

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 21ST DAY OF AUGUST 2015/30TH SRAVANA, 1937

FAO (RO).No. 277 of 2014 ()

AGAINST THE JUDGMENT IN AS. NO.41/2012 OF ADDITIONAL DISTRICT COURT-II
(SPECIAL), KOTTAYAM DATED 30-07-2014.
AGAINST THE JUDGMENT IN OS. NO. 27/2011 OF MUNSIFF COURT, VAIKOM
DATED 16-11-2011.

APPELLANTS/RESPONDENTS 1, 2/DEFENDANTS 1, 2:

- 1. PANKAJAKSHAN, S/O.KARUNAKARAN,**
AGED 61 YEARS, PERUMPALATHUTHARAYIL HOUSE,
PADINJAREKKARA P.O., 686 146, NADUVILE VILLAGE,
VAIKOM TALUK.
- 2. GIRIJA, W/O.PANKAJAKSHAN,**
AGED 56 YEARS, PERUMPALATHUTHARAYIL HOUSE,
PADINJAREKKARA P.O., 686 146, NADUVILE VILLAGE,
VAIKOM TALUK.

BY ADVS.SRI.K.G.BALASUBRAMANIAN,
SMT.AMBILY (PREMKUMAR).

RESPONDENTS/APPELLANTS & 3RD RESPONDENT/
PLAINTIFFS AND 3RD DEFENDANT:

- 1. GOVINDAN ASARI, S/O.PADMANABHAN ASARI,**
AGED 84 YEARS, MANGALASSERI HOUSE,
PADINJAREKKARA P.O., 686 146, NADUVILE VILLAGE,
VAIKOM TALUK.
- 2. THANKAMMA, W/O.GOVINDAN ASARI,**
AGED ABOUT 75 YEARS, MANGALASSERI HOUSE,
PADINJAREKKARA P.O., 686 146,
NADUVILE VILLAGE, VAIKOM TALUK.
- 3. VISWANMBHARAN, S/O.KARUNAKARAN,**
AGED ABOUT 70 YEARS, PERUMPALATHUTHARAYIL HOUSE,
PADINJAREKKARA P.O., 686 146, NADUVILE VILLAGE,
VAIKOM TALUK.

R1 & R2 BY ADVS. SRI.MATHEW JOHN,
SRI.DOMSON J.VATTAKUZH.

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING BEEN FINALLY
HEARD ON 22/07/2015, ALONG WITH FAO(RO) NO.286 OF 2014, THE COURT
ON 21/08/2015 DELIVERED THE FOLLOWING:

rs.

P.B.SURESH KUMAR, J.

= = = = =

F.A.O.(RO).Nos.277 & 286 of 2014.

= = = = =

Dated this the 21st day of August, 2015.

J U D G M E N T

These appeals are preferred challenging the common judgment in A.S.Nos.297 of 2011 and 41 of 2012 on the file of the Additional District Court-II, Kottayam. Among the said appeals, A.S.No.297 of 2011 was an appeal preferred against the judgment in O.S.No.53 of 2011 on the file of the Munsiff's Court, Vaikom and A.S.No.41 of 2012 was an appeal preferred against the judgment in O.S.No.27 of 2011 on the file of the very same Court.

2. O.S.No.27 of 2011 was a suit for declaration of the right of easement by prescription as also the right of easement by grant claimed by the plaintiffs over plaint schedule item No.8 pathway and for consequential reliefs. The defendants resisted the claim of the plaintiffs,

contending that the pathway described in plaint schedule item No.8 is a private way formed by them for taking vehicles to their coprayard and the plaintiffs have not acquired any right over the same. During the pendency of O.S.No.27 of 2011, the defendants therein filed O.S.No.53 of 2011 seeking a decree of permanent prohibitory injunction restraining the plaintiffs from causing obstructions to them in the matter of constructing a compound wall around their properties and erecting a gate at the entrance of plaint schedule item No.5 pathway, which is plaint schedule item No.8 pathway in O.S.No.27 of 2011 .

3. After the framing of the issues, the plaintiffs in O.S.No.27 of 2011 amended the plaint and confined the reliefs to the declaration of the easement by grant claimed by them over plaint schedule item No.8 pathway.

4. On an elaborate consideration of the materials on record, the trial court came to the conclusion that the plaintiffs have not established their case that they

have acquired a right of easement over the plaint schedule item No.8 pathway. Consequently, O.S.No.27 of 2011 was dismissed and O.S.No.53 of 2011 was decreed as prayed for. The operative portion of the decision in O.S.No.53 of 2011 reads thus:

"1. It is hereby declared that plaint item No.5 property is a private pathway absolutely and exclusively belongs to the plaintiffs 1 to 3.

2. The defendant or anybody claiming under them are perpetually restrained from causing any obstruction in the construction of compound wall around plaint item No.1 to 4 property, in erecting gate at the property and taking any vehicle through plaint item No.1 to 3 and 5 properties.

3. The defendants are directed to remove bund erected across the rivulet in between plaint item No.2 and 3 properties and plaint item No.3 and defendants property, which was shown as plaint item No.6 property, within one month from the date of decree falling it will be removed by the plaintiff at the expense of defendant."

5. The plaintiffs in O.S.No.27 of 2011 challenged the decision of the trial court in the appeals referred to above. The appellate court took the view that the trial court has neither framed any issue nor considered the claim of easement by grant raised by the plaintiffs

over the pathway described as plaint schedule item No.8 property in O.S.No.27 of 2011. On the said view, the appellate court remitted the suits for fresh disposal, without going to the merits of the contentions raised by the parties. Defendants 1 and 2 in O.S.No.27 of 2011 who are plaintiffs 1 and 2 in O.S.No.53 of 2011 are aggrieved by the said decision of the appellate court and hence these appeals.

6. Heard the learned counsel for the appellants as also the learned counsel for the respondents.

7. As noticed above, the suits were remitted for fresh disposal by the appellate court on the view that after the amendment of the plaintiff, the only issue was in respect of the easement by grant claimed by the plaintiffs over plaint schedule item No.8 pathway and that the trial court had neither raised an issue relating to the right of easement by grant claimed by the plaintiffs in O.S.No.27 of 2011 nor considered the said claim on merits. The issues framed by the trial court in O.S.No.27 of 2011 as is seen

from the judgment read thus:

- "1. Whether the plaintiffs have right of way obtained by prescription over item No.8 property?
2. Whether the plaintiffs got right of way by easement by prescription over plaint item No.8 property?
3. Whether the plaintiffs are entitled to get declaration of right ought for?
4. Whether the plaintiffs are entitled to get injunction as prayed for?
5. Relief and cost."

Issue Nos.1 and 2 framed in the suit as quoted above indicate that both the issues are one and the same. There is no reason for the court to frame two issues concerning the right of easement by prescription claimed by the plaintiffs over plaint schedule item No.8 property. The order sheet in O.S.No.27 of 2011 contains the issues originally framed in the suit and the said issues includes an issue relating to the easement by grant claimed by the plaintiffs over plaint schedule item No.8 property. As such, the view taken by the appellate court that there was no

issue at all concerning the right of easement by grant claimed by the plaintiffs over plaint schedule item No.8 property may not be correct.

8. Coming to the view taken by the appellate court that the trial court had not considered the claim of the plaintiffs that they have acquired right of easement by grant over the plaint schedule item No.8 property, it is seen that the trial court considered the said issue to the best of its ability and found that the plaintiffs in O.S.No.27 of 2011 have not established the claim of easement by grant over plaint schedule item No.8 property. Paragraphs 28 to 31 of the judgment of the trial court read thus:

"28. On going through the aforesaid evidence there is no hesitation to hold the view that the enjoyment of the right of way claimed by the plaintiff over plaint item No.6 having been enjoyed as easement by prescription for a period of 20 years stands not proved. Plaintiff claimed easement by grant over plaint item No.8 property after the construction of Padinjattinkara mattom thathamkeril road. It was alleged that a talk was held between the plaintiff and defendant to hew a pathway from padinjattinkara mattom thathamkeril road to the property of the Ist defendant annexing some portion of plaint item No.6. It was agreed by the plaintiff and thereby he was

allowed to take vehicles to the end of the plaint item No.7. It seems a strange thing. Why should the defendant seek the permission of the plaintiff to widen or to construct a road through their property still remains question in scenario. They never required the assistance of the plaintiff in constructing road through the property of them.

29. The plaintiff gave the explanation that he had a right of way obtained by easement by prescription over plaint item No.6 property forming a part of plaint item No.8. But the earlier evidence totally toppled the same. In such circumstances the defendants never want the consent and concurrence of the plaintiff to construct plaint item No.6 road through their property. In the testimony, PW1 categorically stated that he never ask the consent of the plaintiff to construct plaint item No.7 road. PW1 gave negative evidence. In the testimony of PW1, stated that the entire material for the construction and money were spent by the defendant. However he gave some manual assistance to construct road. It seems to be too strange and it is not digestable to the common sense of an ordinary prudent man.

30. Testimony of DW1 itself would suffice that no contribution was given from the part to construct plaint item No.7 road. Manual assistance given for the construction of the road stands not proved. In fact there is nothing compelling defendant to seek the consent and concurrence of the plaintiff to construct road through plaint item No.3 to 5 property. The contention of the plaintiff that he was considered by the defendant on account of his easement by prescription, right of way obtained as easement over the plaint schedule item No.3 to 5 properties. The right of way alleged to have been obtained by easement by prescription stands not proved. Therefore there is no compelling circumstances to seek the consent and concurrence of the plaintiff to construct the road. His version appears to be false.

31. Whereas testimony of DW3 and PW3, both testimony do not have any relevancy to prove easement by grant claimed by the plaintiff. On going through the testimony of PW1 and DW1, it manifests that there is no chance to have any oral understanding between the plaintiff and defendant for the construction of plaint item No.7 road through plaint item No.3 to 5. Therefore there is no chance to grant any right of way by the defendant to the plaintiff to enjoy plaint item No.7 property."

True, the discussion of the materials on record and the findings by the trial court are not satisfactory. The question whether the conclusion arrived at by the trial court is correct or not is a matter for the appellate court to decide. The appellate court has not considered the correctness or otherwise of the findings of the trial court that the plaintiffs have not established the claim of easement by grant over plaint schedule item No.8 property. Instead, it chose to remit the matter holding that the trial court had not considered the said claim of the plaintiffs. The said conclusion arrived at by the appellate court cannot be accepted.

In the result, the appeals are allowed, the

FAO.(RO).Nos.277 & 286/2014.

9

impugned judgments are set aside and the appellate court is directed to consider and dispose of A.S.Nos.41 of 2012 and 297 of 2011 on merits. The interlocutory applications in this case are closed.

Sd/-
P.B.SURESH KUMAR,
JUDGE.

Kvs/-

// true copy //

PA TO JUDGE