

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 25TH DAY OF JUNE 2015/4TH ASHADHA, 1937

RSA.No. 689 of 2008 (F)  
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AGAINST THE JUDGMENT IN AS 384/2002 of II ADDL.DISTRICT COURT,  
THIRUVANANTHAPURAM DATED 24-05-2008

AGAINST the JUDGMENT IN OS 998/1999 of III ADDL.MUNSIFF COURT,  
THIRUVANANTHAPURAM DATED 24.09.2002

APPELLANT:APPELLANT IN LAC - DEFT.IN TC:  
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PHILIP, AGED 78 YEARS, S/O.PHILIPOSE,  
OWNER OF PHILIP TOURIST INTERNATIONAL, ULLOOR,  
THIRUVANANTHAPURAM, RESIDING AT HOUSE No.TC.1/395  
ULLOOR, MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM - 11.

BY SRI.M.C.SEN (SENIOR ADVOCATE)  
BY ADVS.SRI.S.VISHNU  
SRI.M.P.SREEKRISHNAN  
SMT.SHAHNA KARTHIKEYAN  
SRI.ARUN VISWANATH

RESPONDENT:RESPONDENT IN LAC - PLFF.:  
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SOSAMMA CHACKO, W/O.P.S.CHACKO, RESIDING  
IN APARTMENT No.625, 6TH FLOOR, AL-MULLA PLAZA  
DUBAI, U.A.E. P.B.No.28849, FROM VALIYASTHU  
T.C.12/434, 435 OR PTR A - 99 & 100  
PLAMOODU, PATTOM, THIRUVANANTHAPURAM - 4, REPRESENTED BY  
HER POWER OF ATTORNEY HOLDER J.N. BENJAMIN, S/O. G.  
PRABHAKARAN, PRAISE CENTRE, MUKKOLAKKAL P.O., TRIVANDRUM.

BY SRI.R.D.SHENOY (SENIOR ADVOCATE)  
BY ADVS. SRI.M.CHANDRA BOSE  
SRI.A.RAJASIMHAN  
DR.ABRAHAM P.MEACHINKARA

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON  
25-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Regular Second Appeal No.689 OF 2008**  
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**Dated this the 25<sup>th</sup> day of June, 2015.**

**J U D G M E N T**

Undaunted by the concurrent findings against him, the defendant in O.S No.998/1999 before the 3<sup>rd</sup> Additional Munsiff Court, Thiruvananthapuram has come up in appeal.

2. Most of the facts are not in dispute. It will be easier to understand the matter by referring to Ext.C1(a) plan which is an admitted one as far as the lie of the properties are concerned.

3. One Ambika owned nearly 20 cents of land and she, by virtue of Ext.A1 dated 04.06.1976, assigned 9.375 cents of property to the defendant which is situated on the western side and the eastern 9.375 cents to one Philip, S/o.Thomas. The property assigned in favour of the defendant i.e. CDEFC in Ext.C1(a) is shown as A schedule to the plaint and the property assigned to Philip on the eastern side i.e EFGHIJKLE is shown as B schedule to the plaint. It may be noticed that in the same document a way was provided through the northern side of

A schedule property which in Ext.C1(a) is shown as ACFH. Ext.A1 itself recites that both the persons have right to use the said pathway to go to their respective properties as well as to take vehicles. By Ext.A2 dated 20.07.1982, Philip, S/o. Thomas who owned property on the eastern side as per Ext.A1 sold 5 cents out of the 9.375 cents of property along with the right to use the pathway mentioned in Ext.A1. By Ext.A3 dated 21.08.1982 he sold the balance 4.375 cents to the same person who bought the property under Ext.A2. While things stood so, by Ext.A4 dated 03.12.1982, Ambika who as per Ext.A1 assigned property to the persons mentioned above, assigned the northern portion of the pathway already made mention of, to be more precise, the portion shown as ABGH in Ext.C1(a) to the person who owned property on the eastern side and BCFG to the person who owned property on the southern side of the way.

4. It is not in dispute that the defendant who owned property shown as DCFED put up a compound wall along the BG line shown in Ext.C1(a). That necessitated the suit.

5. The plaintiff claimed that by virtue of Ext.A4, the right to

use the way as mentioned in Ext.A1 is not annihilated and Ext.A4 is only to serve the purpose of effecting mutation and for that purpose alone the way was bifurcated into two halves and assignment was given to each of the property owners. The plaintiff also complained of the defendant having trespassed into B schedule property. On the basis of these allegations, the plaintiff laid a suit for a declaration of title over the plaintiff B schedule property and for other consequential reliefs including restoration of C schedule pathway as shown in Ext.A1 deed.

6. The defendant resisted the suit. Apart from denying the allegation of trespass, the defendant contended that the plaintiff in the suit did not continue to have easement right over the portion shown as BCFG since the servient owner had assigned half portion of 15 links pathway shown in Ext.C1(a) to each of the owners on the eastern and western side. Thus the plaintiff has come to become the owner of the portion shown as ABGH and the defendant the other half. At any rate, it should be presumed that he has released his right to use that portion of the pathway.

7. On the basis of the above pleadings, issues were raised

and the parties went to trial. Evidence consists of the testimony of PWs 1 to 4 and documents marked as Exts.A1 to A7 on the side of the plaintiff. The defendant examined DWs 1 and 2 and had Exts.B1 to B4 marked. Exts.C1 and C1(a) are the commission report and plan.

8. Both the trial court as well as the lower appellate court, on evaluation of the evidence, came to the conclusion that the claim put forward by the defendant in respect of C schedule pathway cannot be countenanced and being an easement by grant the way should remain as such and both the parties are entitled to use the pathway as mentioned in Ext.A1 document. Therefore, the defendant was directed to restore the pathway as available in Ext.A1 document. Other reliefs were also granted by the courts below which are not very relevant for the purpose of disposal of this appeal.

9. Notice has been issued on the following questions of law:

- i) Even assuming that there was an easement of way by way of grant over the strip of land marked as ACFH in Ext.C1(a) plan as provided under Ext.A1 sale

deed dated 4-3-1976, does the said right survive after Ext.A4 sale deed dated 3-12-1982 as per which full right over the northern half of plot ACFH and more particularly shown as plot ABGH was sold by the previous owner to the owner (plaintiff's assignor, Abraham) of the eastern property, that is, the plaintiff B schedule property and the southern half more particularly described as plot BCFG in Ext.C1(a) plan was sold to the defendant/appellant who is the owner of the plaintiff A schedule property?

- ii) When the offending compound wall along the line BG in Ext.C1(a) plan was in existence for more than 10 years, was not the plaintiff guilty of acquiescence and abandonment of his right and was the plaintiff entitled to seek the relief of demolition of the compound wall in a suit filed in the year 1999?

10. Sri.M.C.Sen, learned Senior Counsel appearing for the appellant contended that both the courts below have erred in law in coming to the conclusion that C schedule pathway should be retained as such, as is available in Ext.A1 especially after the assignment by Ambika as evidenced by Ext.A4 document dated 03.12.1982 whereby the northern half portion shown as ABGH has been assigned to the plaintiff and BCFG, the southern portion, has been assigned to the defendant. According to the

learned Senior Counsel, there is an extinguishment of the easement right as far as the plaintiff is concerned either by release or by unity of ownership. Learned Senior Counsel drew the attention of this Court to the evidence of PW1 and contended that he too understood the position in the same manner as could be seen from his deposition.

11. Sri.R.D. Shenoy, learned Senior Counsel appearing for the respondent, on the other hand, contended that there is nothing to interfere with the decrees of the courts below and so far as C schedule pathway is concerned, both the courts below have treated the right of way granted under Ext.A1 as an easement by grant. According to the learned Senior Counsel, both the courts below have rightly understood the scope and ambit of Ext.A4 document. In order to constitute release or extinguishment, certain ingredients have to be satisfied which are not available in the case on hand. It is contended that both the courts below have reached identical conclusion on appreciation of evidence and also on appreciation of law on the point and unless it is shown that the findings are perverse, interference under

Section 100 of the Code of Civil Procedure is not warranted.

12. It could be seen from the above contentions that a very narrow point arises in this appeal. It is the scope of use of C schedule pathway as shown in Ext.A1 after the execution of Ext.A4 that arises for consideration in this appeal.

13. It is not in dispute that the way shown as ACFH in Ext.C1(a) was the way provided in Ext.A1 and it was for the benefit of enjoyment of both the owners namely, owner of the property on the eastern side as well as on the western side. By Ext.A4 dated 03.12.1982, Ambika who held absolute right over the pathway executed an assignment deed giving up her right equally in favour of the plaintiff and the defendant. The result was that the portion shown as BCFG in Ext.C1(a) came to be assigned in favour of the person who owned property immediately on the southern side of that portion and a portion of the pathway shown as ABGH was assigned to the person who owned property on the eastern side of the said portion of property shown as B schedule.

14. Learned Senior Counsel appearing for the appellant,

Sri.M.C.Sen, relied on Section 38 of Indian Easement Act and contended that there is an implied release of the portion of easement right by the plaintiff in favour of the defendant and therefore the plaintiff is precluded from using the portion shown as BCFG any more from the date of Ext.A4. In the alternative, it is contended that by virtue of the fact that the defendant has become the owner of a portion of way, easement stands extinguished under Section 46 of the Indian Easements Act.

15. It is difficult to accept either of these contentions.

Section 38 of the Indian Easements Act reads as follows:

**"38. Extinction by release.**-An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I.- An easement is impliedly released-

- (a) where the dominant owner expressly authorises an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to

prevent his future enjoyment of the easement, and such act is done in pursuance of such authority;

- (b) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.- Mere non-user of an easement is not an implied release within the meaning of this section”.

16. Section 46 of the Indian Easements Act reads thus:

**“46. Extinction by unity of ownership.**-An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages”.

17. Before going to the legal aspects, one aspect has to be noticed. Ext.A4 refers to Ext.A1 document and it also clearly specifies that the purpose of assignment under Ext.A4 is only for the purpose of mutation and it does not mention that there will be a reduction in the right of use of pathway as provided under Ext.A1. It cannot be disputed now that Ext.A1 by providing a way to both the owners in fact creates an easement by grant. It

cannot be said that the owner of eastern 9.375 cents has released of the right over the way in favour of the defendant by accepting Ext.A4 document by which he also came to own a portion of the pathway. In order to attract Section 38 of the Indian Easements Act, release should be to the servient owner which is totally absent in the case on hand and it could not be by any stretch of imagination conceived that the plaintiff become the servient owner by virtue of Ext.A4. If that be so, Section 38 can have no application. Coming to Section 46, that contemplates the situation where the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

18. B.B.Katlyar's Law of Easements & Licences, 13<sup>th</sup> edition at page 864 observes as follows:

**"4. Of the whole of the dominant and servient tenement.-** In order that an easement may be extinguished by unity of seisin, the whole of the dominant heritage as well as servient heritage must become vested in absolute ownership and possession in the same person or jointly in the same set of persons. The mere circumstance that the dominant owner after acquisition of the right

becomes also a join co-owner in the servient heritage does not extinguish the right although, if by virtue of such limited interest, he becomes in possession and enjoyment of the whole tenement the right may be suspended for the time such possession continues”.

19. If that principle is to be applied, it is clear that there cannot be an extinguishment by unity of ownership also. The result will be, even though Ext.A4 is executed by Ambika, assigning half portion of pathway to each of the owners will have the effect that each of them is entitled to use of pathway as provided under Ext.A1. That is precisely what the courts below have held and none of the parties have any right to interfere with the pathway as provided under Ext.A1.

In the light of the above findings, there are no reasons made out to interfere with the judgment and decree of the courts below.

This appeal is without merits and it is accordingly dismissed.

Sd/-

**P.BHAVADASAN  
JUDGE**

smp