

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.V.RAMAKRISHNA PILLAI

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYASHTA, 1937

RSA.No.2 of 2008

**AGAINST THE JUDGMENT AND DECREE DATED 10.10.2007 IN AS NO.521/2005 of
VI ADDL.DISTRICT COURT,ERNAKULAM.
AGAINST THE JUDGMENT AND DECREE DATED 26.09.2005 IN OS NO.1151/2003 of
I ADDITIONAL MUNSIF COURT,ERNAKULAM**

**...
SECOND APPELLANTS/APPELLANTS/DEFENDANTS:**

- 1. MARY VARGHESE, W/O.A.P.VARGHESE,
MERRYLAL BHAVAN, 27/2905, K.P.VALLON ROAD,
KADAVANTHRA, KOCHI - 20.**
- 2. A.P.VARGHESE, S/O.POULOSE, MERRYLAL BHAVAN,
27/2905, K.P.VALLON ROAD, KADAVANTHRA, KOCHI - 20.**

**BY ADVS.SRI.S.SREEKUMAR
SRI.P.MARTIN JOSE
SRI.S.VAIDYANATHAN**

RESPONDENTS/RESPONDENTS/PLAINTIFFS:

- 1. SAJU JOHN, S/O.LATE LONAN, ENGINEERING ASSISTANT,
CHAKKALAKKAL, POLAPARAMBIL HOUSE,
KADAVANTHRA, KOCHI - 20.**
- 2. SAJI JOHN, S/O.LATE LONAN, CHAKKALAKKAL,
POLAPARAMBIL HOUSE, KADAVANTHRA, KOCHI - 20.**

**R1 & R2 BY SRI.R.D.SHENOY (SENIOR ADVOCATE.)
ADVS.SRI.A.RAJAGOPALAN
SRI.M.N.MANMADAN
SRI.SOJO J.KALLIDUKIL
SRI.A.BALAGOPALAN**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 02.03.2015 ALONG WITH RSA.3/2008, THE COURT ON 25-05-2015,
DELIVERED THE FOLLOWING:**

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A.V. RAMAKRISHNA PILLAI, J.

R.S.A. Nos. 2 & 3 of 2008

Dated this the 25th day of May, 2015

J U D G M E N T

The starting point of this litigation is the filing of OS No.1151/2003 before the Munsiff's Court, Ernakulam, by the respondents herein. The appellants in RSA No.2/2008 were the defendants in the said suit.

2. The said suit was for a permanent prohibitory injunction alleging that the appellants in RSA No.2/2008 have openly declared that they would take possession of item No.2 of plaint A schedule property by removing portion of the northern compound wall at its western end. The appellants contended that one late Lonan and Anthony assigned 21.25 cents of land to one Vilasini Vijayan, who is the predecessor in interest of the appellants as per sale deed No.3702/1976 dated 16.12.1976 of SRO, Ernakulam. Thereafter, the said Vilasini Vijayan constructed a compound wall on all four sides of the property and put up a gate in the middle of the northern wall for entrance to

the pathway on the northern side. Thereafter, the said Vilasini Vijayan assigned the property to the appellants as per sale deed No.444/1981 dated 31.01.1981 of SRO, Ernakulam. They pointed out that the respondents have put up a gate immediately on the eastern side of the aforesaid gate put by Vilasini Vijayan across the pathway restricting their entry to the eastern portion of the pathway.

3. The appellants contended that the respondents have filed the aforesaid suit after obstructing the appellants from using the way on the northern side of their property.

4. The 1st appellant in RSA No.2/2008 filed OS No.1317/2003 for declaration of right of way over the portion, in which the obstruction was made and also for a mandatory injunction for the removal of obstruction.

5. Both the suits were tried together and disposed of by a common judgment decreeing OS No.1151/2003 and dismissing OS No.1317/2003. Though the appellants took the matter in appeal before the lower appellate court, the District Court, Ernakulam, which heard the appeals, dismissed the appeals confirming the decree and judgment

of the trial court. The same are under challenge in these appeals.

6. This Court, on admission, raised the following substantial questions of law for consideration and issued notice to the parties;

“1) When Ext.A3 sale deed provides a right of way, which lies to the north of plaint B schedule property having a width of 18 links, by easement of grant, whether courts below were justified in holding that right of way to the east of the northern gate of appellant is lost by extinguishment is legal.

2) In the absence of plea of extinguishment of right of easement by grant, whether courts below were justified in holding that right of way available towards the east from the northern gate is lost, is sustainable.

3) Whether courts below were justified in granting a decree in respect of item No.2 of plaint schedule property without considering the right of possession over the said property.”

7. I have heard Mr.S.Sreekumar, the learned senior counsel for the appellants and Mr.R.D.Shenoy, the learned senior counsel for the respondents.

8. The properties in dispute along with a large extent belonged to one Ouseph (late). The respondents herein are the children of late Lonan, the son of late

Ouseph. Evidently, after the death of Ouseph, his widow Eliswa and six children including Lonan and Anthony partitioned the properties as per Ext.A1 partition deed dated 11.06.1960. The properties described as B and C schedule to the partition deed were allotted to Anthony and Lonan respectively. Item No.1 of C schedule property allotted to Lonan is 57 cents of land comprised in Sy.No.857/1 of Elamkulam Village. Item no.1 of B schedule property allotted to Anthony is 56 cents of land comprised in Sy.No.857/2 and lying on the southern side of item no.1 of C schedule. As per an exchange deed No.169/1963 executed between Anthony and Lonan, 14 cents of item No.1 of B schedule on the northern side, lying east-west, was given to Lonan. Thus, Anthony became the owner of 71 cents of property (57 cents in Sy.No.857/1 as per Ext.A1 and 14 cents in Sy.No.857/2 as per the exchange deed). Later, as per Ext.A3 sale deed dated 16.12.1976, Anthony assigned 12.380 cents from Sy.No.857/2 and Lonan assigned 8.870 cents in Sy.No.857/1 & 2 to one Vilasini Vijayan, the predecessor in interest of the appellants, who

was examined as DW2 in this case. Thus, by virtue of Ext.A3 sale deed, Vilasini Vijayan obtained 21.250 cents of property. The property so assigned by Anthony in the name of Vilasini Vijayan is described as A schedule and the property assigned by Lonan in the name of Vilasini Vijayan is described as B schedule to Ext.A3 sale deed. The 1st appellant purchased the aforesaid 21.250 cents of land described in Ext.A3 sale deed as per Ext.B1 dated 31.01.1981. In Ext.A3 in B schedule, a pathway having a width of 18 links on the northern side of B schedule was provided for having access to the public road on the western side. The recital reads as follows;

“എട്ട് സെന്റും 870 ചതുരശ്രലിംഗ്സ് വിസ്തീർണ്ണമുള്ള സ്ഥലവും അതിലെ സകല വൃക്ഷാരാഴ്ചകളും സകല അവകാശവും ടി സ്ഥലത്തിന്റെ വടക്കുഭാഗത്ത് 18 ലിംഗ്സ് വീതിയിൽ സ്ഥലത്തുകൂടി പടിഞ്ഞാറോട്ട് ഗതാഗതത്തിനുള്ളവകാശവുമാകുന്നു.”

On the strength of this recital, the learned senior counsel for the appellants would argue that a pathway on the northern side of Ext.A3 property starting from the public road on the west and leading to west has been provided as an easement by grant. The respondent do not dispute the grant as well as the width of the said pathway. While the

appellants allege that this pathway is provided covering the entire northern boundary of Ext.A3 property starting from the east and ending with the public road on the west, the respondents deny the same.

9. The appellants allege that the respondents enclosed a portion of the land between the pathway and the aforesaid 21.250 cents of land and put up a barbed wire fencing enclosing about 200 sq. links of land and also installed a gate across the pathway in its middle and filed a suit for injunction. As per the description of plaint schedule property in OS No.1151/2003, plaint A schedule item no.1 is 46.800 cents in Sy.No.857/1 and A schedule item No.2 is 200 sq. links of land enclosed by barbed wire fencing and B schedule property is the pathway. According to the respondents, item No.2 of plaint A schedule (200 sq. links of property) is part and parcel of the land, over which the appellants do not have any right.

10. Mr.S.Sreekumar, the learned senior counsel for the appellants, would argue that there is no property described as plaint A schedule item No.2 and no such

property was retained by late Lonan when he executed Ext.A3 and when 18 links' width pathway was formed. According to the learned senior counsel, at the time of purchase of property covered under Ext.A3, the appellants were abroad. However, when they came to Kerala in 1995, two coconut saplings were seen planted in the pathway. The 1st appellant took the matter with the mother and brother of respondents, who undertook to remove the coconut saplings. By the time, a gate was also fixed on the pathway blocking the entry. As the saplings were not removed, on a complaint, the local authorities cut and removed the coconut trees and the gate put up obstructing the appellants' ingress and egress to their property. According to the appellants, it was on 11.08.2003 that the respondents forcibly enclosed a portion of 18 links' width pathway and put up a gate across the pathway after obtaining an order of temporary injunction. According to the appellants, by the installation of the gate, the appellants are prohibited from entering that portion of the pathway on the eastern side of the gate now put up. They would also

contend that on account of the installation of the barbed wire fencing, they are not in a position to take vehicles to their property through the gate on its northern boundary.

11. According to Mr.R.D.Shenoy, the learned senior counsel for the respondents, the gate leading to the property of the appellants is installed almost in the middle of the northern boundary wall of the property of the appellants; and therefore, the right of way commences only from that point, where the gate is put, and they cannot claim any right of way towards east. This contention was accepted by both the courts below, which led to the decree in favour of the respondents.

12. According to the learned senior counsel for the respondents, there is nothing to warrant that the alignment of the property is through the entire northern boundary of Vilasini Vijayan, who was the predecessor in interest. Relying on the recitals in Ext.A3 regarding the pathway, the learned senior counsel for the appellants, per contra, would contend that the aforesaid pathway is provided along the entire northern boundary of the property of DW2.

Evidently, and admittedly too, it was an easement by grant. Undoubtedly, the rights so granted will limit the extent of the user. This Court in **Simon** v. **N.Jayanth** [1986 KLT 457] has observed that where the grant is silent about the extent of the user, the grant “must be construed most strongly against the grantor” and a reasonable user in the circumstances of each case is to be inferred.

13. It is true that the recitals in Ext.A3 are not cogent enough to clearly identify the starting point as well as the end point of the pathway. However, as it specifies that the lie of the pathway is along the northern boundary of DW2, the only possible inference that can be drawn is that it runs through the entire northern boundary of the aforesaid 21.250 cents of property covered by Ext.A3, starting from east and ending in the public road on the western side.

14. It is true that the predecessor in interest of the appellants had installed the gate in the middle of the northern boundary wall. It cannot be said that the right over the pathway towards east beyond the said gate is extinguished on account of such act. Nothing prevents the

appellants from installing a gate on the eastern extremity on their northern boundary if situation warrants. The courts below have erred in finding that the right of way of the appellants to the east of the northern gate of the appellant is extinguished as an easement by grant cannot be curtailed or expanded unilaterally.

15. Now, the remaining question is regarding the 200 sq. links, which is described as item No.2 in plaint A schedule in OS No.1151/2003, which is now seen enclosed by the respondents installing a barbed wire fencing. According to the learned senior counsel for the respondents, each inch of the land other than the pathway is that of the respondents; and as the predecessor in interest of the appellants took the land with her eyes wide open, there cannot be any further increase in the width. Relying on Exts.C3 and C4, it was argued that at present, the width of the pathway is more than 18 links; and therefore, the appellants cannot claim any right over the enclosed portion.

16. It has to be noted that none of the document

produced on record would go to show that neither the respondents nor the predecessor in interest set apart any property between the way and the property purchased by the appellants. The description of the pathway in Ext.A3 would indicate that the pathway provided as per the sale deed lies just adjacent to the property of the appellants and it runs through the entire northern boundary. Therefore, the claim put forward by the respondents in respect of 200 sq. links described as item no.2 of plaint A schedule property in OS No.1151/2003 will not stand. Both the courts below have failed to consider these crucial aspects.

17. On a consideration of the entire materials now placed on record, this Court is of the definite view that the courts below were not justified in holding that the appellants have not right of way over the eastern portion of the pathway. The right of way available towards the east from the gate installed by appellants on the northern boundary wall is not lost and they are entitled to get the obstructions made on the said pathway removed.

In the result, the appeals are allowed. The decree and

judgment passed by the lower appellate court in AS Nos.521/2005 and 522/2005 (the impugned judgment) are set aside. The decree and judgment passed in OS No.1151/2003 on the file of the Munsiff's Court, Ernakulam is set aside. OS No.1317/2003 on the file of the Munsiff's Court, Ernakulam is decreed directing the respondents herein to remove the gate and allied structures as well as the barbed fencing and the granite pillars installed by them between the two boundary walls on either side of the existing pathway. The respondents are also restrained by a permanent prohibitory injunction from making any obstruction in the said pathway. No costs.

Sd/-
A.V. RAMAKRISHNA PILLAI
JUDGE

bka/-