

IN THE COURT OF THE MUNSIFF, KOCHI

Present :- Sri.Mithun Roy K., B.A., LL.B., Additional Munsiff
Saturday, the 31st day of August, 2019/9th Bhadra, 1941

O.S.No.97/2016

Plaintiff:-

- . I.J.George, aged 71, S/o. Joseph, residing at Irumbanath House, Ochanthuruthu PO, Kochi- 682 508

By Advs. P.G. Jayashankar, P.Sreelakshmi & V.Sreejayan

Defendant:-

- . I.J.Devassy, aged 80, S/o.Joseph, residing at Irumbanath House, Ochanthuruthu PO, Kochi- 682 508

By Advs. Ajesh Babu T. & M.K. Robin Raj

This suit come up for hearing before me on 06.08.2019 in the presence of above advocate concerned and having stood over for consideration on 31.08.2019, the court delivered the following:-

JUDGMENT

2. **The plaintiff's case, in brief, is as follows:-** The plaintiff's father named Joseph had obtained 10 cents of land as per the proceedings in O.A.7429/1970 of the Land Tribunal,Vypin. After the death of Mr.Joseph, his property devolved upon his wife and 5 children and they had executed Partition Deed No.2002/89 of S.R.O.,Njarakkal in respect of late Joseph's property. Accordingly, the plaintiff became the absolute owner in possession of the plaint A schedule property having an extent of 5 cents. The remaining 5 cents was allotted to the defendant as per the same Partition Deed No.2002/89 of S.R.O.,Njarakkal. The entire property mentioned in the Partition Deed No.2002/89 of S.R.O.,Njarakkal is having

only one entrance which is on the north-eastern corner of the defendant's property. The only access to the public road from the plaintiff A schedule property is through the plaintiff B schedule pathway that runs through the defendant's property. The parties to the partition deed had specifically prescribed easementary right for the plaintiff to use the plaintiff B schedule pathway. It was also agreed in the partition deed for not causing any obstruction by the defendant or his successors to the plaintiff in using the plaintiff B schedule pathway. Thereafter, the plaintiff and his family are using the plaintiff B schedule property without any obstruction. In the month of January 2016, the defendant, with an intent to alienate his property had tried to obstruct the usage of the plaintiff B schedule property by the plaintiff. Attempt to settle the dispute through mediation was failed. Now the defendant is taking hasty steps to construct a fence across the plaintiff B schedule property to deny the right of the plaintiff to use the plaintiff B schedule property. So the suit is essentially filed for a decree of permanent prohibitory injunction, restraining the defendant, his men, successors or agents from interfering with or obstructing the right of the plaintiff and his family to use the plaintiff B schedule property as an access to the public road, in any manner whatsoever, contrary to the terms of the partition deed.

3. The defendant appeared through counsel and filed Written Statement with Counter Claim, contending *inter alia* as follows:- The way provided to the plaintiff's property is through the extreme northern boundary of the defendant's property. The description of the plaintiff B schedule property is only imaginary. The counter claim B schedule property is the pathway provided in the partition deed. The counter claim

B schedule property is part of the counter claim A schedule property of the defendant. The allegation that the parties had prescribed easementary right of way for the plaintiff to access the public road is incorrect. The present attempt of the plaintiff is to shift the pathway to the south and to increase its width for obstructing the defendant from constructing a house in his property. The plaintiff is having no right to shift the pathway towards south. The allegation that the defendant had tried to obstruct the plaintiff's right to use the plaint B schedule property, by putting up fence across the plaint B schedule property is false. On 16.03.2016, the plaintiff had attempted to trespass into the counter claim A schedule property, other than the counter claim B schedule property, for the purpose of shifting the earlier pathway. Hence the defendant had prayed for the dismissal of the suit with costs. The prayer in the counter claim is to restrain the plaintiff, his men and agents from trespassing into the counter claim A schedule property, except the counter claim B schedule property or obstructing the defendant from putting up any construction, fence or compound wall around the said property, except the counter claim B schedule property.

4. The plaintiff filed Written Statement to the Counter Claim with following contentions-: The allegation regarding the pathway on the extreme northern boundary of the defendant's property is incorrect. The extreme north-western boundary portion of the defendant's property is dumped with remnant of the demolished building. The counter claim B schedule pathway is not in existence. The plaintiff is not attempting to shift the pathway towards south as alleged by the defendant. The defendant is trying to establish an alternative pathway and the same cannot be termed as a cause of action for filing counter claim. The

plaintiff had not trespassed or attempted to trespass into any portion of the defendant's property. The plaintiff is only exercising his easementary right of way mentioned in the plaint. Thus the plaintiff had prayed for the dismissal of the counter claim with costs.

5. Issues settled in the case are as follows:-

- (i). Whether the plaint schedule properties are properly identified?
- (ii). If so, whether the plaintiff is entitled for a decree of permanent prohibitory injunction as prayed for in the plaint?
- (iii). Whether the defendant is entitled to seek for a counter claim relief of permanent prohibitory injunction against the plaintiff as prayed for?
- (iv). Reliefs and costs?

6. In evidence, the plaintiff was examined as PW1. Exts.A1 to A4 and C1 documents were marked on the side of the plaintiff. The defendant was examined as DW1 and no document was marked on his side.

7. Heard the learned counsel for the parties.

8. **Issues No.(i) to (iv):-** These issues are considered together as they are inter related. The fact that the plaint A schedule property belongs to PW1 and the counter claim A schedule property belongs to DW1 as per the partition deed referred to in Ext.A1 is undisputed. The B schedule property in Ext.A1 is the plaint A schedule property and A schedule property in Ext.A1 is the counter claim A schedule property. PW1 and DW1 are the 6th party and the 4th party respectively in Ext.A1.

9. The dispute pertains to the usage of pathway by PW1 through the counter claim A schedule property. According to PW1, the plaint B

schedule property is the pathway provided in Ext.A1 through the property of DW1 for the usage of the plaint A schedule property from the public road on the north.

10. It is clearly stated in the decision reported in **Kochan Ramanathan V. Kochan Natarajan [1990 KHC 316]** that, quasi easements arise by implied grant by fiction of law on severance of tenements by bequest, transfer or partition just like easements of necessity. In this case, right of way is claimed on the basis of the partition deed referred to in Ext.A1. Hence the claim of easement raised by PW1 on the basis of Ext.A1 can be considered.

11. DW1 is not disputing the fact regarding the right granted to PW1 in Ext.A1 to use a pathway through DW1's property. In Ext.A1, there is mention regarding PW1's right of transportation through the property allotted to DW1 to reach the pathway on the north. No other details regarding the pathway through DW1's property is mentioned in Ext.A1. However, it is categorically mentioned in Ext.A1 that DW1 or the sharers have no right to obstruct the usage of the pathway through DW1's property.

12. The description of the plaint B schedule property in the plaint is as follows: *All that part and parcel of way having a width of 5 ½ links stating from the eastern boundary of the plaint A schedule property and 4.35 m. south of the northern boundary of the plaint A schedule property,proceeding to the north east direction in a curved manner through the property of the defendant and further northwards, and extending up till the public road (Pipeline Road).* Likewise, the description of the counterclaim B schedule property in the Counter Claim is as follows: *Pathway starting from north eastern corner of the*

plaintiff's property and proceeds straight towards eastern side through the counter claim A schedule property along its extreme northern boundary and reaches the pathway coming from the northern side. The pathway has a uniform width of 5 links and length of approximately 5 ½ meters.

13. So there is material difference in the narration of the pathway mentioned as the plaint B schedule property and as the counter claim B schedule property. As per PW1's case, the pathway is running in a curved manner. But according to DW1, the pathway is running in a straight manner along the extreme northern boundary of his property.

14. The contention of DW1 is that the pathway provided for PW1 in Ext.A1 is the counter claim B schedule property and not the plaint B schedule property. DW1 had pleaded that the plaint B schedule property is only an imaginary one.

15. *Per contra*, PW1 had contended that there is no pathway as the counter claim B schedule property and the north-western side of the counter claim A schedule property is dumped with remnant of the old building.

16. There is clear reference in Ext.C1 regarding the issuance of prior notice of inspection by the Advocate Commissioner to the daughter-in-law of DW1, since DW1 was not in the house at that time. It is also mentioned in Ext.C1 that PW1 and the daughter-in-law of DW1 were present at the time of inspection. In the notice memo submitted along with Ext.C1, one person claiming to be the daughter-in-law of DW1 had signed in the notice on behalf of DW1. No objection was filed by DW1 against the findings in Ext.C1 report. That being so, there is no reason to discard the findings in Ext.C1.

17. In Ext.C1, the plaint B schedule property that runs in a curved manner through DW1's property to reach the Pipeline Road from the plaint A schedule property has been clearly identified. There is nothing on record to hold that the pathway mentioned in Ext.C1 is a newly formed one. The length and widths of the plaint B schedule property at different points are also noted in Ext.C1.

18. It is categorically mentioned in Ext.C1 that there is no other access for PW1 to the public road, other than the plaint B schedule property. There is nothing in Ext.C1 to infer the existence of a pathway mentioned as the counter claim B schedule property inside DW1's property. In fact, DW1 in cross examination had admitted that there is debris of old building on the western boundary of his property. DW1 had also deposed that a scooter cannot pass through the northern side pathway claimed by him. However, in Ext.C1, a bike was seen inside the plaint A schedule property. Thus it is probable to hold that the plaint B schedule pathway, as identified in Ext.C1, is the pathway referred to in Ext.A1 through DW1's property. No other pathway, other than the plaint B schedule property is noted in Ext.C1.

19. That being so, the allegation of DW1 regarding attempt on the part of PW1 to trespass into the counterclaim A schedule property, other than the counter claim B schedule property, for the purpose of shifting the earlier pathway cannot be believed.

20. As already noted, there is clear stipulation in Ext.A1 that DW1 or the sharers have no right to obstruct the transportation of PW1 through DW1's property. In this regard, PW1 had deposed that DW1 is taking hasty steps to construct a fence across the plaint B schedule property to deny PW1's right to use the plaint B schedule property.

Though DW1 had denied the said allegation, it is material to note that, DW1 had sought for a counter claim decree to restrain PW1 from causing any obstruction to put up fence or compound wall around DW1's property, except the counter claim B schedule property. So the intention of DW1 and the possibility to put up fence inside the plaint B schedule property by DW1 is evident from the prayer made in the counter claim.

21. Since DW1 had not established the existence of the counter claim B schedule property, the prayer in the counter claim to restrain PW1, his men and agents from trespassing into the counter claim A schedule property, except the counter claim B schedule property or obstructing the defendant from putting up any construction, fence or compound wall around the said property, except the counter claim B schedule property cannot be allowed. On the other hand, the existence of the plaint B schedule property is evident from Ext.C1 report. So PW1 is entitled to seek for a decree, restraining DW1, his men, successors and agents from interfering with or obstructing the right of PW1 and his family to use plaint B schedule as an access to the public road from the plaint A schedule property.

22. The learned counsel for DW1 had highlighted the evidence of PW1 that there is possibility to split the property of DW1 into two, if the way claimed by PW1 is formed. At this juncture, the learned counsel for DW1 had relied on the decision reported in Sreeharan V. Madanan [2003(1) KLT 320] to contend that, a right which involves total exclusion of the owner of the soil from its enjoyment cannot be claimed as an easement. The learned counsel for DW1 also cited the ruling reported in Thilakraj V. Sebastian [2014 (4) KLT 714] to submit that, Section 22 of the Indian Easement Act enables the servient owner to specify the route and even

assuming that Section 22 of the Easement Act is not available, that cannot tie down the hands of the court from granting relief.

23. It is to be noted that, there is no prayer in the counter claim to confine the exercise of easement by PW1 to a determinate part of DW1's property. In fact, DW1 had not accepted the plaint B schedule property as the pathway mentioned in Ext.A1. Above all, the existence of the counter claim B schedule property is also not established by DW1. There is no cogent reason to hold that the plaint B schedule property will totally exclude DW1 from the counter claim A schedule property, since the right of PW1 to use the pathway was acknowledged by DW1 in Ext.A1. It is already observed in paragraph 18 of this Judgment that the plaint B schedule pathway, as identified in Ext.C1, is the pathway referred to in Ext.A1 through DW1's property. So the decisions referred above cannot be applied to the facts of this case.

24. In the light of the afore mentioned discussions and findings, it is safe to hold that PW1 is entitled for a decree of injunction and DW1 is not entitled for any counter claim decree. These issues are answered accordingly. Hence the suit has to be decreed with costs and the counter claim has to be dismissed with costs.

In the result,

The suit is decreed with costs as follows:

(a). The defendant, his men, successors or agents are restrained by a decree of permanent prohibitory injunction from interfering

with or obstructing the right of the plaintiff and his family to use the plaint B schedule property as an access to the public road from the plaint A schedule property.

(b). The Counter Claim is dismissed with costs.

(Typed, corrected and pronounced by me in open court on this the 31th day of August, 2019)

Mithun Roy.K.
Additional Munsiff.

APPENDIX

Plaintiff's Exhibits:-

A1 03.10.89 Certified copy of partition deed No.2002/89
A2 14.03.16 Tax receipt
A3 25.01.16 Letter
A4 - CD and 3 photographs

Defendant's Exhibits:- Nil

Court's Exhibits:-

C1 01.04.16 Commission report

Plaintiff's Witness:-

PW1 - I.J.George

Defendant's Witness:-

DW1 18.06.19 I.J.Devassy

Court's Witness:- Nil

Third Party Exhibits:- Nil

Additional Munsiff

jjk

Comp. by

O.S.No. 97/2016

JUDGMENT

Dated : 31.08.2019