IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

SA.No. 302 of 2001 (C)

AGAINST THE JUDGMENT IN AS 58/1999 of ADDITIONAL SUB COURT, KOCHI DATED 30.08.2000

AGAINST THE JUDGMENT IN OS 508/1997 of ADDITIONAL MUNSIFF COURT, KOCHI DATED 26.02.1999

APPELLANT(S)/APPELLANTS/PLAINTIFFS:

----

1. XAVIER @ XAVI, AGED 68 YEARS,
S/O. ANTONY, RESIDING AT KONNOTH HOUSE,
OCHANTHURUTH DESOM,
PUTHUVYPPU VILLAGE, COCHIN TALUK.

2. JOSEPH, AGED 63 YEARS,
S/O. ANTONY, RESIDING AT KONNOTH HOUSE,
OCHANTHURUTH DESOM,
PUTHUVYPPU VILLAGE, COCHIN TALUK.

BY ADVS.SRI.K.R.KURUP
SRI.C.R.SYAMKUMAR
SRI.R.AJITH MENON
SRI.K.J.ABRAHAM
SRI.SREEKUMAR G. NAIR
SRI.LAVARAJ M.G.
SRI.JOSE KURIAN

RESPONDENT(S)/RESPONDENTS/DEFENDANTS:

----

1. ANTONY, S/O. XAVIER,
RESIDING AT BLAITHARA HOUSE,
OCHANTHURUTH DESOM, PUTHUVYPPU VILLAGE,
COCHIN TALUK. (DIED, LRS IMPLEADED)

2. XAVIER, S/O. RAPHEL,
RESIDING AT BLAITHARA HOUSE,
OCHANTHURUTH DESOM, PUTHUVYPPU VILLAGE,
COCHIN TALUK. (DIED, LRS IMPLEADED)

ADDL.R3. MARY, W/O. LATE XAVIER,
RESIDING AT BLAITHARA HOUSE,
OCHANTHURUTH DESOM, PUTHUVYPPU VILLAGE,
COCHIN TALUK.

ADDL.R4. JOB, S/O. LATE XAVIER,
RESIDING AT BLAITHARA HOUSE,
OCHANTHURUTH DESOM, PUTHUVYPPU VILLAGE,
COCHIN TALUK.

ADDL.R5. SWAPNA, D/O. XAVIER,
RESIDING AT MUKKATH HOUSE,
OCHANTHURUTH DESOM, PUTHUVYPPU VILLAGE,
COCHIN TALUK.

(ADDL. RESPONDENTS 3 TO 5 ARE IMPLEADED AS THE LRS OF DECEASED R1 AND R2 AS PER ORDER DT. 24.05.2005 ON I.A. 826/2005)

R3 TO R5 BY ADV. SRI.P.T.SEBASTIAN
R3 TO R5 BY ADV. SRI.K.M.SUBIAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 10-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ds

P.BHAVADASAN, J.

- -

S.A. No. 302 of 2001

- -

Dated this the 10th day of August, 2015

J U D G M E N T

The plaintiffs, who claimed to be the owners of A schedule property, lost their suit for prescriptive right of easement against the defendants and they have thus come up in appeal.

2. The facts absolutely necessary for the purpose of disposal of this appeal are as follows:

The plaint A schedule property is shown as 50 cents of land with two buildings therein. It is not in dispute that the property originally belonged to one Smt. Elizabeth Kalapurakkal. She became mentally ill and a receiver was appointed to manage her property. It appears that the sea swallowed the property and later on, when the sea receded, the property was treated as a Puramboke land. The plaintiffs claimed that they had trespassed into the property, put up the structures therein and have been in occupation

from 1967 onwards. Claiming that the plaint B schedule pathway had been used by them for over the statutory period as a matter of right openly, uninterruptedly and continuously, they claimed a right of easement by prescription over the plaint B schedule pathway alleging it to be running through the property of the defendants.

3. The defendants resisted the suit. They pointed out that the plaintiffs did not have title to the suit property i.e. dominant tenement and there is no B schedule pathway as alleged. The defendants claimed that there is no access to the plaint A schedule property through their property which they brought from the receiver as per the order of the Court. On the basis of these contentions, they prayed for a dismissal of the suit.

4. On the basis of the above pleadings, issues were raised and the parties went to trial. The evidence consists of the testimony of PWs 1 to 3 and documents marked as Ext. A1 from the side of the plaintiffs.

Defendants examined DWs 1 and 2 and had Ext.B1 marked. Exts. C1 and C1(a) are the Commissioner's report and plan.

5. The trial court, mainly on the basis that the plaintiffs did not have title to the dominant tenement in the light of the fact that in the suit filed by the receiver as O.S.No. 778/1986 based on title was decreed against the plaintiffs in the present case, it was held that they cannot claim prescriptive right of easement through the property of the defendants, dismissed the suit. An appeal filed by the plaintiffs also did not meet with success. That brought the plaintiffs before this Court.

6. Notice was issued on substantial question No. (b) formulated in the memorandum of appeal which reads as follows:

> “b) In a case of adverse possession, if the possession is admitted for more than a statutory period of limitation, is the nature of ownership of the property material to declare the right and title over the property?”

7. The learned counsel appearing for the appellants contended that both the courts below have grievously erred in law in coming to the conclusion that to claim an easement right, the dominant tenement owner must be real owner of the property and a person in possession of the property cannot claim the same. Further, it was contended that the finding of the courts below that the plaintiffs did not have title to plaint A schedule property, was essentially based on the decree in O.S.No.778/1986 filed by the receiver against the plaintiffs wherein, initially, the Munsiff Court dismissed the suit holding that the plaintiffs, who were the defendants in that suit, had perfected their title by adverse possession and limitation. In appeal, the decree of the trial court was reversed and the suit was decreed. The defendants in O.S.No. 778/1986 had filed S.A.No. 583/1993. Later, S.A.No. 583/1993 was allowed and it was declared that the defendants had perfected title by adverse possession and limitation. It was therefore

contended that even assuming that the plaintiffs were earlier not recognized as owners of dominant tenement, in pursuance to the decree of this Court in S.A.No. 583/1993, the plaintiffs become the owners of dominant tenement and that infirmity no longer exists. The learned counsel further went on to contend that the stand taken in the plaint was that from 1965-1967 onwards, the plaintiffs have been using the plaint B schedule pathway. Later, the defendants had purchased the property from the receiver and their purchase can only be subject to the right of the plaintiffs. It was therefore contended the courts below have erred in law in dismissing the suit.

8. The learned counsel appearing for the respondents on the other hand contended that plaint A schedule property is shown as 50 cents in extent and the pathway scheduled as B schedule shows that it extends upto the south-eastern boundary of plaint A schedule property. If that be so, according to the learned counsel, the plaintiffs

can have no claim with regard to the pathway running though the property of the defendants. Even as on the date of plaint, plots belonging to the first plaintiff and the second plaintiff in the Commissioner's rough sketch is shown as lying as a compact plot which has access even without making use of any portion of the defendants property. Drawing attention to Ext.B1, the learned counsel contended that the pathway does not extend beyond the south-eastern corner of the plaint A schedule property, which is shown as 50 cents in extent. Viewed from that angle, the learned counsel contended that they need not have to make use of any portion of the property purchased by the defendants having access to the plaintiffs property.

9. After having heard the learned counsel on both sides, it must be said that there is considerable force in the submission made by the learned counsel for the respondents. True, in the decision reported in **Narayanan Nair** v. **Mariamma Kurian** [1988 (2) KLT 486] and

Pankajakshi Amma v. **Gourikutty Amma** [2010 (1) KLT 185], the question regarding prescriptive right of easement was considered. Heavy reliance was placed by the learned counsel for the appellants on these two decisions. In the decision reported in **Narayanan Nair** v. **Mariamma Kurian** [1988 (2) KLT 486], it was held that in order to claim a right of easement, the dominant tenement owner need not be the actual owner of the property and a person in possession of the same can claim easementary right, since it is a proprietary right and not a personal right.

10. In the decision reported in **Pankajakshi Amma** v. **Gourikutty Amma** [2010 (1) KLT 185], it was held that it is not necessary that the notice of use of pathway should be given to servient owners, if as a matter of fact, the dominant tenement owner has been using the way as defined in Section 15 of the Indian Easement Act for the statutory period.

11. One can have no quarrel with the proposition laid down in the above decisions. The question is whether it applies to the facts of the present case. True, the Commissioner's report and the plan make mention of a way which seems to be running through the property of the defendants. That is in continuation of the pathway shown in Ext.B1 sketch.

12. The question is whether the plaintiffs can legitimately make any claim over any portion of the property belonging to the defendants by way of use as a pathway by prescriptive right of easement. The answer must be in the negative. The simple reason is that the plaint A schedule property is shown as 50 cents in extent which consists of the two plots shown in the Commissioner's report belong to the first plaintiff's and the second plaintiff's property.

13. As rightly pointed out by the learned counsel for the respondents, these two plots are shown as a compact plot of 50 cents lying as a single plot. If that be so, going by

Ext.B1 document, that plot has access from the pathway shown in Ext.B1 sketch. It was not necessary for the plaintiffs to use any portion further to the south-eastern corner of the plaint A schedule property to reach their properties. Even though the two plots belonged to the first and the second plaintiffs have been shown as separate plots, there is nothing to show that there has been a division between them or that there has been a partition of the property.

14. The learned counsel appearing for the appellant may be correct in his submission that in the light of the judgment and decree in S.A.No.583/1993 it can no longer be said that the plaintiffs are not the owners of plaint A schedule property. There is a clear finding by this Court in the said Second appeal that the plaintiffs herein, who are the defendants in the said A.S. which arose from O.S.No. 778/1986 that they have perfected title to the plaint A schedule property herein by adverse possession and

limitation. To that extent, the finding may be erroneous.

15. But that however does not save the plaintiffs at all. As pointed out earlier, having shown the plaint A schedule property as a compact plot of 50 cents enjoyed by two persons and when that property has direct access, it becomes inconceivable that they had to use any portion of the defendant's property to gain access to the plaint A schedule property. If as a matter of fact, the plaintiffs had a case that each of them has been using separate pathway, they should have separately scheduled their properties and shown the way separately and make claim on that basis. That has not been done.

16. At the risk of repetition, one may note that the plaint A schedule property is still lying as a compact plot having an extent of 50 cents. If that be so, Ext.B1 is the answer to the claim made by the plaintiffs.

17. Though the reasons given by the courts below may not be justifiable in the light of what has been

noticed by this Court, no interference is called for in the dismissal of the suit.

This second appeal is without merits and it is accordingly dismissed. There will be no order as to costs.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge