

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

WEDNESDAY, THE 29TH DAY OF JULY 2015/7TH SRAVANA, 1937

RP.No. 402 of 2014 () IN RSA.239/2013

AGAINST THE JUDGMENT IN RSA NO. 239/2013 of HIGH COURT OF KERALA
DATED 25-06-2013

REVIEW PETITIONER(S)/APPELLANTS/APPELLANTS/DEFENDANTS:

1. ANNIE STEPHEN, AGED 61 YEARS
W/O.STEPHEN, MUPRAPPALLIL HOUSE, UZHAVOOR EAST PO
UZHAVOOR VILLAGE, MEENACHIL TALUK.
2. M.E.STEPHEN, AGED 66 YEARS
S/O.ESTHAPPAN, MUPRAPPALLIL HOUSE, UZHAVOOR EAST PO
UZHAVOOR VILAGE, MEENACHIL TALUK.
3. M.STESON AGED 38 YEARS
S/O.STEPHEN, MUPRAPPALLIL HOUSE, UZHAVOOR EAST PO
UZHAVOOR VILLAGE, MEENACHIL TALUK
NOW RESIDING AT NO.8 CROFTON ROAD, OLD SWAN
LIVER POOL L.13, UNITED KINGDOM
REP.BY HIS FATHER AND POWER OF ATTORNEY HOLDER THE SECOND
APPELLANT M.E.STEPHEN OF MUPRAPPALLIL HOUSE
UZHAVOOR EAST PO, UZHAVOOR VILLAGE, MEENACHIL TALUK.

BY ADVS.SRI.P.SANTHALINGAM (SENIOR ADVOCATE)
SRI.S.SHARAN
SRI.P.G.JACOB

RESPONDENT(S)/RESPONDENT/RESPONDENT/PLAINTIFF:

MATHEW JOSEPH
S/O.UTHUPAN, RESIDING AT KAIPARETTU HOUSE
UZHAVOOR EAST PO, UZHAVOOR VILAGE, MEENACHIL TALUK
KOTTAYAM DISTRICT 686 634.

BY ADV. SRI.M.NARENDRA KUMAR

THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON 24.07.2015, THE
COURT ON 29-07-2015 PASSED THE FOLLOWING:

A.HARIPRASAD, J.

Review Petition No.402 of 2014

in

R.S.A. No.239 of 2013

Dated this the 29th day of July, 2015

ORDER

Heard the learned counsel for the review petitioners and the contesting respondent.

2. Review petitioners are the defendants in a suit for declaration of easement right by grant for ingress and egress to the plaint schedule property. The plaintiff is the respondent in this review petition. The trial court as well as the first appellate court concurrently found that the rights set up by the plaintiff are legally sustainable and hence decreed the suit. That was challenged in R.S.A.No.239 of 2013 before this Court. Learned Single Judge vide judgment dated 25.06.2013 considered the entire matters at length and decided the points against the appellants/review petitioners. The second appeal was dismissed finding that there was no merit.

3. The review petitioners contend that there are errors apparent on the face of the record and the findings arrived at by this Court require to be reconsidered. Learned counsel for the review petitioners mainly contended that the theory of implied grant developed by the trial court is

legally wrong. The suit was decreed throughout without reference to the pleadings in the matter. The same was repeated by the lower appellate court too.

4. Per contra, learned counsel for the plaintiff/respondent contended that the case of the review petitioners, if considered in toto, is insufficient for invoking the jurisdiction of this Court under Order XLVII Rule 1 of the Code of Civil Procedure (in short, "CPC"). Respondent placed reliance on a Division Bench decision of this Court in **Delta Foundations & Constructions v. Kerala State Construction Corporation Ltd. (2003 (1) KLT 626)** to contend as follows:

"Error apparent on the face of the record must be an error which must strike on mere looking at the record and would not require long drawn process of reasoning on points on which there may conceivably be two opinions. An error which is not self evident and has to be detected by a process of reasoning can hardly said to be an error apparent on the face of the record justifying the court to exercise its powers under O.XLXII R.1 of the Code of Civil Procedure. If there is a clear distinction between an erroneous decision and an error apparent on the face of the record the first can be corrected by the higher forum while the latter can

only be corrected by exercise of the review jurisdiction.”

Another Division Bench of this Court in **Smt.Kamala Raphael v. Earnest & Ors.(2011 (1) KLJ 286)** also took the same view and expressed the same as follows:

“Under O.47 R.1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under O.47 R.1 CPC. In exercise of the jurisdiction under O.47 R.1 CPC it is not permissible for an erroneous decision to be “reheard and corrected”. A review petition, it must be remembered has a limited purpose and cannot be allowed to be “an appeal in disguise”.

Therefore, it is evident that the error said to have been occurred in the judgment of this Court must be patent and it shall not be one detected on a long drawn process of reasoning.

5. Learned counsel for the review petitioners contended that the finding that there was an implied grant permitting the respondent to use the

disputed pathway is bereft of pleading. On the basis of the decision of the Supreme Court in **Rajagopal (dead) By Lrs. v. Kishan Gopal and another ((2003) 10 SCC 653)**, it is contended that in the absence of specific pleading in the plaint, no lis exists thereon and the courts are precluded from taking cognizance on mere evidence. This proposition is unchallengeable. But as contended by the learned counsel for the respondent, these facts have been marshalled and analysed by the two courts below and after referring to the pleadings and evidence, the courts below arrived at a finding that the plaintiff/respondent is entitled to claim a right of way through the disputed pathway by virtue of a grant. This factual finding was re-examined by this Court in extenso, though not relevant in a second appeal, and arrived at a finding that the respondent succeeded in proving an implied grant for claiming a right of access. Various authorities have been cited at Bar to impress upon the distinction between easement of necessity and right of easement claimed through grant. I am of the view that those decisions are not germane for considering the question since what is the scope of review is well settled and the review cannot be treated as an appeal in disguise.

6. In the grounds of review also, factual issues are raked up by the review petitioner attacking the reasoning of this Court based on

evidence. Understanding the scope of review correctly as mentioned in the decisions quoted above, I am unable to agree with the submission of the learned counsel appearing for the review petitioners that this Court committed an error apparent on the face of the record warranting a review of the judgment. I find no merit in the review petition.

In the result, the review petition is dismissed.

A. HARIPRASAD, JUDGE.

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