

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 26TH DAY OF MARCH 2015/5TH CHAITHRA, 1937

OP(C).No. 2836 of 2014 (O)

(Against the order in C.M.A.2/2014 dtd.22.9.14 of Sub Court, Thiruvalla
against the order in I.A.823/2013 in O.S.No.187/13 of Munsiff Court,
Thiruvalla dtd.11.12.13)

PETITIONER/APPELLANT/DEFENDANT:

RAJ MOHAN AGED 54 YEARS
S/O.LATE KOCHURAMAN
RESIDING AT MALAYIL PUTHANVEETIL HOUSE
THALAYAR MURI, KUTTOORVILLAGE
REPRESENTED BY POWER OF ATTORNEY HOLDER AMBILI MOHAN,
AGED 47 YEARS, W/O.RAJ MOHAN
RESIDING AT MALAYILPUTHENVEETIL HOUSE
THALAYAR MURI, KUTTOOR VILLAGE, THIRUVALLA.

BY ADVS.SRI.K.R.AVINASH (KUNNATH)
SRI.ABDUL RAOOF PALLIPATH
SRI.C.H.ABDUL RASAC
SRI.T.P.SANTHOSH KUMAR

RESPONDENTS/RESPONDENTS/PLAINTIFFS:

-
1. RAJU BHASKARAN, AGED 50 YEARS
S/O.LATE BHASKARAN, RESIDING AT MALAYIL PUTHEN VEEDU
THALAYAR MURI, KUTTOOR VILLAGE, KALAYIL HOUSE
MUTHOOR MURI, KUTTAPPUZHA VILLAGE
THIRUVALLA - 689 106, PATHANAMTHITTA DT.
 2. SUJATHA BHASKARAN, AGED 45 YEARS
W/O.RAJU BHASKARAN, RESIDING AT MALAYIL PUTHEN VEEDU
THALAYAR MURI, KUTTOOR VILLAGE, THIRUVALLA- 689 106,
PATHANAMTHITTA DT.

R1&2 BY ADV. SRI.P.HARIDAS
R1&2 BY ADV. SMT.S.SIKKY

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON
26-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS :

- EXT.P-1: TRUE COPY OF THE COMMISSION REPORT FILED BY THE
ADVOCATE COMMISSIONER IN O.S.NO.226/13 ON THE FILES
OF THE MUNSIFFS COURT, THIRUVALLA.
- EXT.P-2: TRUE COPY OF THE COMMON ORDER DATED 11.12.13 IN
I.A. 551/13 AND I.A.NO.823/13 ON THE FILES OF THE
MUNSIFFS COURT, THIRUVALLA.
- EXT.P-3: TRUE COPY OF THE COMMON ORDER DATED 22.9.14 IN C.M.A.
NO.1/2014 AND C.M.A. NO.2/14 ON THE FILES OF THE SUB
COURT, THIRUVALLA.

RESPONDENTS' EXHIBITS:

- EXT. R1 : COPY OF COMMISSIONER REPORT AND ROUGHT SKETCH
FILED IN O.S.187/2013 DTD.16.5.13.
- EXT. R2 : COPY OF COMMISSIONER REPORT AND ROUGH SKETCH
FILED IN O.S.187/13 DTD.17.8.13.

// True Copy //

P.A. To Judge.

smp

P.BHAVADASAN, J.

Original Petition (Civil) No.2836 OF 2014

Dated this the 26th day of March, 2015.

J U D G M E N T

Faced with the concurrent findings, the defendant in O.S.No.187/2013 before the Munsiff Court, Thiruvalla has come up under Article 227 of the Constitution of India by way of this original petition.

2. The facts absolutely necessary for the purpose of disposal of this original petition are as follows:

The respondents herein instituted a suit claiming right of way to item No.1 property scheduled to the plaint. They claimed prescriptive right of easement to use the pathway. They admittedly acquired only item No.1 of plaint schedule property in 1999. When the defendant sought to cause obstruction to the plaint item No.2 pathway, suit was laid for permanent prohibitory injunction. Along with the suit, an Interlocutory Application as I.A.No.551/2013 was filed for temporary injunction. Though an ex parte injunction was not granted, a commission was issued

and Ext.R1 is the Commissioner's report initially obtained by the plaintiffs in the suit. Subsequently, the Commissioner again visited the property and Ext.R2 is the report filed by him.

3. The case of the plaintiffs was that after the visit of the Commissioner at the first instance, the defendant in the suit with a view to block use of the way by the plaintiffs put up steps on the northern extremity of plaintiff item No.2 pathway. They therefore filed I.A.No.823/2013 to have the obstruction removed by way of interim mandatory injunction. The defendant entered appearance and resisted the suit. He disputed the very existence of the pathway and also pointed out that there was no specific pleading regarding the claim of prescriptive right of easement made by the plaintiffs. It was also contended that since there was no interim ex parte order of injunction against the defendant, nothing prevented him from putting up steps and it could not be said that it was with the intention of obstructing the use of way by the plaintiffs. Relying on Ext.R2 report, it was contended that there is alternate means of access to the property of the plaintiffs and it is not necessary that the so called obstruction alleged to have been made should be removed at this

stage. Even without removal of the so called steps said to have been put up by the defendant, alternate way which runs through the property of the defendant could be used by the plaintiffs to gain access to their property situated on the southern side. At any rate, according to the defendant in the suit, it is not proper to grant an interim mandatory injunction directing removal of obstruction when it is not shown that it was deliberately done or it was so done to obstruct the use of way.

4. Both the applications were tried together and the trial court, for the purpose of the interlocutory applications, had Exts.A1 to A5 series marked on the side of the petitioners and Exts.B1 to B7 marked on the side of the defendants. Exts.C1, C1 (a), C2, C2(a), C3, C3(a), C4 and C4(a) are the Commissioner's reports and rough sketches marked by the trial court. It may be noticed here that the defendants in turn had laid another suit in which also a commission was taken out and the report is Ext.P1 produced along with the petition before this Court.

5. Both the courts below, on appreciation of the materials before them, came to the conclusion that steps noticed by the Commissioner in Ext.R2 was laid recently in fact after the suit

was laid by the plaintiffs and therefore formed the opinion that the case put forward by the plaintiffs that there was obstruction caused by the defendant is prima facie true and directed to remove the same. Both the Interlocutory Applications were allowed by the trial court.

6. Aggrieved by the order of the trial court, the respondent before the trial court carried the matter in appeal as C.M.A.Nos. 1 and 2 of 2014 and the lower appellate court found no reasons to interfere with the findings of the trial court and confirmed the same.

7. Learned counsel appearing for the petitioner assailing the findings of the court below contended that there are no precise and definite pleading regarding the nature of right claimed by the plaintiffs with regard to item No.2 pathway. The claim of easement is being a precarious nature, it is well settled, according to the learned counsel, that the pleadings are to be precise and definite and the nature of the claim has to be clearly stated. Even on the basis of the pleadings now available, according to the plaintiffs, they acquired the property only in 1999 and if that be so, the period necessary to claim the

prescriptive right of easement has not been completed. At any rate, according to the learned counsel, there is nothing to show that there was deliberate attempt from the side of the respondent before the trial court to cause obstruction to the pathway and if at all any steps were put up, that was in their own independent right as plaintiff had no right to use item No.2 pathway. Further it was contended that in the light of the fact that alternate way is available as could be discernible from Ext.R2, it is quite imprudent on the part of the courts below to have ordered removal of steps by the respondent before the trial court by issuing an interim mandatory injunction. At any rate, according to the learned counsel, interim order of mandatory injunction ought not to have been granted.

8. Learned counsel appearing for the respondents pointed out that there can be no manner of doubt regarding the fact that steps were put up subsequent to the visit of the Commissioner as could be evident from Ext.R1 and if that be so, the claim made by the petitioner before this Court that the plaintiffs in the suit had no right to use the pathway as claimed by them cannot be countenanced. It is also contended that it is inconceivable that

an alternate pathway as now put forward by the petitioner before this Court could have existed. Further, according to the Commissioner's report, the said way has been laid recently while item No.2 over which claim is laid was annexed to the old pathway by Commissioner.

9. Learned counsel appearing for the respondents also contended that the complaint regarding dearth of pleadings is incorrect as there are sufficient pleadings for the purpose of claiming of prescriptive right of easement available in the plaint. Learned counsel went on to point out that after having been found that steps have been put up subsequent to the visit of the Commissioner and thereby causing obstruction to the right to use pathway by the plaintiffs, the respondent before the court below cannot be heard to say that the interim mandatory injunction ought not to have been granted. The duty of the court, according to the counsel, is to see that state of affairs as available on the date of the suit is preserved till the culmination of the suit and any alteration during the pendency of the suit ought not to be encouraged. For the above reasons, learned counsel went on to point out that no grounds are made out to interfere with the

order of the court below.

10. At the outset itself, it may be mentioned that both the courts below have concurrently found that the claim of pathway made by the plaintiffs in the suit over item No.2 pathway probably is true. It is also found by both the courts below that at the time of visit of Commissioner at the first instance, there were no steps as noticed on the second visit by the Commissioner. On going through Ext.R2 commission report, it is evident that seven steps seen to have been put up on the northern end of item No.2 are of recent origin. The Commissioner's report also shows that the so called alternate way suggested by the respondent before the courts below, as could be discernible from Ext.R2 report is a newly laid pathway. It also looks quite improbable that the way as now suggested by the petitioner could have been in existence earlier. Whatever that be, going by the Commissioner's report, it is quite evident that seven steps noticed by the Commissioner in Ext.R2 report are recently laid steps.

11. As to whether pleadings are sufficient and whether the plaintiffs are able to establish their claim of prescriptive right of easement are matters to be gone into at a later stage after

adducing evidence. At this stage, this Court is only concerned with the question whether the step is put up subsequent to the suit.

12. As regards the above aspect, both the courts below were unanimous in their finding that steps have been laid subsequent to the filing of the suit. Both the courts below were not inclined to accept the case put forward by the petitioner before this Court that in fact the plaintiffs had another alternate means of access and that was closed by one of the owners of the property through which the way passed. The courts below have referred to the Commissioner's report in this regard and found that it is quite improbable that such a way could have existed.

13. Both the courts below were persuaded to accept Ext.R2 report and inclined to grant relief to the petitioners before the trial court on the ground that there has been willful alteration of the nature of the property by the defendant. Since there is nothing to show that the said findings are either perverse or contrary to the evidence on record, scope of interference by this Court exercising the jurisdiction under Article 227 of the Constitution of India is rather limited. Even assuming that a

different view is possible, unless it is shown that the findings are very perverse and the order is unjust and unreasonable, this Court will not be justified in interfering with the order. If that be so, it follows that there are no grounds made out to interfere with the orders of the courts below.

This original petition is without merits and it is accordingly dismissed. However, it is made clear that none of the observations made by this Court while disposing of the original petition shall stand in the way of the trial court disposing the suit in accordance with law and in the light of the evidence adduced before the court below. There will be no order as to costs.

Sd/-

**P.BHAVADASAN
JUDGE**

smp