

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. 823 of 2002 (F)

**AGAINST THE JUDGMENT IN AS 180/1997 of ADDITIONAL SUB COURT, IRINJALAKUDA
DATED 31-05-2002**

**AGAINST THE JUDGMENT IN OS 395/1995 of MUNSIFF COURT, KODUNGALLUR
DATED 25-09-1997**

APPELLANT(S)/APPELLANT/PLAINTIFF:

**MOHAMMED, S/O.KOTTAIPARAMBIL BAVA
CHAKKARAPPADAM POST, PERINJANAM DESOM AND VILLAGE
KODUNGALLUR TALUK.**

**BY ADVS.SRI.K.G.BALASUBRAMANIAN
SMT.SREEKALA KRISHNADAS**

RESPONDENT(S)/RESPONDENT/DEFENDANT:

**MOHAMMED, S/O.PULIKKALAKATH VEETIL KOYA
CHAKKARAPADAM POST, PERINJANAM VILLAGE
DESOM, KODUNGALLUR TALUK.**

**R1 BY ADV. SRI.T.B.SIVAPRASAD
R1 BY ADV. SRI.ABHILASH AKBAR
R1 BY ADV. SMT.KHADEEJA RISHBATH KALLINGAL
R1 BY ADV. SRI.C.Y.VIJAY KUMAR**

**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. 823 of 2002

Dated this the 10th day of August, 2015

J U D G M E N T

The plaintiff, who met with his waterloo both in the trial court and at the hands of the lower appellate court, is the appellant.

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

According to the plaintiff, the plaint A schedule property, which he obtained under Ext.A1 dated 08.09.1979, is in his absolute possession and enjoyment. Plaint B schedule property in the partition deed is allotted to his brother, Abdul Razak. Since his brother is abroad, the property is being looked after by him. The defendant is residing on the northern side of the plaint A schedule property. Further on the western side is Kodungallur-Guruvayoor National Highway and there is a pathway starting from the National Highway road passing through the

defendant's property leading to plaintiff A schedule property. It is claimed to be a motorable way with a width of 18 feet and 10 feet at the start and the end respectively. The plaintiff claimed that the way had been in existence for more than 25 years and he as well as his predecessors have been using the way as a matter of right uninterruptedly, openly and continuously. Consequently, they have acquired a prescriptive right of easement in the said pathway. The suit was laid on the basis that the defendant is intending to cause obstruction to the pathway.

3. The suit was resisted by the defendant. Allegations were denied and it was pointed out that the way which leads to the property of the defendant itself came into existence only in 1988. The defendant's wife obtained property as per a deed of 1988. It was also pointed out that the way was laid after exchanging a property with one of her relatives and that pathway belongs exclusively to her. It was further contended that it is not as if the plaintiff is left

without any other way, for he has another motorable way which he has been using for a long time. On the basis of these contentions, he prayed for a dismissal of the suit.

4. On the above pleadings, issues were raised and the parties went to trial. The evidence consists of the testimony of PWs 1 to 6 and documents marked as Exts. A1 to A5 from the side of the plaintiff. The defendant examined DWs 1 to 6 and had Exts. B1 to B9 marked. Exts.C1 to C4 are the Commissioner's report and plan.

5. On an appreciation of the evidence in the case, the court below found that neither is there a pathway as alleged in the plaint nor is there any user by plaintiff and dismissed the suit.

6. The disappointed plaintiff carried the matter in appeal as A.S.No. 180/1997 but with no success. The lower appellate court concurred with the trial court.

7. Notice was issued on the following substantial questions of law:

“a) In a suit for declaration of right of easement, can the plaintiff be non-suited for not scheduling the entire property of the servient owner? Is it not sufficient to schedule to the plaint only that portion which is in dispute?

b) Whether, on the facts and circumstances of the case, were not the courts below in error in declining to grant a declaration in as much as the appellant has established the two termini of the pathway in question and its continuity in either direction?

c) Whether, on the facts and circumstances of the case, was it not incumbent on the courts below to afford an opportunity to the appellant by invoking order XXVI Rule 10 CPC if the report and sketch of the commissioner were, in any manner, unsatisfactory?”

8. The learned counsel appearing for the appellant contended that the court below has grievously erred both on facts and in law in holding that there is no proper description of the plaint B schedule pathway so as to identify the same and therefore, the plaintiff has to fail. Drawing the attention of this Court to the plaint, it was pointed out that

the property was properly described in the plaint and there could be no identity crisis as far as the plaint B schedule pathway is concerned. Witnesses examined on behalf of the plaintiff had uniformly spoken to the fact that the way has been in existence for a long time and that even lorries have been plying through the same road. The courts below were not justified in coming to the conclusion that the pathway came into existence in 1988 and the plaintiff has not used the same for the statutory period. It is contended that there has not been a proper appreciation of the evidence in the case and that has resulted in miscarriage of justice. Therefore, it is contended that the judgment and decree may be set aside and the suit be decreed.

9. The learned counsel appearing for the respondent pointed out that both the courts below have considered the evidence in considerable detail and have come to the conclusion that the claim of the plaintiff that the plaint B schedule pathway came into existence about 25 years

cannot be true. Even otherwise, it is not as if the way claimed was in existence for a long time. It was formed in 1988 when the defendant, for the purpose of laying a road to her property, exchanged the property which she obtained in partition with another property which abutted the National Highway. It was thereafter a pucca way was laid leading to the property of the defendant. It can be seen that there is no substance in the contention. Further, it was pointed out that the way leading to the house of the defendant itself came into existence only in 1988 and if that be so, even assuming that the plaintiff has been using the way, he has not completed user for the required statutory period and on that ground also, he has to fail. The learned counsel concluded by pointing out that both the courts below have appreciated the evidence in considerable detail and have come to identical conclusions and unless it is shown that the findings are perverse, interference while exercising jurisdiction under Section 100 of C.P.C. is not warranted.

10. After having heard the learned counsel on both sides and after having perused the records, it seems that there is considerable force in the submissions made by the learned counsel for the respondent.

11. Even assuming, for argument sake that there is sufficient pleadings to the effect regarding the location of the pathway, the question seems to be whether there is any pathway in existence as alleged in the plaint and if it exists, whether the plaintiff has been able to establish that he has been using it for the statutory period acquiring a prescriptive right of easement.

12. Both the courts below have considered the matter in considerable detail and have analysed the evidence. Both the courts below have found that there have been disputes between the parties regarding the pathway in question. Another suit is O.S.No. 893/1995, a copy of plaint is produced as Ext.A5. That was filed by the defendant in the present case against the plaintiff. The courts below perused

the report and plan prepared in that suit and found that there is another pathway to the plaintiff's compound. Both the courts below found the oral evidence furnished by the plaintiff to be unacceptable and unconvincing mainly for the reason that the courts below, on appreciation of the evidence, found that the pathway involved in this proceedings which starts from the National Highway from the west and leads to the defendant's property, itself came into existence only in 1988. It is the further continuation of that pathway which is claimed as prescriptive right of easement by the plaintiff.

13. There can be no manner of doubt that it is for the plaintiff to establish the necessary ingredients of prescriptive right of easement. The claim of the plaintiff that there was a motorable way running through the property of the defendant leading to his property is totally false and is without any substance.

14. Any doubt in this regard is set at rest by Exts.B6 and B7 documents which would show that the way could have come into existence only in 1988 and even assuming and accepting the claim of the plaintiff, he could have been using it only from 1988 onwards, even though there is considerable doubt regarding the claim so made by the plaintiff.

15. As rightly pointed out by the learned counsel for the respondent, it is not as if the plaintiff is left with no other way to reach his property. There is another access to the plaintiff's property. Whatever that be, both the courts below have considered the evidence in considerable detail and have come to an identical conclusion that the claim of the plaintiff is not established. Since there is nothing to show that the findings are either perverse or contrary to the evidence on record, as rightly contended by the learned counsel for the respondent, interference under Section 100 of C.P.C. is not warranted.

This second appeal is without any merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge