

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 20TH DAY OF AUGUST 2015/29TH SRAVANA, 1937

RSA.No. 898 of 2011 (F)

AGAINST THE JUDGMENT AND DECREE IN AS NO. 33/2010 of DISTRICT
COURT,THODUPUZHA DATED 12.07.2011

AGAINST THE JUDGMENT AND DECREE IN OS NO.280/2007 of MUNSIF
COURT,THODUPUZHA DATED 24.03.2010

APPELLANT/APPELLANT/PLAINTIFF::

JOSEPH, S/O.MATHEW, AGED 63,
CHERUNILATHU HOUSE, CHEPPUKULAM P.O., EDAMARUKU KARA
UDUMBANNOOR VILLAGE, THODUPUZHA TALUK.

BY ADVS.SRI.K.C.CHARLES
SRI.POLY MATHAI
SRI.P.CHELLAPPAN
SRI.E.N.HARI
SRI.VIMAL K.CHARLES
SMT.A.T.RENJU

RESPONDENT(S)/RESPONDENTS/DEFENDANTS:

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1. LEELA @ SUNDHARI, W/O.THANKAPPAN,
AGED ABOUT 58, MOONNILAVUMKAL (KANIKUDIYIL) HOUSE,
THATTAKUZHA P.O., EDAMARUKU KARA, UDUMBANNOOR VILLAGE
THODUPUZHA TALUK.
 - (*) 2. THANKAPPAN, S/O.RAMAN, AGED ABOUT 60,
MOONNILAVUMKAL (KANIKUDIYIL) HOUSE, THATTAKUZHA P.O
EDAMARUKU KARA, UDUMBANNOOR VILLAGE, THODUPUZHA TALUK.
(DIED. LRS. IMPEADED AS ADDL.R3 AND R4)

(*)ADDITIONAL RESPONDENTS 3 AND 4:

3. SUDEEP, S/O.THANKAPPAN, AGED 37 YEARS,
MOONNILAVUMKAL (KANIKUDIYIL) HOUSE,
THATTAKUZHA P.O., EDAMARUKU KARA,
UDUMBANNOOR VILLAGE, THODUPUZHA TALUK.
4. SUBIN, S/O.THANKAPPAN, AGED 33 YEARS,
MOONNILAVUMKAL (KANIKUDIYIL) HOUSE,
THATTAKUZHA P.O., EDAMARUKU KARA,
UDUMBANNOOR VILLAGE, THODUPUZHA TALUK.

THE LEGAL HEIRS OF THE DECEASED RESPONDENT NO.2 ARE IMPEADED AS
ADDITIONAL RESPONDENTS 3 AND 4 AS PER ORDER DATED 28/7/2015 IN I.A.
NO. 1748/2015.

R1, ADDL. R3 & R4 BY ADV. SRI.G.SREEKUMAR (CHELUR)

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
07.08.2015, THE COURT ON 20-08-2015 DELIVERED THE FOLLOWING:

A.HARIPRASAD, J.

R.S.A. No.898 of 2011

Dated this the 20th day of August, 2015

JUDGMENT

Plaintiff in a suit for declaration of prescriptive easement right of way and prohibitory injunction, who lost in the two courts below, is the appellant. Defendants are the respondents. Pending this appeal, the second respondent died. His legal representatives are additional respondents 3 and 4.

2. Facts, in nut shell, are as follows: Plaintiff is the owner in possession of land described in plaint A schedule. For the last 50 years he is residing in the house in plaint A schedule property. Cheppukulam-Edamaruku-Karukappally road is passing through the western side of plaint A schedule property. First defendant is having one acre of property in between the said Panchayat road and plaint A schedule property. A pathway having a width of 12 feet and length of 50 metres runs through the first defendant's property in east-west direction starting from the Panchayat road and reaching upto the plaintiff's property. That pathway is described in plaint B schedule. Plaint B schedule pathway is in existence for more than 23 years before institution of the suit. From 11.07.1984 onwards, the plaintiff and his family members are using plaint B schedule pathway

openly, continuously, uninterruptedly, peaceably, as of right and as an easement for entrance and exit to plaint A schedule property including for vehicular traffic. It is, therefore, the case of the plaintiff that he has perfected an easement right over the plaint B schedule pathway. There is no other way for ingress and egress to plaint A schedule property. Second defendant is the husband of the first defendant. Due to enmity, he tried to interfere with the plaintiff's right to ply vehicles through plaint B schedule. Therefore, he was compelled to file the suit.

3. The defendants contended that plaint B schedule road is only having a width of 8 feet. Plaintiff has no manner of right over plaint B schedule property. Defendants permitted the plaintiff to take vehicles through Plaint B schedule pathway on certain occasions. Plaintiff has not prescribed any easement right over plaint B schedule property. Plaintiff took vehicles through the road only after 2004 and that too with the permission of the defendants. Passage through the way was restricted by placing wooden planks. As the defendants did not accede to the plaintiff's request to remove the wooden planks, infuriated plaintiff falsely filed the suit. It is liable to be dismissed.

4. Heard Sri.K.C.Charles, Advocate for the appellant (plaintiff) and Sri.G.Sreekumar (Chelur), Advocate for the respondents.

5. The learned Single Judge at the time of admission had

formulated the following substantial question of law for determination:

“When the evidence of PW1, PW2 and PW3 show that appellant has been using the plaint B schedule way even to take a car more than 20 years prior to the institution of the suit openly, peaceably and continuously without interruption, as of right and as an easement, whether the courts below on the evidence were justified in refusing to grant the decree sought for.”

6. Learned counsel for the appellant (plaintiff) contended that the properties belonging to the plaintiff and defendants are rubber plantations. Extent of the property owned by the plaintiff is 1.39 acres. His house was built about 50 years before the institution of suit. The defendants' property is also having an extent of one acre. It lies on the north-western side of plaint A schedule property. On the western side of the defendants' property, a road passes through. It is the definite case of the plaintiff that plaint B schedule pathway originating from the said road and reaching upto his property is having an average width of 12 feet. According to the plaintiff, for past 23 years, he was using plaint B schedule pathway for ingress and egress openly, uninterruptedly, peaceably, continuously as of right and as an easement. It is the further case of the plaintiff that he used to take

vehicles through plaint B schedule property from that period onwards. It is the contention of the learned counsel for the plaintiff that the court below seriously erred in not appreciating the evidence in the correct perspective. Finding of the lower appellate court that for claiming a prescriptive easement right the plaintiff should establish user of the way for 22 years is legally incorrect. It is contended that the observations by the lower appellate court is against the provisions in Section 15 of the Indian Easements Act, 1882 (in short, "the Act"). Learned counsel for the plaintiff contended that documentary evidence, which was not challenged by the defendants would show that for more than 20 years, the plaintiff owned a vehicle. In the absence of any other way for vehicular traffic to the plaintiff's house, the courts below should have considered the acceptability of the claim for easement right. It is also contended that the broad probabilities of the case as born out from the evidence was wrongly appreciated by the courts below.

7. Per contra, learned counsel for the defendants contended that easement being a precarious right should be specifically pleaded. It has not been done so in this case. There is no illegality or irregularity in appreciating the facts by the courts below and there is no scope for interference in the factual findings in a second appeal.

8. Learned counsel for the defendants contended that the

pleading in the plaint is highly insufficient to grant a decree based on prescriptive easement right. Section 15 of the Act deals with acquisition of easementary rights by prescription. That part of the Section relevant in this case says that where a right of way has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption for 20 years, the right to such access shall be absolute. It is further mentioned in the Section that the said period of 20 years shall be taken to be a period ending within two years next before the institution of suit wherein the claim to which such period relates is contested. It is a settled principle that this part of the Section deals with the period of limitation for asserting the right. The purport of the provision is that if a party prescribes a right of way for 20 years and in case there is any disturbance to the easement right so prescribed, the suit shall be brought in within a period of two years from the date of interruption of the easementary right. What ever be the length of time of user of the right beyond 20 years, what is material is only 20 years user immediately prior to the suit and the suit should be brought in within two years of disturbance of the user. Viewing from that angle, the observation of lower appellate court that the appellant (plaintiff) must have proved that he was enjoyed the right for atleast 22 years before filing the suit is legally incorrect.

9. Now I shall refer to the pleadings. In paragraph 4 of the plaint,

it is specifically stated that from 11.07.1984 onwards the plaintiff and his family members have been using the plaint B schedule pathway openly, continuously, uninterruptedly, peaceably, as of right and as an easement for the entrance and exit to plaint A schedule property from the western Panchayat road, including vehicular traffic. Therefore, the contention of the defendants that there is no specific pleading is unacceptable. Similarly, oral evidence adduced on the side of the plaintiff, viz., the testimony of PWs 1, 3 and 4 probalilise the case pleaded in the plaint.

10. Learned counsel for the plaintiff strongly relied on Exts.A4 to A6. Ext.A4 is the registration particulars in respect of a jeep bearing No.KLF-6229. It can be seen from Ext.A4 that the vehicle was transferred to the name of plaintiff with effect from 03.03.1986. In the light of the unchallenged contention of the plaintiff that no access other than the disputed pathway is available for vehicular traffic to the plaintiff's house, this document assumes great importance in strengthening the plaintiff's case that he used to take the jeep through the disputed pathway to his home. No effective challenge is made against this document. It cuts at the root of the defendants' contention that they permitted the plaintiff to use the way in 2004. Ext.A5 is an agreement to assign timber executed between the plaintiff and PW3. It is dated 02.08.1987. It is the case of the plaintiff that trees cut and removed from the his property were removed in lorry

through the plaint B schedule property. Ext.A6 is yet another agreement executed on 29.10.1996 in respect of the sale of timber which stood in the property of the plaintiff. It is the definite case of the plaintiff that the only vehicular access to remove the timber was through plaint B schedule property. Ext.C1 is the commissioner's report. Trial court rejected the case of the plaintiff mainly for the reason that there was no plan submitted by the commissioner showing the dimensions of the way. However, the lower appellate court found that there was no necessity of a plan to establish the plaintiff's case reckoning the nature of contentions raised by the parties. As rightly observed by the lower appellate court, existence of the pathway through the first defendant's property is an admitted fact. Of course, there is a dispute regarding width of the pathway. Fact remains that the pathway permits vehicular traffic. It is the admitted case that it starts from a public road and ends in the plaintiff's property. The defendants' house lies in a lower level and vehicular entry is not possible to the defendants' property. In Ext.C1 report, the commissioner has clearly stated that B schedule pathway starting from the road ends in the courtyard of the plaintiff. From the appearance of the pathway, the commissioner could identify that it was being used for vehicular traffic for long. The commissioner has specifically stated that except B schedule pathway there is no other road or other pathway to plaint A schedule property. The commissioner had seen that the

car belonging to the plaintiff was taken through the B schedule pathway. Commissioner who testified as PW2 categorically proved the averments in Ext.C1. There is no challenge made by the defendants against the commissioner's report.

11. In the light of the above evidence, learned counsel for the plaintiff contended that the reasonings by the courts below are incorrect. The trial Judge dismissed the suit by holding that no earnest attempt was made by the plaintiff to prove and establish the actual width of the plaintiff schedule road. It may be too much to expect proof regarding the width of a country road with mathematical precision. The evidence adduced would clearly show that the disputed pathway is capable of vehicular traffic including lorry traffic. Therefore, the dismissal of the suit only for this reason after accepting all other contentions of the plaintiff is not justifiable.

12. The lower appellate court disagreed with the trial Judge on many of the findings. The lower appellate court was carried away by an assumption that the plaintiff must have started using the pathway initially with the permission of the property owner. Learned counsel for the plaintiff contended that the defendants have no consistent case regarding the grant of permission. It is an admitted case that the property belongs to the first defendant. No portion of the pathway passes through the second defendant's property. Therefore, the contention that the second defendant

permitted the plaintiff to use the pathway is of no legal consequence. The reasonings of the lower appellate court for dismissing the appeal in the light of the above discussed evidence are legally unsustainable. Therefore, I find that the courts below committed legal errors in appreciating the evidence and applying the correct principles of law to the proved set of facts. Therefore, the appeal is to be allowed.

In the result, the appeal is allowed. The judgment and decree of the courts below are set aside. The suit is decreed restraining the defendants/respondents and their men by a permanent prohibitory injunction from closing or obstructing or destroying plaintiff B schedule pathway, from altering its lie and nature and also from interfering with the use of plaintiff B schedule pathway by the plaintiff. There is no order as to costs.

All pending interlocutory applications will stand closed.

A. HARIPRASAD, JUDGE.

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