

**IN THE COURT OF THE MUNSIF, ATTINGAL
PRESENT: SMT. SWATHI.R.KRISHNAN, MUNSIF
WEDNESDAY 22nd JANUARY, 2025 / 2nd MAGHA, 1946**

IA No.06/2024 in OS No.397/2023

Petitioners/ 1st and 2nd Defendants:

1. Nirmala, W/o Muraleedharan, aged 58 years, Manna Club Lane, Market Road, Avanavancheri Village, Attingal. PO.
2. Muraleedharan, H/o Nirmala, Manna Club Lane, Market Road, Avanavancheri Village, Attingal. PO.

By Advocate: Sri. J. Jayakumar

Counter Petitioners/ Plaintiffs:

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

By Advocates: Sri. Kilimanoor. S. Suresh

This petition having been finally heard on 22.01.2025 and the court on same day passed the following:

ORDER

This is a petition filed under Order XXXIX Rule 1 and 2 of CPC by the defendants in the suit.

2. **Petition averments are as follows:** The first petitioner's husband purchased 2 cents of property to gain vehicular access to their property, which is situated far from the respondents 1 to 4's property. The said property is scheduled as petition A schedule property. The respondents 1 to 4 requested petitioners to allow them vehicular access through the proposed pathway being constructed by first petitioner's husband for their vehicular access to their properties. The petitioners were not willing to accept their illegal demand and hence they filed this suit to harass and vex the petitioners. The

respondents obtained a temporary injunction in IA. No.01/2023 to restrain the petitioners from destroying the lateral support of the northern boundary of the plaint A and B schedule properties by JCB or by any other means and from encroaching any portion of plaint C schedule pathway and also from committing any waste in plaint A and B schedule properties and to the northern boundary of plaint A and B schedule properties and to the C schedule pathway. Due to the injunction order of this court, petitioners are not in a position to start construction of residential building in their property. The respondents 1 to 4 were not allowing petitioners to do any work in the petition schedule properties on the strength of the injunction order granted by this Court. The petition schedule properties are not scheduled in the suit and the same are not the subject matter of the above suit even though respondents 1 to 4 are not permitting us to do anything in the above said property. The petition A schedule property situates far away from plaint A and B schedule properties. The above said 2 cents of property having a width of nearly 4 meter which starts from the Municipal road ends in petition B schedule property. The respondents are making complaints for preventing the construction of cartable way through petition A schedule property. Petitioners preferred CMA No.18/2023 against the order in IA.01/2023 before the Hon'ble Sub Court, Attingal. The Hon'ble Sub Court clarified the order in IA.01/2023 limiting the injunction by restraining petitioners from destroying the lateral support of northern boundary of plaint A and B schedule properties, from encroaching any portions of plaint C schedule pathway and from committing any waste to the northern boundary of plaint A and B schedule properties or to plaint C schedule pathway until disposal of the suit. The construction work done on the petition schedule properties never affects the lateral support of plaint A and B schedule properties. If such a damage had occurred,

the Municipal Authorities would not have issued the license and approved the plan for construction of residential house in petitioners' property. The petitioners obtained building permit and approved plan from Attingal Municipality for the purpose of construction of a residential building in petition B schedule property. But respondents 1 to 4 are not allowing the petitioners to proceed with the construction work due to the injunction order passed by this Court. Due to the adamant stand of respondents, petitioners are suffering huge loss and untold hardships and the same cannot be compensated in terms of money. In the above circumstances, this court may pass an order of temporary injunction restraining the respondents 1 to 4 and their men from trespassing into petition schedule properties and also from doing any illegal acts or obstruction to the construction of residential building in the petition B schedule property and construction of pathway in the petition A schedule property. If the petition is not allowed petitioners will be put to irreparable injury and untold hardship. Petitioners have got a strong prima-facie case and the balance of convenience heavily weighs in favour of them.

3. **The respondents filed an objection as follows:** The petition is not maintainable either under law or on facts. It is not fully correct that the first petitioner's husband purchased 2 cents of property for pathway and that the said property is situated far away from the respondent's property. The petitioners have the malafide intention to destroy the lateral support of respondents' property and to encroach the 1 metre width pathway situated on the east. It is on the northern side adjoining the Municipality road that the petitioner purchased 2 cents. The plaint C schedule pathway to the respondents' property is situated on the eastern side. There is around 20 to 30 feet height difference between the road and the portion where the respondents' house is situated. The

respondents have 1 metre width pathway. The respondents purchased 2 cents to destroy the lateral support by constructing a pathway on the north-western side. The CMA.18/2023 filed by the petitioners was dismissed and the petitioners were restrained from destroying the lateral support of plaint A schedule and B schedule properties and from acquiring any part of the plaint C schedule pathway. This petition was filed without respecting the orders of the Appellate Court. The terrace building of the petitioners situated on the north of the Municipality road was sold and hence there are no bonafides in the petition. The 2 cents of property scheduled as item No.1 is situated near the Municipality road on the northern side. It was purchased recently for ingress of excavator by the 1st petitioner's husband to excavate soil from the petition schedule item No.2 property and to deposit the same on the property lying on the west of the Municipality road. As aforesaid the petitioners are not having the bonafide intention of constructing a house. In the order in CMA.18/2013 the Appellate Court has observed that no permit from Geology department was produced to excavate soil from the boundary of plaint schedule property. The permit now produced is obtained illegally. The building plan also not produced. The contention that the respondents are obstructing the construction is wrong. The respondents have no reason to file petitions before various authorities since the injunction orders of Sub Court and Munsiff Court are in existence. The suit was filed due to the anticipation that the eastern pathway and the northern boundary will be destroyed and it was due to the chance of destruction of the buildings and lateral support on the northern boundary at a 20 feet height that the order of injunction was granted. This petition is filed malafidely to obtain an order of injunction and to produce the same before the Hon'ble High Court and to stay the order of injunction by the Sub Court. The petitioners are trying to convert the property on the

northern side of Municipality road to reclaim their land and hence are trying to destroy the lateral support of respondents' property. The petitioner has no prima facie case and balance of convenience. Hence the petition may be dismissed with costs.

4. The points that arose for consideration are:

1. Can the petition be allowed ?

2. Reliefs and costs ?

5. From the side of the petitioners, Exts.A1 to A4 documents were marked.

From the side of respondents, Exts.B1 to B12 were marked.

6. Heard both sides.

7. **Point No.(1):** The case of the petitioners is that the respondents are obstructing the construction of residential building in their property since they obtained an order of injunction in IA.01/2023. The petitioner contended that her husband purchased 2 cents of property (petition schedule property item No.1) for vehicular access to their property. The petitioner contended that the petition schedule properties are situated far away from the plaint A and B schedule properties. Petition schedule property item No.1 is having a width of 4 metres, starts from municipal road and ends in petition schedule property item No.2. The petitioner further contended that the respondents are not allowing them to make constructions in the petition schedule property item No.2 and also from constructing a cartable way through the petition schedule property item No.1. They obtained building permit and approved plan for construction but the respondents are preferring complaints before various authorities and hence obstructing the construction.

8. The respondents objected to the same mainly contending that this petition is filed by the petitioners in a crooked manner and it is infact a strategy adopted by the

petitioners to destroy the lateral support of the respondents' property. The petitioners are trying to excavate soil from the petition schedule property and the reclaim the property situated on the north of Municipality road. Ext.A1 is the complaint filed by the respondents before Kerala State Commission for Scheduled Caste and Scheduled Tribe and Ext.A2 is the notice issued to the petitioners. Further the petitioners have produced the building permit issued by Attingal Municipality dated 09.03.2023 and Ext.A4 is the approved building plan. Relying upon the same the petitioners contended that they are making constructions in the petition schedule property and it is authorised.

9. The respondents relied on Ext.B2 which is certified copy of Order in CMA. 18/2023 wherein it was held as follows:

IA.No.01/2023 is allowed and the respondents therein are restrained from destroying the lateral support of northern boundary of plaint A and B schedule properties from encroaching the portions of plaint C schedule pathway and from committing any waste to the northern boundary of plaint and from committing any waste to the northern boundary of plaint A and B schedule properties or to C schedule pathway until disposal of the suit.

10. The respondents have also produced the copy of order in IA.01/2023. Ext.B3 is the commission report and rough sketch filed by the advocate commissioner in OS.397/2023. The respondents have also produced photographs as Exts.B5 and B6. They have relied on Ext.B10 which is the certificate issued by Assistant Engineer, Attingal Municipality certifying that the property wherein the 2nd plaintiff/ 2nd respondent is residing is not inhabitable since its south western portion was destroyed and there occurred a change in the nature of soil therein after 2018 flood. They have also produced photographs as Exts.B11 and B12.

11. To substantiate their case the petitioners predominantly relies on Ext.A3 which is the building permit issued by Attingal Municipality issued in the name of 1st petitioner with respect to construction in 309.17 sq. metres of property. The old survey number of the property is 1287/C-4-7-1 which is the petition schedule item No.2 property and as per Ext.A3 total built up area is 17.08 sq. metres. The respondents filed objection contending that the approved building plan was not produced by the petitioners. Later the petitioners produced the building plan and the same was marked as Ext.A4. The respondents hence objected the petition primarily contending that the property there in is not inhabitable and the petitioners have filed this IA to bypass the injunction order passed against them. The respondents contended that if an injunction order is granted in this petition it will run contrary to the injunction order passed in IA.01/2023 and the order of the Hon'ble Appellate Court in CMA.18/2023.

12. The petitioners relied on the judgment of the Hon'ble High Court of Kerala in **Jessy Raju and Others v. Zacharia 2011 (3) KHC 456** it is held as follows:

'The natural right is available only when the land is kept in its natural condition. If the person has built structures on his land and thereby added the pressure on his property, the right of lateral support for the artificial pressure so caused, natural right for the increased pressure cannot be claimed. It is to be acquired. Such right can be acquired only as provided under S.15 of Indian Easement Act'.

'Just like the right of a person to construct a building or boundary wall upto the extremity of his property, his neighbour has also a right to dig to the very extremity of his property, provided the natural right available to the neighbour is not infringed'.

13. Hence relying upon the same the learned counsel for the petitioners contended that in the instant case the respondents have already added the pressure on

the property by construction and hence they cannot ask the petitioners to restrict themselves from continuing the construction. In the instant case the respondents relies on the order of Hon'ble Appellate Court wherein the Appellate Court has clarified that the respondents / petitioners herein are restrained from destroying the lateral support of plaint A and B schedule properties or from encroaching any portion of plaint C schedule pathway and from committing any waste to the northern boundary of plaint A and B schedule properties or to plaint C schedule pathway till the disposal of the suit. Hence it is clarified that the petitioners herein are restrained from destroying the lateral support and from encroaching the specified portion and also not to committing any waste in the northern side of plaint A and B schedule properties. One of the objection raised by the learned counsel for the respondents is that the petitioners have not produced the approved building plan. But thereafter, the petitioners have produced the building plan. In the instant case the petitioners have specifically averred that they are not trying to violate the order of injunction but has infact filed this petition since the respondents have obstructed them from making constructions in the petition schedule property item No.2. The whole case of the respondents is with respect to the fact that the petitioners have filed this petition to bypass the order of injunction passed in favour of the respondents herein in IA.01/2023 and in CMA.18/2023.

14. In the order in IA.01/2023 and in CMA.18/2023, both courts have found that the respondents have a prima facie case and balance of convenience in their favour. Both courts have found that the respondents established a prima facie case regarding their lateral support. Hence there is every chance that if an order is passed in this petition, irreparable injury will be caused to the respondents due to the construction made by the petitioners. Further the petitioners herein has sought for a relief having a

nature of mandatory injunction. In a petition seeking a relief of mandatory injunction, the petitioner is bound to prove that they have a strong prima facie case and balance of convenience. Distinct from a petition seeking the relief of temporary injunction, the petitioners are bound to prove that the prima facie case is more strong enough to get a favourable order. In the instant case the order in IA.01/2023 is already in existence and the court have found that the respondents have a prima facie case regarding their right of lateral support. The petitioners averred that if the construction is restricted by respondents it will cause injury to them. The term injury was interpreted as an injury that is material one which cannot be compensated by way of damages. In the instant case the loss of lateral support is more critical compared to the right of the petitioner to make construction. The suit property has to be preserved and the relief of mandatory injunction can only be granted if the petitioners have proved their case with more clarity. Hence this court is of the view that the petitioners have failed to prove three prong test that is mandatory to get a favourable order of injunction. The petitioners failed to prove that they have a prima facie case, balance of convenience and that irreparable injury will be caused to them. Hence this court is of the view that there are no sufficient grounds to allow this petition.

15. **Point No.(2):** In result, the petition is dismissed with costs.

Dictated to the Confidential Assistant, transcribed and typed by her corrected and pronounced by me in Open Court on this the 22nd day of January, 2025.

Sd/-
SWATHI.R.KRISHNAN
MUNSIFF

Appendix:**Exhibits marked for the Petitioner:**

| | | |
|----|------------|---|
| A1 | 12.06.2024 | Copy of application filed before Kerala SC/ ST Commission |
| A2 | 20.06.2024 | Copy of Notice from Kerala SC/ ST Commission |
| A3 | 09.03.2023 | Copy of Building permit issued by Attingal Municipality |
| A4 | – | Proposed Plan of the Building |

Exhibits marked for the Counter Petitioners:

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|-----|------------|---|
| B1 | 30.11.2023 | Certified Copy of Order in IA.01/2023 in OS.397/23 of the Munsiff's Court, Attingal |
| B2 | 20.02.2024 | Certified Copy of Judgment in CMA.18/23 in OS.397/23 of the Sub Court, Attingal |
| B3 | – | Certified Copy of Commission Report filed by Adv. Mridula. M.D before Munsiff's Court, Attingal |
| B4 | – | Certified Copy of Objection filed in CMA.18/23 before Sub Court, Attingal |
| B5 | – | Copy of Laser Photo print |
| B6 | – | Copy of Laser Photo print |
| B7 | – | Photocopy of Certificate |
| B8 | – | Copy of Objection in IA.01/2023 |
| B9 | – | Photocopy of Certificate issued from Village Office, Avanavancheri |
| B10 | – | Photocopy of Certificate issued from Attingal Municipality |
| B11 | – | Photograph (1) |
| B12 | – | Photograph (1) |

Witness examined for the Petitioner: Nil**Witness examined for the Counter Petitioner:** Nil**Court Exhibits:** Nil

Id/-
MUNSIFF

//True Copy//

Typed by: Lasitha
Compared by: Sheena.K

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