

**IN THE COURT OF THE MUNSIF, ATTINGAL**  
**PRESENT: SRI. SANTHOSH KUMAR. N, MUNSIF**  
**THURSDAY 30<sup>th</sup> NOVEMBER, 2023 / 9<sup>th</sup> AGRAHAYANA, 1945**

**IA No. 01/2023 in OS No. 397/2023**

**Petitioners/ Plaintiffs:**

1. Sandhya, D/o Maniyan, aged 32 years, residing at Kattil Puthen Veedu, Market Road, Avanavanchery Village, Attingal. PO.
2. Mini, D/o Maniyan, aged 35 years, residing at Kattil Puthen Veedu, (Poovattivila Kunnil Puthen Veedu), Market Road, Avanavanchery Village, Attingal. PO.
3. Maniyan, aged 68 years, residing at Kattil Puthen Veedu, Market Road, Avanavanchery Village, Attingal. PO.
4. Biju, S/o Maniyan, aged 38 years, Kattil Puthen Veedu, Market Road, Avanavanchery Village, Attingal. PO.

By Advocate: Sri. Kilimanoor. S. Suresh

**Counter Petitioners/ Defendants:**

1. Nirmala, W/o Muraleedharan, aged 58 years, residing at Mana, Club Lane, Market Road, Avanavanchery Village, Attingal. PO.
2. Muraleedharan, aged 63 years, residing at Mana, Club Lane, Market Road, Avanavanchery Village, Attingal. PO.

By Advocate: Sri. J. Jayakumar

This petition having been finally heard on 14.11.2023 and the court on 30.11.2023 passed the following:

**ORDER**

Petition filed under Order 39 Rule 1 & 2 and Sec.151 of CPC.

2. **Averments in the petition in brief:** Petitioner is the 1<sup>st</sup> plaintiff in the original suit. The petition is filed for plaintiffs 2 to 4 also. Original suit is filed for permanent prohibitory injunction. Plaint A schedule property belongs to the 1<sup>st</sup> plaintiff by virtue of sale deed No.1625/2011 of SRO, Attingal. Plaint B schedule property belongs to the 2<sup>nd</sup> plaintiff by virtue of settlement deed No.806/2005 of SRO, Attingal. They mutated the property and

paid tax. Plaintiff A and B schedule properties are in the absolute possession and enjoyment of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively.

3. 1<sup>st</sup> defendant is the wife of 2<sup>nd</sup> defendant. 1<sup>st</sup> defendant owns property which situate on the immediate north of plaintiff A schedule property. 3<sup>rd</sup> defendant owns property on the immediate north of B schedule property. There was a residential building in the property owned by the 3<sup>rd</sup> defendant who partly demolished the same for the purpose of construction of a new building therein. There is a pathway on the immediate east of the 3<sup>rd</sup> defendants' property. Plaintiffs have been using the said pathway for their ingress and egress to their respective properties for the last 40 years in continuation of their predecessors in interest.

4. There is a municipal road on the north of the properties of plaintiffs and defendants. The pathway at the east of 3<sup>rd</sup> defendant's property starts from the municipal road in the north towards south. The pathway is described as the C schedule in the plaint. The nature of terrain of the plaintiff schedule properties is that it slopes from south to north. A and B schedule properties and the properties of the other plaintiffs lie at a higher level while the properties of the defendants lie at a lower level. A and B schedule properties situate at a higher level of about 20 feet from the properties of the defendants.

5. C schedule pathway is having 1 mtr wide and 30 mtr long starting from the northern municipal road running towards south which slopes down from south to north. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are using the C schedule pathway for their ingress and egress to A and B schedule properties. 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs are also using the said pathway for conveyance to their residential building. On many occasions 1<sup>st</sup> and 2<sup>nd</sup> defendants with the support of the

3<sup>rd</sup> defendant tried to destroy the northern boundary of the A and B schedule properties which remains about 20 feet height from the properties of defendants.

6. On 25.07.2023 the 1<sup>st</sup> and 2<sup>nd</sup> defendants with the support of the 3<sup>rd</sup> defendant attempted to remove earth from the northern boundary of A and B schedule properties using JCB. The removal of earth from the boundary area of A and B schedule properties would destroy the lateral support of the A and B schedule properties. The defendants have trespassed into the C schedule pathway also. The plaintiffs and other men tried to prevent the defendants from their illegal acts. The defendants tried to manhandle the plaintiffs and abused them. Neighbours rushed to the spot and then the defendants retreated from their attempt. However, the defendants declared that they would come again and would destroy the lateral support of A and B schedule properties. Though the plaintiffs lodged complaint to the Circle Inspector of Police, Attingal on 25.07.2023 nothing yielded from it. Plaintiffs reasonably apprehend that the defendants would come again and repeat their illegal act of destruction of the lateral support of A and B schedule properties. Plaintiffs have a strong prima facie case and balance of convenience also favours the plaintiffs. If the ad-interim injunction is not granted, restraining the defendants from trespassing into the plaintiff schedule properties, it would cause irreparable loss and agony. Hence this petition.

7. **Counter petitioners filed objection contending as follows:** The petition is not maintainable either under law or on facts. It is admitted that the plaintiffs and defendants are using the C schedule pathway for their ingress and egress. The plaintiff C schedule pathway starting from the northern public road is having width of 1 mtr and it is having 50 steps. So no JCB can be driven through the C schedule pathway. The allegation that the

defendants took JCB through the C schedule pathway is absolutely false. The old building in the 3<sup>rd</sup> defendant's property was in a dilapidated condition and the same was collapsed naturally. The allegation that it was demolished by the 3<sup>rd</sup> defendant by using JCB is false and hence denied.

8. As a matter of fact the 2<sup>nd</sup> defendant purchased 2 cents of property which situate on the western extremity of one Moli's property which is having direct access from the municipal road. On the immediate east of the Moli's property is the property of one Muraleedharan Nair. Further east of Muraleedharan's property is the C schedule pathway. The residential building in the properties of both Moli and Muraleedharan are facing northern municipal road. The 2<sup>nd</sup> defendant purchased the said 2 cents of property which lies in the north – south direction facing the municipal road for having access to the road from their property. 2<sup>nd</sup> defendant purchased the above property for forming a cartable way to their property. The plaintiffs requested the defendants to permit them also to use the cartable way. But the demand was turned down by defendants. Hence they grew animosity towards defendants and happened to institute a false and frivolous suit. The cause of action alleged is false and fabricated. In fact the A and B schedule properties situate at a top hill which is not fit for residential purpose. The Tahsildar has already issued notice to them to vacate the place. The allegation that the plaintiffs lodged police complaint is false. They have not produced copy or acknowledgment receipt in respect of the false complaint.

9. The intention behind this petition and suit is to stop the construction of the residential building in the defendants' property. Hence the petition is without bona fide. The defendants have no intention to encroach upon the C schedule pathway. Hence the

petitioners are not entitled to get any relief as prayed for. The petition is liable to be dismissed.

10. Based on the above averments the following points were raised for consideration.

1. Whether the petitioners are entitled to get an order as prayed for ?

2. Reliefs and costs ?

11. Exts.A1 to A4 documents are marked from the side of the petitioners. Exts.B1 series and B2 marked from the side of the defendants. The advocate commissioner who inspected the site filed report and plan which is marked as Ext.C1 and C1(a).

12. Heard both sides.

13 . **Point No.(1):** Exts. A1 and A2 are the certified copies of the title documents pertaining to the A and B schedule properties. Exts.A3 and A4 are tax receipts in respect of the plaint schedule properties. Ext.B1 series are the photographs showing the earth work in the defendant's property to form a cartable way and flight of steps leading to A and B schedule properties from the northern municipal road. Ext.B2 is the original of the document pertaining to the 2 cents of property purchased by the 2<sup>nd</sup> defendant from one Moli on the west leading to the defendants' property. The advocate commissioner in the Ext.C1 report has noted that the C schedule pathway which starts from the northern public road leading to the A schedule property. The commissioner has also reported that A and B schedule properties situate about 30 feet height from the northern municipal road. It is also reported that the entire property is lying slopping towards north. The commissioner has noted residential building in the A schedule property and also in the adjacent property

belong to the other plaintiffs. The commissioner noted moved earth in the defendant's property as watched from the northern municipal road. The commissioner noted that the soil in the area is loose in nature and that if earth is removed from the lower part of the plaintiffs' property there is chance for landslide from the plaintiff schedule properties.

14. The learned counsel for the plaintiffs contended that the photographs produced from the side of defendants itself would show the remnants of earth work carried out by JCB machine. It is also contended that as the plaintiff's property situate at a higher level from the defendants' property there is chance for decline of earth from the A and B schedule properties if any earth work is carried out in the defendants' property.

15. The learned counsel for the defendants per contra contended that the photographs would show that there is no any encroachment on the C schedule pathway. It is submitted that the earth work carried out is on the west of the property belong to Moli which was purchased by the 1<sup>st</sup> and 2<sup>nd</sup> defendants for forming a cartable way to their property. It is also contended that the commissioner has nowhere noted any earth work in the defendants' property. Hence the petition is liable to be dismissed.

16. The identity of A, B and C schedule properties are not disputed. It is also not disputed that there is a municipal road on the north of properties of plaintiffs and defendants. It is not in dispute that the access of A and B schedule properties and even to the properties of defendants is through the flight of steps running along with the east of the properties of one Muraleedharan and of the 3<sup>rd</sup> defendant which starts from the municipal road proceeding towards south. It is also not in dispute that the properties of the plaintiffs and defendants situate at a higher level from the northern municipal road. The apprehension

of the plaintiffs that if any earth is removed from the defendants' property there is every likelihood of damage to the plaintiffs' property and to the C schedule property. The defendants in the objection has admitted that the area is not fit for residential purpose and Tahsildar has already communicated the petitioners to vacate the place. From the above averments it is crystal clear that the soil is not hard and chances of landslide is high. Even when without any external pressure, there are chance for landslide consequences could be imagined when external pressure is exerted at the lower strata, by the using of heavy machine like JCB. The commissioner has noted earth work in the defendant's property. The defendants have admitted that they have purchased certain extent of property for forming a cartable way to their property. It is not in dispute that the C schedule pathway lies adjacent to the 3<sup>rd</sup> defendant's property. It is also not in dispute that there is an old house in dilapidated stage. The apprehension of the plaintiffs is that the earth if removed from the properties of defendants, A and B schedule properties would collapsed. Hence from the subsisting circumstances, there is ground for the apprehension of the plaintiffs. 1<sup>st</sup> and 2<sup>nd</sup> defendants also submitted that they are making preparation for the construction of building in their property. The construction of the building in one's property cannot be restrained by an injunction. It would cause hardship to the property owner. If the earth work in the defendants property is such that as to cause any loss of lateral support to the A and B schedule properties, it can't be permitted. From this circumstances and materials on record it is brought out that the plaintiffs has made out a prima facie case in their favour. The plaintiffs have no objection in forming a cartable way to the defendant's property. Their apprehension is only with respect to the removal of earth from their property so as to cause

loss of lateral support to their properties. It is true that the commissioner has not reported any excavation in the defendants' property so as to cause any damage to the C schedule pathway. Since there is a dilapidated house in the 3<sup>rd</sup> defendant's property and the allegation that the defendants have plans to construct house in the defendants' property the alarm of the plaintiffs have base. The photographs produced from the side of the defendants would show the preparatory works and formation of cartable way to their property. The defendants have admitted in the objection that the petition is only to halt the construction of the house in the property. Defendants have not produced any document to show that they have obtained permission from the Geology Department and nature, extent and volume of excavation. Altogether it would reveal that the petitioners have apprehension of trespass on the C schedule property and removal of earth from defendants' property to cause loss of lateral support to the A and B schedule properties. In the above circumstance, I am of the view that the petition can be allowed to restrain the defendants from removing earth from their property causing loss of lateral support to the plaintiffs' property and also C schedule pathway till the parties adduce evidence and the matter is adjudicated on merit.

17. **Point No.(2):** In the result, petition is allowed. Parties shall bear their respective costs.

*Dictated to the Confidential Assistant, transcribed and typed by her, corrected by me and pronounced in open Court on this the 30<sup>th</sup> day of November, 2023.*

Sd/-  
SANTHOSH KUMAR. N  
MUNSIFF

**Appendix:**

**Exhibits marked for the Petitioners/ Plaintiffs:**

A1	08.06.2011	Certified Copy of Sale Deed No. 1625/2011/I of SRO, Attingal
A2	04.03.2005	Certified Copy of Settlement Deed No. 806/05 of SRO Attingal
A3	31.05.2022	Tax Receipt No. KL01022901569/2022 issued from Avanavanchery Village Office
A4	23.04.2015	Tax Receipt No. 0554666 issued from Attingal Village Office

**Exhibits marked for the Counter Petitioner/ Defendant:**

B1	-	Photographs (2 Nos)
B2	29.10.2005	Original Sale Deed No. 2880/05 of SRO Attingal

**Court Exhibits:**

C1 & C1(a)	25.08.2023	Commission Report and Plan prepared by Adv. Mridula. M. D
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**Witness for both sides:**

Nil

*Id/-*  
MUNSIFF

*// True copy//*

Typed by: Lasitha  
Compared by: Sheena.K

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