

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 27TH DAY OF MAY 2015/6TH JYAISHTA, 1937

SA.No. 88 of 2002 ()

**AGAINST THE ORDER/JUDGMENT IN AS 500/1998 of FIRST ADDITIONAL DISTRICT
COURT, THRISSUR DATED 11-07-2001**

**AGAINST THE ORDER/JUDGMENT IN OS 255/1997 of MUNSIFF COURT ,
VADAKKANCHERRY DATED 25-09-1998**

APPELLANT/APPELLANT/PLAINTIFF::

**SIDHAN, S/O. VEERAN, ANANDA JYOTHIS,
CHELAKKARA VILLAGE DESOM, THALAPPILLY TALUK
THRISSUR DISTRICT.**

**BY ADVS.SRI.P.G.PARAMESWARA PANICKER (SR.)
SRI.SANTHEEP ANKARATH**

RESPONDENT/RESPONDENT/DEFENDANT::

**PANCHANAYAKI, W/O. CHELAKKARA ANGADIYIL
LEKSHMANAN, CHELAKKARA DESOM, THALAPPILLY TALUK
THRISSUR DISTRICT.**

BY ADV. SRI.G.SREEKUMAR (CHELUR)

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

S.A. No. 88 of 2002

Dated this the 27th day of May, 2015

J U D G M E N T

Having been unsuccessful before both the courts below in his attempt to establish the prescriptive right of easement to drain water falling from his roof and also to use B Schedule property as pathway, the plaintiff in O.S.No. 255/1997 has come up in appeal.

2. The plaint averments as it initially stood contained a plea that the plaint schedule properties belonged to the plaintiff. Later on, the plaintiff became wise and realized the folly and then in paragraph 4 of the plaint was amended and claim of title was confined to plaint A schedule. But paragraph 3 of the plaint remains as such. The complaint of the plaintiff was that the defendant, who is his neighbour, is trying to prevent the plaintiff from using the plaint B schedule property for draining out water and using it as a way and the defendant has no manner of right to do so. On

the basis of these allegations, the suit was laid.

3. The defendant resisted the suit. The defendant pointed out that there was never a way as alleged and the plaintiff never used to walk through that portion. He claimed that the property exclusively belonged to him and the plaintiff had no manner of right whatsoever over the same. He disputed the right claimed by the plaintiff and pointed out that this is nothing but an attempt to create a right of way through the plaintiff's scheduled Property. He therefore prayed for dismissal of the suit.

4. The trial court raised necessary issues for consideration. The evidence consists of the testimony of PWs 1 to 3 and documents marked as Exts. A1 to A3 from the side of the plaintiff. Defendant examined DWs 1 and 2 and Exts. C1 and C1(a) are the Commissioner's report and plan.

5. On appreciation of the materials in the case, both the courts below found that on pleadings and on evidence,

the plaintiff continued to assert that the plaint B schedule property also belonged to him and that the defendant may be restrained from interfering with the right of the plaintiff. As far as the claim of easement by prescription was concerned, both the courts below found evidence and pleadings absolutely wanting in that regard and held against the plaintiff.

6. Notice was issued on the following question of law:

“Whether the court below erred in not granting a decree regarding the easement right for atleast dropping of eves after having found that the eves drop into the 'B' schedule and 'B' schedule alone?”

7. After having heard the learned counsel for the appellant elaborately, this Court feels there are absolutely no grounds made out to interfere with the judgment and decree of the courts below.

8. The plaintiff was not sure about his right over the plaint B schedule property and he chose to lay claim both as

owner and as prescriptive right over the same. In one portion of the plaint, he continues to claim ownership, while in another portion, he confines his ownership to plaint A schedule property. While in the plaint, he will plead all the ingredients of prescriptive right of easement. But at the time of evidence, PW1 did not utter a word about the necessary ingredients to attract the right of prescriptive right of easement. It must be noticed here that plaint B schedule property is a narrow strip of land lying between the buildings of the plaintiff and the defendant and the claim of the plaintiff was that he used the plaint B schedule property for eaves dropping and also for using it as pathway. On going through the written statement, there appears to be no serious objection regarding the eaves dropping, but the claim of right to use the B schedule as a pathway is very strongly objected.

9. In a claim for easement, it is necessary that there should be at least two different tenements and two distinct

owners. Even at the time of evidence, the plaintiff was not willing to give up his right regarding ownership over plaint B schedule property and the relief 'B' is very relevant in this context. It reads as follows:

"B) പ്രതി ബി പട്ടിക കയ്യാരി
കൈവശപ്പെടുത്തിപ്പോകരുതെന്നും ബി പട്ടികയിലൂടെ
അന്യായക്കാരൻ ഇറവെള്ള വീഴ്ത്തുന്നതിനെയോ ബി
പട്ടികയിലൂടെ തെക്കോട്ട് പ്രവേശിക്കുന്നതിനെയോ ടി
പരിസരം വൃത്തിയാക്കുന്നതിനെയോ യാതൊരു ശല്യമോ
തടസ്സമോ ചെയ്ത് പോകരുതെന്ന് പ്രതിയേയും
ആശിക്കാരെയും ഒരു ശാശ്വത ഇഞ്ചിങ്ങ്ഷൻ കല്പനമൂലം
നിരോധിച്ചും;"

10. It literally means that the defendant be prevented from trespassing and reducing a portion of plaint B schedule property which means that the plaintiff lays claim over the same.

11. Faced with the above situation, the learned counsel relied on the decision reported in **Raychand**

Vanmalidas v. Maneklal Mansukhbhai [AIR (33) 1946 Bombay 266] and pointed out that he can avail of an alternate contention and can chose one of the rights to establish his claim.

12. Well, there can be no doubt regarding the proposition. Even this Court has held that the plea of ownership and the plea of easement can be taken, but only restriction is that at the time of evidence, he has to chose one of the claims. He cannot pursue both the claims till the end and finally says now I chose the particular claim. He can opt before proceedings come to an end.

13. Nowhere in the plaint, or in the evidence of PW1, there is any indication to show that the plaintiff admitted the title of the defendant over plaint B schedule property. Moreover, as already noticed, there is no statement in the evidence of the PW1 that he has been utilizing the plaint B schedule property for complying with the necessary ingredients to attract prescriptive right of easement.

14. The lower appellate court has also found that the defendant had made construction over the plaint B schedule property before 15 to 20 years. This is stoutly refuted by the learned counsel for the plaintiff and says that there is no such case for the defendant and the lower appellate court was unjustified in its finding. Whatever that be, even assuming it to be an erroneous finding, that may not be of much help to the plaintiff. As already stated, he was ambiguous, inconsistent and unsure of his rights. He was not willing to give up his right of claim of title over the plaint B schedule property. Added to that is the situation where the necessary ingredients to attract prescriptive right of easement are not spoken to by PW1 or any of the witnesses.

15. It would appear from a reading of the judgment of the court below that the defendant has no serious objection in the eyes dropping by the plaintiff and therefore that question does not arise for consideration.

For the above reasons, this Court finds no ground to interfere with the judgment and decree of the courts below.

This appeal is without merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

ds

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P.A. to Judge