

IN THE COURT OF MUNSIFF - MAGISTRATE, PERINTHALMANNA  
Present: Sri.Anandakrishnan S, Munsiff-Magistrate.

Monday, the 21<sup>st</sup> day of February, 2022  
2<sup>nd</sup> day of Phalguna, 1943.

ORIGINAL SUIT No. 1/2017

Between:-

Haneefa, 64 years, : Plaintiff.  
S/o.Paloli Muhammad,  
Kadungapuram amsom desom,  
Perinthalmanna Taluk.

And:-

Ayamu, 45 years, : Defendant  
S/o.Chelukad Machingal Muhammad Haji,  
Kadungapuram amsom desom,  
Perinthalmanna Taluk.

This Suit coming on 15<sup>th</sup> day of February, 2022 for hearing before me in the presence of Smt.N.P.Saleena, Advocate for the plaintiff and of Sri.C.H.Ashique, Advocate for the defendant and having stood over to this day for consideration, the court passed the following:-

### **J U D G M E N T**

Suit for permanent prohibitory injunction.

2. The case of the plaintiffs is that he derived title over the plaint schedule property vide sale deed No.1792/1988. Defendant has no manner right over the plaint schedule property. PWD road is passing through the western side of the plaint schedule property. There is a clear boundary demarcating the same. The plaintiff is conducting wood business in the two shop rooms constructed in the plaint schedule property. He is residing in the house in the plaint schedule

property. Property of Ummathoor Kunhalan is situated on the  $\frac{3}{4}$ <sup>th</sup> portion of the northern boundary of the plaint schedule property and same is separated by a granite wall. Property of Machingal Kunhimohammed is situated on the  $\frac{3}{4}$ <sup>th</sup> portion of the eastern boundary of the plaint schedule property and same is separated by compound wall. Defendant is having some property on the north eastern side of the plaint schedule property. Since a septic tank is situated on the north eastern boundary of the plaint schedule property, the same is covered by a concrete slab and there is a five feet high wall made of hollow bricks separating the plaint schedule property from the defendants property. The property of Cherukad Machingal Kunhimohammed situated on the southern side of the plaint schedule property is separated from the same by a well demarcated compound wall. Plaintiff has been enjoying the plaint schedule property since 1988. Defendant has build some quarters on his property 3 years back. Since defendant has not maintained the required setback while constructing the said building, it has not been assigned any building number. Plaintiff has complained before the Pulamanthole panchayath Secretary in this regard and they have inspected the same. Facts being so, on 31.12.2016 while plaintiff was in his shop defendant came with his henchmen and destroyed the hollow bricks wall situated on the north eastern side of the plaint schedule property and also attempted to dislocate the concrete slab of septic tank. When plaintiff rushed to the spot, defendant and his henchmen retreated for the time being. But, they threatened that they will come again and annex the plaint schedule property into his property. Hence, the plaintiff approached this court with the instant suit for a mandatory injunction directing the defendant to restore the hollow brick wall situated on the north eastern side of the plaint schedule property as it stood before. He has also sought for a perpetual injunction restraining the defendant and men under him from trespassing into the plaint schedule property.

3. The defendant entered appearance and filed written statement along with counterclaim by contending that the suit is not maintainable and the same is only experimental one. He contended that plaint schedule property is not identifiable. Plaint schedule property has been purchased by the plaintiff from the defendant's father. The boundaries and extent shown in the plaint are incorrect. Plaintiff has no property on the western side of the property of the defendant. The septic tank is located in the defendant's property. The quarters situated on the defendant's property was build around 10 years ago. The allegation regarding demolition of the hollow bricks wall is incorrect. While defendant's father assigned plaint schedule property to plaintiff, the northern properties were owned by the former and he has set apart a 3 feet wide way for accessing his remaining properties on the east. During 2013, when defendant and his brother Abdul Salam assigned some property to Avarankutty and Mohammed Ali, a way was created to the defendant's property from the public road and thereafter they were hardly using the old way. Only when the residents of the quarters informed the defendant, he noticed that plaintiff has destroyed the compound wall and annexed a portion of his property to the plaintiff's property by constructing a septic tank. Even though, the defendant approached the plaintiff demanding reconstruction of the compound wall and to restore the property as it is stood before, it was turned down by the plaintiff. Hence, the defendant sought for dismissal of the above suit filed without any bonafide cause with his compensatory costs.

4. **Defendant filed counter claim raising the following contentions**:- Counterclaim A schedule property originally belonged to the father of the defendant. Now the same devolved upon the defendant and he has constructed quarters in the said property. Counterclaim B schedule property is part of the A schedule property and which is now under the possession of the

plaintiff. Plaintiff purchased his plaint schedule property from the defendant's father. The properties on the east, south and north of the plaint schedule property were the properties of the defendant's father. The properties situated on the west of the counterclaim A schedule property and north of the plaint schedule property is the property of Kunhalan. There is a way starting from the western PWD road terminating in the south- western corner of counterclaim A schedule property, passing through the south of Kunhalan's property and north of plaint schedule property. This way is described as counterclaim C schedule property. Defendant's father has set apart the counterclaim C schedule as a pathway to the counter claim A schedule. The same is now under the exclusive ownership of the defendant. During 2013, while defendant and his brother Abdul Salam alienated 15 cents of property to one Avarankutty and Mohammedali they have set apart a way having direct access to the PWD road. Since heavy vehicles could not ply through counterclaim C schedule way, the above said way having width of 10 feet was created in 2013. The majority of the property on the south of counterclaim A schedule is the property of defendant's brother. So he barely inspected the southern portion of his property. He inspected the southern portion of his property around 6 months prior to the suit at the request of the residents of the quarters. Then only he came to know the illegal construction of the plaintiff. After the filing of the suit, plaintiff abused defendant while he accessed counterclaim A schedule property through the counterclaim C schedule and also threatened him. Now the defendant is using the way between the properties of Avarankutty and Mohammedali as a way to the counterclaim A schedule. If they obstruct the same, then counterclaim C schedule is defendant's only access use property. Hence, defendant has filed this counterclaim seeking for the relief of the recovery of plaint B schedule portion from the plaintiff and also for the relief of the mandatory injunction directing

the plaintiff to remove unlawful construction in the B schedule and restore the compound wall. He has also sought for the relief of the perpetual injunction restraining the plaintiff from trespassing upon the counterclaim C schedule way.

**5. Plaintiffs filed written statement to counter claim raising the following contentions:-** Counter claim is not maintainable either on law or on facts. Defendant is bound to prove the averments with respect to the counter claim A schedule property contained in para No.9 of the written statement with counter claim. Counter claim B schedule property is not identifiable. Counter claim C schedule way is only an imagination of the defendant. The averments with respect to the counter claim C schedule way are denied as false. In fact, there is no such way as counter claim C schedule and the same has never come into existence. The averments with respect to the cause of action stated in the written statement with counter claim are devoid of merits. Plaintiff has constructed the septic tank in his own property. A compound wall was build above the said septic wall demarcating the properties of both plaintiff and defendant. In fact counter claim B and C schedule properties form part of the plaint schedule property owned by the plaintiff. During 1988 itself, defendant's father had installed barbed wire fencing separating the plaint schedule property with his northern property. The septic tank installed in the plaint schedule property was constructed during 1993-1994, when the plaintiff built a house in the plaint schedule property and started to reside therein. During 2000, defendant's father has replaced the barbed wire fencing with the foundation of a compound wall. Facts being so, during 2004, property disputes arose within defendant's family and defendant's father partitioned his properties. The property on the north of the plaint schedule property was allotted to the share of defendant's sisters who in-turn build the compound wall on the south of their property and sold the property to the present owner namely Kunhalan. Till

2004, the property on the north of the plaint schedule property as well as the defendant's property were under the ownership of defendant's father. So there was no need, whatsoever, for the creation of the so called counter claim C schedule way. Also, the well in the plaint schedule property which was constructed in the year of 1989 is situated at the middle of so called counter claim C schedule way. Counter claim B and C schedule properties are the part and parcel of the plaint schedule property. Defendant has no manner of right over the same. Even if it is found that defendant has any right over the said properties, the same got extinguished by the law of adverse possession. Hence the plaintiff sought for dismissal of the counter claim with her costs.

6. The court raised the following issues for consideration on the basis of plaint and written statement with counter claim.

1. Whether the plaintiff is entitled to perpetual injunction as prayed for?
  2. Whether the defendant/ counter claim plaintiff is entitled to a mandatory injunction as prayed for?
  3. Whether the defendant/ counter claim plaintiff is entitled to recover possession of plaint B schedule on the strength of his title?
  4. Reliefs and costs.
- **Addl. Issue No.5**:- Whether the plaintiff is entitled for mandatory injunction as prayed for?
  - **Addl. Issue No.6**:- Whether the defendant/ counter claim plaintiff is entitled for a perpetual injunction as prayed for?

7. Evidence herein consists of the oral testimony of PW1 to PW4 and Ext.A1 to Ext.A8(series) documents on the side of the plaintiffs and oral evidence of DW1 and Ext.B1 to Ext.B3 documents on the side of the defendant. Exts.C1, C2, C3, C1(a), and C3(a) are the commissioner's reports and plan.

8. Both sides were heard in detail.

9. **Issue No.1**:- It is the case of the plaintiffs that the plaint schedule property is under his absolute ownership and possession. He purchased the same from the father of the defendant vides Ext.A1 sale deed. Now, defendant is having some property on the north eastern corner of the plaint schedule property. On 31.12.2016 while plaintiff was in his shop, defendant came with his henchmen and destroyed the hollow bricks wall situated on the north eastern side of the plaint schedule property and also attempted to dislocate the concrete slab of septic tank situated in his property. Plaintiff apprehends further invasion from the side of defendant and hence he filed this suit. Whereas defendant has filed his written statement with counter claim stating that plaintiff has no property on the western side of the counter claim A schedule property. Plaintiff has annexed counter claim B and C schedules to his plaint schedule property. Counter claim B schedule is the part and parcel of counter claim A schedule, which is now under the illegal possession of the plaintiff. Counter claim C schedule is a pathway starting from the western PWD and terminating in the south-western corner of the counter claim A schedule property. Hence he sought for a decree of recovery of possession of the counter claim B schedule, mandatory injunction to restore the counter claim B schedule property and for a perpetual injunction against plaintiff restraining him from trespassing upon the counter claim C schedule way.

10. Learned counsel for the plaintiff argued that Exts.A6 and A7 show that plaintiff is having settled possession over the plaint schedule property.

It is further argued that Counter claim A schedule property is not identified as per the title deed of defendant and that the existence of C schedule is not proved. Defendant has failed to prove that he has title over the counter claim B schedule portion, sought to be recovered. Since PW4 has reported in the Ext.C3 report that boundary of plaintiff schedule property extends further eastwards, the claim of defendant that plaintiff is having no property on the western side of plaintiff schedule property also turned out to be false. Hence she sought for dismissal of the counter claim with her costs. On the other hand, learned counsel for the defendant/ counterclaim plaintiff stated that as per Ext.A1 title deed, plaintiff has title only over 4 cents of property, whereas as per Ext.C3 report, he is stated to be in possession of 5 cents of property. Plaintiff has filed to account for the excess one cent of property in his possession. According him, plaintiff has not taken any steps to identify the plaintiff schedule property as per Ext.A1 title deed and that plaintiff has failed to prove his possession over 5 cents of property. Hence, he sought for a decree as prayed for in the counter claim and dismissal of the plaintiff with his costs.

11. Both the plaintiff and defendant were examined as PW1 and DW1 respectively. They affirmed to their pleadings in the proof affidavit filed in lieu of examination-in-chief. It is admitted by DW1 that there is no dispute with respect to the survey numbers of the properties involved in the lis. In order to be entitled for the relief of injunction, a party has to prove that he is in possession of the property in dispute. As far as the relief of perpetual injunction claimed by the plaintiff is concerned, the moot question is whether the plaintiff has proved his possession over the plaintiff schedule property. From the schedule appended to the plaintiff, the plaintiff schedule property is shown to have an extent of 4 cents. This is also true as per the Ext.A1 title deed of the plaintiff. Learned counsel for the defendant has contended that after the properties were surveyed

and demarcated by the surveyor and Advocate commissioner, the extent of the plaint schedule property was found out to be 5 cents. Plaintiff has failed to account for the excess one cent and this proves fatal to the case set up in the plaint, argued the learned counsel for the defendant.

12. According to the PW1, while he purchased the plaint schedule property from the defendant's father, the abutting properties were under the ownership of the latter. In fact, he purchased the plaint schedule property as per the side measurements shown in the Ext.A1 title deed and the same was having an extent of 5 cents. When PW1 was asked regarding the 4 cents shown in the Ext.A1 title deed, he pleaded ignorance. But, he affirmed to his version that the plaint schedule property was purchased from the defendant's father as per the description shown in Ext.A1. Learned defense counsel has stated that PW1 has not offered any explanation for not mentioning that he is in possession of 5 cents of property and that plaint has not been amended to incorporate the extent of plaint schedule property as 5 cents after the filing of Ext.C3 plan and Ext.C3(a) plan respectively by the Advocate commissioner. It is also pointed out by the learned defense counsel that, plaintiff has taken a vague contention in his replication that counterclaim B and C schedule properties are part of the plaint schedule property and that even if it is found that defendant has any right over the said properties, the same got extinguished by the law of adverse possession. Learned defense counsel argued that any claims with respect to adverse possession has to be specifically pleaded and the same is conspicuously absent in the pleadings of the plaintiff. He had relied on the decisions reported in **2012 KHC 4245** and **2010 KHC 4967**.

13. An identical issue arose in the decision of the Hon'ble High Court in **Chandrakumar vs. Narayanan Bahuleyan and Another** reported in **2011 (2) KHC 884**. It has been held in the said decision that "*The extent shown*

*in item No. 2 in Ext. A1, which is the plaint schedule property, is 14 cents. The only contention raised by the plaintiffs is that at the time of re - survey settlement, the extent was found to be 17.5 cents. The Commissioner, on measurement of the property in accordance with the boundaries, found that the extent of the property is 7 Ares 40 Sq.m. equivalent to roughly 18.5 cents. No averments are made in the plaint as to how the excess extent happened to be in the possession of the plaintiffs. This would have assumed importance if the boundaries of the property could not be fixed in accordance with the description of boundaries shown in the title deeds. If the boundary is to be fixed only on the basis of the extent, this difference in extent and lack of pleadings may assume importance. When the description of boundaries is clear, and within the four boundaries stated in the document more extent of land than that shown in the document is found to be in the possession of the plaintiffs, the mere fact that there is larger extent than that shown in the document by itself would not deprive the plaintiffs to get title to the excess extent”.*

14. The specific case of the plaintiff is that he is in absolute possession and enjoyment of the plaint schedule property and the same is clearly demarcated with well-defined boundaries on all sides. Only when the defendant demolished the brick wall situated on the north-eastern corner of his property, he has come up with this suit. In order to prove his possession over the plaint schedule property, plaintiff has produced Exts.A1 to A3 and A5 to A7 documents. Exts.A2, A3 and A5 series shows that plaintiff is remitting basic tax in respect of 5 cents of property. Exts.A6 and A7 are the possession certificates issued in respect of the plaint schedule property and the same was proved through PW2. Even though PW2 deposed that he was not sure as to whether the plaint schedule property was inspected before the issuance of Exts.A6 and A7, it is sufficient to establish his de jure possession over the plaint schedule property.

Ext.A8 also shows that plaintiff is in possession of the building in the plaintiff schedule property. So the only question remaining to be answered is whether the plaintiff schedule property has been clearly demarcated.

15. As evident from the pleadings and evidence, the dispute in this suit is confined to the north-eastern boundary of the plaintiff schedule property. As per Ext.C1 report, counter claim A schedule property is situated on the north and east of the plaintiff schedule property. In the Ext.C3 report, Commissioner has reported that there is a laterite wall on the north of the plaintiff schedule property. From the Ext.C3(a) plan, it is revealed that plaintiff schedule property is marked as 'ABCDFEA'. But while in the box, PW4 deposed that even though it is stated in the Ext.C3 report that the northern boundary of plaintiff schedule property is counter claim C schedule property, the actual northern boundary is the property of Kunhalan and that there is a granite wall separating plaintiff schedule property with the property of Kunhalan. It is also reported by PW4 in the Ext.C3 report that plaintiff schedule property and counter claim B and C schedule properties are lying as a compact plot. Existence of laterite wall is admitted by DW1 in his cross-examination. PW4 also testified that counter claim B and C schedule properties are part of the 5 cents of property in the possession of plaintiff. In the Ext.C1 report, Advocate Commissioner has specifically reported that he has seen remnants of a wall made of hollow-bricks and laterite stones on the north of the septic tank in the plaintiff schedule property, i.e, the north of the counter claim D schedule property. DW1 has even testified before the Court that he has demolished the wall on the north of the counter claim B schedule property. All these go on to show that there exists well demarcated boundary on the north of the plaintiff schedule property and that a portion of the same has been demolished by the defendant.

16. So this court is of the view that plaintiff has sufficiently established his possession over the plaint schedule property and that the same is clearly demarcated. The failure of the plaintiff to offer any explanation for him being in possession of 5 cents of property as distinct from the 4 cents mentioned in the Ext.A1 title deed appears to be insignificant in view of the decision rendered by our Hon'ble High Court in **Chandrakumar vs. Narayanan Bahuleyan and Another** reported in **2011 (2) KHC 884** and also since plaintiff has satisfactorily proved his possession over the 5 cents of property. So in light of the aforementioned discussion, this issue is found in favour of the plaintiff.

17. **Issue No. 2 and Addl. Issue No. 5:-** Defendant/ counter claim plaintiff has sought for a decree of mandatory injunction directing the plaintiff/ counter claim defendant to restore the wall on the north of the counter claim B schedule to its original position. Whereas in the plaint, plaintiff has claimed the relief of mandatory injunction directing the defendant to restore the hollow bricks wall situated on the north-eastern side of the plaint schedule property, which was demolished by the latter, to its original position.

18. Plaintiff's version is that defendant has demolished the wall made of hollow bricks on the north-eastern side of his property. Whereas, defendant/counter claim plaintiff has asserted that it was the plaintiff who demolished the said wall. In the Ext.C1 report, PW1 has reported that he has seen remnants of a wall on the north-eastern side of the plaint schedule property. Defendant's claim is that counter claim B schedule property is part of counter claim A schedule property. The validity of the said claim will be discussed in the subsequent paragraph. While being cross-examined, DW1 deposed that he has demolished the hollow bricks wall situated on the northern side of the septic tank. He further deposed that he demolished the same while demarcated the boundary of his counter claim A schedule property. In view of the said

admission, it is crystal clear that it was the defendant who has demolished the said wall.

19. The septic tank and the slab is situated on the south of the said wall made of hollow bricks. In the Ext.C3 report, PW4 has reported that the septic tank was built around at the same time as that of the construction of the house in the plaint schedule property. Whereas, the case of defendant is that the same is built after the institution of the suit. Commissioner has also reported that the counter claim B schedule property and plaint schedule property is lying as a compact plot. PW4 has also deposed before the court that counter claim B and C schedule property are part of the plaint schedule property. It has already been found out under issue No.1 that plaintiff is in settled possession of the plaint schedule property and that its actual extent amounts to 5 cents. In such a situation, defendant cannot be entitled for an order directing the plaintiff to remove the septic tank, its slab and fill the same with soil. Hence plaintiff is a decree of mandatory injunction as prayed for. Issue No.2 is found against the defendant/ counter claim plaintiff and additional issue No. 5 is found in favour of the plaintiff.

20. **Additional Issue No. 3:-** In order to claim recovery of possession of counter claim B schedule property from the plaintiff on the strength of title, defendant/counter claim plaintiff has to prove that counter claim B schedule portion is part of counter claim A schedule property and that the same is now under the illegal possession of the plaintiff/ counter claim defendant. Learned counsel for the plaintiff argued that in order to claim recovery of possession of counter claim B schedule property, the onus is on the defendant/ counter claim to prove that he has title over the property sought to be recovered. Whereas the learned counsel for the defendant contended that plaintiff has excess property in his possession that what was actually sold to

him. Only 4 cents was sold to the plaintiff by the father of defendant as per Ext.A1 title deed, whereas plaintiff now has 5 cents in his possession, argued the learned counsel. Hence he argued that the excess property with the plaintiff schedule property is the counter claim C schedule way and the portion of the counter claim A schedule property i.e, counter claim B schedule.

21. It is in this context the decision of the Hon'ble High Court of Kerala in **William Babu and Another vs. Helma Roy alias Emily Carmel** reported in **2017 KHC 1023** assumes significance. It was held in the said decision that *“When the reliefs of declaration and recovery of possession based on title have been sought for, the plaintiff has to stand on her own legs to prove that she has title. The weakness of the defence or the absence of title on the part of the defendants cannot be encashed by the plaintiff to prove the title of the plaintiff.”*

22. It has already been found out under issue No.1 that plaintiff is in settled possession of the plaintiff schedule property and that its actual extent amounts to 5 cents. PW4 has also deposed that he has identified the counter claim schedule properties as per the direction of defendant. He has also deposed that counter claim B and C schedule properties are part of plaintiff schedule property. The specific case of defendant is that plaintiff is in possession of excess property than what was actually sold to him. Merely because plaintiff is in possession of 5 cents of property, it doesn't mean that the excess 1 cent belongs to the defendant and is part of the counter claim A schedule property.

23. PW4 has reported in Ext.C3 report that counter claim B schedule property and plaintiff schedule property are lying as a compact plot and that there is no common boundary separating the same. He has deposed before the court that there is a concrete wall along the line shown as “BG” in the Ext.C3(a) plan. The same is marked as per the direction of defendant and the said concrete wall is aged more than 10 years. The portion marked as “CG” corresponds to

the eastern boundary of the counter claim B schedule property. So there exists well demarcated boundary on the east of the counter claim B schedule from the eastern property and the same is in continuation of the eastern boundary of the plaintiff schedule property. This leads to the inference that counter claim B schedule is part of the plaintiff schedule property.

24. In the Ext.C3(a) plan, commissioner has only measured the plaintiff schedule property and the counter claim schedule properties. It is not in dispute that defendant's father was the original owner of the plaintiff schedule property, counter claim schedule properties and the adjoining properties. DW1 has deposed that while plaintiff schedule property was alienated to the plaintiff, the remaining properties were not demarcated. Defendant has not taken any steps to survey and measure the extent of the properties adjoining the counter claim A schedule property so as to ascertain whether any portion of the counter claim A schedule property is included in the same. This assumes significance since PW4 has deposed that he has identified counter claim schedule properties as per the direction of defendant and not in accordance with his title deeds. Defendant/counter claim plaintiff cannot take advantage of any weakness in the case of plaintiff to prove his title over the counter claim B schedule portion. Onus is on the defendant to prove the same. Since the defendant has failed to discharged the said onus, this Court is of the view that defendant is not entitled for the relief of recovery of possession of counter claim B schedule on the strength of his title. Accordingly, this issue is found against the defendant/counter claim plaintiff.

25. **Additional Issue No.6:-** Defendant/counter claim plaintiff will be entitled for the relief of perpetual injunction only if he proves the existence of the counter claim C schedule way. According to the defendant, counter claim C schedule is the way starting from the western PWD road and terminating in

the counter claim A schedule way. Defendant contended that counter claim C schedule was in existence during the lifetime of his father. Defendant has contended that the same came into existence when defendant's father assigned counter claim A schedule in his favour. Whereas the learned counsel for the plaintiff contended that counter claim C schedule way is only an imagination of the defendant. According to her, till 2004 the property on the north of the plaintiff schedule property, the counter claim A schedule property and the adjoining properties were under the ownership of defendant's father. So there was absolutely no need to create such a way.

26. A perusal of the Ext.B1 title deed shows that there is no mention of a way adjoining the counter claim A schedule property. PW1 has deposed that there is no way to counter claim A schedule property from the western Malappuram-Kolathur PWD road. He categorically denied the formation of counter claim C schedule in the year of 2004. Whereas, DW1 deposed that his counter claim A schedule could be accessed from the western Malappuram-Kolathur PWD road and northern PWD road at the time of execution of Ext.B1 deed. He deposed that his sisters were given property on the north of plaintiff schedule property after counter claim A schedule was assigned in his favour. The contra-version stated in the written statement is denied by DW1. If that be so in the title deed of defendant's sisters, whereby property on the north of plaintiff schedule property was assigned in their favour, there would have been a mention of the so called counter claim C schedule portion. But no such title deed is produced by the defendant to prove his case. Had there been such a way, the same would also have been mentioned in the title deed of Ummathur Kunhalan, i.e, the northern property owner. The same is also not seen produced.

27. In the Ext.C3 report, commissioner has specifically reported that he has witnessed the very old compound wall of the well in the plaint schedule property and concrete slabs of septic tank in the alleged way portion. He has also reported that he was unable to note any portion in the form of a way as per the description of the counter claim C schedule property. The compound wall of the well in the plaint schedule property is reported to be having the same age as that of the house in the plaint schedule property. In the Ext.C2 report also, Commissioner has reported that the said compound wall of the well is protruding towards the counter claim schedule way portion. DW1 is silent about the well situated in the middle of the counter claim C schedule way. In cross examination, he has admitted that he has not taken any steps to remove the well, thereby clearing the counter claim C schedule way. Commissioner has also reported in Ext.C3 that apart from the 2.75 metre wide way on the north of the counter claim A schedule property, there is no other way for ingress and egress to the counter claim A schedule way. It is also pertinent to note that defendant has not filed any objection to Exts.C3 report and C3(a) plan. This is admitted by DW1 in his cross-examination. DW1 has also gone to the extent of deposing that his father has not alienated counter claim C schedule property to anybody. This appears bizarre as the law is well settled that there cannot be any property without any owner. Hence, this court is of the view that defendant/counter claim plaintiff has miserably failed to prove the existence of the counter claim C schedule way and thereby he is not entitled for a perpetual injunction in respect of the so called counter claim C schedule way. Accordingly, this issue is found against the defendant/ counter claim plaintiff.

28. **Issue No.4:-** In the light of my findings on Issue Nos.1 to 3 and Additional Issue Nos.5 and 6, the plaintiff is entitled to succeed and the defendant/ counter claim plaintiff is liable to fail. Suit is liable to be decreed

with costs and the counterclaim is liable to be dismissed. Considering the nature of contentions raised by the parties, this court is of the finding that the plaintiff is entitled for costs of the suit also.

29. In the result, the suit is decreed with costs and the counterclaim is dismissed as follows:

- i. The defendant or anybody claiming through him are hereby restrained from trespassing into the plaint schedule property or from annexing the same to his property.
- ii. The defendant is hereby directed to restore and reconstruct the hollow-bricks wall situated on the north-eastern corner of the plaint schedule property, demolished by him, within a period of 30 days from today.
- iii. Plaintiff is permitted to realize costs of the suit from the defendant/ counter claim plaintiff and his assets.

*(Dictated to the Confidential Assistant, typed by her, corrected by me and pronounced in open court this the 21<sup>st</sup> day of February, 2022)*

Sd/-  
Munsiff – Magistrate

Appendix:

Witness examined from the side of Plaintiff:

PW1. : 13.01.2020 : Haneefa.  
 PW2. : 20.01.2020 : M.Rajesh.  
 PW3. : 20.01.2020 : Krishnankutty.J.  
 PW4. : 20.01.2020 : Mohammed Sabeer.P.

Witness examined from the side of Defendant:

DW1. : 27.01.2020 : Ayamu.

Exhibits marked from the side of Plaintiff:

- Ext.A1. : 17.10.1988 : Certified copy of Janman Assignment deed.  
Ext.A2. : 21.12.2016 : Tax Receipt.  
Ext.A3. : 16.09.2015 : Tax Receipt.  
Ext.A4. : 20.12.2016 : Copy of complaint.  
Ext.A5. : 12.12.2013 : Tax Receipt (original)  
Ext.A5(a). : 22.02.2010 : Tax Receipt(Original)  
Ext.A5(b). : 10.06.2002 : Tax Receipt (Original)  
Ext.A5(c). : 07.08.2000 : Tax Receipt (Original)  
Ext.A6. : 16.11.2000 : Possession certificate.  
Ext.A7. : 14.02.2006 : Possession certificate.  
Ext.A8. : : Copy of building assessment.

Exhibits marked from the side of Defendant:

- Ext.B1. : 16.06.2004 : Janman Assignment deed No.1800/2004.  
Ext.B2. : 05.01.2013 : Janman Assignment deed No.134/2013.  
Ext.B3. : 04.07.2019 : Tax Receipt.

Court Exhibits:-

- Ext.C1. : 24.01.2017 : Commission report by Adv.Mansoor.M.P.  
Ext.C1(a).: 24.01.2017 : Plan by Adv.Mansoor.M.P.  
Ext.C2. : 08.12.2017 : Interim report by Adv.Mohammed Sabeer.P.  
Ext.C3. : 02.02.2018 : Commission report by Adv.Mohammed Sabeer.P.  
Ext.C3(a): 02.02.2018 : Plan by Adv.Mohammed Sabeer.P.

Sd/-  
Munsiff-Magistrate

Fair /Copy of Judgment in  
OS 1/2017  
Dated 21-02-2022