

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

TUESDAY, THE 27TH DAY OF OCTOBER 2015/5TH KARTHIKA, 1937

RSA.No.362 of 2005 (B)

AGAINST THE JUDGMENT IN AS 31/2002 of I ADDL. DISTRICT COURT,
ERNAKULAM DATED 30-09-2004

AGAINST THE JUDGMENT IN OS 1389/1999 of II ADDL. MUNSIF COURT,
ERNAKULAM DATED 23-10-2001

APPELLANT (APPELLANT IN THE APPELLATE COURT AND DEFENDANT IN THE
TRIAL COURT):

M.B.PRADEEP, S/O.M.V.BHASKARAN,
MELEPARAMBIL HOUSE, KONTHURUTHY, ERNAKULAM.

BY SRI.R.D.SHENOY, SENIOR ADVOCATE
ADV.SRI.S.VINOD BHAT

RESPONDENTS (RESPONDENTS IN THE APPELLATE COURT AND PLAINTIFFS IN
THE TRIAL COURT):

ST.JOHN NEPUMSIAN CHURCH,
KONTHURUTHY, THEVARA, KOCHI-13
REPRESENTED BY

1. VICAR, REV.FR.THOMAS PUTHIYAVELIYIL
S/O.JOSEPH, RESIDING AT THE PRESBITORY OF CHURCH
ELAMKULAM VILLAGE.
2. P.V.JOHN, (KAIKARAN), S/O.VARKEY,
RESIDING AT PALAKKAPALLY HOUSE, KONTHURUTHY, THEVARA
KOCHI-13.
3. E.O.JOHN, (KAIKARAN), S/O.OUSEPH,
RESIDING AT ERETHARA HOUSE, KONTHURUTHY, KOCHI-13.

R1 TO R3 BY ADV. SRI.P.GEORGE WILLIAM

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27-
10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ALEXANDER THOMAS, J.

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Dated this the 27th day of October, 2015.

J U D G M E N T

The concurrent findings of both the courts below in favour of the plaintiff is under challenge in this Regular Second Appeal preferred by the defendant. The instant appeal arises out of the impugned judgment rendered on 30.9.2004 by the I Additional District Judge, Ernakulam in Appeal Suit, A.S.No.31/2002 which in turn arose out of the impugned judgment and decree dated 23.10.2001 of the II Additional Munsiff Court in Original Suit, O.S.No.1389/1999.

2. The Original Suit preferred before the trial court is one for injunction. The case of the plaintiff is that out of the total 8 cents of land covered by plaint A schedule property belonging to the plaintiff-Church, 5.745 cents property covered in plaint B schedule was assigned to the defendant as per Ext.A-2 sale deed No.4093/1995 dated 8.8.1995 of SRO, Ernakulam. As per Ext.A-2 the right of way was granted by the plaintiff to the defendant for latter's ingress and egress to the public road (St. Johns road) situated on the southern side. It is stated in Ext.A-2 regarding the said right of way for the defendant as follows:

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“വഹകളുടെ തെക്കെ അതിരിൽ നിന്നും തെക്കോട്ട്
തെക്കുവശമുള്ള റോഡ് വരെ വാഹന ഗതാഗതത്തിന് 10 മറ്റും
അനുയോജ്യമായ വിധത്തിലുള്ള വഴി അവകാശവും ആകുന്നു.”

The said pathway is described as 'C' schedule in the plaint and it is stated that it is having a width of 10 ft. starting from the south-western corner of plaint 'B' schedule property and ends with southern public road. It is further averred that 3 cents of property lying between the plaint 'B' schedule property and southern road (which is the total extent in plaint A schedule property as deducted by the extent covered by plaint 'B' schedule) lying in between plaint 'B' schedule and southern road is in the possession and ownership of the plaintiff-Church authorities. It is the case of the plaintiff that the defendant had put up a compound wall on the southern side of his property and fixed gate in the middle of the compound wall. As a result of this, the property lying in between plaint 'B' schedule property and southern road has been cut into two pieces. It is in the light of these aspects that the plaintiff has preferred the instant suit for injunction.

3. The defendant resisted the plaint averments by filing written statement. It is inter alia contended that the aforesaid property lying in between pliant 'B' schedule and the southern road is not under

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the right and possession of the plaintiff-Church authorities. In other words, it is not the property of the Church. It is also specifically contended in the written statement that the said property is actually puramboke property. It is further asserted in the written statement that the defendant has absolute right over the said property which is lying in between plaint 'B' schedule and southern public road and that it is highly necessary for the full and proper enjoyment of the defendant's plaint 'B' schedule property. It is also averred in the written statement that 6 meter width pathway is necessary for him, etc.

4. The plaintiff-Church had examined the 2nd plaintiff as PW1 and Exts.A-1 to A-5 were marked on the plaintiffs' side. The defendant and another, one of his witness, were examined as DWs 1 & 2 and the Advocate Commission report has been marked as Ext.C-1.

5. From the pleadings, the trial court had framed the following issues:

- “1. Whether the plaintiff has got title and possession over the plaint schedule properties?
2. Whether there is a pathway as described in the plaint 'C' schedule?
3. Whether the plaintiff is entitled to get a decree of permanent prohibitory injunction as prayed for?
4. Reliefs and costs?”

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6. The trial court as per the impugned judgment and decree rendered on 23.10.2001 has decreed the suit. This has also been affirmed by the lower appellate court as per the impugned judgment and decree rendered on 30.9.2004 in Appeal Suit, A.S.No.31/2002. This Court while admitting this Regular Second Appeal on 7.4.2005 had formulated the following questions of law on the basis of questions (a) and (b) pleaded in the memorandum of appeal which reads as follows:

“(a) Where easement by grant of right of way is expressed in the document (Ext.A2) and is conceded in the plaint, and need of the grant is also specified so as to measure its terms, can the grantor be allowed to derogate from the grant by unilaterally fixing the width of the way so as to defeat the measure of the terms of the grant?

(b) Whether the report filed by an advocate commissioner, based on local inspection by him without issuing/giving notice to the defendant (appellant) has any evidentiary value without his being examined in court to give evidence regarding the substance of the report?”

7. Heard Sri.S.Vinod Bhat, learned counsel appearing for the appellant and Sri.P.George William, learned counsel appearing for the respondents.

8. At the outset it is to be noted that the specific contentions and assertions made by the defendant in the written statement to the effect that the 3 cents of property lying in between plaint 'B' schedule property and the southern public road is not under the right and

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possession of the plaintiff-Church authorities and that it is puramboke property and the defendant has absolute right over the property, etc., has been given up by the defendant. It is also common ground that the defendant has been granted a right of way for use of the vehicle as per Ext.A-2 sale deed conveyed by the plaintiff-Church authorities in favour of the defendant. However, it is to be noted that both parties were not wise enough to put terms and conditions in the said sale deed in clear, precise and cogent terms. As already stated, the language employed in that regard as discernible from Ext.A-2 sale deed is as follows:

“വഹകളുടെ തെക്കെ അതിരിൽ നിന്നും തെക്കോട്ട്
തെക്കുവശമുള്ള റോഡ് വരെ വാഹന ഗതാഗതത്തിന് പൂർണ്ണ
അനുമതിയോടുകൂടിയ വിധത്തിലുള്ള വഴി അവകാശവും ആകുന്നു.”

Hence it is evident from the width, length that its exact commencing point and terminal point have not been precisely and clearly stated by the parties in Ext.A-2 sale deed. Therefore, the court will have to read the said document in a wholesome and harmonious manner and gather the intention of the parties at the time of execution of the said document regarding the right of the said pathway. In other words, the task of the court will be to ensure that reasonable intention of the parties is

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gathered from the language employed in the said deed and the reasonable and minimum requirements of the defendant in the enjoyment of grant of right of pathway is effectuated in favour of the defendant in such a manner so as to cause least inconvenience to the rights of the plaintiff-Church authorities. An effort should be made so as to harmonise the rights of the parties so as to effectuate the right of way in favour of the plaintiff without causing any onerous burden on the right of the servient owner. Both the courts below noted that it has come out in evidence that the defendant is having a mini bus which he has to take into his property in plaint 'B' schedule. This has also been admitted by PW1 when he mounted the box. On an overall appreciation of the factual aspects of the matter, both the court below have come to the conclusion that 10 ft. width pathway commencing from south western corner of plaint B schedule property and ending with St. Johns road would met the minimum requirement and necessities of the defendant in the enjoyment of the grant of right of pathway. True, that the recital in Ext.A-2 sale deed in this aspect of the matter only says that the pathway is from southern boundary of plaint 'B' schedule property to the south public road. If the contention of the defendant that he can enjoy the grant of the said right of pathway

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through any part of aforementioned 3 cents of property lying in between the plain B schedule property and the southern public road is accepted, then the inevitable outcome of this would result in dividing the said 3 cents of property of the Church authorities into two and making one part of it almost useless. This crucial aspect of the matter has been concurrently so found by both the courts below and it is on this basis the courts below have come to the considered conclusion that the pathway as envisaged in plaint 'C' schedule would meet the minimum requirements and necessities of the defendant in the enjoyment of his right of pathway. There is yet another important aspect of the matter. The plaintiffs represent a Church. As public trust is holding the said Church property for the benefit of its beneficiaries, one cannot presume that Church authorities would have intended to grant right of pathway to the defendant in such a manner so as to cut the aforesaid 3 cents of property into two and so as to make one half of it almost useless. No land owner while making such conveyance could be presumed to have such an intention. Therefore, such a right of pathway should be either through the south western corner of plaint 'B' schedule property or through the eastern extremity of the aforesaid 3 cents property of the Church. It could not have been in a manner so as

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to cut the aforestated 3 cents of property into two. Therefore, the adjudication of these aspects of the matter done concurrently by both the courts below, based on the appreciation of the evidence adduced in this case, cannot be said to be unreasonable or perverse. Hence, this Court is of the considered opinion that the said crucial intention made by both the courts below on the concurrent basis does not require any interference in this appeal.

9. As regards the question of law (a) framed in this appeal, this court is of the considered opinion that both the courts below while rendering its adjudication on this aspect of the matter has not allowed the plaintiff to derogate from the grant by unilaterally fixing the width of the way so as to defeat the intention and basis of the terms of the grant. On the other hand, this Court is of the considered opinion that both the courts below have made a reasonable and fair attempt so as to adjudicate the rival claims in this regard and workout the rights of the defendant in a matter which causes least inconvenience to the plaintiff. Moreover, the attempt made by both the courts below is done so as to effectuate the reasonable exercise of the right of the defendant in the enjoyment of his right of pathway. But, at the same time, the courts below have taken prudence and care so as to cause lease onerous burden on the plaintiff. This question of law is answered accordingly.

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10. As regards question of law (b), the points that were to be mainly ascertained by the Advocate Commissioner was in the matter of nature and lie of the property in question. Moreover, this question is not seen raised and argued before both the courts below. At any rate, it can be seen that both the courts below have not placed much reliance on the Advocate Commission report so as to come to a considered conclusion on the aforestated crucial aspects of the matter regarding the working out of the rights and interest of both parties. No prejudice has been caused to the defendant on the reception of the commission report. The said question is accordingly, so answered.

11. There is yet another aspect of the matter. It is submitted before this Court as well as before the lower appellate court by the defendant that if the south western portion of plaint 'B' schedule property is used as a pathway as envisaged in plaint 'C' schedule then the defendant has difficulties in taking his vehicle to the southern public road as there is an electric post in front of that way. The lower appellate court has clearly stated that the appellant will be at liberty to take appropriate steps to ensure the shifting of the electric post so as to facilitate the convenient use of plaint 'C' schedule pathway. During the course of submissions, Sri.P.George William, learned counsel appearing for the respondents/plaintiffs, submitted that when the plaintiffs construct a

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compound wall on the eastern boundary of plaint 'C' schedule property, then they would provide a bell mouth there on the southern end of the pathway. This fair submission made on behalf of the respondent is hereby recorded. It is made clear that it will be open to the appellants/defendants to move the competent authority of the Kerala State Electricity Board (KSEB) in the matter of shifting of the said electric post as permitted by the lower appellate court and if the proper motion is made before the competent authority, then the said authority should take reasonable measures so as to alleviate the grievances of the appellant in that regard. It will be open to the appellant to produce a certified copy of this judgment before the KSEB authorities for further necessary action. In the light of these aspects, this Court is of the considered opinion that the impugned judgments and decrees of the courts below do not call for any interference in this Second Appeal.

Accordingly, the Regular Second Appeal stands dismissed., with the above observations. However, it is made clear that there shall be no order as to costs.

ALEXANDER THOMAS,
Judge.

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