

IN THE COURT OF THE SUBORDINATE JUDGE OF VATAKARA

Present: Sri. M. Ramesan, Sub Judge

Tuesday, the 6th day of October, 2020

APPEAL SUIT NO: 5/2019

Between:

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| <ol style="list-style-type: none"> 1. Preetha, W/o. Late Soman, aged 54 years, Coolie, Padinhare Thuruthiyil house, Puthuppanam amsom, Vatakara Taluk. 2. Swaroop P.T, S/o. Late Soman, aged 24 years, Padinhare Thuruthiyil house, Puthuppanam amsom, Vatakara Taluk. 3. Princy P.T, W/o. Byju, aged 31 years, Pakuni Parambath house, Chorode post, Vatakara Taluk. 4. Prinsha P.T, W/o. Ranjith, Nadukkandi Meethal house, Vatakara, Nadakkuthazha post, Vatakara Taluk. | } | Appellants |
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And

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| <ol style="list-style-type: none"> 1. Damu, S/o. Chathan, aged 72 years, swastham, Kizhakke Thuruthiyil house, Puthuppanam desom, Vatakara Taluk. 2. Ganeshan, S/o. Damu, aged 51 years, business, Kizhakke Thuruthiyil house, Puthuppanam desom, Vatakara Taluk, Kozhikode. | } | Respondents |
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Appeal filed against the Judgment and decree passed by the Munsiff Court, (Sri. Santhosh T.K., B.A. (Law), LL.B, Munsiff (In-Charge), Vatakara, dated 8th day of November, 2018 made in

O.S. 70/2012**Between:**

1. Damu, S/o. Chathan, aged 72 years, swastham, Kizhakke Thuruthiyil house, Puthuppanam desom, Vatakara Taluk.
2. Ganeshan, S/o. Damu, aged 51 years, business, Kizhakke Thuruthiyil house, Puthuppanam desom, Vatakara Taluk, Kozhikode.


 Plaintiffs
And

1. Soman, S/o. Krishnan, aged 53 years, Coolie, Padinhare Thuruthiyil house, Puthuppanam post, Vatakara Taluk (died).

Supplemental defendants

2. Preetha, W/o. Late Soman, aged 54 years, Coolie, Padinhare Thuruthiyil house, Puthuppanam amsom, Vatakara Taluk.
3. Swaroop P.T, S/o. Late Soman, aged 24 years, Padinhare Thuruthiyil house, Puthuppanam amsom, Vatakara Taluk.
4. Princy P.T, W/o. Byju, aged 31 years, Pakuni Parambath, Vatakara Taluk.
5. Prinsha P.T, W/o. Ranjith, Nadukkandi Meethal house, Vatakara, Nadakkuthazha post, Vatakara Taluk.


 Defendants

This appeal suit coming on the 11th day of September, 2020 for final hearing before me in the presence of Sri. K.V. Sasidharan, Advocate for appellants and of Sri. K.K. Vijayan, Advocate for respondents and having stood over to this day for consideration, the court delivered the following:

JUDGMENT

This appeal is filed against the decree and judgment of the Munsiff Court, Vatakara in OS 70/2012 dated 08-11-2018. The above suit is for fixation of boundary and prohibitory injunction .

2. Plaintiff averments in brief are as follows:- Plaintiff schedule property is in the ownership and possession of the plaintiffs. One Bappu was in possession of the property situated on eastern boundary of plaintiff schedule property. After his death his legal heirs effected partition. Manikyam, Bhaskaran and Pokkan are the children of Bappu. Plots A, C and E in the partition deed are allotted to Manikaym, Bhaskaran and Pokkan respectively. There was a stream having 3 meter width flowing through east-west direction through the southern side of the plaintiff schedule property and the property allotted to Pokkan. Later the said stream was converted into road. It turned to north side through eastern side of 'E' schedule property in the partition deed. 'C' schedule property allotted to Bhaskaran and some portion of 'E' schedule property were assigned to the defendant before the formation of the stream into road. There was demarcated boundary on the eastern side of the plaintiff schedule property and the corresponding western side of the defendant's property. When the defendant tried to trespass into plaintiff schedule property, the plaintiffs has filed OS 120/2007 against the defendant and the said suit was dismissed as the plaintiff could not establish identity of the property. Appeal filed by the plaintiff was also dismissed. After the disposal of the said suit and appeal, the defendant started encroaching plaintiff schedule property on eastern boundary.

Therefore, the visible boundary on eastern side of plaintiff schedule property was lost. The plaintiffs apprehend that the defendant would again encroach the plaintiff schedule property. Hence the suit.

3. Defendant raised the following contentions. OS 120/2007 and AS 63/2008 were dismissed on the basis of boundary fixed properly by the advocate commissioner. There was Kallithode on southern side of Pokkan's property and the portion that comes within his property was reclaimed and converted into a road. There was no water channel on eastern side of 'E' schedule property known as Kizhakkethuruthiyil paramba stands in the name of one Nanu. Road was constructed on eastern side on those paramba. Not even an inch of property was taken from E schedule for constructing the road. Eastern boundary of plaintiff schedule property and the corresponding western boundary is identifiable. There are stones laid down to demarcate the properties. Boundary can be fixed on the basis of the plan submitted by the advocate commissioner in OS 120/2007. This suit is filed with intention to encroach south- western boundary of the defendant by stating false allegations. This defendant never trespassed into plaintiff schedule property. Therefore, the suit may be dismissed.

4. Based on respective contentions, the following issues were settled for trial:-

- (i) Whether the plaintiffs are in possession of the plaintiff schedule property?
- (ii) Whether the plaintiffs are entitled for fixation of boundary between the plaintiff schedule property and the property of the defendant?

- (iii) Whether the plaintiffs are entitled to permanent prohibitory injunction restraining the defendant from trespassing in the plaint schedule property?
- (iv) Reliefs and costs?

5. Exts. A1 to A8, C1, C1(a), C2, C2(a) were marked. DW1 and DW2 were examined and Exts. B1 to B7 were marked. No oral evidence for the plaintiffs. By judgment and decree dated 08-11-2018 the trial court decreed the suit and aggrieved by it this appeal by the defendants.

6. Points that arise for consideration are:-

- (i) Whether the trial court judgment requires any interference by this court?
- (ii) Reliefs and costs?

7. **Point No.(i):-** The main dispute between the parties is in respect of a strip of land in between the eastern boundary of the respondents/plaintiffs and western boundary of the appellants. Learned counsel for the appellants argued that if the measurement is taken from the eastern boundary of the appellant's property the disputed strip of land will be part of appellant's property. If the measurements are taken from western boundary claimed by the respondents, the disputed piece of land will be part of respondent's property. Respondents had filed OS.120/2007 against the appellants for injunction in respect of the same property involved in the present case. That case was dismissed on the ground that when the property of the defendant's(appellants herein) was measured from eastern boundary of

the plaintiff schedule property, the road lying on eastern boundary of the defendant's property was found not part of section of one Pokkan's property as contended by the plaintiff. Ext. B6 is certified copy of judgment in that case. In the present case, testimony of DW2 shows that property lying on eastern boundary of the appellants is his fathers property. According to DW2, property of his father was taken for road and not the property of Pokkan. In Ext. B6 case also DW2 was examined and there was no change in his versions.

8. Learned counsel for the appellants relied on oral testimony of DW2. Respondent's contention is that the aforesaid road was constructed by taking the property of the appellant. But the appellant's case is that road was constructed by taking the property of DW2's father Nanu. According to the learned counsel for the appellants, DW2 deposed that property of his father alone was taken for construction of the road. According to the learned counsel for the appellants, OS 120/2007 was dismissed for the reason that the strip of land is part of appellant's property and that there is no proof that road was formed by taking the appellant's property.

9. Learned counsel for the appellants argued that oral evidence of advocate commissioner examined as CW1 was more than enough to dismiss the suit. Let's hear what CW1 deposed. During cross examination, CW1 deposed that survey boundary was not shown by him in the plan. What she deposed was that property was measured from the boundary shown by the plaintiffs. She would depose that disputed land is having sandy soil. Therefore, there is no chance for

natural boundary. CW1 would depose that when he measured property by fixing western boundary shown by the plaintiffs, some portion of defendant's property on eastern side was found part of the road. That portion is marked in yellow colour by the commissioner. Ext. A8 is document No. 951/2011. Appellants got property as per Ext.A8. CW1 categorically deposed that measurements shown in Ext. C1(a) plan and the measurements in document No.951/11 are not correct. CW1 further deposed that when the property of the defendants(appellants herein) was measured as per the measurement shown in their document it was tallying with and the same has been shown in Ext. C2(a) plan. She would depose that she has shown the measurements from east to west in Ext. C2(a) plan. She would depose that as per the said measurements, defendant's property abuts to the plaint schedule property. Her further testimony is really confusing. Shse would depose that he cannot say whether the actual boundary will be obtained if the measurements are taken from eastern boundary of the defendants. CW1 would depose that property of the person on western boundary of the plaint schedule property has not been measured by her.

10. It was argued by the learned counsel for the appellants that boundary of plaint schedule property may be fixed as per Ext.C2(a) plan or the suit may be remitted for appointment of another commissioner to identify the property. Trial court fixed eastern boundary of plaint schedule property as per Ext. C1(a) plan. Ext. C2 report was given as per order in IA 893/2013. Prayer in IA 893/2013 was to measure the property from the boundary that will be shown by the defendants. Defendant's property was inspected in the presence of surveyor as per

document No.951/11. Property taken for road from south east corner was considered by the commissioner. Property was measured on the basis of document Nos. 2724/82 and document No.1700/97 also. Measurement was taken from south-east corner towards west and north and the same has been shown in blue line in C2 plan. Commissioner reported that no natural boundary for defendant's property could be seen by her. In Ext. C1, commissioner reported that green shaded portion is in the possession of 3rd parties. What is the extent of property in the possession of 3rd parties and whether there was survey stone to demarcate eastern boundary of plaintiff schedule property was not mentioned in C1 report. Commissioner simply reported that plots E, F, G are defendant's property. On perusal of Exts. C1 and C2, testimony of CW1 as well as DW2, this court find that without fixing survey boundary, both reports and plans cannot be accepted.

11 . Learned counsel for the respondents argued that in Ext. B6 judgment it was held that western boundary of plaintiff schedule property has been marked by the commissioner in Ext. C2 plan. On going through para No.8 of Ext. B6 judgment, this court find that learned Munsiff observed that the evidence given by PWs 1 to 3 does not prove the eastern boundary of plaintiff schedule property. Respondent's took a contention that road on eastern boundary of the appellant was formed by taking property of Pokkan. After examination of DW2, learned counsel for the respondent's deviated from it. Testimony of DW2 who is son of Nanu shows that road was formed by taking his father's property. But the contention of the plaintiff in Ext.B6 was that section

of defendant's property had been appropriated for formation of the road. Learned Munsiff found that the said averments were incorrect as per the report of the commissioner.

12. It was argued by learned counsel for the respondents that plots 'F' and 'G' were previously owned by Pokkan. Exts A4 and A8 represents those plots. Southern boundary of Ext. A4 assignment deed executed by Pokkan in favour of the defendant Soman(appellant's predecessor) shows that there is 'thodu' on southern boundary. Southern boundary of Ext. A8 also is 'thodu'. Measurements shown in Ext. A8 assignment deed executed by Vimala and others in 2011 shows 13 ½ in 6 feet measurement. It will comes to 24.7 meters. Measurement shown by the commissioner is only 21.4 meters. When the property was measured from eastern boundary of defendant's property, its western boundary found to be protruding to plaint schedule property. When the plaint schedule property was measured as per document No.1533/90(Ext. A2), a triangular portion was found in the possession of strangers. Apart from that, some extent from southern boundary was seen taken for road. Ext.C1(a) plan shows that certain extent of property covered by Ext. A2 was lost by adverse possession on western boundary and for road on southern boundary. The trial court observed that plaintiff could not prove possession of plaint schedule property on the basis of Exts. A1 to A3 and on the basis of oral testimony of DW1 and CW1. How much extent was lost by the plaintiff by way of adverse possession and for widening the road on southern boundary was not considered by the commissioner. No survey boundary was fixed by the surveyor while the properties of the

defendants and the plaintiff were measured. Besides the above, property on western boundary of the plaintiff was also not measured by the commissioner.

13. Trial court judgment shows that 'BD' line in Ext. C1(a) plan was fixed as eastern boundary of plaintiff schedule property. There is no discussion about Ext. C2 report and C2(a) plan. Learned counsel for the appellants argued that if testimony of CW1 is accepted, Ext. C1(a) plan cannot be accepted by the court to fix eastern boundary of plaintiff schedule property. CW1 deposed that when the defendant's property was measured from his eastern boundary, it was found abutting to plaintiff schedule property. She deposed that plaintiff schedule property was not measured from western boundary as per the measurement shown in the document of the plaintiff. She categorically deposed that measurements shown in Ext. C1(a) plan is different from the measurement shown in document No.951/2011. Apart from that her testimony would further show that when the property was measured as shown by the defendants, it was found tallying with the measurement shown in their document. When a specific question was put to CW1 whether the measurements taken from eastern boundary of defendant's property was actual boundary, she was in helpless situation to reply.

14. Learned counsel for the respondents argued that as per Ext.A8, total measurement on southern boundary is 24.7 meters (6 feet X 13 ½). Ext. C2(a) plan shows only 21.4 meters instead of 24.7. He further argued that there is shortage of 3 meters and that was taken for

the road. It was argued that old boundaries are shown in Ext. A8 also. Ext. A7 partition deed has been referred in Ext.A8. 'E' schedule in Ext. A7 was set apart to the share of Pokkan. On perusal of the boundaries of E schedule, I find that it corresponds to 'C' schedule in Ext.A8. DW1 deposed that property of his father alone was taken from eastern boundary of defendant's property to form road. As per his testimony, some property of his father lies in between the property of the defendant and the road. Learned counsel for the respondents referred description of second tak of Ext.A5. It is "Oru thengulla kizhakkubhagam mukkon aayulla sthalam". According to him, remaining property is in the possession of Pokkan. It was further argued that 3 meters taken for widening of road has to be looked into.

15. Commissioner has not shown the extent of property in the possession of stranger and the extent of property taken for road on southern boundary. Total extent of Ext. A2.is 15.38 Ares. When calculated, it was found that total extent lost will comes to more than one cent. Ext. A2 shows 37.98cents. After excluding one cent, property in the possession of the plaintiff will be approximately 36.98 cents. Although the learned counsel for the respondents argued that 3 meters taken for widening road has to be considered by the court, he was silent about the extent which was lost by adverse possession and for widening of the road. I agree with the argument of learned counsel for the respondents that old boundaries are shown in Ext. A8. DW1 deposed that road was formed before 1995. Ext. A8 was executed in 2011. If there was road in 1995, it ought to have been shown as southern boundary in Ext. A8. It may be an omission on the part of document writer.

16. Learned counsel for the appellants argued that present suit is bared by resjudicata because the subject matter and the parties are same in the former suit and in the present suit. Learned counsel for the respondents argued that OS 120/2007 was a suit for injunction simplicitor and the present suit is for fixation of boundary. Issue of resjudicata was not raised by the trial court. On perusal of written statement, this court find that the question of resjudicata was not raised before the trial court. Learned counsel for the respondents submitted that if there is cause of action for instituting a suit it cannot be prevented on the ground that the parties and the subject matter were involved in a previous litigation. In my view, since the relief sought is for fixation of boundary, present suit filed by the respondents in respect of the same property which was involved in OS 120/2017 is maintainable. Therefore, there is no question of resjudicata as argued by learned counsel for the appellants.

17. After considering entire evidence, this court find that plaint schedule property was not properly identified by the commissioner. On perusal of Ext.B6 judgment, this court find that Advocate Commissioner was deputed many times and Exts. C1 to C8 were filed to identify plaint schedule property. Testimony of CW1 is not sufficient to accept either Ext.C1(a) or Ext.C2(a). In the above circumstance, fixation of boundary cannot be ordered by the court Therefore, this court find that this is a fit case to remand the matter for identifying plaint schedule property with the help of survey records. Point answered accordingly.

18. **Point No.(ii):-** In view of finding on point No.(i), this appeal is allowed and the suit is remanded to the trial court for identifying plaint schedule property as per survey records. Both parties are directed to appear before the trial court on 16.11.2020.

(Dictated to the Confidential Assistant, transcribed and typed by her, corrected and pronounced by me in open court this the 6th day of October, 2020)

Sd/-
Sub Judge.

Witness and Exhibits marked on either side : NIL

Sd/-
Sub Judge

Apb