

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 20TH DAY OF OCTOBER 2015/28TH ASWINA, 1937

RSA.No. 969 of 2011

**JUDGMENT DATED 24-03-2011 IN AS 74/2007 OF SUB COURT, HOSDRUG
JUDGMENT DATED 23-08-2007 IN OS 435/2003 OF MUNSIFF COURT, HOSDRUG**
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APPELLANT(S)/RESPONDENTS/DEFENDANTS:

- 1. PAZHAYATT JOSEPH, (DIED),**
- 2. JENO JOSEPH, AGED 37 YEARS,
S/O.LATE PAZHAYATT JOSEPH, RESIDING AT
PAZHAYATT HOUSE, PARAMBA P.O., MALOTH VILLAGE,
HOSDURG TALUK, KASARAGODE DISTRICT.**
- 3. M.C.CHERIAN, AGED 78 YEARS,
S/O.CHACKO, KOVOOR HOUSE, RESIDING AT PAYMARUTHI,
KAKKUDUMUN P.O., ATHIKAYAM VILLAGE, RANNI TALUK,
PATHANAMTHITTA DISTRICT.**

**BY ADVS.SRI.JAWAHAR JOSE
SMT.CISSY MATHEWS**

RESPONDENT/APPELLANT/PLAINTIFF:

**C.D.VIJU, AGED 44 YEARS,
S/O.DEVASSIKUTTY, RESIDING AT MUTHUKAD, PERUVANNAMUZHI,
CHAKKITTUPARA VILLAGE, QUILANDY TALUK
KOZHIKODE DISTRICT - 673 528.**

BY ADV. SRI.RAJU SEBASTIAN VADAKKEKKARA

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
20-10-2015 ALONG WITH RSA.NO.972/2011 THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:**

msv/

P.B.SURESH KUMAR, J.

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R.S.A.Nos.969 & 972 of 2011.

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Dated this the 20th day of October, 2015.

J U D G M E N T

These Second Appeals arise from the suits O.S.Nos.389 and 435 of 2003 on the file of the Munsiff's Court, Hosdurg.

2. The brief facts relevant for the disposal of these Second Appeals are the following:

The appellants in R.S.A.No.972 of 2011 are the plaintiffs in O.S.No.389 of 2003. The said suit was one for injunction. According to the plaintiffs, the plaint schedule pathway in the suit is part of the property owned by them; that the defendants are causing obstructions to the user of the plaint schedule pathway and hence the suit for a decree of prohibitory injunction restraining the defendants from causing obstructions to the plaintiffs in the matter of using the plaint schedule pathway. The defendants contested the

suit, contending *inter alia* that the plaint schedule pathway is part of the property of the defendants and that therefore the plaintiffs are not entitled to any relief in the suit. In the meanwhile, the defendants instituted O.S.No.435 of 2003, from which R.S.A.No.969 of 2011 arises, in respect of the very same pathway alleging that the plaintiffs are attempting to trespass into the same. The relief claimed in the said suit was for a decree of prohibitory injunction restraining the plaintiffs from trespassing into the said pathway. O.S.No.435 of 2003 was tried along with O.S.No.389 of 2003 treating O.S.No.389 of 2003 as the lead case. The trial court, on an examination of the materials on record, found that the plaint schedule pathway is part of the property of the defendants. Consequently, O.S.No.389 of 2003 was dismissed. By the very same judgement, the trial court dismissed O.S.No.435 of 2003 filed by the defendants also, holding that the defendants who filed the subsequent suit without disclosing the pendency of the earlier suit are not entitled the discretionary relief of injunction claimed by

them. The plaintiffs challenged the decision in O.S.No.389 of 2003 in appeal. The defendants also challenged the decision in O.S.No.435 of 2003 in appeal. The appellate court, by a common judgment, confirmed the decision in O.S.No.389 of 2003 and decreed O.S.No.435 of 2003, reversing the decision of the trial court. The plaintiffs, who are aggrieved by the concurrent decisions in O.S.No.389 of 2003 as also the decision of the appellate court in O.S.No.435 of 2003, have come up in these Second Appeals.

3. Heard the learned counsel for the appellants as also the learned counsel for the respondents.

4. As far as the decision in O.S.No.389 of 2003, the learned counsel for the appellants is unable to establish that the plaint schedule pathway in the said suit is part of the property of the appellants. As such, it cannot be contended that the decisions of the courts below on the said issue is incorrect or faulty. Coming to O.S.No.435 of 2003, the learned counsel argued that the plaintiffs, who have

instituted the said suit without disclosing the pendency of the earlier suit and without disclosing the fact that the disputed property is being used as a pathway, are not entitled to the discretionary relief of injunction claimed by them in the suit. He also relied on the decision of this Court in **Padmanabhan v. Thomas** (1989 KHC 67) in support of his contention.

5. The only point arising for consideration in these appeals, in the circumstance of the case, is whether the appellate court is justified in reversing the decision of the trial court in O.S.No.435 of 2003. True, the relief of injunction is a discretionary relief and the person claiming a discretionary relief shall approach the court with clean hands. The exercise of discretion on a given set of facts is correct or not is a pure question of fact. The appellate court, on an appraisal of the entire materials on record, found that the trial court has not exercised its discretion correctly. In the said view of the matter, I do not find any substantial question of law warranting interference by this

RSA.Nos.969 & 972/2011.

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Court under Section 100 of the Code of Civil Procedure. The Second Appeals, in the circumstances, are devoid of merits and the same are, accordingly, dismissed. All the interlocutory applications in the appeals are closed.

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

Kvs/-

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PA TO JUDGE.