

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

RSA.No.955 of 2007 (E)

AGAINST THE JUDGMENT IN AS 91/2004 of PRINCIPAL SUB COURT,
NORTH PARAVUR DATED 27-07-2007

AGAINST THE JUDGMENT IN OS 399/1999 of MUNSIFF COURT,
NORTH PARAVUR DATED 4.1.2003

NAME & ADDRESS OF THE APPELLANTS/RESPONDENTS IN THE APPEAL &
PLAINTIFFS IN THE SUIT:

1. HAMEED, S/O.ALIYAR, THAYATH,
THEKKE VAZHAKKULAM KARA, THEKKE VAZHAKKULAM VILLAGE,
KUNNATHUNADU TALUK, PIN 683 107.
2. HAMEED, S/O.KUNJUMUHAMMED,
PANTHALAKODATH, KEEZHMADU KARA, ALUVA EAST VILLAGE
ALUVA TALUK PIN 683 101.

BY.SRI.M.M.ABDUL AZIZ, SENIOR ADVOCATE.
ADVS.SRI.M.A.ABDUL HAKHIM
SRI.JYOTHISH.J.KALLINGAL

NAME & ADDRESS OF THE RESPONDENT/APPELLANT IN THE APPEAL AND
DEFENDANT IN THE SUIT:

LAKSHMIKUTTY AMMA, D/O.KUTTY AMMA.
KALAVUPADIKKAL HOUSE, KOTTAPPURAM KARA
ALANGAD VILLAGE, PARAVUR TALUK., PIN 683 511.

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 19-
11-2015, ALONG WITH RSA. 957/2007, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

ALEXANDER THOMAS, J.

R.S.A.Nos.955 & 957 Of 2007

Dated this the 19th day of November, 2015.

J U D G M E N T

These Regular Second Appeals are directed against the impugned common judgment and decree dated 27.7.2007 of the Principal Sub Court, North Paravur, rendered in Appeal Suits, A.S.Nos.91/2004 and 92/2004, whereby the common judgment and decree of the trial court which was in favour of the plaintiff has been set aside and modified.

2. O.S.No.391/1999 was filed by the respondent herein seeking declaration of right of easement by prescription over plaintiff B schedule pathway mentioned therein having a width of 4 ft. lying on the northern side of her plaintiff A schedule property and consequential injunction. The plaintiff A schedule property in O.S.No.391/1999 is having an extent of 29.235 cents. The property of the defendant therein/appellant herein is on the northern side of the said plaintiff A schedule property. According to

R.S.A.Nos.955 & 957 Of 2007

the plaintiff in O.S.No.391/1999, it is the only way for her ingress and egress to the said plaint A schedule property and that her house faces towards north and that she has been residing in the house put up in plaint A schedule property and that she and her predecessors-in-interest have been using the plaint B schedule pathway for the last 50 years. The appellants herein (who are defendants 3 & 4 in O.S.No.391/1999) had filed O.S.No.399/1999 before the trial court seeking injunction against the defendant therein (who is the plaintiff in O.S.No.391/1999) from trespassing into the aforestated 29.235 cents of their property. Both the suits were tried together. The trial court as per the common judgment found that easement by prescription is not proved by the plaintiff in O.S.No.391/1999 and that she is having two other ways; one on the south and other on the north-western corner of plaint A schedule property in that suit and her house faces towards south. Accordingly, the trial court dismissed O.S.No.391/1999. Consequently, the trial court had decreed O.S.No.399/1999 by granting a decree for injunction as prayed for by the plaintiffs

R.S.A.Nos.955 & 957 Of 2007

therein (appellants herein). Aggrieved by the aforestated common judgment of the trial court, the plaintiff in O.S.No.391/1999 (who is also the defendant in O.S.No.399/1999) had filed separate Appeal Suits before the Court of Principal Sub Judge, North Paravur. A.S.No.92/2004 is directed against the judgment and decree in O.S.No.391/1999 and A.S.No.91/2004 is directed against the judgment and decree in O.S.No.399/1999. As per the impugned common judgment rendered on 27.7.2007, the lower appellate court found that easement by prescription is not proved, but has granted consequential relief of injunction as sought for in O.S.No.391/1999 in favour of the respondent herein (who is the plaintiff in O.S.No.391/1999). Over and above this, the lower appellate court has also set aside the judgment and decree in O.S.No.399/1999 and has even gone to the extent of issuing an injunction restraining the plaintiffs in that suit from creating a new pathway through the defendants' property covered under their title deed and committing waste therein and causing anything detrimental to the peaceful possession and enjoyment of the

R.S.A.Nos.955 & 957 Of 2007

aforestated pathway for their ingress and egress to the property from the thoroughfare. It is this common judgment of the lower appellate court that is challenged in these Regular Second Appeals.

3. While admitting these Regular Second Appeals, this Court as per order dated 13.11.2011 had framed the following questions of law in both cases which are as follows:

“1) When the courts below concurrently found that respondent/plaintiff in O.S.391 of 1999 has no easement right of way through the property of the appellants, whether first appellate court was justified in modifying the decree enabling respondent to use a portion of the plaint schedule property in O.S.399 of 1999 as a way.

2) In the absence of evidence to prove that there is a way through the property of the appellants, which is the plaint schedule property in O.S.399 of 1999, whether the decree granted by first appellate court is legal.”

Though notice in respect of both these Regular Second Appeals has been duly served on the respondent herein, she has not chosen to enter appearance in this case.

4. Heard.

5. The issues framed by the trial court in O.S.No.391/1999 are as follows:

“1. Whether plaintiff is entitled to easement by prescription over B schedule way?

R.S.A.Nos.955 & 957 Of 2007

2. Whether B schedule is separately identifiable?
3. Whether any consequential injunction is to be allowed?
4. Reliefs and costs?"

The issues framed in O.S.No.399/1999 are as follows:

- "1. Whether plaint schedule property is identifiable?
2. Whether same is possessed by defendant?
3. Whether defendant has a right of way through plaint schedule property?
4. Whether plaintiff has a cause of action?"

6. Reference in respect of the schedules are relatable to those given in O.S.No.391/1999 unless otherwise indicated. PW1 (plaintiff in O.S.No.391/1999, who is the respondent herein) admitted in evidence in cross-examination that there is a way on the south of plaint A schedule, but that it is only a private way. There is no evidence let in by her to show that she is not having any right over that way. It is clearly admitted by her that there is a gate on the southern boundary in order to enter the said way and her explanation is that the said gate is used for the cows for grazing. More crucially, she has deposed in cross-examination that plaint B schedule property belongs to her and is included in her property. It is elementary principle that one of the essential

R.S.A.Nos.955 & 957 Of 2007

features of easement is that it should be associated with two tenaments, viz., the dominant tenament to which the right of easement is appurtenant and the servient tenament, in or upon or over which the right is exercised and a corresponding burden or obligation is imposed. There can be no right of easement without a dominant tenament and servient tenament. It is against the basic principles of the law relating to easementary rights by prescription, when the claimant for such right projects the specific case that he owns the land over which such easement is claimed. The plaintiff in O.S.No.391/1999 has asserted not only the possession of plaint B schedule, but also the ownership rights over B schedule properties. Further, she has also admitted in evidence that she can enter through the north-western corner to the road on the western side. In this view of the matter, the trial court has come to the considered conclusion that the plaintiff in O.S.No.391/1999 is using the pathway through the defendants property is only to be ruled out. Moreover, it has come out in evidence that her house is facing towards the south and not towards the north as averred in her

R.S.A.Nos.955 & 957 Of 2007

plaint. Therefore, this would strongly probabilise the case of the plaintiff in O.S.No.391/1999 that she was using the pathway on the southern side. It has come out in evidence that as per Ext.C-2 commission report that Aluva-Paravur road is very proximate and proximately accessible from the said southern opening (shown as item No.8 of Ext.C-2(a) sketch). It has also come out in evidence that PW1 is residing in Aluva. All these aspects also probabilise that she would have been using the pathway through the southern access. DW1 (1st defendant in O.S.No.391/1999) has deposed about the aforestated ways on the southern side as well as the western side of plaint A schedule property. PW2 (a witness examined on behalf of the plaintiff in O.S.No.391/1999) has admitted that the plaintiff is residing at Aluva and in cross-examination he has deposed that the house in the plaint A schedule property belongs to the plaintiff in O.S.No.391/1999 which faces to the south. He has corrected this only in re-examination. In Ext.C2 (a) report, the Advocate Commissioner has found that the house of the plaintiff in O.S.No.391/1999 is facing towards south. Though

R.S.A.Nos.955 & 957 Of 2007

PW3 [the first Advocate Commissioner who prepared Exts.C-1 and C-1(a)] has identified the plaint B schedule way on the western side of the canal, there are no such clear findings in Exts.C-2 report and C-2(a) sketch of the second Advocate Commissioner. The trial court has not made any specific finding that plaint B schedule pathway has been identified. However, the trial court holds that even if it is found that there is B schedule pathway it is leading to a way which is newly made, whereas the specific case put up by the plaintiff in O.S.No.391/1999 is that she and her predecessors-in-interest have been using this pathway for the last 55 years. This would also probabilise the case of the defendants in comparison to the one advanced by the plaintiff. In the light of these aspects, the trial court comes to the considered conclusion that the plaintiff in O.S.No.391/1999 is not entitled for any easement over plaint B schedule pathway and that resultantly she is not entitled for consequential relief of injunction as she failed to prove her right of easement. Accordingly, the trial court has dismissed O.S.No.391/1999. In view of the aforestated findings, the trial

R.S.A.Nos.955 & 957 Of 2007

court decreed O.S.No.399/1999 in favour of the plaintiff therein (appellants herein) and granted the decree of injunction as sought therein.

7. The lower appellate court also on a consideration of the matter comes to the considered conclusion that the plaintiff has no specific case regarding the servient tenement in the plaint and that the lower appellate court has also found that there is no evidence available in this matter to establish the right of the plaintiff in O.S.No.391/1999 in respect of easement by prescription over the plaint B schedule pathway. The lower appellate court has also found that PW1 in her cross-examination has deposed that the disputed pathway is part of her property which is purchased by her under Ext.A-1. Therefore, in view of these aspects, the lower appellate court also come to the considered conclusion that the plaintiff in O.S.No.391/1999 has failed to establish her claim of easementary right by prescription over plaint B schedule pathway. However, the lower appellate court very strongly finds in paragraph 6 of the judgment that the defendants in

R.S.A.Nos.955 & 957 Of 2007

O.S.No.391/1999 have no title over the disputed pathway even though they have title and possession over the 29.235 cents of property covered by Ext.B-1 sale deed. None of the parties in the suits have a case to the effect that the defendants in O.S.No.391/1999 have no title over the disputed pathway. On the other hand, the specific plea put forward by the plaintiff in O.S.No.391/1999 is clearly to the effect that the said B schedule pathway is passing through the defendants' property. In para 4 of the plaint filed in O.S.No.391/1999, the plaintiff therein has averred clearly as follows:

“The defendants have purchased the property on the northern side and eastern side of plaint B schedule and has been conducting brick manufacturing therein. Plaint B schedule pathway is passing through the southern side of the property of the defendants and thereafter, to the north, through the middle of the property of the defendants.”

No pleadings or evidence has been advanced by the plaintiff in O.S.No.391/1999 to the effect that the defendants therein have no title over the land pertaining to plaint B schedule pathway. Therefore, in the absence of such pleadings and evidence, the aforestated findings made by the lower appellate court in para 6 of

R.S.A.Nos.955 & 957 Of 2007

the impugned judgment is clearly wrong and unsustainable. On the basis of this patently wrong and erroneous finding, the lower appellate court holds that though the plaintiff in O.S.No.391/1999 has failed to establish the prescriptive right over plaint B schedule pathway, she has every right to use the same. On the basis of this wholly erroneous approach, the lower appellate court set aside the judgment in O.S.No.391/1999 and decreed the suit in part restraining the defendants and their men from causing any obstruction to the plaintiff and her men in using the existing pathway as shown in Ext.C-2(a) sketch and they are also restrained by permanent prohibitory injunction from destroying, altering or adding the pathway along with their property and causing anything detrimental to the peaceful possession and enjoyment of the pathway by the plaintiff. Apart from the above aspects, a mere perusal of Ext.C-2(a) sketch would show that the Advocate Commissioner has not identified plaint B schedule pathway in Ext.C-2(a). More importantly, the whole basis of the claim made by the plaintiff in O.S.No.391/1999 is on the basis of easementary

R.S.A.Nos.955 & 957 Of 2007

right by prescription and she sought a declaration for easementary right in that regard. The property for injunction was only consequent to the prayer of declaratory relief. When the lower appellate court fully concurred with the finding of the trial court that the plaintiff has miserably failed to establish the claim for easementary right, it is wholly erroneous and legally wrong on the part of the lower appellate court to have granted a decree of consequential injunction. That apart the very basis of the reasonings sought to be advanced by the lower appellate court as made in para 6 of the impugned judgment of the lower appellate court is plainly without any factual foundation. Therefore, the impugned judgment of the lower appellate court to the extent it interferes with the trial court judgment and decree is liable to be reversed so as to restore the verdict of the trial court.

8. The lower appellate court has also went wrong to the extent of partly allowing A.S.No.91/2004 (arising out of O.S.No.399/1999) and modifying the judgment and decree in O.S.No.399/1999 by injuncting the plaintiff in O.S.No.399/1999 by

R.S.A.Nos.955 & 957 Of 2007

restraining them from creating a new pathway through the defendant's property covered under their title deed (Ext.B-1) and committing waste therein causing anything detrimental to the peaceful possession and enjoyment of the pathway as shown in Ext.C-2(a) for their ingress and egress to their property from the thoroughfare. If at all the injunction were to be granted in O.S.No.391/1999 then the injunction that could be granted in O.S.No.399/1999 could have been restricted to the plaint schedule property in O.S.No.399/1999 after excluding the plaint schedule pathway in O.S.No.391/1999. That question does not arise as O.S.No.391/1999 is liable to be dismissed. The decree granted by the lower appellate court in injuncting the plaintiff in O.S.No.399/1999 is totally untenable and unsustainable. That apart, none of the parties, more particularly, the plaintiff in O.S.No.391/1999 (who is the defendant in O.S.No.399/1999) have a case either in the pleadings or evidence that the plaintiffs in O.S.No.399/1991 are in any way attempting to create a new pathway through the property of the defendant covered under

R.S.A.Nos.955 & 957 Of 2007

their title deed (Ext.B-1). Therefore, the entire foundation of the reasonings of the lower appellate court in granting a decree in O.S.No.399/1999 is unsustainable and untenable. Moreover, as stated earlier herein above, the Advocate Commissioner in Ext.C-2 (a) report has not identified the alleged pathway also. In view of these reasons, the decree granted by the lower appellate court in O.S.No.399/1999 is also liable to be reversed so as to restore the verdict of the trial court.

9. As regards the aforestated question of law (1) it is to be held that when both the courts below have concurrently found that the plaintiff in O.S.No.391/1999 has no easementary right through the property of the appellants, the lower appellate court was not justified in modifying the decree enabling the respondent to use a portion of the plaintiffs' property in O.S.No.399/1999. In view of the aforestated aspects, the said question of law is answered in favour of the appellants herein. As regards the question of law (2) stated herein above, it is to be held that though PW3 [the first Advocate Commissioner who prepared Exts.C-1 and C-1(a)] has

R.S.A.Nos.955 & 957 Of 2007

deposed that she had identified plaint B schedule pathway, the second Advocate Commissioner has not identified the said pathway as is clearly discernible from her Ext.C-2(a) report. In view of these aspects, as the prayer for injunction sought for by the plaintiff in O.S.No.391/1999 was only consequential to the main declaratory right of easementary right, the impugned decree of injunction granted by the lower appellate court in O.S.No.391/1999 is legally wrong. The aforestated question of law (2) is also accordingly answered in favour of the appellant herein.

In the light of these discussions, the impugned common judgment and decree of the lower appellate court to the extent it interfered with the verdict of the trial court is reversed and set aside. Consequently, the common judgment and decrees of the trial court in both the suits stand restored. With these observations and directions, these Regular Second Appeals stand allowed. However, there shall be no order as to costs.

ALEXANDER THOMAS,
Judge.