

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 31ST MAY 2007 / 10TH JYAISHTA 1929

WP(C).No. 15347 of 2007(B)

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AGAINST THE ORDER DATED 09 /02/2007 IN IA 1535/2006 IN  
OS.115/2003 of MUNSIF COURT, ETTUMANOOR  
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PETITIONER: DEFENDANT  
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THOMAS, AGED 34 YEARS,  
S/O.DEVASSIA, MANNOOSSERIL HOUSE,  
MANNANAM P.O. AND KARA,  
ATHIRAMPUZHA VILLAGE.

BY ADV. SRI.N.K.MOHANLAL

RESPONDENTS: COUNTER PETITIONERS/PLAINTIFF  
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VARKEY, AGED 78 YEARS,  
S/O.THOMAN, MANNOSSERIL HOUSE,  
AMALAGIRI P.O.,  
MANNANAM KARA, ATHIRAMPUZHA VILLAGE.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION  
ON 31/05/2007, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

**M.N. KRISHNAN, J.**

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**W.P. (C) No.15347 OF 2007 B**  
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**Dated this the 31<sup>st</sup> May, 2007**

**J U D G M E N T**

This writ petition is filed challenging the order in I.A. No. 1535/2006 in O.S. No. 115/2003 of the Munsiff's Court, Ettumanoor. The suit was one for declaration of title and for recovery of possession and a permanent prohibitory injunction. The present petitioner is the 3<sup>rd</sup> defendant. He contended in the written statement that there is a 'thondu' on the northern side of the plaintiff's property inclusive of item No.2 towards the western paddy field. The suit was dismissed originally by the trial court. The matter was taken up before the District Court as A.S. No. 88/2005 and in the said appeal the District Court permitted to amend the plaint and to adduce evidence and allowed the defendants to file additional written statement. Now the defendants have filed the application for amending their counter claim. The trial court observed that if the amendment application is allowed at that stage the same will be against the

order of the appellate court. It also had dealt with in detail the various contentions and the inconsistent stand taken by the defendants throughout. Now in the proposed amendment they want to contend that the disputed property is a public pathway and they also contend that the width of the pathway is about 5 to 8 feet. At the time of filing the original counter claim the defendants had no case that the pathway was having a width of more than 5 feet. It was specifically pleaded that the pathway had a width of 5 feet only upto the property of the 1<sup>st</sup> defendant and thereafter the width was tapering and it ended on the western paddy field. It was nowhere pleaded in the counter claim that the pathway was a public pathway or that it was used by several people as a public pathway. At this juncture it is advisable to refer to the scope of a counter claim to be filed under Order VIII Rule 1, C.P.C. The defendant is entitled to file a counter claim and the time limit fixed is with respect to any right or claim in respect of a cause of action accruing the defendant against the plaintiff either before or

after the filing of the suit, but before the defendant has delivered his defence or before the time limit for delivering his defence has expired, whether such counter claim is in the name of a claim for damages or not. It has to be stated that the counter claim was filed, and the matter was disposed of by the court and it was the appellate court which remanded the matter to enable the plaintiff to amend the plaint and also permitting the defendant to file additional written statement. So far the defendant did not have a case that it is a public pathway at all. Now they want to incorporate a plea of pathway in the counter claim much belatedly, that too after the time has expired for setting up of the defence. Just because a plaint is ordered to be amended in order to claim relief by the plaintiff it does not mean that further cause of action accrues for the defendant in the case. His right is limited to that of filing of an additional written statement alone. He cannot attempt to incorporate a new case and attempt to change the character of the suit. Therefore, I am in perfect agreement with the

learned Munsiff who had disallowed the prayer for amendment of the counter claim. Therefore the writ petition lacks merits and it is dismissed.

**M.N. KRISHNAN**  
**JUDGE**

jan/