

IN THE COURT OF THE SUB JUDGE, CHERTHALA

Present:- Ms. Lakshmy. S., Sub Judge

Tuesday, 4th day of June 2024/14th Jyshta 1946

IA 3/2024 in CMA. 13/2024

(Filed on: 15.04.2024)

Petitioner/Appellant:- Augustine @ Antappan, S/o. Late Vakko, aged 63,
Kannanthara, Padinjattinkara Vadakkumuri,
Kuthiyathode Village, Thirumalabhagam.P.O,
Pin- 688 540, Chavadi, Cherthala Taluk.

By Adv. M.M. Vinod

Cr. Petitioners/Respondents:-

1. Varghese @ George, S/o. Late Vakko, aged 73, Kannanthara, Padinjattinkara Vadakkumuri, Kuthiyathode Village, Thirumalabhagam.P.O, Pin- 688 540, Chavadi, Cherthala Taluk. Alappuzha District.
2. Robin, S/o. Thankachan, aged about 38, residing at Anjilikkal, Kuthiyathode Village, Thuravoor .P.O, East of Thuravoor Railway Station, Thuravoor, Cherthala Taluk.
3. Josmi @ Mable, W/o. Robin, aged about 35, Of-do-do

R2 & R3 By Adv.M.M. Salichan

This petition filed under section 94(e) 151 r/w order XXXIX Rule 1 & 2 of the CPC 1908 or an ad- interim injunction having been finally heard on 01.06.2024 and the Court on 04.06.2024 passed the following:-

ORDER

The petition is filed by the appellant/petitioner under Section 94 and 151 r/w Order 39 Rule 1 and 2 CPC for an order of interim injunction restraining the respondent Nos.2 and 3 and their men from constructing compound wall on the southern side of plaintiff A schedule property by obstructing C schedule pathway by trespassing into plaintiff A schedule before

fixing the boundary and also from committing waste in plaint A and C schedule properties, till the disposal of the suit.

2. The contentions of the petitioner are briefly stated as follows: The petitioner is the owner of plaint A schedule property which he obtained by virtue of a Sale Deed No.1986/1998 of SRO, Kuthiathodu. Plaint A schedule has well defined boundaries and is lying in an uneven shape. The first respondent is the brother of the petitioner who was the owner of plaint B schedule property which is on the southern side of A schedule and respondents No.2 and 3 are residing therein. Both plaint A and B schedule properties were part of a single tenement owned by Joseph @ Kunjappan vide Sale Deed No.1607/1972 of SRO, Arookkuty. Thereafter, a Settlement Deed No.1370/1984 and Sale deed No.1986/98 were executed and the property was divided into three portions. The pathway which connects A schedule and the panchayath pathway situated on the southern side of B schedule property is plaint C schedule. The said pathway is in existence from 1972 onwards and the petitioner and his predecessors in interest are its users openly, peacefully, continuously without any obstruction, as of right, and as an easement for the last more than 20 years from 24/07/1998 onwards. The respondents have no manner of right to obstruct the user of plaint C schedule pathway. While so, the petitioner got information that the first respondent was intending to sell the property to second and third defendants. On 28.01.2024, the respondents No.2 and 3 came to B schedule property and made certain measurements therein. They informed the petitioner that they would construct foundation covering all the boundaries of B schedule property and also threatened the petitioner that they would destroy plaint C schedule pathway through their property. Thus, the suit was filed along with a petition for temporary injunction to restrain the respondents from obstructing C schedule pathway. The petition was dismissed by the Munsiff's Court against which the present appeal is filed. After the dismissal of injunction application, the respondents tried to construct a

compound wall, fully obstructing C schedule pathway and hence, the present petition is filed.

3. The third respondent filed counter-affidavit for himself and on behalf of the second respondent, as follows:

The petitioner has approached the Court with unclean hands and has suppressed material fact that the petitioner has direct access to plaint A schedule property. The petitioner has no easement right over plaint C schedule pathway. He has deliberately included incorrect boundaries to plaint A schedule property. There is a public pathway on the southern side of plaint schedule property having 1metre width. Plaint A and B schedule property and another property of 2 cents were part of the single holding. Since the southern portion of the entire property was on the side of public pathway, the property on the northern side was given 1meter width portion touching the southern public pathway. Plaint B schedule property was sold to the third respondent by the first respondent on 22.05.2023. The suit was filed to prevent the second and third respondent from constructing a house in plaint B schedule property. Plaint C schedule property is claimed through the middle of B schedule property. As beneficial enjoyment of A schedule property is possible even without B schedule property, there is no question of easement right. I.A.01/24 in O.S.55/24 was dismissed by the Munsiffs Court after considering all the documents produced by both parties. The petitioner has suppressed the material fact that his boundary touches the public pathway on the southern side. The petitioner who suppressed material fact is not entitled to an order of injunction and no irreparable injury would be caused to him as he has direct access from the southern public pathway. Hence the application is to be dismissed.

4. Heard both sides.

5. The points that arise for consideration are:

1. Is the petitioner entitled to get an order of interim

injunction, as prayed for?

2. Is the petition allowable?
3. Order as to costs?

6. **Point No.1:** The petitioner is the appellant and the CMA is preferred against the order of the Munsiffs Court, Cherthala, dismissing I.A.1/24 in OS 55/24 for interim injunction mainly to prevent obstruction to plaint C schedule pathway. The petitioner is the owner of plaint A schedule property and plaint B schedule property belongs to the respondents No.2 and 3 which they obtained from the first respondent. Both the properties were part of his single tenement and it belonged to Joseph @ Kunjappan by virtue of a Sale Deed No.1607/1972. Later the property was divided into three portions. The property on the northern side which is A schedule property was given to the petitioner and the property on the southern side was given to the first respondent, who is the brother of the petitioner herein. Plaint C schedule is a pathway passing through the southern side of plaint B schedule property. The above derivation of title and existence of plaint A to C schedule properties are not disputed.

7. The main dispute between the parties to the suit is with respect to a pathway which is claimed to be passing through the plaint B schedule property allegedly starting from plaint A schedule to touch a public pathway on the further southern side of plaint B schedule property. The petitioner has claimed prescriptive easement right over plaint C schedule property. His contention is that C schedule pathway has been in the user of petitioner and his predecessors in interest which was open, peaceful, continuous, without obstruction, as of right and as an easement from 24.07.1998. According to the petitioner, he has perfected her right of easement by prescription over plaint C schedule pathway.

8. The contention of the respondents No.2 and 3 is that the petitioner has suppressed the material fact that he has direct access to the southern public

pathway through his property. It is further contended that a portion of the total extent of land was made part of plaint A schedule so that the title holder could access the pathway easily through the said portion. Their contention is that plaint C schedule pathway is claimed through the middle of plaint B schedule property which is having only an extent of 5 cents. It is also contended that the respondents No.2 and 3 after the purchase of the property were making preparations to construct a residential building in the property and the intention of the petitioner is to obstruct the said construction. The learned counsel for the respondents argued that the petitioner has direct access to southern public pathway and there is no question of having an easement right through the middle of B schedule property.

9. The learned Munsiff after appreciating the commission report and rough sketch submitted in the case has found that plaint C schedule is in existence in B schedule property which starts from the southern side of A schedule and reaches upto the public pathway on the southern side. But her finding to deny the interim injunction is that, since the petitioner was allotted access directly from A schedule, it was not possible to use the pathway through plaint B schedule as of right. The learned Munsiff did not appreciate the law that existence of another way is not relevant to decide the right of easement by prescription. However, there is no doubt that the petitioner has to establish his right of uninterrupted user of way, as of right, to succeed his case. As it is already found by the learned Munsiff that plaint C schedule pathway through plaint B schedule property was identified by the Commissioner, as against the contention of the respondents, the petitioner has got a prima facie case in his favour.

10. The learned Munsiff has found that there exists another strip of land for the petitioner through plaint A schedule to reach the public pathway on the southern side and her observation is that the obstructions reported therein

could easily be removed by the petitioner. But the discussion would show that the said strip of land was not in use as a pathway unlike plaint C schedule property. So, there cannot be a finding that there was material suppression of fact by the petitioner. It is true that an interim injunction against obstruction of plaint C schedule pathway would affect the construction of residential building planned by the respondents. At the same time, it is highly relevant to consider that the construction in plaint B schedule would destroy the very subject matter of the suit. So the balance of convenience is in favour of the petitioner and he would suffer irreparable loss if no order of injunction is granted.

11. When the petition for interim injunction was heard and decided by the Vacation Court also, it was found that it would be inappropriate to reach a conclusion as to the right of the parties at this stage and that the very purpose of temporary injunction is to protect and preserve the plaint schedule properties till the disposal of the suit to ensure that the suit is not defeated. This Court find no reason to deviate from the aforesaid finding and hence the petitioner is entitled to get an interim order of injunction to protect plaint C schedule pathway. The point is found in favour of the petitioner.

12. **Point Nos.2 and 3:** In view of the finding on point No.1, the I.A.is only to be allowed.

In the result, IA is allowed with costs and the respondents No.2 and 3 are hereby restrained from causing any obstruction to the user of plaint C schedule pathway, till the disposal of the suit.

Dictated to the Confidential Assistant, typed by him directly to the Computer, corrected and pronounced by me in open court on this the 04th day of June, 2024.

Sd/-
LAKSHMY.S
SUB JUDGE

Appendix:- Nil

Id/-
SUB JUDGE