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Court : Kerala

Decided On : Jan-05-2016

Judge : K. Abraham Mathew

Appeal No. : OP(C).No. 2507 of 2015 (O)

Appellant : Paul

Respondent : Varghese and Another

Judgement :

This Original Petition arises from a suit instituted by respondents 1 and 2, who are son and mother respectively, for a declaration that they have acquired right of easement by prescription over the plaint B schedule way. The respondents reside in the plaint A schedule property belonging to the first respondent, in which the second respondent has life interest. The adjoining northern property belongs to the petitioner. Plaint B schedule way is in this property. The parties are close relatives. Their properties belonged to their ancestor Kunju Vareed. In a partition that took place in his family in 1099 ME(1924 AD) the plaint A schedule property was allotted to the grandfather of the first respondent and the northern property to the grandfather of the petitioner. The respondents allege that the B schedule pathway came into existence in 1099 M.E and for the last 90 years they and their ancestors have been using it for their ingress and egress. Just before the suit was filed the petitioner allegedly dumped pieces of granite and rubble in the plaint B schedule way, which is said to be the cause of action for the suit. Along with the plaint the

respondents filed an application for a temporary mandatory injunction directing them to remove obstruction on the way. The petitioner contends that the respondents have no right of way over the plaint B schedule property and their claim is false. According to him, to the west of the properties involved in the suit there is a panchayat road and there is a road leading from it up to the house of the respondents in the plaint A schedule property; national highway runs along the eastern boundary of the respondents' property; eastern portion of the respondents' property was acquired to widen the national highway, as a consequence of which the respondents' property now lies at a higher level than the national highway; they wanted to form a road through their property from the national highway, for which dumping of soil was necessary as the difference in level was considerable; the petitioner granted their request to take vehicles through his property so that they may take soil from their property in order to form the road but the respondents started removing soil from their property destroying the lateral support of the petitioner's property; so he withdrew the permission granted to them to take vehicles through his property. It is this that has caused them to file the suit raising false allegations.

2. The learned Munsiff took the view that the respondents have established a prima facie case and so they are entitled to the temporary mandatory injunction prayed for. This has been upheld by the appellate court in C.M.A.No. 30 of 2015.

3. Heard the learned counsel on both sides.

4. Unless there is a dominant heritage and a servient heritage right of easement cannot be claimed. As these two properties form subject matter of the suit, both of them should be described in separate schedules in the plaint. The way over which the right is claimed should be described in another schedule. In the plaint filed by the respondent the servient heritage is not described in a schedule.

5. There is a way in the petitioner's property as described in the plaint B schedule. A ridge having a width of about 1.65 metre starts from a nearby panchayath road and it reaches the property of the respondents. The width of the ridge is about 2 metres when it reaches the respondents' property. Their property lies as a compact area and national highway runs along its eastern boundary. A road is

being formed through their property, for which they have dumped soil in their property to facilitate entry from the national highway. There were pieces of granites on the plaint B schedule way. These are facts noted in the reports of the commissioner. The learned Munsiff took the view that existence of an alternative way or a formation of a new road will not defeat the claim of easement by prescription.

6. The first commission report does not disclose all the material and relevant facts. Existence of the ridge which is used as a pathway and formation of the new road through the respondents' property came to light only in the second report filed by the commissioner after he visited the property at the request of the petitioner. A commissioner is a representative of the court and not an agent of a party. He has a duty to report facts which are material and relevant to decide the dispute before the court whether they support or do not support the party on whose application he is appointed. He should not give room for the complaint that he failed to report the facts which are favourable to the opposite party. He should peruse the pleadings of the petitioner before he visits the property, which is necessary for a proper understanding of the case. He should foresee the contentions that might be raised by the opposite party.

7. Existence of prima facie case is very important in an application for temporary injunction. Existence of alternative way does not disentitle the party who claims easement of way by prescription from getting order of injunction. But in a court of equity it is equally important that he should come to the court with clean hands. Suppression of material or relevant facts is evidence of his hands being unclean.

8. Plaint A schedule property of the respondents extends up to the national highway which runs at a length of 150 feet along its eastern boundary. This is not disclosed in their pleadings. They have given a false description of the boundaries of their property in the petition schedule. There is no explanation for not disclosing existence of the alternative way up to their courtyard. When the commissioner inspected the property, a new road was being formed through their property.

9. The probability also may be taken into consideration. The width of the way claimed by the respondents is 10 feet. It allegedly came into existence 90 years

ago. It is beyond any stretch of imagination that 90 years ago the petitioner's predecessor allowed the respondents' predecessor to use a 10 foot wide road through his property.

10. The trial court and the appellate court failed to take into consideration the suppression of material and material facts by the respondents. The claim for injunction should have been refused on the mere ground that it was not with clean hands they approached the court. The impugned order is liable to be set aside.

In the result, this Original Petition is allowed. The impugned order is set aside. The respondents are liable to pay costs of the petitioner in the courts below and in this court.

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