(2007) 07 KL CK 0063

High Court Of Kerala

Case No: Regular Second Appeal No. 511 of 2006

Kirandumkara Muraleedharan	APPELLANT
Vs	
V.P. Abdul Latheef	RESPONDENT

Date of Decision: July 13, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100

Hon'ble Judges: Sasidharan Nambiar, J

Bench: Single Bench

Advocate: S.V. Balakrishna Iyer, for the Appellant; T.K. Vipindas, for the Respondent

Final Decision: Dismissed

Judgement

M. Sasidharan Nambiar, J.

Plaintiff in O.S. 353/1997 on the file of Munsiff Court, Hosdrug is the appellant. Defendant is the respondent. Appellant instituted the suit seeking a decree for permanent prohibitory injunction contending that he has prescribed a right of way over the plaint schedule property, which is being used as a way as of right to reach plaint A schedule property which admittedly belongs to him. It originally belonged to Kunhambu Nair. On his death as per a partition it was allotted to the share Narayani Amma and others, who sold the same, as per Ext.A1 sale deed dated 2.7.1976 in favour of Raghava Poduval who was examined as PW3. PW3 sold it to Janardhanan under Ext.A2 sale deed from whom appellant purchased it under Ext.A3 sale deed dated 3.5.1997. Appellant contended that plaint B schedule property is the way which was being used by his predecessors as of right and as an easement right, openly, peacefully and uninterruptedly for more than 35 years and therefore he has right of easement by prescription. A decree for injunction was sought contending that respondent is obstructing the way and he has no right to obstruct it. Respondent in his written statement disputed the claim and contended that plaint B schedule property is not a road and plaint A schedule property was originally a paddy field and predecessor of the appellant has been using another

way and he has no right of way over the plaint B schedule property. Originally learned Munsiff granted a decree in 1997 favour of the appellant. In the first appeal (A.S. 31/1997) filed by the respondent, the decree was set aside and the suit was remanded. It was challenged before this Court in C.M.A. 262/01. This Court as per judgment dated 12-6-2002 found that the evidence on record is insufficient to establish the right of easement by prescription claimed by appellant and did not interfere with the order of remand. Learned Munsiff thereafter as per judgment dated 22.1.2003 dismissed the suit holding that appellant did not establish the right of easement by prescription appellant is not entitled to the decree for injunction. Appellant challenged the decree and judgment before Sub Court, Hosdrug in A.S. 9/2003. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

2. Learned Counsel appearing for the appellant vehemently argued that courts below did not appreciate the evidence in the proper perspective and evidence establish that PW3 constructed a house in the plaint A schedule property in 1976 and plaint B schedule way was being used by him as a road. It was argued that evidence of PW3 prove that he filled up plaint B schedule property with 70 loads of earth and since then he has been using the way as a road to the plaint A schedule property openly, peacefully and without interruption and courts below on the evidence should have granted the decree for injunction.

3. On hearing learned Counsel and going through the judgments of the courts below, I do not find any substantial question of law involved in the appeal.

4. Though suit is only one for injunction, the decree was sought setting up a right of way by easement of prescription over plaint B schedule property. Appellant cannot succeed in the suit without establishing the right of way. He has to establish the ingredients necessary to establish a right of easement by prescription. The case of appellant was sought to be proved by the evidence of PW3, the assignor of the appellant. Learned Munsiff and learned Sub Judge on appreciation of evidence found that evidence of PW3 that he filled up the plaint B schedule property in 1976 and has been using it as a way cannot be believed, and there is no other evidence to support the case of the appellant that he has been using the way as a right of easement for the requisite period. Courts below found that the southern road to which the disputed way was connected, was formed only two years prior to the date of the suit and therefore case of appellant and PW3 that plaint B schedule property was filled up to form the road in 1976 cannot be believed. Moreover after remand no other witness was examined to prove the alleged right even though the earlier evidence was found insufficient. Though it was argued that evidence was not properly appreciated and so the finding is unsustainable, the powers of this Court u/s 100 of C.P.C. cannot be widened. This Court cannot on reappreciation of evidence substitute the findings of this Court to that of the courts below. Factual findings of the courts below cannot be interfered. As no substantial question of law

is involved in the appeal, appeal is dismissed in limine.