

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 3RD DAY OF JUNE 2015/13TH JYAISHTA, 1937

SA.No. 107 of 1998 (D)

(AGAINST THE JUDGMENT AND DECREE IN AS 74/1996 of ADDL.SUB COURT,
KOCHI DATED 23-08-1997

OS 393/1994 of PRL.MUNSIFF COURT KOCHI)

APPELLANT/RESPONDENT-PLAINTIFF:

K.K. SWARNAVALLI, W/O. VIJAYARAMAN,
RESIDING AT 12/1314, CHULLICKAL ROAD,
KOCHI - 5. (DIED. LRs IMPEADED).

ADDL. APPELLANT IMPEADED
P.V. AVTAAR, S/O. P.V. VIJAYAKUMAR,
AGED 20 YEARS, RESIDING AT 6/444 A
(NEW No.XV/36), FR. GEORGE VAKAYIL ROAD,
NEAR MOOTHEDAM CHURCH, MARADU,
ERNAKULAM - 682 304.

(LRs OF THE DECEASED SOLE APPELLANT IMPEADED AS ADDL.
APPELLANT AS PER ORDER DTD.20.6.12 IN I.A.1469/12).

BY ADV. SMT. SUMATHI DANDAPANI (SR.)
ADV. SRI.MILLU DANDAPANI

RESPONDENT/APPELLANT-DEFENDANT:-

1. SHRI M P PAUL, IV/339 (C-4-188),
MUTTUNGAL HOUSE, OCHANATHURUTH,
KOCHI - 682 508 (DIED. LRs IMPEADED).

ADDL.R2 JESSI PAUL, W/O. LATE M.P. PAUL,
R/O IV/339 (C-4-188),
MUTTUNGAL HOSUE, OCHANATHURUTHU, COCHIN - 682 508.

ADDL.R3 SWAPNA PAUL, D/O. LATE M.P. PAUL,
R/O IV/339 (C-4-188),
MUTTUNGAL HOSUE, OCHANATHURUTHU, COCHIN - 682 508.

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ADDL.R4 GENA PAUL,
 R/O IV/339 (C-4-188),
 MUTTUNGAL HOSUE, OCHANATHURUTHU, COCHIN - 682 508.

ADDL.R5 ANJU PAUL, D/O. LATE M.P. PAUL,
 R/O IV/339 (C-4-188),
 MUTTUNGAL HOSUE, OCHANATHURUTHU, COCHIN - 682 508.

(LRs OF THE DECEASED SOLE RESPONDENT IMPEADED AS
ADDL. RESPONDENTS 2 TO 5 AS PER ORDER DTD.20.6.12 IN
I.A.2123/06).

BY ADV. SRI.S.SREEKUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON
03-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Second Appeal No.107 OF 1998

Dated this the 3rd day of June, 2015.

J U D G M E N T

The plaintiff in O.S.No.393/1994 before the Principal Munsiff Court, Kochi who was successful before the trial court but failed before the lower appellate court is the appellant before this Court.

2. The suit related to pathway shown as B schedule. Plaintiff A schedule property was obtained by plaintiff as per Ext.A1 partition deed. It was alleged that plaintiff B schedule pathway runs through the property of the defendant and that was the sole means of access to plaintiff A schedule property. Complaining that the defendant is trying to block B schedule pathway thereby denying access to the plaintiff's property, suit was laid.

3. The defendant resisted the suit by pointing out that there is no such way as shown as B schedule in existence and the plaintiff has other means of access to her property. He denied that any portion of his property has ever been used by the

plaintiff or any other person as pathway and the present claim is without any bonafide. He therefore prayed for dismissal of the suit.

4. Issues were raised and the parties went to trial. Evidence consists of the testimony of PWs 1 to 5 and Ext.A1 marked on the side of the plaintiff. The defendant examined DWs 1 to 3. Exts.C1, C1(a), C2 and C2(a) are the commission reports and plans.

5. The trial court mainly impressed by the fact that there is a gate on the southern boundary of the property of plaintiff and there is also a gate on the eastern boundary of defendant came to the conclusion that the case set up by the plaintiff is probably true and that the plaintiff has no other means of access to her property and therefore, decreed the suit.

6. Disappointed defendant carried the matter in appeal and the lower appellate court after re-appreciating the evidence found that the claim of the plaintiff was that there was an E schedule property which was used as pathway and B schedule was a continuation of the same. The lower appellate court found that

the Commissioner could not identify E schedule at all and going by the recital in Ext.A1, it is only a piece of land which is entitled to be used for discharging of water during rainy season. Holding that the materials available are not sufficient to confer right on the plaintiff, the appeal was allowed and the suit was dismissed.

7. The following substantial questions of law have been formulated in this appeal for consideration.

- 1) Whether the Lower Appellate Court is justified in dismissing the suit without considering and appreciating the oral evidence in the case?
- 2) Whether the Lower Appellate Court is justified in dismissing the suit, especially, when the plaintiff has clearly established his right of easement as provided under Section 15 of the Easement Act?
- 3) Is the judgment and decree passed by the Lower Appellate Court is justifiable, especially, when it is so vague and ambiguous?
- 4) Whether the Lower Appellate Court is justified in reversing the judgment and decree of the trial court without re-appreciating the evidence?

8. Smt.Sumathi Dandapani, learned Senior Counsel appearing for the appellant pointed out that the lower appellate court was not justified in interfering with the decree of the trial court. The trial court on appreciation of the evidence did find the existence of pathway as alleged by the plaintiff and its use by the plaintiff. The existence of a compound wall separating the property of the defendant from B schedule pathway coupled with the existence of gate in the compound wall opening to the pathway namely, B schedule and so also the gate put up on the southern boundary of the plaint A schedule property giving access to B schedule are sufficient in law to justify the conclusion that the claim of the plaintiff is true. It is also pointed out by the learned Senior Counsel that the defendant has miserably failed to show that the plaintiff has any other means of access to her property and the oral evidence adduced by the plaintiff is sufficient to show that there is a pathway shown as B schedule. That the said pathway has been used for a long time is evidenced by the oral evidence adduced by the parties. Learned Senior Counsel went on to point out that the reversal of the judgment

and decree of the trial court was uncalled for.

9. Sri.S.Sreekumar, learned Senior Counsel appearing for the respondent, on the other hand, supported the findings of the lower appellate court. It is pointed out that the pleadings in the plaint are ambiguous and inconsistent in nature. Learned Senior Counsel emphasised that in a suit where claim of easement right is put forward, pleadings are to be precise. In the case on hand, both easement by necessity and prescription are pleaded. Learned Senior Counsel went on to point out that a perusal of Ext.A1 document would show that the property which was the subject matter of partition had direct road access and if that be so, right of easement by necessity can only arise by partition as evidenced by Ext.A1. Even assuming that there is a right of way, that could be only against the sharers who partitioned the property as per Ext.A1 and not against a stranger. As regards the prescriptive right of easement, argument advanced is that if one carefully goes through Ext.A1, it can be seen that there are two pathways on the western and another portion of the entire property which was lying as common plot which was the subject

matter of partition and E schedule property which is set apart as common in the partition deed and which is now claimed to be a portion of the pathway came into existence in the year 1982. The suit is of the year 1994. The statutory period is therefore not satisfied. The mere fact that there is a compound wall with a gate on the eastern boundary of the defendant's property may not be sufficient in the sense that it is for the plaintiff to prove and establish her case of prescriptive right of easement. These aspects, according to the learned Senior Counsel, have been omitted to be noticed by the trial court and the trial court was persuaded by the presence of gate and compound wall separating the property of the defendant which may not have much significance, according to the learned Senior Counsel, when viewed in the light of other facts and circumstances brought out in evidence in the case.

10. After having heard the learned counsel on both sides, it is felt that there is considerable force in the submission made by the learned Senior Counsel for the respondent. It is trite that pleadings in a case where prescriptive right of easement or such

other easement rights are claimed, will have to be precise and definite. In the case on hand, it is seen that both the right of easement by necessity and prescription have been claimed. In paragraph 2 of the plaint it is mentioned that when the properties were partitioned, E schedule was set apart as common pathway for the requirements of the sharers. In fact when one goes through Ext.A1 partition deed, it is not seen mentioned that E schedule is set apart as pathway. But it is seen that it is a strip of land enabling some of the sharers to discharge water during rainy season. As far as the pathway is concerned, there is a mention in Ext.A1 to the effect that along the northern boundary of item No.1 in A schedule, a walkable pathway is provided.

11. Coming back to the plaint again, even though in one portion of plaint, it is stated that E schedule belongs to defendant, in the same paragraph it is stated that while the properties were partitioned, 16 links pathway was provided to the entire property and that is shown as B schedule. Inconsistencies in the pleadings are not properly explained. Further, as rightly pointed out by the learned Senior Counsel for the respondent, a

Careful look at Ext.A1 would clearly show that the property partitioned under Ext.A1 lies as a compact plot and it had direct road access. There is no evidence in the case to show that while the property was lying as a compact plot, B schedule pathway now claimed to be running through the property of the defendant was being used.

12. It is significant to notice that except PW1, the plaintiff, none of the other sharers who obtained property under Ext.A1 have been examined to show that any of them had used the pathway scheduled as B schedule pathway. There is no pleadings in the case that before partition as per Ext.A1 the compact plot enjoyed right of way through plaintiff B schedule property. If that be the position, the argument advanced by the learned Senior Counsel for the respondent assumes significance. As already mentioned the plaintiff goes on the premises that in the partition deed, Ext.A1 which is of the year 1982, a 16 links pathway is provided as E schedule for sharers to gain access to their properties.

13. An attempt is made to show that plaintiff B schedule

pathway is a continuation of plaint E schedule pathway. First of all, E schedule so claimed is not seen located. As already stated, there is absolutely no evidence to show that common property covered by Ext.A1 had ever enjoyed right of way through plaint B schedule property. If, as a matter of fact, as per Ext.A1 properties were partitioned and thereafter B schedule pathway was being made use of by the plaintiff, then necessarily the period of use begins only from 1982. The suit is of the year 1994. Obviously, the statutory period required to claim the prescriptive right of easement had not been completed and as rightly pointed out, the question of easement by necessity does not arise for consideration at all. It was the above facts which have persuaded the lower appellate court to reverse the finding of the trial court.

14. Merely because the defendant's property is bound by a compound wall and there is a gate on its eastern boundary opening to the plaint B schedule as located by the Commissioner or that there is a gate on the southern boundary of the plaintiff's property giving access to plaint B schedule, does not mean that

the plaintiff has acquired the right of use of that way. Neither the prescriptive right of easement nor easement by necessity is available in the case on hand. First of all, the dominant tenement and servient tenement are to be properly described and the B schedule pathway is not properly described. There is no severance of tenements as between plaintiff and defendant so as to give rise to a claim of easement by necessity. It has already been found that the claim for prescriptive right of easement cannot be accepted.

For the above reasons, the judgment and decree of the lower appellate court will not call for any interference. This appeal is without any merits. It is accordingly dismissed. There will be no order as to costs.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A. to Judge.