

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

RSA.No. 1023 of 2013 ()

**AS 116/2010 OF I ADDL. SUB COURT, THIRUVANANTHAPURAM
OS 848/2007 OF PRINCIPAL MUNSIF COURT, THIRUVANANTHAPURAM**
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APPELLANT(S)/RESPONDENT/DEFENDANT:

**J.RAJEEV, AGED 35 YEARS,
S/O. JANARDHANAN, SREE GANESH MANDIRAM, VALLAMKODE,
KALLIYOOR, PALLICHAL, THIRUVANANTHAPURAM.**

BY ADV. SRI.G.SUDHEER

RESPONDENT(S)/APPELLANTS/PLAINTIFFS:

- 1. K.JAYACHANDRAN, AGED 44 YEARS,
S/O. KESAVA PANICKER, VISAKH BHAVAN, KALLIYOOR,
THIRUVANANTHAPURAM-695 001.**
- 2. V.PRABHA KUMARI, AGED 40 YEARS,
D/O.VIJAYAMMA, VISAKH BHAVAN, KALLIYOOR,
THIRUVANANTHAPURAM-695 001.**

R1 BY ADV. SRI.L.MOHANAN

R2 BY ADVS. SRI.P.B.SAHASRANAMAN

SRI.T.S.HARIKUMAR

SRI.K.JAGADEESH

SRI.RAAJESH S.SUBRAHMANIAN

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 07-12-2015, ALONG WITH RSA. 1047/2013, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:**

msv/

P.B.SURESH KUMAR, J.

R.S.A.Nos.1023 & 1047 of 2013

Dated this the 7th day of December, 2015

JUDGMENT

These appeals are preferred challenging the common judgment in two appeals viz; A.S.Nos.115 and 116 of 2010 on the file of the Sub Court, Thiruvananthapuram. Among the said appeals, A.S.No.115 of 2010 is an appeal preferred by the defendants in O.S.No.793 of 2007 and A.S.No.116 of 2010 was preferred by the plaintiffs in O.S.No.848 of 2007. The suits referred to above on the file of the Munsiff Court, Thiruvananthapuram were jointly tried treating O.S.No.793 of 2007 as the lead case. As such, I am referring to the parties in this judgment as they appear in O.S.No.793 of 2007.

2. O.S.No.793 of 2007 is a suit for injunction.

There are two items of properties in the said suit. The plaintiff A schedule property is owned by the plaintiff and the plaintiff B schedule property is a pathway. According to the plaintiff, the plaintiff B schedule is a public pathway and that the defendants are causing obstructions to the plaintiff in the matter of using the plaintiff B schedule pathway. The relief claimed in the suit, in the circumstances, was an injunction restraining the defendants from causing obstructions to the plaintiff in the matter of using the plaintiff B schedule pathway. The defendants contended that the plaintiff B schedule is not a public pathway. According to them, the plaintiff B schedule property is part of their property. They also raised a counter claim in the suit for fixation of the southern boundary of their property. In the meanwhile, the defendants filed another suit as O.S.No.848 of 2007 against the brother-in-law of the plaintiff seeking a decree of permanent prohibitory injunction, restraining him from cutting open a pathway through their property. The trial

court accepted the case of the plaintiff and decreed O.S.No.793 of 2007 and dismissed the counter claim in the said suit as also O.S.No.848 of 2007. The defendants challenged the decision of the trial court in appeals. The appellate court, on a reappraisal of the evidence on record, found that the plaintiff has not established that the plaint B schedule property is a public pathway and consequently, reversed the decision of the trial court and dismissed O.S.No.793 of 2007 and decreed the counter claim as also O.S.No.848 of 2007. The plaintiff in O.S.No.793 of 2007 and the defendant in O.S.No.848 of 2007, who are aggrieved by the decision of the appellate court, have thus come up in these second appeals.

3. Heard the learned counsel for the appellants.

4. The learned counsel for the appellants raised two contentions. The first contention raised by the learned counsel for the appellants is that Ext.A3 report and plan prepared by XW2 Village Officer would indicate beyond

doubt that the plaint B schedule property is a public pathway. He also contended that at any rate, the decree passed by the appellate court in the counter claim preferred by the defendants in the suit is unsustainable as the plaintiff is not sharing a common boundary with the defendants.

5. There is nothing on record to indicate that the plaintiff has raised a contention before the courts below that he is not sharing a common boundary with defendants 1 and 2 and that therefore, the counter claim raised by the defendants in the suit is unsustainable. Further, if the plaintiff is not sharing any common boundary with the defendants, there is no reason why he should feel aggrieved by the decision in the counter claim. Again, the defendant in O.S.No.848 of 2007 who is the appellant in R.S.A.No.1023 of 2013 and who is sharing a common boundary with the defendants, is not seen to have disputed the fixation of the southern boundary of the defendants' property by the Advocate Commissioner. There is,

therefore, no substance in the contention raised by the learned counsel for the appellants as regards the decree passed by the appellate court in the counter claim preferred by the defendants.

6. Coming to the contention raised concerning the plaint B schedule property, it is now settled that a public pathway can be created only by acquisition or dedication. The appellants have no case that the plaint schedule property is a property acquired from the defendants for the purpose of forming a public pathway. They have also no case that the said pathway is a pathway formed by dedicating the property by its owners for the use of the general public. On the other hand, the case of the plaintiff and the defendant in O.S.No.848 of 2007 is only that Ext.A3 prepared by XW2 would indicate that the plaint B schedule property is a public pathway. The appellate court found on facts that that Ext.A3 is not a document prepared based on any public document. The appellate court also found that in

the resurvey records maintained by the Survey Department, the plaint B schedule pathway does not find a place. It is in the said circumstances, the appellate court held that the plaintiff has not established that the plaint B schedule property is a public pathway. There is, therefore, no substance in the contention raised by the learned counsel for the appellants concerning the plaint B schedule property as well.

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.

P.B.SURESH KUMAR, JUDGE.

smm