

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 11TH DAY OF JUNE 2015/21ST JYAISHTA, 1937

SA.No. 204 of 2003

JUDGMENT DATED 16-06-2001 IN AS 146/1998 OF DISTRICT COURT, KOZHIKODE

JUDGMENT DATED 31-01-1998 IN OS 154/1993 OF SUB COURT, KOYILANDY
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APPELLANT(S)/RESPONDENTS-PLAINTIFFS IN LOWER COURTS:

- * 1. C.K.CHATHU, AGED 72 YEARS,
S/O KANNAN, KUNATH MEETHAL HOUSE,
PURAKKAD AMSOM, PURAKKAD - 673 522,
KOYILANDY TALUK, KOZHIKODE DISTRICT. (DIED)
(LHRS IMPEDED AS ADDITIONAL APPELLANTS 3 TO 5)
- 2. C.K.AMMALU, AGED 54 YEARS,
W/O CHATHU, KUNNATH MEETHAL HOUSE, PURAKKAD AMSOM,
PURAKKAD - 673 522, KOYILANDY TALUK, KOZHIKODE DISTRICT.
- * 3. C.K.NARAYANAN, S/O.LATE CHATHU, AGED 48 YEARS,
EDAVANAKANDYTHAZHA, PURAKKAD AMSOM,
DESOM, KOYILANDY TALUK, KOZHIKODE DISTRICT.
- 4. BROTHER, C.K.DAMODRAN, AGED 43 YEARS,
KUNNATH MEETHAL, PURAKKAD AMSOM,
DESOM, KOYILANDY TALUK, KOZHIKODE DISTRICT.
- 5. BROTHER, C.K.SREEDHARAN, AGED 39 YEARS,
KUNNATH MEETHAL, PURAKKAD AMSOM,
DESOM, KOYILANDY TALUK, KOZHIKODE DISTRICT.
- * LEGAL HEIRS OF DECEASED 1ST APPELLANT ARE IMPEADED
AS ADDITIONAL APPELLANTS 3 TO 5 AS PER THE ORDER
DTD.11.6.2015 IN IA.2345/2007.

**BY ADVS.SRI.B.KRISHNAN
SRI.PARTHASARATHY**

msv/

SA.No. 204 of 2003

RESPONDENT(S)/APPELLANT-DEFENDANT IN LOWER COURTS:

RAROTH MEETHAL KANNAN,
AGED 54 YEARS, S/O. CHATHAPPAN, PURAKKAD AMSOM,
PURAKKAD - 673 522, KOYILANDY TALUK, KOZHIKODE DISTRICT.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

msv/

P.BHAVADASAN, J.

S.A. No. 204 of 2003

Dated this the 11th day of June, 2015

J U D G M E N T

A very short question arises for consideration in this second appeal and that is regarding the alignment of a way which the plaintiff claims through the property of the defendant.

2. Plaint A schedule property belonged to plaintiff and plaint B schedule is that of the defendant. According to the plaintiff, there was an earlier suit as O.S.No. 30/1989 in which the parties were the plaintiff herein and the predecessor-in-interest of the defendant herein was the defendant in the said suit. That suit also related to the same way in question. Relying heavily on Ext.A4, A2 and A3, which are the sketch prepared by the Commissioner in the earlier suit and the judgment and decree in the said suit, it is contended by the learned counsel for the appellants that the finding lower appellate court that in all probability the way

must have been along the northern boundary of the property of the defendant, cannot be accepted.

3. It will be useful at this juncture to refer to the plan in this case namely Ext.C3. The plaintiff's property is shown as 'ABCD' and the property of the defendant is shown as 'MNOP'. There is no dispute regarding the fact that along the eastern boundary of the defendant's property, which is situated on the eastern side of the plaintiff's property, there is a by-lane running north-south. Referring to Ext.C3, the way claimed by the plaintiff as per the earlier decree is shown as 'LM' by the Commissioner.

4. It was based on Exts. A2, A3 and A4 that the present suit was laid complaining of the present defendant changing the alignment of a way from 'LZ' to 'NZ'.

5. The defendant resisted the suit and pointed out that there were no change in alignment and the way that was provided under the earlier suit was the same way as is now seen in the Commissioner's report. The defendant

pointed out that attempt of the plaintiff is to get a new way laid through his property.

6. Issues were raised and the parties went to trial. The evidence consists of the testimony of PW1 and documents marked as Exts. A1 to A6 from the side of the plaintiff and defendant had DW1 examined and had Exts. B1 and B2 marked. Exts. C1 to C3 are the Commissioner's report and plan.

7. On an appreciation of the evidence in the case, the trial court chose to accept the plea of the plaintiff that the pathway was actually along with 'LZ' line shown in Ext.C3 plan by the Commissioner in the present case and granted a decree to that effect.

8. The aggrieved defendant carried the matter in appeal and the lower appellate court, on an re-appreciation of the evidence, came to the conclusion that there is no concrete evidence to show that the pathway as claimed by the plaintiff in the present suit was the pathway as is the

subject matter of the earlier suit. Or in other words, the lower appellate court found it extremely difficult to come to the conclusion that the pathway, which was the subject matter of the earlier suit, was 'LZ' and not 'MN'. Based on all probabilities and the present stage of affairs, the lower appellate court felt that in all probability, the way would have been along MN itself and the decree of the trial court granting a relief of having a way through 'LZ' was reversed by the lower appellate court.

9. Notice was issued on the following substantial questions of law:

- “1) Did the lower appellate court act contrary to law in refusing to act on Ext.A4 plan after the same was admitted to in evidence before the trial court?
- 2) In the facts and circumstances of the case, is the decree of the lower appellate court sustainable in law in view of the findings in Ext.A2 suit?
- 3) Have the courts below acted in accordance with the law in the matter of appreciating the evidence on record?”

10. Sri. B. Krishnan, the learned counsel appearing for the appellants contended that the defendant who is the successor-in-interest of the defendant in the earlier suit namely O.S.No. 30/1989 cannot be heard to contend that the way provided is one along 'MN' line when Ext.A4 Commissioner's report which formed the basis of Ext.A2 decree in the earlier suit showed the way was along 'LZ' line in Ext.C3. The learned counsel went on to point out that having come to the conclusion in the earlier suit that the way was along 'LZ' in Ext.C3, the alignment could not have been changed later on without the consent of the plaintiff. The lower appellate court, according to the learned counsel, fell into error in coming to the conclusion that there were no material to show that in the earlier suit, the way was located along 'ZL' line. A reading of Exts. A2, A3 and a perusal of Ext.A4 taken along with Amin's report ie., Ext.A5 will clearly show that the way in question as located in O.S.No. 30/1989 was along the 'LZ' line and the trial court had rightly decreed

the suit. There was no reason for the lower appellate court to interfere with the same.

11. Though the argument seems to have considerable force and looks very attractive, on a closer scrutiny, it is difficult to accept the same. It is true that there was an earlier suit between the plaintiff in this case and the predecessor-in- interest of the defendant with regard to the same way. Ext.A4 is the plan in the earlier suit. There, the way is indicated as shown as 'LZ' in the present Ext.C3 plan. Ext.A4 plan was not appended to the decree in the earlier suit and the description in decree schedule provides no help to ascertain the way for which relief was granted in O.S.No.30/1989. It is in this context, one will have to appreciate the facts of the case.

12. In Ext.A5, the report furnished by the Amin though it has been stated that in execution proceedings i.e, E.P.No. 47/1991 in O.S.No.30/1989, he had gone to the place and located the way as per the decree and plan in the suit, he

would say that 10 steps were seen put up with laterite stones. He would also report that only a portion of the way is actually visible and the rest of the so called way is covered by the thick growth of grass and shrubs.

13. Even though the decree holder in O.S.No. 30/1989 took serious objection to the report and wanted a fresh location of the way in laying of the way and also wanted the judgment debtor to deposit the amount for the same, that was declined and the report of the Amin was accepted and that E.P. was closed. Therefore, except for the alignment shown in Ext.A4, there is nothing to show that the way available was along 'LZ' line.

14. Coming to the present case, Exts. C1 to C3 are the Commissioner's report and plan. Ext.C3 is the plan on which the lower appellate court placed reliance for arriving at its conclusion. The Commissioner has reported that at the time of his inspection on 16.11.1994, he could locate 3 steps at the point 'M' shown in Ext.C3 plan and at the 'N' point, there

are 9 steps. The Commissioner has taken caution to mention that he had gone through the Commissioner's report in O.S.No.30/1989 and that he observed that at the time of his inspection, a way as claimed along 'LZ' was nowhere visible at sight and there were no basis of any such way. It is also mentioned in Ext.C2 report that no traces of any steps ever having been put up or existed at the 'L' point also. The Commissioner again visited the spot and furnished Ext.C1 report dated 11.12.1995. At the time of the second visit, the Commissioner reported that the defendant informed them that the way was along 'ZL' line. But the Commissioner reported that he was unable to locate such a way.

15. One may here recall Ext.A4 report filed by the Amin in the earlier suit. He makes mention of 10 steps having been put up with laterite stones on the eastern boundary of the defendant's property in that suit and also about the steps at the western boundary of the property of

the defendant in that suit. One may now refer to the present report also. The present report says that at the point 'L' where the plaintiff claimed the way began and ended at point 'Z', which was the subject matter of the decree in O.S. NO. 30/89, the Commissioner could not locate any traces of any steps of laterite stones. But he was able to locate 9 steps at the point 'N'. There is nothing to show that the 9 steps located by the Commissioner in Ext.C2 report is newly laid. One may here also recall that in the Amin report Ext.A4, a good portion of the way then claimed remained unused and was covered by shrubs.

16. One cannot omit to note that Ext.A4 was not made part of the decree and a reading of the decree schedule in O.S.No.30/89 provides no help regarding the location of the way.

17. It was the above factors which weighed with the lower appellate court. Trial court simply went on the premises that Ext.A4 concludes the issue. It may not be so,

more so in the case when both the way are now not in existence. However, the defendant in the present suit has been gracious enough to say that the way available to the plaintiff is along the extreme northern side of his property. Whatever that be, the lower appellate court was persuaded by the existence of the 9 steps of laterite stones and also the fact that there is no traces of any such way as claimed by the plaintiff led to the appellate court judgment and decree. There is nothing to show that there was continuous use of 'LZ' way by the plaintiff so as to leave traces there.

18. When viewed from that angle, it looks more probable that the way would have been provided along the northern side of the property of the defendant causing least inconvenience to him. Any how, it could not be said that the judgment and decree of the lower appellate court is perverse or contrary to the evidence on record. It is a possible view. If that be so, interference by this Court at the second appellate stage is not warranted.

This second appeal is without merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge