

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K. BABU

TUESDAY, THE 28<sup>TH</sup> DAY OF NOVEMBER 2023/7TH AGRAHAYANA, 1945

RSA NO. 420 OF 2007

AGAINST THE JUDGMENT & DECREE DTD. 28.7.2006 IN AS 71/2003

OF ADDITIONAL SUBORDINATE JUDGE'S COURT, THALASSERY

OS 141/1997 OF MUNSIFF'S COURT, KUTHUPARAMBA

APPELLANTS/APPELLANTS/DEFENDANTS:

1 ELAMBILAN NANI AMMA,

[REDACTED]

2 NANDINI, [REDACTED]

-DO-.

3 RAGHAVAN NAMBIAR

[REDACTED]

4 ELAMBILAN SASI, [REDACTED]

-DO-.

5 ELAMBILAN MANY, [REDACTED]

-DO-.

6 VIJAYAN

-DO-.

BY ADVS. SRI. K. V. SOHAN

SMT. SREEJA SOHAN. K.

RESPONDENTS/RESPONDENT/PLAINTIFF:

1 MULAVANA ANTONY (DIED IRS IMPEADED)

[REDACTED]

ADDL. 2 VAZHAKATTU ANNAMMA AGED 78 YEARS. W/O LATE MULAVANA

[REDACTED]

3 MULAVANA CHACKO ANTONY @ SIBI,

[REDACTED]

4 MULAVANA DEVASYA ANTONY @ BABY,

[REDACTED]

5 MULAVANA JOSEPH ANTONY @ TONY,

[REDACTED]

6 MULAVANA THOMAS ANTONY @ THOMACHAN,

[REDACTED]

7 MULAVANA VARGHESE ANTONY @ KUNHIMON,

[REDACTED]

8 MULAVANA MINI, AGED 47 YEARS, D/O LATE MULAVANA ANTONY,

[REDACTED]

9 MULAVANA SINI, AGED 43 YEARS, D/O LATE MULAVANA ANTONY,

[REDACTED]

(LEGAL HEIRS OF DECEASED RESPONDENT ARE IMPEADED AS  
ADDITIONAL RESPONDENTS 2 TO 9 AS PER ORDER DATED  
11.03.2020 IN IA.1/2019.)

BY ADVS.SRI.JAYANANDAN MADAYI PUTHIYAVEETIL  
SRI.K.V.PAVITHRAN

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON  
14.12.2022, THE COURT ON 28.11.2023 DELIVERED THE FOLLOWING:

**“C.R.”**

### **JUDGMENT**

This Regular Second Appeal arises from the judgment and decree dated 28.7.2006 in A.S.No.71 of 2003 passed by the Additional Subordinate Judge’s Court, Thalassery. The Appeal Suit arose from the decree and judgment of the Munsiff Court, Kuthuparamba, in O.S.No.141 of 1997.

2. The defendants are the appellants. During the course of the proceedings, the respondent/plaintiff died. His legal representatives were impleaded as additional respondent Nos.2 to 9.

3. The plaintiff instituted the original suit for declaration of title, fixation of boundary and consequential injunction with respect to the plaint schedule property. The plaint schedule property is 15.89 cents of land in Re-Survey No.91/1 (Old Survey No.25) of Payamamsom. The plaint schedule property originally belonged to late Krishnan Nambiar. After his lifetime, his wife Parvathi Amma and defendant Nos.1 to 3, his children and one Velayudhan Nambiar succeeded to the property. A small strip of land on the northern

boundary of the property was utilised for the construction of a road. Originally, Krishnan Nambiar had possessed 75 cents of property. Seven cents of land was surrendered for the construction of the northern road. He retained the remaining 68 cents in his possession. The legal representatives of Krishnan Nambiar executed partition deed No.3469/1979, by which the property was partitioned among them. Parvathi Amma, wife of Krishnan Nambiar, received cash in lieu of her share. Thus, the entire 68 cents were shared equally among the other four persons, each obtaining 17 cents. Velayudhan Nambiar and defendant Nos.2 and 3 took their share in single plots measuring 17 cents each. Defendant No.1 took her share in two plots: item No.1, containing 2½ cents, and item No.2, measuring 14½ cents.

4. Even prior to the partition of the property, the plaintiff had entered into an understanding with Sri.Velayudhan Nambiar to buy his entire share of the property. After the partition, the plaintiff purchased the entire 17 cents from Velayudhan Nambiar. Item No.4 in the partition deed was allotted to the share of Velayudhan Nambiar. Defendant No.3 had transferred his share in favour of defendant No.4. After the partition, shallow trenches were dug to separate the shares. Defendant No.4 destroyed the trench constructed as the boundary

separating the properties of defendant Nos.2 and 3. On 28.2.1998 defendant Nos.1 and 4 to 6 commenced construction of a building on the property. They attempted to meddle with the boundary separating the plaintiff schedule property from the property of defendant Nos.1 and 3 to 6. The plaintiff intervened, but the defendants destroyed the boundaries. The plaintiff, therefore, instituted the suit initially for fixation of boundary and permanent prohibitory injunction. When the Commissioner submitted Ext.C8 plan, the plaintiff incorporated amendments in the plaint and prayed for declaring his title over the property.

5. The defendants resisted the suit. They pleaded as follows:-

The identity of the plaintiff schedule property is not clear from the pleading. The allegation that shallow trenches were dug to separate the property allotted to the sharers soon after the partition is incorrect. The averment that the defendants meddled with the boundary marks is baseless. The defendants have no intention to trespass on the plaintiff's property. The construction of the building was done on the property of the defendants.

6. The trial Court framed the following issues:-

1. What is the correct identity of the plaint schedule property ?
2. Whether the plaintiff is entitled to an injunction as prayed for ?
3. Whether the plaintiff is entitled to a decree for fixation of boundary ?
4. Whether there is any cause of action for the suit ?
5. Whether the trespass alleged is true ?
6. Whether the defendants are entitled to compensatory costs ?
7. Relief and costs ?

7. On the side of the plaintiff PW1 was examined, and Exts.A1 to A3(g) were marked. DW1 was examined, and Exts.B1 to B3 were marked on the side of the defendants. Exts.C1 to C8 were marked as Court Exhibits.

8. The trial Court decreed the suit declaring plaintiffs' title over plots A, A1 to A12 in Ext.C8 plan and directed fixation of boundary in accordance with the measurements in Ext.C8 plan. The defendants were also restrained by an order of permanent prohibitory injunction from trespassing upon the plaint property.

9. The defendants challenged the decree and judgment passed by the trial Court in A.S.No.71 of 2003. The First Appellate Court confirmed the judgment and decree passed by the trial Court.

The concurrent findings of the trial Court and the First Appellate Court are under challenge in this Regular Second Appeal filed under Section 100 of the CPC.

10. After hearing both sides, this Court re-formulated the substantial questions of law as follows:-

- (1) Has not the Court below misconstrued the evidence when it declared that the plaintiff acquired title over A and A1 to A12 plots in Ext.C8 plan ?
- (3) Have the Courts below drawn necessary inferences and presumptions based on the pleadings and evidence ?
- (4) When the demarcation of boundaries of immovable property is based on the title deed, and it is found that the actual enjoyment boundary is within the permissible error under Rule 56 of the Kerala Survey and Boundary Rules, 1964, whether the court will be justified in re-fixing the boundary.

11. The case of the plaintiff is that he has acquired title and possession over 15.89 cents of land identified as plots A and A1 to A12 in Ext.C8 plan. The further case of the plaintiff is that at the time of the partition of the property, after the death of Krishnan Nambiar, the properties acquired by the different sharers were separated by shallow trenches, and the said boundaries were in existence when the plaintiff purchased the property from Velayudhan Nambiar, one of the legal representatives of Krishnan Nambiar. The plaintiff further pleaded that

at the time of construction of the building on the property of the defendants, they deliberately destroyed the boundary separating their property with the plaint schedule property.

12. The case of the defendants is that the plaintiff has not obtained possession of the entire plaint schedule property as pleaded and his attempt is to acquire a portion of the property in the possession of the defendants.

13. The plaintiff gave evidence as PW1. He deposed that at the time of partition, the property was measured and divided into five plots, and shallow trenches having a depth of 2 feet were dug to separate the shares. PW1 further stated that some boundaries were destroyed by the defendants. DW1/defendant No.3 gave evidence in support of the case of the defendants. He would state that the total extent of the property covered by the partition deed was 68 cents, and 4 sharers got 17 cents each. He would further state that the properties were not measured at the time of partition. DW1 would further depose that there were only 68 cents of land after the widening of the road. In Exts.C1 to C8 Commission Reports, the Commissioner reported that even now, the extent of the entire property is between 68-70 cents. Ext.A1 title deed shows that all the allottees except defendant No.1



took their shares in a single plot. The property allotted to defendant No.1 was in two plots, 2½ cents in one plot and 14½ cents in another. Ext.C8 plan goes to show that plots B, B1 to B10 in Ext.C8 plan are the items given to defendant No.1. Plots B7 and B8 together constitute 2½ cents and plots B1 to B6, B9 and B10 together constitute 14½ cents. Ext.A1 would further show that the property allotted to Velayudhan Nambiar (the predecessor of the plaintiff) was on the west of the property allotted to defendant No.1. Ext.C8 plan would show that the portion of item No.2 in Ext.A1 was surrendered for the construction of the road. There is no dispute regarding plot 'C' identified as Nandini's property. Plots D and D1 allotted in favour of Raghavan together constitute 17 cents. The case of the plaintiff is that plot D forms a portion of his property, and plots F1 and D, the property of Raghavan, together constitute 17 cents. According to the plaintiff, a 'Tak kila' is the southern boundary of item No.5, on the south of F and F1 plots, which is tallying with the boundaries mentioned in Ext.A1.

14. The trial Court found that the defendants cannot claim plot E, as the said property was held by the plaintiff even prior to the partition. While giving evidence, DW1 put up a case that the plaintiff only possesses plots A, A3 & E2. If that be the case, the plaintiff

obtained only around 12 cents of property. Ext.C8 report and plan would show that the extent of the property is between 68 and 71 cents. The trial Court rightly noted that the defendants have no case that they possessed property on the strength of any document other than Ext.A1 partition deed. Therefore, the trial Court disbelieved the version of DW1.

15. The learned counsel for the appellants would contend that the shortage in extent of the property in the possession of the plaintiff is within the allowable limits of error as provided under Rule 56 of the Kerala Survey & Boundaries Rules, 1964 (for short 'the Rules'). The learned counsel heavily relied on Rule 56 of the Rules to contend that the shortage in extent is only 0.31 cents, which is the difference between the plots A7 to A12 (2.11 cents) and E2 to E4 (1.80 cents), which is less than the permissible extent of 0.34 cents being 2% of the registered extent of 17 cents.

16. Rule 56 of the Rules reads thus:-

**"56. Limits of error in the case of recorded areas of fields or sub-divisions.-** In the case of recorded areas of fields or sub-divisions, the allowable limits of error shall be as follows:-

(a) in the case of survey fields or sub-divisions in the Corporation or Municipal areas, One per cent of the

registered extent subject to a minimum of 10 square meters;

(b) in other cases, two per cent of the registered extent subject to a minimum of 20 square meters.”

17. The learned counsel submitted that in the case of recorded areas of fields or sub-divisions, the allowable limits of error shall be 2% of the registered extent subject to a minimum of 20 square meters in areas other than Corporation or Municipal areas. Rule 56 of the Rules was notified in exercise of the powers under Section 22 of the Kerala Survey & Boundaries Act (for short 'the Act'). The provisions of the Kerala Survey & Boundaries Act and the Rules made thereunder can only be made applicable to the survey of lands as provided in Chapter II of the Act. The survey conducted in this case is not in accordance with the survey process as provided in Chapter II of the Act. It is also trite that the decisions of the survey authorities under Chapter II of the Act will not affect the right and title of the property acquired by a party as per a valid title deed. The right and title to property have to be determined not with reference to the survey demarcation but based on other cogent materials, the primary of which is the title deed. The record of the survey result shall be conclusive proof that the boundaries were determined and recorded therein correctly. (Vide: **Cheriyamad**

**Grama Panchayath v. The State of Kerala and Ors. (2019 (5) KHC 699, Venugopalan Nair v. Saraswathy Amma (2013 (4) KLT 717), Karthyayani v. Balakrishnan [2014 (2) Suppl. 67 (Ker.)], Ibrahim v. Saythumammed (2013 (4) KLT 435) and Achama Alexander (Died. Lrs impleaded) and Others v. Assistant Director, Survey and Land Records and Others (2022 (2) KHC 131).**

18. In the present case, the dispute is not a 'boundary dispute' as provided in Chapter II of the Act, and therefore, the theory of 'error' deduced from Rule 56 of the Rules has no application when the right of a party is adjudicated based on title deeds and possession.

19. Yet another contention of the appellants is that a strip of land scheduled in the plaint is in the possession of the defendants, for which the plaintiff should have sought recovery of possession to succeed. Going by the pleadings and the unchallenged Ext.C8 report and plan, it is evident that the dispute only relates to a narrow strip of land lying on the boundary of the plaint schedule property. It is to be presumed that, that strip of land is in the possession of the plaintiff and that the boundary of his property extends up to the line noted by the Commissioner in Ext.C8 plan. This view is fortified by the decision of

the Apex Court in **Achuthan Nair v. Narayanan Nair (AIR 1987 SC 2187)**, and the decisions of this Court in **Kathirummam Chiramman Karyhyayani v. Kunnool Balakrishnan and Others (2014(2) KHC 108)**, and **Susi v. Sujathan and Another (2022 (1) KHC 671)**.

20. Both the trial Court and the First Appellate Court held that the plaintiff proved his title over the property noted as plots A & A1 to A12. The defendants failed to establish any right over the disputed land. The trial Court has drawn necessary inferences and presumptions based on the pleadings and evidence. I have not come across any misconstruction of evidence by the courts below. The substantial questions of law are answered accordingly against the appellants.

The Regular Second Appeal stands dismissed.

Sd/-  
**K.BABU**  
Judge

TKS