

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

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

SA.No. 408 of 2001 ()

**AGAINST THE JUDGMENT IN A.S.No. 87/1995 of PRINCIPAL SUB COURT, KOTTAYAM
DATED 16-10-2000**

**AGAINST THE JUDGMENT IN O.S.No.674/1991 of ADDITIONAL MUNSIFF'S
COURT,KOTTAYAM DATED 30-09-1994**

APPELLANTS/APPELLANTS/PLAINTIFFS:

**1. T.M.MANI, S/O.T.C.MATHEW,
THENGUMTHURUTHEL HOUSE,
KUZHIPURAYIDAM KARA,
MANARCADU VILLAGE, KOTTAYAM**

**2. M.K.MANI, S/O.M.V.KURIEN,
MATTAKANDATHIL HOUSE,
KUZHIPURAYIDAM KARA,
MANARCADU VILLAGE, KOTTAYAM**

**BY ADVS.SRI.MATHEW JOHN (K)
SRI.BABY THOMAS**

RESPONDENT/RESPONDENT/DEFENDANT:

**P.S.REJI, S/O.SKARIAH,
PEEDIACKAL HOUSE,
KUZHIPURAYIDAM KARA,
MANARCADU VILLAGE, KOTTAYAM**

BY ADV. SRI.M.NARENDRA KUMAR

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

MJL

ALEXANDER THOMAS, J.

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S.A.No. 408 of 2001

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Dated this the 16th day of November, 2015

J U D G M E N T

The unsuccessful plaintiffs have instituted this Second Appeal impugning the concurrent findings of the trial court as well as the lower appellate court. The plaintiffs/appellants filed suit for injunction with the averment that plaint A schedule property belongs to the 1st plaintiff, who is claimed to be in possession of the same from 1969 onwards and that a building in the property is being used as go-down and office for the rubber business run by him. That B schedule property belongs to the 2nd plaintiff, which lies on the southern side of A schedule property and that the 2nd plaintiff is residing with family in the building situated therein. That C schedule property is said to be a water course through the southern side of A schedule and eastern side of B schedule, which is said to have a length of 80 ft. and width of 2.5 feet. That it is the only way for flow of water from the eve-drops of the plaintiffs' building and also waste water from the bathroom and kitchen

portion. That the plaintiffs and the predecessors have been enjoying this water course for flow of water as easement, peaceably openly and as of right for the last more than three decades and that they have thus acquired prescriptive easement right. That the defendant attempted to obstruct the flow of water through C schedule and hence the plaintiffs have filed the suit for injunction.

2. The respondent herein/defendant filed written statement, inter alia, contending that the description of plaint A and C schedule properties is wrong and that there is no water course as referred to in C schedule. That the plaintiffs' property is lying about three feet lower level than the defendant's property and that the plaintiffs have destroyed the boundary wall of the defendant's property on its eastern end on 12.8.1991 and opened a new water channel and that it is this new water channel so unlawfully opened by the plaintiffs, which is described by them in the plaint as water course. The averment that foul water from the bathroom and kitchen is going through C schedule channel is wrong and that the plaintiffs have not acquired any easement right by prescription over plaint C schedule property. That it is also wrong to say that the defendant obstructed the flow of water and that the defendant has

constructed boundary wall after obtaining permission from the authorities concerned, etc.

3. On the framework of these pleadings, three issues were framed by the trial court. Both sides adduced evidence, which consist of oral testimonies of PWs 1 to 3, DW-1 and further Exts.A-1 to A-5, B-1, B-2, C-1 and C-2 were also marked. The learned Munsiff, after appreciating the evidence, dismissed the suit finding that the plaintiffs have not acquired any easement right over C schedule property. The learned Munsiff has dismissed O.S.No. 674/1991 as per judgment dated 30.9.1994. Aggrieved by the same, the unsuccessful plaintiffs had instituted Appeal Suit, A.S.No. 87/1995 before the Principal Sub Judge, Kottayam and the said lower appellate court has also dismissed the said Appeal Suit as per the judgment dated 16.10.2000, affirming the considered view rendered by the learned Magistrate. Thus, it can be seen from a perusal of the impugned judgments of the courts below that both the courts below have concurrently made considered findings against the plaintiffs.

4. The following questions of law have been formulated in the memorandum of this Second Appeal;

- “A. Are not the courts below in serious error in having taken the view that the appellants cannot prescribe the easement right in respect of plaint C schedule water course in view of the fact that what is drained through the water course is waste water ?
- B. Are not the courts below in serious error in having taken the view that the appellants cannot prescribe the right of easement in view of the fact that there is no such pleading at all by the respondent in his written statement ?
- C. Are not the courts below in serious error in applying the principles laid down in the decision reported in AIR 1983 Allahabad 223 to the facts and circumstances of this case ?”

5. Heard Sri.Mathew John, learned counsel appearing for the appellants/plaintiffs and Sri.M.Narendra Kumar, learned counsel appearing for the respondent/defendant.

6. In paragraph 7 of the impugned judgment dated 30.9.1994 the learned Munsiff has found that the Advocate Commissioner, who has examined as PW-3, has also in her C-1 report has stated that the property of the 2nd plaintiff and that of the defendant lies slanting from west to east. But that in cross examination she has stated that the 2nd plaintiff's property is at a little lower level than the property of the defendant on the eastern side. PW-2 has also given evidence that the property of the 1st plaintiff and that of the 2nd plaintiff and that of the defendant are all lying in the same level. But the 2nd plaintiff, who was examined as PW-1, stated that the plaint B schedule is at a higher level than the

property of the defendant on the east. Accordingly, the learned Munsiff opined that if the property of the defendant is at a higher level as admitted by PW-3 or if it is on the level of the 2nd plaintiff's property as stated by PW-2, then there is no possibility for flow of water from B schedule item to the public road on the east through the defendant's property. It is also noted from the report of the Commissioner that the portion of eastern end of the claimed water course is in a damaged condition and hence it was held by the court below that it means that there was no drain upto the road on the east when the Advocate Commissioner visited the spot and therefore the court below held that it is not clear as to how the Commissioner could say that there is a water course as described in the plaint. The learned Munsiff also doubted the genuineness of the case set up by the plaintiffs as can be seen from the findings made in paragraph 8 of the impugned judgment, which reads as follows:

“8. It has come in evidence that the defendant has constructed a building in his property and that it was constructed after removing the soil from his property. It shows that the property was laying at a higher level than the road on the east as otherwise he would not have removed soil from his property before constructing the building. If that is the case, there is no chance for flow of water through the defendants property from the plaint B schedule property of the 2nd plaintiff. The commissioner was asked whether she was convinced about the flow of water from the plaint C schedule drain. Then she was stated that water could be flown through plaint C schedule item. (see page 9 of her deposition). From this it is clear that it was not after convinced of the flow of water through plaint C

schedule item, that she reported in Ext.C1 that the water from the eaves of the building in A schedule property and also the foul water from the B schedule item are flowing through plaint C schedule drain. The Commissioner has also found the demolition of the northern portion of the boundary wall constructed by the defendant on the eastern side of his property. The defendant as Dw1 has given evidence that on 12.8.91 the plaintiffs had demolished his wall opened a new chul on northern side of his property and it is after that the suit was filed. The commissioner was quite categorical that the boundary wall portion was demolished by somebody and according to her it is not a case of the boundary wall not being completed as suggested by the learned counsel for the plaintiff. From this, I doubt the genuineness of the case set up by the plaintiffs. It is also to be noted that the case of the plaintiffs is that C schedule drain opens to the gutter on the western side of Ayarkunnam Manarcad road. But it has come out from evidence of the commissioner and also from her report which is marked as C2 that there is no gutter on the western side of the said road. The defendant has also produced the approved plan relating to the construction of his building and that is marked as B2. In B2 the boundary wall is noted in red ink as extending from north to south. On the northern side it proceeds a little bit towards west. Thus it can be seen that permission was given for the construction of the boundary wall upto the northern extremity of his property. From all these aspects the case of the plaintiffs that water from A schedule and B schedule properties has been flowing through the plaint C schedule item for more than 35 years appears to be not true."

7. Further, the learned Munsiff held that the prayer of the plaintiffs for injunction is not allowable due to certain crucial aspects of the matter. In this regard, the learned Munsiff noted that in paragraph 4 of the plaint it is stated that plaint C schedule water course is the only way for flow of waste water from the bathroom and kitchen room of the building in plaint B schedule property and that the plaintiffs have acquired easement right for flow of waste water through the plaint C schedule property. The court below held that there is no right that can be recognized by law to claim the

flow of dirty water towards the house and well of a neighbour, which amounts to nothing but nuisance and that such a claim cannot be recognized in law as a legally enforceable right, as it would amount to perpetuating nuisance on the affected party. The court below thus held after referring to the provisions in Secs. 5, 6, 7, 15 and 17 of the Easement Act, that there is no right by way of easement to discharge the dirty water of the drain of one's house or property on another person's land. In view of this crucial aspect of the matter, the learned Munsiff had dismissed the suit.

8. The lower appellate court has also more or less proceeded on the same lines. The learned Principal Sub Judge, Kottayam, has held in paragraph 12 of the impugned judgment as follows:

"12. From the evidence available it can be seen that a drain having a width of 2 feet is existing from the B schedule building towards east upto the road on the eastern side and a portion of that drain has been levelled recently. A retaining wall separating the disputed drain is also found by the commissioner. So the contention of the defendant that the C schedule drain is not existing is not correct. But the question to be decided is whether the plaintiff can succeed in a claim for prescriptive easement right for discharging foul water from his latrine and kitchen through the defendant's property. Admittedly, the portion through which C schedule drain is passing belongs to the defendant. So the plaintiff has to establish his case of prescriptive easement right. It is not a natural flow of water. So the claim of plaintiff will not come under a natural right. The view taken by the learned Munsiff is that the plaintiff cannot claim easement right to discharge the dirty water from his building through the defendant's property and hence the injunction prayed for is not allowable. Learned counsel for the appellant argued that since there

is no other provision for the plaintiff to discharge the drain water and the foul water from the bathroom and kitchen and that right has been acquired by enjoying it for more than 40 years plaintiff has acquired prescriptive easement right.”

In this view of the matter, the lower appellate court, relying on Sec.7 of the Easement Act, which deals with easement right generally and also exclusive right to enjoy the property of the person and right to enjoy natural advantages arising therefrom from the situation of his property, without disturbance by any other, held that it can be seen from the illustrations adumbrated in Sec.7 of the Easement Act that no one can claim easement right to discharge dirty water from his property through an artificial drain to another person's property. It was held that essentially the claim of the plaintiffs is for a prescriptive easement right to discharge foul water from their kitchen and bathroom through the defendant's property. The lower appellate court held that the learned Munsiff has rightly found that the plaintiffs are not entitled to get any prescriptive easement right as claimed in the plaint. In view of this aspect, the learned Principal Sub Judge, Kottayam, has dismissed the Appeal Suit (A.S.No.87/1997) as per the impugned judgment dated 16.10.2000. After considering the various aspects of the matter, this Court is not persuaded in any manner to deviate from the aforestated concurrent

findings of the courts below.

9. It may be noted that in a similar case, the Allahabad High Court, in the case Prabhu Narain Singh v. Ram Niranjan & Ors. reported in AIR 1983 All. 223, has held in paras 4 and 5 thereof as follows:

'4. On the findings recorded by the lower appellate Court, the first question, which arises in this Second Appeal, is whether the defendants could be said to have acquired any right of easement to discharge the dirty water from the drain of their house in the plaintiff's land. The trial Court has observed that the flow of the dirty water from the defendant's house gives out a "nauseating smell", S.17 of the Indian Easements Act says that easement acquired under S.15 are said to be acquired by Prescription and are called prescriptive rights. The present is not a case of any of the exceptions specified under clauses (a) to (d) in respect of which prescriptive rights of easements could not be acquired. Nevertheless, S.15 itself specifies the kinds of rights which can be acquired by prescription. They include the right to light or air to a building, a right to support to land or things affixed thereto, a right of way, "or any other easement". The question is whether a person could discharge the dirty water of his house on another person's land as of right by way of an easement. S.4 of the Easements Act defines an easement. The illustrations under that section give certain instance of the kinds of rights which may be acquired by way of easements and also certain rights which are not easements. S.5 describes what are continuous and discontinuous or apparent and non-apparent easements, S.6 is not material for our present purpose. S.7 defines the nature of the easementary rights by saying that easements are restrictions of one or other of the following rights (namely):

"(a) The Exclusive right to enjoy. The exclusive right of every owner of immovable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

(b) Rights to advantages arising from situation. The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantage arising from its situation."

5. The illustrations and the explanations under that

section also show the nature of the easementary rights. A perusal of the illustrations (f), (g), (h), (i) and (j) show that there is no right by way of easement to discharge the dirty water of the drain of one's house or property on another person's land. That would be, in my opinion, allowing a right to create or cause nuisance on another person's land. An easement of that kind is not contemplated by the Easements Act, and I think properly so.'

This Court is fully inclined to concur with the aforestated view expressed by the Allahabad High Court in the afore-cited ruling. That case also dealt with the claimed right of easement to discharge dirty water from the drain of the house of the defendant therein. The court held therein that Sec.7 of the Easements Act defines the nature of the easementary rights by holding that the easements are restrictions of one or other of the following rights:-

- (a) The Exclusive right to enjoy. The exclusive right of every owner of immovable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.
- (b) Rights to advantages arising from situation. The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantage arising from its situation.

10. Illustrations (f), (g), (h), (i) and (j) and the Explanation under Sec. 7 of the Easements Act, read as follows:

"Sec.7: Easements restrictive of certain rights.- Easements are restrictions of one or other of the following rights (namely):-

xxx xxx xxx

Illustrations of the Rights above referred to

xxx xxx xxx

(f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

(h) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(i) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

(j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

Explanation.— A natural stream is a stream, whether permanent or intermittent, tide or tideless, on the surface of land or underground, which flows the operation of nature only and in a natural and known course.”

The court held therein that a perusal of illustrations (f), (g), (h), (i) and (j) show that there is no right by way of easement to discharge dirty water of the drain of one's house or property to another person's land and that that would tantamount to allowing a right to

create or cause nuisance on another person's land and that an easement of that kind is not contemplated by the Easements Act. This Court is in full agreement with the view taken by the Allahabad High Court in the aforestated ruling. Accordingly, the views taken by both the courts below in the instant case do not call for any interference. The aforestated questions of law stand answered accordingly in the light of the aforestated discussion.

Accordingly, the Second Appeal stands dismissed. There will be no order as to costs.

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Sd/-
ALEXANDER THOMAS, JUDGE

///True copy///

P.S. To Judge.

ALEXANDER THOMAS, J.

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S.A.No. 408 of 2001

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J U D G M E N T

16th November, 2015