2023:KER:76736

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 5TH DAY OF DECEMBER 2023 / 14TH AGRAHAYANA, 1945

RSA NO. 605 OF 2023

AGAINST THE DECREE AND JUDGMENT DATED 16.03.2020 IN OS 258/2016 OF MUNSIFF COURT, KOCHI

JUDGMENT AND DECREE DATED 30.01.2023 IN AS 38/2020 OF SUB COURT,KOCHI

APPELLANT/APPELLANT/1ST DEFENDANT:

MERCY,
AGED 82 YEARS
D/O. PETER, VELIKKAKATHU HOUSE, KUMBALANGHI P.O., KOCHI, ERNAKULAM DISTRICT-, PIN - 682007.
BY ADV PAUL K.VARGHESE

RESPONDENTS/RESPONDENTS/PLAINTIFF & 2ND DEFENDANT:

1 AGNUS MARIA E.J.,
W/O. JOSEPH SEBASTIAN, AGED 61 YEARS, TEACHER, VELIKKAKATHU HOUSE, KUMBALANGHI, (SOUTH) P.O., KUMBALANGHI, ERNAKULAM DISTRICT-, PIN - 682007.

2 LILLY,
D/O. PETER, W/O. LATE JOHN, AGED 79 YEARS, (HOUSE WIFE) VELIKKAKATH HOUSE, ROSE VILLA NO. 2, STEPHEN, PADUVA ROAD, KONTHURUTHY, COCHIN, ERNAKULAM DISTRICT-, PIN - 682013.

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 23.11.2023, THE COURT ON 05.12.2023 DELIVERED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

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R.S.A No.605 of 2023

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Dated this the 5th day of December, 2023

J U D G M E N T

This Second Appeal has been filed by the 1st defendant in O.S.No.258/2016 on the files of the Munsiff Court, Kochi, challenging the decree and judgment in the above Suit dated 16.03.2020, confirmed by the Sub Court, Kochi in A.S.No.38/2020 vide decree and judgment dated 30.01.2023, under Order XLII Rule 1 read with Section 100 of the Code of Civil Procedure.

2. Heard the learned counsel for the appellant/1st defendant on admission.

3. Perused the lower court records.

4. I shall refer the parties in this appeal with reference to

their status before the trial court, as `plaintiff' and `defendant' hereafter for easy reference.

5. In this matter, the 1st defendant is the appellant herein. The plaintiff is the 1st respondent and 2nd defendant is the 2nd respondent herein.

6. The plaintiff instituted the suit asserting right of easement by prescription over plaint B schedule pathway having a length of 66 links and width of 56 links, which is on the eastern side of the plaint schedule property having access to the plaint A schedule property, originally purchased by the plaintiff as per sale deed No.1778/1995 of S.R.O, Kochi which do form part of partition deed No.2648/1986 of S.R.O, Kochi. According to the plaintiff, plaint B schedule is the only way available to plaint A schedule property, on which the plaintiff perfected right of easement by prescription. When the defendant attempted to obstruct its use, for declaration of the said right, prohibitory injunction was sought for.

7. The 1st defendant entered appearance and filed written statement, though the 2nd defendant remained *exparte*. The contention raised by the 1st defendant in the written statement is that plaint A schedule property is a plot lying adjacent to the property belonging to the husband of the plaintiff. Thereafter, as per the desire of the plaintiff's husband, 11 cents out of 11 ½ cents land belonged to the defendants and their mother was sold in favour of the plaintiff after retaining half cent to provide a pathway of 6 links for the ingress and egress to the property of Rosakutty w/o Rocky, situated on the northern side of plaint A schedule. According to the defendants, B schedule pathway is provided for the ingress and egress towards property of V.R. Charly and V.R.Antony, s/o late Rocky and they have been using the same from 1995 onwards. Therefore, the right claimed by the plaintiff over B schedule was disputed.

8. The trial court ventured the matter. PWs 1 to 3 were examined and Exts.A1 to A4 were marked on the side of the

plaintiff. DW1 was examined on the side of the defendants. Ext.C1 commission report and Ext.C1(a) rough sketch also were marked as court's exhibits.

9. On analysis of the evidence and after hearing the contesting parties, the learned Munsiff granted decree declaring right of easement by prescription over B schedule pathway in favour of the plaintiff and thereby the defendants, their men and agents were restrained by a decree of permanent prohibitory injunction from causing any sort of obstruction to the plaint B schedule pathway. Aggrieved by the verdict of the trial court, the 1st defendant filed appeal before the Sub Court, Kochi and the learned Sub Judge dismissed the appeal.

10. While assailing the concurrent verdicts of the trial court as well as the appellate court, the learned counsel for the 1st defendant argued at length to convince this Court that no sufficient pleadings incorporated in the plaint to claim right of easement by prescription and the evidence available also do not suggest

establishment of the said right. Therefore, the courts below went wrong in granting the relief sought for and the same would require interference by admitting the Second Appeal. It is argued by the learned counsel for the 1st defendant that mere user of the way by the plaintiff in common with general public will not confer on them right of easement by prescription and in this regard a decision of this Court reported in [2020 (6) KHC 343 : 2020 (6) KLT 645 : ILR 2021 (1) Ker.65 : 2020 KHC OnLine 796], ***Sooraj K.R & Ors. v. Southern Railway & Ors.*** has been placed.

11. It is argued that an inchoate right or a right which has not ripened into an easement by prescription, but is merely one of user, no relief can be granted to the user of them as against the owner of that land. In this regard, a decision of this Court reported in [1998 KHC 318 : 1998 (2) KLT 47 : 1998 (2) KLJ 78 : ILR 1998 (3) Ker. 507], ***Ramanunni Vaidyar v. Govindankutty Nair***, has been pointed out by the learned counsel for the 1st defendant.

12. A decision of this Court reported in [1992 KHC 443 :

1992(2) KLT 775 : 1992 (2) KLJ 468 : ILR 1993(1) Ker. 331 : AIR 1993 Ker. 91], ***Ibrahimkutty v. Abdul Rahumankunju*** has been placed to argue that in order to succeed right of easement by prescription, pleadings should be specific and precise. It is also pointed out that when user of the pathway is permissive, it could not be held that its user have perfected right of easement by prescription.

13. In so far as the essentials to establish easement by prescription, the ingredients mandated under Section 15 of the Easement Act should have been pleaded and proved. Section 15 provides that where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years, and where support from one person's land or things affixed thereto has been peaceably received by another person's land subjected to artificial pressure or by things affixed thereto as an easement, without interruption, and for twenty years, and where a right of way or any other easement

has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years, the right to such access and use of light or air, support or other easement shall be absolute. Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

14. In the decision reported in [2005 (1) SCC 471], ***Justiniano Antao v. Bernadette B. Pereira***, the Apex Court held that in order to establish a right by way of prescription one has to show that the incumbent has been using the land as of right, peacefully and without any interruption for the last 20 years. Further it was held that in order to establish the right of prescription to the detriment of the other party, one has to aver specific pleadings and categorical evidence. In the present case, after going through the pleadings as well as the statement of the witnesses it is more than clear that the plaintiff has failed to

establish that she has been using the access, peacefully, openly, as of right for the last 20 years.

15. While precising the mandate of Section 15 of the Easement Act, the following ingredients must be pleaded and proved:

(1) There must be pre-existing easement which must have been enjoyed by the dominant owner;

(2) the enjoyment must be peaceable;

(3) the enjoyment must be an easement;

(4) the enjoyment must be as of right;

(5) the right must be enjoyed openly;

(6) the enjoyment must have been for a period of twenty years;

(7) the enjoyment for 20 years must have been without interruption; and

(8) the enjoyment must be openly, peaceable, uninterrupted, as of right, as an easement, without interruption for twenty years,

for the beneficial enjoyment of the dominant tenement.

16. Coming to the case at hand, where the contention raised by the plaintiff is that the plaintiff failed to plead and prove the essential ingredients as espoused herein above. In this context, paragraph 2 of the plaint assumes significance. In paragraph 2, the plaintiff raised a specific contention that the plaintiff has been using plaint B schedule pathway for ingress and egress for the last more than 20 years, peacefully, openly as of right, as an easement without interruption from anyone and the same is the only access to plaint A schedule property. It has been pleaded further that when the defendants obstructed use of the said pathway to access A schedule property, this Suit has been filed.

17. The contention raised by the 1st defendant in the written statement as could be read out from paragraph 3 is that plaint A schedule property is a plot of land lying adjacent to the property belonged to the husband of plaintiff and it is the plaintiff's husband who expressed his desire to purchase 11 cents out of 11 ½ cents of

land from the defendants and their mother and to attach the same with his compound. Half cent was retained with the defendants to provide a pathway of 6 links for the ingress and egress to the owners' property (Rosakutty w/o Rocky) on the northern side of Plaint A Schedule, since without such a pathway, if the said property would have been left, that would have burdened the plaintiff to provide a pathway from the plaint A schedule property, by way of easement of necessity. Thus the specific case of the 1st defendant is that the B schedule pathway is provided for the ingress and egress of property belongs to V.R.Charly and V.R.Antony, s/o late Rocky, Velikkakath House, Kumbalanghi South and that they are in actual possession and enjoyment of B Schedule property from 1995 onwards. Hence the above suit is bad for non-joinder of necessary parties.

18. On reading the plaint averments, there is no reason to hold that there is lack of pleadings to perfect right of easement by prescription in any manner. Therefore, this contention found in the

negative.

19. The learned counsel for the 1st defendant argued that going by the evidence of PW1 on the further eastern side of B schedule, there existed a thodu and now the same is transformed into a road before 3 years. Therefore, the use of the way is an impossibility and hence it could not be pleaded that the plaintiff used the said way and perfected easement by prescription. On perusal of the evidence of PW1, even though PW1 admitted existence of thodu on the eastern side of plaint B schedule, the consistent evidence of PW1 supported by the evidence of PW3 is that the plaintiff has been using the said way and thereby perfected easement by prescription as herein abvoe discussed.

20. It is surprising to see that the case of the 1st defendant is that ½ cent property out of 11 ½ cents sold was set apart for providing way to Rosakutty w/o. Late Rocky, V.R.Charly and V.R.Antony, So.Rocky. Thus it appears that half cent of property is, in fact, left for the purpose of way as admitted by the defendants

and, therefore, the defendants could not contend that B schedule is not a way at all.

21. On analysis of the evidence, it could be seen that the trial court as well as the appellate court appraised the evidence supported by the pleadings to perfect easement by prescription over B schedule and rightly granted decree in favour of the plaintiff. The said concurrent verdicts do not deserve any interference at the hands of this Court, since the same are perfectly in order.

22. The learned counsel for the appellant/1st defendant submitted further that in this case there is no justification on the part of the plaintiffs to claim easement by prescription over the plaint B schedule way, since there is a PWD road on the immediate western side of the plaint schedule property abutting the same. He also submitted that in view of the availability of alternative motorable public road, the claim of easement by prescription must fail.

23. Answering this contention, it is held that availability of

alternative pathway with more convenience to the dominant tenement is not a reason to deny easement by prescription if the essentials are pleaded and proved by the plaintiff's. However, availability of even an inconvenient pathway would defeat the claim of easement by necessity.

24. Coming back, in order to admit and maintain the Second Appeal, substantial question of law necessarily to be formulated by the High Court within the mandate of Order XLII Rule 2 Read with Section 100 of C.P.C.

25. In this case, the learned counsel for the defendant failed to raise any substantial question of law warranting admission of the Second Appeal. Order XLII Rule 2 provides thus:

> *"2. Power of Court to direct that the appeal be heard on the question formulated by it.-At the time of making an order under rule 11 of Order XLI for the hearing of a second appeal, the Court shall formulate the substantial question of law as required by section 100, and in doing so, the Court may direct that the second appeal be heard on the question so formulated and it shall not be open to the defendant to urge any other ground in the appeal without the leave*

of the Court, given in accordance with the provision of section 100."

26. Section 100 of the C.P.C. provides that, (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. (2) An Appeal may lie under this section from an appellate decree passed ex parte. (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. Proviso says that nothing in this sub-section shall be deemed to take

away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

27. In the decision in [2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168], ***Nazir Mohamed v. J. Kamala and Others*** reported in the Apex Court held that:

> *The condition precedent for entertaining and deciding a second appeal being the existence of a substantial question of law, whenever a question is framed by the High Court, the High Court will have to show that the question is one of law and not just a question of facts, it also has to show that the question is a substantial question of law referring Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, [(1999) 3 SCC 722].*

28. In a latest decision of the Apex Court reported in [2023 (5) KHC 264 : 2023 (5) KLT 74 SC], *Government of Kerala v. Joseph*, it was held, after referring Santosh Hazari v. Purushottam Tiwari, [2001 (3) SCC 179] (three – Judge Bench), as under:

> *For an appeal to be maintainable under Section 100,*

> *Code of Civil Procedure ('CPC', for brevity) it must fulfill certain well – established requirements. The primary and most important of them all is that the appeal should pose a substantial question of law. The sort of question that qualifies this criterion has been time and again reiterated by this Court.*

29. The legal position is no more *res-integra* on the point that in order to admit and maintain a second appeal under Section 100 of the C.P.C, the Court shall formulate substantial question/s of law, and the said procedure is mandatory. Although the phrase 'substantial question of law' is not defined in the Code, 'substantial question of law' means; of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as S.109 of the Code

or Art.133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. As such, second appeal cannot be decided on equitable grounds and the conditions mentioned in Section 100 read with Order XLII Rule 2 of the C.P.C. must be complied to admit and maintain a second appeal.

30. In view of the above fact, no substantial question of law arises in this matter to be decided by admitting this appeal.

31. In the result, this appeal is found to be meritless and the same is dismissed without being admitted.

All interlocutory orders stand vacated and all interlocutory applications pending in this second appeal stand dismissed.

Sd/-

(*A.BADHARUDEEN, JUDGE*)

rtr/