

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 8TH DAY OF JUNE 2015/18TH JYAISHTA, 1937

RSA.No. 1172 of 2010

AGAINST THE JUDGMENT IN AS 79/2007 of SUB COURT, NEYYATTINKARA
DATED 07-02-2009

OS 428/2004 of PRINCIPAL MUNSIF COURT, NEYYATTINKARA

APPELLANT/RESPONDENT/DEFENDANT:

MARANALLOOR GRAMA PANCHAYATH,
MARANALLOOR, REPRESENTED BY ITS SECRETARY.

BY ADVS.SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL)
SRI.A.R.DILEEP
SRI.V.SUNIL KUMAR (PANACHAMOODOU)
SRI.H.JAWHAR

RESPONDENTS/APPELLANTS/PLAINTIFFS:

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1. GOPI.P,S/O.PARAMU NADAR,ANAMARAMVALICHA
THEKKEPUTHEN VEEDU, MULLUVILA.P.O. - 695 133.
 2. SUJATHA.A.K, W/O.GOPI, ANAMARAMVALICHA
THEKKEPUTHEN VEEDU, MULLUVILA.P.O.- 695 133.

R1 & R2 BY ADV. SRI.K.R.AVINASH (KUNNATH)

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
08-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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R.S.A. NO. 1172 OF 2010
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Dated this the 8th day of June, 2015.

JUDGMENT

Aggrieved by the decree granted by the lower appellate court reversing the finding of the trial court and granting more than Rs.30,000/- as damages to the plaintiffs, the defendant Panchayat has come up in appeal.

2. The plaintiffs owned 25 cents of property which they obtained as per Ext.A1 document. Their grievance was that the Panchayat, without any authority, usurped a portion of their property to widen a pathway and for that purpose rubber trees and other trees were cut and removed and thereby they suffered damages. The plaintiffs issued Ext.A2 notice to the Panchayat and there was no reply. Therefore, they came up with a suit.

3. The defendant resisted the suit contending that the road was not widened by the

Panchayat and that the road was in existence from 1973 onwards. According to the defendant, the people had widened the road and handed over it to the Panchayat and the Panchayat had only tarred the road. Contending that the plaintiffs are not entitled to any relief, the defendant prayed for a dismissal of the suit.

4. Issues were raised by the trial court and parties went to trial. The evidence consists of the testimony of P.Ws.1 and 2 and documents marked as Exts.A1 to A5 from the side of the plaintiffs. The defendants examined D.W.1 and had Exts. B1 to B3 marked. The Commissioner was examined as C.W.1 and Exts. C1 and C1(a) were marked. The court below, finding that there was no proper averment or pleading to show that the act of encroachment was on behalf of the Panchayat, dismissed the suit.

5. The aggrieved plaintiffs carried the matter in appeal as A.S. 79 of 2007. The lower appellate court on a re-appreciation of the evidence found that the finding of the court below cannot be justified and there were materials to show that a portion of the property of the plaintiffs has been annexed to the road which has been recently tarred. Finding that recovery of possession could not be taken aid of, the court below thought it fit to award damages and granted Rs.30,000/- as damages. The aggrieved defendant came up with this appeal.

6. At the time of admission of this Second Appeal, the following questions of law were formulated:

1. Whether first appellate court is justified in granting a decree in reversal of the findings of the trial court without proper appreciation of the evidence?

2. When appellant has claimed damages at the rate of Rs.8000/- per cent alleging that 3 cents was encroached upon for forming the road and the report of the Commissioner shows that the extent encroached upon is only 2.25 cents and there is no evidence to prove that any tree was existing at the encroached portion, whether first appellate court was justified in granting a decree for realisation of Rs.30,000/- as damages.

7. Learned counsel appearing for the Panchayat contended that there is gross violation of Section 249 of the Panchayat Act in that the alleged notice, namely Ext.A2, does not specify the requirements of law and on that sole ground the suit has to be dismissed. It is also contended that the pleadings in the plaint are far from satisfactory and sufficient to warrant a conclusion that if there was widening of the road, it was done by the Panchayat or on behalf of the Panchayat. A reading of Ext.A2 would reveal that the complaint

of the plaintiffs was that somebody had annexed a portion of their property to the road and and the Panchayat had to take necessary steps to compensate them. It is also pointed out that on a perusal of the commission report and the survey plan produced by the plaintiffs, it can be seen that the commission report and plan are not correct. Further, it was contended that there is no averment in the plaint as to who had annexed the property and when it was done. These material particulars are totally lacking in the case and that is vital. Under these circumstances, learned counsel contended that the lower appellate court was not justified in reversing the finding of the trial court.

8. Learned counsel appearing for the respondents contended that most of the contentions now raised were not raised before the court below and the contentions are raised for the first time

before this Court. Referring to the two questions of law formulated by this Court at the time of admission, it is contended that even at the time of admission, this Court was not convinced about the infirmity in the notice. Further, it is contended that before neither of the courts below nor in the appeal memorandum there is a ground or averment regarding the insufficiency of notice under Section 249 of the Panchayat Raj Act. It cannot be treated as a pure question of law and it is a mixed question of fact and law. Relying on the decision reported in **Mammadhan Kutty v. Pallivasal Grama Panchayat** (2004(1) K.L.T. 751) it was contended that even assuming that there is infirmity or lacuna in the notice, that does not matter because the act of the Panchayat is highhanded and there is absolutely no authority for the Panchayat to annex a portion of his property to the road. Referring to the document produced by the defendant, it is

contended that it is clear that going by the entries in Ext.B3, the road in question is shown as a new road and it cannot then be contended that the road was in existence from 1973 onwards.

9. After taking note of rival contentions, it is felt that there is considerable force in the submission made by the learned counsel for the respondents. As far as the contentions regarding Ext.A2 notice are concerned, those contentions were never raised by the defendant. A reading of the judgments of the courts below does not indicate that there was any contention that the notice contemplated under Section 249 of the Panchayat Raj Act had not been issued or Ext.A2 is not sufficient to meet the requirements. It is significant to notice that even in the appeal memorandum there is no such contention. The notice could be waived.

10. As rightly pointed out by the learned counsel for the respondents, it could not be said that the contention regarding the contents of notice is a pure question of law but it is a mixed question of fact and law. Further, the plaintiffs were put on guard regarding the grievance. As already noticed, for the first time such a contention was taken before this Court to the surprise of the respondents. Obviously it cannot be countenanced.

11. There seems to be some substance in the contention of the learned counsel for the appellants that there is no averment in the plaint as to who had annexed the property and when was it annexed. All that is stated in the plaint is that about three cents of property was annexed to the pathway situate on the eastern side of the property belonging to the plaintiffs without authority and they had suffered damages in the process.

12. At the time of evidence P.W.1 would say that a member by name Chandran along with his stooges had done the work.

13. Even assuming that there is no averment or pleading in that regard, the claim of the plaintiffs that the road is a newly widened one is supported by the commission report. Exts.B1 and B2 were discarded by the lower appellate court as it does not contain the dates. Ext.B3 which is a document produced by the Panchayat would show that the road in question is a new road and tarring was done to the road. There is no suggestion to P.W.1 that Panchayat had no role to play in the incident. The case of the Panchayat was that the road as now seen was in existence from 1973 onwards. If that be so, they could have produced the relevant documents. Though Ext.B1 had been produced, that has not been relied on for want of dates in the said document. The defendant would

have examined other witnesses to prove that the road was already in existence. Having not done so, it is too late in the day for the defendant to contend that there is no pleading.

14. It is clear that both the parties understood the case pleaded by the plaintiffs and they have adduced evidence in that regard. Therefore, it could not be said that the defendant is taken by surprise.

15. As regards the comparison between the commission report and the plan and report, survey report, if the defendant had any grievance, it should have been put to the commissioner when she was examined. Without doing so, it cannot now be contended that there is error in the plan prepared by the Commissioner. The Commissioner deposed as to the inspection conducted by her and as to the manner in which it has been done. There is nothing to show that she has erred in any manner. There is

no infirmity pointed out in the plan and report. Under such circumstances, the challenge to the Commission report cannot be accepted.

16. However, there is one glaring infirmity in the judgment of the court below. The lower appellate court while reversing the decree of the trial court has granted Rs.30,000/- as compensation. Rs.30,000/- was granted on the basis that Rs.8000/- per cent was claimed as value of the property and Rs.6000/- was claimed towards the trees cut and removed. The Commissioner has simply stated that from extraneous sources she came to know that six non-yielding coconut trees have been cut. Anyhow, there is no evidence to show that any of the trees had been cut and removed.

17. In the light of the fact that the first plaintiff as P.W.1 had deposed that value of the property is Rs.7000/- per cent and in the light of the fact that the Commissioner has assessed the

extent of property affected as 2 $\frac{1}{4}$ cents, the plaintiffs are entitled only that amount towards damages.

Thus while confirming the finding of the lower appellate court that the plaintiffs are entitled to damages, the judgment and decree of the lower appellate court are modified and it is held that the plaintiffs are entitled to a sum of Rs.15,750/- as damages with 6% interest from the date of suit till realization. There is no order as to costs.

sb.

P. BHAVADASAN,
JUDGE