

**IN THE COURT OF THE DISTRICT MUNSIF,
ERANIEL.**

Present: **Thiru. A. Maruthupandi, B.Com., B.L.,**
District Munsif, Eraniel. (F.A.C.)

Friday, the 08th day of December 2023

I.A.No.04/2022
in
O.S.No.85/2012

1.Thangam
2. Ganesan
3. Jegan
4. Jose Jeya Seelan

... Petitioners/ Plaintiffs

Vs.

Govindra

.... Respondent / Defendant

This petition is coming before me for final hearing on 08.12.2023 in the presence of Mr.M.Thankaraj, learned counsel for the Petitioners / Plaintiffs and Mr.R.Ramesh, learned counsel for the Respondent/Defendant and on perusal of the case records and having stood over for consideration till this day, this court delivered the following

Order.

This petition is filed under Order VI Rule 17 and Section 151 of the Code of Civil Procedure 1908 as amended by Act 22 of 2002 to allow the Petitioners/Plaintiffs to amend the plaint.

2. THE AVERMENTS IN THE PETITION IN BRIEF:-

(i) The suit which is one for declaration of pathway right over 'B' schedule property and injunction. The petitioners are the absolute owner in possession and

enjoyment of the plaint A schedule property in respect of this respective plots. The petitioners have obtained as per various sale deed in their favour. The plaint 'B' schedule property is pathway. Plaint schedule property along with larger area of about 3 Acres 84 cents of land originally belonged to one boothathankutty Nadar Kutty Pillai Nadar, comprised in Old survey Number 9374 (1 Acre 12 cents) and 9375 (2 Acres 62 cents) which co-relates with resurvey number 254/1 of Colachel Village, Kalkulam Taluk, Kanyakumari District.

(ii) Kutty Pillai Nadar has four sons by name K.Chellappan, K.Rajendran, K.Chellam and K.Ganesan. Among the four sons K.Chellam is mentally retarded, person who is under the custody of K.Rajendran. After the demise of Kutty Pillai Nadar his sons entered into a registered partition on 14.09.1989. The partition deed was registered as per document number 1163/1989 dated 14.09.1989 of Colechel sub registrar's office. As per the partition deed the schedule property survey was divided into three plots, from north to south. The first plot with an area of 1 Acre 67 cents 750 square links was allotted to K.Chellappan. Plot No.2 with an area of 75 cents 750 sq.links was allotted to K.Rajendran plot Number 3 with an area of 92 cents was allotted to K.Ganesan, the 2nd plaintiff. Mutation also effected in their respective names. The entire plot was sub divided by revenue authorities and sub numbers 254/1A, 254/1B and 254/1C were allotted respectively to the above said three persons.

(iii) Rajendran was in possession and enjoying Resurvey No.254/1B which is the middle plot. Out of 75 cents 750 sq. Links, Rajendran sold 640 sq.links of land on the eastern side of his entire property to his brother Ganesan for pathway purpose as per document number 890/1994 dated 20.06.1994 of Colachel Sub registry. The remaining area of 75 cents 110 sq.links plot was sold to Mr.J.Patric Julian and Mr.V.Vijaya Kumar as per document Number 893/1994 dated 20.06.1994 of Colachel

Sub registry. On 28.02.1994 Mr.K.Chellappan executed a sale deed No.386/1994 dated 01.03.1994 of Colachel Sub registrar's Office in respect of 1 cent land on the south eastern corner out of his entire property ie. 1 acre 67 cents 750 sq.links which is resurvey No.254/1A infavour of Mr.J.Patric Julian and Mr.V.Vijayakumar. This property has been purchased for the purpose of pathway. This pathway which is marked as red washed portion in the rough plan appended along the plaint property is the plaint 'B' schedule property. The plaint 'B' schedule property is connected with on the eastern side by southern portion of Resurvey numbr 254/4 spread about an area of 2 cents 975 sq. Links (1296 sq.ft) and northern portion of 1 cent 400 sq. Links (610.sq.ft.) comprised in resurvey 254/5. Altogether a total area of 4 cents 375 sq.links of land, which in also used as pathway having an width of 17 feet to reach the north-south main road on the eastern side. This property is purchased by J.Patric Julian and V.Vijayakumar as per sale deed No.892/1994 dated 20.06.1994 of Colachel Sub registry from Mr.K.Ganesan with a condition that the property is to be preserved as a pathway and the vendor and his successor in interest also have the right of pathway for ingress and egress.

(iv) The plaintiffs are the owners in possession and enjoying the 'A' schedule property comprised in resurvey number 254/1B. 'A' schedule property with a total area of 75 cents 110 sq.links was divided into 7 plots with a 12 feet width pathway on the northern side of the entire property in Resurvey No.254/1B. This 12 feet width pathway is joining with the plaint 'B' schedule property on the east, and then it runs on resurvey numbers 254/4 and 254/5 up to east i.e. is the north to south road. On 17.12.2004 J.Patric Julian and V.Vijayakumar executed two sale deeds infavour of Tmt.Anbammal as per sale deed No.1959/2004 and 1960/2004 of Colachel Sub registry. From that date on wards Anbammal was in possession and enjoying the property. Prior to the sale Thiru.P.Patric Julian and V.Vijayakumar have jointly conducted a fishnet company in the above said property. Anbamal also continued the

fish net company for some time. At that time also the plaint 'B' schedule property was used as pathway, for heavy motor vehicles to reach the road on the east and vice versa.

(v) The first plaintiff is the owner and he is in possession of plot No.1 in the rough plan. First plaintiff Thangam purchased the 1/2 portion of plot No.1 from Jaya Rajan, as per sale deed No.559/2012 dated 01.03.2012 of Colachel Sub registry, who with G.Jaya Seelan purchased remaining half of the plot No.1 from Tmt.Vijaya Bala 23.01.2011 of Colachel Sub registry. From that date onwards the first plaintiff is in possession and enjoying the property as full owner paying revenue tax in their name. Patta also stands in the name of the vendor. The second plaintiff has purchased the plot No.2 in the rough plan from Tmt.Anbammal who has purchased the entire area in resurvey No.254/1B from J.Patric Julain and V.Vijayakumar. The sale deed in favour of second plaintiff is registered one, as per document No.999/2008 dated 21.05.2008 of Colachel Sub registry. From that date onwards the second plaintiff is in possession and enjoying the property along with the plaint 'B' schedule property the pathway.

(vi) The third plaintiff is the owner in possession of plot No.4. Third plaintiff purchased plot No.4 as per document number 748/2009 dated 24.04.2009 of Colachel sub registry from Tmt.A.Vijaya Bala. Third plaintiff is in possession and enjoying the property along with plaint 'B' schedule property. The fourth plaintiff is the owner in possession of plot No.7 fourth plaintiff purchased the plot no.7 from Tmt.V.amel Freeda as per sale deed No.2604/2011 dated 20.10.2011 of Colachel sub registry. From that date onwards the fourth plaintiff is in possession and enjoying the property as full owner. The plaintiffs along with other plot owners comprised in resurvey Number 254/1B are enjoying the plaint 'B' schedule property was purchased by the predecessor in title only for the purpose of pathway use, without B schedule property the remaining area has no access to reach the Colachel to Karungal road which is on

the east. The plaint 'B' schedule property along with the 12 feet width pathway on the west and 17 feet, width pathway on the east is the only pathway available to reach the plaintiffs respective plots.

(vii) The respondent is the son of late K.Chellappan who was the previous owner of the plaint 'B' schedule property. 'B' Schedule property was sold by K.Chellappan, S/o.Kutty Pillai Nadar to the plaintiffs vendor's predecessor namely J.Patric Julian and V.Vijayan Kumar as per sale deed number 386/1994. This property is purchased only for pathway purpos that can be seen from recital itself. Moreover the vendor that is Mr.K.Chellappan and his successors also have the right to use this as pathway which is provided in that sale deed also. After filing this suit the respondent (defendant) and his men encroached the western portion of the plaint 'B' schedule property and put up the retaining wall on 28.03.2012 the petitioners gave a memo to the commissioner to visit the property urgently, so the commissioner has given notice on both sides and visited the suit properties and note down the facts. On the date of suit over the above state retaining wall the defendant putup Hollow brick compound wall. Then defendant demolished a portion of compound wall. Again it was reconstructed by the defendant.

(viii) The encroached western portion of plaint 'B' schedule property was measured and located by the commissioner having an extent of 90 sq.links and shown with in JKC letters of his plan No.1. The Respondent encroached western portion of plaint 'B' schedule property and put up granite retaining wall along with Hollow brick compound walll be demolished and cut and remove the small teak wood and முந்திரி planted after suit on the western portion of 'B' schedule property by way of mandatory injunction. The defendant encroached western portion of the plaint 'B' schedule property having an extent of 90 sq.links and put up granate retaining well

along with Hollow brick compound wall be recovered from the defendant. For this purpose the plaint has to be suitably ammended and the same may be allowed for the interest of justice. If the amendment is not allowed he will be put to irreparable loss and hardships.

3. Counter filed on the side of Respondent:-

(i) All the averments in the affidavit filed in support of the amendment application, except those that are herein after specifically admitted or otherwise dealt with shall be deemed to have been denied as false. The averments are false to the core, frivolous and vexatious in toto. The petition is not maintainable and unsustainable in law and on facts. This petition is filed after the commencement of the trial of the suit. The proposed amendment , if allowed, will change the entire structure of the suit and change the nature of the suit. The proposed amendment changes the cause of action of the suit, changes the court fee and changes the relief also. The plaint was elaborately prepared with due diligence at the time of filling of the suit. There was no change in the plaint schedule property after filling the suit. The plaintiff as a dominant litigant should be careoful and diligent while drafting the plaint. The proposed amendment is sought for based on the false and biased commission report, which is under challenge for set aside. There was no encroachment of the plaint schedule property as alleged. The petition is liable to be dismissed in limine with compensatory cost.

(ii) The averments in paragraph 1 of the affidavit are admitted. The averments in paragraph 2 of the affidavit are not fully correct. The plaint 'A' Schedule property is not correctly described. The plaintiffs alone are not the owner of the plaint 'A' schedule property. Some other persons are also having title and possession over the 7 plots described as plaint schedule property in addition with the plaintiffs/petitioners.

All the proper and necessary parties are not added as petitioners/plaintiffs in this suit. The suit and amendment application are not maintainable in law, since similar persons are also having the same right and interest over the plaint schedule properties. The 2nd petitioner could not represent the other petitioners. The averments in paragraph 3 of the affidavit are not fully correct. It is not correct to state that Resurvey No.254/1 of Colachel Village contain 3 Acres 84 Cents. But it measures only 3 acres 35 cents 500 sq.links. All the averments in paragraph '4' and '5' of the affidavit are put to proof of the petitioners. All the averments in paragraph 6 of the affidavit are not fully correct. It is true that Mr.K.Chellappan executed a sale deed No.386/1994 dated 01.03.1994 in respect of 1 cent of land on the south eastern corner of his property infavour of Mr.J.Patric Julian andMr.Vijayakumar for the purpose of pathway. But this one cent of property sold to them is rectangular in shape measuring 4.30 mts. At the north, 4.50 mts, at the South, and 9.25 mts at the east and west respectively. Immediately, after the sale infavour of Patric Julian and Vijayakumar, the defendants father K.Chellappan had put up barbed wire fence with pipe pillars on the southern side and eastern side of his property and thus separated the one cent of land already sold to the plaintiff's vendor. The defendant and his predecessor in interest has been enjoying his property surrounded by barbed wire fence without any interruption for the past 18 years. The above said Mr.Patric Julian and Mr.Vijayakumar sold their property in the 'A' schedule property, along with the pathway right to one. Anbammal, W/o.Raju in the year 2004. Anbammal converted the land into housing plots and sold to so many persons. Ultimately the plaintiffs and three other persons purchased the 7 plots. The 2nd plaintiff is non other than the paternal uncle of the defendant, who developed enmity with the defendant and colluded with the other plaintiffs and caused all sorts of trouble to the defendant. At the instigation of the 2nd plaintiff, the 3rd and 4th plaintiffs on 08.03.2012 illegally damaged the barbed wire fence and trying to widen the 1 cent pathway in such away

to create free access to heavy vehicles. Therefore the defendant lodged a complaint before the Colachel Police Station on 08.03.2012.

(iii) Due to Mandaicode Temple festival, the police authorities were unable to enquire the matter immediately, but they enquired and disposed the petition on 19.03.2012 with a consensus arrived at between the parties that the counter petitioners shall measure the 1 cent property with the help of Taluk Surveyor on or before 31.03.2012 otherwise the petitioner shall construct a compound wall on the original place where the barbed wire fence was removed. Accordingly, the defendant constructed a compound wall, using cement Hollow bricks, at the original place where the barbed wire fence was removed by the 3rd and 4th plaintiffs. This can be seen from the photographs filed along with the written statement. The plaintiffs made all necessary arrangements to file this vexatious suit on 28.03.2012 against this defendant as if the defendant was trying to obstruct the free passage of the plaintiffs to the plaint A schedule property and pulled down and damaged the compound wall on 28.03.2012 at 3.30 PM. in the evening. The plaintiffs after damaging the compound wall brought the commissioner on the spot on 28.03.2012 itself at about 5.30 p.m. In the mean time the defendant lodged a criminal complaint before the Colachel police. The Inspector of Police visited the spot, investigated the case and filed FIR against 2nd, 3rd and 4th plaintiff as FIR No.138/2012 for offence under section 294(b), 427 and 506(ii) IPC. The defendant never obstructed any pathway as alleged. The one cent of property used as a pathway remains as such without any obstruction as alleged. The defendant has every right to put up compound wall around his property. The plaint 'B' schedule property is not correctly described. The plaintiffs described the plaint 'B' schedule property in such a way to suit their case. The red washed portion shown in the rough plan appended along with the plaint is not correct and true. Actually the path leading from the Colachel to Karunkal, north to south road bends at the above said 1 cent of property as L shape. But the plaintiffs

draw an incorrect plan with a curv and trying to mislead the court. The 1 cent of property sold by the defendant's father for the purpose of path way is having east to west width of 14 3/4 feet and north to south length of 30 feet.

(iv) The averments in paragraph 7 of the affidavit are not fully correct. The plaintiff alone are not owners in possession and enjoying the 'A' schedule property comprised in resurvey No.254/1B. Some other persons are also owners in possession and enjoyment over the plaint 'A' schedule property. The rest of the allegations are to the strict proof of the plaintiffs. The averments in paragraph 8 of the affidavit are not fully correct. It is not correct to state that the plaint 'B' schedule property was used as pathway for heavy motor vehicles to reach the road on the east and vice versa. The plaint 'B' Schedule property as described and shown in the rough sketch is not correct. Mr.J.Patc Julia, N.Vijaya Kumar and Anbammal had been using the one cent of rectangular shaped property purchased from the defendant's father for the purpose of pathway and not the plaint 'B' schedule property as shown in the plaint and injunction application. This defendant did not object anybody from using the above mentioned one cent of property as a pathway. But the plaintiff's are trying to take more area with different shape and size from the defendant's property.

(v) The averments in paragraph 9 to 12 of the affidavit are not known to the defendant and the plaintiffs are put to proof of the same. The averments in paragraph 13 of the affidavit are not fully correct. As already mentioned above, Re-surey No.254/1B has sufficient access to reach the Colachel to Karungal road through the one cent of property sold by the defendant's father. This one cent of property is not described as plaint 'B' schedule property. But more area on the south eastern corner of the defendant's property is mentioned in the 'B' schedule property leaving some portion at the north western corner of the one cent property, by altering the size and shape of the original 1 cent already sold.

(vi) All the averments in paragraph 14 of the affidavit are true except the fact that 'B' schedule property (as described was not sold) was sold by K.Chellappan, S/o.Kutty Pillai Nadar to the plaintiff's vendor. The 'B' schedule property mentioned in the petition/plaint includes some portion of land from the defendant's property and some portion of land from the one cent purchased by the plaintiff's vendor from the defendant's father. The one cent of property is more than sufficient to use as a pathway; But the plaintiff's are trying to grab more area from the south-western corner of the defendant's property in such a way to widen the pathway to suit their taste. This defendant objected to this.

(vii) All the averments in paragraph 15 of the affidavit are false. The defendant never encroached the western portion of the plaintiff 'B' schedule property and put up retaining wall on 28.03.2012 as alleged. The plaintiffs made all necessary arrangements to file this vexatious suit on 28.03.2012 against this defendant as it the defendant was trying to obstruct the free passage of the plaintiffs to the plaintiff A schedule property and pulled down and damaged the compound wall on 28.03.2012 at 3.30 pm. In the evening. The plaintiffs after damaging the compound wall brought the commissioner in the spot on 28.03.2012 itself at about 5.30 p.m. In the mean time the defendant lodged a complaint before the Colachel Police. The Inspector of Police visited the spot, investigated the case and filed FIR against 2nd, 3rd and 4th plaintiff as FIR No.138/2012 for offence under section 294(b), 427 and 506(ii) IPC. The defendant never obstructed any pathway as alleged. The one cent of property used as a pathway remains as such without any obstruction as alleged. The defendant put up compound wall covering his own property in Rsy.No.254/1A and not included the 1 cent of property sold to the plaintiff's vendors. The defendant has every right to put up compound wall around his property at the defendant's boundary line. The allegation that " the defendant demolished apportion of compound wall again it was

reconstructed by the defendant is not true". The alleged date of encroachment, retaining wall construction, hollow bricks construction, and date of filling suit are 28.03.2012. The present amendment application is filed on 27.09.2022. What prevent the petitioners to file this application at the earliest point of time is not stated and explained anywhere in the affidavit. After the lapse of more than 10 years this petition is filed, which cannot be allowed. The petitioners are trying to insert the Commissioner's wrong findings into the plaint by way of this amendment, which is against law.

(viii) All the averments in paragraph 16 are denied as false. Nothing was encroached in the 'B' schedule property as alleged. The commissioner did not act properly without bias. The 90 sq.links area shown within JKC letter of his plan is not true. With serious and strong allegations the respondent filed petitions to set aside the commission report. Which are pending for hearing. All the averments in paragraphs 17 and 18 are denied as false. The Teak and Cashew nut trees are not planted after suit as alleged. They are already grown inside the defendant's property. The petitioners could not ask for any relief to cut and remove the standing trees and demolish the compound wall. For that purpose, the petitioners could not ask to amend the plaint. If an order for amendment is granted it will affect the defendant's right, title and possession of part of his property which is included in the plaint 'B' schedule property. Heavy hardship and irreparable damage will be caused to the defendant if the order for amendment is granted against this defendant. The application is not maintainable in law and on facts. The report of the commissioner in any means could not be inserted in the plaint by way of proposed amendment. To accept this counter and dismissed the amendment application with cost.

4. POINTS FOR DETERMINATION:-

Whether the Petitioners/ plaintiffs are entitled to the relief as prayed for or not ?

5. DISCUSSION AND ANALYSIS:-

Both side not argued. Records perused carefully.

(i) On perusal of an affidavit the reasons for amending the relief and others is a reasonable one, because of while the suit is pending the compound wall was demolished and again re-constructed by the Respondent/Defendant as alleged by the Petitioners/Plaintiffs, so that, in the said circumstances, it is just and necessary to allow the same to amend the plaint and to seek a relief of mandatory injunction for proper and effective disposal of the case and more over this court is inclined to allow the same to avoid an unnecessary multiplicity proceedings.

6.DECISION:-

In the result, petition is allowed.

Written by me, typed by Steno-Typist in computer, corrected and pronounced by me in open court, on this the 08th day of December 2023.

True copy

Sd/-A.Maruthupandi,
District Munsif,
Eraniel, (FAC).

D.M.C. Eraniel.
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