

IN THE COURT OF THE MUNSIFF, KANJIRAPPALLY.

Present : Smt. Smitha Susan Mathew, Munsiff

Wednesday 30th October 2024

8^h Karthika 1946

O.S 67/2016

Plaintiff:-

Anvar, aged 44, S/o Muhammad Kunju,
Vazheparambil House, Kanjirappally P.O.,
Kanjirappally Kara, Koovappally Village,
Kanjirappally Taluk.

By Adv. Bilu G.

Defendant:-

M.S. Abdul Salam, aged 66, S/o Said Muhammad
Mankasseryilaya Thoufeeque Mansil (Ramanattu
Purayidam), Kanjirappally P.O., Kanjirappally Village,
Kanjirappally Taluk.

By Adv. Benny Jacob

This suit having been finally heard on 30.10.2024 and the court on the same day passed the following:-

**ORDER SETTING ASIDE THE COMMISSION REPORT
AND PLAN**

The suit is filed seeking a decree of permanent prohibitory injunction restraining the defendant from demolishing plaintiff schedule Item No.2 wall or committing waste thereon.

2. Defendant filed counter claim seeking a decree of permanent prohibitory injunction, restraining the defendant from demolishing plaint schedule Item No.2 wall.

3. **Plaint allegations in brief is as follows:-** Plaint schedule Item No.1 property was part and parcel of a property having a total extent of 1.86 ares and a shop room therein. The 1.86 Ares of property and the shop room was purchased by mother of the plaintiff and her siblings by virtue of sale deed No.3598/1975. This was later partitioned as per partition deed 111/2014 of the SRO, Kanjirappally. As per the partition deed 1.23 Ares of property and a part of the shop room became the share of plaintiff's brother Abdul Salam and the remaining 62 Ares of property and the portion of the shop room therein became the share of mother and her two brothers. The 62 square meter of property and the portion of shop room therein was given to plaintiff as per settlement deed No.1121/2014. This is the plaint schedule Item No.1 property. The northern side of plaint schedule Item No.1 property belongs to the defendant. The shop room which was constructed even before 1975 was in existence in plaint schedule Item No.1 property, the property on the southern side of plaint schedule Item No.1 property which belongs to the brother of plaintiff and northern side of plaint schedule Item No.1 property which belongs to the defendant. Defendant demolished the portion of the shop room in his property and constructed a new building on the northern side of plaint schedule Item No.1 property. This is

away from the northern wall of the portion of the shop room existing inside the plaint schedule Item No.1 property. The said northern wall of the shop room which is described as Plaint schedule Item No.2 wall is a supporting wall of the roof of the portion of shop room existing in the plaint schedule Item No.1 property and defendant have no right over the said wall. Plaint schedule Item No.2 is the wall of portion of the shop room in the plaint schedule Item No.1 property. The property claimed by plaintiff is comprised in resurvey No.105/46.

4. On the other hand, the property owner on the northern side of this property, who is the defendant claims that there was a concrete building in his property when he purchased counter claim Item No.1 property which is comprised in 105/45. The remnants of the said building ie, 3 pillars, connecting beam and a wall is existing in the said property. When he constructed new building, he had not demolished the said wall as the current connection belonging to him was attached to the said wall and the portion was proposed for a passage from K.K Road to the new building he constructed. This was proposed to be demolished later. The said pillars and wall are not in plaint schedule Item No.1 property or it is not the part of the shop room in the said building. Defendant alleges that the property description of the wall is incorrect. According to him, the said wall is made of bricks and is connecting 3 concrete pillars and the beam passing over it.

5. From the above contentions, it is discernible that the accurate location of plaintiff schedule Item No.2 wall is highly necessary to determine the dispute raised in the plaint and counter claim. For locating the position of the disputed wall a commissioner and joint commissioner to assist the commissioner were appointed. Surveyor who was examined as DW1 prepared C2(b) plan and the commissioner, PW2, filed C2 report along with C2(b) plan. None of the parties filed objection to the commission report and plan. Plaintiff amended the plaint and left the claim over the disputed wall by way of easement by prescription. He claims right over the disputed wall based on C2 and C2(b) which reports that the disputed wall is in defendant's property which is comprised in survey No.105/46.

6. Now the question to be considered is whether C2 and C2(b) plan are reliable to locate the position of disputed wall.

7. The court perused plaint, written statement with counter claim, written statement to counter claim, evidence of the witnesses examined. i.e, PW1 plaintiff, PW2 commissioner, DW1 surveyor, DW2 village officer, Kanjirappally, Ext.X1 series, the resurvey plan of resurvey No.105, block NO.11, Kanjirapally village and the sub division plans and the relating field book, C2 and C2(b) plan and other documents.

8. The entire measurements in C2(b) plan is fundamentally based on HIJ angle which is shown as $118^{\circ} 24' 20''$. According to DW1, H, I and J are

theodolite stations available at the place. The theodolite is used to measure angles in the horizontal and the vertical plane. Horizontal angles and vertical angles are measured with the help of horizontal circle and vertical circle inside the instrument. To measure the H I J angle, the instrument is to be arranged at I and locate J point and H point therefrom with the help of horizontal and vertical circles inside the instrument. In this case, the surveyor had not used theodolite instrument. His evidence does not show how he could measure $\angle HIJ$ as $118^{\circ} 24' 20''$. The J point is on the other side of Chittar which is on the Eastern side of the properties involved in the suit and counter claim. Surveyor deposed that he had not gone to the J theodolite station. Without plotting a 0° angle (0° line) either through 'IH' line or 'IJ' line, surveyor cannot measure $\angle HIJ$ as $118^{\circ} 24' 20''$. He has not stated how did he come to a conclusion that the said angle is $118^{\circ} 24' 20''$ without measuring the said angle using theodolite.

9. The surveyor had not measured the distance from I to J or I to H. But, 'IJ' is shown as 70.4 meter and 'IH' is shown as 32.0 meter. From the evidence it can be seen that he entered those measurements not by re-fixing, but by sketching or copying those measurements from the resurvey plan. Hence it is clear that plotting of 'IJ' line, upon which the entire further measurement are based itself is without actually measuring the angle or the distance from I to other theodolite stations.

10. His cross examination shows that for fixing the offset points 58,59,60,61 in C2(b), the 'IJ' line has to be fixed correctly. He states that 'IJ' line is at $118^{\circ} 24' 20''$ from HI line. But he has no answer to the question how did he fix 'IJ' line at the above said angle. This itself is sufficient to doubt the correctness of the offset points shown in C2 (b). 58,59,60 and 61 are the only offset points upon which the surveyor plotted C2(b) plan. The ladder is provided for those offset measurements only.

11. Evidence of DW1 shows that the line separating the plaintiff's properties and road is the one starting from point 58 and ends at the south-western portion of the plot in survey subdivision 47. He states that the said line is having 16.4 meter and 17.7 meter measures with a bent in the line. Surveyor claims that the bent is on the south-western corner of the property of defendant. He marked it as 'd'. He has two versions regarding the plotting of the south-western corner of the defendant's property. He stated that he had worked out from 58, 59 offset points. From the point 59, on the line having 27.5 meter length which connects offset point 58 and 59, he measured 21.9 meter towards the West and 16.4 meter from 58 towards the South and fixed the 'd' point which is, according to him, the south-western corner of property of defendant. He has no case that he measured the distance from 58 to 59 and found out it is 27.5 meter. Without fixing 59, he cannot measure 21.9 meter towards the West. The workout he made to locate offset 59 meter for preparing C2(b) or to reach a

decision that the distance is 27.5 meter is not clear from the C2(b) plan, report or his evidence. Already the correctness of offset points is under doubt due to non accounting of the plotting 'IJ' or 'IH' lines. The area of triangle 58 59 d is not given to check the correctness of the above said side measurements. His evidence also would show that the data to fix the 'd' point is not available in resurvey records.

12. Later, he deposed that he had not measured the distance from 58 to 59 i.e, 27.5 meter. Instead he measured the distance between 59 and d point i.e, 21.9 meter, considering that the measurement from 58 to 'd' is 16.4 meter. He never claims that he measured this 16.4 meter also. By considering these two measurements as base and altitude of the triangle 58 d 59, whose angular measurement at 'd' as 90° , calculated the hypotenuse i.e, distance from 58 to 59 as 27.5 meters. When he was asked how did he came to a conclusion that $\angle 58 d 59$ is 90° , he agreed that it is not 90° . Then he stated that, as that angle is not 90° , he found out a point as the west to 'd' point and formed a right triangle and then calculated the distance from 58 to 59 as 27.5 meters. The vertex of that triangle he relied on to calculate the distance is not shown in C2(b) plan. Moreover, what is the base and height distance he measured is not shown in C2(b) plan. C2(b) plan is prepared to demarcate accurately the boundary between 105/45 and 105/46. He himself deposed that if the 'd' point is on 28

cm south to the point presently located, the disputed wall will be in the property comprised in resurvey No.105/45.

13. DW2, the Village officer, Kanjirappally deposed that offset point 57 can be seen in the land resurvey plan of the field No.105 at the south-western corner of 105/45, referring Ext. X1. This offset point is not located in C2(b) plan. The available data are insufficient to determine whether offset point 57 and 'd' point marked by the surveyor are same. Accurate plotter of offset points 59 and 57 are highly necessary for finding out the boundary line between properties comprised in resurvey Nos.105/45 and 105/46. It is already found that locating 59 is incorrect as 'IJ' line is fixed without measuring <HIJ. Measurement available in C2(b) is insufficient to satisfy that 'd' point is located accurately. Locating offset point 57 is necessary to identify the south-western corner of the property 105/45. C2(b) plan can only be considered as a sketching based on available survey plan. Surveyor had not made any attempt to find out location of offset point 57.

14. The identification of the properties are highly necessary to determine who is in possession of the disputed wall. PW1 during cross examination stated that he was not aware that the disputed wall is in his property till the surveyor from the court measured the properties and located it in his property. In these circumstances, an accurate plan is highly necessary to locate the disputed wall. The available C2, C2(b) plan and report are

insufficient to locate the disputed wall. They are unreliable for the reasons stated above. Hence the commission report and plan are to be set aside and a fresh commission report with plan of surveyor is necessary.

15. In the result the C2, C2(b) commission report and plan are set aside. Adv. Bindhu M. Thomas and Sri. Jose Thomas are appointed as commissioner and joint commissioner to assist commissioner. Commission batta Rs.5000/- and Surveyor batta Rs.4000/- are fixed. Both parties shall share batta. Both parties are directed to handover necessary documents to the commissioner for measuring the properties at the earliest. A copy of this order is also to be handed over to the commissioner so as to identify the errors made in C2(b) plan.

Dictated to the Confidential Assistant transcribed and typed by her corrected by me and pronounced in open court on this the 30th day of October, 2024.

Sd/-

SMITHA SUSAN MATHEW
MUNSIFF

APPENDIX :-Nil

Id/-

MUNSIFF

// True Copy //

Typed By : Lucykutty Thomas

Compd. By : Rajalekshmi T.P.

MUNSIFF