

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 23RD DAY OF NOVEMBER 2015/2ND AGRAHAYANA, 1937

RSA.No. 659 of 2012 (C)

**AGAINST THE JUDGMENT & DECREE IN AS 77/2009
OF II ADDL.SUB COURT, KOZHIKODE DATED 30-09-2011
AGAINST THE JUDGMENT & DECREE IN OS 172/2006
OF ADDL. MUSIFF COURT -II, ,KOZHIKODE DATED 21-01-2009**

APPELLANT/APPELLANT/PLAINTIFF :

**KIZHAKKEPURAKKEL BHASKARAN,
S/O.CHANDU, AGED 64 YEARS, CARPENTER, KADALUNDI AMSOM
PAZHANCHANNOR DESOM, KOZHIKODE DISTRICT.**

**BY ADVS.SRI.V.T.MADHAVANUNNI
SRI.V.A.SATHEESH
SRI. J. ABHILASH**

RESPONDENTS/RESPONDENTS/DEFENDANTS :

**1. KIZHAKKEPURAKKAL BALAKRISHNAN,
S/O.CHANDU, AGED 59 YEARS, CARPENTER, KADALUNDI P.O.,
PAZHANCHANNOOR DESOM, KOZHIKODE DISTRICT-673 302.**

**2. M.L.RAYIN,
S/O.MOIDEEN KUTTY, AGED 49 YEARS
MADATHIL HOUSE, KADALUNDI P.O.,
PAZHANCHANNOOR DESOM,
KOZHIKODE DISTRICT.-673 302**

**R1 BY ADVS. SRI.S.PRASANTH (AYYAPPANKAVU)
SMT.VARSHA BHASKAR
R2 BY ADVS. SRI.R.SUDHISH
SRI.P.P.BALAN
SMT.M.MANJU
SRI.K.R.RANJITH**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 23-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

P.B.SURESH KUMAR, J.

R.S.A.No.659 of 2012

Dated this the 23rd day of November, 2015

JUDGMENT

The plaintiff in a suit for injunction is the appellant in this second appeal.

2. The plaint A schedule property belonged to two persons namely Maman and Chandu. They partitioned A schedule property as per Ext.A1, by which the northern portion was allotted to Maman and southern portion was allotted to Chandu. The property allotted to Maman as per Ext.A1 is the C schedule property in the suit and the property allotted to Chandu as per Ext.A1 is the B schedule property. The plaintiff and the first defendant are the children of Chandu. The plaint B schedule property was partitioned among the plaintiff and the first defendant, as per which, one half portion of the plaint B schedule property on the west was allotted to the first defendant and the remaining one half portion of the plaint B

schedule property on its east was allotted to the plaintiff. The property allotted to the plaintiff in the said partition is the plaintiff D schedule property in the suit and the property allotted to the first defendant in the said partition is the plaintiff E schedule property in the suit. Ext.A1 provided an access to the plaintiff B schedule property through the eastern boundary of the plaintiff C schedule property. Since the pathway provided in Ext.A1 is through the eastern boundary of the plaintiff C schedule property, after the partition between plaintiff and the first defendant, the pathway reaches only upto the plaintiff D schedule property. The first defendant then started using a portion of the plaintiff D schedule property to reach the pathway provided for in Ext.A1 partition deed. The suit was filed by the plaintiff then for injunction restraining the first defendant from using any portion of the plaintiff D schedule property for access to the pathway in C schedule property. The first defendant resisted the suit contending that since he is unable to reach the pathway provided through the plaintiff C schedule property without using a portion of

the plaintiff D schedule property, he is entitled to use a portion of the plaintiff D schedule property as an easement by necessity. The trial court accepted the case of the first defendant and dismissed the suit. The appellate court, on a reappraisal of the evidence on record, confirmed the decision of the trial court.

3. Heard the learned counsel for the appellant as also the learned counsel for the first defendant.

4. It is beyond dispute that the pathway to the plaintiff B schedule property is only through the eastern boundary of the plaintiff C schedule property. It is also beyond dispute that when the plaintiff B schedule property is divided into two parts, the pathway reaches only upto the D schedule property. Section 30 of the Indian Easements Act reads thus:

"30. Partition of dominant heritage.--Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: Provided that such annexation is consistent with the terms of the instrument, decree or revenue-proceeding (if any) under which the division was made, and in the case of prescriptive rights, with the user during the prescriptive

period.”

The effect of Section 30 is that when a dominant heritage is further divided, the burden on the servient heritage cannot be increased. If the burden on the servient heritage cannot be increased, the first defendant can reach the pathway provided in Ext.A1 partition deed only through the plaint D schedule property. If the first defendant has a right to reach the pathway through the plaint D schedule property, the plaintiff cannot seek an injunction restraining such user.

In the said view of the matter, there is absolutely no merit in the second appeal and the same is, accordingly, dismissed in limine. All the interlocutory applications in the appeal are closed.

P.B.SURESH KUMAR, JUDGE.

smm