

Aboobacker Siddique Vs. Ashokkumar

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Court : Kerala

Decided On : Nov-21-2014

Judge : Honourable Mr.Justice P.Bhavadasan

Appellant : Aboobacker Siddique

Respondent : Ashokkumar

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN FRIDAY, THE 21ST DAY OF NOVEMBER 2014 30TH KARTHIKA, 1936 OP(C).No. 2737 of 2014 (O) ----- AGAINST THE

ORDER

IN CMA92014 IN I.A.2736/13 IN O.S.374/13 of SUB COURT, OTTAPPALAM DTD. 22.08.2014 PETITIONERS: ----- ABOOBACKER SIDDIQUE, AGED 35 YEARS, S/O. MUHAMMED, THAZHAVARATHIL HOUSE, CHUNAGAD P.O., CHUNAGAD AMSOM DESOM, OTTAPPALAM TALUK, PALAKKAD DISTRICT. BY ADV. SRI.K.RAVI (PARIYARATH) RESPONDENTS: -----
1. ASHOKKUMAR, AGED 48 YEARS, S/O. KANNADASAN, THAZHAVARATHIL HOUSE, CHUNAGAD P.O., CHUNAGAD AMSOM DESOM, OTTAPPALAM TALUK, PALAKKAD DISTRICT - 678 001.

2. SANTHI. K, AGED42YEARS, W/O.ASHOKKUMAR, AGED48YEARS, S/O. KANNADASAN, THAZHAVARATHIL HOUSE, CHUNGAD P.O., CHUNGAD AMSOM DESOM, OTTAPPALAM TALUK, PALAKKAD DISTRICT - 678 001.

3. MUSTHAFA, AGED48YEARS, S/O. KUNHAYAMU, MULAKKAL HOUSE, CHUNGAD P.O., CHUNGAD AMSOM DESOM, OTTAPPALAM TALUK, PALAKKAD DISTRICT - 678 001.

4. RAMAKRISHNAN, AGED57YEARS, S/O. CHILAMBUNNI THARAKAN, ERAMTHOTTIL HOUSE, VELLINEZHI P.O., OTTAPPALAM TALUK. PALAKKAD - 678 001. THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON2111-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: O.P.(C).No.2737/2014 A P P E N D I X PETITIONER'S EXHIBITS: EXT. P1 : COPY OF PLAINT IN O.S.374/2013 OF COURT OF MUNSIF, OTTAPALAM DTD. 8.10.13. EXT. P2 : COPY OF COMMISSIONERS REPORT AND PLAN, FILED IN I.A.2735/13 IN O.S.374/13 OF MUNSIF COURT, OTTAPALAM DTD. 17.10.13. EXT. P3 : COPY OF

ORDER

PASSED IN I.A.2736/13 IN O.S.374/13 OF MUNSIF COURT, OTTAPPALAM DTD. 19.12.14. EXT. P4 : COPY OF

ORDER

PASSED IN C.M.A.9/14 IN I.A.2736/13 IN O.S.374/13 OF SUBORDINATE JUDGE, OTTAPALAM DTD. 19.12.14. RESPONDENT'S EXHIBITS: NIL. // True Copy // P.A. to Judge. smp P.BHAVADASAN, J.

----- Original Petition (Civil) No.2737
OF2014----- Dated this the 21st day of
November, 2014.

JUDGMENT

This Original Petition is directed against Ext.P4 order in C.M.A.9/2014 in I.A.No.2736/2013 in O.S.No.374/2013 before the Sub Court, Ottapalam.

2. The petitioner was the 2nd plaintiff in O.S.No.374/2013 before the Munsiff Court, Ottapalam. The plaint item No.1 belongs to the 1st plaintiff and item No.2 belongs to the 2nd plaintiff. It is an admitted case that the 2nd plaintiff purchased the property from the 1st plaintiff in 2005. The plaintiffs thereafter laid a claim for prescriptive right of easement in respect of the way which is alleged to be running along the western side of the plaint item Nos.1 and 2 properties. It is contended that the way has been in existence at least from 1993 onwards and they have been using it as a matter of right. Complaining about the obstructions caused by the defendants to the way, the plaintiffs laid a suit for injunction. Along with the O.P.(C) No.2737/2014 2 suit, they filed I.A.No.2736/2013 for interim injunction. The defendants entered appearance and objected to the claim made by the plaintiffs. The defendants contended that even though plaintiffs laid a claim for prescriptive right of easement, the way in question is a private way belonging to the 1st defendant and the plaintiffs have no manner of right to use the same.

3. For the purpose of the I.A, the trial court marked Exts.A1 to A4 and Exts.C1 and C1(a). Exts.B1 to B3 were also marked. The trial court granted relief to the 2nd plaintiff on the ground that there is an electric post standing on the pathway and electric connection to the house of the 2nd plaintiff is taken from that post. Aggrieved defendants carried the matter in appeal as C.M.A.No.9/2014. The lower appellate court, on re-appreciation of the materials before it, came to the conclusion that the 2nd plaintiff has not been able to establish his right over the way. It was found that the plaint A schedule property has a public road on the southern boundary and on the western side of item No.1 plaint A schedule property is the Government Ayurveda Hospital and behind the same is item No.2 property which is occupied by O.P.(C) No.2737/2014 3 the 2nd plaintiff. The lower court noticed that the 2nd plaintiff had obtained the property from the 1st plaintiff. The lower appellate court found that the entire property covered by Ext.A1 has been set apart to the share of the 1st plaintiff and while he was in enjoyment of the property, he would have had no occasion to use the pathway in question for the simple reason that he had public way on the southern side of his property. It is also found that house in item No.2 which is now occupied by the 2nd plaintiff was constructed only 5-6 years back. This persuaded the lower appellate court to come to the conclusion that the claim of prescriptive right of easement prima facie

cannot be accepted. On the basis of these findings, the order of the trial court was reversed and I.A was dismissed.

4. Sri.Ravi.K Pariyarath, learned counsel appearing for the petitioner contended that the lower appellate court was not justified in allowing the appeal in the light of the fact that the trial court found that there does exist a way and also that there is an electric post standing of way and electric connection to the house of the 2nd plaintiff is taken from that post. Further O.P.(C) No.2737/2014 4 contention is that the definite averment in the plaint was that the pathway on the western side has been in use by the plaintiffs from 1993 onwards and therefore, they have acquired the necessary right. At any rate, according to the learned counsel, the facility available to the 1st plaintiff is not available to the 2nd plaintiff and the trial court was careful enough to grant relief only to 2nd plaintiff. It was therefore contended that the order of the lower appellate court is unsustainable.

5. Probably, at the first blush, the contention may look very attractive. But, it has to be borne in mind that the 2nd plaintiff obtained the property from the 1st plaintiff and the lower appellate court had found that the building where the 2nd plaintiff now resides has been put up only 5-6 years prior to the filing of the suit. As rightly noticed by the court below, prior to the putting up of building in item No.2, it is extremely difficult to believe that the plaintiffs would have been using the pathway on the western side especially when the 1st plaintiff had direct access to the public road on the southern side.

6. Learned counsel appearing for the petitioner relied on O.P.(C) No.2737/2014 5 the decision in John Varghese (Pazhampallil) vs. Sweena Anna Thomas (2013 (4) KHC612 and contended that there is common boundary with a pathway besides his property, then unless that pathway is shown to be the private property of another, he can make use of that way.

7. The defendants in the suit had a definite contention that the pathway of which right is now claimed is a private way to their property and the plaintiffs have no manner of right over the said way. The lower appellate court, on appreciation of the material before it found that that probably is true. The court below has considered the matter in considerable detail and based on the material before it,

the court had come to the conclusion that the 2nd plaintiff has not been able to establish prima facie his case and that finding cannot be said to be perverse or illegal in the light of the materials now available and the facts and circumstances of the case as discussed by the court below. The mere fact electric post is standing on the pathway and electric connection had been taken from that to the house of the 2nd plaintiff cannot be ground to accept the plea of O.P.(C) No.2737/2014 6 prescriptive right of easement especially when the 2nd plaintiff admitted that he purchased the property from the 1st plaintiff in 2005 and the house where the 2nd plaintiff resides has been put up only very recently. As rightly noticed by the court below, prior to that the possibility of the plaintiffs using the pathway is very remote. For the above reasons, this Court finds no grounds to interfere with the order passed by the court below. The original petition is dismissed. However, it is made clear that the trial court shall dispose of the suit based on the evidence adduced before it and untrammelled by any of observations made by the lower appellate court or this Court. The trial court may make every endeavour to dispose of the suit as expeditiously as possible provided it is ripe for trial. P.BHAVADASAN
JUDGE smp

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