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(2007) 01 KL CK 0041

In the High Court Of Kerala

Case No : WP (C) No. 1166 of 2007 (L)

Muralidharan Pillai and Usha Pillai — APPELLANT

Vs

Radhamani Amma Pillai and Others — RESPONDENT

Date of Decision : 19-01-2007

Acts Referred:
Constitution of India, 1950 — Article 227

Citation : (2007) 01 KL CK 0041

Hon'ble Judges : Sasidharan Nambiar, J

Bench : Single Bench

Advocate : K. Divakaran Nair, for the Appellant; No Appearance, for the Respondent

Judgement

M. Sasidharan Nambiar, J.—Petitioners are defendants and respondents plaintiffs in O.S.273/06 on the file of Munsiff Court, Kottarakkara. Respondents filed I.A.1794/06, an application under Order XXXIX Rule 1 restraining petitioner from closing or locking the gate or making any obstruction to the plaint F schedule pathway contending that they have a right of way by easement of prescription over that pathway. Petitioners resisted the claim contending that there is no pathway to the property of respondents through F schedule property belonging to petitioners and the way to the property of respondents is from the east and therefore they are not entitled to the order of temporary injunction sought for. Under Ext.P3 order, learned Munsiff dismissed the application holding that the available evidence reveals that respondents have no right of way through the property of petitioners and access to the properties through the eastern side of their property and the balance of convenience is in favour of petitioners and no irreparable injury will be caused if an order of injunction is not granted. Respondents challenged that order before Sub court, Kottarakkara in C.M.A. 30/06. The learned Sub Judge reappreciated the materials and found that the finding of learned Munsiff that there is no prima facie case for a right of way to the respondents or that balance of convenience is in favour of the petitioners is not sustainable. Under Ext.P4 an order of temporary injunction was granted

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restraining petitioners from obstructing the use of the existing pathway along the F schedule property through the gate fitted at the southern boundary of F schedule property, till disposal of the suit.

2. This petition is filed under Article 227 of the Constitution of India contending that learned Sub Judge should not have interfered with the discretion exercised by learned Munsiff under Ext.P3 order and therefore Ext.P4 order is illegal. It was argued that Ext.C2 report submitted by the Commissioner establish that there is a way to the plaint A to D schedule property, through the eastern varamba and respondents have no right to pass through the plaint F schedule property belonging to petitioners and therefore the order is unsustainable. Relying on the decision of the Apex Court in Seema Arshad Zaheer v. Municipal Corporation 2006 (4) KLT 65 it was argued that when the discretion has been exercised properly by the trial court, appellate court is not entitled to arbitrarily interfere with the discretion exercised, unless the exercise of discretion by the trial court was arbitrary and therefore Ext.P4 order is to be quashed.

3. Relying on the decision of a Division Bench of this Court in Kurichiyan Chandu v. Kunjuraman Nambiar 1989 (2) KLT 763 it was argued that learned Sub Judge did not properly appreciate the materials and therefore it was an erroneous interference in the discretion exercised by the trial court which is to be corrected by this Court in exercise of the supervisory jurisdiction.

4. Learned Counsel appearing for respondents argued that learned Sub Judge rightly appreciated the materials and found that finding of the learned Munsiff that there is no way through the plaint F schedule property is factually incorrect and Ext.C1 report establish that there is a pathway through the plaint F schedule property to the plaint A to D schedule properties and when respondents are claiming right of easement by prescription, the question whether respondents established the right is to be decided only in the suit after evidence and in such circumstance the discretion rightly exercised by the appellate court under Ext.P4 order, cannot be interfered in exercise of the extra ordinary jurisdiction of this Court under Article 227 and therefore the petition is only to be dismissed.

5. Case of respondents is that they have a right of way through plaint F schedule property belonging to petitioners, to reach plaint A to D schedule properties which belong to them and where they reside. Though it was vehemently argued that respondents have a right of way through the eastern property, when a right of way is claimed by easement of prescription, the availability of an alternate way as such will not be very relevant and will not destroy the right of easement by prescription. Therefore that aspect is not very material at this stage. Learned Munsiff after quoting the contentions of the parties decided the interlocutory application in paragraph 9 to the effect that the available evidence reveals that the pathway claimed by the plaintiffs is through the property of defendants and they wanted to block the locking of the gate installed on the southern side of F schedule property and the construction of the gate is not just prior to the institution of the suit and respondents have access through the eastern property.

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The effect of the availability of an alternate way through the eastern side as found by the learned Munsiff, on a plea of right of way by easement of prescription was not considered by the learned Munsiff. So also the right of respondents for the way, even a prima facie case was not considered by the learned Munsiff. Under Ext.P4 order, learned sub Judge discussed these aspects in detail. Analysing Ext.C1 report submitted by Commissioner after inspection, immediately after the filing of the suit, which learned Counsel appearing for petitioners attacked as an ex parte commission report, and Ext.C2 report which was subsequently filed wherein points sought to be noted by plaintiffs and evidence were recorded, existence of a pathway through F schedule property leading to the plaint A to D schedule properties is seen. That has been relied on by the learned Sub Judge. The learned Sub Judge also observed that there was dispute with regard to the age of the gate. Ext.C1 report shows that the gate was installed only two months earlier to the institution of the suit. Ext.C2 report shows that it was installed much earlier. The argument of learned Counsel appearing for petitioners by producing a copy of the bill for purchase of the gate in March 2005 was that the gate was installed in March 2005 itself. Whatever it be, that is a matter for the Munsiff to decide on the evidence. But as found by the appellate court, existence of the way cannot be disputed in the light of Ext.C1 and C2 reports. The question whether the right of way by easement of prescription claimed by respondents and disputed by petitioners is to be settled on the evidence, finding the existence of way and providing that the right is to be determined on evidence and till then the way shall not be obstructed cannot be termed an illegal or improper exercise of discretion. Then the question is whether that discretion exercised by learned Sub Judge is to be interfered in exercise of the supervisory jurisdiction of this Court. I do not find any reason to interfere with Ext.P4 order on the facts and circumstances of the case. Learned Munsiff is directed to dispose the suit as expeditiously as possible and untrammeled by any observation in Ext.P4 or in this judgment. Petitioners are at liberty to move the trial court to shift the way, from the existing position if feasible to the eastern extremity of their property, till the disposal of the suit without prejudice to the contentions in the suit. If such an application is filed, learned Munsiff has to consider the same and pass appropriate orders.

Writ petition is disposed as above.

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