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Chellappan Vs. Mathew

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Court : Kerala

Decided On : Dec-17-2014

Judge : Honourable Mr.Justice P.Bhavadasan

Appellant : Chellappan

Respondent : Mathew

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN WEDNESDAY, THE17H DAY OF DECEMBER201426TH AGRAHAYANA, 1936 OP(C).No. 2889 of 2014 (O) ---------- (O.S.100/2012 OF MUNSIFF COURT, PALA) PETITIONERS: ---------- 1. CHELLAPPAN, AGED74YEARS THUNDATHIL HOUSE, S/O.KELAN, KOZHA P.O KOZHA KARA, KURAVILANGADU VILLAGE, MEENACHIL TALUK.

2. K.G.VIJAYAN, AGED47YEARS FARMER, S/O.GOVINDAN, KOTTAKAVIL HOUSE KOZHA P.O, KOZHA KARA, KURAVILANGADU VILLAGE MEENACHIL TALUK.

3. GEETHA, AGED37YEARS W/O.K.G.VIJAYAN, KOTTAKAVIL HOUSE, KOZHA P.O KOZHA KARA, KURAVILANGADU VILLAGE, MEENACHIL TALUK.

4. UTHAMAN, AGED49YEARS S/O.CHELLAPPAN, THUNDATHIL HOUSE, KOZHA P.O KOZHA KARA, KURAVILANGADU VILLAGE, MEENACHIL TALUK.

BY ADV. SRI.P.C.HARIDAS RESPONDENTS: ---------- 1. MATHEW, AGED82YEARS KURICHIYIL HOUSE, KOZHA P.O, KOZHA KARA KURAVILANGADU VILLAGE, MEENACHIL TALUK.

2. JOSE MATHEW, AGED56YEARS S/O.MATHEW, KURICHIYIL (H), KOZHA PO KOZHA KARA, KURAVILANGADU VILLAGE, MEENACHIL TALUK. R1 BY ADV. SRI.JOHN JOSEPH. THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON1712-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: OP(C).No. 2889 of 2014 (O) ---------- APPENDIX PETITIONERS' EXHIBITS : ---------- EXHIBIT P1 COPY OF THE PLAINT IN OS NO.100/12 ON THE FILES OF THE MUNSIFF'S COURT, PALA. EXHIBIT P2 COPY OF THE COMMISSION REPORT IN OS NO.100/12 ON THE FILES OF THE MUNSIFRF'S COURT , PALA. EXHIBIT P3 COPY OF THE WRITTEN STATEMENT FILED BY THE RESPONDENTS IN OS NO. 100/12 ON THE FILES OF THE MUNSIFF'S COURT PALA. EXHIBIT P4 COPY OF COMMUNICATION REPORT IN OS NO.100/12 ON THE FILES OF THE MUNSIFF'S COURT, PALA. EXHIBIT P5 COPY OF THE OBJECTION TO EXHIBIT P4 FILED BY THE PETITIONERS. EXHIBIT P6 COPY OF THE IA NO. 2328/14 IN OS NO. 100/12 ON THE FILES OF THE MUNSIFF'S COURT, PALA. EXHIBIT P7 COPY OF THE

ORDER
DATED2411/2014 IN IA NO. 2328/14 IN OS NO. 100/12 OF THE MUNSIFF'S COURT,PALA. EXHIBIT P8 COPY OF PETITION SEEKING AMENDMENT OF PLAINT IN O.S.100/12 ON THE FILES OF MUNSIFF'S COURT, PALA. RESPONDENTS' EXHIBITS: NIL. ---------- // True Copy // P.A. To Judge. smp P.BHAVADASAN, J.

---------- Original Petition (Civil) No.2889 OF2014---------- Dated this the 17th day of December, 2014.

JUDGMENT

The petitioners challenge Ext.P7 order whereby their application for issuance of a commission was dismissed by the court below.

2. The petitioners are plaintiffs in O.S.No.100/2012 before the Munsiff Court, Pala. The suit was for declaration of right of easement over a way and also for other consequential reliefs. The petitioners claim to be the owners in possession of plaint schedule items Nos.1 and 2 and according to them, item No.3 is a way which is having width of 3 feet and length of 90 metres starting from a road and passing through the properties of the respondents and leading to plaint schedule item Nos.1 and 2. They claimed prescriptive right of easement over the said pathway. Complaining of interference with the pathway and the act of the defendants in damaging the way, suit was laid. O.P.(C) No.2889/2014 2 3. Soon after the suit was laid, a commission was taken out and Ext.P2 is the report filed by the Commissioner. The defendants raised their objection with regard to the claim made by the plaintiffs and pointed out that there is no such way in existence as claimed by the plaintiffs and that the attempt of the plaintiffs is to create a new road through their properties. They made mention of various talks between the parties. Finally, they pointed out that they had entered appearance in the suit and had the Commissioner visited the property again. Ext.P5 is the second report filed by the same Commissioner.

4. Trial commenced and PWs 1 to 5 were examined and Exts.A1 to A7 were marked. When the case was posted for further evidence of the plaintiffs, I.A.No.2328/2014 was moved for remitting the Commissioner's report which is objected to by the respondents pointing out that the attempt is to simply drag on the proceedings and there is no bonafides in the petition. It is pointed out that all facts which are now sought to be ascertained were already made available in the earlier reports of the Commissioner. Accepting the contention raised by the O.P.(C) No.2889/2014 3 respondents in the Interlocutory Application, the petition was dismissed.

5. Learned counsel appearing for the petitioners contended that two commission reports namely, Exts.P2 and P4 show different measurements regarding the pathway and there is some ambiguity regarding its location. Learned counsel also

brought to the notice of this Court that he has moved the lower court for amendment of the plaint. According to the learned counsel, for proper adjudication of the issue involved in the suit, it is necessary that the identity of the way is ascertained and no particular prejudice is caused to the defendants by doing so. Therefore, according to the learned counsel, the court below was in error in dismissing the petition.

6. Learned counsel appearing for the respondents, on the other hand, contended that there is absolutely no bonafides in the petition filed before the court below and the finding of the court below that remission is unnecessary is justified. It could not be treated as a perverse order.

7. After having heard the learned counsel for the O.P.(C) No.2889/2014 4 petitioners and the learned counsel appearing for the respondents and also after having perused the records, there seems to be considerable force in the submission made by the learned counsel for the respondents. The Commissioner has filed two reports namely, Exts.P2 and P4. Of course, there is difference in the nature of pathway mentioned in the two reports. But the Commissioner can be examined and that can be clarified. Moreover, Commissioner's report is only an item of evidence and it does not stand in isolation. It is to be assessed and analysed in the light of other items of evidence in the case. As rightly noticed by the court below, the plaintiffs can adduce evidence with regard to actual length and width of the way. Moreover, the court below was of the view that it is possible to ascertain the disputed factors from the records available before it.

8. Under the above circumstances, if the court below formed an opinion that remission is sought for without any bonafides, it cannot be found fault with. Consequence of amendment of plaint is not a matter for this Court to consider in this proceedings. It cannot be said that the evidence of the O.P.(C) No.2889/2014 5 petitioners is sought to be shut out. The court below has rightly observed that there are other means of way to establish the claim of the plaintiffs including examination of Commissioner.

9. This Court finds no irregularity, illegality or impropriety in the order assailed before this Court and no interference is called for under Article 227 of the

Constitution of India. This original petition is without merits and it is accordingly dismissed. Sd/- P.BHAVADASAN JUDGE smp

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