

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 30TH DAY OF JUNE 2015/9TH ASHADHA, 1937

RSA.No. 294 of 2011 ()

**AGAINST THE JUDGMENT AND DECREE IN AS 179/2008 of III ADDL.DISTRICT COURT,
KOLLAM DATED 19-11-2010.**

**AGAINST THE JUDGMENT AND DECREE IN OS 213/2004 of PRL.MUNSIFF COURT,
KOLLAM DATED 25-06-2008.**

APPELLANTS/RESPONDENTS/DEFENDANTS:

- 1. LEELAMMA,W/O.MONACHAN,PLAVARA VEEDU,
MUKKODU CHERRY, MULAVANA VILLAGE, KOLLAM DISTRICT.**
- 2. THOMAS JOHN,PLAVARA PUTHEN BUNGLOW,
MUKKODU CHERRY, MULAVANA, KOLLAM DISTRICT.**
- 3. MAMACHAN,PLAVARA VEEDU,MUKKODU CHERRY,
MULAVANA VILLAGE, KOLLAM DISTRICT.**

**BY ADVS.SRI.JOHN VARGHESE.
SRI.P.M.JOSEPH.**

RESPONDENT(S)/APPELLANTS/PLAINTIFFS:

- 1. BINI THOMAS,W/O.VARGHESE,PLAVARA KOCHUPUTHEN VEEDU,
MUKODU CHERRY, MULAVANA VILLAGE, KOLLAM TALUK-691 503.**
- 2. VARGHESE,S/O.YOHANNAN,-DO- ,
REPRESENTED BY POWER OF ATTORNEY HOLDER,
MR.JOPPACHAN, S/O.YOHANNAN, PLAVARA VEEDU,
MUKKOD CHERRY, MULAVANA-691 503.**

BY ADV. SRI.K.SUBASH CHANDRA BOSE.

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
24-06-2015, THE COURT ON 30-06-2015 DELIVERED THE FOLLOWING:**

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A.HARIPRASAD, J.

R.S.A No.294 of 2011

Dated this the 30th day of June, 2015.

J U D G M E N T

Feeling aggrieved by the judgment and decree in A.S No.179/2008 on the file of IIIrd Additional District Judge, Kollam, the defendants in O.S No.213/2004 before the Munsiff's Court, Kollam have come up in this appeal.

2. Heard the learned counsel for the appellants and the contesting respondents.

3. The suit filed by the respondents is one for declaration of right of easement by prescription over the plaint D schedule pathway. Plaintiffs case in short is that the plaint A, B and C schedule properties lie as one block. Second plaintiff obtained the properties as per Ext.A1 partition deed. First plaintiff is the wife of the second plaintiff. The appellants (defendants 2 and 3) are brothers and the first defendant is the wife of the third defendant. It is the contention of the plaintiffs

that defendants 2 and 3 are having properties on the eastern and southern side of plaint A, B and C schedule properties. The property belonging to defendants 2 and 3 is shown in E schedule. It is alleged that the plaintiffs and their predecessors were using the plaint D schedule pathway for the last more than 90 years for ingress and egress to the plaint A to C schedule properties. The said pathway is having a width of about 2 metres and it starts from Plavara junction, Mookkoodu - Ela road. The length of the pathway is about 66 metres. This is the only access to the plaint A to C schedule properties. The predecessors in interest of the plaintiffs and the plaintiffs were using the plaint D schedule pathway as of right, as an easement, without interruption, continuously and peaceably for more than 20 years and so the plaintiffs have derived a right of easement by prescription over the said pathway. The defendants/appellants attempted to obstruct user of the same and hence the suit.

4. The defendants/appellants resisted the suit disputing the right of way claimed by the plaintiffs. There is no pathway in existence as claimed in the plaint. It is the contention that when the second defendant unloaded rubbles for construction of a compound wall, the plaintiffs filed this suit with false allegations. According to the defendants, plaintiffs are trying to make a way through the defendants' property. It is also contended by the defendants in the written statement that they are ready to set out a way through their property as shown in the schedule therein.

5. The parties adduced evidence before the trial court and marked some documents. The court below on appreciation of evidence found that the plaintiff did not prove user of plaint D schedule pathway in prescriptive easement right. Therefore, the suit was dismissed.

6. Aggrieved by the decision, the plaintiffs preferred an

appeal before the lower appellate court. After reconsidering the entire evidence, the learned Additional District Judge allowed the appeal and decreed the suit.

7. Learned counsel for the appellants contended that the lower appellate court misread the evidence and wrongly applied the law. According to him, the plaintiff's right is traceable only from the year 1997. Exts.A1 and A2 are the documents evidencing title of the plaintiffs over plaint A to C schedule properties. Ext.B1 is the document executed by the second defendant in respect of 20 cents of property in favour of PW1 and that is of the year 1999. Based on these documents, learned counsel for the appellants contended that the statutory requirement of user for 20 years for claiming a prescriptive easement right under Section 15 of the Easements Act, 1882 has not been fulfilled. It is true that if we reckon the periods of execution of the said documents, 20 years might not have

elapsed in 2004, the year in which the suit was instituted. But the appellants have a case that in plaint A to C schedule properties there was an old family house of about 90 years age and the predecessors in title of the plaintiffs were residing in the house. Plaint D schedule pathway was the only access for them also for ingress and egress to the nearby public road. PW1 is the brother of the second plaintiff. He testified in the capacity as power of attorney holder of the second plaintiff, who is the owner of the plaint A to C schedule properties. It is the testimony of PW1 that originally 60 cents of property belonged to their father, from out of which 20 cents of property on the southern side was sold to the second defendant. Remaining property was partitioned and a portion of the property admeasuring $37 \frac{3}{4}$ cents was allotted to the second plaintiff. Ext.A5 is the copy of the resurvey plan in respect of the properties. The properties covered by these documents are

shown in plaint A to C schedules. PW2 is an independent witness cited to prove the existence and user of plaint D schedule pathway. However, on a reading of his testimony one can see that much credence cannot be attached to it.

8. The lower appellate court relied on Exts.C1 to C6 Commissioner's reports and plans. Exts.C1 to C3 reports and plans was remitted to the Commissioner for ascertaining the age of the pathway. Commissioner rightly observed that she was unable to state with precision the age of the disputed pathway. It is a common knowledge that on a mere look no one can ascertain the exact age of any pathway. One can only say whether the pathway by appearance is an old or recent one. Therefore, Exts.C4 to C6 which confirms the correctness of Exts.C1 to C3, in respect of all the matters can be relied only for the purpose of understanding the facts and circumstances relating to the way, except the age. Commissioner's plans and

reports will show that the disputed pathway is not of a uniform width throughout. At the point where the disputed pathway meets a public way is having a width of 1.9 metres. Commissioner's reports would show that the pathway proceeds from a road on the eastern side to plaint A to C schedule properties. No other pathway could be seen to the house in plaint A to C schedule properties. The parol evidence and the Commissioner's reports show that the old house in plaint A to C schedule properties were also facing to the side of the disputed pathway probalising the case of the plaintiffs.

9. Learned counsel for the contesting respondents relied on an admission by DW1 that there is no other pathway for the plaintiffs to gain access to their properties. Learned counsel for the contesting respondents further contended that the preparedness of the defendants expressed in their written statement to set out a way to the plaintiffs is a clear indication

that the plaintiffs have a right of easement through plaintiff D schedule pathway. I am of the view that this is certainly an indicator to strengthen the case of the plaintiffs.

9. Learned counsel for the appellants relied on a decision in *Justiniano Antao and others v. Bernadette B.Pereira (AIR 2005 SC 236)* to contend that the law mandates that the plaintiff, to claim a right of access by way of prescription, to prove user as of right for more than 20 years. In the facts and circumstances of the case, the Supreme Court held that in the said case, the plaintiff failed to establish a right claimable under Section 15 of the Easement Act. The decision can be easily distinguished on facts. In this case, the oral evidence and the materials revealed from the Commissioner's reports are correctly analysed by the court below to find that the plaintiffs and their predecessors were using the disputed way as of right, as an easement, uninterruptedly, continuously and for

more than 20 years to claim a prescriptive easement. It is a well settled principle that an easement by prescription can also be claimed by tacking possession of the plaintiffs predecessors in title. User of the right of way by a person with whom the plaintiff is having a privity of contract may be tacked to make up the time necessary to acquire an easement by prescription and the user will not be considered as having been interrupted provided it has been existed for the required period by persons in privity with each other. The evidence in this case will clearly show that the predecessors in title and thereafter the plaintiffs are continuously and without interruption used the pathway as of right and as an easement for 20 years and therefore the claim of easement have matured to a legal right.

10. Decision cited by the learned counsel for the appellants in *Ramanunni Vaidyar v. Govindankutty Nair (1998 (2) KLT 47)* that on the basis of an inchoate right or the right

which has not ripened into an easement by prescription, but is merely one of user, cannot be recognized has no application to the facts of this case.

11. Considering the materials in the records and the lower appellate court's judgment, I am of the view that no substantial question of law arises in this appeal. The question of law raised regarding non mentioning of prescriptive rights in Exts.A1 and A2 and also in Ext.B1 could only be answered against the appellants. The reason is that the easement is a right claimed by the dominant owner on the property of a servient owner and the transfer of dominant heritage carries with it an easement over the servient heritage. In one sense, it can be said that the holder of a prescriptive easement right can claim no title over the portion of the servient heritage through which the right of way is claimed. Therefore, non mentioning of prescriptive easement right accrued in favour of plaint A to C schedule

properties in Exts.A1, A2 and B1 will be of no legal consequence and the appellants cannot be claim any right based on that fact. I find that the appeal is devoid of any merit. Hence, the regular second appeal is dismissed.

All pending interlocutory applications will stand dismissed.

Sd/-
A.HARIPRASAD,
JUDGE.
//True copy//

P.A to Judge

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