

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 JYAISHTA, 1937

RSA.No. 1009 of 2010 ()

**AS 69/2009 of PRL.SUB COURT, IRINJALAKUDA
IN OS 52/2006 of MUNSIF COURT, CHALAKUDY**

APPELLANT/1ST RESPONDENT/1ST PLAINTIFF :

**POULOSE,
VAREETH, AGED 71 YEARS, RESIDING AT
KIZHAKKECHALAKUDY VILLAGE, PIN-680307.**

BY ADV. SRI.S.R.DAYANANDA PRABHU

RESPONDENTS/APPELLANTS & 2ND RESPONDENT/PLAINTIFFS 1 :

- 1. SURESH, AGED 52 YEARS,
S/O. KUNDUMATTATHIL KARAPPAN, CHALAKUDY DESOM,
KIZHAKKE CHALAKKUDY VILLAGE, MUKUNDAPURAM TALUK.**
- 2. MR. SUJITH, AGED 33 YEARS,
KUNDUMATTATHIL SUKUMARAN, DO-DO-DO-**
- 3. SECRETARY CHALAKUDY MUNICIPALITY,
CHALAKUDY, PIN-680307.**

**R1 & R2 BY ADV. SRI.K.G.BALASUBRAMANIAN
R3 BY ADVS. SRI.SHEEJO CHACKO
SRI.SANGEETH C. SUBRAMANIAN
SRI.PJINISH PAUL**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 29-10-2014, ALONG WITH RSA. 1010/2010,THE COURT ON
25-05-2015 DELIVERED THE FOLLOWING:**

bp

A.V. RAMAKRISHNA PILLAI, J.

R.S.A. Nos. 1009 & 1010 of 2010

Dated this the 25th day of May, 2015

J U D G M E N T

The judgment and decrees in AS Nos.69/2009 and 73/2009 on the file of the Principal Subordinate Judge's Court, Irinjalakkuda, which arose out of OS Nos.52/2006 & 94/2008 of the Munsiff's Court, Chalakudy, respectively, are under challenge in these appeals.

2. OS No.94/2008 was filed by the appellant in these appeals for declaration and consequential injunction alleging that the plaint schedule property belongs to him by virtue of Sale Deed No.2234/1969 and the defendant municipality issued a letter to remove the remnants of compound wall on the eastern side of the plaint schedule property. The plaintiff sent a reply stating that there is no such road. However, without considering the same, the defendant removed the remnants with the aid of police; and thereafter, the defendant tried to take

possession of the plaint schedule pathway by force. The plaintiff sent a lawyer's notice. There was no reply. The plaintiff approached this Court with WP(C) No.26546/2007, which was disposed of with a direction to approach a civil court. The plaintiff sent a notice to the defendant municipality under Section 544 of the Municipality Act. There was no reply. Hence, he filed the suit for declaration to the effect that the pathway is a private pathway of the plaintiff with a prayer for consequential injunction against forcible eviction.

3. The defendants contended that the pathway on the eastern side of the plaint schedule property was formed by surrender of properties on both sides by owners of those properties for using it as a public way. The defendant municipality has taken possession of the way. It is being maintained by the municipality. Line for power supply was drawn through the pathway. The said way has been used as public pathway for the last 20 years. The plaintiff has no right to obstruct the same.

4. OS No.52/2006 was filed by the adjacent land

owners against the appellant and the municipality. They alleged that the plaint A schedule property belongs to them by virtue of two documents of 2006; and plaint B schedule property was purchased by them by virtue of a document of 2006, which is the pathway leading to A schedule property. In the suit as it originally stood, the appellant was the sole defendant. However, subsequently, the municipality was impleaded as the additional 2nd defendant. It was alleged that the 1st defendant has no title to the plaint A schedule property and the predecessor in interest of the plaintiff has filed a previous suit as OS No.198/1995. In that suit, the 1st plaintiff and the 1st defendant are the defendants and they jointly filed a written statement. In the written statement, it was contended that in between the property of the plaintiff therein and the B schedule pathway, there was a compound wall constructed by Kundumattathil Family; and the court found that it was not belonging to the plaintiff in that suit. There was no appeal. The pathway on the western side of A schedule property belonged to the

'tarwad' of the plaintiff. The 1st defendant, who purchased the property from the predecessors in interest, have also a right to use the aforesaid way. However, he has no right of ownership over the said way. He has no right to obstruct or to demolish the compound wall between plaint A schedule and B schedule properties. The 1st defendant is residing on the western side of the A schedule property and he is not having any right of way between plaint A schedule and B schedule properties. The way is used by several people. It is a public road and it is maintained by the defendant municipality.

5. In the written statement filed by the 1st defendant (the appellant herein) in OS No.52/2006, he contended that the plaintiffs have no right or title over the B schedule property. The person, who executed the sale deed in respect of B schedule property, had not obtained any right over the same. The property described as C schedule item No.2 in partition deed No.3815/82 is not the B schedule property; and it is a separate property. The predecessors in interest of the plaintiffs have not obtained

any right over the said property. The compound wall separating plaint A and B schedule properties is constructed by the predecessors in interest of the 1st defendant. From A schedule property, there was a direct access to the road. The 1st defendant has every right to obstruct the use of the B schedule by anyone other than the 1st defendant.

6. The trial court, after considering the evidence, which consists of the oral testimonies of PW1 as well as DW1 & DW2, and Exts.A1 to A14, B1 to B17 series as well as C1 series, dismissed OS No.52/2006. OS No.94/2008 was decreed declaring that B schedule pathway is not vested with the municipality and it is a private pathway possessed and enjoyed by the plaintiff in OS No.94/2008.

7. The plaintiffs in OS No.52/2006 filed AS No.69/2009 and the defendant municipality filed AS No.73/2009. Both these appeals were heard and disposed of by the lower appellate court by the impugned judgment. AS No.69/2009 was allowed and OS No.52/2006 was decreed restraining the 1st defendant and his men from

obstructing the plaintiffs from the use of the plaint B schedule property as pathway to plaint A schedule property and the possession and enjoyment of the plaint A schedule property by the plaintiffs. AS No.73/2009 was allowed. The judgment and decree in OS No.94/2008 was set aside and the said suit was dismissed with costs.

8. I have heard Mr.S.R.Dayananda Prabhu, the learned counsel for the appellant; Mr.Sheejo Chacko, the learned counsel for the respondent municipality; and Mr.K.G.Balasubramanian, the learned counsel for party respondents.

9. The learned counsel for the appellant argued that the courts below failed to consider Exts.A10, A11, B6 and B7. Ext.A10 is the certified copy of the judgment in OS No.198/2005 of the Munsiff's Court, Irinjalakkuda. Ext.A11 is the certified copy of the decree in OS No.198/2005 of the Munsiff's Court Irinjalakkuda. Ext.B6 is the certified copy of the written statement in OS No.198/1995 of the Munsiff's Court, Irinjalakkuda. The aforesaid suit was instituted by the prior owner of the

property of the plaintiff in OS No.52/2006. In that case, the plaintiff and the 1st defendant in OS No.94/1998 were the defendants and they jointly filed a written statement. It was pointed out that in the aforesaid suit, the plaintiff contended that the plaintiff had no right over the pathway. But, now he claims right over the pathway after purchasing the property. It was pointed out that he has right of way through that pathway towards A schedule property and B schedule property is vested with the municipality and it is a public road. It was argued that the Munsiff's Court, Irinjalakkuda dismissed the above suit, which is binding on the plaintiffs in OS No.52/2006. Therefore, it was argued that the contention raised by the plaintiffs in OS No.52/1996 is hit by constructive res judicata as per explanation 4 of Section 11 of CPC.

10. It was further argued that though DW2, the Assistant Engineer, has stated that he is maintaining the assets register, which would show about streets and street lights, he has deposed that he has not perused the said documents to ascertain that the pathway is vested with the

municipality. It was argued that if street lights are provided as alleged by the respondents, the municipality would have sufficient records regarding the maintenance of street lights. The definite case put forward by learned counsel for the appellant is that the pathway in question is his private way and the party respondents do not have any right over the same.

11. The courts below have made a reference to the additional report, which revealed that B schedule property is not part of A schedule property of the plaintiff in OS No.94/2008 and it is being used by a number of people in the locality. It was observed by the lower appellate court that the said way connects a public road on the south and goes towards north beyond the property of the plaintiff in OS No.94/2008 and the same is used by other families as evident from Ext.C1(a) sketch. This particular aspect was overlooked by the trial court and entered into a wrong finding; so found by the lower appellate court. It was also observed by the court below that the suit itself is not maintainable as the other users of the pathway were not

impleaded in the suit. In fact, the trial court was carried away by the failure of the respondent municipality in producing the assets register of the municipality to prove that the pathway is a public pathway vested with the municipality. The trial court failed to consider that the burden is entirely on the plaintiff to prove that the pathway is part of his properties. This particular aspect is pointed out by the lower appellate court in the impugned judgment.

12. The case of the plaintiffs in OS No.52/2006 is that as per the averments in OS No.198/1995 (Ext.B9) and Ext.B6 written statement in the aforesaid suit, they have right over the pathway. This aspect was also not considered by the trial court. The lower appellate court has elaborately considered the evidence on record and found that the way on the eastern side of the plaint schedule property in OS No.94/2008 and the B schedule property in OS No.52/2006 is not part of the plaint schedule property; and on the other hand, it is the pathway used by the plaintiffs in OS No.52/2006 along with others.

I see no reason to disturb the said finding of fact in these appeals. As the plaintiffs in OS No.52/2006 have succeeded in proving that they are also entitled to use B schedule pathway and that it is a pathway vested with the public local authority, the lower appellate court has rightly found that the plaintiffs in OS No.52/2006 are entitled to obtain an injunction order against the 1st defendant from obstructing the plaintiffs from using the B schedule pathway, which is a public pathway vested with the municipality.

On a consideration of the entire materials now placed on record, this Court is of the definite view that no substantial question of law has been wrongly decided by the courts below calling for an interference by this Court in exercise of appellate powers.

In the result, the appeals fail; and accordingly, they are dismissed.

Sd/-
A.V. RAMAKRISHNA PILLAI
JUDGE

bka/-