

**Peter vs Kuriakose**

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**SooperKanoon Citation :** [sooperkanoon.com/1363435](http://sooperkanoon.com/1363435)

**Court :** Kerala

**Decided On :** Nov-17-2023

**Judge :** Honourable Mr.Justice K. Babu

**Appeal No. :** RSA/410/2012

**Appellant :** PETER

**Respondent :** Kuriakose

**Judgement :**

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU FRIDAY, THE 17TH DAY OF NOVEMBER 2023 / 26TH KARTHIKA, RSA NO. 147 OF 2012 AGAINST THE JUDGMENT AS 241/2009 OF THE SUBORDINATE JUDGES COURT, PERUMBAVOOR AGAINST THE JUDGMENT IN OS 269/2006 OF THE MUNSIFF COURT, PERUMBAVOOR APPELLANTS/APPELLANTS/PLAINTIFFS/: 1 KURIAKOSE AGED 54 YEARS S/O. ITTOOPU, OLANGATTU HOUSE, RESIDING AT EDAKKERIL PERINGALA,P.O., PINARMUNDA KARA, KUNNATHUNADU. 2 ANNAMMA AGED 51 YEARS W/O. KURIAKOSE, OLANGATTU HOUSE, RESIDING AT EDAKKERIL PERINGALA,P.O., PINARMUNDA KARA, KUNNATHUNADU. BY ADVS.

SRI.G.RAJAGOPAL SMT.S.LEELALAKSHMI SMT.N.RENJINEE DEVI  
RESPONDENTS/RESPONDENTS/DEFENDANTS: 1 SHAJI AGED  
ABOUT 39 YEARS S/O. MATHEW, OLANGATTU HOUSE, RESIDING  
AT ADAKKERIL, PERINGALA.P.O., PINARMUNDA KARA,  
KUNNATHUNADU VILLAGE, PIN-683565. 2 PETER AGED ABOUT 38  
YEARS S/O. MATHEW,OLANGATTU HOUSE, RESIDING AT  
ADAKKERIL, PERINGALA.P.O., PINARMUNDA KARA,  
KUNNATHUNADU VILLAGE, PIN-683565. ..2.. 3 SAJI AGED ABOUT 35  
YEARS S/O. MATHEW,OLANGATTU HOUSE, RESIDING AT  
ADAKKERIL, PERINGALA.P.O., PINARMUNDA KARA,  
KUNNATHUNADU VILLAGE, PIN-683565. 4 SARAMMA AGED ABOUT  
61 YEARS W/O. MATHEW,OLANGATTU HOUSE, RESIDING AT  
ADAKKERIL, PERINGALA.P.O., PINARMUNDA KARA,  
KUNNATHUNADU VILLAGE, PIN-683565. R2 TO R4 BY SRI.PAUL  
K.VARGHESE SMT.A.A.GEETHA THIS REGULAR SECOND APPEAL  
HAVING BEEN FINALLY HEARD ON 17.11.2023, ALONG WITH  
RSA.410/2012, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING: ..3..

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU FRIDAY, THE  
17TH DAY OF NOVEMBER 2023 / 26TH KARTHIKA, RSA NO. 410 OF  
2012 AGAINST THE JUDGMENT IN AS 233/2009 OF THE  
SUBORDINATE JUDGES COURT, PERUMBAVOOR AGAINST THE  
JUDGMENT AND DECREE IN OS 319/2006 OF THE MUNSIF  
COURT, PERUMBAVOOR  
APPELLANTS/APPELLANTS/(APPELLANTS 2 TO 4-PLAINTIFFS 2 TO  
4:) 1 PETER S/O. MATHEW, OLANGATTU HOUSE, PINARMUNDA  
KARA, KUNNATHUNAD VILLAGE, KUNNATHUNAD TALUK. 2 SAJI  
S/O.MATHEW,OLANGATTU HOUSE, PINARMUNDA KARA,  
KUNNATHUNAD VILLAGE, KUNNATHUNAD TALUK. 3 SARAMMA  
W/O.MATHEW,OLANGATTU HOUSE, PINARMUNDA KARA,

KUNNATHUNAD VILLAGE, KUNNATHUNAD TALUK. BY ADVS. SRI.PAUL K.VARGHESE SMT.A.A.GEETHA RESPONDENTS/(RESPONDENTS & 1ST APPELLANT & DEFENDANTS AND 1ST PLAINTIFF): 1 KURIAKOSE S/O. ITTOOP, OLANGATTU HOUSE, PINARMUNDA KARA, KUNNATHUNAD VILLAGE, KUNNATHUNAD TALUK. PIN- 683542. 2 ANNAMMA ..4..

W/O. KURIAKOSE,OLANGATTU HOUSE, PINARMUNDA KARA, KUNNATHUNAD VILLAGE, KUNNATHUNAD TALUK. PIN- 683542. 3 PATHROSE S/O. ITTOOP,OLANGATTU HOUSE, PINARMUNDA KARA, KUNNATHUNAD VILLAGE, KUNNATHUNAD TALUK. PIN- 683542. 4 IYPE S/O. ITTOOP,OLANGATTU HOUSE, PINARMUNDA KARA, KUNNATHUNAD VILLAGE, KUNNATHUNAD TALUK. PIN- 683542. 5 EOUYEB S/O. ITTOOP,OLANGATTU HOUSE, PINARMUNDA KARA, KUNNATHUNAD VILLAGE, KUNNATHUNAD TALUK. PIN- 683542. 6 MARY D/O. ITTOOP,OLANGATTU HOUSE, PINARMUNDA KARA, KUNNATHUNAD VILLAGE, KUNNATHUNAD TALUK. PIN- 683542. 7 SHAJU S/O. MATHEW,OLANGATTU HOUSE, PINARMUNDA KARA, KUNNATHUNAD VILLAGE, KUNNATHUNAD TALUK. PIN- 683542. BY ADVS. VINU CHAND SMT.S.LEELALAKSHMI SMT.N.RENJINEE DEVI C.R.VINOD KUMAR(K/667/2001) GEEVARGHESE MATHEW(K/152/2019) SHEENA K.S.(K/003451/2022) RAGIN ROY(K/2267/2023) ABU MATHEW(K/742/2000) AJU MATHEW(K/637/2004)

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 17.11.2023, ALONG WITH RSA.147/2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: ..5.. K. BABU, J

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----- Dated this the 17th day of  
November, 2023

## JUDGMENT

## **These two appeals arise from the common judgment**

and decree in A.S.Nos.233 and 241 of 2009 passed by the Subordinate Judges Court, Perumbavoor. The appeal suits arose from the common judgment and decree in O.S.Nos.319 and 269 of 2006 on the file of the Munsiffs Court, Perumbavoor.

2. Plaintiffs 2 to 4 in O.S.No.319 of 2006 are the appellants in RSA No.410 of 2012. Defendants 1 to 6 and plaintiff No.1 are the respondents.

3. The plaintiffs in O.S.No.269 of 2006 are the appellants in RSA No.147 of 2012. Defendants therein are the respondents.

4. As the subject matter relates to the common immovable properties scheduled in the plaint, these ..6.. appeals are disposed of analogously by way of a common

### **judgment.**

5. After hearing both sides, this Court

reformulated the substantial questions of law as follows:- (1)Has not the First Appellate Court committed an error when it failed to remit the Original Suits to the Trial Court after recording the finding that there had not been effectual adjudication of the lis in view of the fact that the properties were not identified by the Commissioner? (2)Are not Exts.C1(a) and C2(a) plans incomplete since they do not contain the mandatory requirements for identifying the properties so as to re-fix the same on the land?

6. The properties and the parties are referred to with reference to their description in O.S.No.269 of 2006.

7. The plaint A schedule property is 1 Acre 45

Cents of land in old Sy Nos.498/4A, 498/4B-1, 498/5, ..7.. claim that they are the owners of this property. B schedule property having an extent of 65 cents comprised in Sy No.498/4A, 498/4B and 495/6 belongs to defendants 1 and 2. The plaint C schedule property is another 65 cents of land comprised in Sy

Nos.498/4A, 498/4B, 498/7 and 498/6 that belongs to defendant No.3. 68 cents of land in 498/4B and 495/6 that belongs to defendant Nos.4 to 6 is scheduled as D schedule. E schedule property is described as 3.24 ares of land which is stated to be part of A schedule.

8. The property scheduled as B in

O.S.No.319/2003 is scheduled as A schedule property in O.S.No.269 of 2006. A portion of A schedule property in O.S.No.319 of 2003 is scheduled as B schedule in O.S.No.269 of 2006. Pleadings set up by the plaintiffs:-

9. Plaintiffs 1 and 2 are husband and wife.

Defendants are the wife and children of first plaintiffs ..8.. fathers brother Mathew. Plaintiffs acquired title over plaint A schedule property by virtue of Exts. A1 to A5.

10. Defendants acquired title over B, C and D schedule properties by way of the same partition deed No.1060/1959.

11. B schedule property lies on the immediate west

of plaint A schedule property. The plaintiffs attempted to put up fence on the boundary of their property. The defendants prevented them from erecting fence on the boundaries. Defendants attempted to trespass upon A schedule property and to reduce the portions of plaint schedule property to their possession. The Commissioner appointed by the Court after surveying the property found that the defendants illegally obtained possession of an extent of 1.35 Ares of land. Plaintiffs are entitled to recover possession of the said 1.35 Ares of land which is scheduled as C in the plaint.

12. The defendants set up the following pleadings:-

..9.. The plaintiffs have no title or possession over the property. First plaintiffs father Ittoop obtained 65 cents of land by way of the family partition deed and a portion of the said property was dedicated to the Panchayat for construction of a road. As per the partition deed, defendants father Mathew obtained 74 cents of land. Thereafter, Sri. Mathew purchased 82.5 cents from his brother Paili and 18.5

cents from his brother Varkey. Sri. Mathew obtained 1 Acre 45 cents of land. At the time of effecting the partition, the properties had not been measured and demarcated. There was no boundary on the western side of A schedule property. The plaintiffs influenced the re-survey authorities and created survey records in their favour without deducting the property dedicated to the Panchayat for the construction of road. The attempt of the plaintiffs is to annex the portions of the properties of the defendants.

13. The parties went to trial. The Trial Court jointly

tried both the suits. PWs 1 and 2 were examined and ..10.. Exts.A1 to A5 were marked on the side of the plaintiffs. Exts.B1 and B2 were marked on the side of the defendants. Exts.C1 to C3 series were marked as Court Exhibits.

14. In O.S.No.269 of 2006, the Trial Court framed the following issues:-

(1)Whether the plaintiffs have title and possession over the plaint A schedule property? (2)Whether the plaintiffs are entitled to recover possession of plaint C schedule property on the strength of title? (3)Whether the plaintiffs are entitled to get prohibitory injunction as prayed for? (4)Relief & Costs.

### **15. In O.S.No.319 of 2006, the following issues**

were framed:- (1)Whether the plaintiffs are entitled to get a decree for fixation of boundary of A schedule property? (2).Whether the prohibitory injunction is allowable? (3)Relief and cost. Addl. Issue No.4 Whether the plaintiffs are entitled for recovery of possession of plaint E schedule property? ..11..

16. The Trial Court found that as the parties set up

their claim based on Ext.A1 partition deed and the Commissioner failed to identify the property based on the partition deed and old survey plan, the properties could not be identified. Resultantly, the Trial Court dismissed both the suits.

17. The plaintiffs as well as the defendants

challenged the common judgment and decree by filing AS Nos. 233 and 241 of 2009 before the First Appellate Court which confirmed the findings recorded by the Trial Court. Both the plaintiffs and defendants are before this Court challenging the common judgment and decree in these Regular Second Appeals.

18. I have heard Shri. Paul K. Varghese, the learned counsel appearing for the plaintiffs and Sri. Vinu Chand, the learned counsel appearing for the defendants.

19. The parties in the suit belong to the same

family. The father of the plaintiffs and the father of the defendants are siblings. They acquired title over the ..12.. respective properties by virtue of partition deed No. from seeking the relief of fixation of boundary, prayed for recovery of possession of E schedule property which has been allegedly encroached upon by the defendants and made part of B schedule. In O.S.No.269 of 2006 the defendants prayed for fixation of boundary of the property and also recovery of possession of 1.35 Ares of land allegedly in the possession of the plaintiffs based on Ext.C2(a) plan.

20. The learned counsel for the plaintiffs contends

that identity of the property is essential for the adjudication of the disputes raised by the parties. The learned counsel submits that Ext.C2(a) and C1(a) plans are insufficient to identify the properties. It is the further submission of the learned counsel for the plaintiffs that measurement of the properties based on the old survey plan and Ext.A1 title deed is required to adjudicate the disputes. The learned counsel for the defendants submits ..13.. that the properties could not be identified and therefore there had not been an effectual adjudication of the lis in the Courts below.

21. The Original Suits have been essentially instituted for recovery of possession of the properties over which the parties raise rival claims based on their title deeds.

22. I have gone through Exts.C1(a) and C2(a) plans.

Ext.C2(a) and C1(a) plans are incomplete in the sense that those are not sufficient to identify the properties. On the requirements of a survey plan, this Court in Sabu v. Sasi [2022 (2) KHC 435], observed thus:-

13. This Court appointed Sri.A.A.Rajan, Assistant Director of Survey in charge of Deputy Director of Survey, Ernakulam, to assist the Court as Amicus Curiae. The Assistant Director of Survey perused Ext.C3(a) plan and submitted that `Ladder is necessary to plot the field and verify the shape and area of the field. Re-fixation of the property in the field is impossible in the absence of `Ladder, `G-line, `Check-line, and `Offset. Sri.A.A.Rajan submitted a report describing the steps to be followed in preparing the plan. He relied on ..14..

the Kerala Survey Manual in support of his submissions. The Amicus Curiae submitted that the surveyor concerned has adopted `chain survey in preparing Ext.C3(a) plan .

14. The relevant portion of the report submitted by the

Amicus Curiae is extracted below:- Surveying is the process of making such measurements as will determine the relative positions of points on the surface of the earth in

### **order that the shape and extent of Surveying is**

the process of making such measurements as will determine the relative positions of points on the surface of the earth in order that the shape and extent of any position of earth's surface may be ascertained and delineated on a map or plan. A plan is therefore the representation to some scale, of the ground and the objects upon it.

XX XX XX XX

The following are the various components of a survey plan:- a. G-Line: G-line outlines the making of the entire sketch. It is an imaginary line that converts the sketch into various sizes of triangles to fix the boundary lines and the various points in the sketch. Errors in G-line will affect all the pertinent calculations. b. F-Line: F-line signifies the actual field boundaries in the outer lines of the sketch. Its points are fixed with reference to its offset distance from the G-line. ..15..

c. Check-Lines: Check Lines are lines that divide a survey field into triangles, so that off-sets can be laid to the field line points, and thereby area can be calculated. d. Sub-Divisional Lines: Subdivision lines demarcate a small portion of land within a survey number. A sub-divisional extent of a polygon is directly correlated to the extent found for the particular subdivision. The subdivision lines are generally defined through a ladder, or the likes of it. e. Ladder: The field line points are defined with reference to an offset distance from the G-line or check line. The offset distance may deviate to the left or right side of the G- line. This left or right angle deviation is highlighted by the ladder. f. Extension Lines: Each survey number field forms a crucial part of the village map, and as a result of it, other fields surround each sketch. The precise direction wherein the subject field joins the neighbouring field is depicted on the survey map as an extension line. g. Neighbouring Field Survey Nos: The other fields surround each of the survey sketches. These surrounding field numbers are marked around each FMB. h. Off-set: It is the perpendicular distance which is the least distance to a point measured from a G line or Checkline. In a Survey, the position of the details such as boundaries, buildings, roads etc. is located with respect to the Surveyline by means of lateral measurement taken at right angles to the survey line. Every offset has two ..16..

measurements 1) the distance along the chainline called Chainage and 2) the length of the offset. i) Field Measurement Sketch/FM Sketch: Field

Measurement of a field is a plan plotted to scale in the field measurement sheet with triangulation measurements and offsets. As a rule, the top of the page will represent north, but when it does not, the north point line should be shown. Measurements of F lines, G lines and Checklines are recorded in the sketch. The G line measurements, Check lines measurement and offsets are neatly entered in the ladder in the FM sheet. Offset are numbered in series in red ink from the bottom of the ladder. The direction of adjoining field boundaries, and adjoining survey numbers are entered in the sides of the field. The ladder is necessary to plot the field and verify the shape and area of the field. It is not possible to plot and calculate area or refix the field with boundary measurements only. j) Measurement of Fields: An Eyesketch of the field to be surveyed is prepared before taking the R.S.A.Nos.1002 & 1004 of 2014 11 measurements. All side and subdivision boundaries measured are noted in the Eyesketch. Junctions are named A, B, C, D etc. G lines connecting trijunctions are then measured. Offsets are taken for field boundary bends from G lines. Offsets for subdivision points are taken from checkline. Offsets are recorded in the field book (Ladder) on the left or right of the line. Each point of the field can be refixed using this ladder. ..17..

15. The principle of `Chain surveying is to divide the field

into a framework of triangles. The sides of a triangle are measured directly in the field. Each field is divided into triangles by chaining lines called Diagonal or Check-lines from tri-junction to tri-junction and the Offsets taken from G-line or Check-line to the bend points.

16. The Amicus Curiae submitted that Ext.C3(a) plan is

styled as a field measurement sketch (FM Sketch). An FM Sketch shall contain `F-line, `G-line, `Check-line and `Offset measurements. The `G-line measurements, `Check-line measurements and `Offset are entered in the `Ladder in the FM sheet. In addition, the direction of adjoining field

boundaries and adjoining survey numbers are entered on the sides of the field. `Ladder is necessary to plot the field and verify the area of the field. It is impossible to plot and calculate the area or re-fix the field with the aid of boundary measurements (Flines) only. To re- fix the field `G-lines, `Check-lines, `F-lines and `Offsets are required. A survey plan becomes complete and self explanatory only when it contains the requirements mentioned above.

17. Ext.C3(a) plan contains only `F-lines, which cannot be

used to find the area of any of the properties described therein and to identify the boundaries of the properties. Ext.C3(a) plan relied on by the Courts below has not been prepared following the requirements mentioned above. It is impossible to ascertain how `C schedule property was identified as 617 sq.links by the surveyor from Ext.C3(a) Survey Plan. `G-line, `F-line, and `Sub-Divisional Lines ..18..

are necessary for plotting and re-fixing the boundary of a property and `Check-line and `Ladder are necessary for computing the area of the property surveyed. Ext.C3(a) plan, which is made part of the decree is not useful to find the area of the property depicted therein and to fix the boundaries of the property.

18. It is pertinent to note that the appellant had questioned

the veracity of Ext.C3(a) plan in the Trial Court itself. A specific objection was raised, stating that the plan was incomplete. In the objection to the Commission Report and plan, the appellant contended that the area of the property could not be tabulated from the plan and boundaries cannot be fixed due to the lack of diagonal lines. The Trial Court and the First Appellate Court lost sight of those vital aspects while decreeing the suit. Ext.C3(a) is insufficient to identify the properties in dispute. The Trial Court and the First Appellate Court ignored the fact that Ext.C3(a) plan was incomplete, even when the appellant raised such a contention in the Trial Court itself.

23. Exts. C1(a) and C2(a) plans do not contain the

requirements as mentioned above. So I hold that Exts. C1(a) and C2(a) plans are insufficient to identify the property to grant a decree as provided in Order 20 of the Code of Civil Procedure. ..19..

24. The insufficiency of Ext.C1(a) and C2(a) plans

had been brought to the notice of the First Appellate Court by the plaintiffs and defendants. They requested that as there had not been an effectual adjudication of the lis, the matter be remanded to the trial Court for retrial. The First Appellate Court did not consider the submissions raised by the appellants. This is a case where there had not been proper trial or effectual adjudication of the proceedings due to the fact that the survey plans prepared for identifying the properties were insufficient for that purpose. On the power of the Court to remand, a Constitution Bench of the Supreme Court in Shankararamiah A. v. M.S. Lakshminarayanamoorthi and Others [(2016) 5 KHC 87] held thus:-

An order of retrial after remand may also be made in exercise of the inherent jurisdiction of the Court where the Court of appeal is satisfied that there has been no proper trial or no complete or effectual adjudication of the proceedings and the party complaining of the error or omission or irregularity has suffered material prejudice on that account. Such an order may also be ..20..

made to prevent abuse of the process of Court. But power to order retrial after remand, where there has already been a trial on evidence before the Court of first instance, cannot be exercised merely because the Appellate Court is of the view that the parties who could lead better evidence in the Court of first instance have failed to do so. A trial de novo, after setting aside a final

**order passed by the Court of first instance may therefore**

be made in exceptional circumstance, where there has been no real trial of the proceeding, or where allowing the order to stand would result in the abuse of the process of the Court.

(h) We clarify that the presumption in law under Section

20 of the Act is distinct from presumption of fact referred to above in point (e) as the former is a mandatory presumption while the latter is discretionary in nature.

25. In the present case, I am of the considered view that

there had not been complete or effectual adjudication of the proceedings and both the plaintiffs and defendants suffered material prejudice on account of the insufficiency of the survey plans submitted before the Trial Court by the respective Commissioners. The only course open to this Court is to remit the matters to the Trial Court for adjudication afresh. I hereby make it clear ..21.. that I have not made any observation on the merits of the contentions of the parties. In the result:- (1)The Regular Second Appeals are allowed by way of remand. (2)The judgment and decree passed by the First Appellate Court and Trial Court are set aside. (3)The Trial Court is directed to consider the matter afresh. (4)The parties are at liberty to lead evidence. (5)They are also at liberty to apply for issuing commission, if they are so advised. (6). All the parties are at liberty to incorporate additional pleadings. (7)Those parties who remained ex parte in the Trial Court are also at liberty to submit written statements.

26. The learned counsel for the defendants submits

that some strangers have acquired title and possession over a portion of the properties. The learned counsel for ..22.. the plaintiffs submits that the properties in respect of which dispute survives have not been alienated. The parties are directed to appear before the Trial Court on 22.01.2024. No costs. Sd/- K.BABU, JUDGE kkj

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