

IN THE COURT OF THE MUNSIFF, KODUNGALLUR.

Present:-

Sri.M.I.Johnson, B.A. LL.M., Munsiff.

Wednesday, the 31st day of March, 2018/10th Chaithra, 1939

O.S.2647/2013

Plaintiffs

- 1 Padmanabhan, S/o. Muttathara Velayudhan, Parappuram desom, Kakkuliassery Village, Mukundapuram Taluk
- 2 Surya, aged 33, W/o. Muttathara Sivadasan, Parappuram desom, Kakkuliassery Village, Mukundapuram Taluk

By Adv. P.R.Ramesan

Defendants:

- 1 Gangadharan, S/o. Muttathara Velayudhan, Parappuram desom, Kakkuliassery Village, Mukundapuram Taluk
- 2 Kunjappan, S/o. Muttathara Velayudhan, Parappuram desom, Kakkuliassery Village, Mukundapuram Taluk
- 3 Balamani, aged 59, W/o. Muttathara Gangadharan, Parappuram desom, Kakkuliassery Village, Mukundapuram Taluk
- 4 Subhi, aged about 33, W/o. Manjanath Veetil Shaji, Parappuram desom, Kakkuliassery Village, Mukundapuram Taluk
- 5 Suja, aged about 33, W/o. Chiravattayi Veetil Shibu, Narayanamangalam desom, Pullut Village, Kodungallur Taluk

Additional defendants 6 & 7

- 6 Suraj, aged about 41, S/o. Muttathara Gangadharan, Parappuram desom, Kakkuliassery Village, Mukundapuram Taluk
- 7 Sunoj, aged about 35, S/o. Muttathara Gangadharan, Parappuram desom, Kakkuliassery Village, Mukundapuram Taluk

(Additional defendants 6 and 7 are impleaded as per order in I.A.1567/15 dated 15.09.2015)

D3,4,5 & 6 By Adv.D.T.Venkiteswaran

D2 & additional D7 exparte.

These suits are having come up for final hearing before me on 26.03.2018 in the presence of counsel for both sides and having stood over to consideration on 31.03.2018 and the court delivered the following:

JUDGMENT

Suit is for fixation of boundary and for permanent prohibitory.

2. Plaint averments in brief are stated as follows:- Plaint A and B schedule properties are belonged to first plaintiff and plaint C schedule property is belonged to second plaintiff. Plaint C schedule property is situated on Eastern side of plaint A and B schedule properties. First plaintiff obtained plaint A and B schedule properties through settlement deed No. 3085/1969 of Mala SRO. Second plaintiff obtained plaint C schedule property through document No. 2324/2013. First defendant obtained 6.5 cents of land on the North Western corner of plaint A and B schedule properties, 20 cents of land through aforesaid settlement deed and 15-cents of land on the Western side of aforesaid 20 cents of land. Second defendant obtained 15 cents of land on the northern side of aforesaid 15 cents of land of first defendant. After settlement deed No. 3085/1969, the properties belonged to each parties were separated by fencing. There is a well in between B schedule and 6.5 cents of land belonged to first defendant on its northern end. All the parties in aforesaid settlement deed have right to draw water from aforesaid well. There is a way on the north-eastern side of the

entire properties covered by settlement deed No. 3085/1969, provided in that settlement deed. All the parties in the settlement deed have right to use aforesaid way as a common way. So as to widen the initial portion of aforesaid way on its Eastern end, first plaintiff and first defendant jointly purchased 0.5 cents of land from one Padmavathi and the way was widened into a 12 feet wide way. Aforesaid way is shown as plaintiff D schedule. As per the settlement deed, the way is provided through the northern end of entire properties which is shown as plaintiff D schedule and first defendant is reaching in his house through that way. Second defendant is reaching in his property through aforesaid way. Since, there is a well in the way, at the portion of the well, everybody is travelling around the well. At the time of marriage of daughters of first defendant, since, it was difficult to pass through the way provided through the northern boundary of the entire properties, first plaintiff and defendants 1 and 2, who are brothers, decided to create a temporary way through plaintiff B schedule property and first plaintiff gave permission to defendant No. 1 to use the same. At the time of creation of the new way, it was decided to fill the well and to straighten the way through the northern boundary of the entire property. In the immediate past, first plaintiff decided to construct boundary wall to his property so as to

protect the same. For the same, he dug foundation and at that time, defendants 1, 3 to 5 obstructed first plaintiff and manhandled him. They threatened to encroach into plaintiff A and B schedule properties. First plaintiff has withdrawn his permission given to defendants to pass through his property. In the said circumstances, defendants are not entitled to use the way through plaintiff B schedule property. In the aforesaid circumstances, defendants are to be restrained by a permanent prohibitory injunction from obstructing the plaintiff in constructing boundary wall or fencing through the boundaries of plaintiff A and B schedule properties. Plaintiff D schedule way is not lying separately. In the said circumstances, plaintiff D schedule way is to be set out. Boundaries of plaintiff schedule properties are to be fixed through the process of court. For aforesaid reliefs, plaintiffs filed the suit.

3. Second defendant remained absent and hence, he was set ex parte.

4. While the suit was pending, first defendant died and his legal heirs were impleaded as additional defendants 6 and 7.

5. Additional defendant No. 7 remained absent and hence, he was set ex parte.

6. Defendants 3 to 6 filed written statement with contentions briefly

stated as follows:- Description of plaint schedule properties are incorrect. There is no way in existence shown as plaint D schedule. No such a way is stated in settlement deed No. 3085/1969. It is not possible to create a way shown as plaint D schedule. A well, motor shed and two motor's are there in the way shown as plaint D schedule. There are a number of trees also in plaint D schedule. Hence, a way shown as plaint D schedule with a width of 12 feet cannot be created. It is not correct to say that, there was a way through the northern boundary of entire properties and for widening the same, 0.5 cents of land was purchased by first plaintiff and first defendant. At the time of execution of settlement deed No. 3085/1969, there was a way starting from Eastern side, proceeding towards West, turning and proceeding towards South through B schedule property and reaching in the property of first defendant. Later on, for widening aforesaid way, first defendant purchased some property from Padmavathi. Prior to that, for the last 30 more years, a widened way is using. Later on, for purchase of property from Padmavathi, a document was created. The document was created in the year 2011. The document was created on 25/06/2011 and in the same, Padmavathi, first defendant and first plaintiff put their signatures. In fact, only first defendant paid consideration for purchase of aforesaid property.

Since, first plaintiff is brother of first defendant, he was allowed to be a party in aforesaid document. For the last 30 more years, aforesaid way is being used by first defendant to his property, openly, continuously, without any obstruction and as of right. Accordingly, first defendant and his successors obtained right of way by easement by prescription through aforesaid motorable way. Plaintiffs have no right to obstruct the same. It is not correct to say that, first defendant and family were using plaintiff D schedule way and at the portion of the well, they are travelling around the well. It is not correct to say that, at the time of marriage of daughters of first defendant, first plaintiff gave permission to construct a way through plaintiff B schedule property as a temporary arrangement. It is not correct to say that, all the parties agreed to fill the well and to straighten the way. First defendant and his successors never agreed to fill the well. At the time of execution of settlement deed, its executants is never intended for filling the well. On the other hand, they intended to take water from the well by all the parties in the settlement deed. Defendants never threatened the plaintiffs as alleged. They never obstructed the plaintiffs as alleged. Plaintiffs are trying to obstruct the way of defendants. Defendants never manhandled the plaintiffs. Plaintiffs have no right to obstruct the right of way of defendants. Plaintiff D

schedule is an imaginary way. A way shown as plaint D schedule is not described anywhere in the settlement deed. The prayer for setting out plaint D schedule way is not maintainable. After setting out plaint D schedule way, plaint schedule properties cannot be measured and located. The prayer for fixation of boundary as prayed for in the suit is not maintainable. Plaintiffs are not entitled to get any of the relief sought for in the suit. The suit is liable to be dismissed with the cost of defendants.

7. Upon the pleadings, following issues were raised for consideration:-

1. Are the plaintiffs entitled to get a decree for fixation of Western and northern boundaries of plaint A and B schedule properties and northern boundary of plaint C schedule property and if so, through which lines?

2. Are the plaintiffs entitled to get a decree for permanent prohibitory injunction as prayed for?

3. Are plaintiffs entitled to get a decree for mandatory injunction as prayed for?

4. Order as to costs?

8. Plaintiffs' evidence in this case is comprised of oral testimonies of P W1 to PW 3 and documents marked as exhibits A1 to A4. Defendants' evidence is comprised of oral testimony of DW1 and documents marked as exhibits B1 to B4. Commission reports, rough sketch and plan

were marked as exhibits C1 to C2 (a).

9. I heard the counsel for both sides.

10. **Issue No. 1:-** First plaintiff was examined as PW1. He filed proof affidavit in terms of the plaint.

11. Admittedly Ist plaintiff and defendants 1 and 2 are brothers. Defendants 3 to 7 are wife and children of Ist defendant. Case of the plaintiff is that, plaint A schedule property is belonged to Ist plaintiff and he obtained that property through settlement deed No.3085/1969 of Mala SRO as C schedule in the same. Further case of plaintiffs is that, plaint B schedule property is also belonged to Ist plaintiff and he obtained that property also through aforesaid settlement deed and plaint B schedule is situated on north eastern corner of A schedule property in aforesaid settlement deed. Plaintiff's further case is that, plaint C schedule property is belonged to 2nd plaintiff and she obtained that property through sale deed No.2324/2013 of Mala SRO. Plaintiffs have further case that, through aforesaid settlement deed, 2nd defendant obtained 16.5 cents of land on the eastern side of plaint A and B schedule properties and from the same, 2nd plaintiff purchased 5.50 cents of land through document No.2324/2013 which is shown as plaint C schedule. Plaintiffs have further case that, Ist defendant obtained 6.5 cents

of land on the north western corner of plaintiff A and B schedule properties, 20 cents of land as D schedule in aforesaid settlement deed and 15 cents from 30 cents situated on western side of D schedule in the settlement deed. According to plaintiffs, 15 cents in 30 cents is situated on southern side of 30 cents and remaining 15 cents in aforesaid 30 cents on its northern side is belonged to 2nd defendant. Plaintiffs have further case that, the parties in the settlement deed got possession of their properties as per the settlement deed and after the same, they separated their respective properties by fixing fencing through the boundaries. It is alleged by plaintiffs that, at present, there are no boundaries to plaintiff A and B schedule properties for separating the same from defendants properties and accordingly, they have prayed for fixation of boundaries of plaintiff A , B and C schedule properties. Plaintiffs have further alleged that, in the settlement deed, a way is provided, on the northern side of entire properties covered by settlement deed, to the properties divided through the settlement deed and the same is shown as plaintiff D schedule. Plaintiffs have alleged that, plaintiff D schedule is not lying within well demarcated boundaries and hence, setting out plaintiff D schedule is also to be done through the process of the court. According to plaintiffs, there is a well in plaintiff D schedule and as per the settlement deed,

the parties in the settlement deed have right to draw water from the same for irrigation purpose. It is alleged by plaintiffs that, after execution of the settlement deed, all the parties were reaching in their properties through the way provided in the settlement deed , passing through the northern boundary of entire properties, starting from panchayat road on east. Plaintiffs have further alleged that, at the time of marriage of daughters of Ist defendant, since it was difficult to use the way passing through the northern boundary of the entire properties, Ist plaintiff allowed defendants 1 and 2 to use a way through plaint B schedule property as a temporary arrangement. It is further alleged that, at the time of allowing the defendants to use the way through plaint B schedule property, there was an understanding that, the well situated in the plaint D schedule way is to be filled and the said way is to be straighten since, at the portion of the well, parties were passing around the well in a half round shape. Plaintiffs have further alleged that, later on so as to bring vehicles, initial portion of D schedule way was widened into 12 feet, by purchasing half cents from one Padmavathi, who is the owner of property situated on immediate western side of panchayat road and on immediate southern side of D schedule way. It is alleged by plaintiffs that, on 6.11.2013, Ist plaintiff tried to construct boundary wall to his property

and as part of the same, dug foundation. It is further alleged by plaintiffs that, at that time, defendants 1, 3 and 5 obstructed 1st plaintiff in constructing boundary wall to his property and threatened to encroach into plaintiff A and B schedule properties. According to plaintiffs, defendants have no right at all over plaintiff A and B schedule properties. With the said allegations, plaintiffs have prayed for fixation of boundaries of plaintiff A , B and C schedule properties and for a decree of permanent prohibitory injunction restraining the defendants from trespassing into plaintiff A , B and C schedule properties, from committing any waste therein and from obstructing the plaintiffs in conducting any construction works in their properties. Plaintiffs have further prayed for setting out plaintiff D schedule way as per the recitals in settlement deed NO.3085/1969 also. For the said reliefs, plaintiffs filed the suit.

12. On the other hand, defendants have contended that, even prior to execution settlement deed No.3085/1969, there was a way starting from panchayat road on east, proceeding towards west, turning and proceeding towards south through plaintiff B schedule property and reaching in the old family house of plaintiffs and defendants. They have further contended that, aforesaid way is still in existence and the same is being used by defendants for their

ingress and egress to their respective properties and plaintiffs are also using the said way. Defendants have claimed right of way by easement by prescription over aforesaid way and defendants denied the existence of plaintiff D schedule way. According to defendants, plaintiff D schedule is an imaginary way and it is not possible to set out plaintiff D schedule, since, there is a well in the middle portion of the alleged D schedule way. They denied the prayer for fixation of boundaries of plaintiff A, B and C schedule properties in their written statement.

13. 3rd defendant was examined as DW1 and in her cross examination, she has categorically admitted that, there is no boundaries separating plaintiff A, B and C schedule properties and the properties of defendants. She has the case that, fixation of boundaries of plaintiff schedule properties and properties of defendants are absolutely necessary. In the said circumstances, it is to be held that, plaintiffs are entitled to get a decree for fixation of boundaries of plaintiff A, B and C schedule properties.

14. Plaintiffs have produced certified copy of document No.3085/1969 and the same was marked as Ext.A1. Ext. A2 is certified copy of document No.2324/2013. Plaintiffs have produced the agreement dated 25.6.2011 and the same was marked as Ext.A4.

15. Plaintiffs have the case that, in Ext.A1 settlement deed, a way is provided through the northern side of the entire properties covered by that document abutting to its northern boundary for ingress and egress to each plots set apart in aforesaid settlement deed. They have further alleged that, there is no other way to the properties covered by aforesaid document and the way provided in Ext.A1 settlement deed is the only way to all the properties in aforesaid settlement deed. According to plaintiffs, aforesaid way was widened into a 12 feet wide way in the year 2002 by purchasing half cents of land from one padmavathi on its eastern end where D schedule way is starting from the panchayat road on east. Now, plaintiffs are claiming that, the way stated in Ext.A1 settlement deed has a width of 12 feet and accordingly, 12 feet wide way is to be set out and has shown aforesaid way as plaint D schedule.

16. On the other hand, defendants have contended that, a way shown as plaint D schedule is not in existence and the same is an imaginary way. According to them, a way as shown as plaint D schedule cannot be set out since there is a well and motor shed in the middle portion of the alleged way. Accordingly, they opposed setting out of plaint D schedule way.

17. As per the pleadings of plaintiffs, at the time of creation of Ext.A1

settlement deed, the alleged D schedule way had no width of 12 feet, and the same was widened into 12 feet only in the year 2002. It is true that, in Ext.A1, it is stated that, a way is provided through the northern boundary of entire properties covered by Ext.A1 document as a common way for ingress and egress to the scheduled properties in Ext.A1 document. Significantly, width of aforesaid way is not stated in Ext.A1 document. In considering aforesaid fact also, it cannot be said that, plaintiff D schedule way had a width of 12 feet at the time of execution of Ext.A1 document. So as to find out the width of aforesaid way, measurement of the entire properties covered by Ext.A1 document is absolutely necessary. After measuring the entire properties, each schedule shown in aforesaid document is to be set apart and remaining extent of property is to be used for providing the way. Another significant fact is that, in Ext.A1, it is stated that, there is a well in the properties covered by Ext.A1 document and all the parties in aforesaid document shall have right to draw water from the well for irrigation purpose. Admittedly, aforesaid well is situated on the northern side of entire properties abutting to its northern boundary. It is already stated that, the way provided in Ext.A1 document is passing through the northern side of entire properties covered by Ext.A1 document abutting to its northern

boundary. In the said circumstances, the well will be within the way portion. In the said circumstances, a way starting from the panchayat road on eastern side, proceeding towards west straightly cannot be created, since, there is a well in that portion. In the said circumstances, on a joint reading of recitals in Ext.A1 document it is to be presumed that, intention of the executors of Ext.A1 document was that , the parties in the document shall use a way starting from the panchayat road on east, proceeding towards west, abutting to the northern boundary of entire properties up to the well and thereafter passing around the well through its southern side and after reaching the other side of well again to proceed towards west abutting to the northern boundary. Hence, it is to be held that, the way provided in Ext.A1 document is starting from panchayat road on east, proceeding towards west up to the well, turning through the sides of the well through its southern side in half circular shape, reaching on the other side of the well and again proceeding towards west through the northern boundary of the entire properties. Such a way is to be created as per the recitals in Ext.A1 document. The said way is to be crated through excess property after setting apart the properties scheduled in Ext.A1 document. Since, all the parties in Ext.A1 settlement deed are provided with right to collect water from the

well, the portion at which well is situated is to be located separately and shall set apart the same as common property. Since, there is recital in Ext.A1 for providing a way, plaintiffs are entitled to get a decree for setting out the said way and contention of defendants that, such a way cannot be set out since, such way is not in existence is not sustainable.

18. An advocate commissioner and surveyor were appointed from this court to measure out, identify and locate the plaintiff schedule properties. They after measurement of the properties, filed commission report and plan. The same were marked as Exts. C2 and C2(a). In Ext. C2(a) plan, surveyor has located plaintiff A, B, C and D schedule properties and properties of defendants. Significantly, surveyor has located the plaintiff D schedule way through the northern boundary of entire properties without locating the well. Surveyor has not shown the direction of the way around the well as intended by the executors of Ext.A1 document and hence, Ext.C2(a) plan for fixation of boundaries of plaintiff D schedule property cannot be accepted. Since, boundaries of plaintiff D schedule shown in Ext.C2(a) plan cannot be accepted, boundaries of plaintiff A, B and C schedule properties which are related with southern boundary of D schedule property also cannot be accepted. In the said circumstances, Ext.C2(a) plan cannot be

accepted for fixation of boundaries of plaint A, B ,C and D schedule properties.

19. In considering aforesaid facts, it is to be held that, even though plaintiffs are entitled to get a decree for fixation of boundaries of plaint A to D schedule properties, Ext. C2(a) plan cannot be accepted for fixing the same and there is no other plan for fixation of boundaries of plaint A to D schedule properties. Hence boundaries of plaint A to D schedule properties cannot be fixed with the evidence before this court. This issue is accordingly found against the plaintiffs.

20. **Issue No.2:-** Plaintiffs have prayed for permanent prohibitory injunction restraining the defendants from trespassing into plaint A1 to C schedule properties and from committing any waste therein. Plaintiffs have prayed for such a decree on the basis of fixation of boundaries of plaint schedule properties. Significantly, it is already found in issue No.1 that, with the plan produced before the court boundaries of plaint A, B and C schedule properties cannot be fixed. In the said circumstances, an injunction as prayed for cannot be granted at this stage.

21. Defendants have the contention that, there is a way starting from panchayat road on east, proceeding towards west turning and

proceeding towards south, passing through plaint B schedule property and reaching the properties of defendants. Defendants have claimed right of way by easement by prescription over the same. With the said contention, they have further contended that, plaintiffs are not entitled to construct boundary wall or fencing around plaint B schedule property without giving the way to defendants through plaint B schedule.

22. Aforesaid claim of right of way by easement by prescription over plaint B schedule way by defendants is denied by plaintiffs. According to defendants, at the time of marriage of daughters of Ist defendant, Ist plaintiff allowed the defendants to use a way through plaint B schedule property since, usage of D schedule way, which was a narrow way, was difficult. It was further alleged by plaintiffs that, they have withdrew their permission to use the way through plaint B schedule property and hence, defendants are not entitled to use a way through plaint B schedule property, but are entitled to use D schedule way only.

23. Defendants have the contention that, at present, there is a motorable way from panchayat road on east to the properties of defendants through plaint B schedule and the same is being used by defendants and their predecessors for the last 30 more years openly, continuously, without

any obstruction and as of right. Significantly, 3rd defendant was examined as DW1 and in her cross examination, she deposed that, earlier there was only a pathway through plaint B schedule property and the same was widened only in the year 2000. She had further admitted that, initial portion of the way was widened after purchase of half cents of land from one Padmavathi¹ and prior to that, there was no motorable way to the property of defendants through plaint B schedule property. Very significantly, in her cross examination, DW1 has categorically deposed that, in the year 2000, with the permission of Ist plaintiff, a way was constructed through his property and the same is being used by defendants at present. She has categorically deposed that, the way was constructed with the permission of Ist plaintiff through plaint B schedule property and the same was constructed in the year 2000. By the said deposition of DW1, she has categorically admitted that, defendants were not using the way as of right, but as per the permission given by Ist plaintiff. In the said circumstances, defendants are precluded from claiming right of way by easement by prescription over plaint B schedule property.

24. At the time of argument, counsel for defendants argued that, earlier, there was a pathway through plaint B schedule way and widening of

the way was done as per the permission given by Ist plaintiff. According to counsel for defendants, defendants have right of way by easement by prescription over the earlier pathway passing through plaint B schedule property. Significantly, there is nothing before this court to show the alignment of the alleged earlier pathway through plaint B schedule property. More over, it is not possible to find out the alignment of the alleged pathway passing through plaint B schedule property. Apart from that, in considering the evidence of DW1, it is to be held that, they are using the way through plaint B schedule property as per the permission given by Ist plaintiff and hence, they are precluded from claiming right of way by easement by prescription over plaint B schedule property.

25. Since, boundaries of plaint A, B and C schedule properties cannot be fixed with Ext.C2(a) plan, it is to be held that, plaint A, B and C schedule properties are not lying within well demarcated boundaries and hence, injunction as prayed for against the defendants with respect to plaint A ,B and C schedule properties cannot be granted. This issue is found against the plaintiffs.

26. **Issue No.3:-** Defendants have prayed for setting out plaint D schedule way as provided in Ext.A1 document. It is already found that,

plaintiff are entitled to get a decree, setting out plaint D schedule, since, such a way is provided in Ext.A1 document. Significantly, so as to set out the way as provided in Ext.A1 document, entire properties covered by Ext.A1 document is to be measured and thereafter, the schedules shown in Ext.A1 document as well as the portion and which the well is situated are to be set apart and thereafter, the remaining property is to be used for setting out the way provided in that document. Such act is not done by the surveyor and Ext.C2(a) plan is not prepared as stated above. In the said circumstances, at present, it is not possible to set out a way as stated in Ext.A1 document and hence, aforesaid prayer for setting out plaint D schedule way cannot be passed. This issue is accordingly found against the plaintiffs.

27. **Issue No.4:-** Considering the facts and circumstances of the case there is no costs. This issue is found accordingly.

In the result, the suit is dismissed. No costs.

Dictated to the Confdl.Asst., transcribed by her, corrected by me and pronounced in open court on this the 31st day of March, 2018.

M.I.JOHNSON
MUNSIFF.

APPENDIX:**Plaintiff's Exhibits:**

A1. ----	Certified copy of Document No.3085/69
A2. ----	Certified copy of Document No.2324/8/13
A3.	Judgment in CC 334/14
A4. 25.06.2011	Agreement

Defendants' Exhibits:

B1. 10.02.2000	Sale deed
B2. 15.11.2010	Sale deed
B3 ----	Certified copy of Judgment in O.S.306/04
B4 26.10.2017	Tax receipt

Court Exhibits:

C1. 02.01.2014	Commission Report
C1(a)02.01.2014	Rough Plan
C2 08.09.2015	Commission Report
C2(a) 08.09.2015	Plan

Plaintiff's Witness:

PW1. 19.03.2018	Padmanabhan
PW2. 26.03.2018	Adv. Siji P.S.
PW3..26.03.2018	Anoop K.A.

Defendants' Witness:

DW1.21.03.2018	Balamani
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MUNSIFF.

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