

IN THE COURT OF ADDITIONAL DISTRICT JUDGE-IV, KOTTAYAM

Present : Dr. Satheesh Kumar V., Addl. District Judge-IV, Kottayam

Tuesday the 31st day of March, 2026/10th day of Chaithra 1948

A. S. Nos.48/2019 and 65/2019

A. S. Nos.48/2019

(O. S. No.465/2014 of Munsiff's Court, Kottayam)

Appellant : -

T. C. Joseph @ Jose, aged 65 years, S/o late Mathai Chacko,
Thondampally House, Kooroppada, Lakkattoor Kara,
Kottayam District

By Adv. Philson Mathews

Respondents :-

- 1 Mathai, aged 64 years, S/o late Mathai Chacko,
Thondampally House, No.124, Ward 1, Kooroppada,
Lakkattoor Kara , Kottayam District
- 2 Baby, aged 56 years, S/o late Mathai Chacko, Thondampally House,
No.114, Ward 1, Kooroppada, Lakkattoor Kara , Kottayam District
- 3 T.C.Elamma @ Sr. Mary Salomy, aged 67 years, D/o Mathai Chacko,
Clarist Home Imfal, Manthripukhri, Manipur

R1 & R2 – No vakalath

R3 - Exparte

A. S. Nos.65/2019

(O. S. No.465/2014 of Addl. Munsiff's Court, Kottayam)

Appellants/Counter claim plaintiffs : -

- 1 Mathai, aged 64 years, S/o late Mathai Chacko, Thondampally
House, Kooropada Panchayat, Lakkattoor Kara, Kottayam
- 2 Baby, aged 56 years, S/o late Mathai Chacko, Thondampally House,
Kooropada Panchayat, Lakkattoor Kara, Kottayam

By Adv. Josekutty Mathew

Respondents/Respondents :-

- 1 T. C. Joseph @ Jose, aged 60 years, S/o late Mathai Chacko,
Thondampally House, Kooroppada, Lakkattoor Kara,
Kottayam District (Counter claim defendant)

- 2 T.C. Elamma @ Sr. Mary Salomy, aged 67 years,
D/o late Mathai Chacko, Clarist Home Imfal,
Manthripukhri, Manipur (3rd defendant)
R1 – No vakalath
R2 – Exparte

These Appeals having been finally heard on 28.03.2026 and the Court on 31.03.2026 delivered the following :-

COMMON JUDGMENT

1. These two appeals are directed against the judgment and decree rendered by the learned Additional Munsiff, Kottayam, on 30/11/2018 in O.S. No.465/2014, a suit and a counter-claim. A.S. No. 48/2019 is preferred by the unsuccessful original plaintiff, challenging the dismissal of his suit seeking to set aside a partition deed on the ground of fraud. A.S. No. 65/2019 is preferred by the first and second original defendants/ counter-claim plaintiffs, who are aggrieved by the dismissal of the counter-claim they preferred for the measurement and demarcation of a pathway. Since both appeals arise from the same proceedings and involve common questions of fact and law, they were heard together and are being disposed of by this common judgment. For convenience, the parties shall be referred to as per their status in the original suit.
2. The case set out by the plaintiff is that the plaint schedule property, having an extent of 2.59 acres and 141 Sq. links, originally belonged to his father, the late Mathai Chacko. He died intestate in 2008. The plaintiff, an ex-serviceman, contended that he was away from the locality for a significant period due to his service. He alleged that his siblings, the first and second defendants, taking advantage of his absence and his trust, obtained a registered Power of Attorney (Ext. B3) from him. Using the same, they executed a Partition Deed No. 161/2009 (Ext. A1) at the Pampady SRO. The plaintiff claimed that this partition was fraudulent, irregular, and allotted him a portion less than his legal

share. He sought to declare the partition deed null and void and a permanent prohibitory injunction.

3. The first and second defendants, in their joint written statement, refuted the allegations of fraud. They contended that the father possessed only 4.94 acres, and various portions were gifted to the children during his lifetime. They asserted that Ext. A1 partition was executed with the full knowledge and consent of all sharers to settle the family properties. In their counter-claim, they further asserted that counter-claim plaintiff 1 was allotted a specific pathway in 'Schedule A' of the partition deed to reach his property, scheduled as counter-claim item No.1. The defendants sought to have the counter-claim No. 1 measured based on the "A" schedule of partition deed No. 161/2009, and also to have its four boundaries demarcated and fixed from the properties of the original plaintiff and the counter-claim 2nd plaintiff, with the counter-claim 1st plaintiff bearing the expense. They have also sought a permanent prohibitory Injunction to restrain the original plaintiff and his men from obstructing their peaceful enjoyment and use of the counter-claim item No. 1 property as a vehicular road, intended to provide ingress and egress to counter-claim No. 2 property from the Lakkattoor-Kannamkunnu road.
4. The counter-claim defendant, in his written statement, contended as follows. The Partition Deed No. 161/09 of the Pampady SRO is a fraudulent, illegal, and fabricated document that is not maintainable under law. Consequently, any subsequent transactions or mutations based on this deed are also considered invalid. He alleges that the counter-claim plaintiffs cheated him by misusing a power of attorney to execute the partition deed for "item no. 1 property" without his knowledge, permission, or any prior consultation. He subsequently cancelled this power of attorney. He asserts that his father, who owned and possessed 14 acres of land, intended to give the plaint schedule property and the building specifically to him. He denies that the counter-claim plaintiffs are

in possession of their respective shares as per the partition. He further contends that they have no rights over the "A schedule property" or the other claimed properties. He maintains that the counter-claim plaintiffs are not entitled to any of the reliefs claimed in the counter-claim. He pleads that granting an injunction would cause him "inseparable loss" and that the balance of convenience rests in his favour. While he states he has no intention of obstructing the vehicular road facility, he claims the defendants are trying to measure the property based on the false partition deed, which he opposes until the deed is cancelled.

5. The following issues were framed by the trial court;

1. Was Partition Deed No. 161/2009 of Pampady SRO executed by committing fraud on the plaintiff?
 2. Is plaintiff scheduled item No. 1 property identified?
 3. What are the rights of the parties on the plaintiff scheduled item No. 1 property?
 4. Is the apprehension of the plaintiff reasonable and established?
 5. Should and could the boundary of counter-claim item No. 1 property be fixed?
 6. What should be the boundary of counter-claim item No. 1 be?
 7. What are the rights of the parties on counter-claim item No. 1 property?
 8. Is the apprehension of the defendants reasonable and established?
 9. Relief and costs?
6. The oral account on the side of the plaintiff involves PW1 and PW2. PW1, the plaintiff, deposed that he was misled into executing the Power of Attorney and that the siblings breached an oral understanding regarding the division of the "tharavadu" property. PW2, a neighbour, testified that the plaintiff had looked after the parents and suggested there was a family understanding that the plaintiff would inherit the main house. Documentary evidence for the plaintiff includes Ext. A1 (Partition Deed), Ext. A2 (Tax Receipt), and Ext. A3 (Ration Card). On the side of the defendants, DW1,

DW2, and DW3 were examined. DW1 is the Advocate Commissioner, who testified about the local inspection and the identification of the pathway with the help of a surveyor. DW2, the first defendant, and DW3, the second defendant, stated that the partition was mutual and that the plaintiff was a willing party to the document. Documentary evidence for the defendants consists of Ext. B1 (Sale Deed), Ext. B2 (Tax Receipt), and Ext. B3 (Power of Attorney). The commission report and plans are marked as Exts. C1 and C1(a).

7. The learned Additional Munsiff, after trial, dismissed the suit, finding that the plaintiff failed to establish the alleged fraud or misrepresentation in the execution of the partition deed.
8. The trial court also dismissed the counter-claim primarily on the ground that the counter-claim item No.1 pathway, described as a pathway in "A" schedule of the Partition Deed, was found to be unidentifiable in reality, for the reasons that although the Partition Deed described a specific pathway (counter-claim item No. 1), the Commissioner and Surveyor reported that they could not find any property matching that description on the ground; the court concluded that the description in the Partition Deed was an "imaginary disposition" that did not correspond to the actual nature or physical layout of the land; the boundaries plotted in the commission plan were entirely different from the descriptions provided in the counter-claim; the evidence showed that the parties were already using a different, established way for entering and leaving their properties, a route they had relied upon even before the Partition Deed was executed; since the property could not be identified or located based on the provided descriptions, the court determined it was impossible to fix its boundaries or grant the injunctions sought for.

9. In AS 48/2019, Respondent 3 was set ex parte. Heard respondents 1 and 2. Appellant submitted that there would be no oral argument; instead, a memorandum of argument would be filed, but it was not filed. So, the appellant is taken to have been heard.
10. In AS 65/2019, respondent 2 was set ex parte. Heard the appellants. Perused the memorandum of arguments filed by them. Respondent 1 submitted that he would have no oral argument; instead, a memorandum of argument was filed, contending as follows. The alleged vehicular road or path does not exist on the ground. Reports from the advocate-Commissioner (C1 and C1(a)) and his testimony as DW1 confirm that the topography, which consists of dense vegetation and uneven terrain, does not admit the existence of such a way. There is a material variance between the description of the property in the counter-claim schedule and the plan (C1(a))) prepared after the site visit. Because the pleaded description and the plotted plan are inconsistent, the property is deemed unascertainable and unidentifiable. While Schedule-A is mentioned in the title deed (Ex. A1), the deed provides no description that supports the actual existence of a road or way over that area. Consequently, the respondent contends that the alleged way is a mere paper fiction without legal or factual standing. Legal principles require that a claim for boundary fixation be based on certain and identifiable property. The court cannot decree the fixation of boundaries for a non-existent or untraceable portion of land, which is the current status of the appellant's claim.
- 11. Having perused the records and addressed the arguments of the learned counsel for both sides, the following points arise for consideration:**
- (i) Whether the finding of the trial court that the plaintiff failed to prove fraud in the execution of Partition Deed No. 161/2009 (Ext. A1) is erroneous?

- (ii) Whether the trial court was justified in dismissing the counter-claim for identification and demarcation of the pathway?
- (iii) Whether the counter-claim plaintiffs are entitled to the permanent prohibitory injunction sought for?
- (iv) Whether the judgment and decrees of the trial court require interference?
- (v) Reliefs and costs?

12. **Point No. (i):** The plaintiff's challenge to Ext. A1 partition deed is based on the allegation that his siblings played a fraud upon him. It is a fundamental principle of evidence, as laid down in Section 101 of the Evidence Act, that the person who asserts a fact is duty-bound to prove it. When a party alleges fraud in a registered transaction, the burden of proof is significant. PW1 admitted the execution of Ext. B3 Power of Attorney. His grievance is that the subsequent division in Ext. A1 did not follow an alleged oral agreement. However, considering the oral accounts of DW2 and DW3, which remained consistent throughout, and the fact that the third defendant (the sister) also accepted the partition, the plaintiff's plea of fraud remains a mere assertion without cogent supporting evidence.

13. In *Ram Sarup Gupta (dead) by L. Rs. v. Bishun Narain Inter College and Others* (AIR 1987 SC 1242), the Hon'ble Supreme Court cautioned against a pedantic approach toward pleadings and evidence, stressing that the court must look at the substance. Here, the substance of the transaction is a family settlement through a registered deed. The plaintiff has not shown how his siblings' actions amounted to a legal fraud, especially considering that his execution of the Power of Attorney was voluntary. The trial court's decision to uphold the validity of Ext. A1 is therefore based on a proper appreciation of the facts and the burden of proof. I find no reason to interfere with the findings in the main suit. Point (i) is found against the plaintiff.

14. **Point Nos. (ii) and (iii):** These points concern the dismissal of the counter-claim. The counter-claim was dismissed due to the following reasons: The court found that "counter-claim item No.1" was unidentifiable; the Commissioner and Surveyor who inspected and measured the land were unable to find property matching the description provided in the counter-claim. The boundaries of the property plotted in the Commissioner's plan (Ext C1(a)) were entirely different from the description provided in the counter-claim. The trial court concluded that the pathway described as 'A' schedule in the Partition Deed was an "imaginary disposition" that did not tally with the actual nature and lie of the properties. Evidence revealed that another way was already in use for the property, and had been used for ingress and egress even prior to the execution of the Partition Deed.
15. This court, upon re-appreciating the evidence of DW1 and the descriptions in Ext. A1, finds this conclusion to be unsustainable. Ext. A1 partition deed, which has been upheld as valid, explicitly describes 'Schedule A' as the share allotted to the first defendant specifically for use as a road. Page 10 of Ext. A1 defines the boundaries of Schedule A: West by a private path, East by the property of Chacko Mathai, North by the property of the plaintiff, and South also by the property of the plaintiff.
16. The Advocate Commissioner, DW1, categorically deposed that he caused to prepare the Ext. C1(a) plan based on the descriptions in Ext. A1 and the resurvey records. He further stated that both sides assisted him in identifying the pathway during the local inspection. If the trial court found the partition deed to be a valid document, it follows that the allotments made therein must be respected. Dismissing the counter-claim on the ground of non-identification, when the pathway is specifically described in the title deed and measured by the Commissioner, is a contradiction in appreciation.

17. The pathway exists as an allotment under a registered deed. As per the rule of interpretation, a document should be read as a whole. The fourth paragraph on page 9 of Ext. A1 clearly states that the way through 'Schedule A' can be used by the original plaintiff and the second defendant as well. This reinforces the existence and intended utility of the pathway.
18. On going through Ext.C1(a) plan, the above-mentioned boundary descriptions of the pathway tally perfectly within letters "HIJKLMNQPQRSTH", and this Court fails to see why the trial court found it was not identifiable.
19. Considering the preponderance of probabilities, the defendants/ counter-claim plaintiffs have established their legal right to have the pathway measured and demarcated as per the schedules of Ext.A1. The Commissioner's plan, Ext. C1(a), providing the width and lie of the path, is sufficient to pass an enforceable decree. The trial court's dismissal of the counter-claim was an error of judgment.
20. As the right over the counter-claim schedule pathway is strongly resisted by the original plaintiff, and thus, the counter-claim plaintiffs have proved their apprehension that the counter-claim defendant would restrain them from using the pathway, by preponderance of probabilities. Hence, they are entitled to the permanent prohibitory injunction sought for. These points are found in favour of counter-claim plaintiffs.
21. **Point No. (iv):** In view of the findings above, the judgment and decree dismissing the suit O.S. No. 465/2014 are to be confirmed. However, the dismissal of the counter-claim is unsustainable and requires the interference of this appellate court.
22. **Point No. (v): In the result:**
 1. *A.S. No.48 of 2019 is dismissed, and the judgment of the trial court dismissing O.S. No. 465/2014 is confirmed.*

2. *A.S. No.65 of 2019 is allowed. The judgment and decree of the trial court dismissing the counter-claim are set aside.*
3. *The counter-claim is hereby decreed.*
4. *The counter-claim item No.1 property is identified as situated within letters “HIJKLMNQPQRSTH” in Ext. C1(a) plan.*
5. *The counter-claim item No.1 property shall physically be demarcated from the properties of the original plaintiff and the original second defendant at the expense of the counter-claim plaintiff 1.*
6. *The counter-claim defendant is prohibited by a permanent prohibitory injunction from restraining the counter-claim plaintiffs from using the counter-claim item No.1 property.*
7. *Ext. C1(a) plan shall form part of the decree.*
8. *The counter-claim plaintiffs (Appellants in A.S. No. 65 of 2019) are entitled to the costs throughout, including both appeals, from the original plaintiff.*

(Dictated to and typed by the Dictation Software, corrected by me and pronounced in open court on this the 31st day of March, 2026)

Sd/-
Dr. Satheesh Kumar V
Addl. District Judge-IV

APPENDIX- Nil

Id/-
Addl. District Judge-IV

// True Copy //

Copied by :-
Compared by:-

Sd/-
Dr. Satheesh Kumar V
Addl. District Judge-IV

