

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 31ST MARCH 2011 / 10TH CHAITHRA 1933

RSA.No. 417 of 2008()

AS.62/2006 of DISTRICT COURT,KOLLAM
OS.104/2002 of ADDL.MUNSIFF COURT, KOLLAM
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APPELLANTS/APPELLANTS/ PLAINTIFFS :

1. C.RAVEENDRAN PILLAI,AGED 48 YEARS
CHELLAM VEEDU, PUTHALATHAZHATHU CHERRY
VADAKKEVILA VILLAGE, KOLLAM.
2. C.VIJAYAN PILAI, AGED 51 YEARS
ULLAS VEEDU, PUTHALATHAZHATHU CHERRY
THRIKKOVILAVATTOM VILLAGE, KOLLAM.

BY ADV. SRI.P.B.SURESH KUMAR
SRI.K.P.SUJESH KUMAR

RESPONDENT(S): RESPONDENTS

SOMAN PILLAI, AGED 53 YEARS
BINDU BHAVAN, DECENT JUNCTION, MUKHARTHALA CHERRY
THRIKKVILAVATTOM VILLAGE, KOLLAM.

ADV. SRI.B.RADHAKRISHNA PILLAI
SMT.S.AMBIKA DEVI
SMT.K.B.REKHA
SRI.R.JYOTHIKRISHNAN
SRI.P.U.SHAILAJAN

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 31/03/2011, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

R.S.A.NO.417 OF 2008

Dated 31st March, 2011

JUDGMENT

Plaintiffs in O.S.104/2002 on the file of Additional Munsiff court, Kollam are the appellants. Defendant is the respondent. Appellants instituted the suit for declaration of right of way by easement of prescription over plaint B schedule property and a permanent prohibitory injunction restraining the respondent from causing obstruction to the way by enclosing it within a compound wall. Appellants contended that plaint A schedule property belongs to them under Ext.A1 sale deed dated 13/4/1973 and since then, they have been in possession of that property. It is contended that respondent has

property on the north and west of the plaint A schedule property and he subsequently purchased paddy field adjoining those properties and there is a Corporation road on the south and plaint B schedule way starts from the southern Panchayath road and leads to the plaint A schedule property and appellants have been using that way as of right and as an easement openly and peacefully, without any obstruction since the date of execution of Ext.A1 sale deed and appellants thereby prescribed a right of way. They sought a decree for declaration of right of way. Respondent resisted the suit contending that there does not exist a way as described in the plaint B schedule and the properties adjoining the plaint A schedule property is paddy fields and owners used to have their ingress and egress to the paddy

field through the ridges. Case of the appellants that they have been using plaint B schedule way as a way as of right and as an easement for more than 28 years is false and they have no right of way and the suit is to be dismissed.

2. Learned Munsiff on the evidence of Pws.1 and 2, Dws.1 to 3, Exts.A1, A2, B1, B2 and C1 to C3 dismissed the suit finding that a reading of the plaint does not show through whose property appellants are claiming right of way. Learned Munsiff found that when the suit is for declaration of right of easement by prescription, servient owner must be a party and must be shown and plaint does not disclose the same. Learned Munsiff on the evidence found that appellants are not entitled to the decree sought for. The suit was

dismissed. Appellants challenged the judgment before District Court, Kollam in A.S.62/2006. Learned District Judge on re-appreciation of the evidence confirmed the findings of the learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for the appellants was heard.

4. Argument of the learned counsel appearing for the appellants is that appellants had already filed I.A.1026/2008, an application under Rule 17 of Order VI of Code of Civil Procedure to amend the plaint and if the amendment is allowed, the grounds for dismissal of the suit will not be available and in the interest of justice, appellants are to be permitted to amend the plaint. Learned counsel also argued that though there is a

mistake in describing the way in the plaint, respondent had undisputed the identity of the way claimed by the appellants and the report submitted by the Commissioner shows that it is the only way available to the plaint A schedule property and in such circumstances, a decree is to be granted.

5. Amendment of the plaint sought for is only to substitute the word "west" by "east" in the description of the plaint B schedule property. Plaint B schedule property as shown in the plaint is a way leading to the plaint A schedule property from the southern Corporation road, which is described as immediate to south-west of plaint A schedule property. The attempt is now to shift south-west to south-east. Even if the amendment is to be allowed, it would only shift the way claimed in the plaint to

south-eastern corner of the plaint A schedule property. As seen from Ext.C3 sketch, made available by the learned counsel, southern boundary of plaint A schedule property is the property of Sathyaseelan marked as plot D and portion of plot B belonging to the respondent. Only less than 1/10th of the southern boundary forms part of the property of the respondent and the remaining property to its east is that of Suseelan. As per the plaint, the way claimed is the way which starts from the southern road and reaches the south-western corner of plaint A schedule property. That way is evidently through plot B which is the property of the respondent. Amendment sought for is to shift that way from the south-western corner to the south-eastern corner. If that be the case, that way could only be through plot D, which is the

property of Suseelan and if that be so, appellants cannot contend that he has a right of way through the property of the respondent as claimed before the trial court.

6. In spite of the application for amendment of the written plaint appellants have not sought amendment of the relevant recitals in the plaint. As per the allegation in the plaint, plaint B schedule property does not form part of the property of the respondent. Boundary of the plaint B schedule property shown in the plaint is that plaint B schedule property lies to the east of the property of the respondent. Though learned counsel appearing for the appellants submitted that the way is through the property of the respondent, there is no allegation in the plaint that the way passes through the property

of the respondent. On the other hand, specific allegation in the plaint is that property of the respondent lies to the north and west of plaint A schedule property belonging to the appellants. The right of way claimed in the plaint is from the southern road to the plaint A schedule property through the property which lies to the south of plaint A schedule property. When there is no allegation in the plaint that said pathway passes through the property of respondent and there is no case for the appellant that property on the south of the plaint A schedule property is that of the respondent, as finding of the courts below that as the servient tenement was not shown in the plaint and the servient owner is not a party of the suit, a decree for declaration of right of way cannot

be granted is perfectly correct. In the light of amendment sought for, right of way could only be through the property of Suseelan, who could only be the servient owner. He was not impleaded. Appellants are not entitled to the decree sought for. I find no substantial question of law involved in the appeal.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.