

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR.JUSTICE P.BHAVADASAN**

**THURSDAY, THE 26TH DAY OF FEBRUARY 2015/7TH PHALGUNA, 1936**

**OP(C).NO. 2053 of 2014 (O)**  
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**C.M.A.NO. 23/2014 OF DISTRICT COURT, THIRUVANANTHAPURAM**

**I.A.NO.9052/2013 IN O.S.NO.1817/2013 OF THE 1ST ADDITIONAL MUNSIFF'S COURT,  
THIRUVANANTHAPURAM**  
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**PETITIONER(S)/APPELLANT :**  
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**SIDHEEK, AGED 41 YEARS,  
S/O.ABOOBAKER,T.C 46/279(2)  
ST. JOSPEH'S SCOOOL LANE, PARUTHIKUZHY,  
VALLAKADAVU P.O, THIRUVANANTHAPURAM**

**BY ADVS.SRI.R.SUNIL KUMAR  
SMT.A.SALINI LAL**

**RESPONDENT(S)/RESPONDENT :**  
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- 1. S.RASHEED, AGED 71 YEARS,  
S/O.SAMALABHA, T.C 49/197, MANACAUD P.O,  
TRIVANDRUM- 695 001.**
- 2. KERALA WATER AUTHORITY,  
REPRESENTED BY ITS M.D, PALAYAM P.O, TRIVANDRUM- 695 001.**
- 3. ASST. EXECUTIVE ENGINEER,  
KWA, SOUTH SUB DIVISION, KURIYATHI,  
CHALAI P.O, TRIVANDRUM- 695 001.**
- 4. THE CITY CORPORATION OF TRIVANDRUM  
REPRESENTED BY ITS SECRETARY- 695 001.**
- 5. THE MOTHER SUPERIOR,  
CANOSSIAN CONVENT, POONTHURA P.O, TRIVANDRUM- 695 001.**

**R1 BY ADV. SRI.T.I.UNNIRAJA  
R2 & R3 BY ADV. SRI.JOSEPH JOHN, S.C  
R4 BY ADV. SRI.P.K.MANOJKUMAR**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 26-02-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Msd.

OP(C).No. 2053 of 2014 (O)

**APPENDIX**

**PETITIONER(S)' EXHIBITS**

- EXHIBIT P1: COPY OF THE PLAINT IN O.S NO.1817/2013.
- EXHIBIT P2: COPY OF THE ORDER IN I.A NO.9052/2013.
- EXHIBIT P3: COPY OF THE ORDER IN C.M.A NO.23/2014 DATED 02-07-2014 OF  
THE DISTRICT JUDGE, TRIVANDRUM.
- EXHIBIT P4: COPY OF THE WRITTEN STATEMENT FILED BY THE 3RD RESPONDENT
- EXHIBIT P5: COPY OF THE JUDGMENT IN O.S NO.720/1989.
- EXHIBIT P6: COPY OF THE JUDGMENT IN O.S NO.720/1989.
- EXHIBIT P7: COPY OF THE PROCEEDINGS BEFORE R.D.O.
- EXHIBIT P8: COPY OF THE E.P NO.315/04 IN O.S NO.720/1989

**RESPONDENT(S)' EXHIBITS**

NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

**P. BHAVADASAN, J.**

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O.P.(C). No. 2053 of 2014  
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Dated this the 26<sup>th</sup> day of February, 2015.

**JUDGMENT**

Aggrieved by Ext.P3 order whereby the lower appellate court dismissed C.M.A. 23 of 2014 which was directed against the order in I.A. 9052 of 2013 in O.S. 1817 of 2013 dismissing the said application filed by the plaintiff for interim relief, the plaintiff has filed this Original Petition.

2. The first respondent herein had obtained a decree in O.S. 720 of 1989 vide judgment dated 15.10.2001 whereby he was given a decree for mandatory injunction directing Kerala Water Authority which was the defendant in the suit to remove the pipeline running through his property. It is noticed here that the parties to the said suit were the Kerala Water Authority, Corporation of Thiruvananthapuram and other persons. On the basis of the evidence in that case, the court concerned found that not

only that there was no pathway as alleged in the said suit by the defendants in the suit, but also that the pipeline were drawn through the property of the plaintiff without authority and they are liable to be removed.

3. It is significant to notice that O.S. 720 of 1989 was initially dismissed which was carried in appeal as A.S. 22 of 1994. The appellate court remanded the matter to the trial court and after fresh trial decree was passed in favour of the plaintiff.

4. When the Water Authority did not honour the decree, the plaintiffs in O.S. 720 of 1989 was constrained to take out execution. Then alleging that under the guise of the decree, the plaintiff in O.S. 720 of 1989 was trying to annex a public road used by a number of people to go to their houses and also along which pipelines have been drawn and also alleging that the decree obtained in O.S.720 of 1989 was a collusive decree the present suit as O.S. 1817 of 2013 was laid. It was for a declaration that the

decree obtained in O.S. 720 of 1989 was a fraudulent and collusive decree and it cannot bind the plaintiff.

5. The definite claim put forward in the plaint was that concealing the true state of affairs, the plaintiff in O.S. 720 of 1989 with the aid of the defendants therein had managed to obtain the decree annexing a portion of the public road. It was pointed out that the plaintiffs in O.S. 720 of 1989 have no right to do so and had the suit been properly contested, the decree now sought to be put in execution would not have been passed.

6. The first respondent herein entered appearance and contested the suit. He placed all the materials before the court below.

7. Along with the suit, the plaintiff moved I.A. 9052 of 2013 seeking to have the execution of the decree in O.S. 720 of 1989 stayed. The trial court for the purpose of the I.A. had Exts. A1 to A8 marked on the side of the plaintiff and Ext. B1 marked from the side of the defendant.

The court below mainly based on the judgment and decree in O.S. 720 of 1989 came to the conclusion that the finding in that suit was that there was no road as alleged is in existence at all and that the pipelines were drawn through the property of the plaintiff in the said suit. Finding that there is no prima facie case made out by the plaintiff, the I.A. was dismissed.

8. The plaintiff carried the matter in appeal as C.M.A.23 of 2014. The lower appellate court on an independent analysis of the matter came to the conclusion that there were no grounds to interfere with the finding of the court below and dismissed the C.M.A.

9. Learned counsel appearing for the petitioner before this Court contended that a reading of the order in O.S. 720 of 1989 would show that the Commissioner on measurement of the property had found that the plaintiff in the suit was in possession of 57 and odd cents whereas his document of title and the plaint schedule contain only 54

cents. It is therefore contended that the 3 cents shown in excess by the Commissioner did not belong to the plaintiff and that was a public road through which pipeline was laid and that was annexed to the plaintiff's property in O.S. 720 of 1989.

10. Reference was also made to Ext.P7 which seems to have been the minutes of the compromise meeting convened by the Revenue authorities wherein it was contended that the first respondent herein is trying to close down a public pathway and that it may not be allowed.

11. According to the learned counsel, it is clear that the decree in O.S. 720 of 1989 was a result of collusion and fraud and that cannot be binding on the plaintiff in the present suit. It is significant to notice according to the learned counsel that none of the persons who were alleged to have been using the pathway and who are using water drawn through the property was not made a party and only two persons were made parties other than Kerala Water

Authority and Corporation of Thiruvananthapuram and that was deliberate and willful. The court below was therefore not justified in not taking note of these salient features and therefore the order cannot be sustained.

12. Learned counsel appearing for the respondents on the other hand pointed out that there have been several suits between him and his brother, who is the fourth defendant in O.S. 720 of 1989. In O.S. 720 of 1989 the statutory authorities were made parties to the suit and they had contested the suit. Drawing attention to the stand of the water authority, it is pointed out that infact the case of the Water Authority was that the pipeline was not drawn through the property of the plaintiff, but outside his property. Learned counsel went on to point out that the Commissioner measured the property within the four boundaries shown in the plaint schedule and even though the title deed took in 54 cents only, the plaintiff was in actual possession of 57 and odd cents. It is significant to

notice, according to the learned counsel, that in O.S. 720 of 1989 there is a categorical finding that there was no pathway available as alleged in existence at all and the judgment in O.S. 720 of 1989 has become final.

13. It is also pointed out by the learned counsel for the respondents that the suit is not maintainable also. The petitioner cannot have any private right over the public pathway and his remedy lies elsewhere and something else. The suit ought to have been one under Order I Rule 8 of the Code of Civil Procedure. Viewed from that angle also, it is pointed out that orders passed by the court below do not call for any interference.

14. As to whether the suit is maintainable or not is not a matter to be considered by this Court now. That contention does not seem to have been agitated before the court below. That is a matter to be decided at a later stage when the issue is taken up for consideration.

15. The main contention taken by the learned counsel for the petitioner is that the document of title of the first respondent herein so also the plaint schedule in O.S. 720 of 1989 show only an extent of 54 cents and he is entitled to a decree in respect of that extent of property. In fact when the Commissioner measured the property involved in O.S. 720 of 1989 the plaint schedule was found to contain an extent of 57 and odd cents. The contention is that 3 cents was in excess and the plaintiff in O.S. 720 of 1989 is not entitled to that extent of land.

16. Even though the argument looks attractive at the first blush, on a close scrutiny, it can be found to be without any basis. The Commissioner measured the property lying within the four boundaries shown in the plaint schedule by the plaintiff in O.S. 720 of 1989 and found that even though the extent shown in the document of title was only 54, on measurement it was found to be 57 and odd cents.

17. What is more significant is the finding by the court below in O.S. 720 of 1989 that there was no road as contended by some of the respondents and that pipeline laid by the Water Authority was through the property of the plaintiff in the said suit though the Water Authority contended that it was outside his property.

18. Ext.P7 would indicate that existence of a road is of considerable doubt. The first respondent seems to have been reluctant to some extent in the meeting of the revenue authorities and agreed to give a portion of the property for taking an autorickshaw through the pathway. But that was not found sufficient by the warring group and the compromise talk did not materialize.

19. It is significant to notice that the case of the plaintiff in the present suit is that the road in question is a public pathway in which case as per the provisions of the Local Authorities Act, it should vests with the local authority. The local authority was a party in the earlier suit and they

had no such contention. They were also parties in the present suit. This fact cannot also be lost sight of. The above fact is weighed by the court below in coming to the conclusion that the plaintiff in the suit at no point of time able to make out a prima facie case.

20. This Court, exercising its supervisory jurisdiction under Article 227 of the Constitution of India, unless and until it is established that the finding of the court below is perverse or contrary to the materials of record, may not be justified in interfering with the finding of the court below even if a different view is possible.

This Original Petition is without merits and it is accordingly dismissed.

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P. BHAVADASAN,  
JUDGE