

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 10TH DAY OF FEBRUARY 2015/21ST MAGHA, 1936

FAO (RO).No.9 of 2014

**(AGAINST THE JUDGMENT IN AS.18/2011 OF THE II ADDITIONAL DISTRICT COURT,ERNAKULAM DATED 19-11-2013).
(AGAINST THE JUDGMENT AND DECREE IN OS.1370/2008 OF THE ADDITIONAL MUNSIFF COURT,ERNAKULAM).**

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APPELLANTS/RESPONDENTS/ DEFENDANTS:

1. **RADHAMANI AMMA,D/O.KARTHIAYANI AMMA,AGED 72 YEARS,
ILLATHUVEETIL,CHEPPANAM DESOM,KUMBALAM VILLAGE,
KANAYANNOOR TALUK,KOCHI-682506.**
2. **GEETHA DEVI,D/O.RADHAMANI AMMA,AGED 47 YEARS,
ILLATHUVEETIL,CHEPPANAM DESOM,KUMBALAM VILLAGE,
KANAYANNOOR TALUK,KOCHI-682506.**
3. **MADHUSOOTHANAN,S/O.RADHAMANI AMMA,AGED 47 YEARS,
ILLATHUVEETIL,CHEPPANAM DESOM,KUMBALAM VILLAGE,
KANAYANNOOR TALUK,KOCHI-682506.**
4. **JAYAPRAKASH,S/O.RADHAMANI AMMA,AGED 45 YEARS,
ILLATHUVEETIL,CHEPPANAM DESOM,KUMBALAM VILLAGE,
KANAYANNOOR TALUK,KOCHI-682506.**
5. **KRISHNAKUMAR,S/O.RADHAMANI AMMA,AGED 40 YEARS,
ILLATHUVEETIL,CHEPPANAM DESOM,KUMBALAM VILLAGE,
KANAYANNOOR TALUK,KOCHI-682506.**
6. **SWARNALATHA,W/O.CHANDRASEKHARA MENON,
AGED 60 YEARS,ILLATHUVEETIL,CHEPPANAM DESOM,
KUMBALAM VILLAGE,KANAYANNOOR TALUK,KOCHI-682506.**
7. **REKHA,D/O.CHANDRASEKHARA MENON,AGED 32 YEARS,
ILLATHUVEETIL,CHEPPANAM DESOM,KUMBALAM VILLAGE,
KANAYANNOOR TALUK,KOCHI-682506.**
8. **RENJITH,S/O.CHANDRASEKHARA MENON,AGED 30 YEARS,
ILLATHUVEETIL,CHEPPANAM DESOM,
KUMBALAM VILLAGE,KANAYANNOOR TALUK,KOCHI-682506**

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9. SANTHOSH KUMAR,S/O.PANKAJAKSHA MENON,
AGED 42 YEARS,COMPANY EMPLOYEE,
NADAPPILLY HOUSE,RESIDING AT ELLANUVEETIL,
CHEPPANAM DESOM,KUMBALAM VILLAGE,
KANAYANNOOR TALUK,KOCHI-682506.

BY ADVS.SRI.T.B.THANKAPPAN
SRI.T.THARIKUMAR
SRI.RAHUL SHENOY
SRI.ASHISH VIDYADHARAN

RESPONDENT/APPELLANT/ PLAINTIFF:

RADHAKRISHNA MENON,S/O.NARAYANA MENON,
PEROOR HOUSE,VADAKKEKOTTA,
TRIPUNITHURA-682301.

R1 BY ADV.SRI.B.JAYASANKAR

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING BEEN
FINALLY HEARD ON 10-02-2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

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P.B.SURESH KUMAR, J.

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F.A.O.(R.O.).No.9 of 2014.
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Dated this the 10th day of February, 2015.

J U D G M E N T

The decision in A.S.No.18 of 2011 on the file of the Court of the District Judge, Ernakulam, by which the suit O.S.No.1370 of 2008 on the file of the Court of the Munsiff, Ernakulam was remitted for fresh disposal, is under challenge in this appeal.

2. O.S.No.1370 of 2008 is a suit for injunction. The case of the plaintiff therein is that plaint A schedule property was allotted to the father of the plaintiff as per Ext.A2 partition effected in his family in the year 1954; that he has obtained plaint A schedule property from his father as per Ext.A1 settlement deed; that plaint B schedule pathway is the only access to the plaint A schedule property; that plaint B schedule pathway is through the properties allotted to other sharers as per Ext.A2 partition deed and that the third defendant who is the successor of a

party to Ext.A2 partition deed is obstructing the use of plaint B schedule pathway. The plaintiff has, therefore, claimed a decree of permanent prohibitory injunction restraining the defendants from causing obstructions to the use of the plaint B schedule pathway for access to plaint A schedule property and for a mandatory injunction directing the defendants to remove the obstruction caused to plaint B schedule pathway.

3. The defendants contested the suit contending inter alia that the plaintiff has never used any portion of the properties covered by Ext.A2 partition deed as pathway for access to plaint A schedule property and that he has an alternate means of access to plaint A schedule property.

4. The trial court found that the description of plaint B schedule pathway is vague; that the plaintiff has an alternate means of access to plaint A schedule property and that the suit, without a prayer for declaration is not maintainable. On the said findings, the trial court dismissed the suit.

5. The plaintiff challenged the decision of the trial court in appeal. The appellate court found that the plaintiff has no means of access to plaintiff A schedule property otherwise than through the properties covered by Ext.A2 partition deed. The appellate court also found that plaintiff A schedule property being a property separated from the rest of the properties as per Ext.A2 partition deed, the plaintiff is entitled to claim an easement of necessity over the properties covered by Ext.A2 partition deed. However, since the appellate court found that the description of plaintiff B schedule pathway is vague, the suit was remitted to the trial court to enable the plaintiff to set out a pathway through the properties covered by Ext.A2 partition. In the appeal, the plaintiff has also filed an interlocutory application as I.A.No.2684 of 2013 seeking leave to amend the plaint in so far as it relates to the description of the plaintiff B schedule pathway. Since the matter was remitted to the trial court to enable the plaintiff to set out a pathway, the appellate court allowed I.A.No.2684 of 2013 also. The

said decision of the appellate court is under challenge in this appeal.

6. Heard Sri.T.B.Thankappan, the learned counsel for the appellants and Sri.B.Jayasankar, the learned counsel for the respondent.

7. It is beyond dispute that plaint A schedule property and the properties over which the plaintiff is claiming a right of way were portions of a larger extent of property partitioned as per Ext.A2 partition deed. It is also beyond dispute that in Ext.A2 partition deed, a separate pathway is not provided for plaint A schedule property. As such, the finding rendered by the appellate court that the plaintiff is entitled to a right of easement over the remaining properties in Ext.A2 partition deed cannot be held to be wrong. Section 14 of the Indian Easements Act provides that when a right to a way of necessity is created on account of the partition of a property, the owner of the share over which the right is exercised is entitled to set out a reasonably convenient way for the dominant owner. The

said Section also provides that when the person entitled to set out a way refuses or neglects to do so, the dominant owner may set it out. It appears that it is in the light of the provision contained in Section 14 of the Act, the appellate court permitted the plaintiff to set out the way through the properties covered by Ext.A2 partition deed, for, the appellate court found that the description of the pathway as contained in the plaint is vague. The decision of the appellate court in remitting the suit also, in the circumstances, cannot be held to be illegal.

8. The learned counsel for the appellants contended that the finding by the appellate court that there is no alternate pathway to the plaint A schedule property is incorrect and is unsustainable. The question as to whether there exists any alternate pathway or not to plaint A schedule property is a pure question of fact, the correctness of which cannot be gone into by this Court in this appeal.

9. It is seen that the appellate court has made a few observations as to the manner in which the pathway is to be

set out, its width etc. According to me, the said observations were unwarranted since the matter was being remitted to the trial court to set out the way. The said observations, in the circumstances, are liable to be vacated and I do so.

In the result, the appeal is allowed in part confirming the decision of the appellate court in remanding the suit for fresh disposal, but vacating the observations made by the appellate court as to the manner in which the pathway is to be set out, its width etc. The appellants will be entitled to file an additional written statement in the suit as the application for amendment filed by the plaintiff was allowed by the appellate court.

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

Kvs/-

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PA TO JUDGE.