

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR**

**TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937**

**RSA.No. 297 of 2013 ()**  
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**(AGAINST THE DECREE AND JUDGMENT IN AS.NO. 6/2006 OF I ADDL.SUB  
COURT, THIRUVANANTHAPURAM DATED 20-09-2012)**

**(AGAINST THE JUDGMENT IN OS.NO. 1243/2003 OF II ADDL.MUNSIFF COURT,  
THIRUVANANTHAPURAM DATED 31-08-2005)**  
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**APPELLANTS/APPELLANT/DEFENDANTS:**  
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- 1. BIJU, AGED 38 YEARS,S/O.SASIDHARAN,  
RESIDING AT MELE CHERUKONATHU VEEDU,  
K.S.ROAD, KOVALAM, THIRUVANANTHAPURAM.**
- 2. SIMON, AGED 58 YEARS,  
S/O.YESUDASAN, RESIDING C.V.SADANAM, K.S.ROAD,  
KOVALAM, THIRUVANANTHAPURAM.**
- 3. RAJAM, AGED 45 YEARS,  
W/O.SIMON, RESIDING C.V.SADANAM, K.S.ROAD,  
KOVALAM, THIRUVANANTHAPURAM.**

**BY ADV. SRI.POOVAPPALLY M.RAMACHANDRAN NAIR**

**RESPONDENT/RESPONDENT/PLAINTIFF:**  
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**SUHARA BEEVI, AGED 62 YEARS,  
D/O.MAITHEEN BEEVI, RESIDING AT V.P.11/487, JHS MANZIL,  
KAILAN SAIPPU ROAD, KOVALAM,  
THIRUVANANTHAPURAM- 695 001.**

**BY ADVS. SRI.M.R.ANANDAKUTTAN  
SMT.M.A.ZOHRA  
SRI.MAHESH ANANDAKUTTAN**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD  
ON 29-09-2015, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:**

**P.B.SURESH KUMAR, J.**

**= = = = =**

**R.S.A.No.297 of 2013.**

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Dated this the 29<sup>th</sup> day of September, 2015.

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

Defendants 1 to 3 in a suit for injunction are the appellants in this Second Appeal.

2. The plaint A schedule property was obtained by the plaintiff by virtue of Ext.A1 sale deed. The property on the east of the plaint A schedule property is lying low and as such the predecessor of the plaintiff constructed a retaining wall in plaint A schedule property separating the same and the property on its east. The retaining wall constructed on the eastern boundary of the plaint A schedule property is scheduled as plaint B schedule. The case of the plaintiff is that the defendants who are residing in the neighbourhood of the plaint A schedule property is using the surface portion of the plaint B schedule retaining wall as a pathway. According to the plaintiff, the defendants have no manner of right to use any portion of the plaint B schedule

retaining wall as pathway and hence the suit for a decree of permanent prohibitory injunction restraining the defendants from making use of the plaint B schedule retaining wall either as a way or as a means of ingress and egress to their respective properties. The plaintiff has also claimed a decree of mandatory injunction directing the defendants to remove the polythene pipe fixed by the defendants on the eastern side of the plaint B schedule retaining wall. The defendants contested the suit. According to them, there is a public pathway from the road namely, Cherukarakonath Road to the properties owned and possessed by the defendants and that the said public pathway passes through the plaint B schedule retaining wall. In other words, according to the defendants, the retaining wall constructed in the plaint A schedule property is part of a public pathway.

3. The trial court decreed the suit in part granting the plaintiff a decree of prohibitory injunction restraining the defendants and their men from making use of the plaint B schedule retaining wall either as a pathway or as a means of ingress and egress to their respective properties. The prayer for

mandatory injunction was, however, turned down. The defendants challenged the decision of the trial court in appeal. The appellate court, on a reappraisal of the evidence on record, confirmed the decision of the trial court. The defendants who are aggrieved by the concurrent decisions of the courts below have thus come up in this Second Appeal.

4. Heard the learned counsel for the appellants as also the learned counsel for the respondent/plaintiff.

5. The learned counsel for the appellants at the outset contended that the plaintiff who has instituted the suit in the year 2003 has settled all her rights and interests in the plaint A schedule property to her daughter in the year 2004 and that therefore she had no *locus standi* to continue the suit. The learned counsel for the appellants has also brought to my notice the report of the Advocate Commissioner appointed in the suit as also the evidence tendered by the witnesses examined on the side of the defendants that the people in the locality used to walk through the surface portion of the plaint B schedule retaining wall to establish the contention raised by the defendants that there exists a public pathway though the plaint B schedule retaining

wall. The learned counsel also brought to my attention the report of the Advocate Commissioner that the electric posts installed to draw electric line to the neighbouring properties are installed on the side of the plaint B schedule retaining wall to buttress the argument that the plaint B schedule retaining wall is part of a public pathway.

6. The fact that the plaint B schedule is the retaining wall constructed on the eastern boundary of plaint A schedule property obtained by the plaintiff by virtue of Ext.A1 sale deed is not in dispute. True, plaint B schedule retaining wall is not a retaining wall constructed by the plaintiff. It is a retaining wall constructed by the predecessor of the plaintiff in the year 1970. This fact is also not disputed by the defendants. When it is admitted that plaint B schedule retaining wall is a part of the plaint A schedule property, it is for the defendants to establish their right to use the same as a pathway to their respective properties. The defendants do not claim any right of easement over the plaint B schedule retaining wall. Their case on the other hand, is that the plaint B schedule retaining wall is the portion of a public pathway. No evidence of any implied or

express surrender of plaint B schedule retaining wall for the use of the general public as a pathway was let in by the defendants. On the other hand, the attempt of the defendants was only to establish that the people in the locality used to walk over the surface portion of the plaint B schedule retaining wall for convenient access to their respective properties. As noticed above, they also rely on the existence of the electric post on the side of the retaining wall to contend that the plaint B schedule retaining wall is part of a public pathway. Merely for the reason that an electric post is erected on the side of the retaining wall, it cannot be inferred that the retaining wall is part of a public pathway. Likewise, merely for the reason that the people in the locality are using a portion of the property of the plaintiff for the convenient access to their respective properties, it cannot be inferred that the said user is as of right as a public pathway. In the aforesaid facts and circumstances, the courts below cannot be faulted for having decreed the suit. It is now settled that the transfer of property involved in a suit will not affect the right of the plaintiff to pursue the suit till its culmination on behalf of the transferee who is bound by the decision in the suit. There is,

therefore, no substance in the contention raised by the learned counsel for the appellants that the plaintiff was not entitled to pursue the suit.

The Second Appeal, in the circumstances, is devoid of merit and the same is accordingly dismissed. All the interlocutory applications in this case are closed.

***Sd/-***  
**P.B.SURESH KUMAR,**  
**JUDGE.**

***Kvs/-***

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*PA TO JUDGE.*