

(2011) 05 KL CK 0050

In the High Court Of Kerala

Case No : Regular Second Appeal No. 945 of 2004

Sarojini Amma, Krishna Pillai, Lekshmikutty and Omana

APPELLANT

Vs

P. Vasudevan Achary, P. Gopalan Achari, Raghavan and
Thulasi

RESPONDENT

Date of Decision : 25-05-2011

Acts Referred:

Citation : (2011) 05 KL CK 0050

Hon'ble Judges : Sasidharan Nambiar, J

Bench : Single Bench

Advocate : K.G. Anil Babu, for the Appellant; K.S. Manu, for the Respondent

Final Decision : Dismissed

Judgement

M. Sasidharan Nambiar, J.—Legal heirs of the Plaintiff in O.S.47/1993 on the file of Munsiff-Magistrate Court, Sasthamcotta are the Appellants. Respondents are the Defendants. Plaintiff instituted the suit against Defendants 1 and 2 seeking a decree for permanent prohibitory injunction alleging that the plaint schedule property viz, one acre and ten cents in Survey No. 432/9 belongs to him and he has been in possession of the property and Defendants have no right over the same and they attempted to construct a new way through the northern portion of the plaint schedule property, trespassing into the plaint schedule property and they have no right to do so and therefore they are to be restrained by a permanent prohibitory injunction. Along with the suit, Plaintiff took out a commission and DW1, the Commissioner inspected the property on the same day and submitted Ext.C1 report. Subsequently, PW5 was appointed as the Commissioner and he identified the property with the help of DW2, Taluk Surveyor and submitted Ext.C2 report and C2(a) plan. The second Respondent contended that the suit was filed suppressing the existence of a way and the attempt of the Plaintiff was to reduce the width of the way. It was contended that Plaintiff has no right to reduce the width of the northern way and therefore Plaintiff is not entitled to the decree sought for. Second Defendant also filed a

counter-claim and sought a decree for mandatory injunction to remove the construction made in the northern way causing reduction of its width, contending that the Plaintiff had trespassed into the way and reduced its width. The Commissioner in Ext.C2(a) plan demarcated the property of the Respondent in Survey No. 215/15 as well as the property of the second Respondent which lies to its west and the way which starts from the eastern panchayat road and proceed towards the west, reaching the house of second Respondent and others. The Commissioner also found that as per the resurvey plan, the width of the way is not now available in the land as a portion of the way has been trespassed upon and made part of the property of the Plaintiff. That encroached portion has been shown as plot A in Ext.C2(a) plan. The Commissioner also found that on the northern side of the way also there was an encroachment by the northern owner and that encroached portion is marked as plot "B".

2. Learned Munsiff did not rely on Ext.C2(a) plan and finding that admittedly there exists a way to the north of the plaint schedule property, held that the Plaintiff is not entitled to the decree sought for. Learned Munsiff also found that the second Defendant is not entitled to a decree in the counter claim, but in view of the existence of the way directed that the way shall not be reduced or encroached upon. The Plaintiff did not file an appeal.

3. Second Defendant filed A.S.72/1998 before District Court, Kollam challenging the dismissal of the counter claim contending that learned Munsiff should have granted the counter claim as it is clear that Plaintiff has trespassed into the northern way and reduced its width as demarcated by the Commissioner in Ext.C2 (a) plan. Learned Additional District Judge, on reappraisal of evidence found that 0.49 ares of the northern way was trespassed upon and encroached by the Plaintiff and therefore allowed the appeal and granted a decree in the counter claim and directed the Plaintiff to surrender 0.49 ares of the property encroached from the pathway. Aggrieved by the judgment, the legal heirs of the Plaintiff filed this appeal.

4. Second appeal was admitted formulating the following substantial questions of law.

1) Was the first appellate court legally right in allowing the counter claim, without coming to a definite finding on the type and nature of easementary right pleaded in the suit by the 2nd Defendant.

2) Is not the first appellate court bound to consider the subsequent events with regard to the disputed pathway, the nature and lie of which has been stated in the subsequent commission report, and in the circumstances, whether the first appellate court was right in granting the prayer under the counter claim.

5. Learned Counsel appearing for Appellants and the second Respondent were heard.

6. The argument of the learned Counsel appearing for Appellants is that first

appellate court should not have granted a decree in the counter claim directing the Plaintiff to surrender portion of the property, as the second Respondent did not establish any right of way. It is argued that second Respondent could claim a right of way either as a right of easement by prescription or necessity or as a public way and the ingredients of these rights are not pleaded and therefore the decree granted by the first appellate court is not sustainable. Learned Counsel also pointed out that Ext.C1 report shows that the Commissioner found a cashew plant aged one year which was existing near to the wall was cut and removed and therefore argued that there could not have been a way as found by the first appellate court. It is therefore argued that the judgment of the first appellate court is to be set aside.

7. Learned Counsel appearing for second Respondent pointed out that though the existence of the way before the institution of the suit was admitted by the Plaintiff as PW1 at the time of evidence, neither in the plaint nor in the statement filed in answer to the counter claim, existence of the way was admitted. It is pointed out that the very existence of the way was denied in the written statement filed in answer to the counter claim and there is no case that Defendants have shifted the compound wall from the then existing place towards south and therefore first appellate court rightly granted the decree.

8. The necessity to plead the ingredients of a right of easement would arise, if the Defendants are claiming any right of way through the property of the Plaintiff. Respondents are not claiming any right of way through the property of the Plaintiff. On the other hand, their case is that there existed a pathway which starts from the eastern panchayat road and proceeds towards west through the northern side of R.S.215/15 belonging to the Plaintiff and it reaches the house of the Respondents and others. It is argued that the case of Respondents is that suppressing the existence of the pathway, the suit was instituted, as if a new way is being carved out when in fact the width of the existing way was reduced by constructing a compound wall and it is in such circumstances the counter claim was sought for.

9. There is no case for the Plaintiff that there existed a pathway on the north of the plaint schedule property. There is no case that, either before the institution of the suit or subsequent to the institution of the suit, Defendants have demolished the existing northern wall of the plaint schedule property and shifted it towards the north or south. Though PW1 at the time of evidence deposed that subsequent to the institution of the suit and before the inspection of the Commissioner, Defendants with the aid of politicians trespassed into the plaint schedule property and constructed a new way on the northern side, Ext.C1 report establish that PW4, the Commissioner inspected the plaint schedule property on the date of institution of the suit itself. Therefore what the Commissioner could note at the time of his inspection on the date of the institution of the suit was the position as it existed on that date. It shows existence of a way. In such circumstances, Appellant cannot be heard to contend

that what was noted by the Commissioner was the existence of a new way which was carved out subsequent to the institution of the suit.

10. Ext.C1 report shows that the Commissioner could find the existence of a way and there existed walls both on the south and north of the said way. As stated earlier, when the Plaintiff or Appellants have no case that the existing compound wall was demolished and a new compound wall was constructed after forming a new way, it could only be taken that the wall which was found by the Commissioner on the southern side of the existing way was not the result of any encroachment by the Defendants but is a wall constructed by the Plaintiff himself. If the Defendants have constructed a new way before the inspection of the Commissioner, such a way could not have been constructed without demolishing the northern compound wall. When there is no case that northern compound wall was demolished by the Respondents, it could only be that the compound wall found by the Commissioner was constructed subsequently by the Plaintiff, encroaching upon the existing way, as the existence of the way was suppressed by the Plaintiff.

11. Ext.A2 was produced by the Plaintiff to show that there does not exist a way in Survey No. 215/15. Ext.A2 shows that though there is no way in Survey No. 215/15, there exist a public way to the north of Survey No. 215/15 and that way is in 213/11. Therefore the way claimed by the Defendants is also not in Survey No. 215/15, but to the north of 215/15 as demarcated by the Commissioner in Ext.C2(a) plan. The Commissioner found that in re-survey plan, the said way has been separately marked as is clear from Ext.B2 re-survey plan. When the way claimed by Respondents is not within the property of the Plaintiff, and the right is claimed over a public way which lies to the north of Survey No. 215/15 as demarcated by the Commissioner, it is not necessary to plead the ingredients of a right of easement, as the way claimed is a public way as is proved by Ext.A2 Certificate produced by the Plaintiff herself and Ext.C2 report and C2(a) plan. Ext.C2(a) plan shows that a portion of the way was encroached upon by the Plaintiff, which is demarcated by the Commissioner in Ext.C2(a) plan as plot "A". Appellants have no right to continue in possession of the said portion and first appellate court rightly granted a decree, though trial court failed to grant the decree. In such circumstances, I find no merit in the appeal. Appeal is dismissed. It is made clear that the property to be surrendered is the plot A as demarcated by the Commissioner in Ext.C2(a) plan, which lies to the north of the northern survey boundary of R.S.215/15.