from locking the gate in plaint B schedule way.
- 2) Ext.C1(a) rough sketch shall form part of decree.
- 3) Parties shall suffer their respective costs.

Dictated to Confl. Asst., typewritten by her in computer, corrected and pronounced by me in the open Court on this the 25th day of November, 2019.

Sd/-
Joseph Rajesh.K.A.,
Munsiff.

APPENDIX

Plaintiff's Exhibits:

| | | |
|-----|-----------|--|
| A1. | 12.6.1978 | Certified copy of deed No.1643/78 of Koothattukulam SRO. |
| A2. | 30.1.1996 | Certified copy of deed No.368/1996 of Piravom SRO. |
| A3. | 17.5.2014 | Basic tax receipt issued by Piravom Village office. |
| A4. | Nil | Copy of sketch obtained by Right to information Act. |
| A5. | 16.9.1980 | Certified copy of deed No.1822/80 of Piravom SRO. |

| | | |
|------|-----------|---|
| A6. | 16.9.1980 | Certified copy of deed No.1826/80 of Piravom SRO. |
| A7. | 17.5.2014 | Basic tax receipt issued by Piravom Village office. |
| A8. | Nil | Copy of Thandaper Register No.4500 obtained by RTI Act. |
| A9. | Nil | Copy of Thandaper Register No.7131 obtained by RTI Act. |
| A10. | 27.4.2005 | Copy of application submitted before Tahsildar, Muvattupuzha obtained by RTI Act. |
| A11. | 24.4.2006 | Certified copy of order in WP(C) No.7259 of 2006 (L) of the Hon'ble High Court obtained by RTI Act. |
| A12. | 18.5.2006 | Certified copy of letter from Tahsildar, Muvattupuzha obtained by RTI Act. |
| A13. | 1.1.2007 | Certified copy of plaint in OS 6/2007 of Munsiff's Court, Muvattupuzha. |
| A14. | Nil | Certified copy of plan obtained by RTI Act. |
| A15. | Nil | Attested copy of survey sketch of survey No.733/17 obtained by RTI Act. |
| A16. | 16.3.2011 | Copy of building permit issued by Piravom Grama Panchayath. |
| A17. | 13.1.2006 | Copy of encumbrance certificate. |
| A18. | 22.5.2004 | Basic tax receipt issued by Piravom Village office. |
| A19. | 1.12.2011 | Certified copy of judgment in OS 6/2007 of Munsiff's Court, Muvattupuzha. |
| A20. | Nil | Copy of Thandaper Register No.13269 obtained by RTI Act. |

- A21. Nil Copy of report submitted by the Village Officer Piravom to R.D.O., PR No.182/2015 obtained by RTI Act.
- A22. Nil. Certified copy of commission report in OS 6/2007 of Munsiff's Court, Muvattupuzha.
- A23. Nil. Survey plan in OS 6/2007 of Munsiff's Court, Muvattupuzha.
- A23(a) Nil. Survey plan in OS 6/2007 of Munsiff's Court, Muvattupuzha.
- A23(b) Nil. Survey plan in OS 6/2007 of Munsiff's Court, Muvattupuzha.

Defendants' Exhibits:

- B1. 31.1.1996 Certified copy of deed No.396/1996 of Piravom SRO.
- B2. 12.6.1978 Certified copy of deed No.1643/1978 of Koothattukulam SRO.
- B3. 31.7.2009 Certified copy of order in CMCP No.73/2008 (C) of Hon'ble High Court of Kerala.

Court Exhibits:

- C1. 1.9.2011 Commission report filed by Advocate Commissioner Jeena Paul.
- C1(a) ,, Rough sketch.

Plaintiffs' Witness:

- PW1. 2.2.2017 & 18.2.2019 E.M.Joy.
- PW2. 15.10.2019 Amruthavally Ammal K.R.
- PW3. 15.10.2019 Simly M.S.
- PW4. 15.10.2019 Shaji M.S.

PW5. 15.10.2019 John Varghese.

Defendant's Witness: NIL.

Krv.
Comp

Id/-
Munsiff.

//True copy//

Munsiff.