

IN THE COURT OF THE MUNSIF, VAIKOM

Present: Sri.Sandeep Krishna.V., BAL.,LL.B., DCL.,LL.M, Munsiff.

Monday 20th February,2017

1st day of Phalguna 1938

O.S.119/2014 and O.S.102/2014

O.S.119/2014

Plaintiff:

Prasannan,aged 49 Years,S/o.Madhavan, residing at Tharayil House, from Kizhakke Alumtharayil House, Udayanapuram.P.O., Padinjaremuri Kara, Vadakkemuri Village, Vaikom Taluk.

By Adv. Sri.B.Biju and Adv.M.Harikrishnan.

Defendants:

1. Maniyan,aged 77 Years, S/o.Velu, residing at Madavana House, from Kattezhathu House, Udayanapuram.P.O., Padinjaremuri Kara, Vadakkemuri Village, Vaikom Taluk.
2. Sarojini,aged 68 Years, W/o. Maniyan, residing at Madavana House, from Kattezhathu House, Udayanapuram.P.O., Padinjaremuri Kara, Vadakkemuri Village, Vaikom Taluk.

By Adv.K.P.Roy.

O.S.102/2014

Plaintiffs:

1. Maniyan,aged 77 Years, S/o.Velu, Madavana House, from Kattezhathu House, Udayanapuram.P.O., Padinjaremuri Kara, Vadakkemuri Village, Vaikom Taluk.

2. Sarojini, aged 68 Years, W/o. Maniyan,
Madavana House, Padinjaremuri, Vadakkemuri Village,
Vaikom Taluk.

By Adv.K.P.Roy.

Defendants:

1. Prasannan, aged 49 Years, S/o. Madhavan,
Tharayil House, Padinjaremmuriyil,
Vadakkemuri Village, Vaikom Taluk.
2. Sheela, aged 46 Years, W/o. Prasannan,
Tharayil House, Padinjarekkara Muri,
Vadakkemuri Village, Vaikom Taluk.
3. Praveen @ Shiju, aged 21 Years, S/o. Prasannan,
Tharayil House, Padinjarekkara Muri,
Vadakkemuri Village, Vaikom Taluk.
4. Unni, aged 19 Years, S/o. Prasannan,
Tharayil House, Padinjarekkara Muri,
Vadakkemuri Village, Vaikom Taluk.

By Adv. Sri.B.Biju.

These suits are having been finally heard on 08/02/2017 and the court on 20/02/2017 delivered the following:-

COMMON JUDGMENT

1. O.S.102/2014 is a suit for perpetual injunction against the defendants.

2. O.S. 119/2014 is a suit for declaration of easement right of way by necessity, for a mandatory injunction and for a perpetual injunction.

3. O.S.119/2014 and O.S. 102/2014 are tried jointly as per order in I.A.820/2015 and I.A.819/2015. O.S. 119/2014 is the leading case.

O.S.102/2014

4. **Facts of the case:-** Plaintiffs are husband and wife. They obtained title to 25 cent of land in Sy. No.52/6 of Vadakkemuri village by virtue of sale deed No. 812/1971 of Vaikom SRO. This property is scheduled as plaint scheduled property. Plaint scheduled property is situated on the southern side of Udayanapuram-Nerekadavu road. In between the plaint scheduled property and the said road, there is a water channel flowing east-west. About two years back the plaintiffs constructed a bridge connecting the road and plaint scheduled property after meeting all the monetary expenses. At present the plaintiffs and their son are taking motor vehicles to plaint scheduled property through this bridge in connection with their business activities. According to the plaintiffs, about 15 meters west from the plaint scheduled property, there is another bridge constructed by the panchayat across the stream connecting the public road to a temple known as Valiyara temple. By the said bridge, the road towards the temple is made cartable. Defendants are the property owners on the south western side of the plaint scheduled property. They reside in the

house therein. Plaintiff scheduled property lies within clearly identifiable boundaries. The plaintiff scheduled property is bounded on the north, east and west by water channels. At the southern side of plaintiff scheduled property the plaintiffs' property and defendants' property are separated by plants which are colloquially known as Othalam and Gandharajan. Plaintiffs are constructing a cattle shed on the south-western portion of the plaintiff scheduled property. They constructed the foundation for the same after felling coconut trees and other plants standing there. On the northern side of the proposed cattle shed, the bathroom and toilet of the plaintiffs is situated. Further according to the plaintiffs, on the northern boundary of the plaintiff scheduled property they constructed a compound wall and had also erected a gate at the entrance portion to the plaintiff scheduled property from the bridge. Defendants access their property through a wooden bridge on the southern side of the defendants' property. On the southern side of the defendants' property there is a water channel. Therefore, the defendants' walk towards the south through the bridge and then goes towards the west to reach Vaikom- Valiyara panchayat road. Defendants have also drawn water connection and electricity connection through this way. Plaintiffs sell milk and tapioca at their house. Defendants used to purchase milk and tapioca from the plaintiffs. For that purpose they have been using a small gap portion with a step on the northern side of the defendants' property. Further when the father of the first defendant died the visitors to the defendants' property had used the bridge and the

plaint scheduled property to reach the defendants' property. But that was not the permanent way to the defendants' property. Defendants are constructing a new house in their property. They had brought the building materials for the construction of the house in their property through the property of a person named Bhaskaran who has property on the western side of defendants' property. The building materials were carried from Nerekadavu-Valiyara road through property of Bhaskaran but recently the defendants and Bhaskaran quarreled with each other and thereafter Bhaskaran began to obstruct the defendants. While matters being so when the plaintiffs began the works for constructing the cattle shed the defendants approached the plaintiffs demanding a cartable way through the western side of the plaint scheduled property connecting the private bridge constructed by the plaintiffs. Plaintiffs declined the request. Then on 21.3.2014 the defendants along with several other persons came to the plaint scheduled property and threatened the plaintiffs that they would destroy the gate at the entrance portion of the plaint scheduled property. Plaintiffs apprehend that the defendants would forcefully trespass into the plaint scheduled property and cut open a new way through it. Therefore, the plaintiffs seek a perpetual injunction against the defendants.

5. Defendants 1 to 4 filed joint written statement denying the plaint averments. According to the defendants, the defendants have a right of way through the plaint schedule property to access the northern public road. The plaintiffs have suppressed this fact.

The plaintiffs are constructing the cattle shed with a dubious and malafide intention to obstruct the right of way of the defendants. The defendants strongly denied the allegation regarding the pathway from their property towards the south and then to the west. According to the defendants, the defendants have been using the pathway which starts from the southern side of the concrete bridge constructed across the water channel from the northern PWD road and which passes through the western part of the plaintiff scheduled property and through the eastern side of the bathroom in the plaintiff scheduled property towards the south direction and which joins the defendants' property at its northern boundary. This is the only pathway available for the defendants to reach their property. Further according to the defendants, earlier there was a wooden bridge across the water channel which was subsequently replaced by the concrete bridge jointly by the plaintiffs and the defendants. Further according to the defendants, the property of the plaintiffs and the property of the defendants were in the past lying in the joint ownership and possession of one Ouseph @ Kochupaapu of Manipadathu house. He had obtained title to that property through partition deed No. 1539/1957 of Vaikom SRO. That property was later severed into two by separate deed of sale and patta. Defendants therefore acquired an easement right of way by necessity through the pathway before mentioned. They and their predecessors have been using this pathway for the last 43 years as a matter of right without any interruption, obstruction, peaceably, openly and continuously as an easement hostile to the

ownership and possession of the plaintiffs over the plaintiff scheduled property. Defendants have transported all the construction materials for the construction of the house in the defendants' property. The plaintiffs have been incessantly trying to disturb the defendants from enjoying the pathway. As a part of that effort to disturb the easement right of defendants the plaintiffs along with their hench men constructed a basement using laterite stones at that portion to which the pathway has been passing so that the free access of the defendants could be obstructed. Plaintiffs did this act on 21.3.2014. Defendants are earning their livelihood by doing business on coir products. They bring coconut husk fibers to their property in connection with their coir manufacturing unit. On 23.3.2014 when the defendants attempted to transport raw materials to their coir manufacturing unit through the pathway the plaintiffs obstructed the defendants and intimidated them with fear and bodily injury. As a temporary arrangement, defendants sought the permission of the adjacent property owners named Mr. Aji and installed a wooden bridge across the southern water channel portion and transported the raw materials to the defendants' property through the property of the person named Kunjamma. Defendant preferred a complaint against the plaintiffs' before the District Collector, Kottayam. As per the reference from the District Collector, Kottayam and then the Revenue Divisional Officer, the Village Officer inspected the properties. It was in the said circumstances that the plaintiffs have

filed the present suit. Plaintiffs are not entitled to the reliefs prayed for.

6. After considering the rival contentions, court settled the following issues for trial:-

1. Have the defendants attempted to trespass into the property of the plaintiff?
2. Is not the plaintiff entitled to the injunction prayed for?
3. What is the order on reliefs and costs?

O.S. 119/2014

7. **Facts of the case**:- The first defendant in O.S. 102/2014 is the plaintiff in O.S. 119/2014. According to the plaintiff herein, the property located in Sy.No. 52/6 of SRO, Vaikom and having an extent of 10 cent came into the ownership of his mother as per patta No. 598/1970 of Land Tribunal Vaikom and sale deed No. 3282/1971 of SRO, Vaikom. His mother Devaki died intestate. Therefore, this 10 cent of land devolved upon the plaintiff and his siblings named Omana, Lakshmikutty and Kumari. In the year 2009, the co-owners of this property executed a joint right release deed registered as 2538/2009 of SRO, Vaikom releasing their right over five cent of property on the western side of the entire 10 cents in favour of the plaintiff. Even thereafter as the other co-owners were residing far away, the plaintiff has been looking after the 10 cent property on his behalf and on behalf of the other co-owners. This entire 10 cent of property is scheduled as plaint scheduled

item No.1 property. The defendants herein are the plaintiffs in O.S. 102/2014. According to the plaintiff herein, an extent of 25 cents of land comprised in sy. No. 52/6 of Vadakkemuri village is owned by the defendants on the northern side of plaintiff scheduled property. This property of the defendants is scheduled as plaintiff scheduled item No.2. On the northern side of that plaintiff scheduled item No.2 property there is a public canal passing in east-west direction and on the northern side of that canal there is a PWD road. Plaintiff scheduled item No.3 is a pathway having a width of one meter and an average length of 20 meter which starts from the southern portion of the concrete bridge across the canal which links the northern PWD road to the northern side of plaintiff scheduled item No.2 property and which then passes through the western part of plaintiff scheduled item No.2 specifically through the eastern side of the bathroom situated therein towards the south direction and reaches the northern boundary of the plaintiff scheduled item No.1 property. According to the plaintiff, in the place of the concrete bridge across the water channel on the northern side of plaintiff scheduled item No.2, there was a wooden bridge. This wooden bridge was replaced with the concrete bridge by the plaintiff jointly. According to the plaintiff, plaintiff scheduled item No.3 is the only pathway available for the plaintiff to get access from plaintiff scheduled item No.2 to other places specifically to the northern public road. According to the plaintiff, plaintiff scheduled item Nos. 1 and 2 properties were in the past lying as a common tenement in the ownership and possession of Mr. Ouseph

@ Kochupaappu of Manipadathu house in Vadakkemuri Village. He had obtained title to that common tenement through partition deed No. 1539/1957 of SRO, Vaikom. As this common tenement was later severed through separate deeds of sale and patta and as there was no other way available for the plaintiff to get access from plaintiff scheduled item No.1 to other places specifically the northern public road except through plaintiff scheduled item No.3, the plaintiff has an easement right of necessity through plaintiff schedule item No.3. He has been enjoying that right without interruption, obstruction, peaceably, openly, adversely and continuously, as an easement hostile to the ownership and possession of plaintiff schedule item No.2 property. When the plaintiff constructed a new house in the plaintiff schedule item number one property all the construction materials were brought to the plaintiff schedule item number one property through plaintiff schedule item number three pathway. The basement for the house is completed. Now the defendants are not in good terms with the plaintiff and his family. On 21.3.2014, the defendants along with their henchmen started to construct a laterite stone basement over plaintiff schedule item number three so as to prevent the plaintiff from using the plaintiff schedule item number three. The basement portion so constructed is scheduled as plaintiff schedule item number four. According to the plaintiff, the ulterior motive of the defendants is to obstruct the easement right of way of the plaintiff through plaintiff schedule item number three. Plaintiff tried to prevent them from doing the illegal act. But the defendants threatened the plaintiff. According to the plaintiff, the

defendants do not have any cattle rearing business and therefore the cattle shed is constructed only with the sole intention to obstruct the right of way of the plaintiff. On 23.3.2014 when the plaintiff attempted to transport raw materials to their coir manufacturing unit in plaint schedule item No.1 property through the plaint schedule item No.3 pathway the defendants obstructed the plaintiff and intimidated them with fear and bodily injury. As a temporary arrangement, plaintiff sought the permission of the adjacent property owners named Mr. Aji and installed a wooden bridge across the southern water channel portion and transported the raw materials to the plaintiff's property through the property of the person named Kunjamma. Plaintiff preferred a complaint against the defendants before the District Collector, Kottayam. As per the reference from the District Collector, Kottayam and then the Revenue Divisional Officer, the Village Officer inspected the properties. There upon the defendants filed OS 102/2014 against the plaintiff and obtained a temporary injunction and on the strength of the temporary injunction the defendants are hastily constructing the cattle shed over the plaint schedule item number three way. If the defendants succeed in their illegal mission it will cause irreparable injury and severe hardships to the plaintiff. Therefore plaintiff has filed the present suit seeking declaration of easement right of way through plaint schedule item number three, for a mandatory injunction to demolish and remove plaint schedule item number four constructions. Plaintiff also seeks a perpetual

injunction against future obstructions to plaintiff schedule item number three way.

8. Defendants 1 and 2 are jointly filed written statement denying the plaintiff averments and reiterating the facts stated by them in the plaintiff in OS 102/2014. They have specifically denied the existence of plaintiff schedule item number three way and the right of way of the plaintiff through plaintiff schedule item number three. They specifically state that the pathway to plaintiff schedule item number one property was through the southern side of plaintiff schedule item number one property. They specifically state that there was a wooden bridge on the southern side of plaintiff schedule item number one property through which the plaintiff was walking Southwards and then towards the west to reach Valiyara coastal road. Further according to the defendants, there has been a cattle shed on the South Western side of plaintiff schedule item number two property. It was constructed using wood and palm leaves. In its place a new concrete cattle shed is being constructed. They also specifically stated that the concrete bridge on the northern side of plaintiff schedule item number two was constructed by them after obtaining permission from the panchayat as they had to take motor vehicles to their property in connection with their business on milk and tapioca. Defendants denied all the contrary allegations contained in the plaintiff.

9. After considering rival contentions, court settled the following issues for trial:-

1. Whether the plaintiff is entitled to declaration of easement right of necessity through plaint scheduled item No.3?
2. Whether the plaintiff is entitled to the mandatory injunction prayed for?
3. What is the order on reliefs and costs?

10. Evidence on both the cases was taken in the leading case, OS 119/2014. Hereafter in this judgment, the term 'plaintiff' will refer to the plaintiff in OS 119/2014 and the defendants in OS 102/2014. Similarly, the term 'defendants' will refer to the plaintiffs in OS 102/2014 and the defendants in OS 119/2014.

11. To prove their case, plaintiff examined Pws1 to 4 and marked Exts.A1 to A8. To prove their case, the defendants examined Dws1 and 2 and marked Exts. B1 to B8. The reports and plans prepared by the advocate commissioner are brought to evidence as Ext.C1, C1(a), C2, C2(a), C3 and C3(a). Heard.

12. **Issue No.1 in OS 119/2014**:- As stated by the plaintiff, his mother Devaki obtained title to the plaint schedule item No.1 property through a patta and then another portion of it through a sale deed. The original patta is marked as Ext.A1 and the certified copy of sale deed No.3282/1971 of SRO Vaikom is marked as Ext.A2. Exts.A1 prove that Devaki obtained kudikidappu right over 5 cent of land in Survey No.52/6 from Ouseph Kochupappu of Manippadathu family. Ext.A2 prove that she purchased 5 cent in survey No.52/6 close to the kudikidappu land from the same Ouseph Kochupappu. In

Ext.A2, Ouseph Kochupappu mentioned that he obtained title to the property through partition deed No. 1539/1957 of Vaikom SRO. Ext.B2 is the certified copy of sale deed No.812/1971 which is the deed by which the defendants obtained title to plaint schedule item No.2. The vendor of that deed is also Ouseph Kochupappu and he mentions in that deed that the property he sells through that deed was one which he obtained through partition deed No.1539/1957 of Vaikom SRO. The 25 cent which is the plaint schedule item No.2 in this case is the first schedule property in that deed and its survey number is also 52/6. Like in his plaint in OS 119/2014, Pw1 testified that the plaint schedule item No.1 and 2 properties were in the past lying under one common ownership as one common tenement and that it was by Ext.A1, A2 and B2 that it was severed from common tenement. The defendants have not specifically denied the allegation that the plaint schedule item No.1 and 2 were in the past part of a common tenement. From Ext.A1, A2, B2 and the testimony of Pw1, I find it safe to conclude that the plaint schedule item No.1 and 2 properties were in the past part of one common tenement belonging to Ouseph Kochupappu of Manipadathu family and that by virtue of Ext.A1, A2 and B2 the properties were severed into two and in the ownership of two persons, Maniyan and Devaki.

10. Now, the question involved in the case is whether plaint schedule item No.3 is the only pathway to reach plaint schedule item No.1 and whether plaint schedule item No.1 has acquired

an easement right of way by necessity through plaint schedule item No.3. During the thoroughly researched and well presented argument of learned Advocate M. Harikrishnan, he relied on **Leela v. Ambujakshy**, 1989 (2) KLT 142. The ratio of this decision is extracted below as it will guide the discussion of the evidence adduced in the case. It reads:

“ 9. The right cannot be claimed as a quasi easement under S.13(b), (d) or (f) of the Easements Act also. The other clauses of S.13 deal with easements of necessity while these three clauses concern quasi easements. Like easements of necessity, quasi easements also arise only on severance of tenements, testamentary or inter vivos. It can arise in cases of partition also. The transferor, transferee, testator, legatee or parties to partition could get such rights. Quasi easement is an accommodation as it existed during the common ownership. That must not only be necessary for the enjoyment of the transferred, retained or severed portion, but also must be apparent and continuous during the common ownership till the transfer, bequest or severance. The quasi easement is only to the extent it was enjoyed when the transfer, bequest or partition took effect. An apparent easement is one which could be perceived. Continuous easement is one which is or may be continued without the act of man. Unless it is also apparent and continuous, quasi easement cannot be claimed simply because it maybe necessary for enjoyment. **These two conditions viz. apparent and continuous, are not**

necessary for an easement of necessity. What is required is only that it must be necessary for the enjoyment. **But in cases of easements of necessity the necessity must be absolute in the sense that without it the property could not be enjoyed in any way or any state much less in the way or state in which it was enjoyed before. So also, as soon as the necessity ceases the easement of necessity also gets extinguished.** But in the case of a quasi easement, the necessity is not absolute, but only qualified. It is available even in cases where the property is otherwise enjoyable. The only condition is that without the easement it is not otherwise enjoyable in the way in which it was enjoyed till the severance.”

11. The first and foremost question is whether plaint schedule item No.3 is in apparent existence. The question is ordinarily irrelevant in a case of easement of necessity. But, here the question is gone into as the plaintiff has claimed in the plaint that for the past 43 years he himself and his predecessors have been openly, peaceably, as of right, without interruption and as an easement being using plaint schedule item No.3 way. To analyze this aspect, I studied the testimony of Pw4, Advocate A. Manaf, who visited the plaint schedule property to prepare Ext.C1 to C3 reports and plans. The relevant part of the testimony of Pw4, which is contained in page No.2 and 3 of his testimony is extracted below:

“ O.S.102/2014 – നമ്പർ കേസിൽ സ്ഥല പരിശോധന നടത്തിയ സമയം ടി വഴി കണ്ട ഭാഗത്ത് കരിയിലയും ചപ്പു ചവറുകളും ഒക്കെ കിടന്നതായി കണ്ടിരുന്നു. ടി ഭാഗം നന്നായി ഉറച്ചു നിലയിൽ ആണ് കാണപ്പെട്ടത് എന്ന് Ext.C1 പറഞ്ഞിട്ടുണ്ടല്ലോ എന്ന് അർത്ഥത്തിലാണ് അങ്ങനെ ഉറച്ചു കിടക്കുന്നത് കണ്ടുയെന്ന് പറഞ്ഞത് (Q). സ്ഥിരമായി സഞ്ചരിക്കുകയും അതു പോലെ മണ്ണുളർക്കുന്ന തരത്തിലുള്ള എന്തെങ്കിലും ആവശ്യങ്ങൾക്ക് ടി ഭാഗം ഉപയോഗിച്ചിട്ടുള്ളതാണ് (A). തുടർന്ന അങ്ങോട്ട് രണ്ടാം നമ്പറിൽ ചെറിയ മെറ്റലുകൾ വിരിച്ചതായി കാണപ്പെട്ടു (A). ആറാം ചോദ്യത്തിന് ഉത്തരത്തിൽ മൂന്നാം നമ്പർ വഴി ഒന്നാം നമ്പർ വസ്തുവിന് നാശനഷ്ട സൗകര്യത്തിന് അത് വശമല്ലേ എന്നു ചോദിച്ചിട്ടുണ്ട്, പട്ടിക രണ്ടാം നമ്പരിലൂടെ മാത്രമാണ് ആ സമയം പട്ടിക ഒന്നാം നമ്പറിൽ നിന്ന് പുറത്തേക്ക് കടക്കുന്നതിന് എന്തെങ്കിലും മാർഗ്ഗം നിലവിൽ കാണപ്പെട്ടുള്ളൂ. എന്നാൽ മൂന്നാം നമ്പർ എന്ന് പസ്സാവിടുന്ന വിധം വക്തവായ ഒരു വഴി കാണാൻ കഴിഞ്ഞില്ല. മൂന്നാം നമ്പരായി പറയുന്ന വഴി ഭാഗത്ത് ഒരു അടിത്തറ പണിഞ്ഞ് കൊണ്ടിരിക്കുന്നതാണ് ടി സമയത്ത് കണ്ടത് (A).

12. At page No.4 of his testimony, Pw4 testified as follows:

"മൂന്നാം നമ്പർ വഴി എന്തിന്റെ അടിസ്ഥാനത്തിൽ ആണ് identify ചെയ്തത് (Q). അനായ പട്ടിക വിവരണവും മുൻ റിപ്പോർട്ടിൽ പസ്സാവിച്ചതുപോലെ അനായ പട്ടിക മൂന്നാം നമ്പർ start ചെയ്യുന്നത് പോലെ ഉള്ള ലക്ഷ്യങ്ങളും അടിസ്ഥാനമാക്കിയാണ്.....

4. Ext.C1 report തയ്യാറാക്കുന്ന സമയത്തെ അടിത്തറ Ext.C2 report സമയം ഒരു കെട്ടിടം ആയി മാറിയിരുന്നു. അത് മൂന്നാം നമ്പർ ആയി അനായത്തിൽ പസ്സാവിടുന്ന ഭാഗത്ത് കൂടിയാണ്....."

13. During cross examination of Pw4, at paragraph 7, page No.6, he testified as follows:

" 'ഉറച്ചത്' എന്നതുകൊണ്ട് ചീഫിൽ ഉദ്ദേശിച്ചത് എന്താണ് (Q). നടന്നുവെച്ചുകൊണ്ടോ സ്ഥിരമായി ആ ഭാഗം എന്തെങ്കിലും ആവശ്യത്തിന് ഉപയോഗിച്ചു കൊണ്ടോ (A).

എന്ന് ഉപയോഗിച്ചതു കൊണ്ട് (Q). ആ ഭാഗത്ത് സ്ഥിരമായി കുറെക്കാലം എന്തെങ്കിലും ഭാരമുള്ളത് വച്ചിരുന്നുവെങ്കിൽ (A). സ്ഥിരമായി നടക്കുന്നതാണെങ്കിൽ നടപ്പാതയോ വണ്ടി പോയതിന്റെ പാടോകാണാറില്ലേ (Q). നിർബന്ധം ഇല്ല (A). ഒരു പുരയിടത്തലൂടെ ഒരു നടപ്പാത ഉണ്ടെങ്കിൽ ആ നടക്കുന്ന ഭാഗം ഒഴിച്ചു ബാക്കി ഭാഗത്ത് പുല്ല് കിളിക്കുറിക്കൂടം (Q). ഉണ്ട് (A).

14. A combined reading of this testimony of Pw4 gives the impression that Pw4 perceived that there are marks of a previous way at the beginning part, which was concealed with dried leaves and rubbish. These signs were shown to him only by the plaintiff when he took Pw4 as the urgent commissioner in OS 119/2014. In the later part of his testimony, while referring to Ext.C2(a), Pw4 also clearly testified that the visible marks of the plaint schedule item No.3 can be seen only at the portion it starts from plaint schedule item No.2. The testimony of Pw4 also gives the impression that he perceived that the remaining portion of plaint schedule item No.3 was not visible due to the construction of the plaint schedule item No.4, cattle shed.

15. In this connection, Ext.A8 assumes importance. Ext.A8 is the certified copy of the urgent commission report filed by Advocate T. C. Santhilal in OS 441/1997. OS 441/1997, a suit between the plaintiff and the neighbouring property owner named Bhaskaran, was first brought to the notice of the court by the defendants themselves. Defendants produced Ext. B1, the written statement filed by the defendants in OS 441/1997 in which they stated that they did not have a way through the property of Maniyan, the first defendant herein. However, in Ext.A8 (at page 6), the commission report filed in

that case, the learned advocate commissioner reports that there is a pathway for the plaintiff herein through the property of Maniyan and that walking through that pathway one could reach a wooden bridge on the northern side of the property of Maniyan and through that bridge one could reach the Udayanapuram-Nerekadavu road. In the rough sketch attached to Ext.A8, the advocate commissioner clearly showed that pathway from plaint schedule item No.1 herein through plaint schedule item No.2 herein to the northern road. In Ext.A8 learned advocate commissioner also clearly reported that this was the only way. Ext.A8 should be proved by examining Advocate T. C. Santhilal. But, Advocate T. C. Santhilal is no more. In the circumstance, the statements recorded by him in Ext.A8 are relevant as per section 32(2) of the Indian Evidence Act, 1872. He reported these facts in discharge of his professional duty.

16. The evidence of Pw4 suggests that plaint schedule item No.3 was in existence and it was obstructed by the construction of the plaint schedule item No.4 cattle shed. Ext.A8 suggests that Pw4 cannot have gone wrong in his finding.

17. The learned counsel for the defendants have strongly placed reliance of the statements in Ext.B1 i.e., the written statement in OS 441/1997 that the defendants in OS 441/1997 had admitted that there was no way through the property of Maniyan. At paragraph No.7, page 13 and 14, of the cross examination of Pw1, the learned counsel for the defendants brought to the attention of Pw1 the statements in Ext.B1. The relevant portion is extracted below:

“7. Ext.B1 paragraph NO.4 read over “ അന യം മൂന്നാം വകുപ്പ് ശരിയല്ല. പതികൾ പൂർവിക കാലം മുതൽ കിഴക്കോട്ടിറങ്ങി വാഴമനയിൽ മണിയൻ വക പുരയിടത്തിലൂടെ പുറത്തേക്ക് ഗതാഗതം ചെയ്യുന്നു എന്ന പസ്ഥാവന ശുദ്ധകളവാണ്.” എന്ന അമ്മ എഴുതിയിട്ടുണ്ടല്ലോ (Q). അറിയില്ല (A). അതിന് തുടർച്ചയായി “ പതികൾ ടി യാൻമാരുടെ വസ്തുവിൽ നിന്നും തെക്കോട്ടിറങ്ങി തുടർന്ന് ടി യാൻമാരുടെ പുരയിടത്തിൻ്റെ കിഴക്കു വശം വേലിയിൽ നിന്ന് കിഴക്കോട്ടിറങ്ങി വാദിയുടെ പുരയിടത്തിൽ പവേശിച്ച് തെക്ക് ഭാഗത്തുകൂടി ധനഞ്ചയൻ്റെ പുരയിടത്തിൽ കൂടി പടിഞ്ഞാറ് വശത്തേക്കാണ് സഞ്ചരിച്ചു കൊണ്ടിരിക്കുന്നതാണ് എന്ന് പറഞ്ഞിട്ടുണ്ടല്ലോ (Q). ഇല്ല അറിയില്ല. (A). 96/1997 – നമ്പർ ഹർജ്ജി പകാരം നിങ്ങൾ വർഷങ്ങളായി ഉപയോഗിച്ചിരുന്ന വഴി പുനസ്ഥാപിച്ച് കൊടുക്കാൻ ഭാസ്കരനോട് നിർദ്ദേശിച്ചിരുന്നു എന്നും അമ്മ പ തികയിൽ പറഞ്ഞിട്ടില്ലേ (Q). ശരിയല്ല. (A).”

18. This previous statement in Ext.B1 brought much embarrassment to the plaintiff’s case. Therefore, at the later part of the examination on the subsequent days, the plaintiff tried to bring on record the stand that he was not in town during the time when Ext.B1 was filed in court and that the recital in Ext.B1 are not binding on him. Learned counsel for the plaintiff argued relying on **Tresa Xavier v. Mary Simon and others**, 2014 (4) KLT 246 and **Krishan v. Kurukshetra University, Kurukshetra**, AIR 1976 SC 376. He also relied on Order III Rule 2 of the Code of Civil Procedure, 1908 to argue that the statements contained in Ext.B1 are not binding on him.

19. In **Krishan v. Kuruskshetra University, Kurukshetra**, AIR 1976 SC 376 , at paragraph 9, the honourable Apex Court observed that, it is well settled that any admission made in ignorance of legal

rights or under duress cannot bind the maker of the admission. According to the learned counsel for the plaintiff, the statement contained in Ext.B1 if it is an admission cannot bind the plaintiff as it could have been made in ignorance of his legal right for that way. Learned counsel for the plaintiff relied on **Tresa Xavier v. Mary Simon and others**, 2014 (4) KLT 246 to highlight the argument that the plaintiff was not a signatory to Ext.B1 and that the statements made by his mother the co-plaintiff in that case cannot bind the plaintiff. However, I find that this argument is cut down by the learned counsel for the defendants, Advocate K. P. Roy, effectively. He pointed out that plaintiff inherited the plaint schedule item No.1 from the maker of the statements in Ext.B1 and therefore the statements therein are binding on the plaintiff too.

20. In **Tresa Xavier v. Mary Simon and other**, 2014(4) KLT 246, the legal position on admission as evidence is clearly explained. I am extracting those important paragraphs for easy discussion of this case.

“ 17. A combined reading of S.17 and S.18 of the Evidence Act shows that a statement which suggests the inference as to a fact in issue or a relevant fact is an admission 1) if the maker is a party to the proceedings 2) even though the maker is not a party to the proceedings, if he had proprietary or pecuniary interests in the subject - matter of the proceedings and it was made in his character of the person so interested 3) eventhough the maker is not a party

to the proceedings, if it is from him the parties to the proceedings have derived interest in the subject - matter of the proceedings.”

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33. Admission of a plaintiff or a defendant is not an admission of the co -plaintiffs or co - defendants.

(Chandy Avira v. Thomman Varkey, 1951 KHC 154 : 1951 KLT 7 (FB) : 6 DLR TC 173 : AIR 1951 TC 109 : ILR 1951 TC 209 (FB) and Sitaram Motilal Kalal v. Santanu Prasad Jaisankar Bhat, 1966 KHC 684 : AIR 1966 SC 1697 : 1966 (3) SCR 527 : 68 Bom LR 489 : 1966 MPLJ 913 : 1966 Mah LJ 881). **But if the statement was made in his capacity as agent of the co - plaintiffs or co - defendants, it will be binding on them also.** Taylor in his Law of Evidence has observed that an admission of one identified in interest with the maker is binding on the latter. (S.740, page 473, Edition 12). ...

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39. An admission is a substantive piece of evidence. What is admitted by a party to be true must be presumed to be true. (Nathoo Lal v. Durga Prasad, 1954 KHC 479 : AIR 1954 SC 355 : 1955 (1) SCR 51). **It is**

the best evidence against him. (Union of India v. H. C. Goyal, 1965 KHC 505 : AIR 1965 SC 364: 1964 (7) SCR 267 : 66 Bom LR 681 : 1965 MPLJ 509 : 1965 Mah LJ 365 (sic: Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati)). **But it is open to him to show that his admission was erroneous or untrue.** (Nathu Lal's case supra and Delhi Transport Corporation v. Shyam Lal, 2004 KHC 1556 : AIR 2004 SC 4271 : 2004 (8) SCC 88 : 2004 SCC (L&S) 1053 : 2004 (113) DLT 1 : 2004 (102) FLR 1021 : 2004 (3) LLJ 532 : 2004 (3) CLR 287 : 2004 (21) AIC 953 (SC)). Sanity of a person is the presumption (R v. Mc Naughten, 1843 (10) CI &F 200 (TAC)). **But admission shifts the burden of proof."**

21. Ext. B1, the written statement in OS 441/1997 contains statements made by Devaki, the mother of the plaintiff at a time when she was alive and at a time when she was the sole title owner of the plaint schedule item No.2 property herein. Her statements in Ext.B1 are admissions made by her as the title owner of the property and are evidence. It binds the plaintiff too as from Ext.A7 it is clear that the plaintiff herein was the third defendant in that case and the written statement filed by Devaki was for herself and on behalf of all the defendants therein. But, as held in Tresa case cited above, this admission contained in Ext.B1 can be proved to be wrong or incorrect by the plaintiff. In fact, by the production and marking of Ext.A8, the commission report in OS 441/1997, plaintiff discharged his burden of

proving that the admission contained in Ext.A8 that the pathway to plaint schedule property was from south and not through the property of Maniyan, is false. As the plaintiff has proved that the statements contained in Ext.B1 were false and incorrect, the defendants cannot rely on Ext.B1 to state that the plaint schedule item No.3 has not been in existence.

22. The evidence so far discussed takes us to the conclusion that plaint schedule item No.3 has been in existence.

23. The next question that remains is whether there is any alternative way for the plaintiff to reach plaint schedule item No.1 other than plaint schedule item No.3. The burden to prove this fact is on the defendants. This is because, plaintiff has examined Pws 2 and 3, who are neighbouring property owners and they all testified clearly that the plaintiffs have been using the plaint schedule item No.3 pathway to reach plaint schedule item No.1 property. The existence of plaint schedule item No.3 is also proved. Plaintiff has also proved that by severance of a common tenement, plaint schedule item No.1 and 2 came into two separate ownership. Plaint schedule item No.2 does not have direct access from any public road even today. These are circumstances generating the impression that the plaintiff might have acquired easement right of way by necessity through plaint schedule item No.3.

24. Defendants examined Dw1 and 2 to prove that there is a way through the southern side of the plaint schedule item No.1 property to reach another public road on the west known as Valiyara temple road. Dw2 testified that the plaintiff has been walking

southwards from plaint schedule item No.1 through a wooden bridge across the water channel which flows east-west through the southern boundary of the plaint schedule item No.1 property. After crossing the water channel this bridge connects plaint schedule item No.1 to a pathway which comes from the west and goes to the east to the property of a person named Sasi. This pathway first enters the property of a person named Aji and thereafter it goes westwards to the property of a person named Kunjamma and after her property this pathway goes further west ward through the property of Dw2, named Shibu. Even though Dw2 was thoroughly cross examined by the learned counsel for the plaintiff, nothing discrediting him has come out. Pw2 is the said Aji, who clearly testified that the pathway used by plaintiff is through the property of the first defendant. Pw3 is the daughter in law of Kunjamma who also testified that the pathway used by the plaintiff is through the north and through the property of the first defendant. Dw2 is a relative of the defendants. But, compared to Pw2 and 3, Dw2 is admitting that there is a way through his property which is part of the alternative way from the property of the plaintiff. This means that Dw2 is admitting that he is a servient owner of the land through which the alternative pathway from the plaintiff's property passes. On the other hand, Pw2 and Pw3 who are also supposedly servient owners of the property through which that allegedly alternative pathway passes denies the existence of that way for the plaintiff. Pw4 had testified that he had seen a new bridge on the southern side of the plaint schedule item No.1 property. He also clearly testified that there was an old wooden bridge lying beneath

that new bridge in the water channel at the time he visited the plaintiff schedule property. When this testimony of Pw4 is read along with the testimony of Dw2, it becomes prudent to believe that there is an alternative way for the plaintiff from the plaintiff schedule property. The existence of another way is admitted by Devaki in Ext.B1 written statement. Though plaintiff succeeds in proving that the statement in Ext.B1 that there is no way through plaintiff schedule item No.2 herein is an incorrect statement, plaintiff fails to disprove the statement in Ext.B1 by Devaki that the way to her property was from the south. The testimony of Dw1, Dw2 and Pw4 regarding the existence of alternative way to plaintiff schedule item No.1 is more believable than the testimony of Pws1 to 3 regarding its non existence. As argued by the learned counsel for the plaintiff, in Ext.B1, Devaki might have made statements in ignorance of her legal rights. In the context, one must also see that the suit OS 441/1997 was also filed against the plaintiff's family by the neighbouring owner Bhaskaran alleging that the plaintiff's are trying to cut open a new way through the property of Bhaskaran.

25. In the context, the decision in **Kochan Ramanathan** v. **Kochan Natarajan**, 1990(2) KLJ 617, relied on by the learned counsel for the plaintiff assumes significance. At paragraph 11 of the said judgment, it is held as follows:

“11. Easement of necessity arises on severance of tenements by transfer inter vivos, bequest or partition as envisaged in clauses

(a), (c) and (e) of S.13 of the Indian Easements Act. If such an easement is apparent and continuous and necessary for enjoying the subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee, unless a different intention is expressed or necessarily implied, shall be entitled to such easement. Sub-s.(b) and (d) of S.13 deal with what is called quasi easements. Easement of necessity is one which is claimed without any express grant and it is on the basis of an implication of law alone. In such a case, it must be confined to an absolute necessity and no question of convenient and reasonable enjoyment may arise. So also, the easement being one of necessity must automatically come to an end when that necessity ceases, by owner of the dominant tenement acquiring some other access or otherwise. But the alternate access should be one which could be used as a matter of right and not at the sufferance of somebody."

26. In this case, it cannot be said that the alternative way to plaintiff schedule item No.1 is as a matter of right. It is at the sufferance of one Aji, Kunjamma and Shibu. The existence of such an alternative way is not the one that is recognised by section 41 of the Easement Act, 1882 for extinguishment of the easement right of way by necessity. I am supported in this conclusion by the ratio of the decision in Kochan Ramanathan case.

27. Therefore, on an overall analysis of the evidence, the evidence only tends to convince me that plaintiff schedule item No.3 is necessary

for accessing plaint schedule item No.1. Plaint schedule item No.1 has acquired easement right of way by necessity through plaint schedule item No.3. Issue No.1 is found accordingly.

28. **Issue No.2 in OS 119/2014:-** As discussed under issue No.1 above, the plaintiff's right of way by necessity over plaint schedule item No.3 is obstructed by the defendants. By the testimony of Pw4, it is proved that the plaint schedule item No.3 way is already obstructed by the plaintiff by constructing a cattle shed at the place through which it had been passing in the past. The question then is whether the cattle shed should be demolished to restore plaint schedule item No.3. In the context, section 14 of the Easement Act, 1882 assumes importance. It reads as follows:

“14.Direction of way of necessity.—When a right to a way of necessity is created under section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way, but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.”

29. In this case, in Ext.C2 report and C2(a) plan the learned advocate commissioner has set out such a way. It is shown within letters 'LMNPQEFGL'. I find that as such a way is carved out, the prayer for mandatory injunction need not be allowed. The easement right of way by necessity can be set out through 'LMNPQEFGL' way

shown in Ext.C2(a). In the light of the strong objection raised from the side of the defendants and the obstruction they made to plaintiff schedule item No.3, plaintiff is entitled to a perpetual injunction to protect his right to way through 'L M N P Q E F G L' way shown in Ext. C2(a). Issue No.2 in OS 119/2014 is found accordingly.

30. **Issues 1 and 2 in OS 102/2014:-** In the light of the findings under issue No.1 in OS 119/2014, I find that the defendants (plaintiffs in OS 102/2014) fail to prove that there was an attempt for illegal trespass from the side of the plaintiff (defendants in OS 119/2014). Plaintiff in OS 119/2014 has proved that he has acquired an easement right of way by necessity through a portion of plaintiff schedule property. It was obstructed by the plaintiffs in O.S.102/2014. In such circumstances, the plaintiffs in OS 102/2014 fail to prove that their case. They fail to prove their entitlement for the perpetual injunction they prayed for. So, issues 1 and 2 are found against them.

31. **Issue No.3 in OS 102/2014:-** In the result, in the light of the reasons stated above, OS 102/2014 is dismissed. Defendants are entitled to the costs of the suit.

32. **Issue No.3 in OS 119/2014:-** In the result, in the light of the reasons stated above, OS 119/2014 is partly decreed as follows:-

(1) It is hereby declared that the plaintiff schedule item No.1 property acquired an easement right of way by necessity through plaintiff schedule item No.3 property which is shown in Ext.C2(a) within the letters 'LMNPQEFGL'. Ext.C2(a) shall form part of the decree.

(2) Defendants are hereby restrained from obstructing the right of way of the plaintiff, his family members and his visitors through 'LMNPQEFGL' way shown in Ext.C2(a) to access plaint schedule item No.1.

(3) Plaintiff is entitled to the costs of the suit.

Dictated to confidential assistant, transcribed and typewritten by her, corrected and pronounced by me in open court on this the 20th day of February, 2017.

Sandeep Krishna V.
Munsiff.

A P P E N D I X

Exhibits marked for the Plaintiff:

A1	15/05/1970	Certificate of Purchase of Kudikidappu issued from Land Tribunal, Vaikom.
A2	12/07/1971	Certified copy of Sale deed No.3282/1971 of SRO., Vaikom.
A3	22/12/2009	Release deed No.2538/2009 of SRO, Vaikom.
A4	05/04/2014	Land Tax receipt No.3158147 issued by Village Officer, Vadakkemuri.
A5	24/03/2014	Copy of application submitted by Prasannan before District Collector, Kottayam.

A6	23/04/2014	Copy of report prepared by Village Officer, Vadakkemuri (Subject to Proof).
A7	05/09/1997	Certified copy of plaint in O.S.441/1997 of Munsiff's Court, Vaikom.
A8	11/11/1997	Certified copy of commission report in O.S.441/1997 of Munsiff's Court, Vaikom.

Exhibits marked for the Defendants:

B1	16/12/1998	Certified copy of Written statement in O.S.441/1997 of Munsiff Court, Vaikom.
B2	03/03/1971	Certified copy of sale deed No.812/1971 of SRO., Vaikom.
B3	01/11/2013	Land tax receipt no.5804179 issued by Village Officer, Vadakkemuri.
B4	04/06/2014	Copy of Certificate issued by K.Sivadasan, Dairy Extension Officer, Vaikom (Subject to proof).
B5	10/03/2015	Copy of cash receipt received from United India Insurance Company Ltd.
B6	18/12/2015	Cash receipt received from United India Insurance Company Ltd.
B7	12/05/1971	Certified copy of release deed No.3209/1971 of SRO., Vaikom.
B8	30/06/2016	Land tax receipt No.4038597 issued by Village Officer, Vadakkemuri.

Third party Exhibits: NIL.

Court Exhibits:

- C1 09/04/2014 Commission report filed by Adv.A.Manaph.
- C1(a) 09/04/2014 Rough sketch filed along with C1 report.
- C2 16/01/2016 Survey commission report filed by Adv. A.Manaph.
- C2(a) 06/01/2016 Survey plan prepared by Sabu.K.D, Surveyor filed along with C2 report.
- C3 02/04/2014 Commission report filed by Adv. A.Manaph.
- C3(a) 02/04/2014 Rough sketch filed along with C3 report.

Witness examined for the Plaintiff:

- PW1 02/09/2016 Prasannan.
- PW2 27/09/2016 Aji Dinesh.
- PW3 27/09/2016 Suseela.
- PW4 17/10/2016 Manaph.A.

Witness examined for the Defendants:

- DW1 03/12/2016 Sivadas.M.M.
- DW2 05/01/2017 Shibu.T.

Court Witness: NIL.

Munsiff.

//True Copy//

Typed by:

Compared by:

Sandeep Krishna.V.,
Munsiff.

Copy of Common Judgment
O.S. 102/2014 and
O.S.119/2014
Dated: 20/02/2017.

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