

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 16TH DAY OF NOVEMBER 2015/25TH KARTHIKA, 1937

RSA.No. 1101 of 2015 ()

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AGAINST THE JUDGMENT IN AS. NO.8/2015 OF SUB COURT, KOCHI
DATED 03-07-2015**

**AGAINST THE JUDGMENT IN OS. NO.131/2012 OF PRINCIPAL MUNSIF COURT,
KOCHI DATED 05-01-2015.**

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APPELLANTS/RESPONDENTS IN AS/DEFENDANTS:

- 1. CATHERINE JOSEPH, AGED 87 YEARS,
W/O. JOSEPH, HOUSE NO.11/1247, KARIMANCHERRY HOUSE,
ODATH, VELI, FORT KOCHI, KOCHI -682 001.**
- 2. JANNET JOSEPH, AGED 60 YEARS,
D/O.JOSEPH, HOUSE NO.11/1247, KARIMANCHERRY HOUSE,
ODATH, VELI, FORT KOCHI, KOCHI -682 001.**
- 3. USHA, AGED 56 YEARS,
D/O.JOSEPH, HOUSE NO.11/1247, KARIMANCHERRY HOUSE,
ODATH, VELI, FORT KOCHI, KOCHI -682 001.**
- 4. TITUS JOSEPH, AGED 53 YEARS,
S/O.JOSEPH, HOUSE NO.11/1247, KARIMANCHERRY HOUSE,
ODATH, VELI, FORT KOCHI, KOCHI -682 001.**
- 5. ALEX JOSEPH @ ALEXANDER JOSEPH, AGED 49 YEARS,
S/O.JOSEPH, HOUSE NO. 11/1247, KARIMANCHERRY HOUSE,
ODATH, VELI, FORT KOCHI, KOCHI -682 001,
REPRESENTED BY WIFE AND POWER OF
ATTORNEY HOLDER ROSHNI.**

**BY ADVS.SRI.M.P.RAMNATH,
SRI.P.RAJESH (KOTTAKKAL),
SEI.M.VARGHESE VARGHESE,
SMT.UMA R.KAMATH,
SMT.S.SANDHYA,
SRI.BEPIN PAUL,
SRI.SHALU VARGHESE.**

RESPONDENTS/APPELLANTS IN AS/PLAINTIFFS:

- 1. LALY JOSSEY @ LALY JOSEPH, AGED 52 YEARS,
W/O.E.A. JOSSEY, ERASSERIL HOUSE, HOUSE NO.11/1243 -F,
ODATH, VELI, FORT KOCHI, KOCHI- 682 001.**
- 2. JOSEPH KURISINGAL, AGED 55 YEARS,
S/O.SIMON, KURISINGAL HOUSE, HOUSE NO.11/1244-A,
ODATH, VELI, FORT KOCHI, KOCHI -682 001.**
- 3. FRANCIS. G. @ SHAURIAL, AGED 55 YEARS,
S/O. GEORGE, HOUSE NO.11/1245- A, PALLIPARAMBIL HOUSE,
ODATH, VELI, FORT KOCHI, KOCHI- 682 001.**
- 4. JOHNSON P.G., AGED 52 YEARS,
S/O. GEORGE, HOUSE NO.11/1245, PALLIPARAMBIL HOUSE,
ODATH, VELI, FORT KOCHI, KOCHI -682 001.**

R1, R2 & R4 BY ADV. SRI.G.KRISHNAKUMAR.

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 16-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

rs.

P.B.SURESH KUMAR, J.

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R.S.A.No.1101 of 2015.

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Dated this the 16th day of November, 2015.

J U D G M E N T

The defendants in a suit for injunction are the appellants in this second appeal.

2. The plaint A to D schedule properties belong to the plaintiffs. The plaint E schedule property belongs to the defendants. According to the plaintiffs, there is a pathway having a width of three meters through the eastern boundary of plaint E schedule property to plaint A to D schedule properties. The pathway claimed by the plaintiffs through plaint E schedule property is shown in the plaint as plaint F schedule. The case of the plaintiffs is that they have prescribed a right of easement over plaint F schedule pathway. It is alleged that the defendants are causing obstruction to the user of plaint F schedule pathway and hence the suit for injunction restraining the defendants from

causing obstructions to the user of plaint F schedule pathway. The defendants contested the suit. According to them, the plaintiffs have not prescribed any right over plaint F schedule pathway. It was, however, conceded by the defendants that they have permitted the plaintiffs to use a portion of plaint E schedule property having a width of four feet for the convenient enjoyment of plaint A to D schedule properties and that the plaintiffs have been using plaint E schedule property only as permitted by defendants. The trial court found that the plaintiffs have acquired a right of easement by prescription over a portion of plaint E schedule property having a width of 1.25 meters. Consequently, a decree of injunction was passed restraining the defendants from causing obstruction to the user of the said property having a width of 1.25 meters. Dissatisfied with the decision of the trial court, the plaintiffs preferred an appeal. The appellate court, on a consideration of materials on record, found that the width of the pathway claimed by the plaintiffs

is not 1.25 meters. Instead, according to the appellate court, the width of the pathway varies from 1.25 meters to 2 meters at different points. Consequently, the appellate court modified the decision of the trial court taking the average at 1.5 meters. The operative portion of the appellate decision reads thus:

“(a) The plaintiff is entitled for a decree of prohibitory injunction restraining the defendants and their men from causing any inconvenience, obstruction or damage to the pathway having 1.50 meters width on the eastern side of plaint 'E' schedule property and its peaceful enjoyment by the plaintiffs and their men.

(b) In the facts and circumstances of the case there is no order as to costs.”

The defendants have come up in this second appeal challenging the said decision of the appellate court.

3. Heard the learned counsel for the appellants as also the learned counsel for respondents 1, 2 and 4.

4. Having heard the learned counsel for the parties, the following substantial question of law was framed for decision in the second appeal :

“Whether the appellate court is justified in granting a decree declaring the right of easement by prescription claimed by the plaintiffs based on the average width of the pathway?”

5. As noticed above, the dispute between the parties is as to the width of the pathway claimed by the plaintiffs through plaint E schedule property. According to the plaintiffs, the width of the pathway is three meters and according to the defendants, the width of the pathway is 1.25 meters. As noticed above, the trial court accepted the case of the defendants. The appellate court, however, found that the width of the pathway varies from 1.25 meters to 2 meters. It is on the basis of the said finding, the appellate court modified the decree passed by the trial court as indicated above. I am unable to agree with the view taken by the appellate court. As noticed above, the case of the plaintiffs is that they have prescribed a right of easement over plaint E schedule property. It is beyond dispute that for prescribing a right of easement, one has to

use the property. It is categorically found by the appellate court that at some points the user is limited to 1.25 meters. If the user is limited at some points to 1.25 meters, the plaintiffs cannot claim a right of easement by prescription beyond that. In the said view of the matter, I do not find any justification for the appellate court to vary the decision passed by the trial court. The question of law framed for decision is thus answered in favour of the appellants.

In the result, the appeal is allowed and the decision of the trial court is restored. All the interlocutory applications in the appeal are closed.

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

Kvs/-

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PA TO JUDGE.