2025:KER:31413

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE M.A.ABDUL HAKHIM

FRIDAY, THE 11TH DAY OF APRIL 2025 / 21ST CHAITHRA, 1947

RSA NO. 1262 OF 2011

AGAINST THE JUDGMENT&DECREE DATED 13.07.2011 IN AS NO.156 OF 2006 OF ADDITIONAL DISTRICT COURT-II, MAVELIKKARA ARISING OUT OF THE JUDGMENT&DECREE DATED 20.09.2006 IN OS NO.293 OF 2002 OF MUNSIFF COURT, MAVELIKKARA

APPELLANTS/RESPONDENTS/DEFENDANTS 2 AND 3:

1 RAVI S/O LATE.KUNJUPANIKEN,
KANNIMEL PARAMBIL HOUSE,, ARANOOTTIMANGALAM MURI, VETTIYAR VILLAGE,, MAVELIKKARA TALUK.

2 PONNAMMA W/O.RAVI
KANNIMEL PARAMBIL HOUSE,, ARANOOTTIMANGALAM MURI, VETTIYAR VILLAGE,, MAVELIKKARA TALUK.

BY ADVS.
SRI.M.V.THAMBAN
SRI.B.BIPIN
SRI.R.REJI
SMT.REVATHY P.NAIR
SMT.THARA THAMBAN

RESPONDENTS/APPELLANTS/PLAINTIFFS:

1 LEKSHMI (DIED),
D/O.LATE NANGELI, NJARAKKATTU PADEETTATHIL,
ARANOOTTIMANGALAM MURI, VETTIYAR VILLAGE, MAVELIKKARA-691 101.

2 SURENDRAN,

S/O.LATE LEKSHMI, LITTLE HUT, THAZHAKKARA VILLAGE,
AKKANATTIKARA, MURI, KALLUMALA FROM NJARAKKATTU
PADEETTATHIL,, ARANOOTTIMANGALAM MURI, VETTIYAR VILLAGE,,
MAVELIKKARA - 690101.

3 KOMALAN,
AGED 54 YEARS, S/O.LATE LEKSHMI, NJARAKKATTU PADEETTATHIL,
ARANOOTTIMANGALAM MURI, VETTIYAR VILLAGE,,
MAVELIKKARA - 690101.

4 SOLOMEN,
AGED 45 YEARS, S/O.LATE LEKSHMI, NJARAKKATTU PADEETTATHIL,
ARANOOTTIMANGALAM MURI,, VETTIYAR VILLAGE,
MAVELIKKARA - 690101.

5 SOBHA,
AGED 39 YEARS, D/O.LATE LEKSHMI, NJARAKKATTU PADEETTATHIL,
ARANOOTTIMANGALAM MURI,, VETTIYAR VILLAGE,
MAVELIKKARA - 690101.

6 NJANAMBIKA,
W/O.LATE SUDHAKARAN, NJARAKKATTU PADEETTATHIL,
ARANOOTTIMANGALAM MURI,, VETTIYAR VILLAGE,
MAVELIKKARA - 690101.

7 SUDHI SUDHAKARAN,
S/O.LATE SUDHAKARAN, NJARAKKATTU PADEETTATHIL,
ARANOOTTIMANGALAM MURI,, VETTIYAR VILLAGE,
MAVELIKKARA - 690101.

8 SUMITH SUDHAKARAN,
S/O.LATE SUDHAKARAN, NJARAKKATTU PADEETTATHIL,
ARANOOTTIMANGALAM MURI,, VETTIYAR VILLAGE,
MAVELIKKARA - 690101.

BY ADVS.
R2 TO R8 BY ADV. SRI P.MARTIN JOSE
SRI P.PRIJITH
R2 TO R4 BY ADV. SRI SIJU KAMALASANAN
R5 TO R8 BY ADV. SRI. ANEESH JAMES
SMT. DHANYA CHANDRAN, ADVOCATE COMMISSIONER

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

1. The appellants are the defendants 2 and 3 in the suit. They are husband and wife. The 2nd defendant is the nephew of the 1st defendant. The plaintiff is the wife of the 1st defendant.
2. Plaintiff filed suit for declaration of easement by prescription over C schedule pathway and consequential injunction. On account of the objection of non-joinder of parties, the 3rd defendant who is the wife of the 2nd defendant was impleaded in the suit. The 3rd defendant remained exparte.
3. Plaint A schedule property having an extent of 58.5 cents of land and the residential building therein belongs to the plaintiff as per Ext.A1. Plaint B schedule property having an extent of 11.20 Ares of land belongs to the 1st defendant. Plaint B schedule property is situated on the south-eastern side of plaint A schedule property. Canal Road is situated on the eastern side of B schedule property. Plaint C schedule pathway is shown as having a length of 48 meters and 3 meters width situated on the

northern extremity of Plaint B schedule property starting from the Canal Road on the eastern side and ending at the south-eastern side of the plaint A schedule property. The suit was filed on 10.07.2002. The 1st defendant had executed Ext.B2 Sale Deed dated 05.07.2002 with respect to plaint B schedule property in favour of the defendants 2 and 3, and thus, they also became parties to the suit.

4. As per the plaint allegations, the residential building in the Plaint A schedule property is having an age of more than 100 years facing towards east. The plaintiff and her predecessors have been using plaint C schedule property for the last more than 50 years for passage including vehicular passage from canal road to Plaint A schedule property. Plaint C schedule pathway is the only means of access to plaint A schedule property. The plaintiff travels through the eastern side of plaint A schedule property towards south from the house and enters plaint C schedule pathway for traveling to the eastern public road which was

converted into a canal road about 22 years back. On account of age-related diseases, the plaintiff has been frequently going for treatment in the car through Plaint C schedule property. The 1st defendant is also residing in the house in the plaint A schedule property. He also has been using Plaint C schedule property for access. Though the plaintiff and the 1st defendant have been residing in the same house, they have been remaining in bitter inimical terms. Hence, 1st defendant has been attempting to obstruct the plaint C schedule pathway. He has been attempting to create some documents in favour of the defendants 2 and 3 to defeat the rights of the plaintiff.

5. The 1st defendant filed a Written Statement opposing the suit prayers, contending, *inter alia*, that there is no pathway through plaint B schedule property. Plaint A schedule property is having access to the PWD road situated on the northern side through a pathway starting from the northern side of plaint A schedule property. The plaintiff is not in need of any other pathway. The

canal road on the eastern side of plaint B schedule property came into existence only in the year 1986. Hence the contention of the plaintiff that the plaintiff has been using the pathway through the Plaint B schedule property to access the canal road on the eastern side for the last more than 50 years is incorrect. Even according to the plaintiff, the canal road came into existence about 22 years back, and hence, she could not contend that she has been using pathway through plaint B schedule property for the last more than 50 years. Since the plaintiff is the wife of the 1st defendant, the 1st defendant has permitted the plaintiff to access the Canal Road through the plaint B schedule property for walking and on the basis of the said permission, the plaintiff has been walking through plaint B schedule property for accessing the Canal road on the western side. It will not create an easement by prescription.

6. The 2nd defendant also filed a Written Statement opposing the suit prayers, contending that the 2nd defendant and his wife

purchased the plaint schedule property as per Ext.B2 Sale deed dt. 05.07.2002. The said sale was very well known to the plaintiff. Before the date of sale, the property was measured and boundary stone was fixed in the presence of the plaintiff and the plaintiff has filed the suit impleading the 2nd defendant alone as a party in the suit apart from the 1st defendant. There was no pathway in the plaint B schedule property at the time of purchase by the 2nd defendant. The alleged C schedule is a part and parcel of Plaint B schedule. If there was a pathway, these defendants would not have purchased the property. Hence, the plaintiff has no right to claim the prescriptive right of easement through the alleged C schedule. There was no canal road till the year 1985. If the plaintiff had any opportunity to walk through the plaint B schedule property after the commissioning of eastern canal it is pursuant to the consent or agreement with the 1st defendant on the basis of their relationship. On the basis of such usage, the plaintiff cannot claim the prescriptive right of

easement through any portion of Plaint B schedule property. No vehicle has ever passed through plaint B schedule property. There is no chance of passing of any vehicle since the canal portion of the property is lying 2 ft higher than the plaint B schedule property, and there is a 'murippu' situated on the eastern side of the plaint A schedule property separating A schedule property from the plaint B schedule property.

7. Since the 1st defendant died during the pendency of the suit and no legal heirs were impleaded, the suit was dismissed as abated against the 1st defendant.

8. On the side of the plaintiff, son of the plaintiff was examined as PW1, Brother in law of PW1 was examined as PW2, President of SNDP Branch was examined as PW3 and Advocate Commissioner who prepared Exts.C1, C2 and C2(a) was examined as PW4. The title deed of the plaintiff was marked as Ext.A1 and Land Tax Receipt was marked as Ext.A2 on the side of the plaintiffs. On the side of the defendants, the 2nd

defendant was examined as DW1, and Exts.B1 to B3 were marked. Ext.B1 is the copy of the plaint in O.S NO. 242/2006 filed by the plaintiff and her children against the defendants 2 and 3.Ext.B2 is the Sale deed by which the 1st defendant sold Plaint B schedule property to the defendants 2 and 3. Ext.B3 is the title deed of the 1st defendant by which he derived the plaint B schedule property.

9. The Trial Court dismissed the suit, holding that the plaintiff failed to prove that she had acquired an easement by prescription over plaint C schedule property.

10. The plaintiff filed an appeal before the First Appellate Court. During the pendency of the appeal, the plaintiff died, and hence, her legal heirs were impleaded as additional appellants 2 to 8.

11. The First Appellate Court allowed the appeal, setting aside the judgment and decree of the Trial Court and decreeing the suit declaring that the plaintiff/additional appellants are having right of easement by prescription over plaint C schedule property for

travel and to carry vehicle for the beneficial enjoyment of A schedule property and passing permanent prohibitory injunction restraining the defendants 2 and 3 and their men from obstructing the use of the plaint C schedule way by the plaintiff for their ingress and egress.

12. This Court admitted the Regular Second Appeal on the following substantial question of law:

> "Whether on the evidence on record, the First Appellate Court was justified in holding that the plaint c schedule way was in existence and the appellant has established a right of way by easement or prescription under S.15 of the Indian Easement Act?"

13. At the time of admission, this Court had ordered the parties to maintain the status quo. During the pendency of the appeal, the appellants filed I.A No.996/2012 to restrain the respondents from trespassing into the plaint B and C schedule till the disposal of the appeal on the ground that there is no such way as mentioned in the plaint C schedule available at the spot at

present. In view of the said contention, this Court appointed an Advocate Commissioner to inspect and report regarding the plaint schedule properties. The Advocate Commissioner has filed a Report dt. 09.04.2012, and the same is available in the files. Thereafter, this Court passed order dt. 11.04.2012 directing the respondents not to do any act affecting the present lie, condition, and position of the plaint C schedule property as reported by the Advocate Commissioner in her Report dt. 09.04.2012 and they are further directed not to enter into the rest of Plaint B schedule property or to do any act therein.

14. I heard the learned Counsel for the appellant Sri. R.Reji, and the learned Senior Counsel for respondents Sri.S Sreekumar instructed by Adv. Sri. P Martin Jose.

15. The learned Counsel for the appellant contended that the Trial Court, as well as the First Appellate Court, illegally found easement by prescription over the plaint C schedule property. The Advocate Commissioner did not identify Plaint C schedule

pathway in his report. Though the plaintiff specifically contended that the plaint C schedule pathway is the only means of access to plaint A schedule property, it has come out in evidence that there is a pathway starting from the north side of plaint A schedule property towards the PWD road situated on the northern side, which will reveal the falsity of the contention of the plaintiff. At any rate, the plaintiff might have used plaint B schedule property as a means of easy access by walking to the canal road on the eastern side of B schedule property as per the permission given by the 1st defendant on account of their relationship. Such permissive use could not be turned as easement by prescription. The learned counsel for the appellant cited the decision of this court in **Cherootty Balan v. Velayudhan Nair [1998 (1) KLJ 479**] to substantiate the point that when the right of way is by way of permission, the same could not ripen into an easement by prescription. At any rate, the plaintiff is having only right of way by walking through the

plaint B schedule property. The learned counsel for the appellants cited the decision of this Court in **Badariya Madrassa Committee and another v. Antony Robert Breganza [2006(2) KLT 636]** to substantiate the point that when the use of way is only for walking, the plaintiff cannot claim easement for taking vehicular traffic. She cannot claim any vehicular passage through plaint B schedule property. The plaintiff herself admits that the canal road on the eastern side came into existence only about 22 years back, and at the same time, she claims that she has been using the plaint C schedule property for the last more than 50 years for vehicular passage. It reveals the falsity of the claim. As a matter of fact, the canal road came into existence after 1986, and the suit was filed in the year 2002 and hence, the plaintiff will not get the statutory period of 20 years to claim an easement right by prescription. The Advocate Commissioner has specifically reported that the way towards the northern side from the plaint A schedule

property is aged more than 50 years, whereas the age of the beaten track through the middle of the plaint C schedule is only around 10 years. At any rate, the First Appellate Court acted illegally in granting easement by prescription over plaint C schedule pathway, including vehicular passage, holding that the width of the pathway is 3 meters, whereas the Advocate Commissioner has reported in his report that the width of the beaten track is only 30 cms. At any rate, only a width of 2 feet is sufficient for a pathway which can be used for walking. The Trial Court has specifically found that PW2 and PW3 are interested witnesses, and their interests could not be relied on. The plaintiff did not mount to the box to give evidence. The son of the plaintiff, who was examined as PW 2, could not give an answer to the material questions, pleading ignorance of the same. The counsel further contended that the plaintiffs filed an Ext.B1 suit claiming that the plaintiffs are the owners of plaint B schedule property against defendants 2 and 3 and others. In such case,

the plaintiff does not admit the defendants 2 and 3 as the owners of plaint B schedule property. It is settled that only if the plaintiff admits the defendant as the owner of the land, easement by prescription can be claimed against the defendants. The learned counsel for the appellants concluded his arguments by praying to allow the appeal answering the substantial question of law formulated in the appeal in favour of the appellant.

16. On the other hand, the learned Senior Counsel for the respondents contended that the specific case of the defendants was that plaint C schedule property does not exist. The Trial Court, as well as the First Appellate Court, specifically found the existence of a plaint C schedule pathway. The Trial Court non-suited the plaintiff on the sole reason that the plaintiff could not prove easement for the statutory period to claim an easement by prescription relying on the age of Plaint C schedule pathway reported by the Advocate Commissioner as 10 years. The Advocate commissioner will not be able to assess the age of a

pathway on inspection. It is in evidence that the plaintiff and the 1st defendant, though wife and husband, were at loggerheads. The 1st defendant wanted to see that the right of easement through the plaint C schedule pathway of the plaintiff is defeated and hence executed Ext.B2 sale deed in favour of the defendants 2 and 3 who are his nephew and wife. It is in evidence that the pathway started from the northern side of plaint A schedule is not wide enough to take four-wheeler vehicles through it. It is a settled law that the availability of an alternative pathway is not a reason for denial of easement by prescription if the essentials are pleaded and proved by the plaintiff. The learned Senior Counsel cited the decision of this court in **Mercy v. Agnes Maria. E.J [2023 KHC 828]** to substantiate the said proposition of law. The house situated in plaint A schedule property is facing towards east. Hence, it is quite natural that the pathway for access would go towards the eastern side. The Learned Senior Counsel concluded the

arguments by praying to dismiss the appeal, answering the substantial question of law in favour of the respondents.

17. I have considered the rival contentions.

18. The original ownership of the plaint A schedule property by the plaintiff and the plaint B schedule property by the 1st defendant is admitted by the parties. The suit was filed on 10.07.2002. The plaint B schedule property was sold by the 1st defendant to the 2nd and 3rd defendants by Ext.B2 immediately before the institution of the suit on 05.07.2002. Hence, as on the date of the suit, defendants 2 and 3 are the owners of the plaint B schedule property. The plaintiffs filed Ext.B1 suit only on 06.07.2006 to declare that Ext.B2 document is a sham document and that they are the title holders of the plaint B schedule property as legal heirs of the 1st defendant after his death on 10.05.2006. The plaint B schedule property belonged to the 2nd and 3rd defendants as per Ext.B1 document so long as the said document is not set aside or declared void by a

competent court. Since the plaintiffs are not the owners of the Plaint B schedule property, they can maintain the suit for easement by prescription. Merely because they have filed an Ext.B1 suit challenging the Ext.B2 document after the death of the 1st defendant, it could not be said that the present suit is not maintainable.

19. The first question to be considered is the existence of Plaint C schedule pathway. Plaint C schedule pathway is shown as having 3 Meters width and 48 Meters length. The existence of the pedestrian pathway as on the date of the suit is more or less admitted by the defendants. Their contention is that it is used as a means of easy access on the basis of consent on account of the relationship of the plaintiff and the 1st defendant. The appellants have expressed no objection in providing the said pedestrian pathway on the northern extremity of the plaint B schedule property. But such concession could not be taken as a proof of existence of the pathway having a width of 3 Meters

for the statutory period of 20 years immediately preceding the suit. Hence the plaintiffs have to prove the existence of the plaint C schedule pathway having a width of 3 Meters first.

20. Let us examine whether the plaintiffs have succeeded in proving the existence of the plaint C schedule pathway having a width of 3 Meters.

21. There are two Commission Reports available in the suit. Ext.C1 is the Commission Report dated 26.07.2002 prepared on the basis of the inspection on 10.07.2002, the date on which the suit was filed. Ext.C1 would show that there is a beaten track on the front side of the house situated in A schedule property towards southern side joining with Plaint C schedule way. Plaint C schedule way goes towards east and ends at canal road. The length and width of Plaint C schedule way is reported as 47 Meters and 30 cms respectively. It is true that the Advocate Commissioner has reported tyre marks on both sides of the said 30 cms. Even then, the Advocate Commissioner did not report

that the way is having a width to take vehicles. In sum and substance, Ext.C1 would reveal that the width of the way found by the Advocate Commissioner is only 30 cm. As rightly pointed out by the learned Senior Counsel for the respondents, an Advocate Commissioner could not assess the age of the pathway, and hence, the report of the Advocate Commissioner that the age of the pathway is only ten years could not be relied on. Ext.C2 Commission was taken at the instance of the defendants to prove that the plaint A schedule property is having a way towards the northern side. Ext.C2 Commission Report is dated 09.04.2003 and prepared on the basis of the inspection on 17.03.2003. It reveals that there is a pathway towards the northern side from the north-eastern corner of the plaint schedule property. As per Ext.C2 Commission Report four wheeler vehicles could be taken through the said way in the first 60 Meters towards south from the northern Panchayat road and only three wheeler vehicles could be taken through the further

33 Meters upto the plaint A schedule property. Ext.C2(a) Plan would also reveal that the plaint A schedule property is having access towards northern side. It is in evidence that the house in Plaint A schedule property is situated on the northern side of Plaint A schedule property. It is in evidence that the house is facing towards east. The way towards the northern side starts from the north-eastern side, and the plaint C schedule starts from the south-eastern side. Hence, merely because of the fact that the house is facing towards the eastern side, it could not be said that the plaint C schedule pathway is the pathway to the plaint A schedule property. Considering the fact that the house is situated on the northern side of Plaint A schedule property, the access towards the northern side is the probable access. It is true that the existence of an alternative pathway is not a ground to deny easement by prescription. But as rightly pointed out by the learned counsel for the appellants, the suppression of the northern way will reveal the falsity of the claim of the

plaintiffs. Hence, the existence of a vehicular passage through plaint C schedule property is not proved by the Commission Reports available in the suit.

22. The plaintiffs examined PWs 1 to 4 to prove the plaint claim. Instead of the plaintiff, the son of the plaintiff was examined as PW2. PW2 deposed that the plaint C schedule pathway is the only pathway available to plaint A schedule property. When it is in evidence that the plaint A schedule property is having a pathway towards northern side, it is clear that PW2 is not telling truth before the court. PW2 was examined as a person who knows the parties to the suit. He did not disclose the fact that he is the brother-in-law of PW1 in his proof affidavit. He filed a proof affidavit stating that the plaint C schedule is the only way available for the plaint A schedule property. His evidence could not be relied on as he is also not telling the truth and he is an interested witness. PW4 is the President of the SNDP branch. Even though in cross examination he initially stated that there is

no way towards northern side from Plaint A schedule, later he admitted that there is a way towards northern side since 21 years and he could not state for sure whether the plaintiff and her family members have used the said way. The evidence of PW4 also does not inspire confidence. The evidence of PW4 Advocate Commissioner would show that there is a beaten track having a width of 30 cms through the middle of plaint C schedule. PW1 admitted that he had seen a way towards the northern side during the inspection for preparing Ext.C1, and the plaintiffs did not want to inspect the said way. PW4 has specifically stated that the way which she saw in the plaint B schedule is having a width of 30 cms and length of 47 Meters. So, the evidence of PWs 1 to 4 is not helpful to the plaintiffs to prove a vehicular passage through Plaint B schedule property.

23. The plaintiff might have taken the car through plaint C schedule pathway for some period when she was taken for treatments. When the canal road is situated on the eastern side of plaint B

schedule property and B schedule property has been remaining open, the usage of vehicles through plaint C schedule pathway is quite normal. But the plaintiff cannot claim right to take vehicle through plaint C schedule pathway as of right in the absence of any proof to show that the plaintiff has been taking vehicle through plaint C schedule pathway for the statutory period of 20 years. The way towards northern side from plaint A schedule property admits only three wheeler vehicle passage. The evidence would indicate that the plaintiffs and the family members started walking through plaint B schedule property as an easy access after the formation of the canal road. Now the attempt of the plaintiff is to obtain a vehicular passage through the plaint B schedule property.

24. The specific finding of the First Appellate Court is that once the use is established over a particular area, a reasonable space claimed as 3 Meters width required for the said use as deposed by PWs 1 to 3 can be fixed as the width of the plaint C schedule

though the same is not specifically demarcated in the Commission Report. Such finding is plainly illegal and unsustainable. First of all, the width of the way could not be fixed relying on the interested testimonies of PWs 1 to 3. The Advocate Commissioner has not identified a 3 Meters width pathway through plaint B schedule property. There is no evidence to prove the vehicular passage through the plaint schedule property for the statutory period of 20 years.

25. The First Appellate Court failed to understand the distinction between the pedestrian passage and vehicular passage. In **Badariya Madrassa Committee (supra)** this Court held that when the use of way is only for walking the plaintiff cannot claim easement for taking vehicular traffic. When the evidence before the court is only for pedestrian passage the First Appellate Court should not have granted the relief of vehicular passage. Hence, I am of the view that the judgment and decree passed by the First Appellate Court is liable to be modified. From the pleadings

and evidence, it is clear that the plaintiff and the family members have been using the northern extremity of plaint B schedule property for walking. Even though the Advocate Commissioner has reported only 30 cms as the width of beaten track, I am of the view that 30 cms is not enough for pedestrian passage, when both sides are enclosed. A minimum width of three feet is reasonably required for a pedestrian passage. The description of plaint C schedule pathway is not in accordance with the said three feet width pathway and the same is not identified by the Advocate Commissioner. Even then, in order to have a quietus to the litigation, I hold that plaintiffs are entitled to get a declaration of easement by prescription over a pathway having three feet width on the northern extremity of plaint B schedule property, i.e; on the immediate southern side of the northern boundary of plaint B schedule property. There will not be any difficulty to identify such a pathway through plaint B schedule property even without any schedule.

26. In view of the aforesaid discussion, I answer the substantial question of law in the negative and in favour of the appellant.

27. The Regular Second Appeal is allowed in part, modifying the judgment and decree passed by the First Appellate Court by declaring that the additional plaintiffs are having right of easement by prescription over a pathway lying east-west having three feet width on the immediate southern side of the northern boundary of plaint B schedule property starting from eastern canal road and ending at the south eastern side of the Plaint A schedule property and further passing a permanent prohibitory injunction restraining the defendants 2 and 3 from obstructing the use of such three feet width pathway by the additional plaintiffs for their ingress and egress to Plaint A Schedule property.

Sd/-

M.A.ABDUL HAKHIM

JUDGE

jma/shg