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Sukumaran Vs. Hari

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Court : Kerala

Decided On : Feb-20-2014

Judge : Honourable Mr.Justice P.Bhavadasan

Appellant : Sukumaran

Respondent : Hari

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN THURSDAY, THE20H DAY OF FEBRUARY20141ST PHALGUNA, 1935 RSA.No. 1382 of 2013 () ---------- AS2282008 of ADDL.DISTRICT COURT-I,MAVELIKKARA IN OS542006 of MUNSIFF COURT, MAVELIKKARA ----- APPELLANTS1& 2/DEFENDANTS1amp;2 : ---------- 1. SUKUMARAN, AGED61YEARS, S/O.THIRUVANCHAN, SAJEEV BHAVANAM, PAYYANALLOOR MURI, PALAMEL VILLAGE2 PONNAMMA, AGED53YEARS, W/O.SUKUMARAN, SAJEEV BHAVANAM, PAYYANALLOOR MURI,PALAMEL VILLAGE BY ADVS.SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL) SRI.A.R.DILEEP SRI.MANU SEBASTIAN SRI.K.J.SHARATH KUMAR RESPONDENTS/RESPONDENT & 3RD APPELLANT/PLAINTIFF & 3RD DEFENDANT:

1. HARI, AGED51YEARS, S/O.KRISHNA PILLAI, KUTTIPLAVIL HOUSE, PAYYANALLOOR MURI, PALAMEL VILLAGE - 690504 2. SAJEEV,

AGED31YEARS,S/O.SUKUMARAN, SAJEEV BHAVANAM, PAYYANALLOOR MURI, PALAMEL VILLAGE69050 R1 BY ADV. SRI.B.KRISHNA MANI THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON2002-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: BP P.BHAVADASAN, J.

---------- Regular Second Appeal No.1382 OF2013---------- Dated this the 20th day of February, 2014.

JUDGMENT

The defendants 1 and 2 in O.S.No.54/2006 before the Munsiff Court, Mavelikara are the appellants. They suffered a decree for permanent prohibitory injunction. The facts absolutely necessary for the purpose of disposal of the appeal are as follows:

2. The plaintiff pointed out that he is in absolute possession and enjoyment of the plaint schedule property and the defendants had no manner of right over the said property. The defendants were residing on the south-eastern side of the plaint schedule property. According to the plaintiff, the defendants are having access to the northern and southern panchayath roads through pathway towards east from their property. It is also pointed out that near the property of the plaintiff, there is property of the sister of the plaintiff also. According to the plaintiff, the properties are lying within well defined boundaries. R.S.A No.1382/2013 2 The defendants demanded a pathway through the plaint schedule property and the plaintiff was threatened to cut open a new way. So, the suit was laid.

3. The defendants resisted the suit. They disputed the way which was alleged to be in use by them. According to them, there is a pathway running through the plaint schedule property and that is the only means of access to them to go to outside world. When the plaintiff tried of obstruct the pathway, they took objection to the same. It was contended that the property wherein the defendants reside has an extent of 18.5 cents and it was purchased by the 1st defendant 35 years back from the sister of the plaintiff namely, Sreedevi. They put up a building and have

been residing there. The defendants laid a counter claim in respect of the pathway.

4. Issues were raised by the trial court and the parties adduced evidence. The evidence consists of the testimony of PWs 1 and 2 and the documents marked as Exts.A1 to A4 on the side of the plaintiff. The defendants had DWs 1 and 2 examined. They did not produce any document. Exts.C1 to C3 series are R.S.A No.1382/2013 3 commission reports and plan.

5. The trial court, on appreciation of the evidence, came to the conclusion that the defendants who laid the counter claim had not produced the document of title to show that they own the property as they claimed and therefore the plea has to fail. It is also found by the trial court that the way as alleged by the defendants in the suit in respect of which counter claim was laid could not be located by the Commissioner and all that the Commissioner has mentioned in the report is that there is a footpath running through the property of the plaintiff. The trial court found the evidence insufficient to establish the right of way of defendants. The counter claim was found untenable. Accordingly, suit was decreed and the counter claim was dismissed.

6. Aggrieved defendants took up the matter in appeal. The lower appellate court, after independent evaluation of the evidence, concurred with the finding of the trial court and dismissed the appeal. Hence this R.S.A. R.S.A No.1382/2013 4 7. Learned counsel appearing for the appellants in this appeal mainly contended that what has been considered by the lower appellate court is only appeal in the counter claim and not the appeal against the decree of injunction in favour of the plaintiff. It is contended that even the plaintiff admits that the defendants had been residing in the property for more than 35 years and there is nothing to show that the defendants have any other means of access to their property. The plaintiff claimed 57 cents of property and the property has not been properly identified, according to the defendants. It is pointed out that a decree has been granted in respect of a property which has not been properly identified and therefore the plaintiff cannot succeed.

8. This Court issued notice before admission and the respondents entered appearance. It is pointed out by them that the defendants are facing a suit for eviction and there is nothing to show that the property in relation to which prescriptive right of easement is made belongs to the plaintiff. It is significant to notice, according to the learned counsel, that the owner of the R.S.A No.1382/2013 5 property in which the defendants now claim to reside has not been examined to prove that the property in which the defendants now reside, enjoys the prescriptive right of easement over the pathway now claimed by the defendants. The only person examined is the close relative of the defendants. It is further pointed out by the learned counsel that both the courts below have found that the defendants are not entitled to the claim made by them.

9. Therefore, exercising the jurisdiction under Section 100 of the Code of Civil Procedure, there is no substantial questions of law raised to entertain the appeal.

10. After having heard the learned counsel for the appellants and the learned counsel appearing for the respondents, there seems to be considerable force in the submission made by the learned counsel for the respondents. It is significant to notice that the owner of the property where the defendants claim to reside has not been examined and the title deed of that property has not been produced. It is seen from the judgment of the trial court that the defendants are facing a suit R.S.A No.1382/2013 6 for eviction from the property.

11. It is trite that prescriptive right of easement can be only in relation to a property and unless it is shown that the right is attached to a particular property that is a dominant tenement, the claim cannot succeed. Of course, it is not necessary that the owner of the dominant tenement itself should come forward. It may be done by a person in possession of the property on behalf of the owner. But, certainly, the owner of the property should have a claim as of right. There is no case that subsequent to the giving of the possession of the property, the defendants had acquired the prescriptive right of easement.

12. Apart from the above fact, a perusal of the commission report shows that a footpath is running through the property of the plaintiff and also through the rubber estate situated on the northern side of the property now occupied by the

defendants. The report is clear to the effect that the Commissioner in spite of three inspections could not locate the pathway as alleged by the defendants.

13. The courts below, after independent evaluation of the R.S.A No.1382/2013 7 evidence, found that the claim of the defendants cannot succeed. Apart from the fact that the defendants were not able to show their ownership over the property, the courts below also found that there is no pathway as alleged in the counter claim or in other words as claimed by the defendants and accordingly, right was declined. There is nothing to show that the findings are either perverse or are contrary to the evidence on record. Mere possibility of a different view is not a ground to entertain the appeal under Section 100 of the Code of Civil Procedure. There is no merit in the R.S.A and it is liable to be dismissed. I do so. Sd/- P.BHAVADASAN JUDGE smp // True Copy // P.A. to Judge.

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