

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 30TH DAY OF MARCH 2015/9TH CHAITHRA, 1937

OP(C).No. 635 of 2015 (O)

(AGAINST THE ORDER IN CMA 11/2014 of SUB COURT, KANNUR DATED
10.10.14

OS 240/2014 of MUNSIF COURT, KANNUR)

PETITIONER/APPELLANT:

T.K.PREMARAJAN AGED 57 YEARS
S/O.GOVINDAN, T.K HOUSE, PAPPINISSERY AMSOM AND DESOM,
KANNUR - 670 561.

BY ADVS.SRI.P.SANKARANKUTTY NAIR
SRI.K.SANDESH RAJA
SRI.VENU MENON

RESPONDENT/RESPONDENT:

SUNIL KUMAR K.K., AGED 46 YEARS,
S/O.GOPALAN, THARAMMAL KEERI HOUSE
PAPPINISSERY AMSOM AND DESOM, P.O PAPPINISSERY WEST,
KANNUR - 670 561.

BY ADV. SRI.K.C.SANTHOSHKUMAR
BY ADV. SMT.K.K.CHANDRALEKHA

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON
30-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP(C).No. 635 of 2015 (O)

APPENDIX

PETITIONER'S EXHIBITS :

EXHIBIT P1. COPY OF THE PLAINT IN OS 240/14 DATED 11.4.14 OF THE
HONOURABLE MUNSIFF COURT, KANNUR.

EXHIBIT P2. COPY OF THE INJUNCTION APPLICATION IN IA 1735/14 IN
OS 240/14 DATED 11.4.14 OF THE HONOURABLE MUNSIFF
COURT, KANNUR.

EXHIBIT P3. COPY OF THE COMMISSION REPORT DATED 17.05.14 IN
OS 240/14 OF THE VACATION COURT, THALASSERY.

EXHIBIT P4. COPY OF THE COMMISSION REPORT IN OS 240/14
DATED 31.05.14 OF THE MUNSIFF COURT, KANNUR.

EXHIBIT P5. COPY OF THE PHOTOGRAPH SHOWING THE PROPERTY OF
MADHAVI.

EXHIBIT P6. COPY OF THE ORDER IN IA 1735/13 IN OS 240/14 OF THE
MUNSIFF COURT, KANNUR DATED 9.6.14.

EXHIBIT P7. COPY OF THE CMA 11/14 OF THE SUB COURT KANNUR AND THE
IA 1028/14 IN CMA 11/14.

EXHIBIT P8. COPY OF THE IA 1028/14 IN CMA 11/14 OF THE HONOURABLE
SUB COURT, KANNUR DATED 16.06.14.

EXHIBIT P9. COPY OF THE IA 1028/14 IN CMA 11/14 DATED 25.06.14 OF
THE SUBORDINATE JUDGE, KANNUR.

EXHIBIT P10. COPY OF THE JUDGMENT IN OP(C)1672/14 DATED 23.07.14.

EXHIBIT P11. COPY OF THE ORDER CMA NO.11/14 DATED 10.10.14.

RESPONDENT'S EXHIBITS: NIL.

//True Copy //

P.A. to Judge.

smp

P.BHAVADASAN, J.

Original Petition (Civil) No.635 OF 2015

Dated this the 30^h day of March, 2015.

J U D G M E N T

This original petition is directed against the concurrent findings by the courts below that the plaintiff in the suit has failed to establish his right of prescriptive easement and also easement by necessity to the plaint B schedule pathway which is allegedly running through defendant's property. The plaintiff claimed that he obtained plaint A schedule property from his mother along with her brother and others and when the brother partitioned the property, property on the northern side of plaint A schedule property was transferred in favour of his son i.e the defendant. The plaintiff also claimed that on the northern side of the plaint A schedule property, there exists a well laid motorable way having length of 35 metres and width of 3.5 metres starting from Kannur-Pazhayangadi road and leading to other properties scheduled in gift deed No.1298/1965. The said motorable way is

described as plaint B schedule road. It is claimed that there is no other means of access to the plaint A schedule property. In respect of plaint B schedule pathway, the plaintiff laid claim by prescriptive right of easement and easement by necessity.

2. According to the plaintiff, plaint B schedule property runs through the northern side of plaint A schedule property and that gives access to his property. Further it is stated that plaint B schedule pathway is a common road and a gate was put up by both the plaintiff and the defendant at the mouth of the pathway by sharing the expenses. Complaining of attempted obstruction by the defendant and his agents, suit namely, O.S.No.240/2014 was laid.

3. The suit was resisted by the defendant pointing out that the claim made by the plaintiff that the plaint B schedule pathway is running through property of defendant is false and there is no such pathway as claimed by the plaintiff. He had other means of access to his property. The claim in the plaint that the gate was put up jointly was also denied by the defendant. It is contended

that the plaintiff is not sure of his nature of right and that is sufficient to non suit the plaintiff.

4. Along with the suit, the plaintiff had filed I.A.No.1735/2014 for temporary injunction. A commission was also taken out who filed Exts.C1 and C1(a) report and plan. After the respondent entered appearance and filed his counter, Commissioner again visited the property and submitted Exts.C2 and C2(a) plan and report.

5. Both the courts below, on appreciation of the materials before them, came to the conclusion that the plaintiff has failed to establish his claim of right of easement and his claim that there was a motorable way was also not established. Therefore, interim relief was declined.

6. Learned counsel appearing for the petitioner contended that having found that there exists a way as claimed by the plaintiff, court below ought not to have rejected the interim relief sought for by the plaintiff. It is clear from the Commissioner's report and plan that there is no other means of access to the

plaintiff's property and that would have been sufficient to give an interim relief to the petitioner. At any rate, according to the learned counsel, the question as to whether the plaintiff has acquired prescriptive right of easement or easement by necessity is a matter to be determined at the final stage of the suit. The Commissioner has shown existence of pathway as claimed by the plaintiff in her report and plan and therefore the relief ought not to have been declined.

7. Learned counsel appearing for the respondent pointed out that there is concurrent findings by the courts below that a pathway as alleged in the plaint does not exist and there is no motorable way as claimed by the plaintiff. Apart from that learned counsel went on to point out that the plaintiff is not sure about his nature of right and he claims inconsistent rights. Learned counsel also pointed out that he has no case that plaint B schedule pathway goes through the property of the defendant and that portion of the property belongs to the defendant. He characterised it as joint property. If it is to be

treated as a common property, then learned counsel pointed out that question of easement does not arise for consideration at all. These aspects weighed with the courts below and those facts persuaded the court below to decline relief to the plaintiff.

8. There is much force in the contention raised by the learned counsel for the respondent. First of all, the ex parte commission report which was taken out before the respondent entered appearance itself shows that there is no motorable way as claimed by the plaintiff. The width of the way is not uniform also. After the respondent entered appearance and filed his counter, Commissioner again visited the property and Ext.C2(a) is the sketch submitted by the Commissioner after remission of report. The claim made by the plaintiff that he has no other means of access to his property does not appear to be correct.

9. As rightly pointed out by the learned counsel for the respondent, if the claim of the petitioner before the courts below is that plaint B schedule pathway belongs jointly to plaintiff and defendant, then of course, the claim of prescriptive right of

easement or easement by necessity cannot survive. Both the courts below found that the claim made by the plaintiff that he has no means of access to be not true. On the basis of the materials now available, it cannot be said that the findings of the courts below are either perverse or contrary to the evidence on record.

10. Learned counsel appearing for the petitioner then pointed out that if the findings as entered against the plaintiff stand there will be no purpose if he goes for trial because findings have already been entered into by the courts below that the plaintiff is not entitled to reliefs and that prejudices him and affects his interest. Without even a trial, he has been non suited.

11. Whenever an Interlocutory Application is heard and disposed of, necessary facts will have to be adverted to by the court below. The court below will have to give reason as to why the relief is granted or why it is declined. The court below cannot be found fault with the findings entered into in the case since it has to give sufficient reason for the same.

However, it is made clear that the suit shall be disposed of as per the evidence in the suit and untrammelled by any of the observations made by any of the courts while disposing of the Interlocutory Applications and also by this Court while disposing of this original petition. It is made clear that the position of the way as shown in Exts.C4 and C4(a) shall be maintained till the disposal of the suit. The defendant will be entitled to continue with the construction of the weigh bridge without affecting the right of the plaintiff if any and if ultimately it is found that the plaintiff is entitled to the relief, the construction will not confer any right on the defendant and that shall be removed at the risk and cost of the respondent.

This original petition is disposed of as above.

Sd/-

P.BHAVADASAN
JUDGE

smp