IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT :
THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 17TH MARCH 2006 / 26TH PHALGUNA, 1927

CMA.No. 100 of 2002()

AS.68/1995 of V ADDL. DISTRICT COURT, ERNAKULAM
OS.33/1992 of SUB COURT, MUVATTUPUZHA

APPELLANT: RESPONDENTS 1 TO 9/PLAINTIFFS 2 TO 10:
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1. KLURIAN, S/O.ITHAPPIRY,
CHEMBAKASSERIYIL HOUSE, POTHANICKADU KARA,
-DO- VILLAGE.

2. JOHN, S/O.CHACKO, RETHAPPILLIL HOUSE,
POTHANICKADU KARA, -DO- VILLAGE.

3. ANNAMMA, W/O.VARKEY,
CHEMBAKASSERIYIL HOUSE, POTHANICKADU KARA,
-DO- VILLAGE.

4. ISSAC, S/O.VARKEY -DO- -DO- -DO-.

5. THOMAS, S/O.VARKEY, -DO- -DO- -DO-.

6. CHINNAMMA, D/O.VARKEY, -DO- -DO-- -DO-.

7. JOSEPH, S/O.VARKEY, -DO- -DO- -DO-.

8. MOLY, D/O.VARKEY, -DO- -DO- -DO-.

9. PAUL, S/O.VARKEY, -DO- -DO- -DO-.

BY ADV. SRI.S.ANANTHASUBRAMANIAN
SRI.S.SHYAM
SRI.SAJI VARGHESE KAKKATTUMATTATHIL
SRI.LATHEESH SEBASTIAN

RESPONDENTS: APPELLANTS & 10TH RESPONDENT/DEFENDANTS 1 TO 4:
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1. JOSE, S/O.THOMAS, CHAKKALACKAL HOUSE,
POTHANICKADU KARA, -DO- VILLAGE.

2. ISSAC, S/O.PAILEE,
KUNNUMPURATHU HOUSE, -DO- -DO-.

3. KUNJAPPAN, S/O.AYYAPPAN,
KOCHUKUDYIL HOUSE, -DO- -DO-.

4. VARGHESE, S/O.MATHAI,
KOPPUZHAYIL HOUSE, -DO- -DO-.

BY ADV. SRI.S.SREEKUMAR

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 17/03/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

C.M.A.NO.100 OF 2002

J U D G M E N T

17.3.2006

K.HEMA, J.

C.M.A.NO.100 OF 2002

Dated this the 17th day of March, 2006

JUDGMENT

Appellants are the plaintiffs in a suit for declaration and injunction relating to their right with respect to a pathway. A decree was passed by the Munsiff's Court in favour of the appellants. In an appeal filed by the respondents-defendants, the District Court set aside the decree and judgment and remanded the case to the trial court for fresh consideration regarding respondents'-defendants' "right of easement, if any, over the plaint schedule property, to which the pathway provided by Brothern Hall is also annexed". The said order of remand is under challenge in this appeal.

2. The bare facts necessary to dispose of this appeal are as follows: The appellants filed a suit for declaration of title and possession in respect of a pathway and also for a decree of injunction restraining respondents from taking vehicles through the said way, without permission of appellants and also from causing obstruction from erecting a gate at the opening of the pathway. Defendants-respondents filed written statement

and denied the alleged the title of the appellants over the plaint schedule property. According to them, alleged pathway is a public way which was used by plaintiffs as well as defendants and hence plaintiffs are not entitled to get any declaration of title over plaint schedule property. It was pleaded that they were using the pathway for a very long time. A narrow way was in existence from time immemorial and it was widened to form plaint schedule way. There was obstruction from the side of appellants and to prevent the use of the public way and attempt was made to put up a gate at the entrance. But, public intervened and appellants abandoned the idea of obstructing the use of the way.

3. Before the trial court, PW1 was examined and Exhibits A1 and A2 were marked on the side of the plaintiffs-appellants. The defendants examined DW1 and marked Exhibits B1 and B2. Commission report and rough sketch were marked as Exhibits C1 and C2.

4. The trial court, after appreciation of evidence and the rival contentions raised on both sides, found that right of appellants over plaint schedule pathway has to be upheld, allowing them to put up a gate at the entrance, without interfering with the right of the defendants-respondents to walk through the way. The

alleged permission made by the appellants to give respondents, the right to walk through the property was also taken into account, for entering such a finding and a decree was passed declaring title and possession of appellants over the plaint schedule item, subject to the right of respondents 1 to 3 to use the way, for walking. Defendants 1 to 3 were restrained from taking vehicle through the property and they were also restrained from causing obstruction to the construction of a gate at the entrance of the 'A' schedule way. The plaintiffs were also not allowed to lock the gate so as to cause hindrance to defendants 1 to 3 from using the way for walking.

5. In the appeal filed by respondents-defendants, lower appellate court found that though the defendants have not claimed any easement right by prescription, a reading of the written statement of defendants 1 to 3 would show that they have got a case that the road was in existence from 1968 onwards and they have been using it without any obstruction. The court was of the view that if the road was in existence from 1971 onwards and the defendants were using it without any obstruction, from that day onwards, they are entitled to claim right over the road, which comprises of the plaint schedule

property also. The appellate court also found that better evidence regarding age of the road becomes necessary and for that purpose the matter has to go back to trial court. The lower appellate court also found that a fresh consideration is required with respect to certain facts such as, (1) whether the road which is in existence was there atleast from 1971 onwards, (2) whether the defendants could claim easement right by prescription,(3)whether defendants and their predecessors were using plaint schedule property and the property is set apart as pathway by Brothern Hall for taking their vehicles to their respective holdings without any obstruction etc. The decree and judgment were therefore set aside and the court directed that the lower court shall consider afresh the defendants' right of easement, if any, over the plaint schedule property etc.

6. Learned counsel appearing for appellants vehemently contended that the remand order is totally illegal, since an issue did not arise at all with respect to any easement right. The defendants never claimed any right of easement over the plaint schedule property or any portion of the same, as per the written statement. Since there is nothing in the written statement to show that there is a claim of easement right by prescription,

no issue arises and hence the appellate court ought not to have remanded the case for fresh consideration of an issue which did not actually arise at all.

7. Learned counsel appearing for the respondents, however, contended that a reading of the written statement will show that respondents, in fact, claimed easement right over a portion of the plaint schedule property. But trial court had not considered that issue or even raised that issue and hence the remand is perfectly legal. On going through the written statement filed by defendants 1 to 3, it is clear that defendants only claimed that the road is a public road which was used by the defendants and people of locality without any obstruction, for a long time. They have no case that they acquired any right of easement over such property belonging to appellants. Still, in page 12 of the written statement filed by defendants 1 to 3, there is a vague pleading that they have "easement right". The detailed facts to support such a plea will not find a place in the written statement. On the other hand, they have specifically pleaded in detail that there is a "public right" and they were using the road as a public way. It is needless to say that the use of a way as a public way and the use based on an easement right are

totally inconsistent. The necessary factual foundation with respect to the alleged right of easement is not laid in the written statement. A bare averment that the defendants have easement right will not be sufficient to raise an issue of easement right. That is why, the trial court did not rightly raise an issue relating to right of easement by prescription. It is pertinent to note that the respondents-defendants had not made any request to the court to raise an additional issue relating to this, presumably, being aware of the lack of pleadings and material to raise an issue.

8. In the above circumstances, when an issue does not arise at all, remand for the purpose of raising an issue is illegal. A reading of the written statement filed by fourth defendant also will show that he also did not raise any contention regarding any easement right. On the other hand, he supported plaintiffs' case. In the above circumstances, I find that remand was illegal for fresh consideration of an issue which did not raise.

9. Learned counsel appearing for appellants further argued that this court may consider and decide the case on the available evidence on record. It is submitted that this is permissible in an appeal filed under Order 43 Rule 1(u) of the Code of Civil Procedure. But on

going through the dictum laid down in the decision reported in ***Narayanan v. Kumaran (***2004(2) KLT 312 SC), I find that such a course is not open to this court. The court can and should confine itself to such facts and conclusions and decisions which have a bearing on the order of remand. Except to this extent, this Court cannot go into the other issues and take a decision. Hence, the case has to be remanded back to the lower appellate court to consider all the issues afresh. The lower appellate court, as seen from the judgment, has not decided any other issues but only remanded the case for consideration of an issue which actually did not arise.

Hence the order of remand is set aside and lower appellate court is directed to consider the appeal on merit afresh and dispose of the same in accordance with law.

The appeal is allowed.

K.HEMA, JUDGE.

vgs.