

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 27TH DAY OF JANUARY 2015/7TH MAGHA, 1936

OP(C).No. 2692 of 2014 (O)

AGAINST THE ORDER IN C.M.A.NO.20/2014 of ADL.SUB COURT, THALASSERY DATED
18-10-2014

PETITIONER/1ST APPELLANT/1ST RESPONDENT/1ST DEFENDANT

CHEMBILALI NISAR, AGED 41 YEARS
S/O.KUNHI KUTTYALI, SAFNA MANZIL
P.O.ELAMBARA, VIA.EDAYANNUR,
KANNUR DISTRICT

BY ADV. SRI.P.U.SHAILAJAN

RESPONDENTS/RESPONDENT & 2ND APPELLANT/PETITIONER & 2ND
RESPONDENT/PLAINTIFF & 2ND DEFENDANT :

- 1. UPPIKKARAMBATH MUSTAFA, AGED 54 YEARS**
S/O.ABOOTTY, RESIDING AT SHIBIN MAHAL,
KOLARI AMSOM KALLUR DESOM, IRITTY TALUK
KANNUR DISTRICT 670 702
- 2. K.T. MUHAMMADKUNHI, S/O.HARIS, AGED 54 YEARS**
NEAR JUMA MAZJID, P.O.MATTANUR
KANNUR DISTRICT 670 702

R1 BY ADV. SRI.CIBI THOMAS
R2 BY ADV. SRI.V.C.JAMES
ADV. SRI.K.KUNHIKRISHNAN

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 27-01-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

VS

OP(C).No. 2692 of 2014 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1 :** TRUE COPY OF THE PLAINT IN OS NO.214/2014 BEFORE THE
MUNSIFFS COURT KUTHUPARAMBA DATED 13-5-2014
- EXT.P2 :** TRUE COPY OF THE AFFIDAVIT FILED IN SUPPORT OF IA NO.1008/14
IN OS NO.214/2014 DATED 13-5-2014
- EXT.P3 :** TRUE COPY OF THE COUNTER STATEMENT FILED BY THE
RESPONDENTS/DEFENDANTS IN IA NO.1008/14 IN OS NO.214/2014
DATED 3-6-2014
- EXT.P4 :** TRUE COPY OF THE REPORT SUBMITTED BY THE ADVOCATE
COMMISSIONER DATED 21-5-2014 IN IA NO.874/14 IN OS NO.214/2014
- EXT.P5 :** TRUE COPY OF THE REPORT SUBMITTED BY THE ADVOCATE
COMMISSIONER IN OS NO.224/14 DATED 31-5-2014
- EXT.P6 :** TRUE COPY OF THE CERTIFIED COPY OF THE PLAN SUBMITTED BY
THE RESPONDENT IN THE YEAR 2001 AT THE TIME OF
CONSTRUCTING HIS HOUSE
- EXT.P7 :** TRUE COPY OF THE ORDER DATED 6-6-2014 IN IA NO.1108/14 OF
THE MUNSIFFS COURT, KUTHUPARAMBA
- EXT.P8 :** TRUE COPY OF THE ORDER IN CMA NO.20/2014 DATED 18-10-2014
OF THE ADDITIONAL SUB COURT, THALASSERY
- EXT.P9 :** PHOTOGRAPHS OF THE PETITIONERS' BUILDING AND THE 'B'
SCHEDULE PROPERTY.

RESPONDENT(S)' EXHIBITS

NIL

/TRUE COPY/

PA TO JUDGE

VS

P.BHAVADASAN, J

O.P.(C)No. 2692 of 2014

Dated this the 27th day of January, 2015

JUDGMENT

Faced with the concurrent findings against him, the first defendant in O.S.No.214/2014 has approached this court.

2. The respondent as plaintiff instituted O.S.No 214/2014 praying for the relief of prohibitory as well as mandatory injunction. The suit was in respect of B schedule way which, according to the plaintiff, was a motorable way to which obstruction had been caused by the defendants and the plaintiff sought for removal of the obstruction as well as prohibitory injunction. Along with the suit, he filed I.A.No.1008 of 2014 seeking an interim mandatory injunction to have the defendants remove the obstruction caused on the motorable way so as to enable him to take his vehicle to his residence.

3. The petition was very strongly opposed by the defendants. They denied the existence of the way as claimed in the plaint and contended that it was only a

drainage covered by slab and it could not admit of a motorable way. Pointing out that B schedule property which is claimed as a motorable way passes in between two buildings and the Commissioner's Report would belie the allegations made by the plaintiff, it was contended on behalf of the defendants that B schedule pathway was never used as a motorable way even though the plaintiff could walk along that way. They also disputed the claim made by the plaintiff that for construction purpose, materials were brought in heavy vehicles through this way. Contending that the plaintiff had no right to claim a motorable way along the B schedule, they prayed for a dismissal of the interlocutory application.

4. For the purpose of the interlocutory application, the trial court marked Exts.A1 to A9 marked on the side of the plaintiff and Exts.B1 to B7 were marked on the side of the defendants. Exts.C1 and C2 are the Commission Report and the plan.

5. The trial court, mainly based on the Commission Report and the plan, formed the opinion that there was a

possibility of a motorable way being in existence as claimed by the plaintiff. Finding that obstructions had been caused in the said pathway, the trial court directed for removal of the obstruction within thirty days enabling the plaintiff to use plaint B schedule pathway as a motorable passage for light motor vehicles till the disposal of the suit.

6. The disappointed defendants carried the matter in appeal as CMA No.20 of 2014 before the Sub Court, Thalassery. The lower appellate court, on an independent consideration of the materials before it, concurred with the trial court and refused to interfere with the order. Dismissal of the appeal brings the 1st defendant before this Court.

7. Learned counsel appearing for the petitioner contended that there has not been a proper appreciation of the materials before it by the courts below and that has resulted in a wrong order being passed. The most significant document which, according to the learned counsel for the petitioner, is Ext.P6 produced before this

Court which is a plan submitted by the plaintiff in the suit for construction of his building, and that would show that the disputed portion is a drainage. If as a matter of fact, the plaintiff had a case that it was a motorable way, surely and certainly in Ext.P6 it should have been shown as a way. Further it is pointed out that allowing vehicles to be taken along the alleged way would certainly cause damages to his buildings, and that fact has been omitted to be noticed by the court below. The learned counsel pointed out that there was never a way as claimed by the plaintiff and nobody has any right over the same to use that portion as a motorable way. A perusal of the photographs produced would show that it is virtually impossible to take a vehicle through the alleged B schedule pathway. Reference was also made to O.S.No.224 of 2014, a suit before the Munsiff's Court, Kuthuparamba in which almost the same issue was involved. There a commission was taken out and the Commissioner's Report filed in the said suit is marked as Ext.P5. Placing considerable reliance Ext.P5, it is

contended that it is clear from a reading of the said report that a way as such could not have been in existence. Both the court below were therefore wrong both on facts and in law in allowing the interim mandatory injunction. The learned counsel relying on a decision reported in **Purshottam Vishandas Raheja v. Shrichand Vishandas Raheja**[(2011)6 SCC 73] contended that parameters for allowing an interim mandatory prayer are well settled and if those principles are to be applied to the facts of the case, one can easily see that the present case does not qualify for an interim mandatory injunction order given by the court below. It is therefore contended that the order is clearly unsustainable.

8. The learned counsel appearing for the respondent on the other hand contended that both the court below have appreciated the materials before them and considered them in detail and formed the opinion that in all probability a way did exist as alleged and is being used as a motorable way. The learned counsel pointed out that Exts.P5 and P6 documents have not been

produced before the court below and have been produced for the first time before this Court and therefore they cannot be relied on. Further, the learned counsel pointed out that when the CMA was pending before the court below and when the court below refused to issue an interim order, the petitioner approached this Court by filing O.P.(C) No.1530 of 2014 vindicating his grievances. That O.P. was disposed of directing the court below to dispose of the appeal before the lower appellate court. But, according to the learned counsel, the following observation has considerable relevance, which reads as follows;

“The respondent can take a light motor vehicle only through the way and that too without causing damage to the buildings on either sides”.

9. It is therefore contended that even at that time, this Court was not impressed with the claim of the petitioner that there was no such way as alleged and this Court thought it proper and fit to let the petitioner to take the vehicle for the time being. Pointing out that being concurrent findings of facts and unless it is

shown that the findings are so perverse and it has no support of the materials before the court below, this Court cannot be justified in interfering with the order under Article 227 of Constitution of India. For the above proposition, the learned counsel relied on the decision reported in **Shalini Shyam Shetty v. Rajendra Shankar Patil** [(2010)8 SCC 329].

10. From the facts narrated above, it is evident that the dispute relates to the user of plaint B schedule pathway. There is no dispute regarding the fact that there is a pathway shown as B schedule which can be made use of by the plaintiff for walking as admitted by the defendants. The real controversy is the claim of the respondents herein before the trial court that it is a motorable way through which he used to take his vehicle. According to the petitioner with ulterior motive, the plaintiff would say that the defendants caused obstruction to the pathway.

11. The contention of the respondents before the Court below was that there could never have been a way

as such cannot be true as could be seen from the Commissioner's plan and report Exts.P5 and P6 and those documents are sufficient to non-suit the plaintiff.

12. It must at once be noticed that Ext.P5, commission report in another suit is not produced before the court below. True Ext.P6 is a plan submitted by the plaintiff in the suit before the authorities concerned for construction of the building. It is also true that there, a disputed portion is shown as a drain. But one has to now notice the claim put forwarded by the plaintiff in the present suit. He would say that the drain was covered by slab and thereafter he used it as a motorable way. He claimed to have been using it from the time of purchase of his property somewhere in 1992 that is at the time of construction of the building. Therefore, the fact that Ext.P6, the disputed portion is shown as a motorable way may not have of much consequence as of now. The learned counsel for the petitioner is justified in his submission that had there been a way, it could have been shown to be so. But one cannot omit to note the nature of

claim forward by the plaintiff in the present suit. Both the Courts below have found that going by the Commission Report in the present case, it is not possible to rule out the possibility of motorable way existing shown as B schedule pathway.

13. The claim put forwarded by the plaintiff is prescriptive right of easement. It needs to be noticed that there is no case for the respondents before the trial court that the petitioner has any other access to his property. The petitioner has a definite case that the B schedule is the only means of access to his property. However, the respondent in his counter disputed the said claim made by the petitioner and contended for the position that they had add till recently other means of access.

14. But, the Commissioner's Report namely Ext.C1 produced in the case makes mention of the fact that he could not locate any other means of access to the property. Ofcourse, the counsel for the respondent pointed out that the objection had been filed to the commission report and that is still pending consideration.

15. In the decision relied on by the learned counsel for the petitioner in **Purshottam Vishandas Raheja v. Shrichand Vishandas Raheja** [(2011)6 SCC 73], it was observed as follows;

As far as this judgment is concerned, it must be noted that it was a suit by one joint owner of an undivided family house to restrain the other joint owners/their heirs from transferring their share of the house and from parting with possession to a third party/purchaser and restraining the purchaser from entering into and or remaining into possession of the suit property. This was on the basis of the mandate of Section 44 of the Transfer of Property Act and particularly its proviso. This Court went into the question as to whether interlocutory injunction of a mandatory character as against the prohibitory injunction could be granted? The counsel for the Respondents pointed out that the mandatory injunctions were essential to avoid greater risk of injustice being caused as held in *Films Rover International Ltd. v. Cannon Film Sales Ltd.* [(1986) 3 All ER 87]. There is no difficulty in accepting that this Court did accept that test. It, however, laid down the law in that behalf in paragraphs 16 and 17 as follows:

"16. The relief of interlocutory

mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be

exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

16. It is trite that interim mandatory injunction is seldom granted. Usually such a relief is granted to retain the status quo immediately anterior to the suit. It must be remembered that in the case on hand that the plaintiff had sought for both prohibitory and mandatory injunction. His definite case was that recently the B schedule pathway had been blocked by putting obstacles and he is being prevented from taking vehicle to his residence.

17. In the case on hand, both the court below, after appreciation of the materials before it formed the opinion that going by the Commission Report in the present case, there was a sufficient space in between the two buildings to let a light motorable vehicle pass through. The Court was also impressed by the fact that at the time of the Commissioner's visit a car was seen parked in the

residence of the petitioner. Ofcourse, in Ext.P5 the Commission Report in the other suit there is a positive finding by the Commissioner that four wheelers cannot be taken through that space. However the court below was inclined to tentatively accept the Commission Report in the case on hand.

18. At this point of time, it is useful to refer the observation made by this Court while disposing of O.P.(C) No.1530 of 2014. When the petitioner approached this Court, assailing the interlocutory order passed by the court below in the CMA, this Court did not feel it necessary to interfere with the order, but direct the CMA to be disposed of as expeditiously as possible making the observation already referred to. That has been in force for a long time.

19. This court is given to understand that necessary steps have been taken in the suit and it is possible to dispose of the suit. If that be so, the state of affairs which continued as a result of interim order of this Court need not be disturbed.

20. Further as rightly pointed out by the learned counsel for the respondent, the courts below have considered the material before them and came to the conclusion that in all probability, the B schedule pathway was a motorable pathway and the claim made by the petitioner before the trial court that he has used to take his vehicles is more probable. It could not be said that the findings are perverse on contrary to the evidence on record or in the nature of the findings which could not have been arrived at on the material available on record. The mere fact that this Court may be inclined to take a different view is not a ground to interfere under the visitorial view under Section 227 Articles of Constitution of India. For the above reason this Court finds no reason to interfere with the order of the court below.

This OP is accordingly dismissed. The court below may dispose of the suit untrammelled any observation made by this Court or the Court below while disposing of the interlocutory application. If the parties co-operate, the trial court may make every endeavour to dispose of the

suit as expeditiously as possible, at any rate, within four months from the date of receipt of a copy of this judgment.

Sd/-
P.BHAVADASAN
JUDGE

rkj

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P.A. TO JUDGE