

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 5TH DAY OF AUGUST 2015/14TH SRAVANA, 1937

RSA.No. 244 of 2009 ()

**AGAINST THE JUDGMENT IN AS 139/2007 of SUB COURT, MUVATTUPUZHA
DATED 24-01-2009**

**AGAINST THE JUDGMENT IN OS 583/2001 of MUNSIF COURT, MUVATTUPUZHA
DATED 26-07-2007**

APPELLANT(S)/APPELLANT/PLAINTIFF:

**SABU K. ABEL, S/O. ABEL,
KATTANGANAL HOUSE, KUROOR KARA, KOTHAMANGALM VILLAGE
KOTHAMANGAM TALUK.**

**BY ADVS.SRI.N.SUKUMARAN
SRI.S.SHYAM**

RESPONDENT(S)RESPONDENT/DEFENDANT:

**PARATHOTTU KAVU BHAGAVATHI KSHETHRAM,
KUROOR KARA, KOTHAMANGALAM VILLAGE
KOTHAMANGALAM TALUK, REPRESENTED BY ITS SECRETARY
K.K. GIREESH, KOCHUKIZHAKKEDATHU HOUSE, KUROOR KARA
KOTHAMANGALAM VILLAGE, KOTHAMANGALM TALUK.**

BY ADV. SRI.K.G.BALASUBRAMANIAN

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
05-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.BHAVADASAN, J.

R.S.A. No. 244 of 2009

Dated this the 05th day of August, 2015

J U D G M E N T

The plaintiff, who was non-suited by both the courts below, is the appellant.

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

The plaint schedule property was acquired by the plaintiff as per Ext.A1 dated 20.07.1995. The northern side of plaint schedule property is the National Highway-49. From the national highway through the eastern side of the plaint schedule property, a road runs towards the southern side leading towards defendant temple. The defendant temple installed a repository (offering box) on the northern side of the plaint schedule property which is on the southern side of the National Highway. When the National Highway was widened, it is claimed that the defendant trespassed into the property of the plaintiff and put up a new

repository/offering box in his property. The suit was therefore laid for mandatory injunction. Initially, the suit was dismissed and then an appeal was filed in which an amendment application was also filed seeking a declaration and the suit was remanded for fresh consideration.

3. The defendant resisted the suit by pointing out that the plaintiff had no manner of right over the portion of property over which new repository/offering box is installed and his rights are in no way affected by the said structure.

4. On the above pleadings, issues were raised and evidence was adduced. The evidence consists of the testimony of PWs 1 to 3 and documents marked as Exts. A1 to A11 from the side of the plaintiff. The defendant examined DW1. Exts. C1 to C3 are the Commissioner's sketch and report.

5. After taking into consideration the evidence adduced by both sides, the trial court found that none of the rights of the plaintiff is affected and therefore dismissed the

suit. The plaintiff carried the matter in appeal as A.S.No. 139/2007 before the Sub Court, Moovattupuzha.

6. The lower appellate court, on an independent evaluation of the evidence, found no reason to disagree with the trial court and dismissed the appeal. Hence, this second appeal.

7. Notice was issued on the following substantial questions of law:

“1) Whether the courts below were justified in not granting relief of declaration of title over the plaint schedule property when the defendants have no case that they are having title or even possession of any portion of the plaint schedule property?

2) Whether the courts below were justified in not granting the relief of removal of the “bhandaram” constructed in front of the plaint schedule property belonging to the plaintiff when the temple which has installed the “bhandaram” is not having its property close to the “bhandaram” and it is installed obstructing a portion of the frontage of the scheduled property to the National Highway so

as to deprive access to the National Highway from that portion of the property of the plaintiff.”

8. The learned counsel appearing for the appellant contended that both the courts below have failed to appreciate the real issue that arose in the case for consideration. It is trite that a owner of a property abutting a National Highway has got right of access from every point of his property and that cannot be obstructed except in public interest. The putting up of a repository/offering box cannot be deemed as in the public interest and therefore, any obstruction caused to the plaintiff for direct access to the National Highway from his property has to be removed. The learned counsel also pointed out that there was also a declaration of his title over the suit property which the courts below have not considered. Reliance was placed on the decision reported in **Tanoor Panchayat v. Kunhiamutty** [1978 KLT 813] and **Joseph v. District Magistrate** [1996 2 KLT 490] for the proposition that the

plaintiff has got right of access from every inch of his property to the road abutting his property. The learned counsel went on to point out that true, there is a parcel of land in between his property and the National Highway-1. That forms the part of the road puramboke and therefore, it could not be treated differently from the National Highway. Accordingly, it is contended that the judgment and decree of the courts below are unjustified and illegal.

9. The learned counsel appearing for the respondent on the other hand pointed out that both the courts below have appreciated the evidence in proper perspective and have come to the right conclusion that none of the rights of the plaintiff is affected. As far as the title of the plaintiff is concerned, the learned counsel went on to point out that the defendant has not disputed the title of the plaintiff over the plaint schedule property and therefore, there was no cause of action for the plaintiff in that regard and there were no necessity for an adjudication of that issue at all. The learned

counsel went on to point out that the repository/offering box was earlier on further northern side of the present site immediately on the southern side of the National Highway. When the National Highway was widened, on the request made by the National Highway Authorities, the offering box was shifted to the southern side. The learned counsel for the respondent went on to point out that the claim made by the plaintiff that the property that is lying in between his property and the National Highway as it now runs, is not road purmaboke and there were several structures in that property which was later removed. The learned counsel went on to point out that the benefit of access from every point is available only in a case of a property which abuts a National Highway and not with respect to a road which is separated by another parcel of land from the property of the plaintiff. Accordingly, it is contended that no rights of the plaintiff are affected. The courts below were justified in dismissing the suit.

10. As regards the question of title, there is no dispute as rightly pointed out by the learned counsel for the respondent, that the defendant did not dispute the right of the plaintiff in the plaint schedule property. So that it became unnecessary to adjudicate on that issue as his title was admitted.

11. Initially, the plaintiff came forward with a case that the offering box was inside his property and sought for mandatory injunction alone. On the basis of the report filed by the Commissioner, it was found that it was in the puramboke and therefore, the suit was dismissed. In appeal, the suit was sought to be amended incorporating declaration also and that was allowed and the matter was remanded to the trial court for fresh disposal, after granting permission to both sides to adduce further evidence.

12. The question is whether the claim made by the plaintiff that he has right of access from every point of his property to the National Highway, in the facts and

circumstance of the case is justified. It is true that the decision reported in **Tanoor Panchayat v. Kunhiamutty** [1978 KLT 813], it was held as follows:

“The law may be briefly stated thus: An owner of land adjoining a highway is entitled as a matter of private right to access to such highway at any point at which his land actually touches it. The width of the highway, except where it is the subject of a special enactment is a question of fact. The highway is not necessarily limited to the metalled or tarred track; it will include the side-lands which are necessary for its maintenance or which are proved to be used by the public for the purpose of traffic. However where a metalled or tarred road crosses unenclosed land, there being no ditch or physical feature to indicate the other limits to the highway the proper inference is that the metalled or tarred portion alone forms the highway.”

13. In the decision reported in **Joseph v. District Magistrate** [1996 2 KLT 490], it was held as follows:

“The owner on the side of the national highway has a private right of access as well, subject to the public right of passage which is a higher right to be

enjoyed by public including the person like the petitioner. In other words, a private right of access to the highway may co-exist with a public right of way though it does not necessarily merge with the public right. Public right of passage is subject to private right of landowners' right to access to the highway. Where a foot-path intervenes between a highway and adjoining premises, the owner of the premises is entitled to access across the foot-path to the highway for any kind of traffic which is necessary for the reasonable enjoyment of his premises. The interest of the public in a highway consists solely in the right of passage. Such right would include stopping perhaps for refreshments, enjoying the view, etc. But no highway user may use the highway for parking their vehicles permanently for their business so as to invade the private right of entry of a owner of adjoining land to the highway. For traffic regulation and for public purpose and for the safety of pedestrians it is open to the authorities to plant barriers separating the foot path and the highway, which may invade the private right of a person owning land abutting the highway. It may also possible for a statutory authority to erect obstruction in the highway such as electric posts, telephone posts, but shelter, etc., which may invade the private right of landowners abutting the highway. The same is for public interest. But allowing taxi cars to park on

the side of the highway obstructing the private right of landowners abutting the highway is not for a public purpose, but for the private interest of taxi operators in exercise of their business.”

14. It is by now well settled that a person, who has the property adjoining the National Highway or public road, has got a right of access from every inch of his property, that cannot be obstructed except for public purposes.

15. The claim in the present case is that the repository/offering box obstructs his entry to the National Highway and therefore it is objectionable.

16. It must be remembered that the offering box was placed on the northern side of the property of the plaintiff i.e., immediately on the southern side of the National Highway as it previously exists. With the widening of the National Highway, the temple authorities were constrained to shift the offering box to further south.

17. It is seen from the records that there is a space of 20ft. between the National Highway and the northern

boundary of the plaintiff's property. It is also seen from the records that there was several constructions earlier and there was several trees standing in the property which were later removed.

18. There is nothing as of now to indicate that the property of the plaintiff abuts the National Highway on the northern side. It is difficult to accept the plea made by the appellant that the puramboke land which separates the National Highway and the property of the plaintiff, should be treated as road puramboke and should be treated as portion of the National Highway.

19. The lower appellate court has also observed that initially, the property of the plaintiff was lying at a lower level with a road on the northern side and it is also noticed by the lower appellate court that the property lying in between the plaint schedule property and the National Highway is having a width of 40 ft. as stated by PW1. It is significant to notice that a transformer has also been

installed in the intervening space between the National Highway and the property of the plaintiff.

20. There was no attempt from the side of the plaintiff to show that the property lying in between the National Highway and the property of the defendant was a portion of the National Highway and road puramboke so as to enable him to claim a right of access from every point of his property to the National Highway. Further, the lower appellate court has observed that the evidence shows that there was a thodu on the northern boundary of the plaintiff's schedule property to drain out water from the eastern side. Referring to the evidence of PW1, the lower appellate court has found that he has admitted the existence of a thodu.

21. It cannot be disputed that there were several structures in between the property of the plaintiff and the National Highway on the northern side as it earlier existed even after widening the same. It was at a later stage that those structures were removed.

22. By no stretch of imagination, it could be said that the property of the plaintiff abuts the National Highway so as to enable him to claim a right of access from every inch of his property.

23. Both the courts below were justified in declining relief to the plaintiff since it is not found that his property abuts National Highway on the northern side. The finding of the courts below are based on evidence on record and it is not shown that the findings are either perverse or contrary to the evidence on record. Even assuming that a different view may be possible, this Court will not be justified while exercising its jurisdiction under Section 100 of the C.P.C.. if it is found that the view taken by the courts below is a reasonable and justifiable one.

This second appeal is without merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

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