

IN THE COURT OF THE MUNSIFF, HARIPAD
Present: Sri. D Sreekumar L.L.B., Munsiff
 Thursday 13th February, 2020/ (24th Magha 1941).
OS. 294/2017
 (Filed on 24.10.2017)

Plaintiff: Jacob Thomas, aged 45 yrs,
 S/o Thomas Idikkula,
 Attumalil puthen purayil,
 Melpadam muri, Veeyapuram village,
 Karthikappally Taluk, For his
 Power of Attorney Holder,
 Nirmala Mohan, D/o Thomas Idikkula
 --of --do-- --do--

By Adv. Saji Thampan

Defendant: Joseph, aged 68 yrs,
 S/o Joseph, Vattasseri (H),
 Melpadam muri, Veeyapuram village,
 Karthikappally Taluk.

By Adv. R. Aravindakshan.

This suit is having been finally heard on 03.02.2020 and the court on 13.02.2020 delivered the following:

J U D G M E N T

Suit is for declaration of easement right by grant and permanent prohibitory injunction.

2. The averments in the plaint, in brief, are as follows: Plaintiff and defendant are neighbours. Plaint 'A' schedule property measuring 12.65 ares comprised in resurvey no.289/10-3 of Veeyapuram Village belongs to the plaintiff by virtue of sale deed no.31 dated 03..01..2012 of Haripad Sub Registry. Plaint 'B' schedule property measuring 19.60 ares comprised in resurvey no.290/1 of the said village also belongs to him by virtue of settlement deed no.2078 dated 11..08..2011 of the above Sub Registry. Both properties are

possessed and enjoyed by the plaintiff. 'B' schedule property is situated on the immediate eastern side of plaintiff 'A' schedule property. Plaintiff's residential building is situated in 'B' schedule property. Since the plaintiff is employed abroad, his sister named Nirmala Mohan being his power of attorney holder has instituted this case for and on behalf of him. Even prior to the purchase of 'A' schedule property, the plaintiff and family were using a way that starts from the south-western corner of plaintiff 'B' schedule property and passes through 'A' schedule property towards west and thereafter deviates towards south runs a distance of 50 metres to reach the southern public road, Veeyapuram-Mannar road. The portion of way lying in north-south direction has a width of 3.90 metres in east-west direction and the portion lying in 'A' schedule property in east-west direction has a width of 3 metres. The plaintiff and his family are using this way for the last more than 60 years freely, openly and uninterruptedly. By virtue of deed no.31 dated 03..01..2012 in respect of 'A' schedule property, the plaintiff and family derived a right of way including one for vehicular access through 'D' schedule item from the southern Veeyapuram-Mannar public road upto river Pampa situated on the north with a width of 3.90 metres and the way still exists as such. Plaintiff 'C' schedule property measuring approximately 12 ares comprised in resurvey no.289/10 belongs to the defendant and it is situated on the immediate western side of 'D' schedule way. The defendant has no manner of right to interrupt the plaintiff's user of 'D' schedule way. The plaintiff purchased plaintiff 'A' schedule item from one Annamma Cheriyan and her daughter Mable Cheriyan. They derived title to the property as item no.3 in partition deed

no.3266 dated 03..12..2004. As per the partition deed also, the 'D' schedule item is referred to as a way that starts from the southern public road and lies upto the northern river Pampa with a width of 3.90 metres. The defendant who has in a strained relation with the plaintiff and his family for quite some time is making attempts to obstruct the user of the way by the plaintiff and family and as such on 25..09..2014, the defendant attempted to erect a fence from the south-eastern corner of 'C' schedule property towards 'D' schedule way with a view to obstruct the plaintiff's user of way. Due to the timely intervention of the plaintiff and some neighbours, the above attempt was aborted. However, the defendant threatened to cause further obstruction in the way and as such the plaintiff instituted O.S.No.323/2014 before this court and later with the leave of the court said suit was withdrawn. Thereafter on 24..10..2017 the plaintiff got reliable information that the defendant is deliberating to make further obstructions by taking advantage of the situation that an injunction order is not prevailing against him. Hence the plaintiff approached this court for declaration of easement right by grant through 'D' schedule way on the strength of sale deed no.31 dated 03..01..2012 and for permanent prohibitory injunction restraining the defendant and his men from obstructing the 'D' schedule way by erecting fences, compound wall, etc.

3. Defendant entered appearance and filed written statement contending as follows: This suit is not maintainable factually and legally. The plaintiff approached this court suppressing the fact that there existed a way towards east from the 'B' schedule item to pass towards the eastern public road.

This way was being used by the plaintiff and his family for long. Plaintiff 'A' schedule item was purchased by the plaintiff subsequently and it was joined with the 'B' schedule property. Since there was a pre existing way for 'B' schedule property, 'A' schedule property was purchased by excluding a right of way. A reference as to right of way is absent in the documents pertaining to 'A' and 'B' schedule properties. The suit is filed on an experimental basis to see whether a new way can be created through the defendant's property. Plaintiff 'A' and 'B' schedule properties are erroneously described in the plaint. It is true that partition deed no.3266 dated 03.12.2004 was executed in the family of the defendant. By virtue of the above partition deed, property measuring 52.62 ares comprised in resurvey no.289/10 was also partitioned and each shareholder was allotted 32.5 cents of land. The remaining property comprised in the said resurvey number was left for the purpose of common use of way by the above shareholders. This way is situated on the eastern side of 'C' schedule property belongs to the defendant. This way starts from the southern public road has a width of 3 metres upto the property of the defendant and thereafter through the eastern side of the defendant's property, it goes further towards north to the northern river Pampa at a width of 3 feet only. The existing way towards the defendant's property was constructed by the defendant by spending his own money in the year 2004 in view of construction of a house in his property. The right of way described in the above partition deed was not given to the plaintiff while the property was sold to him by Annamma Cheriyan and Mable Cheriyan. Prior to the partition, the defendant's family had no necessity for a way as

described as 'D' schedule. The entire property belonged to the family was situated as a compact block on the northern side of the public road and it was commonly owned by the plaintiff, his siblings and their mother. Hence the plaintiff's claim that the way was being used for the last sixty years is false. A way in conformity with the description of 'D' schedule item has not existed at any point of time. It was impossible to exist such a way through 'A' schedule property as there existed an 'anjili' tree aged about 70 years on the southern part of 'A' schedule property. This tree was cut and removed after purchase of the property by the plaintiff. Since the way has other right holders also, the suit is bad for non joinder of necessary parties. As the plaintiff has no manner of right in the way, the defendant has every right to prevent the plaintiff from entering in 'C' and 'D' schedule properties. At no point of time, the plaintiff or his predecessors used the way described as 'D' schedule item. The plaintiff's father and some goondas tried to cut open a new way from the south-western side of 'A' schedule property and the same was prevented by the defendant. The above way having a width of 3 feet is situated on the eastern side of 'C' schedule property separately. The plaintiff by creating some signs of way in 'A' schedule property falsely instituted O.S.No.323/2014 claiming right of way by prescriptive easement and while the suit was at the verge of dismissal, he withdrew the same and instituted the present suit raising false contentions. At no point of time, the plaintiff has taken vehicles through 'D' schedule item or 'C' schedule property. As the plaintiff has no manner of right to claim an easement right by grant through property described as 'D' schedule item, the suit is liable

to be dismissed with the cost of the defendant.

4. On the basis of the above pleadings the following issues were framed for consideration;

1. whether the suit is bad for non joinder of necessary parties?
2. whether the plaintiff is entitled to a declaration of easement right by grant through 'D' schedule way?
3. whether the plaintiff is entitled to get a decree of permanent prohibitory injunction as prayed for?
4. what shall be the order as to costs?

5. From the side of the plaintiff, the power of attorney holder of the plaintiff and four witnesses were examined as PW1 to PW5, and Exts.A1 to A6 were marked. The commission report, mahazar and rough sketch prepared by the advocate commissioner were marked as ext.C1 series (a) to (c).

6. Neither any oral nor any documentary evidence was adduced from the side of the defence.

7. Heard both sides

8. **Issue No.1** :- The plaintiff approached this court for a decree of declaration in respect of easement by grant through plaint 'D' schedule way and for consequential injunction. As per the plaintiff's case, the right of way was derived by the plaintiff by virtue of his title deed, deed no.31 dated 03..01..2012 (ext.A1). It is contended by the defendant that the plaintiff has not derived any right of way as per the above document. By virtue of partition deed no.3266 dated 03..12..2004 (ext.A3) executed in the family of the defendant, a total extent of 52.62 ares comprised in resurvey no.289/10 was also partitioned and

each shareholder was allotted 32.5 cents from the said property. The remaining portion of property from the total extent was set apart for the purpose of way for the common use of the above shareholders. Therefore, apart from the defendant herein other right holders are also there in respect of the way and non inclusion of them in the party array renders the suit bad for non joinder of necessary party. Admittedly, the property set apart for way is not the share of any of the above shareholders. In fact, that is a different property set apart as a way. The plaintiff's apprehension is against the defendant herein alone. Section 34 of the Specific Reliefs Act entitles a person to seek the discretionary relief of declaration against any person who denies or interested to deny any legal character or right to property. The plaintiff has no case that the other shareholders have denied or are interested to deny the plaintiff's right to property. No evidence is brought on record to show that some other persons have some distinct right in respect of the property referred to as way in this case. Hence I find no reason to think that an effective decree cannot be passed without the other shareholders on the party array. Hence issue no.1 is found in favour of the plaintiff.

9. **Issue Nos.2 and 3** :- The defendant has denied the plaintiff's right of easement by grant through a way as described as 'D' schedule item. Further, it is specifically denied that the plaintiff has derived a right of way by virtue of his title deed, deed no.31 dated 03..01..2012. As per the plaintiff's claim, on purchase of 'A' schedule property, a right of way was devolved on him which was actually annexed to item no.3 in the partition deed (no.3266 dated

03..12..2004). Since the plaintiff's transferrer Annamma Cheriyan and Mable Cheriyan transferred item no.3 in favour of the plaintiff, the right of way annexed to property was also transferred in favour of the plaintiff. It is true that in ext.A3, a right of way as contended by the defendant is reserved in favour of the shareholders in respect of the above 52.62 ares of land comprised in resurvey no.289/10. It is as follows: സർവ്വേ 289/10 ൽ പ്പെട്ട 52 ആർസ് 62 ച:മീറ്റർ വസ്തുവിന്റെ തെക്കുഭാഗമുള്ള റോഡിൽ നിന്നും വടക്കുവശമുള്ള പമ്പയാറ് വരെ തെൻവടലായുള്ള സ്ഥലത്തുകൂടി 1-ഉം 3-ഉം 4-ഉം 5-ഉം പട്ടിക ഉടമസ്ഥർക്ക് വാഹന ഗതാഗതത്തോടുകൂടി സഞ്ചരിക്കുന്നതിന് അവകാശമുണ്ടായിരിക്കുന്നതും ആയതു അന്യായം തടസ്സപ്പെടുത്തുവാൻ പാടില്ലാത്തതുകൊണ്ടു. Going by the above recitals, it can be seen that the above shareholders were given a right of way convenient to the passage of vehicles, upto the northern river Pampa from the southern public road. However, no specific width is mentioned in the document. The plaintiff has a case that the way has a width of 3.90 metres from the southern public road till the river Pampa. It is pointed out by the learned counsel for the defendant that the plaintiff has no consistent case with respect to the description of the properties including the way. In the plaint schedule description, item 'D' is referred as follows: “അന്യായം എ പട്ടിക വസ്തുവിന്റെ തെക്കു പടിഞ്ഞാറേ മൂലഭാഗത്തു നിന്നും പടിഞ്ഞാറോട്ട് അന്യായം സി പട്ടിക വസ്തുവിന്റെ തെക്കു കിഴക്കേ ഭാഗത്തിന് കിഴക്കുവശത്ത് കൂടി 3 മീറ്റർ 90 സെ.മീ. വീതിയിൽ തെക്കോട്ട് ഉദ്ദേശം 50 മീറ്റർ നീളത്തിൽ കിടക്കുന്ന വഴി സ്ഥലം". However, in paragraph no.7 of the plaint, it is described as; അന്യായം 'ഡി' പട്ടിക വസ്തു

03/12/2004 ലെ 3266-)0 നമ്പർ ഭാഗപത്ര്യാക്കാരം തെക്ക് വശം റോഡിൽ നിന്നും തുടങ്ങി വടക്കുവശം പമ്പയാറുവരെയുള്ള 3 മീറ്റർ 90 സെ.മീ. വീതിയിലുള്ള വഴിസ്ഥലമാകുന്നു. ആയത് ഇപ്പോഴും ഇപ്രകാരം തന്നെ കാണപ്പെടുന്നു. It is pointed out that the plaintiff has no consistent case as to the extent of way for which he is claiming a declaration. As per the plaintiff's case, this way has been in use for the last 60 years. According to him, the plaintiff and his family have been using a way that starts from the south-western corner of plaintiff 'B' schedule property and passes through the plaintiff 'A' schedule property with a width of 3 metres and thereafter from the south-western corner of 'A' schedule property, deviating towards south with a width of 3.90 metres and running a distance of 50 metres reaches the southern public road. When the plaintiff's power of attorney holder was examined as PW1, she described about the way as follows: ബി പട്ടിക വസ്തുവിന്റെ തെക്ക് പടിഞ്ഞാറെ മൂലയിൽ നിന്ന് എ പട്ടിക വസ്തുവിലേക്ക് വഴിയുണ്ട്. ടി വഴിയ്ക്ക് 4 മീറ്റർ വീതി കാണും. നീളം 75 മീറ്റർ. 4 മീറ്റർ വീതിയിലും 75 മീറ്റർ നീളത്തിലുമുള്ള വഴി കിഴക്ക് നിന്നും തെക്കോട്ടായി കിടക്കുന്നു. The defence specifically challenges the probability of the existence of a way from 'B' schedule property, through 'A' schedule to pass towards the southern public road. It is contended by the defendant that there existed a large 'anjili' tree aged about 70 years on the southern part of 'A' schedule property and therefore there was no possibility for formation of a way on this portion. During cross examination, PW1 admitted that after the purchase of property by the plaintiff, the said 'anjili' tree was cut and removed by the plaintiff. It was also admitted by her that the way portion in 'A' schedule

property was reinforced by laying gravel etc. after this. However, she deposed that the way was in use even prior to that.

10. PW2 and PW3 are two witnesses examined from the side of the plaintiff to support his case that the way as described by the plaintiff was in existence even prior to the purchase of 'A' schedule property by the plaintiff. The defendant has a case that the plaintiff had a way from the eastern side of 'B' schedule item to pass towards east and therefore there was no necessity for him to use a way as described by him. It is contended that 'A' schedule property was purchased subsequently, without including a right of way available to the prior owner. PW1 admitted during cross examination that there was a 2 feet wide way from 'B' schedule property to pass towards east.

11. PW4 is the advocate commissioner who conducted local inspection. According to him, he could find an opening on the compound wall situated on the eastern side of 'B' schedule property. However, he did not conduct any further enquiry as to whether this opening is a way available to the plaintiff. From the southern public road, till the south-western corner of 'A' schedule property, he could find a demarcated way having varying width. As per ext.C1 series (c) rough sketch prepared by the advocate commissioner, this way starts from the south-western corner of the plaintiff's property and south-eastern side of the defendant's 'C' schedule property. At the starting point, at the Mannar-Veeyapuram public road, it has a width of 3.60 metres and on the middle it has a width of 3.20 metres. At the north where it joins with the properties belonging to the plaintiff and defendant, it has a width of 4.10 metres. From this portion, it

enters into the plaintiff's property and he could find traces of a way towards 'B' schedule property as if it is a continuation of the way that starts from Mannar-Veeyapuram public road.

12. The defence has specifically contended that the property descriptions in the plaint are erroneous. The description of the properties in the schedule appended to the plaint is different from that of the descriptions in other parts of the plaint. In other parts of the plaint, plaint 'A' schedule property is described to be situated on the western side of 'B' schedule property. In the schedule, the eastern boundary of plaint 'A' schedule property is shown to be 'A' schedule property' itself. On the south, way and Idikkula's property is shown. On the west, way and property belonging to Joseph Joseph is shown. Now coming to 'B' schedule property, eastern boundary is shown to be the property of Gheevarghese. On the south, property belonging to Thonduparambil Family is shown. Western boundary is shown to be the property belonging to Vattasseril Family (the plaintiff purchased 'A' schedule property from a member of Vattasseril Family). On the northern side, river is shown. Description of 'C' schedule property belonging to the defendant is rather interesting. It is as follows: അന്യായം എ പട്ടിക വസ്തുവിന് പടിഞ്ഞാറുവശം ആറ്റിലേക്ക് പോകുന്നതിനുള്ള വഴിയായ എ പട്ടിക വസ്തുവിന്റെ തൊട്ടു പടിഞ്ഞാറുവശം ബി പട്ടിക വഴിയുടെ നേരേ പടിഞ്ഞാറ് വശത്തുകാണുന്ന പ്രതി വക വസ്തു. As pointed out above, 'D' schedule way is described in the schedule as follows: വസ്തുവിന്റെ തെക്കു പടിഞ്ഞാറേ മൂല ഭാഗത്തുനിന്നും പടിഞ്ഞാട്ട് അന്യായം സി പട്ടിക വസ്തുവിന്റെ തെക്കു കിഴക്കേ ഭാഗത്തിന് കിഴക്കുവശത്ത് കൂടി 3 മീറ്റർ

90 സെ.മീ. വീതിയിൽ തെക്കോട്ട് ഉദ്ദേശം 50 മീറ്റർ നീളത്തിൽ കിടക്കുന്ന വഴി സ്ഥലം". As per the version of the advocate commissioner the plaint 'B' schedule property is not situated exactly on the east of plaint 'A' schedule property. In fact, a way like portion, seemingly a continuation of the way coming from the south diagonally divides the above properties. In other words, 'B' schedule item lies on the south-eastern side of 'A' schedule property. PW1, (the power of attorney holder of the plaintiff) and the other two witnesses examined from the plaintiff's side (PW2 and PW3) deposed that after the partition, a fence was erected on the western side of 'A' schedule property.

13. The defendant has a specific case that the portion of way leading upto the river, as continuation of the way till the level of his property, is having only a width of 3 feet. During cross examination, PW1 admitted that the width of this portion is limited to 3 feet by erecting stones. The advocate commissioner also would depose that he could not find a way convenient to the passage of vehicles upto the river level. It is pointed out by the learned counsel for the defendant that the plaintiff approached this court for a declaration in respect of a way having a width of 3.90 metres. However, the width varies at different places. Further, he has inconsistent descriptions in respect of the properties including the way.

14. Now the crucial question is whether the plaintiff has derived any right of way by virtue of his title deed. His claim is that he has obtained an easement by grant by virtue to his title deed. According to him, his transferrers had derived such a right of way in respect of the property transferred in his

favour and they had intended to transfer the right of way also. As pointed out above, ext.A1 does not contain any reference as to a right of way. One of his transferrers viz. Annamma Cheriyan is no more. Plaintiff examined Mable Cheriyan, daughter of Annamma Cheriyan, who is also an executant in ext.A1. By putting leading questions, the learned counsel for the plaintiff elicited a statement from this witness to the effect that a right of way was also intended to confer on the plaintiff. In cross examination, PW1 categorically admitted the defence suggestion that O.S.No.324/2014 was filed against the same defendant for and on behalf of the plaintiff in this case claiming a right of easement by prescription through this way. The properties involved in the said suit are included in this suit also. The said admission would cut the very root of the claim that the transferrers had intended to grant an easement through the above property vide the document which was executed prior to the institution of the suit in the year 2014. Had the parties got such an intention, the plaintiff would never have approached the court seeking an inconsistent claim of easement by prescription. Further, during cross examination PW5 Mable Cheriyan admitted that since she is residing away from the properties included in this case, her knowledge with respect to the properties is from her mother. In the light of the evidence discussed hitherto, I find that the plaintiff is not entitled to a declaration of easement by grant as prayed for by him. In the said circumstance, he is not entitled to a consequential injunction also. Hence issue nos. 2 and 3 are found against the plaintiff.

15. **Issue No.4** :- Considering the facts and circumstances of the case,

the parties shall suffer their respective costs.

In the result, the suit stands dismissed. No order as to costs.

Dictated to the Confl. Asst., transcribed and typed by her, corrected and pronounced by me in open court on this the 13th day of February, 2020.

**D.SREEKUMAR
MUNSIFF**

Appendix

Exhibits for the plaintiff

- | | | | |
|----|-----------------|---|---|
| A1 | dtd. 03.01.2012 | - | Sale deed No. 31/12/I |
| A2 | dtd. 11.08.2011 | - | Settlement deed No. 2078/11 |
| A3 | dtd. 03.12.2004 | - | Certified copy of partition deed No. 3266 |
| A4 | dtd. 10.10.2019 | - | Land Tax receipt issued from Veeyapuram village. |
| A5 | dtd. 10.10.2019 | - | Land Tax receipt issued form Veeyapuram village |
| A6 | dtd. 26.07.2017 | - | Power of Attorney, Executed by Jacob Thomas, in favour of Nirmala Mohan |

Exhibits for the defendant

Court Exhibits

- | | | | |
|-------|-----------------|---|--|
| C1(a) | dtd. 05.10.2019 | - | Nil |
| C1(b) | " | - | Mahazar prepared by Advocae Commissioner Sri . Vinod Abraham |
| C1(c) | " | - | Report prepared by Advocae Commissioner Sri . Vinod Abraham |
| | | - | Rough sketch |

Witness for the plaintiff

- | | | | |
|-----|-----------------|---|--------------------|
| PW1 | dtd. 18.10.2019 | - | Nirmala Mohan |
| PW2 | dtd. 26.11.2019 | - | Sivaraman |
| PW3 | dtd. 26.11.2019 | - | Saji Varghese |
| PW4 | dtd. 13.12.2019 | - | Adv. Vinod Abraham |
| PW5 | dtd. 09.01.2020 | - | Mable W.C |

Witness for the defendant

- | | | | |
|--|--|---|-----|
| | | - | Nil |
|--|--|---|-----|

MUNSIFF