

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 30TH DAY OF JANUARY 2015/10TH MAGHA, 1936

AS.No.588 of 2001 (D)

**(AGAINST THE JUDGMENT DECREE DATED 24-08-2000 IN OS NO.295/1995 OF
THE SUB COURT, PAYYANNUR).**

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APPELLANTS/DEFENDANTS 2 TO 6:

- 1. GOVINDA VADIYAN NAMBOODIRI, AGED 45 YEARS,
CHERUTHAZHAM DESOM P.O., MUNDOOR,
CLERK, N.M.G.BANK.**
- 2. DEVAKI ANDERJENAM, AGED 32 YEARS,
W/O.GOVINDA VADIYAN NAMBOODIRI,
PAYICHAYIL, CHERUTHAZHAM AMSOM DESOM.**
- 3. SRIKRISHNADAS, AGED 13 YEARS,
PAYICHAYIL, CHERUTHAZHAM AMSOM DESOM.**
- 4. SRIVIDYA, AGED 8 YEARS,**
- 5. THRIKALA, AGED 6 YEARS,**

BY ADV.SRI.V.N.RAMESAN NAMBISAN

RESPONDENTS/PLAINTIFFS:

- 1. THEKKEKKARA JANALA PERIKA MANA ILLATH
KRISHNA VADIYAN NAMBOODIRI,
S/O.SUVARNNINI ANDARJENAM, AGED 56 YEARS.**
 - 2. SUBHADRA ANDERJENAM, AGED 45 YEARS,
W/O.KRISHNA VADIYAN NAMBOODIRI.**
 - 3. VISHNU, AGED 17 YEARS,**
 - 4. SATHYANARAYANAN, AGED 16 YEARS,**
 - 5. SUVARNNINI,AGED 10 YEARS,**
- (ALL ARE AT KULAPNAM,CHERUTHAZHAM AMSOM DESOM).**
- 6. KUNHIPPARU PADINHARE VEETIL,
D/O.CHIYYAI, AGRICULTURIST, AGED 53 YEARS,
THEKKEKARA HOUSE, VATTAPOIL, NILESWARAM.P.O.**

7. **THEKKEKKARA JENALA PERIKA MANA,
VADIYAN ILLATH SARASWATHI ANDERJENAM,
W/O.LATE VASUDEVA VADIYAN, AGED 55 YEARS,
CHERUTHAZHAM AMSOM DESOM, P.O.MUNDOOR.**

**BY ADVS.SRI.M.CHATHUKUTTY NAMBIAR
SRI.C.MURALIKRISHNAN (PAYYANUR)
SRI.T.V.JAYAKUMAR NAMBOODIRI
SRI.ABRAHAM GEORGE JACOB**

**THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 30-01-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.B.SURESH KUMAR, J.

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A.S.No.588 of 2001.
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Dated this the 30th day of January, 2015.

J U D G M E N T

Defendants 2 to 6 in O.S.No.295 of 1995 on the file of the Court of the Subordinate Judge, Payyannur have come up in this appeal challenging the decision in that suit.

2. O.S.No.295 of 1995 is a suit for injunction and damages. The case of the plaintiffs therein is that the plaint schedule property owned by them is lying at a higher level to the properties on its north and east; that the properties on the north of the plaint schedule property belong to defendants 1 to 6; that the property on the east of the plaint schedule property belong to the first plaintiff and defendants 7 and 8; that the plaint schedule property is lying at a higher level than the property of defendants 1 to 6 on its north; that the plaintiffs are residing in a property situated about 100 meters away from the plaint schedule property; that in course of time, the defendants started

removing soil from their property on the north and east of the plaint schedule property and that as a result of such removal of soil, the plaint schedule property is exposed to the danger of landslide. According to the plaintiffs, a portion of the plaint schedule property has already been slid away on account of the aforesaid conduct of the defendants and that since the fertile soil in the property of defendants has already been removed, the clay accumulated in their properties used to flow through a channel during rainy season to the residential property of the plaintiffs and causing damage to the residential property of the plaintiffs. The suit was therefore filed seeking a decree of permanent prohibitory injunction restraining the defendants from removing soil from the properties on the north and east of the plaint schedule property, for recovery of damages amounting to Rs.70,000/- and for other ancillary reliefs.

3. Though separate written statements were filed by defendants 1, 2, 3 to 6 and 8, only the second defendant adduced evidence in the case. As such, I am referring only

to the contentions raised by the second defendant in the written statement filed by him. The contentions of the second defendant were two fold. According to him, the plaint schedule property as also the properties surrounding in the plaint schedule property including the property of the defendants were originally part of one tenement and it is only during 1988, the properties have come to the separate possession of the parties by virtue of the partition effected in the family. It is his case that the soil in the property was removed long prior to the partition. It was also contended by the second defendant that since soil from the property held by the first plaintiff along with defendants 7 and 8 and situated on the east of the plaint schedule property was also removed in course of time, what is accumulated in the residential property of the plaintiff is the clay flown from that property. In other words, according to the second defendant, he is not responsible for the damage caused to the plaint schedule property and the residential property of the plaintiffs.

4. A commissioner was appointed by the trial court for local inspection. The commissioner so appointed inspected the property and submitted a report in court which is marked as Ext.C1. In the course of the trial, as per order on I.A.No.1029 of 1997, the commissioner was directed to ascertain and report further facts and on the basis of the said order, the commissioner submitted yet another report which was marked as Ext.C3. The plan appended to Ext.C3 report was marked as Ext.C4.

5. The trial court found that the Advocate Commissioner has clearly identified the plaint schedule property as also the residential property of the plaintiffs. The trial court also found that a portion of the plaint schedule property which is marked in Ext.C4 plan was slid away due to the removal of soil from the properties of the defendants. The trial court also found that what is available after the extensive removal of soil in the property of the defendants is only loose and infertile soil and the same is being flown to the residential property of the

plaintiffs and thereby causing damage to the residential property of the plaintiffs also. On the basis of the said findings, the court below decreed the suit as prayed for. As per the decree, the damages sustained by the plaintiffs was assessed at Rs.28,350/-. Defendants 2 to 6 are aggrieved by the said decision of the trial court and hence this appeal.

6. Heard Adv.V.N.Ramesan Nambisan, the learned counsel for the appellants and Adv.Abraham George Jacob for the respondents.

7. The learned counsel for the appellants reiterated the contentions raised by the second defendant in his written statement as referred to above.

8. The commissioner appointed in the suit has identified the plaint schedule property with the aid of the concerned Village Assistant. In Ext.C4 plan, the properties owned by the plaintiffs are shown as B1 and B2 plots and the properties owned by defendants 1 to 6 are shown as A1 and A2 plots. The properties owned by the eighth defendant are shown as C1 and C2 plots in Ext.C4 plan.

Likewise, the property held by the first plaintiff jointly with defendants 7 and 8 are shown as C3 and D3 plots in Ext.C4 plan. It is reported in Ext.C3 that gravel and clay are seen extracted from plots A1 and A2 and that on account of the removal of gravel and clay from the said plots, the plots A1 and A2 are lying at a very lower level when compared to plots B1 and B2 and further that the plots B1 and B2 are therefore exposed to the danger of landsliding. It is also reported in Ext.C3 that the portion marked as plot B2 which is part of the property of the plaintiffs has already been slid away on account of the removal of soil from the properties of the defendants. The extent of the property of the plaintiffs which was found slid away was estimated at 1.3 cents by the commissioner. The commissioner has also reported that during monsoon the clay from the pits formed in plots A1 and A2 is being carried away by water to the dry channel on the east of the plaint schedule property and through the dry channel, which runs along the paddy fields, the clay

finally reaches the residential property of the plaintiffs. It is further stated that due to the continuous flow of the clay water to the residential property of the plaintiffs, a considerable portion of the property became infertile and useless. The commissioner has estimated the loss sustained to the plaint schedule property on account of the aforesaid acts of the defendants at Rs.1,600/- and the damages caused to the residential property of the plaintiffs on account of the alleged acts of the defendants at Rs.20,680/-. The commissioner who prepared Ext.C1 as also Ext.C3 reports was examined in the suit as PW2. In the cross examination, the quantum of loss sustained to the plaint schedule property as also to the residential property of the plaintiffs as assessed by the commissioner is not seen challenged. The cross examination of PW2 does not also indicate that the conclusions arrived at by him as indicated above are challenged. In the light of Ext.C3 report submitted by the Advocate Commissioner which is part of the records in the case, I find that the plaintiffs have established the case set up by them in the plaint and the

court below was justified in granting the decree sought for by them.

9. Even though it was vehemently contended by the learned counsel for the appellants that the clay and infertile soil from the plots jointly owned by the first plaintiff along with defendants 7 and 8 has caused damage to the residential property of the plaintiffs, there is absolutely no evidence in support of the said contention. The other contentions raised by the learned counsel for the appellants is that the removal of the soil from plots A1 and A2 took place before the partition effected in the year 1988. In this connection, it is to be noted that the commissioner who gave evidence as PW2 has categorically stated that on his examination it was revealed that the removal of the soil from the properties of the defendants were of recent origin. The said part of the evidence tendered by PW2 is also not seen challenged in cross examination. In the said circumstances, the said contention also does not merit consideration.

10. Coming to the quantum of damages, it is seen that the commissioner has assessed the damages sustained by the plaintiffs only at Rs.22,280/-, but the court below has granted a decree to the plaintiffs for a sum of Rs.28,350/- by mistake. The plaintiffs are, therefore, entitled to only Rs.22,280/- by way of damages and the impugned decree to that extent is liable to be modified.

In the result, the appeal is allowed in part, confirming the impugned decree in all respects, except to the extent of reducing the damages from Rs.28,350/- to Rs.22,280/-. The parties are directed to suffer their costs.

**Sd/-
P.B.SURESH KUMAR,
(Judge)**

Kvs/-

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PA TO JUDGE.