

Henry vs K.L.Thomas

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Court : Kerala

Decided On : Aug-07-2023

Judge : Honourable Mr. Justice T.R.Ravi

Appeal No. : RSA/907/2015

Appellant : HENRY

Respondent : K.L.Thomas

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE T.R.RAVI MONDAY,
THE 7TH DAY OF AUGUST 2023 / 16TH SRAVANA, 1945 AGAINST
THE JUDGMENT AND DECREE DATED 29.11.2013 IN OS 206/2011
OF II ADDITIONAL MUNSIF COURT, ERNAKULAM AGAINST THE
JUDGMENT AND DECREE IN AS 162/2013 OF THE ADDITIONAL
DISTRICT COURT-IV, ERNAKULAM
APPELLANTS/RESPONDENTS/DEFENDANTS: 1 HENRY AGED 64
YEARS S/O.LATE PETER, KOLOTHUMVEEDU, VADUTHALA DESOM,
CHERANELLORE VILLAGE, KANAYANNUR TALUK, ERNAKULAM
DISTRICT. 2 ANNIE AGED 54 YEARS W/O.HENRY,
KOLOTHUMVEEDU, VADUTHALA DESOM, CHERANELLORE

VILLAGE, KANAYANNUR TALUK, ERNAKULAM DISTRICT. BY ADVS. SRI.K.S.BABU SRI.BABU SHANKAR SRI.K.S.GOPI SMT.N.SUDHA SRI.K.V.WINSTON RESPONDENT/APPELLANT/PLAINTIFF: K.L.THOMAS AGED 69 YEARS S/O.LATE LONAN, KOLOTHUMVEEDU, VELLISSERIPARAMBU, VADUTHALA DESOM, CHERANELLORE VILLAGE, KANAYANNUR TALUK, ERNAKULAM DISTRICT-682023. BY ADV SRI.G.SREEKUMAR (CHELUR) THIS REGULAR SECOND APPEAL HAVING COME UP FOR ORDERS ON 07.08.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

T.R. RAVI, J.

----- R.S.A No.907 of 2015
----- Dated this the 07th day of August,
2023

JUDGMENT

The appellants are the defendants in the suit. The suit was

filed by the plaintiff, claiming to be the absolute owner in possession and enjoyment of plaint A schedule property, which contains two buildings, one independent building and an apartment building bearing door Nos.47/55 A, 47/55 B and 47/55 C. The 1st defendant is the son of the plaintiffs fathers brother Peter and the 2nd defendant is the wife of the 1st defendant. The defendants are residing to the east of the plaint A schedule property and they also own two buildings. The southern building is let out to a tenant and the defendants are residing in the northern building. It is stated that there is a concrete road maintained by the Cochin Corporation leading to the plaint A schedule property and the defendants property from the Toll Gate road. The road starts from Chittoor road on the western side and proceeds towards east and then further proceeds

towards the north to a distance of 150 metres and towards west and reaches plaint A schedule property. It is stated that the north-south direction area of the part of

the road has a width of approximately 4 metres and the east-west direction area has a width of approximately 1.6 metres. It is stated that the residents of both sides of the road are using the road for their ingress and egress and light motor vehicles and mini lorries can ply through the road, which is 1.6 metres width. On 22.11.2001, the 1st defendant executed a consent letter in favour of the plaintiff giving him permission to use a portion of his property for taking vehicles to the plaintiff A schedule property. The permission was regarding a width of 30 Cms from the south-east boundary and 80 Cms on the south-west boundary of his building bearing No.65/70. The said portion has been shown as plaintiff B schedule in the plaintiff. According to the plaintiff, the cause of action arose when defendants tried to obstruct the way by putting granite rubbles in the plaintiff B schedule property.

2. The defendants filed a written statement along with a counter claim. According to the defendants, even though the

consent letter had been given, the same is not a registered document. It is further stated that the plaintiff is not entitled to use more than 30 Cms and 80 Cms width as consented. A Commission was taken up and the Commissioner has filed Exts.C1 report and C2(a) plan. The trial court dismissed the suit as well as the counter claim filed by the defendants in the suit. The plaintiff filed A.S.No.162 of 2013 challenging the dismissal of the suit. The defendants did not challenge the dismissal of the counter claim. The first appellate court, on re-appreciation of the evidence, partly decreed the suit, granting a decree restraining the defendants from interfering with the taking of vehicles to the plaintiff A schedule property through plaintiff B schedule property, which has a width of 20 Cms on its south-eastern side and 80 Cms on its south-western side, from reducing its width by storing granite rubbles, wooden planks, iron rods and other materials and from making any construction in the plaintiff B schedule property having the aforesaid area. The claim for a mandatory injunction directing the defendants to remove the construction described in plaintiff C schedule was rejected. In the

appeal the defendants had filed a cross objection, which was also dismissed by confirming the dismissal of their counter claim by the Munsiff court. The Sheet No.II of the commission report C2(a) has been made part of the decree. The

defendants have challenged the decree.

3. In this second appeal, the defendants submitted that a

reading of Ext.A6 consent letter would show that there is a relinquishment of property and that the relinquishment of the right over an immovable property, should be by a registered document. Reliance is placed on the decision in Shyam Narayan Prasad vs Krishna Prasad and Ors [AIR 2018 SC 3152] in support of the said contention. Regarding the width of the pathway it is submitted that the evidence is not consistent in so far as it refers to a width of 1.6 metres including a portion covered by slab and in some places it would appear that the 1.6 metres is excluding the slab portion. Another ground taken is that there is no specific pleading of any easement by grant and hence no relief can be granted. Reliance is placed on Bachhaj Nahar v. Nilima Mandal and another [AIR 2009 SC 1103]

to submit that the court cannot infer on the question of easement and the plaint should specifically say the nature of the easement. It is submitted that there are no pleadings regarding easement by the trial court. It is further submitted that the trial Judge had found that the relinquishment deed is unregistered and hence no right is created by the said document and there was no reason for the appellate court to interfere with the said finding.

4. The counsel for the respondent/plaintiff submits that there is no relinquishment involved in Ext.A6 and it only grants permission to use a portion as a way and hence it does not

require a registration. It is submitted that there is no inconsistency regarding the report and that even though the Advocate Commissioner was examined, no point was made out. It is further submitted that the court while partly decreeing the suit has specifically avoided the portion which is covered by the building of the defendants. Another contention taken is that since the appellants had not challenged the judgment in the counter claim the appellants cannot prefer this appeal since they

are bound by the said judgment. Reliance is placed on the

judgment of a Full Bench reported in Khalid v. Sulekha [1986

KLT 1113]. In reply, the counsel for the appellants relied on two Division Bench judgments reported in Papavinasom Subramonian v. Daivani Nagarama & Others [1953 KLT 851] and Koyyatton Sooppi v. Vaniyath Kallyani [1957 KLT

899] to submit that in a case where there is a common judgment

in two suits and an appeal is preferred only against one

judgment there is no res-judicata by the judgment in the other

suit. The decisions referred to specifically find that since the

judgment is a common judgment it cannot be said that the one is

former and the other is latter and hence the principles of res- judicata cannot be applied.

5. I do not think it is necessary to go into the decisions

which have been referred to by the counsel on either side. The case of the appellants itself is that the plaintiff should not use more than what has been consented to in Ext.A6. It is evident from the report of the Commissioner that a portion of the B schedule is actually covered by a building of the defendants and

while granting the decree the court has very carefully excluded the said portion and granted a decree for injunction only with regard to the remaining portion. As such, the defendants cannot have any grievance at all, since the court has not granted anything more than what they have consented. The non- registration of Ext.A6 is not vital, since the document cannot understood to be one wherein the defendants have completely relinquished their right over the property. The permission granted is to use the area covered by the document as a way and, since there is no transfer of property involved, there is no requirement for registration.

No grounds are made out for interference with the well considered judgment of the first appellate court. The second appeal fails and is dismissed. Sd/- T.R.RAVI
JUDGE mpm APPENDIX OF RSA 907/2015 PETITIONERS ANNEXURES
ANNEXURE.A2 TRUE COPY OF THE BUILDING PLAN. ANNEXURE.A1 TRUE
COPY OF THE BUILDING PERMIT.

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