

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 3RD DAY OF AUGUST 2015/12TH SRAVANA, 1937

RSA.No. 1105 of 2010

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AGAINST THE JUDGMENT IN AS 184/2006 of II ADDL.DISTRICT COURT,  
KOLLAM DATED 12-07-2010

AGAINST THE JUDGMENT IN OS 99/2002 of MUNSIFF COURT,  
KARUNAGAPPALLY DATED 15.12.2005

APPELLANTS/RESPONDENTS 1, 2, 4 & 5/PLAINTIFFS 1, 3, 5 & 6:  
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1. REGHU, S/O. THANKAPPAN,  
THEKKETHAZHATHU VEETIL, NADUVILAKKARA,  
THEVALAKKARA,  
KARUNAGAPPALLY, KOLLAM.
2. GEETHA, W/O. REGHU, OF DO. DO.
3. REMADEVI, D/O.SANTHA, OF -DO- -DO-.
4. SAROJINI, DO.

BY ADVS.SRI.K.SUBASH CHANDRA BOSE  
SRI.RAJASEKHARAN PILLAI

RESPONDENTS/APPELLANTS/DEFENDANTS:  
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1. SAIFUDEEN, THAYYIL VEEDU,  
NADUVILAKKARA, THEVALAKKARA VILLAGE, KARUNAGAPPALLY,  
KOLLAM.
2. SAFIYA BEEVI, OF DO. DO.

R1 & R2 BY ADVS. SRI.LEO GEORGE  
SRI.K.P.SUJESH KUMAR  
SRI.K.N.SASIDHARAN NAIR

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON  
03-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Regular Second Appeal No.1105 OF 2010**  
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**Dated this the 3<sup>rd</sup> day of August, 2015.**

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

Plaintiffs 1, 3, 5 and 6 in O.S.No.99/2002 before the Munsiff Court, Karunagappally are the appellants. Though they were successful in getting a decree from the trial court, that was reversed by the lower appellate court and the suit stood dismissed.

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

The plaintiffs, five in number, are owners of five items of properties; A schedule property which consists of three items and B schedule which consists of two items. C schedule property belonged to the defendants. The claim put forward is that there is a way which starts from the panchayath road on the eastern side and runs through the property of the defendants and leads to the property of the plaintiffs and that has been in existence for a long time and the plaintiffs and their predecessor in interest

have been using that way as a matter of right without interruption openly and for the statutory period thereby having acquired prescriptive right of easement to use the way. The defendants attempted to cause hindrance to the use of way by the plaintiffs and that necessitated the suit.

3. The defendants resisted the suit. They disputed the very existence of the way and its use by the plaintiffs as claimed in the plaint. They pointed out that it is not correct to say that immediate to their property on the northern side is the pathway. They also pointed out that the property of one Panickassery Gopala Pillai is on the southern side abutting the road. They further contended that they have purchased 1.860 cents of property for using it as a pathway which leads to the property having an extent of 23 cents. According to them, the plaintiffs wanted to cut open a new pathway through the eastern side of their property and that has resulted in they seeking police help. Since no purpose was achieved, they moved the High Court for police protection. Disputing the very existence of way and its use, they prayed for dismissal of the suit.

4. During the pendency of the suit, 2<sup>nd</sup> plaintiff died and his legal heir was brought on the party array as 6<sup>th</sup> plaintiff. Initially the suit was one for injunction. It was later amended to one for declaration.

5. On the basis of the above pleadings, issues were raised by the trial court. Evidence consists of the testimony of PWs 1 and 2 and the documents marked as Exts.A1 to A7 on the side of the plaintiffs. The defendant had DWs 1 and 2 examined and had Ext.B1 marked. Ext.C1 is the commission report.

6. The trial court greatly impressed by the Commissioner's report and the version given by PWs 1 and 2 regarding use of way and its existence came to the conclusion that the plaintiffs have succeeded in establishing their prescriptive right of easement through D schedule pathway and decreed the suit. In appeal by the aggrieved defendants, the lower appellate court found that the necessary ingredients to constitute prescriptive right of easement have not been established and the trial court was not justified in decreeing the suit. Accordingly, the judgment and decree of the trial court were reversed and the suit was

dismissed.

7. At the time of admission of this appeal, the following question of law has been formulated:

"1) Has not the lower appellate court erred in interfering with the decree of injunction granted by the trial court on the premise that necessary foundation for claiming the right of prescriptive easement over the disputed pathway had not been made by the plaintiff, where such pathway had been described with particulars and identified by the advocate commissioner in Ext.C1, with no challenge thereto raised by the defendants".

8. Learned counsel appearing for the appellants contended that there was no occasion for the lower appellate court to interfere with the judgment and decree of the trial court. The trial court had found the existence of way as is noted in the Commissioner's report and was impressed by the evidence given by PWs 1 and 2 and the use of the pathway as is necessary to constitute prescriptive right of easement. The trial court had considered the matter in considerable detail and had come to the conclusion that the prescriptive right of easement has been established. Learned counsel went on to point out that the lower

appellate court has not pointed out in what manner the trial court has erred in its approach and the reason for interfering with the judgment and decree of the trial court.

9. Recalling the contention raised by the defendants, it is pointed out by the learned counsel appearing for the appellants that still the defendants dispute the very existence of D schedule pathway and Ext.A6 said to have been filed by the defendants before this Court would reveal that there does exist a pathway as alleged by the plaintiffs and its use by the plaintiffs. There was no reason to discard the evidence of PWs 1 and 2 regarding the existence of pathway which is confirmed by the Commissioner's report and its use by the 1<sup>st</sup> plaintiff who is examined on behalf of all the plaintiffs.

10. Learned counsel appearing for the appellants relied on the decision in **Maniyan Krishnan** vs. **Nanukuttan** (1986 KLT 203) and pointed out that the seven ingredients necessary to constitute prescriptive right of easement have been satisfied. Reliance was also placed on the decision in **Pankajakshi Amma** vs. **Gourikutty Amma and another** (AIR 2010 Kerala 58) for

the proposition that use of way need not be to the knowledge of servient owner. Taking aid of the decision in **Varkey Joseph and another** vs. **Mathai Kuriakose** (1992 (2) KLJ 135), it is pointed out that it is not necessary to implead all the servient owners unless they have objection to the use of respective portions of their properties as a pathway. Therefore, it is pointed out that even assuming that a portion of the pathway did not pass through the property of the defendants and it passed through the property of another person and if that person has no objection to the use of pathway, it is not necessary to make that person a party to the proceedings. Relief needs to be sought only as against those persons who object to the use of pathway. This vital aspect has been omitted to be noticed by the lower appellate court and therefore the lower appellate court was not justified in reversing the decree of the trial court.

11. Learned counsel appearing for the respondents, on the other hand, pointed out that the 1<sup>st</sup> plaintiff who speaks about the road as well as existence of pathway gets the property only in 1987 and the suit is of the year 2002. Obviously, referring to the

evidence, it was pointed out that there is nothing to show that he is aware of use of pathway and in fact he goes on to say that after the defendants purchased the property, they reduced the width of the pathway. Evidence of PW1, according to the learned counsel, is interested testimony and as far as PW2 is concerned he only at best speaks about the existence of way and no doubt its use for the statutory period. It was these facts which persuaded the lower appellate court to come to the conclusion that necessary ingredients to constitute prescriptive right of easement have not been established and therefore the lower appellate court was compelled to reverse the judgment and decree of the trial court.

12. In the decision in **Maniyan Krishnan vs. Nanukuttan** (1986 KLT 203), this Court emphasised seven ingredients necessary to attract prescriptive right of easement. They are as follows:

- “(1) There must be a pre-existing easement which must have been enjoyed by the dominant owner;
- (2) The enjoyment must have been peaceable;

- (3) The enjoyment must have been as an easement;
- (4) The enjoyment must have been as of right;
- (5) The right must have been enjoyed openly;
- (6) The enjoyment must have been for a period of 20 years and
- (7) The enjoyment for 20 years must have been without interruption”.

13. Learned counsel for the appellants may be justified in his submission that even assuming that there is yet another servient dominant owner through whose property pathway has been passing and they have not been made as party, that may not be fatal if that servient owner had not objected to the pathway. Learned counsel for the appellants gets ample support in this regard from the decision in **Varkey Joseph and another vs. Mathai Kuriakose** (1992 (2) KLJ 135). The decision in **Pankajakshi Amma vs. Gourikutty Amma and another** (AIR 2010 Kerala 58) mentions that servient owner need not have actual knowledge of the use of the way. If use of way is open and not surreptitious, one can only say that that is only one of the elements and another most important element is use of way

as a matter of right. The mere use of way for a long time is not sufficient to claim prescriptive right of easement.

14. Having thus understood the law, an attempt shall now be made to ascertain whether the plaintiffs in the present suit have succeeded in establishing their prescriptive right of easement.

15. The plaintiffs obtained their property as per Exts.A1 to A4. They are dated 22.12.1987, 02.07.1998, 19.07.2001 and 25.01.2001. It may be remembered that the suit was laid in 2002. It is no doubt true that the plaintiffs pleaded that the way has been in existence for a long time and they have been using it for the statutory period. Probably, the plaintiffs may be justified in their submission regarding existence of way since the Commissioner's report Ext.C1 mentions about the way. However, the report also makes mention of another alternate way which is in use by the plaintiffs in the case.

16. The mere existence of way by itself is not sufficient for the plaintiffs to claim prescriptive right of easement. Seven ingredients already made mention of will have to be necessarily

satisfied. PW1 had obtained the property by Ext.A1 in the year 1987. He therefore speaks about only those matters which happened to be occurred in that period. Of course he says that the defendants have been using the pathway. Though PW1 gives evidence on behalf of all the plaintiffs, whether he is authorised to do so is a different question. The relevant statement of PW1 in his cross examination reads as follows:

“മറ്റ് വാദികൾക്കു വുള്ള വസ്തുക്കളുടെ അവകാശത്തെക്കുറിച്ച് എനിയ്ക്ക് അറിയില്ല . അവർക്ക് ഏതു പ്രമാണപ്രകാരം കിട്ടി എന്ന് അറിയില്ല . പാർവ്വതിയുടെ 10 cent വസ്തു അന്യായത്തിൽ പട്ടിക ചേർത്തിട്ടുണ്ട്”.

17. Of course, PW2 does speak about the existence of way. However, he neither speaks about the age of the way nor its use by the person for the statutory period. It is not possible to understand as to why the plaintiffs were satisfied with the examination of PW1 who obtained the property in 1987. One of the plaintiffs seems to have obtained the property long ago and that person was not examined to establish either the existence of way or its use for the statutory period. It is in the above circumstance that the lower appellate court was compelled to

observe that the solitary evidence is that of PW1 regarding prescriptive right of easement which is insufficient in law. Neither the predecessor in interest nor any other person conversant with the use of the way for the statutory period have been examined. Merely because there is a way in existence and that it has been used for a long time will not by itself be sufficient in law to confer right of prescriptive right of easement on the person concerned. Easement being a precarious right, pleadings and evidence will have to be precise and clear. Person who claims prescriptive right of easement, by convincing evidence, should establish the existence of way as well as its use.

18. In the case on hand, prescriptive right of easement is claimed by the plaintiffs. Quite surprisingly, PW1, the 1<sup>st</sup> plaintiff who is examined on behalf of all other plaintiffs, says that he is unaware of the rights of the other plaintiffs and also the rights enjoyed by them. As rightly pointed out by the learned counsel for the respondents, PW1 gets the property only in 1987. Even assuming that the plaintiffs have been using the property from 1987, no documents have been produced in support of the same.

It follows that the statutory period has not been completed.

In the light of the above facts and circumstances, it is not necessary to go into the question regarding description of the plaint schedule property. It has been taken note of by the lower appellate court. The lower appellate court has given cogent and convincing reason for reversing the decree of the trial court. It is not shown that the findings of the lower appellate court are either perverse or contrary to the evidence on record. It is a possible view. This Court will not be justified in exercising its jurisdiction under Section 100 of the Code of Civil Procedure to interfere with the judgment and decree of the lower appellate court.

This appeal is without merits and it is accordingly dismissed. There will be no order as to costs.

Sd/-

**P.BHAVADASAN  
JUDGE**

smp

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P.A to Judge.