

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 23RD DAY OF FEBRUARY 2015/4TH PHALGUNA, 1936

OP(C).No.463 of 2015 (O)

(I.A.NO.1352/2012 IN O.S. NO.205/2012 OF THE MUNSIFF COURT,KOLLAM).

....

PETITIONER:

**SULOCHANA,W/O.SUJATHAN.C.B,AGED 57 YEARS,
RESIDING AT PATHIVILASAM,MANGAD NAGAR B-52,
WARD NO.16,MANGAD VILLAGE,KOLLAM.**

**BY ADVS.SRI.T.C.SURESH MENON
SRI.P.S.APPU**

RESPONDENTS:

- 1. AJITHKUMAR,S/O.BHARATHAN.**
- 2. SOMALATHA.**
- 3. JYOTHI SOMAN.
ALL ARE RESIDING AT MANNANTTAZHAKAM,
MANGAD NAGAR B-53,WARD NO.16,HOUSE NO.1644,
MANGAD VILLAGE,KOLLAM-691015.**

**THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 23-02-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

pk

OP(C).No.463 of 2015 (O)

APPENDIX

PETITIONER'S EXHIBITS:

**EXT.P1:TRUE COPY OF THE ORDER PASSED IN IA.1352/20912 IN O.S NO.205/2012
ON THE FILE OF THE COURT OF THE ADDITIONAL MUNSIFF,KOLLAM
DATED 15.6.2012.**

**EXT.P2:TRUE COPY OF THE JUDGMENT IN C.M.A.49/2012 ON THE FILE OF THE
COURT OF THE COURT OF THE DISTRICT JUDGE,KOLLAM
DATED 25.8.2014.**

EXT.P3:TRUE COPY OF THE COMMISSIONER'S REPORT DATED 12.4.2012.

RESPONDENT'S EXHIBITS: **NIL**

//TRUE COPY/

P.S. TO JUDGE

pk

P. BHAVADASAN, J.

O.P.(C). No. 463 of 2015

Dated this the 23rd day of February, 2015.

JUDGMENT

Defeated in two courts, the plaintiff in the suit is now trying his luck before this Court.

2. The petitioner before this Court instituted a suit for injunction claiming a pathway through the northern boundary of the property of the defendants. An interlocutory application was filed for interim relief. The trial court based on the commission report in another suit between the same parties came to the conclusion that there was no such pathway in existence though a commission report in this case produced as Ext.C1 would show otherwise. Mainly relying on the commissioner's report in another suit for fixation of boundary between the same parties, the trial court held against the plaintiff in the suit and dismissed the interlocutory application. The plaintiff carried the matter in appeal as C.M.A. 49 of 2012.

The appellate court on an independent consideration of the evidence did not find it necessary to interfere with the finding of the trial court and dismissed the appeal.

3. Learned counsel appearing for the petitioner before this Court very vehemently contended that the trial court was not justified in relying on the commissioner's report in another suit. There was a commission report in this case which would disclose that there existed a pathway as alleged in the plaint. It is that report that should have been looked into and not the report in another case which had nothing to do with the claim of use of pathway running through the property of the defendants in the case. The other suit, according to the learned counsel for the plaintiff was for fixation of boundary where the question of usage of the pathway through the property of the defendants had no relevance at all and there was no such claim in that suit. Both the courts below have omitted to notice this crucial aspect and therefore the orders are not sustainable.

4. It is true that the Commission report in this case discloses the existence of a pathway but mentions about the existence of grown up trees in the alleged pathway. There may be substance in the contention that the trial court should have looked into the commission report in this case and should not have simply referred to the commission report in another suit between the same parties which was regarding fixation of boundary between them.

5. The lower appellate court however found that there was no specific plea regarding the ownership of the servient tenement and that is fatal to the plaintiff. It is seen stated that the defendants own property adjacent to the pathway. Necessarily there has to be a plea regarding the ownership of servient tenement which alone can give rise to a claim of easement whether it is prescriptive easement or easement by necessity or by grant. The lower appellate court was persuaded to agree with the trial court to the

extent that the plaintiff is not entitled to any relief though for different reasons. Whatever that be, two courts have concurrently found against the plaintiff. This court finds no grounds to interfere with the order of the courts below in exercise of supervisory jurisdiction under Article 227 of the Constitution of India. Since it is not shown that the findings are either perverse or contrary to the materials available on record, interference by this Court may not be justified even assuming that a different view might be possible.

6. However, learned counsel for the petitioner pointed out that if this Court is not inclined to entertain this petition, it may be observed that the suit shall be disposed of on the basis of the evidence adduced in the case untrammelled by the observations made by the courts.

7. That seems to be a reasonable request.

This Original Petition is disposed of directing the court below to dispose of O.S. 205 of 2012 pending before the Munsiff's Court, Kollam in accordance with law and on

the basis of the evidence in this case, untrammelled by any observation made by the trial court while disposing of the interlocutory application or by the appellate court while disposing of the appeal or by this Court in this judgment, as expeditiously as possible, at any rate, within six months from the date of receipt of a copy of this judgment.

sb.

P. BHAVADASAN,
JUDGE