

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 17TH DAY OF JUNE 2015/27TH JYAISHTA, 1937

RSA.No. 526 of 2007

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(AGAINST THE JUDGMENT IN AS 224/2002 of DISTRICT COURT, KOZHIKODE  
DTD.31-08-2006

OS 896/1997 of ADDL.MUNSIFF COURT,KOZHIKODE-II

APPELLANT/APPELLANT/DEFENDANT:

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KANNAMBATH SUNDAR RAJ  
S/O.KANDAKUTTY, NELLIKODE AMSOM DESOM, KOZHIKODE.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENTS/RESPONDENT/PLAINTIFFS:

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1. CHEKKYATTU BHARATHAN  
S/O.SATHYAVRATHAN, CHEMBAKASSERY VEEDU  
NELLIKODE AMSOM AND DESOM, KOZHIKODE TALUK.
  2. CHEKKYATTU BHARATHY, D/O.SATHYAVRATHAN,  
CHEMBAKASSERY VEEDU, NELLIKODE AMSOM AND DESOM  
KOZHIKODE TALUK.

R1 & R2 BY ADV. SRI.THOMAS ANTONY

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON  
17-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Regular Second Appeal No.526 OF 2007**  
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**Dated this the 17<sup>th</sup> day of June, 2015.**

**J U D G M E N T**

A very narrow question arises for consideration in this second appeal. That is with reference to the width of pathway shown in C schedule to the plaint. The plaintiffs claimed that the pathway has a uniform width of 2 metres and that they are entitled to use it by way of easement by necessity.

2. The defendant retorted by disputing the very existence of pathway and contended that at best what the plaintiffs could claim is that they had walked at random through the property of the defendant and that will not confer any right on them. He therefore disputed the right claimed by the plaintiffs.

3. Based on the above pleadings, issues were raised and the parties went to trial. The evidence consists of the testimony of PWs 1 and 2 and the documents marked as Exts.A1 to A5. The defendant examined DW1. Exts.C1 and C2 are commission report and plan.

4. Both the courts below, mainly based on the Commissioner's report, to which though objection was filed no attempt was made made by the defendants to substantiate their objections, found that the pathway had a uniform width of minimum 2 metres and decreed the suit which was confirmed in appeal.

5. At the time of admission of the appeal, the following substantial questions of law were formulated:

- "i) When the total extent of the dominant tenement belonging to the defendant is only 13 cents in extent whether the courts below were justified in granting a decree to the plaintiff in relation to the entire C schedule property claimed as pathway having a width of 2 metres and length of 43½ metres and that too when the plaintiff had no case that to the kudikidappu purchased by them pedestrian pathway that was in use was having such a width?
- ii) Whether the courts below were justified in granting a pathway as claimed by respondents-plaintiffs for access to their residence which is having more width than the lane from which access to their residence is so claimed?

6. Sri.P.V.Kunhikrishnan, learned counsel appearing for the appellant contended that the courts below have erred in law and on facts in coming to the conclusion that the pathway has minimum width of 2 metres. The basis for the said finding is the Commissioner's report which, according to the learned counsel, will not help the plaintiffs. It is pointed out that the eastern boundary of the pathway is fixed as compound wall of a property while there is no fixation of western boundary of the pathway without which the width of pathway could not have been ascertained. Learned counsel went on to point out that the 2 and odd metres of width shown in the sketch is from the very bottom of the coconut trees standing on the western side which cannot be the western boundary of the pathway. It is also contended that the pathway runs east west on the northern side from which the pathway in question starts has a width of less than 2 metres and therefore it is inconceivable that a pathway which leads from that pathway could have more width. According to the learned counsel, these aspects have not been looked into by the courts below and that has resulted in an erroneous decree being passed.

7. Learned counsel appearing for the respondents, on the other hand, contended that the Commissioner's report is clear to the effect that pathway has a minimum width of 2 metres as claimed in the plaint. Even though objections were filed to the Commissioner's report, there was no attempt from the side of the defendant to substantiate his contention that the pathway did not have 2 metres. Drawing attention to the written statement, it is pointed out that the only objection was that there was no pathway in existence, let alone the pathway had a lesser width. According to the learned counsel, the Commissioner's report was rightly accepted. There was nothing to show that the Commissioner had noted anything wrongly in his report based on which decree was granted. It is finally contended that the width of pathway having been arrived at by the courts below on appreciation of evidence is essentially finding on facts and unless it is shown that the finding of the courts below is perverse, interference while exercising the jurisdiction under Section 100 of the Code of Civil Procedure is not warranted.

8. While both the courts below have found that the

pathway in question has minimum width of 2 meters, at least before this Court there was no dispute that the plaintiffs are entitled to the use of the pathway even though written statement shows otherwise. It appears that the right that is claimed to the pathway is easement by necessity. Whatever that may, this Court need not be much concerned about that aspect.

9. Before this Court, the main argument was regarding the width of pathway. Emphasis was laid on the aspect that the pathway from which C schedule pathway starts has only less than 2 meters width and if that be so, it is inconceivable that C schedule pathway could have 2 metres width.

10. The reason has no logic. There is no rule that two pathways should be of same width. Apart from the above aspect, it is for the defendants to establish their eastern boundary of the property. The Commissioner's report shows that there is a compound wall on the eastern boundary of C schedule pathway from which the measurements were taken. Of course, Commissioner has taken measurements with reference to certain coconut trees standing on the western side of the pathway.

When measurements were taken at those spots, it was found to be more than 2 metres. However at places where there were no coconut trees, there was a uniform width of 2 metres.

11. The contention that the Commissioner ought to have fixed the western boundary of the pathway is without any basis whatsoever. If the defendant had a case that the eastern boundary was further east, it is for him to establish that fact after having measured the property appropriately. Without taking any such steps, defendant cannot be heard to say that the width of pathway cannot be ascertained in the manner as done by the Commissioner. Add to this is the fact that even though objections were taken to the Commissioner's report, there was no attempt from the side of the defendant to substantiate his contentions. The Commissioner was not even examined. Therefore, Commissioner's report stands unimpeached.

12. It was the above factors which persuaded the courts below to come to the conclusion that the C schedule pathway regarding which easement of necessity is set up by the plaintiffs is in existence and it has a uniform width of 2 metres. As rightly

pointed out by the learned counsel for the respondents, it is essentially a question on fact arrived at after considering the evidence on record and it could not by any stretch of imagination be said that the findings are either perverse or contrary to the evidence on record. If that be so, even assuming that a different view is possible, interference under Section 100 of the Code of Civil Procedure is not warranted.

This appeal is without any merits and it is accordingly dismissed.

Sd/-

**P.BHAVADASAN  
JUDGE**

smp

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P.A. to Judge.