

**IN THE COURT OF ADDITIONAL DISTRICT JUDGE-IV, KOTTAYAM**

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

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

**A. S. No.65/2020**

(O. S. No.206/2016 of Munsiff's Court, Vaikom)

Appellant : -

- 1 Sadasivan, aged 65 years, S/o Narayanan,  
Munduchirayil House, Udayanapuram P O., Vaikom.
- 2 Girija, aged 57 years, W/o Sadasivan,  
Munduchirayil House, Udayanapuram P O., Vaikom.  
By Adv. P Rajeev

Respondents :-

- 1 Sarada, aged 71 years, W/o Thankappan,  
Moolamthottil Houe, Vadakkemuri Village,  
Udayanapuram P O., Vaikom, Kottayam District
- 2 Venugopal, aged 50 years, S/o Thankappan,  
Mullackal House, from Moolamthottil House,  
Udayanapuram P O., Vaikom
- 3 Biju, aged 46 years, S/o Thankappan, Moolamthottil House,  
Udayanapuram P O., Vaikom, Kottayam District
- 4 Sabu, aged 44 years, S/o Thankappan,  
Moolamthottil House, Udayanapuram P O.,  
Vaikom, Kottayam District.  
R1 to R4 - By Adv. Jayakrishnan R

This Appeal having been finally heard on 19.03.2026 and the Court on 31.03.2026 delivered the following :-

**JUDGMENT**

1. This appeal is preferred by the defendants in O.S. No. 206 of 2016 on the file of the Court of the Munsiff, Vaikom, challenging the judgment and decree dated 14/01/2020, whereby the trial court fixed the boundary separating the plaint schedule Item No. 1 and 2 properties as per the Ext. C1(a) plan and granted a permanent prohibitory injunction against the defendants. The parties

will hereinafter be referred to according to their status in the original suit for the sake of convenience.

2. The case of the plaintiffs, in brief, is that they own and possess 67 cents of land in Survey Nos. 158/20/2 and 176/14 in Vadakkemuri Village. They acquired this property through Sale Deed No. 1542 of 1992 from the Thalayolaparambu Registry. The property is bounded by a canal (thodu) on the east and south, and a pathway on the west. The dispute concerns the northern boundary of the plaintiffs' property, which borders land owned by the defendants. The plaintiffs state that there was previously a boundary marked by a fence, and the defendants have been gradually destroying these boundary markers with the intention of encroaching upon the plaintiffs' land. Specifically, the plaintiffs contend that valuable trees are located approximately 1.5 meters south of the original northern boundary. They believe the defendants destroyed the boundary markers specifically to misappropriate these trees and claim that portion of the land as their own. Consequently, the plaintiffs filed the suit to fix the northern boundary of their property (Item No. 1) by conducting a survey based on their title deeds, and to grant a permanent prohibitory injunction restraining the defendants from interfering with the construction of a permanent boundary or damaging it after the boundary is fixed through the court.
3. The defendants resisted the suit by filing a written statement, contending that the plaintiffs are attempting to seize land and claim ownership of valuable trees located within their property. They assert that these trees are situated 1.5 meters south of the existing canal's southern bank, placing them within their property. The defendants state that the properties (Item No. 1 and the defendants' property) are separated by a water-flowing canal. Earlier, this canal had a width of three meters, and both plaintiffs and defendants had equal rights to it, each owning half. The defendants claim that the plaintiffs gradually filled in their half of the canal. As a result of the plaintiffs' filing,

the canal's width has been reduced to 1.5 meters, and the defendants now claim that the remaining portion belongs exclusively to them. Based on the existence of this canal, the defendants deny the plaintiffs' assertion that there are no boundary markers between the properties. The defendants also point out that the plaintiffs' property description is vague and misleading, failing to account for land lost to a public road (approximately 6 feet wide and 50 feet long) that passes through the center of the plaintiffs' plot. The defendants clarify that they do not reside on the disputed Item No. 2 property. Instead, they live in a house located on a contiguous 10-cent plot belonging to the first defendant's father. They state that the plaintiffs misrepresented the western boundary of Item No. 2 by omitting this 10-cent property and listing only a pathway. The defendants maintain that because a clear, physical boundary (the canal) already exists, there is no legal or factual basis for a survey or a permanent injunction. They pray for dismissal of the suit.

4. On the side of the plaintiffs, the fourth plaintiff was examined as PW1, and Exts. A1 to A3 were marked. On the side of the defendants, the second defendant was examined as DW1, and Exts. B1 to B3 were marked. The Advocate Commissioner's report and survey plan were marked as Exts.C1 and C1(a).
5. The trial court, after evaluating the evidence, found that the boundary description in the defendants' prior title document (Ext. A3) supported the plaintiffs' case. It held that the "CD" line in Ext. C1(a) correctly demarcated the properties and fixed the boundary accordingly, while restraining the defendants from trespassing or obstructing the construction of a compound wall.
6. Aggrieved by the said judgment and decree, the defendants have preferred this appeal. The grounds of appeal raised by the learned counsel for the appellants/defendants are as follows:

(i) The trial court committed a grave procedural error by not permitting the examination of the Advocate Commissioner and the Surveyor, despite their inclusion in the witness schedule.

(ii) The court failed to correctly interpret the southern boundary description in Ext. A3, which mentions the property in Survey No. 158/20.

(iii) The survey report (Ext. C1) is patently defective as it shows an extent of 68 cents for Item No. 1 instead of the 67 cents mentioned in the title deed, without any explanation for the excess.

(iv) The survey was flawed for failing to separately measure and exclude the 10-cent Kudikidappu land (Ext. B1), which lies contiguously with the disputed area.

7. Heard both sides and perused the documents.

8. **Considering the arguments raised, the following points arise for determination in this appeal:**

(i) Whether the trial court was justified in passing a decree without affording the defendants an opportunity to examine the Advocate Commissioner and the Surveyor to prove the alleged defects in Exts. C1 and C1(a).

(ii) Whether the identification of the boundary and the fixation of the "CD" line as per Ext. C1(a) are sustainable considering the descriptions in the title deeds and the physical features on the ground.

(iii) Whether the judgment and decree of the trial court require interference or if a remand is necessary for a fresh adjudication.

9. **Point Nos. (i) and (ii):** These points are closely connected and are considered together. The primary grievance of the appellants is the denial of the opportunity to cross-examine the expert witnesses. It is seen from the trial court records that the defendants had filed an objection dated 28/02/2019 to the survey commission report, and a witness schedule dated 11.12.2019, including the Advocate Commissioner and the Surveyor, to highlight the errors in the survey measurements, which they pointed out in the objection.

On 11.12.2019, the plaintiff was examined, and on the next adjournment date, i.e, on 17.12.2019, DW1 was examined, and the documents were marked. No summons was ordered to witness 3 and 4 in the witness schedule dated 11.12.2019, who are the commissioner and the surveyor.

10. The report of an Advocate Commissioner is evidence under Order XXVI Rule 10(2) of the Code of Civil Procedure. However, when a party files serious objections to the report and seeks to examine the Commissioner or the Surveyor to test the accuracy of the measurements or the methodology adopted, the court should not shut out such evidence. By proceeding to judgment without issuing summons to examine the said witnesses, the trial court has deprived the defendants of a meaningful opportunity to challenge the very basis of the boundary fixation.
11. Regarding the property descriptions, the defendants argue that the "thodu" mentioned in their later deed (Ext. B2) is a natural physical landmark. The plaintiffs, on the other hand, rely on the prior deed (Ext. A3) to argue that no such canal existed as a boundary. This court notes that when a thodu or canal existed, its partial reclamation by one party exclusively would require careful scrutiny. Furthermore, the survey report (Ext. C1) shows an extent of 68 cents for the plaintiffs' property, while their title deed (Ext. A1) only grants them 67 cents. In a suit for boundary fixation, an unexplained excess of land in the survey plan, coupled with the arbitrary fixing of a boundary line based solely on a party's direction, constitutes a significant defect.
12. Considering the 10-cent Kudikidappu property (Ext. B1), the defendants contend it was measured as part of the contiguous block without separate demarcation. If the Kudikidappu land and the Item No. 2 property were measured together without excluding the specifically allotted 10 cents, the resulting extents and the placement of the boundary line would inevitably be inaccurate. These are not merely technical errors but issues that affect the

merits of the identification itself. These points are decided in favour of the appellants.

13. **Point No.(iii):** In view of the findings on the points above, this court is of the opinion that the trial court failed to appreciate the evidence in the correct perspective. No sufficient opportunity was given to the appellant to examine the Commissioner and the Surveyor. The power of an appellate court to remand a case is governed by Order XLI Rule 23-A of the CPC. As held by the Hon'ble Kerala High Court in *John V. Augustine Vs. M. R. Renjan* [F.A.O. (R.O.) No. 341 of 2014, decided on 20/07/2016], a remand is legally justified when the appellate court finds that the decree is to be reversed and a retrial is essential for the complete adjudication of the lis.
14. It is settled law that remand should not be done as a matter of course. However, when the identification of the suit property is itself in a cloud due to measurement inconsistencies and the denial of expert testimony, a retrial becomes a necessity to do justice. Similarly, in *Municipal Corporation, Hyderabad v. Sunder Singh* [(2008) 8 SCC 485], the scope of Order XLI Rule 23-A was explained as being wider than Rule 23, allowing remand where the interest of justice demands a fresh look at the factual matrix.
15. Considering the facts of the present case, this court finds that the "twin conditions" for remand are satisfied. Firstly, the decree must be reversed due to the procedural lapse in issuing summons to examine the experts and the failure to account for the excess land and Kudikidappu demarcation. Secondly, a retrial is essential to correctly identify the boundary after affording both sides the opportunity to adduce fresh evidence, specifically by examining the Commissioner and the Surveyor.
16. Therefore, I hold that this is a fit case to exercise the power under Order XLI Rule 23-A of the CPC. The judgment and decree of the trial court are liable to be set aside, and the matter must be remitted for fresh consideration.

**17. In the result,**

- 1. The appeal is allowed.**
- 2. The judgment and decree passed by the Munsiff's Court, Vaikom, in O.S. No.206 of 2016 are hereby set aside.**
- 3. The case is remanded to the trial court for fresh disposal in accordance with the law. The trial court is directed to permit the appellants/ defendants to examine the Advocate Commissioner and the Surveyor.**
- 4. Both parties shall be afforded a fresh opportunity to adduce further evidence.**
- 5. The court fee paid on the memorandum of appeal shall be refunded to the appellants as per the rules.**
- 6. The parties shall bear their respective costs.**
- 7. The parties are directed to appear before the trial court on 20/05/2026.**

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

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

**APPENDIX- Nil**

Id/-  
Addl. District Judge-IV

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Copied by :-  
Compared by:-

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