

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYAISHTA, 1937

SA.No. 245 of 2003

**AS 12/2001 OF VI ADDITIONAL DISTRICT COURT, ERNAKULAM.
OS 289/1996 OF PRINCIPAL MUNSIF COURT., ERNAKULAM.**

APPELLANT/FIRST RESPONDENT/FIRST DEFENDANT:

***VELAYUDHAN, SON OF LATE KRISHNAN,
AGED 76, PEZHUNGA PARAMBIL,
REPRESENTED BY HIS DAUGHTER AND POWER
OF ATTORNEY HOLDER, SANTHA, WIFE OF ARJUNAN,
AGED 45, THRIKKAKARA NORTH VILLAGE,
KANAYANNUR TALUK(POWER OF ATTORNEY
PRODUCED IN O.S.289/1996 AND MARKED AS EXT.B1)(DIED)**

***ADDL. APPELLANTS2 & 3 IMPLEADED**

- 2. PARU, W/O.LATE VELAYUDHAN, AGED 88,
PEZHUNGAPARAMBIL HOUSE,
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK.**
- 3. SANTHA, W/O.ARJUN, AGED 55,
PEZHUNGAPARAMBIL HOUSE,
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK.**

**LRS OF THE DECEASED SOLE APPELLANT ARE IMPLEADED AS
ADDL. APPELLANTS 2 AND 3 AS PER ORDER DATED 20.11.2013 IN
IA.3093/2013.**

**BY ADVS. SRI.M.N.MANMADAN
SRI.A.BALAGOPALAN**

**RESPONDENT(S)/APPELLANTS AND RESPONDENTS 2
AND 3/DEFENDANTS 2 AND 3:**

- 1. MARY, WIFE OF KOZHIKKAL JOSEPH, AGED 48,
RESIDING AT PEZHUNGAPARAMBIL, KANGARAPADY,
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK.**

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2. JOSEPH, SON OF KOZHIKKARA PYLI, AGED 50,
RESIDING AT PEZHUNGAPARAMBIL, KANGARAPADY,
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK.
3. GOPALAN, SON OF KRISHNAN, AGED 64,
RESIDING AT PEZHUNGAPARAMBIL, KANGARAPADY,
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK.
4. GOPI, SON OF VANACHIRAKKAL KUNJAN VAIDYAN,
BUSINESS, KANAYANNUR TALUK,
THRIKKAKARA NORTH VILLAGE, VADAKODU KARA.

R1 & R2 BY ADVS. SRI.A.X.VARGHESE
SRI.A.V.JOJO
SMT.R.SUDHA
R3 BY ADV. SRI.R.RAJESH

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 02-03-2015
ALONG WITH SA. 246/2003, THE COURT ON 25-05-2015 DELIVERED THE
FOLLOWING:

mbr/

A.V.RAMAKRISHNA PILLAI, J

S.A.Nos.245 & 246 of 2003

Dated this the 25th day of May, 2015

JUDGMENT

S.A.No.245/2003 arise out of the decree and judgment in A.S.No.12/2001 on the file of the VI Addl.District Court, Ernakulam, which in turn was directed against the judgment and decree in O.S.No.289/1996 on the file of the Munsiff's Court, Ernakulam. S.A.No.246/2003 arise out of the decree and judgment in A.S.No.10/2001 which in turn arose out of O.S.No.977/1996 on the file of the same Munsiff's Court.

2. The appellant was the plaintiff in O.S.No.977/1996 and he was the 1st defendant in O.S.No.289/1996. O.S.No.289/1996 was a suit for mandatory as well as prohibitory injunction. In that suit filed by the respondents, they alleged that plaint A and B schedule properties originally belonged to the second defendant in that suit as per a registered partition deed, and the respondents had purchased plaint A scheduled property and also the right to use plaint B schedule

pathway as per the registered partition deed in the year 1993 and ever since they are in possession and enjoyment of plaint A schedule property. They also alleged that plaint B schedule pathway having a width of 13 links was being used for their ingress and egress. The property which lies on the southern side of the plaint schedule property belongs to the first appellant. The appellant has been trying to trespass upon plaint B schedule property by removing plants from the boundary and thereafter, he has reduced a portion of plaint B schedule to his possession, which is specifically described as C schedule. He further alleged that they trespassed upon the property on 1.1.1995 and they have been trying to plant trees along the new boundary. Though, a complaint has been preferred before the Police Station, it did not evoke any response. Thus the respondents prayed for a decree for permanent prohibitory injunction restraining the appellants and other defendants from using plaint B schedule property having a width of 13 links and from causing any obstructions to the appellant's taking vehicles along the way, laying pipe line, drawing

electric line, telephone line etc. A mandatory injunction was also sought for directing the appellants and other defendants from removing the structures put up in B schedule pathway.

3. In the plaint in O.S.No.977/96, the appellant alleged that Plaint A schedule property therein belongs to him as per the partition deed of 1961 wherein, he has constructed a residential building thereafter. He claims absolute possession and enjoyment of the same. He further alleged that the plaint A schedule property originally belonged to the Sri.Krishnan, who is the father of the appellant. He assigned the property in favour of his wife and thereafter, in the partition, an extent of 9 cents of land in Sy.No.901/3b and another extent of 8 cents in Sy.No.901/3A was allotted to the share of the plaintiffs'. He who alleged that the properties held by him, his younger brother Kutty and the 2nd defendant Gopalan are having road frontage on the west. Therefore, there was no need to provide any pathway to the property of any of the shares. It is also alleged that the property allowed to the aforesaid Kutty lies immediately on the north of the plot

allotted to the 2nd defendant and the 2nd defendant had never obtained right or possession over 13 links width pathway. Before assigning the land in favour of the plaintiff's in O.S.No.289/96, the 2nd defendant had assigned certain properties in favour of 3rd defendant, which is immediately on the west of the property assigned to the plaintiffs' in O.S.No.289/96. In that document, the width of the pathway is mentioned as 7.5 links. The plaintiffs' in O.S.No.289/96 has been trying to grab a portion of the property of the plaintiff with a view to widen the pathway. The pathway in dispute does not have a width of 13 links as alleged. The trespass alleged in O.S.No.289/96 is incorrect. The complaint filed by the appellant before the police is false. The same contentions were taken by the appellant in the written statement filed by him in O.S.No.289/96.

4. Both suits were tried jointly by the trial court. After raising proper issues, PW1 and DW1 to 4 were examined. Exts.A1 to A8, Exts.B1 to B3 and Exts.C1 to C5 were marked in evidence.

5. The trial court on appreciation of the

evidence, came to the conclusion that plaint B schedule property as described in O.S.No.289/96 is not in existence and the plaintiff has no right to use the said pathway having a width of 13 links. It was also found that plaint C schedule property is not part of the pathway. Accordingly, O.S.No.289/96 was dismissed and O.S.No.977/96 was decreed.

6. The matter was taken in separate appeals before the lower appellate court which considered the appeals. The lower appellate court, after reappreciating the evidence, allowed the appeals and set aside the judgments and decrees of the trial court. O.S.No.289/98 was decreed and O.S.No.977/96 was dismissed. It is with this background, the appellant has approached this Court.

7. Arguments have been heard.

8. It was argued by the learned counsel for the appellant that the evidence adduced including the report of the commissioner would indicate that there exists no pathway having an extent of 13 links as alleged by the respondent. It was pointed out that the commissioner has not even considered whether there is any possibility of

having 13 links of way throughout especially in view of the existence of a survey stone on the north-western corner of the appellant's property and also the electric post and stay wire of the electric post which is installed on the northern boundary of the appellant's property. It is crucial to note that the appellant is not claiming title to plaint B schedule property mentioned in O.S.No.289/96. However, the appellant has a case that the said way is not in existence. The commissioner in his report, stated that the appellant has encroached upon the said pathway and reduced portions of the pathway to his possession by planting trees and also by staking chunks of wood along the pathway. The lower appellate court relied on the report of the commissioner, who was deputed to identify the properties with the help of Taluk Surveyor. Exts.c2 is the survey plan and Ext.C3 is the report submitted by the commissioner. According to the plan, the way having a width of 13 links is lying in the east-west direction, extending from the road on the west. It reaches upto the property of the respondents. The property of the appellant is on the southern side of the way and the property of the

respondents. The way is bounded on the north by the properties of Gopalan and Gopi. Shop rooms were seen on the northern side of this pathway in the north south direction having road frontage on the west. The commissioner has reported that the total extent of properties covered by the documents were identified by him. The properties allotted to the parties as per Ext.A4 partition deed was also identified. In Ext.C1, he has reported that the 13 links pathway leading to plaint A schedule property as stated in Ext.A1 plan was in existence. The southern boundary of the property, which touches the property of the appellant is a permanent one according to the commissioner. It is also crucial to note that except the said pathway, there is no other pathway to the property of the respondents. The portion of the pathway reduced to possession of the appellant was identified and demarcated by the commissioner as plot H in Ext.C2 plan. The remaining portion was shown as plot E. Plot G is also a portion of the pathway recited in Ext.A1 which is in existence. Therefore, plots E, H and G in Ext.C2 plan are portions of the 13 links pathway. The installation

of electric posts or survey stones on the said way will not disentitle the respondents in claiming the right on way over plaint B schedule property in O.S.No.289/96.

9. Therefore, this Court is of the view that the lower appellate court was justified in granting a decree in favour of the respondents and refusing the prayer of the appellant. As the lower appellate court has not wrongly decided any question of law, this Court is of the definite view that the scope of interference by this Court in this second appeal is little.

In the result, the appeal fails and accordingly it is dismissed.

Sd/-
A.V.RAMAKRISHNA PILLAI
JUDGE

VS

/TRUE COPY/

PA TO JUDGE