

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 26TH DAY OF MAY 2015/5TH JYAISHTA, 1937

SA.No.719 of 2001

AGAINST THE JUDGMENT IN AS 22/1995 of ADDL.DISTRICT COURT,
KOTTAYAM DATED 24.02.2001

O.S.48/1992 OF MUNSIFF COURT, KANJIRAPPALLY

APPELLANT/APPELLANT/DEFENDANT:

P.K. DIVAKARAN, S/O. NARAYANAN,
RESIDING AT PUTHENPURACKAL HOUSE,
VAZHOOR KARA, VAZHOOR VILLAGE,
KOTTAYAM DISTRICT (DIED. LRs IMPEADED)

ADDL. APPELLANT No.2

AJITH KUMAR, AGED 36, S/O. LATE P.K. DIVAKARAN,
PUTHENPURACKAL HOUSE, VAZHOOR KARA,
VAZHOOR VILLAGE, KOTTAYAM DISTRICT.

(LEGAL REPRESENTATIVE OF DECEASED SOLE APPELLANT IS
IMPEADED AS ADDL.A2 AS PER ORDER DTD.23/7/2013 IN
I.A.1945/13)

BY ADVS.SRI.M.NARENDRA KUMAR
SMT.LAYA SIMON

RESPONDENT/RESPONDENT/PLAINTIFF:

JOSEPH FEN, THOPPILMALIKAYIL,
VAZHOOR KARA, VAZHOOR VILLAGE,
KODUNGOOR P.O., KOTTAYAM DISTRICT (DIED. LRs
IMPEADED)

ADDL.R2 SARAMMA, THOPPIL MALIKAYIL,
VAZHOOR P.O., KOTTAYAM.

ADDL.R3 BAKER FEN, THOPPIL MALIKAYIL
VAZHOOR P.O., KOTTAYAM.

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ADDL.R4 ROSSY PHILIP
C/O. SARAMMA, THOPPIL MALIKAYIL,
VAZHOOOR P.O., KOTTAYAM.

(ADDL.R2 TO R4 IMPEADED AS LR_s OF DECEASED SOLE
RESPONDENT AS PER ORDER DTD.30.5.13 IN I.A.485/05)

ADDL.R2 TO 4 BY ADV. SRI.RAJEEV V.KURUP

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON
26-05-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Second Appeal No.719 OF 2001

Dated this the 26th day of May, 2015.

J U D G M E N T

The defendant in O.S.No.48/1992 before the Munsiff's Court, Kanjirappally who suffered concurrent decree at the hands of the trial court as well as the lower appellate court in a suit for injunction is the appellant before this Court.

2. The facts absolutely necessary for the purpose of disposal of this appeal are as follows:

Both the plaintiff as well as the defendant traced their title to Ext.A1 document dated 24.02.1125 (M.E). The plaintiff claimed to have obtained 8 and odd acres of land out of which he has set apart a portion to his son and the rest of the property that has been scheduled to him is 4.12 acres. The plaintiff pointed out that the defendant who is the assignee, from one of the brothers of the plaintiff, had obtained 3 cents of property with three rooms which was situated on the southern side of

edakayyala which separates the property of the plaintiff from that of his brother from whom the defendant later on purchased the property. Pointing out that the defendant is trying to trespass into the plaint schedule property, suit was laid.

3. The defendant resisted the suit by pointing out that the plaint schedule property is not identifiable. His definite contention was that out of 8.78 acres of land, after setting apart 6 cents of property with two buildings having three rooms each, only balance extent i.e. 8.72 acres was given to the plaintiff initially. His specific case was that the plaintiff had no claim over the 6 cents set apart to one of his brothers. The defendant contended that out of the 6 cents so set apart, he purchased the western three cents along with three shop rooms and he was in possession of the same. He disputed the existence of edakkayyala as claimed by the plaintiff and pointed out that, that has been destroyed long ago and that cannot be deemed to be the boundary between the property of the plaintiff and the defendant as claimed. He therefore prayed for dismissal of the suit.

4. On the above pleadings, issues were raised by the trial court. The evidence consists of the testimony of PWs 1 to 4 and documents marked as Exts.A1 to A9 from the side of the plaintiff. On the side of the defendant, DWs 1 and 2 were examined and Exts.B1 to B8 were marked. Exts.C1 to C5 are the commission reports and plan.

5. Both the courts below, mainly based on Ext.C1, Commissioner's report as well as the oral evidence of PW2, came to the conclusion that the red line shown as CGD in Ext.C1 is edakkayyala which is made mention of by the plaintiff in the suit and the defendant can lay claim only to the property on the southern side of the line. Pointing out that the suit was one for injunction simplicitor and possession alone was the relevant criteria and the plaintiff having succeeded in proving that the property up to the edakkayyala shown as CGD is in his possession, the suit has necessarily to be decreed. That is how the defendant has suffered the decree.

6. In this Second Appeal, the following substantial question of law has been formulated:

“Whether the court below was right in granting the injunction when it found that the property is not identifiable as per the measurement contained in Ext.A1 based on which the suit was filed”.

7. Sri.M.Narendrakumar, learned counsel appearing for the appellant pointed out that it is very distressing to note that after having entered a finding that the property scheduled to the plaintiff on the basis of Ext.A1 could not be identified, he was granted a decree in his favour. At any rate, according to the learned counsel, the plaintiff has no case that as per Ext.B3 document, defendant did not get 3 cents of property made mention of therein with three rooms. Going by Ext.C1 as it now stands wherein the property obtained by the defendant is identified as ABEFGD if the edakkayyala is treated as passing along the lines CGD, defendant's stand to lose half of their property. A little over 1 cent is obtained by him under Ext.B3. Learned counsel pointed out that there is no case for anybody as things now stand that any property on the southern side of edakkayyala, even assuming that there is edakkayyala, had ever been taken for widening KK road and if that be so, going by

Ext.B3 by which the defendant obtained title, he should have 3 cents. The plaintiff has no case that the defendant did not obtain 3 cents as shown in Ext.B3. Without locating the southern boundary of the property obtained by the plaintiff as well as the northern boundary of the property obtained by the defendant which must be the edakkayyala as narrated by the plaintiff, the suit could not have been decreed. According to the learned counsel, the imaginary edakkayyala now drawn as CGD cannot be treated as edakkayyala even assuming there was one and the same is even now in existence. Learned counsel very vehemently contended that at any rate the plaintiff has no case that the defendant did not obtain the extent of property as covered by Ext.B3. Even assuming that the suit is one for injunction simplicitor, as long as the finding of the trial court as confirmed by the lower appellate court to the effect that the property obtained by the plaintiff as per Ext.A1 is not identifiable, no relief could have been granted to the plaintiff.

8. It is significant to notice, according to the learned counsel appearing for the appellant, that the plaintiff has no case

that he is in possession of more area than what he obtained under Ext.A1 or that the defendant obtained less area than what he has been conveyed under Ext.B3. Under these circumstances, both the courts below have erred in law and on facts in decreeing the suit.

9. Sri.Rajeev V Kurup, learned counsel appearing for the respondents referred to Ext.B3 and contended that the recital in the said document shows that it was out of 8.78 acres of land that 6 cents were carved out and out of that, 3 cents were conveyed to the defendant. It therefore could not be contended by the defendant that out of 8.75 acres, 6 cents have set apart and only the balance extent is available to the plaintiff. Learned counsel also pointed out that the definite case of the defendant is that there was no edakkayyala in existence as of now and the so called edakkayyala as projected by the plaintiff and as shown by the defendant is only a revetment and cannot be treated as a separating boundary.

10. After having heard the learned counsel on both sides, there seems to be some force in the contention raised by the

learned counsel for the appellant. There is a definite finding by the trial court that the plaint schedule property, going by the parameters of boundary, extent and survey number, is not identifiable. It is significant to notice that the trial court also found that the description of plaint schedule property is not in conformity with the description in Ext.A1. Probably, that finding may not be quite correct in the sense that the plaintiff has got a case that out of the total extent of property received by the plaintiff, he had assigned certain portions to his son. However, it was absolutely essential for the purpose of deciding the issue involved in the suit to determine the southern boundary of the plaintiff's property as well as the northern boundary of the defendant's property. It is here that an interesting point emerges for consideration.

11. Ext.C1 on which considerable reliance is placed by the plaintiff in the suit identifies the property obtained by the defendant as per Ext.B3. It is identified as ABEFGD. It is also important to notice that EF is shown as the northern boundary of the property obtained by the defendant as per Ext.B3.

12. However, edakkayyala which, according to the plaintiff, separates the plaintiff's property from that of the defendant's property is now shown as CGD which would mean that nearly 1½ cents of property obtained by the defendant under Ext.B3 is lost to him. This is a case which the plaintiff does not have. He does not have a case that he had got more extent of land than what he obtained as per Ext.A1 or that the defendant had not in possession of extent of land as conveyed to him under Ext.B3. It is therefore essential to fix the boundary between those two properties. It is felt that it was inappropriate for the court below without identifying both the properties to determine temporary edakkayyala as CGD as that would, as already mentioned, take away a portion of the property obtained by the defendant under Ext.B3.

In the light of the above fact, it becomes necessary to reconsider the issue after locating the property properly. It is difficult to sustain the judgment and decrees of the courts below. They are accordingly set aside and the matter is remanded to the trial court for fresh disposal in accordance with law and in the

light of what has been stated above. The parties shall appear before the trial court on 23.06.2015. The trial court may make every endeavour to dispose of the suit within a period of six months from the date of appearance.

Sd/-

**P.BHAVADASAN
JUDGE**

smp