

IN THE COURT OF MUNSIFF, THIRUVALLA

Present:-Sri. Aravind S.J, Munsiff.

Tuesday the 21st day of May 2024/ 30th day of Vaisakha 1946 SE.

IA 1/23 & IA 5/24 in OS 332/23

IA 1/23 in OS 332/23

BETWEEN

Mini Kurian, aged 56, D/o Kurian,
Kodiyattu Poovamnilkkunnathil Veedu,
Paliyekkara Muri, Thiurvalla Village &
Taluk rep. By power of attorney holder
Claramma Jacob, aged 67, W/o
Kocheeppan Mappila, Puthenparambil
Kandathil, Kavumbhagam P.O & Village,
Thiruvalla Taluk.

Plaintiff
Petitioner

(Adv. Abhilash Gopan)

AND

St. Mary's Orthodox Suriyani Church,
Puramattom P.O & Village, Mallappally
Taluk rep. By Trustee, Jerry Mathew, aged
35, S/o Mathew John, Manjumoodu
Veedu, Puramttom P.O & Village.

Counter Petitioner
Respondent

(Adv. Mathew John)

IA 5/24 in OS 332/23

BETWEEN

St. Mary's Orthodox Suriyani Church,
Puramattom Village & Muri, Mallappally
Taluk rep. By Trustee, Jerry Mathew, S/o
Mathew John, Manjumoodu Veedu,
Thelliyoor Muri & Village, Mallappally
Taluk.

Petitioner
Plaintiff

(Adv. Mathew John)

AND

Mini Kurian, aged 56, D/o Kurian, Kodiyattu Poovamnilkkunnathil Veedu, Paliyekkara Muri, Thiurvalla Village & Taluk rep. By power of attorney holder Claramma Jacob, aged 67, W/o Kocheeppan Mappila, Puthenparambil Kandathil, Kavumbhagam P.O & Village, Thiurvalla Taluk.	}	<u>Counter Petitioner</u> Respondent
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(Adv. Abhilash Gopan)

These petitions are filed under order 39 Rule 1, section 151 of Civil Procedure Code.

These petitions having been finally heard on 20.05.2024 and stood over for consideration on 21.05.2024 and on the same day the court passed the following:-

COMMON ORDER

A. I.A. 1/2023

The afore numbered application is filed by the plaintiffs in this suit under Order XXXIX Rule 1 of the Code of Civil Procedure, 1908.

2. Petition averments in brief are stated as follows: - The petitioner is the owner in possession of plaint schedule item No. 1 property as per Settlement deed No. 2079/2011 and is paying tax for the same. Kochedathu Mala – Thelliyoorkavu road is situated at the northern side of the northern property of item No. 1. Vellara Ambanikadu road runs at the southern side of the southern property of item No. 1. There was a pathway at the western side of the property of the plaintiff's father and eastern side of the property of the church connecting the aforesaid two roads. The petitioner, respondent and other neighboring

property owners were using the said pathway. The property of the respondent church is situated at the western side of item No. 1 property. Matters being so, the aforesaid pathway was widened to a width of 12 feet for a length of 80 meters till the north-western side of item No. 1 from the northern road. The said pathway is scheduled as item No. 3. The father of the petitioner thereafter gifted 4 ½ cents of property to the church as per the Settlement deed no. 1102/1987. The said property is scheduled as item No. 3. The then office bearers of the respondent gave permission to the father of the petitioner to use item No. 2 pathway and promised that they would not cause any obstruction to such user. Thus, the petitioner has permission to use item No. 2 pathway. There is no way other than item No. 2 pathway for access to item No. 1 property. The petitioner is employed abroad. The respondent contacted the petitioner during August 2023 for giving item No. 1 property for expanding the respondent church and for its parking. The petitioner told that she is not interested in selling item No. 1 property. The respondent with a view to pressurize the petitioner to sell item No. 1 property installed a gate having a width of 12 feet and height of 5 feet in item No. 2 property. The said gate is scheduled as item No. 4. The respondents have thereafter constructed a granite basement at the western side of item No. 1 property. The respondent thereafter threatened that they would close the gate and would not permit the petitioner to use item No. 2 pathway. The respondent had thereafter locked item No. 4 gate. They have no right or authority to do so. Hence, this petition.

3. The respondent entered appearance and filed objection contending as follows: The above I.A. is not maintainable under law or on facts. The respondent is governed by the 1934 constitution of Malankara Orthodox Suriyani Sabha. The suit is bad for non-joinder of necessary parties. The plaintiff is put to proof regarding the validity of Settlement deed No. 2079/2011.

The extent and description of item No. 2 property is false. The averment that KochedathuMala – Thelliyoorkavu road is at the northern side of the northern property of item No. 1 is false. Vennikkulam – Thundiylpadi Muthuppala Mampeman Panchayat road runs at the northern side of the northern property. A pathway is in existence at the western side of item No. 1 property and eastern side of the property of the respondent which connects the said roads. The people in the locality used to access the said pathway as a short cut and the respondent has not objected to the same. The petitioner and her father accessed item no. 1 property from the southern side of the said PWD road through the aforesaid pathway having a width of 7 feet. Item no. 1 property is situated at a lower level of approximately 4 ½ feet from the property of the respondent. The people in the locality had relinquished a portion of their land for access to the respondent church. Thus there is a way having width of 12 feet and length of 38 meter from the northern side of the panchayat road till the church compound. The said pathway is tarred using the funds of the church and a hoarding is erected at the northern side of the said pathway. There is no pathway as item no. 2 till the north-western side of item No. 1 as alleged. The petitioner has incorporated the property of the church as a part of item No. 2. It is true that the father of the petitioner had sold 4.16 ares of property as per Settlement deed no. 1102/1987. The respondent church had constructed a granite boundary separating item no. 3 property with the remaining property of the father of the petitioner in his presence. No pathway was set out for access to item No. 1 property. No agreement was entered into between the petitioner's father and the then office bearers of the respondent. More over as per the constitution of the sabha, no person can grant such a permission. It is false to allege that there is no way other than item No. 2 for access to item no. 1 property. The respondent has never attempted to purchase item No. 1 property from the petitioner. Item No. 2

and its northern property belongs to the respondent. The pathway is situated at the northern side of the said property. Item No. 4 gate is installed to protect the property of the respondent. The granite wall separating item No. 1 property with the property of the respondent was constructed long ago and the same was plastered 7 months ago as part of its maintenance. The petitioner has no right over item No. 2 property. The respondent has not threatened to close item No. 4 gate. The petitioner has not stated the nature of her right over item No. 2 pathway. The petitioner was attempting to cut down the rubber trees and to sell item No. 1 property by dividing it to different plots. The petitioner had sought permission of the respondent to take rubber timber through the property of the church. The respondent had informed that the same could be considered if a written request is given. However, Instead of making such a request, the petitioner filed the present suit experimentally. Thus the present petition is liable to be dismissed.

4. Heard both sides.
5. Points that arose for consideration are: -
 1. Whether there exists a prima facie case in favour of the petitioners?
 2. Whether balance of convenience tilts in favour of the petitioners?
 3. Whether refusal to grant injunction would cause irreparable injury to the petitioners?
 4. What is the order as to costs?

I.A. 5/2024

6. The afore numbered application is filed by the defendant in this suit under Order XXXIX Rule 1 of the Code of Civil Procedure, 1908.

7. Petition averments in brief are as follows:- The petitioner is the defendant in the suit. The plaint schedule item No. 1 property originally

belonged to the father of the respondent. He had gifted 4.16 cents of property to the petitioner as per settlement deed no. 1102/1987 of the Vennikkulam SRO. The petitioner is in possession of the said property along with their remaining property. The petitioner had constructed granite wall separating item No. 1 property during the said time itself. The respondent has no right over item No. 2 pathway and she can access item No. 1 property through its southern side and there exists a gate at the south-western side of item No. 1 property. The petitioner under the guise of the present suit is attempting to construct a new pathway to sell item No. 1 property by dividing the same into plots after cutting and removing the rubber trees therein. The petitioner is attempting to trespass into item No. 3 property and to demolish the boundary wall situated at the eastern and southern side of item No. 3 property and to construct a new pathway therein. The respondent has no right or authority to do so. The petitioner has a prima facie case and balance of convenience is also in their favour. Hence this petition.

8. The respondent filed objection contending as follows: The above I.A. is not maintainable under law or on facts. There is no road exclusively for the church. The road is constructed not by including any portion of the respondent's property. The existence of a pathway is mentioned in settlement deed no. 1102/1962. Moreover the existence of the said pathway is mentioned in the document through which the petitioner obtained right over the item No. 1 property. Item No. 2 pathway was in existence much earlier. It is shown in resurvey records as having a width of 3.3 meter. The said pathway is now not in existence as the respondent church was renovated by encroaching into the said way. The respondent has no right or authority to obstruct the user of the petitioner over the public pathway which starts from the southern PWD road till the northern road. The petitioner has no intention to alter the lie of item No. 3

property. She could access item No. 2 pathway even without demolishing the granite wall. None of the relief sought for can be allowed. Thus the present petition is liable to be dismissed.

9. Heard both sides.

10. Points that arose for consideration are: -

1. Whether there exists a prima facie case in favour of the petitioners?
2. Whether balance of convenience tilts in favour of the petitioners?
3. Whether refusal to grant injunction would cause irreparable injury to the petitioners?
4. What is the order as to costs?

11. On the side of the petitioners, Ext. A1 to A4 were marked for the purpose of this petition. The respondent did not produce any documentary evidence. The commission report and rough sketch were marked as Ext C1 and C1(a). The parties are referred to as per their status in I.A. 1/2023 unless otherwise requires.

12. **Point No.1 to 3 in I.A. 1/2023:-** To avoid repetition and for brevity, these points are considered together. The sum and substance of the case of the plaint schedule item No. 1 property belongs to the petitioner as per settlement deed No. 2079/2011. The plaint schedule item No. 3 property belongs to the respondent and the same was gifted by the father of the petitioner as per deed No. 1102/1987. There is a pathway having a length of 80 meter and width of 12 feet emanating from the northern Kochedathumala- Thelliyoorkavu road till the north-western side of item No. 1 property.. The same pathway is scheduled as item No. 3. It is the case of the petitioner that the respondent had permitted the petitioner and his predecessor in interest to use item No. 2 pathway. The bone of the contention of the petitioner is that the respondents have now put up item No. 4 gate and is attempting to cause obstruction to the

user of the petitioner over item No. 2 pathway. Per contra, the respondents contend that item No. 2 pathway as alleged in the plaint was never in existence. The defendants have alternate pathway for access to their properties and item No. 1 property is situated at a lower level of approximately 4 ½ feet than item No. 3 property. The neighboring property owners had relinquished portions of their property for widening the pathway to the respondent church and there exists a pathway having a width of 12 feet and length of 38 meters till the compound of the respondent church. The pathway does not proceed further. Therefore, the respondent contends that the petitioner has no prima facie case and thus the present petition filed by the petitioner is liable to be dismissed.

13. The suit and the present petition is filed by the petitioner through his power of attorney holder. The power of Attorney is produced and marked as Ext A1. The petitioner claims title over item No. 1 property as per settlement deed no. 2079/2011. The said deed is produced and marked as Ext A2. A perusal of Ext A2 would show that the petitioner obtained property having an extent of 87.50 ares in resurvey no. 353/6 of the Puramattom village. The title deed with respect to the property gifted by the father of the petitioner to the respondent church is produced and marked as Ext A3. A perusal of Ext A3 gift deed no. 1102/1987 would show that the father of the petitioner had gifted 4.16 cents of property at the western and northern sides of his remaining properties in favour of the respondent church. Therefore, it is evident that the plaint schedule item No. 1 property belongs to the petitioner and item no 3 belongs to the respondent church.

14. The dispute in the present case revolves around item No. 2 pathway. Before delving further, it is necessary to consider whether item No. 2 pathway is in existence. The Advocate commissioner appointed in the case filed Ext C1 report and C1(a) rough sketch. The Advocate commissioner

had reported the existence of item No. 4 gate which is installed 50 meters south of the point from where item No. 2 pathway begins. The report would show that item No. 2 pathway is clearly demarcated till the southern side of item No. 4 gate and thereafter the said pathway is lying contiguously with the property of the respondent. Therefore, it could be seen that the plaintiff schedule item No. 2 pathway after item No. 4 gate is not well defined and that item No. 2 pathway as alleged in the plaint is not in existence. This aspect lends credence to the contention of the respondents that the pathway which starts from the northern road is for access to the church and that the same does not extend till the north-western side of item No. 1 property.

15. The Advocate commissioner has also reported that item No. 1 property is situated at a lower level of approximately 3 ½ feet from the plaintiff schedule item No. 3 property. It is also reported that there is a pathway emanating from the southern Vellara Ambinikadu road through the southern and western side of item No. 1 property and the plaintiff can use the said pathway for access to item No. 1 property. Therefore there is no merit in the contention of the petitioner that he has no way other than item No. 2 for access to his property. The petitioner has produced Ext. A4 resurvey plan to show that the respondents cannot block item No. 2 pathway as the same is in the resurvey records as well. A perusal of the plaint and Ext. A2 would show that the plaintiff schedule item no. 1 property is situated in resy. No. 353/6. A perusal of Ext. A4 would show that a pathway is shown at the western side of the property in resy. No. 353/6.

16. The petitioner produced Ext. A5 report of the village officer dated 18-01-2024. The said document would show that the respondents had preferred a petition to the village officer to mutate item No. 3 property in their name. Report would disclose that the said property is part of resy. No. 353/6 and the

petitioner is presently paying tax for the said property. It is also reported that a puramboke way in resy.No. 353/4 is situated between the property in resy. No. 353/6 and the property belonging to the church in resy. No. 353/1 and the said pathway is not in existence. Therefore, even according to the petitioner, there is no pathway in existence as shown in Ext A4 are present. The petitioner had preferred a petition to reinstate the said puramboke pathway before the village officer. This would mean that the petitioner is claiming right of way over the puramboke land alleged to be in resy. No. 353/4. This runs counter to the averments and contentions made in the plaint and the present petition.

17. Even assuming that item No. 2 is in existence as alleged, could the plaintiff claim any right over the same. The answer would be an emphatic no. The petitioner claims that her father and his successors were granted permission to use item No. 2 pathway when Ext A3 was executed. Thus, the following conclusions could be safely drawn. The plaint schedule item No. 2 pathway is through the property of the respondent church. The father of the respondent was granted a mere permission to use the said pathway. This fact is repeatedly pleaded in the plaint. Therefore, the right claimed by the petitioner in the plaint schedule item No. 2 pathway is that of the license. No document is produced to show the alleged license. Even accepting the contention of the petitioner regarding the grant of permission, a permission to do a particular thing would never ripen into a right how so ever time elapses. Therefore, the petitioner has never obtained any right to use item No. 2 pathway. More over, it is no longer res integra that a license being purely personal between the grantor and grantee, the same is neither heritable nor transferable. Therefore even if the license as alleged is granted to the father of the petitioner, the said permission would not enure to the benefit of the petitioner herein.

18. Based on the aforesaid discussions, this court is of the opinion that

the petitioner has no prima facie case. It is already found that the petitioner has alternate access to item No. 1 property. Therefore the balance of convenience is in favour of the respondent. When the existence of item no. 2 pathway cannot be prima facie ascertained, irreparable injury would be caused to the respondents if an order of injunction is granted in favour of the petitioner. Hence, point No. 1 to 3 in I.A. 1/2023 is found against the petitioner.

19. Point No. 1 to 3 in I.A. 5/2024:- The present petition is filed by the respondent to restrain the petitioner from trespassing into item No. 3 property, from unauthorizedly traveling through the same, altering its lie, from causing any damage or alteration to the boundary wall at the southern and eastern side of item No. 1 property, from constructing any new pathway through the said boundary wall and from committing any waste in item No. 3 property. The Advocate commissioner has reported that there exist a boundary wall at the southern and eastern side of item No. 3 property separating it from item No. 1 property. The Advocate commissioner has also reported that the said compound wall was plastered almost 3 months back. It is interesting to consider that the petitioner has not stated anything about the existence of the said compound wall in the plaint and the present petition. It is already found that the petitioner has failed to show the existence of item No. 2 pathway in item No. 3 property.

20. Before delving further, it is necessary to consider whether an order of injunction can be granted in favour of the defendant. Order XXXIX Rule 1 is reproduced hereunder for easy reference:

“(1) Where in any suit it is proved by affidavit or otherwise:

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- b. that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

c. that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property (or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit) as the Court thinks fit, until the disposal of the suit or until further orders.”

21. The position is now well settled. Learned counsel for the respondent relied on the dictum of the Hon’ble High court in **Sathyabhama Amma V. Vijaya Amma** (1994 (2) KLT 856) in support of the proposition that the defendant can also seek injunction to restrain the plaintiff in cases covered by Clause (a) of Order XXXIX Rule 1. The apprehension stated in the affidavit along with the present petition and the relief sought for would show that the same comes under Order XXXIX Rule 1(a). Therefore this court has jurisdiction to pass an order of injunction in favour of the defendant / respondent. The respondent claims title and possession over item No. 3 property. The said fact is admitted by the petitioner. Even though the plaint schedule item No. 3 property is shown in the plaint to have an area of 4.16 Ares, the plaint schedule description would show that the extent stated is 80.94 Ares. Both parties are in agreement to the fact that the plaint schedule item No. 3 property was obtained as per Ext. A3 document. Ext. A3 would show that the property mentioned therein has an extent of 4.16 cents. Therefore it could only be concluded that item No. 3 property has an extent of 4.16 cents.

22. The petitioner has failed to prima facie show that he has any right over item No. 2 pathway. The averments of the petitioner in the plaint and injunction petition would itself justify the apprehension of the respondents. The respondent

thus has a prima facie case. Balance of convenience is also in favour of the respondent. If an order of injunction as sought for is not granted, it would cause irreparable injury to the respondent. Therefore this court is of the opinion that the present petition is liable to be allowed. Hence point No. 1 to 3 are found in favour of the respondent.

23. **Point No. 4 in I.A. 1/2023 and 5/2024:-** Based on the discussions made above, I.A. 1/2023 is liable to be dismissed and I.A. 5/2024 is liable to be allowed. There is no order as to costs.

In the result, I.A. 1/2023 is dismissed and I.A. 5/2024 is allowed as follows:-

- 1. The petitioner/Respondent in I.A No 5/2024 is restrained by an order of temporary injunction from trespassing into item No. 3 property, unauthorizedly traveling through the same, altering its lie, causing any damage or alteration to the boundary wall at the southern and eastern side of item No. 3 property, from constructing any new pathway through the said boundary wall and from committing any waste in item No. 3 property till further orders.**
- 2. There is no order as to costs.**

Dictated to the Confidential Assistant, transcribed and typed by her, corrected and pronounced by me in open court, this 21st day of May, 2024.

Sd/-

ARAVIND S.J
MUNSIFF

APPENDIX

Petitioner's Exhibits:-

- A1 - Power of attorney.
- A2 - Copy of deed No. 2079/11 dated 16.12.2011 of Vennikulam SRO.
- A3 - Copy of deed No. 1102/1987 dated 16.12.2011 of Vennikulam SRO.
- A4 - Copy of survey plan issued by Puramattom Village office.
- A5 - Report of the Puramattom Village Officer dated 18.1.2024.

Court Exhibits:

- C1 - Report filed by Advocate Commissioner Sijin.K.Raj.
- C1(a) - Rough Sketch filed by Advocate Commissioner Sijin.K.Raj.

Id/-
MUNSIFF

Fair/copy of order in
I.A No 01/23 & IA 5/24 in
OS 332/23
Dated 21.05.2024