

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.V.RAMAKRISHNA PILLAI

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYASHTA, 1937

RSA.No.304 of 2007 C

**AGAINST THE JUDGMENT DATED 15-02-2007 IN AS 65/2003 of SUB COURT,
THODUPUZHA.**

**AGAINST THE JUDGMENT DATED 31-03-2003 IN OS 160/1998 of MUNSIF
COURT, DEVIKULAM.**

APPELLANT/RESPONDENT/PLAINTIFF: "

**S.PONNUSWAMY,S/O SHANMUGHAM,
GRACE COTTAGE,SHANMANKULI KARA,
(PUTHACHIVAYAL),MARAYOOR VILLAGE,
DEVIKULAM TALUK,IDUKKI DISTRICT.**

**BY ADVS.SRI.MATHEW JOHN (K)
SRI.SUJESH MENON V.B.**

RESPONDENT/APPELLANT/DEFENDANT:

**RAJ,S/O.MUTHU,HOUSE NO.MP.VII/8,
SHAMMANKALI KARA,MARAYOOR VILLAGE,
DEVIKULAM TALUK,IDUKKI DISTRICT.**

**BY ADVS.SRI.SATHISH NINAN
SRI.SANTHOSH MATHEW**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 02.03.2015 THE COURT ON 25-05-2015, DELIVERED THE FOLLOWING:**

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A.V. RAMAKRISHNA PILLAI, J.

R.S.A. No. 304 of 2007

Dated this the 25th day of May, 2015

J U D G M E N T

The plaintiff in OS No.160/1998 on the file of the Munsiff's Court, Devikulam, is in appeal.

2. The appellant approached the trial court with a suit for a declaration of his right of easement by grant and also for a decree of mandatory injunction directing the respondent herein from removing the encroachment made in plaint B schedule pathway. A decree of permanent injunction restraining the respondent from interfering with the use of plaint B schedule pathway was also sought for. The appellant alleges that he is the owner in possession of 15 cents of land comprised in Sy.No.253/3 of Marayoor Village and the suit property was described as A schedule to the plaint. The appellant claimed title to the property as per sale deed No.249 of 1993 of SRO, Devikulam. There is a building in the

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property, which was originally used by the predecessor in interest of the appellant as a godown to stock their merchantile goods. At present, he is residing in the said building. The appellant further alleges that a road having a width of 15 links runs between A schedule property and the Kanthalloor Junction - Pattikkadu Road, which is the only way used by the appellant for his ingress and egress. The road is described in B schedule to the plaint. The appellant alleges that the said road is laid by the original owner of A schedule property and it was in existence since 1989. Then, his predecessor in interest purchased plaint A schedule property from one Gopalakrishnan, who was the previous owner. He further alleges that the road is fit for vehicle traffic and it is specifically described in Ext.A2 document, which is a sale deed executed by the aforesaid Gopalakrishnan in favour of one Shaji and Sunny. According to the appellant, the right to use the road was also conveyed by his predecessor in interest while he sold the property in favour of the appellant. The respondent

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and one Jyothi are holding lands adjacent to the plaint B schedule pathway. His specific case is that the respondent has no manner of right over the B schedule pathway except the right to use the same in common with the adjacent land owners.

3. The grievance of the appellant is that the respondent in his move to expand his holding attempted to encroach upon the road on two occasions, one in 1994 and the other in 1995. However, this was abandoned on account of a timely intervention of police. The appellant alleges that on 01.01.1996, the respondent again trespassed into plaint B schedule pathway and obstructed it by putting up a fencing to a length of about 13 meters almost covering entire frontage of the property of the appellant facing plaint B schedule pathway reducing the average width of the road to 3.5 feet as against the width of 15 links that was originally available. Petitions were presented by the appellant before the local Panchayath as well as before the Taluk Adalath. Though directions were

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given to the respondent to remove the obstructions, he did not obey. It is with this background, he approached the court.

4. The respondent, who resisted the suit, contended that there is no road convenient for vehicle traffic. He contended that there is a pathway on the side of the property of the respondent up to plaint A schedule property, which was allowed as a shortcut for transporting building materials for construction of building in the plaint A schedule property. He also alleges that there are two other ways from the plaint A schedule property to the panchayath road. It was further contended that the way thus permitted was having only a width of 3 feet and it was not closed by the respondent. This pathway is used only occasionally by the appellant. However, after filing the suit, the appellant intended to widen the said pathway. Therefore, they prayed for a dismissal of the suit.

5. The trial court, after raising proper issues for

trial, permitted both sides to adduce their evidence. After trial, PWs 1 and 2 were examined. Exts.A1 to A3, C1 series and C2 series were examined.

6. The trial court, after considering the evidence, granted a decree declaring the appellant's right of way over the pathway and the respondent was directed to remove the obstruction in the said pathway. The respondent was also restrained from committing any mischief in plaint B schedule pathway or causing any sort of obstruction or doing any act, which may disturb the appellant's right of peaceful use of plaint B schedule pathway.

7. The respondent took the matter in appeal before the lower appellate court. The Subordinate Judge's Court, Thodupuzha, who heard the appeal (AS No.65/2003), after re-appreciation of evidence, reversed the decree and dismissed the suit. The said decree and judgment are under challenge in this appeal.

8. I have heard Mr.Mathew John, the learned

counsel for the appellant and Mr.Sathish Ninan, the learned counsel for the respondent.

9. The appellant is relying on Ext.A1 sale deed, under which he had purchased plaint A schedule property, where he is residing, and Ext.A2 sale deed, under which the immediate predecessor in interest of the appellant purchased the plaint A schedule property, to establish his claim. Mr. Mathew John, at the very outset, has pointed out that certain mistakes have crept in the boundary description in Exts.A1 and A2 sale deeds. However, it is crucial to note that the claim of easement right by the appellant is the right of easement by grant in respect of B schedule pathway, which, according to the appellant, is expressly provided in Exts.A1 and A2 sale deeds. However, the description of the property in the documents is to the effect that the said pathway connects Pattikkad Road on the west and the plaint schedule property on the east. Mr.Mathew John had pointed out that in fact, the Pattikkad Road is on the south of plaint A

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schedule property and the pathway in question is really connects the public pathway on the south to the plaint A schedule property on the north. The aforesaid mistake in Exts.A1 and A2 documents happened to be carried in the plaint. However, this mistake was revealed only when the Commissioner's reports were placed on record of the trial court. The argument advanced by Mr.Mathew John is that the aforesaid mistake in the plaint as well as in the documents of title would not deprive the benefit of easement obtained by the appellant by grant as per Exts.A1 and A2 sale documents as there is no other pathway to connect the public road with the plaint A schedule property.

10. It is true that the trial court has considered the issue and came to a positive finding that the appellant has proved his right in respect of plaint B schedule pathway by grant and declared the said right and passed a permanent prohibitory injunction restraining the respondent from committing any mischief in the plaint

schedule property. The trial court also granted a mandatory injunction to remove the obstruction.

11. Though it was made to appear that the mistakes pointed out above are only minor, it has to be borne in mind that the appellant is claiming an easement by grant, which is a precarious right over the property of another person. Therefore, the person, who claims easement, should specifically point out the lie of the way in unequivocal terms. Then only, the court will be able to grant a decree declaring his right of easement. It appears from record that the lower appellate court dismissed the suit on the ground that the description of plaint A schedule property and B schedule pathway does not tally with the report of the Commission. The lower appellate court cannot be found fault for the same. It is crucial to note that the appellant, during trial, had no case that the description in Exts.A1 & A2 is wrong. As per Exts.A1 and A2, a pathway having a width of 15 links, which remained in the possession of the vendor was conveyed to the

vendee. As per the plaint description, the said way is on the western side of the property. The same description is carried out in the plaint also. The definite case of the respondent is that the road shown in Ext.C2(a) is not the pathway described in Exts.A1 and A2. Now the appellant is asking for a declaration of easement by grant over a pathway, which existed on the southern side of plaint A schedule property. It is crucial to note that even in witness box, the appellant, who was examined as PW1, has no case that the descriptions in Exts.A1 and A2 and the plaint are wrong. It is also crucial to note that Gopalakrishnan, who is the previous owner of the property, was not examined in this case. These circumstances would naturally lead to the conclusion that the way in existence has no connection with the way made mention of in Exts.A1 and A2, is more probable.

On a consideration of the entire materials now placed on record, this Court is of the definite view that no question of law has been wrongly decided by the lower

appellate court; and therefore, the same does not call for an interference by this Court.

In the result, the appeal fails; and accordingly, it is dismissed.

Sd/-
A.V. RAMAKRISHNA PILLAI
JUDGE

bka/-

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PA to Judge