

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 10TH DAY OF FEBRUARY 2015/21ST MAGHA, 1936

OP(C).No. 2309 of 2014 (O)

COMMON ORDER DATED 27-08-2014 IN CMA 5/2013, CMA 6/2013 AND CMA 10/2013 OF
SUB COURT, ATTINGAL
COMMON ORDER IN IA.NO.899/2012 AND IA.NO.987/2012 IN O.S.NO.118/2012 AND
I.A.NO.911/2012 IN OS.NO.120/2012 OF MUNSIFF'S COURT, VARKALA.
.....

PETITIONER(S)/COUNTER PETITIONER/PLAINTIFF:

AZHAR M. RIFAYI,
S/O LATE UMASUDEEN, RESIDING AT LEBBA COTTAGE,
PUTHENCHANTHA, VETTOOR VILLAGE, TRIVANDRUM.

BY ADVS.SRI.P.K.MUHAMMED
SRI.K.M.GEORGE

RESPONDENT(S)/PETITIONERS/DEFENDANTS:

1. C.N. SAROCHAND,
S/O LATE NARAYANAN, RESIDING AT KADAYIL VEEDU,
VETTOOR DESOM, VETTOOR VILLAGE, PIN:695 312.
2. BINDU SAROCHAND,
W/O C.N.SAROCHAND, RESIDING AT KADAYIL VEEDU,
VETTOOR DESOM, VETTOOR VILLAGE, PIN:695 312.

BY ADV. SRI.M.R.RAJESH

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 10-02-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

msv/

OP(C).No. 2309 of 2014 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

**EXHIBIT P1: TRUE COPY OF THE COMMON ORDER DATED 27.8.2014 IN CMA
NO.5/2013, C.M.A.NO.6/2013 AND C.M.A.NO.10/2013 ON THE FILE OF THE
SUB COURT ATTINGAL.**

**EXHIBIT P2: TRUE COPY OF THE PLAINT IN O.S.NO.118/2012 ON THE FILE OF THE
MUNSIFF'S COURT, VARKALA.**

**EXHIBIT P3: TRUE COPY OF THE PLAINT IN O.S.NO.120/2012 ON THE FILE OF THE
MUNSIFF'S COURT, VARKALA.**

**EXHIBIT P4: TRUE COPY OF THE COMMON ORDER DATED 10.12.2012 IN IA
NO.899/2012 AND I.A.NO.987/2012 IN OS NO.118/2012 AND
I.A.NO.911/2012 IN O.S.NO.120/2012 ON THE FILE OF THE MUNSIFF'S
COURT, VARKALA.**

**EXHIBIT P5: TRUE COPY OF THE COMMISSION REPORT DATED 21.3.2012 IN
O.S.NO.118/2012.**

**EXHIBIT P6: TRUE COPY OF THE COMMISSION REPORT DATED 15.9.2012 IN
O.S.NO.118/2012.**

**EXHIBIT P7: TRUE COPY OF THE COMMISSION REPORT AND ROUGH SKETCH FILED
BY THE ADVOCATE COMMISSIONER IN O.S.NO.120/2012
DATED 24.3.2012.**

**EXHIBIT P8: TRUE COPY OF THE OBJECTION PETITION DATED 5.10.2012 FILED BY
THE PETITIONER TO EXHIBIT P6 COMMISSION REPORT.**

RESPONDENT(S)' EXHIBITS:

NIL

//TRUE COPY//

P.S.TO JUDGE

Msv/

P.BHAVADASAN, J.

O.P.(C) No. 2309 of 2014

Dated this the 10th day of February, 2015

J U D G M E N T

Aggrieved by the order dated 27.08.2014 in C.M.A.No.5/2013, C.M.A.No.6/2013 and C.M.A.No. 10/2013, the respondent before the court below has come with this original petition under Article 227 of the Constitution of India.

2. There were two suits, namely O.S.No.118/2012 filed by the respondent herein and O.S.No. 120/2012 filed by the petitioner herein. Both related to C schedule pathway. It is not in dispute that parties to the litigations purchased the property from the same owner, the plaintiff in O.S.No.118/2012 being prior in point of time in the matter of purchase. He was provided a way along the eastern boundary having a width of 3.5 metres and a length of 7.1 metres. That would be clear from Ext.A1 document. While assigning the rest of the property to the defendant in

O.S.No.118/2012, way was excluded.

3. The grievance of the plaintiff in O.S.No. 118/2012 was that without leaving the length of 7.1 metres towards the south as contained in the schedule to Ext.A1 document, the defendant in the suit was attempting to put up a gate thereby denying the use of the pathway to a length of 7.1 metres towards the southern side. That according to the plaintiff in O.S.No.118/2012 was contrary to the recitals in Ext.A1 document which was in his favour and also that the documents in favour of the defendants. In other words, the case was that if at all the defendant in the suit wanted to put up a gate, that would have been only after leaving 7.1 metres from the northern boundary towards the southern side of the plaintiff's property. When the defendant in the suit attempted to obstruct way, the suit was laid.

4. The defendant in O.S.No.118/2012 in turn laid O.S.No.120/2012 claiming that the defendant in the said suit who is the plaintiff in O.S.No.118/2012 was attempting to

trespass into his property for which he had no right.

5. In both the suits, the respective parties filed interlocutory applications for interim injunction. Commission was also taken out and Exts. P5 to P7 are the Commissioner's report filed in the said cases.

6. It may be noticed that during the pendency of the suit, the apprehended danger of the plaintiff in O.S.No. 118/2012 turned out to be true and the defendant in the suit put up a gate. Therefore, he was also constrained to file an I.A. for mandatory injunction.

7. The three applications namely interim injunction applications filed by the respective parties and also the interim application filed by the plaintiff in O.S.No.118/2012 for mandatory injunction were heard together and disposed of by a common order. The trial court allowed the interlocutory applications filed in O.S.No. 120/2012 and dismissed the other two applications filed by the plaintiff in O.S.No.118/2012.

8. The aggrieved plaintiff in O.S.No. 118/2012 took up the matter before the lower appellate court as C.M.A.Nos. 5/2013, 6/2013 and 10/2013.

9. The lower appellate court, on an independent appreciation of the materials before it, found it difficult to accept the finding of the trial court and found that the trial court was mainly carried away by the fact that the width of the pathway now available is more than what is described in Ext.A1 document in favour of the plaintiff in O.S.118/2012 and therefore there was no infringement of any right of the plaintiff in the suit. But the trial court failed to take note of the fact that there was a description of length of the pathway as 7.1 metres which was omitted to be taken note of by the trial court. Holding that if at all any gate could be put up, that would be only beyond 7.1 metres towards the south and the northern boundary, the court below allowed the applications filed by the plaintiff in O.S.No.118/2012 reversing the finding of the trial court and dismissed the

interlocutory applications filed by the plaintiff in O.S.No.120/2012.

10. In this original petition, Sri. P.K. Muhammed, the learned counsel appearing for the petitioner who suffered order at the hands of lower appellate court assailed the finding on several grounds. Relying on Ext.P7 Commissioner's report, it was contended that there was no substance in the complaint of the plaintiff in O.S.No.118/2012. It is very evident from the report that the width of the way was more than 3.5 metres as mentioned in Ext.A1 and if that be so, the plaintiff in O.S.No.118/2012 had no grievance to be redressed. Referring to the pleadings in the plaint, it was pointed out that the plaintiff in O.S.No.118/2012 was claiming an easement by grant which means the C schedule pathway was running through the property of the defendant in O.S.No. 118/2012. If that be so, the plaintiff in O.S.No. 120/2012 who is the defendant in O.S.No. 118/2012 is certainly entitled to put up a gate to

protect his property. If at all there was any doubt regarding the exact location of the pathway, the lower appellate court should have remanded the matter to the trial court instead of allowing the applications filed by the plaintiff in O.S.No.118/2012. It was also contended that the relief of mandatory injunction granted was beyond the scope of the suit and that there was no substantial prayer in the suit for a mandatory injunction. On the above ground, it was contended that the order of the court below cannot be sustained and that the lower appellate court ought not to have interfered with the finding of the trial court.

11. Sri. M.R. Rajesh, the learned counsel appearing for the respondent on the other hand contended that the lower appellate court has appreciated the materials before it in the proper perspective and has come to the right conclusion after analyzing the materials before it. The trial court was mainly carried away by the fact that going by the Commissioner's report, the width of the pathway is more

than what was mentioned in Ext.A1 document and that would be sufficient to non suit the plaintiff in O.S.No.118/2012. The learned counsel pointed out that the trial court conveniently omitted to note that the way is described as having a width of 3.5 and length of 7.1 metres. It omitted to note the length and thus committed a grave error in not allowing the applications filed by the plaintiff in O.S.No. 120/2012. The learned counsel went on to point out that he has no dispute regarding the fact that the property through which the way is given, belonged to the defendant and he only claims easement by grant. Attention was also drawn to the document of title and it was contended that what is assigned to the defendant in O.S.No. 118/2012 is the balance of the property that was assigned to the plaintiff in O.S.No.118/2012 and the way is clearly described in Ext.A1. The learned counsel went on to point out that even if the defendant in O.S.No.118/2012 wanted to put up a gate, that could have been only beyond 7.1 metres from northern

boundary towards south. These aspects were rightly taken note of by the lower appellate court. As regards the contention based on the question of mandatory injunction, the learned counsel went on to point out that it is quite evident from the Commissioner's report that the gate was put up during the pendency of the suit and if that be so, it is unnecessary for him to seek a substantive prayer of mandatory injunction and the court is certainly empowered to restore the status quo as on the date of suit pending adjudication of the rights between the parties. The learned counsel, for the above proposition, relied on the decision reported in **Athura Sevasangom v. State of Kerala** [2002 (1) KLT 317].

12. Dealing first with the question of the relief of mandatory injunction, the contention raised by Sri. M.R. Rajesh, the learned counsel appearing for the respondent seems to have considerable force. Going by the Commissioner's report, it can be easily seen that as on the

date of filing of O.S.No. 118/2012, there was no gate found but at a later stage it was seen thereby indicating that the gate was put up during the pendency of the suit. It is therefore evident that at the time of filing of the suit, there was no obstruction caused to the way and there was no necessity to seek a relief of mandatory injunction. It is also significant to note that it was while the I.A. filed by the plaintiff in O.S.No. 118/2012 was pending consideration that the alleged construction was made. When the lower appellate court found that it was in violation of the terms of the deed, directed removal of the structure, it could not be said that that was granting of a relief beyond the scope of the suit. Therefore, the argument based on this aspect has necessarily to fail.

13. Coming to the facts of the case also the lower appellate court seems to have struck the right note. The trial court mainly on the basis that the width of the pathway though mentioned in the document was only as 3.5 metres

on site measurement exceeded the same thought it unnecessary to go into the other facts of the case and denied relief to the plaintiff in O.S.No.118/2012.

14. The definite case of the plaintiff in O.S.No. 118/2012 was that the pathway having a width of 3.5 metres and length of 7.1 metres was clearly mentioned in the document and he is entitled to use that pathway.

15. The lower appellate court also took note of the said fact and found that the gate as is now seen put up is without leaving 7.1 metres of length of pathway as specified in Ext.A1 document.

16. The grievance of the petitioner before this Court is that if at all there was any error in the finding of the trial court, the matter ought to have been remanded. Equally so is the contention that the defendant in O.S.No.118/2012 ought not to have called upon to remove the structure until the suit was decided.

17. One should remember that the plaintiff in O.S.No. 118/2012 had laid the suit in earlier point of time and he had mentioned his grievances in the plaint. As already noticed, there can be no doubt that the objectionable construction was put up during the pendency of the suit and the lower appellate court found that it is in violation of terms of Ext.A1 document. To ask the plaintiff in O.S.No.118/2012 to wait till the termination of the suit is not proper. Having changed the nature of the property during the pendency of the suit and when the issues were being agitated, the defendant in O.S.No.118/2012 cannot be heard to say that he cannot be called upon to remove the construction.

18. The lower appellate court was therefore perfectly justified in coming to the conclusion of necessity to grant mandatory injunction. There is no merit in this original petition and it is only to be dismissed. I do so. However, it is made clear that the suit shall be disposed of untrammelled by any of the observations made by any of the

court while disposing of the interlocutory applications. Every attempt may be made to dispose of the suit as expeditiously as possible.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge