C. R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

&

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

FRIDAY, THE 23RD DAY OF AUGUST 2024 / 1ST BHADRA, 1946

SA NO. 18 OF 2001

AGAINST THE JUDGMENT DATED 21.10.2000 IN AS NO.160 OF 1998 OF PRINCIPAL SUB COURT, KOZHIKODE ARISING OUT OF THE JUDGMENT DATED 28.09.1998 IN OS NO.811 OF 1990 OF PRINCIPAL MUNSIFF COURT, KOZHIKODE-II

APPELLANT/APPELLANT/PLAINTIFF:

1 CHIRAKKAL SANKARAN NAIR, [DIED; LRs IMPLEADED]
S/O.SREEDEVI AMMA, EDAKKATHU PARAMBIL, UMMALATHOOR, CALICUT-8.

* SUPPL. APPELLANTS

2 K.KALLIANI AMMA,
W/O.LATE C.SANKARAN NAIR, RESIDING AT EDAKKAT, UMMALATHUR, P.O. MEDICAL COLLEGE, CALICUT-673 008.

3 S.RADHA,
D/O.LATE C.SANKARAN NAIR, HAFEELA QUARTERS, BEHIND MALATHY NURSING HOME, POONGOTTU KULANGARA, TIRUR, MALAPPURAM DISTRICT.

4 S.SARALA,
D/O.LATE C.SANKARAN NAIR, MEENTHALEERI HOUSE, IRINGADAM PALLY, P.O.CHEVAYUR, CALICUT-17.

5 S.SANKARAN,
S/O.LATE C.SANKARAN NAIR, RESIDING AT EDAKKAT, UMMALATHUR, P.O. MEDICAL COLLEGE, CALICUT-673 008.

6 S.SYAMALA,
D/O.LATE C.SANKARAN NAIR, RESIDING AT EDAKKAT,
UMMALATHUR, P.O. MEDICAL COLLEGE, CALICUT-673 008.

* (LR'S OF DECEASED SOLE APPELLANT ARE IMPLEADED AS SUPPL.APPELLANTS AS PER ORDER DATED 10.04.2001 ON CMP.802/2001.)

BY ADVS.
P.K.SURESH KUMAR (SR.)
K.P.SUDHEER

RESPONDENTS/RESPONDENTS/DEFENDANTS:

** 1 PONGUZHI PARAMBATH SREEDHARAN NAIR [DIED]

** [CAUSE TITLE IS AMENDED BY DELETING THE WORD 'DIED' FROM THE FIRST RESPONDENT'S NAME AND BY ADDING ADDRESS AS 'SREEPADAM' UMMALATHOOR, KOVOOR, KOZHIKODE DISTRICT AS PER ORDER DATED 19.01.2001 ON CMP NO.141/2001]

2 SUDHEER,
S/O.SREEDHARAN NAIR, 'SREE PADAM', UMMALTHOOR, KOVOOR,
KOZHIKODE DISTRICT.

3 SAJEEV,
S/O. SREEDHARAN ANIR, 'SREEPADAM', UMMALTHOOR, KOVOOR,
KOZHIKODE DISTRICT

BY ADV SRI.MILLU DANDAPANI

THIS SECOND APPEAL HAVING COME UP FOR HEARING ON 23.08.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C. R.

SATHISH NINAN &
JOHNSON JOHN, JJ.
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S.A. No.18 of 2001
= = = = = = = = = = = = = = = = = = =
Dated this the 23rd day of August, 2024

J U D G M E N T

Sathish Ninan, J.

This second appeal is before us on a reference. The question posed essentially is, "Is it an invariable rule that a prescriptive easement right of way cannot be claimed over ridges of paddy fields?"

2. The reference order doubts the correctness of the judgment of a learned Single Judge in ***Thottathil Thamasikkum Cherootty alias Balan v. Puliyaratharayil Velayudhan Nair (AIR 1998 Kerala 164).*** Therein this Court held, *"It is a common feature in Indian villages that people generally pass over the ridges between two paddy fields. Their right of way can only be permissive"*.

3. We have heard learned counsel Sri.K.P.Sudheer the learned counsel for the appellants and the learned Senior Counsel Smt.Sumathy Dandapani on behalf of the respondents.

4. In ***Smt.Balley and another v. Rama Shanker Lal and others (AIR 1975 Allahabad 461)*** it was held,

> *"It is the common feature in our agricultural villages that on the Mend boundary between two cultivated agricultural fields public generally pass and hardly by habit any agriculturist objects to it. I have no hesitation in holding that such passing over the ridges of the field to and fro by the villagers would always be permissive user. Thus an uninterrupted user by any reason of a ridge between the two agricultural fields for passing over it could be presumed to be permissive and not as of right."*

Again, in ***Vidya Sagar v. Ram Das (AIR 1976 Allahabad 415)*** it was held :

> *"India is predominantly an agrarian country where, speaking generally, the relation between cultivators is cordial and rests on mutual regard for the convenience of others. It is, therefore, too common for one cultivator to pass over the Mend of another cultivator as a means of access to his own field and such user of the Mend of one's field by another for purposes of agricultural operations and allied activities is, generally speaking, never objected to and is, therefore, nothing but permissive."*

This Court, in ***Cherootty @ Balan's case (supra),*** adopted the very same reasoning of the Allahabad High Court.

5. In our opinion, the judgment in ***Cherootty alias Balan (supra),*** the correctness of which has been doubted in the reference order, and the judgments of the Allahabad High Court referred to earlier, do not lay down that there is an absolute prohibition against the claim of a prescriptive easement right of way over the ridges of paddy fields. All that was held was that, it is common in our Country, especially in the villages, that people pass and re-pass over the ridges of paddy fields for their convenient access. Such user is very common. It is not objected to by the owner of the paddy field. So also such user and access is hardly considered as one of 'right'. Courts cannot be oblivious of such common course of events.

6. In ***Aftab Ahmad Ansari v. State of Uttaranchal, [(2010) 2 SCC 583],*** at paragraph 15, the Apex Court held,

> *"In drawing inferences and presumption, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case."*

In ***Mahabir Singh v. Anant Ram (AIR 1966 All. 214)*** it was held,

> *"Section 114 of the Evidence Act does not lay down any hard and fast rule for raising presumptions. It gives a few illustrations from various walks of life. The section provides a guiding principle, namely, that the court shall be led by its own experience and knowledge of the common course of natural events, and public and private affairs."*

7. Thus, it is having due regard to the habits of the people in this Country that it was held that, generally, the presumption is that the user of ridges of paddy field for passing and re-passing is not under a colour of right, but is generally considered to be a permissive user.

8. There is yet another feature of ridges. They are not always kept intact. It is used to aid irrigation in paddy cultivation. The land is divided into various plots. Changes are made in the ridges to inundate and

desiccate the plots. Its location is varied as per the requirements of water for irrigation. Therefore, there would not be a defined course. This militates against the claim of a prescriptive right of way. In the celebrated text book, Katiyar on Easements (16th edn. Page 420), it has been stated, "*A right of way by prescription must have a definite line of travel, although it may not be laid out. A passing over land in different directions, over no well-defined route, however, long continued, is not sufficient to create a right of way by prescription.*" In the commentaries on Easements Act by Sanjiva Row (7th edn. Page 428) it has been observed, "*Easement of way must not be vague or indefinite; they must be limited to a particular route over the servient tenement.*" The frequent realigning of ridges of paddy fields derogates the line of travel. This operates against a claim of prescriptive easement. Of course, it would be open for the claimant to prove otherwise on the facts of the case.

9. In the judgments in ***Cherootty @ Balan*** and that of the Allahabad High Court referred to above, the Courts

had entered a definite finding that there is no evidence to prove that the user was as of right, sufficient enough to displace the presumption of permissiveness. In ***Cherootty @ Balan's case (supra)*** the Court, on the evidence held:-

> *".... There is also no evidence to hold that he is enjoying the B schedule ridge as of right for a continuous period of 20 years against the interest of the true owner. In the absence of any evidence to prove the necessary ingredients under Section 15 of the Act, I hold that the plaintiff cannot claim easement by prescription."*

10. In ***Smt.Balley and another v. Rama Shanker Lal and others (supra),*** the court has only held that the evidence is insufficient to rebut the presumption of permissiveness.

11. In ***Vidya Sagar v. Ram Das (supra)*** the court held :-

> *".... No easementary right, therefore, can be acquired by use of a Mend as a passage unless there is clear evidence of such user as a matter of right."*

The afore judgments are not to be understood as laying down a proposition that there can never be a claim of prescriptive easement right of way over the ridge of

paddy field.

12. To sum up, we hold that there is no invariable rule that prescriptive easement right of way cannot be claimed over ridges of paddy fields. But there is a very strong presumption that the user was only permissive and not as of right. The burden would be heavy upon the claimant to establish that the user was, “as of right”. The reference is answered accordingly.

13. Now coming to the case at hand, the suit claiming prescriptive easement right of way, was concurrently dismissed by the Courts. The plaintiff is in appeal. Pending the Second Appeal the appellant-plaintiff died and the legal representatives are impleaded as additional appellants.

14. The plaint 'A' schedule property belongs to the plaintiff under Exts.A1, A2 and A24 Sale Deeds; A1 is of the year 1971, and A2 and A24 are of the year 1972. The ‘A’ scheduled property is described in three items. It lies as a compact plot. There is a house situated in

item-1 therein. On the immediate eastern side of the 'A' schedule is the plaint 'B' schedule property belonging to the defendant. The plaintiff claims prescriptive easement right of way over plaint 'C' schedule, which is situated in the plaint 'B' schedule, for access to the eastern public way.

15. The defendant denied the existence of the way and contended that his property (‘B’ schedule) is a paddy field. In the paddy field, there are ridges having a width of only 45 cms. It was contended that there is no such way as claimed by the plaintiff.

16. The trial court and the first appellate court rejected the plaintiff's claim, finding that there is no proper plea of prescriptive easement and for the reason that the way claimed is through the ridge of a paddy field.

17. The learned counsel were heard on the following substantial questions of law :-

> *(i) Is it an invariable rule that a prescriptive right of way cannot be claimed over ridges of paddy field ?*
> *(ii) Does the plaint contain sufficient and proper pleadings of a prescriptive easement right of way ?*
> *(iii) Does the evidence on record establish the prescriptive easement right of the plaintiff over the plaint 'C' schedule ?*

18. The first substantial question of law has already been answered while answering the reference and is not reiterated.

19. Plaint ‘C’ schedule is the way over which prescriptive right is claimed. The schedule does not give any description regarding the location of the way or even its width. There ought to have been a reasonably precise description of the way. In ***Madhavan v. Narayanankutti & Ors. [2019 (4) KLT 208]***, this Court held,

> “*There cannot be any dispute that, easement being a precarious and special right, in which one person claims right over another man’s land, the nature of right claimed and factual ingredients constituting the evolution of the right, the details of its user, the length, width, lie and location of the easement have to be precisely and meticulously pleaded and established in court.*”

20. The commissioner’s report states that the way claimed by the plaintiff proceeds towards east from the plaintiff's property, through the 'B' schedule for a length of 17.80 metres, then turns towards the south up to a length of 23.10 metres, and again towards the east for a length of 50.60 metres, leading up to the eastern boundary of defendant's property. The ‘C’ schedule way claimed is through the ridges in the ‘B’ scheduled paddy field. The claim for the right of way being through a paddy field, the presumption is one of permissive user, and it is for the plaintiff to plead and prove that the user has been one “as of right”.

21. It is trite law that, easement being a precarious right and a right being claimed over another man's land, is to be specifically pleaded. Section 15 of the Indian Easements, 1882 stipulates that to acquire a prescriptive right of way, the claimant has to establish the following namely, the user was *(i)* peaceable *(ii)* open *(iii)* as an easement *(iv)* as of right *(v)* uninterruptedly

and *(vi)* for twenty years. In a case like this, when the presumption is of permissive user, it is all the more on the plaintiff to allege and prove with regard to the user "as of right". A reading of the plaint indicates that, a plea of "user as of right" is conspicuously absent. So also, in the evidence of the plaintiff as PW1, such crucial ingredient which is necessary to make out a case of prescription has not been stated. This has been noted by the Courts. The trial court observed, "*There is no specific plea in the plaint that the user of the disputed way has been as of right. When examined as PW1 the plaintiff has also not given any evidence to the effect that the user of the way has been as of right.*" This has been concurred with by the first appellate court. We also uphold the said finding. The suit has to fail solely for the above reason. Substantial question of law no.(*ii*) is answered accordingly.

22. Next, we proceed to analyse the evidence in the case to find out whether a prescriptive user has been established by the plaintiff. The trump card of the

plaintiff is the existence of few steps in his property leading into the plaint ‘B’ schedule paddy filed. The plaintiff purchased plaint 'A' schedule property as per Exts.A1, A2 and A24 documents; Ext.A1 being of the year 1971 and Exts.A2 and A24 being of the year 1972. The suit is filed on 15.09.1990 that is, within twenty years. It is the plaintiff's case that the way was being used by his predecessors and he is continuing such user. He is entitled to tack on the user by his predecessors to complete the prescriptive period, it is claimed. The best person to prove the user of the way prior to Exts.A1, A2 and A24 is the vendor of the plaintiff. However, plaintiff did not venture to examine him. The best evidence is thus not brought on record.

23. PW3 is a person who claimed to have resided in the building in the plaint 'A' schedule and had been using the ‘C’ schedule. In his cross-examination he deposed that there existed so many 'varambas' in the plaint 'B' schedule property over which people used to

pass and repass. However, he claimed that he was using only the way which is now claimed by the plaintiff. At any rate, his indicates that the plaint 'B' schedule property being a paddy field, people were generally passing and re-passing through its 'varambas'.

24. At the eastern boundary of the plaint 'B' schedule property there exists a 'thodu' having a width of 1.40 metres. The Commissioner has noticed the flow of water through the 'thodu'. There is no bridge or other structure across the 'thodu'. The Commissioner who was examined as CW2 has deposed that he entered the property by stepping into the 'thodu'.

25. According to the defendant, access to the plaint ‘A’ schedule is through its northern side to a public way on the north. Ext.C2 Commissioner's plan shows the existence of a lane on the northern side of the plaintiff's property. As PW1, the plaintiff, in his cross examination has admitted the existence of access towards the northern public road. The relevant portion

of his deposition reads thus, "A1 വസ്തുവിന്റെ രണ്ടാം താക്കിന്റെ വടക്കു കിഴക്കേ മൂലയിലൂടെ പഞ്ചായത്ത് റോഡ് പോകുന്നുണ്ട് ? ഇല്ല (A). പൊതുവഴിയും ഇല്ല. അതിലെ ഒരു വഴിയുണ്ട് എന്ന് കമ്മീഷൻ റിപ്പോർട്ട് പ്രകാരവും പ്ലാൻ പ്രകാരവും കാണുന്നുണ്ടെങ്കിൽ എനിക്കൊന്നും പറയാനില്ല. അതിലെ ഒരു ഫുട്ടുപാത്തു വഴിയുണ്ട്. അതു പൊതുവഴിയല്ല. അതു പൊതുവഴിയാണെന്നും അതു ഉമ്മളത്തൂർ വെള്ളി പറമ്പ് റോഡിൽ ചെന്നു ചേരുന്നതാണ് എന്നു പറയുന്നു ? ഉണ്ടായിരിക്കും. (A)." The existence of such a way is also indicated in Ext.A23, the site plan of the building proposed to be constructed in the plaintiff's property.

26. PW1 in his cross-examination has admitted that, prior to his residence in the plaint 'A' schedule property he was residing in Edakkattu Meethale veedu, and that, at that time he was having access through the northern way. The relevant portion of his deposition reads thus :-

> "..... ഞാൻ അന്യായ പട്ടിക വസ്തുവിൽ താമസിക്കുന്നതിന് മുമ്പ് എടക്കാട്ടമീതലെ വീട്ടിൽ താമസംമുണ്ടായിരുന്നു. ആ സമയത്ത് ഞാൻ അതിന്റെ വടക്കു ഭാഗത്തുള്ള വഴിയിൽ കൂടെയായിരുന്നു പോയിരുന്നത്."

The boundary descriptions in Exts.A1 and A2 documents reveal that Edakkattu Meethale property is on the

immediate west of the plaint 'A' schedule property. Such fact is further revealed from Ext.C2 sketch, which shows that the Edakkattu Meethale property is situated on the immediate western side of the plaint 'A' schedule property. Of course, the mere existence of an alternate way will not militate against the claim for prescriptive easement right. However, the existence of a way on the northern side is to be viewed in the backdrop of the claim of 'C' schedule way through a paddy field and of the existence of a water chal at the eastern end of the ‘B’ schedule paddy field. Ext.C1 Commissioner's report suggests that there had been recent harvest in a portion of ‘B’ scheduled paddy field. But, the above circumstances would probabilise the defendant's contention that the plaintiff and his predecessors were having access through the northern way.

27. The segment of the 'C' schedule way, which lies in north-south direction, is stated to be well formed. However, that portion is well inside the paddy field.

The Commissioner noticed indications of footprints in continuation of the same towards north and towards south. This would further suggest that people were generally passing and re-passing through the plaint 'B' schedule paddy field. This further goes against the plaintiff's claim of the prescriptive easement right.

28. DW2 is a neighbour of the plaintiff. He has deposed that he and the plaintiff are using the access towards the north.

29. Thus, the evidence on record does not indicate the user of way by the plaintiff through the plaint 'B' scheduled paddy field as of right. But on the contrary it suggests a permissive user. The mere existence of footsteps in the plaint 'A' schedule for entry into the plaint 'B' schedule is, in the circumstances noted above, not sufficient to find a prescriptive user. Therefore, the plaintiff’s claim of prescriptive easement right of way is bound to fail. Substantial question of law no.(*iii*) is answered against the

appellant.

The judgment and decree of the Courts warrant no interference.

The appeal fails and is dismissed. No costs.

Sd/-
SATHISH NINAN
JUDGE

Sd/-
JOHNSON JOHN
JUDGE

kns/-

//True Copy//

P.S. To Judge