

**IN THE COURT OF THE MUNSIFF, HARIPAD**  
**Present: Sri. Manish. D.A., Munsiff**  
Wednesday the 3<sup>rd</sup> day of February 2021/ 14<sup>th</sup> Magha 1942  
**Common Order in I.A.No.2/20, I.A.No.3/20 & I.A. No. 1/21 in**  
**O.S.No.58/2016**

I.A. No.2/2020 (Filed on 28.11.2020)  
I.A. No.3/2020 (Filed on 20.11.2020)  
I.A. No.1/2021 (Filed on 04.01.2021)

**Petitioners** 1. Ambika, Chittakkattu Tharayil,  
**Defendants** Valiyakuzhy muri,  
Cheppad village.  
2. Saji. C.V. of -do-do,

(By Adv.Sujith Vathallor Koyickal)

**Respondents** 1. Soumya, Changattu Kizhakkathil,  
**Plaintiffs** Valiyakuzhy muri,  
Cheppad village.  
2. Ajesh of -do---do--

(By Adv. M. Ibrahimkutty)

These petitions having been finally heard on 23.01.2021 and the court on 03.02.2021 passed the following:

**COMMON ORDER**

**I.A.No.2/2020**

Application was filed under Sections 114 and 151 of the Code of Civil Procedure.

2. The averments in the affidavit in support of the application in brief were as follows:

The petitioners were the defendants in the suit. Suit was filed for declaration of right of easement by prescription. The case was listed on 09..07..2019. After closing the evidence of both sides, it was posted for arguments. The 2<sup>nd</sup> defendant was examined as DW1. During his examination, three documents stated in the affidavit in lieu of examination in chief as Exts.B1, B3 and B5 were not marked by this Court stating that those were photocopies and photographs. The same was brought to the attention of the petitioners only on 19..11..2020 when copy of the deposition was perused in detail. Marking of those documents is highly necessary as far as the facts of this case is concerned. Hence evidence is to be reopened by reviewing the order dated 05..10..2019. The delay in filing the review application is also to be condoned. Stating as above, this application was filed to review the order dated 05..10..2019 by disallowing the marking of Exts.B1, B3 and B5 mentioned in the affidavit in lieu of examination in chief.

3. The respondents/plaintiffs filed objection stating as follows:

The application was not maintainable and the application was not filed as stipulated under Order XLVII of Code of Civil Procedure. Certified copy of the order sought to be reviewed was not produced. No sufficient court fee was paid for the review application. The documents stated as Exts.B1 and B3 were copies of the complaints filed by the defendants before police. The originals of those documents could be marked by summoning the police officials. It was not

permissible to mark the photocopy in evidence. It cannot be accepted as secondary evidence. The documents mentioned as Ext.B5 were photographs. Its negatives were not produced before Court. It was also not clear as to who had taken the photographs. There was no reason to review the order passed by the Court. The respondents have prayed for dismissal of the application.

### **I.A.No.3/2020**

4. Application filed under Section 151 of the Code of Civil Procedure.
5. The averments in the supporting affidavit in brief were as follows:

The petitioners were the defendants in the suit. Suit was filed for declaration of right of easement by prescription. The case was listed on 09.07.2019. After closing the evidence of both sides, it was posted for arguments. The 2<sup>nd</sup> defendant was examined as DW1. During his examination, three documents stated in the affidavit in lieu of examination in chief as Exts.B1, B3 and B5 were not marked by this Court stating that those were photocopies and photographs. The specific case of the petitioners was that Exts.B1 and B3 were the office copies of complaints. Its originals would be with the authorities and the petitioners would be in possession of its photocopies only. For an effective and fair adjudication of this case, the documents produced as Exts.B1, B3 and B5 are to be marked as Exts.B6 to B8 and for that purpose the evidence is to be reopened. No harm would be caused to the respondents if the petition is allowed. Hence, it was

prayed to reopen the evidence and to mark Exts.B6 to B8 on the side of the defendants.

6. The respondents/plaintiffs filed objection stating as follows:

The application was not maintainable either in law or on facts. The documents stated as Exts.B1 and B3 were photocopies of complaint given before the police. Its originals could be marked by summoning the police officials. The copies were not admissible in evidence. The photographs were also not admissible without production of its negatives or explaining whether they were digital copies. It was not stated in the affidavit that the photographs were mother prints. There was no reason to reopen the evidence. The respondents have prayed for dismissal of the application.

### **I.A.No.1/2021**

7. Application filed under Section 5 of the Limitation Act and Section 151 of the Code of Civil Procedure.

8. The averments in the supporting affidavit in brief were as follows:

The petitioners were the defendants in the suit. Suit was filed for declaration of right of easement by prescription. The case was listed on 09.07.2019. After closing the evidence of both sides, it was posted for arguments. The 2<sup>nd</sup> defendant was examined as DW1. During his examination, three documents stated in the affidavit in lieu of examination in chief as Exts.B1, B3 and B5 were not marked by this Court stating that those were photocopies and

photographs. It was brought to the notice of the petitioners only on 19.11.2020. Immediately, a review petition was filed along with an application to reopen the evidence and to condone the delay. There was a delay of 380 days occurred in preferring the review petition. It was not due to any willful negligence on the part of the petitioners. Earlier, the petitioners have filed I.A.No.1/2020 for condoning the delay. Since there was a mistake in calculating the period of delay, the said application was withdrawn with the permission of the Court. Hence, it was prayed to condone the delay of 380 days in preferring the petition for review and also for reopening the evidence.

9. The respondents/plaintiffs filed objection stating as follows: The application was not maintainable either in law or on facts. DW1 was examined on 05.10.2019. The review petition ought to have been filed before 05.11.2019. It was filed only on 20.11.2010. So there was a delay of 380 days in filing the application. No sufficient reason was stated for the delay happened. The petitioners were well aware about the order passed by the Court by disallowing the marking of documents. There was no sufficient reason to condone the delay as prayed. The respondents have prayed for dismissal of the application.

10. The points that arise for consideration are :-

1. Whether the prayer of the petitioners in I.A.No.3/2020 can be allowed ?
2. Whether the prayer of the petitioners in I.A.No.2/2020 can be allowed ?

3. Whether the prayer of the petitioners in I.A.No.1/2021 can be allowed ?
  4. Findings and Order to be passed?
11. Heard the learned counsel for the petitioners and respondents.
12. **Point Nos.1 to 3** :- These points are discussed together for the sake of convenience.
13. The petitioners in all the above three applications were the defendant Nos.1 and 2 in the suit. The respondents/plaintiffs have filed the suit for declaration of right of easement by prescription and also for permanent prohibitory injunction. The defendants appeared and filed written statement and counter claim. The trial of the suit was already concluded and it was posted for final arguments. During trial, the 2<sup>nd</sup> defendant was examined as DW1 and five documents were marked through him as Exts.B1 to B5. According to the petitioners, the documents mentioned as Exts.B1, B3 and B5 in the affidavit in lieu of examination in chief of DW1 were not marked by the Court. Those documents were rejected stating that those were photocopies and photographs. According to the petitioners, the first two documents were the office copies of petitions filed before police and Ext.B5 were photographs. The rejection of such documents in evidence was noticed by the petitioners only on 19.11.2020 when copy of the deposition was perused by the 2<sup>nd</sup> defendant in detail. According to the petitioners, the original of Exts.B1 and B3 would be with the police officials and

only the office copy would be retained with the petitioners. Marking of those documents were highly necessary for the just decision of this case.

14. The respondents opposed all the three applications and submitted that those were filed without any bondafide and there was no ground to review the order passed by the Court. It was submitted that the court has already taken a decision that those documents were not admissible in evidence and accordingly rejected Exts.B1, B3 and B5 mentioned in the affidavit in lieu of examination in chief. It was also submitted by the respondents that the petitioners could have summoned the police officials for marking the original complaints through them.

15. On perusal of the records of the proceedings, it was observed that DW1 was examined on 05..10..2019 and five documents were marked through him as Exs.B1 to B5. It was observed that the marking of documents stated as Exts.B1, B3 and B5 were disallowed by the Court. On perusal of Exts.B1, it was observed that it was a photocopy containing the signature of the counsel by attesting it as true copy. In Ext.B3 also the counsel had attested the document as true copy by affixing his signature and seal. The document sought to be marked as Ext.B5 were ten photographs. The Court has not marked the photographs and the copies of complaints stating that those were not admissible in evidence. According to the petitioners, those documents were highly necessary for the just and fair decision of the case. In the affidavit filed by the petitioners, it was mentioned that Exts.B1 and B3 were office copies of complaints and naturally its originals would

be with police authorities. The petitioners were not in possession of the originals and the photocopies were retained with them. It was true that the Court has not marked the documents through DW1. It was specifically stated in the affidavit the reason why such copies were produced by the petitioners and wanted to mark it in evidence. It was true that the petitioners have not produced the negatives of the photographs and also not given any explanation how those could be accepted in evidence. The burden of proving the photographs is with the petitioners. Merely by marking the document, it may not be considered as duly proved. If the evidence is reopened and Exts.B1, B3 and B5 are marked in evidence, no substantial prejudice would be caused to the respondents. A party to a proceeding need not be denied an opportunity to adduce evidence. It is satisfied that the prayer of the petitioners can be allowed in the interest of justice. The delay of 380 days in filing the application can also be condoned in the interest of justice. The reason stated in the delay condonation application appears to be genuine. On considering the averments in the supporting affidavit and hearing both sides, it is satisfied that there is sufficient ground to review the order dated 05..10..2019 and to reopen the evidence for marking Exts.B1, B3 and B5 mentioned in the affidavit in lieu of examination in chief of DW1 as Exts.B6 to B8. The prayer of the petitioners in all the three applications is allowed. Hence these points are found in favour of the petitioners.

16. **Point No.4** :- See the relief portion.

In the result,

(i) I.A.No.1/2021 is allowed by condoning the delay of 380 days in filing the application for review. I.A.Nos.2/2020 and 3/2020 are also allowed and it is ordered to reopen the evidence in the suit and to consider marking the documents as Exts.B6 to B8.

(ii) There is no order as to cost.

*Dictated to the Confdl. Asst., transcribed and typed by her, corrected and pronounced by me in open court on this the 3<sup>rd</sup> day of February, 2021.*

**MANISH D.A.  
MUNSIFF, HARIPAD**

**Appendix-Nil**

**MUNSIFF**