



2025:KER:4030

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

MONDAY, THE 20TH DAY OF JANUARY 2025 / 30TH POUSHA, 1946

OP(C) NO. 1993 OF 2015

AGAINST THE ORDER DATED 07.08.2014 IN AS NO.3 OF 2010 OF
ADDITIONAL DISTRICT COURT-II, MAVELIKARA ARISING OUT OF THE
JUDGMENT DATED 30.11.2009 IN OS NO.211 OF 2007 OF MUNSIF
COURT, MAVELIKARA

PETITIONER:

SARIKA.S
AGED 30 YEARS, D/O.MANIYAMMA, THANACHARIL HOUSE,
KAITHA NORTH MURI, KANNAMANGALAM VILLAGE FROM
PAZHOORETHU HOUSE, ARUNOOTTIMANGALAM MURI,
VETTIYAR VILLAGE.

BY ADVS.
SRI.K.SASIKUMAR
SRI.K.JANARDHANA SHENOY
SRI.V.K.PRASAD
SRI.R.ROHITH
SRI.V.N.RAJAPPAN

RESPONDENTS:

- 1 RADHAMMA
AGED 63 YEARS, W/O.RADHAKRISHNAN NAIR,
UTHAMPALLIL HOUSE, KAITHA NORTH MURI,
KANNAMANGALAM VILLAGE 690 109.
- 2 RAJEEV KUMAR
AGED 39 YEARS, S/O.RADHAKRISHNAN NAIR,
UTHAMPALLIL HOUSE, KAITHA NORTH MURI,
KANNAMANGALAM VILLAGE 690 109



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3 **USHA**
 AGED 36 YEARS, D/O.RADHAMMA,
 UTHAMPALLIL HOUSE, KAITHA NORTH MURI,
 KANNAMANGALAM VILLAGE 690 109

4 **SINDHU**
 AGED 34 YEARS, D/O.RADHAMMA,
 UTHAMPALLIL HOUSE, KAITHA NORTH MURI,
 KANNAMANGALAM VILLAGE 690 109.

BY ADVS.
SRI.LEGITH T.KOTTAKKAL
SRI.R.PADMAKUMAR
SRI.S.VINOD BHAT

THIS OP (CIVIL) HAVING COME UP FOR FINAL HEARING ON
20.01.2025, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



CR

K.BABU, J.**O.P (C) No.1993 of 2015****Dated this the 20th day of January, 2025****JUDGMENT**

The plaintiff in O.S.No.211/2007 on the file of the Munsiff's Court, Mavelikara, in the first appellate stage seeks permission to withdraw the Original Suit with liberty to institute a fresh suit on the same cause of action or on a different cause of action.

2. The plaintiff instituted the suit seeking a declaration of easement right by prescription over the plaint schedule property and for consequential injunction against the defendants. The trial Court dismissed the suit, holding that the plaintiff is not entitled to a right of easement by prescription over the property. The plaintiff challenged the decree in A.S.No.3/2010 before the Additional District Court, Mavelikara. She filed I.A.No.779/2013 in the Appeal Suit under Order XXIII Rule 1 CPC, seeking permission to withdraw the suit with liberty to institute a fresh suit.



3. As per the order dated 07.11.2013, the Appellate Court allowed the I.A. subject to the payment of Rs.4,000/- as costs to the defendants. The defendants thereafter filed I.A.No.782/2013, seeking review of the order under Section 114 and Order XLVII Rule 1 of the CPC. The review petition was allowed, and the order dated 07.11.2013 was reviewed. The learned District Judge heard both sides and passed Ext.P5 order, dismissing the application seeking withdrawal of the suit with liberty to institute a fresh suit regarding the same subject matter. This order is under challenge in this original petition.

4. I have heard the learned counsel for the petitioner/plaintiff and the learned counsel for the respondents/defendants.

5. The learned counsel for the petitioner submitted that there is a formal defect in the framing of the suit, in the sense that the plaintiff omitted to plead the right of easement by necessity in respect of the subject matter. The learned counsel submitted that, due to wrong legal advice, the plaintiff failed to plead that the plaintiff was entitled to easement right by way of necessity. It is submitted that this is



a case of severance of tenements, and the plaintiff is entitled to the relief of easement right by way of necessity. It is also submitted that the property is a landlocked one.

6. The learned counsel for the respondents/defendants submitted that granting liberty to the plaintiff to institute a fresh suit on the same subject matter would nullify the rights crystallized in favour of the defendants. The learned counsel relied on ***Avenue Supermarts Pvt. Ltd. v. Nischint Bhalla and Others (2015 KHC 4670), K.S. Bhoopathy and Ors. v. Kokila and Ors. (AIR 2000 SC 2132)*** and ***Sugathan K. R. v. Jyothi [ILR 2014(3) Ker. 621]*** in support of his contentions.

7. The learned counsel for the petitioner relied on ***Haji P. Abdul Rahiman and Others vs. Dr. K. P. Narayanan (1997 KHC 276)*** in support of his contentions. The learned counsel for the petitioner submitted that the plaintiff seeks the liberty to institute a fresh suit to claim the right of easement by necessity alone. Therefore, the learned counsel submitted that the question of nullifying the right crystallized in favour of the defendants does not arise.



8. The plaintiff initially claimed the right of easement by prescription over the plaint schedule property. She did not plead that she was entitled to the right of easement by necessity on the subject matter. She lost the case when the Trial Court held that she failed to prove the ingredients of claiming the right of easement by prescription.

9. At the appellate stage, she filed an application seeking withdrawal, contending that she failed to seek relief in respect of the subject matter by way of easement by necessity.

10. The relevant statutory provision is Order XXIII Rule 1 CPC, which is extracted below:-

“1. Withdrawal of suit or abandonment of part of claim.-

(1) At any time after the institution of a suit, the plaintiff may, as against all or any of the defendants, abandon his suit or abandon a part of his claim:

PROVIDED that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-



(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff -

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

11. It is trite that, at the appellate stage also, the plaintiff is entitled to seek withdrawal of the suit and the appeal, with the liberty to institute a fresh suit in respect of the same subject matter [vide: ***Amina v. Kunjubawa (2005 KHC 1795)***].



12. The specific case of the plaintiff is that there was severance of tenements, and the plaintiff should have prayed for easement of necessity in respect of the plaintiff schedule property. It is contended that wrong legal advice resulted in the absence of necessary pleadings and proper relief.

13. It is relevant to extract the observation of the trial court in page 13 of the judgment in O.S.No. 211/2017:-

“.....The plaintiff could have succeeded in establishing easement right by necessity if the common ownership and severance of tenements of A and B schedule was satisfactorily proved by the plaintiff. Even though A schedule is a land locked property, the burden is on the plaintiff to establish the actual extent, lie and user of the pathway as claimed by the plaintiff.....”

14. The trial Court has found that the property is landlocked and the plaintiff could have succeeded in establishing easement right by necessity. She could have also satisfactorily established common ownership and severance of tenements regarding A and B schedule properties.

15. Therefore, this is a clear case in which, due to oversight or wrong legal advice, the plaintiff failed to seek proper relief and incorporate necessary pleadings.



16. The learned counsel for the respondents heavily contended that as the decree has been passed in favour of the defendants, leading to crystallization of a right in their favour, granting liberty to the plaintiff would divest them of the right they have acquired. In ***R.Rathinavel Chettiar and Another v. V. Sivaraman and Others (1999 KHC 1138)***, the Supreme Court observed that since withdrawal of suit at the appellate stage, if allowed, would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which came to be vested under the decree, it cannot be allowed as a matter of course but has to be allowed rarely only when a strong case is made out.

17. ***R.Rathinavel*** (*supra*) was followed by the Supreme Court in ***Avenue Supermarts Pvt. Ltd. (supra)***. The apprehension of the learned counsel for the respondents/defendants based on the principles declared in ***R.Rathinavel*** and ***Avenue Supermarts Pvt. Ltd. (supra)***, has no foundation in view of the submission of the learned counsel for the plaintiff that the plaintiff seeks permission to withdraw the suit and to institute a fresh suit seeking relief of



easement by necessity alone. Therefore, the question of nullifying the right crystallized in favour of the defendants in the concluded suit does not arise. Moreover, this is a rare situation where a strong case has been made out by the plaintiff to get the relief of withdrawal of the suit, as the contention of the plaintiff is that she has acquired the right of easement by necessity in respect of the property, which now remains landlocked.

18. The learned counsel for the defendants raised a contention that the reason suggested for the withdrawal of the suit would not come under the “formal defect” as required for invoking Order XXIII Rule 1 CPC. A Division Bench of this Court in ***Sugathan K. R.*** (*supra*) has considered the expression, “formal defect” and observed thus:-

“The expression, “formal defect” mentioned in Order XXIII, Rule 1(3)(a), though not defined in the Code, connotes some defect of form or procedure not affecting the merits of the case, such as want of statutory notice under Section 80 of the CPC, mis-joinder of parties or of cause of action, non-payment of proper court fee or stamp fee, failure to disclose cause of action, mistake in not seeking proper relief, improper or erroneous valuation of the subject-matter of the suit, defect in the prayer clause, absence of territorial jurisdiction of the court etc., Reference in this connection can be made to the decision of



the Apex Court in Beniram v. Gaiind, 1982 KHC 560 : (1981) 4 S.C.C. 209: A.I.R. 1982 S.C. 789."

The Division Bench has identified mistakes in not seeking proper relief, failure to disclose cause of action, and defect in the prayer clause as reasons coming under 'formal defect'.

19. In ***Beniram and Others v. Gaiind and Others [(1981) 4 SCC 209]***, a Three Judge Bench of the Supreme Court, while considering a relief to withdraw the suit with liberty to file a fresh suit, observed thus:-

"At this stage Mr Phadke wishes to withdraw the suit with liberty to file a fresh suit on the same cause of action or on a different cause of action. Having considered the fact that non-pleading may prove a technical impediment and may result in the dismissal of the appeal which may impede a fresh adjudication if a point is to be made though belated, we consider it just and proper in the interests of justice to permit the appellant-plaintiff to withdraw the suit with liberty to file a fresh suit as stated hereinabove."

Beniram was a case where non-pleading has been taken as a ground.

20. The plaintiff contends that this is a case of severance of tenements and that due to wrong legal advice, she could not seek a relief of easement by necessity. Therefore, I am of the considered view that the



plaintiff/petitioner is entitled to the relief prayed for. However, I am of the view that the liberty granted is to be confined to the relief of easement by necessity.

21. In the result, the Original Petition is allowed. The order dated 10.04.2015 in I.A.No.779/2013 stands set aside. I.A.No.779/2013 is allowed. The petitioner is granted permission to withdraw the suit with liberty to institute a fresh suit in respect of the subject matter for seeking a claim of easement by necessity.

In the event the plaintiff institutes a fresh suit, the trial Court shall consider the rival contentions untrammelled by any of the observations made by this Court. The Plaintiff shall pay a sum of Rs.5000/- (Rupees Five Thousand only) as costs to the defendants. If the petitioner has already remitted the costs during the pendency of the appeal, the same is to be adjusted towards the costs awarded.

Sd/-

**K.BABU,
JUDGE**



APPENDIX OF OP(C)No. 1993/2015

PETITIONER EXHIBITS

- EXHIBIT P1** A TRUE COPY OF THE JUDGMENT DATED 30.11.09 IN OS.211/07 OF THE MUNSIFFS COURT, MAVELIKARA.
- EXHIBIT P2** A TRUE COPY OF THE PETITION ALONG WITH THE AFFIDAVIT DATED 5.11.13 IN IA 779/13 IN AS.3/2010 IN THE ADDITIONAL DISTRICT COURT, MAVELIKARA.
- EXHIBIT P3** A TRUE COPY OF THE ORDER DATED 7.11.13 IN IA.779/13 IN AS 3/2010 OF THE ADDITIONAL DISTRICT COURT, MAVELIKKARA.
- EXHIBIT P4** A TRUE COPY OF THE ORDER DATED 7.8.14 IN IA.782/2013 IN AS 3/2010 OF THE ADDITIONAL DISTRICT COURT, MAVELIKARA.
- EXHIBIT P5** A TRUE COPY OF THE ORDER DATED 10.4.15 IN IA.779/2013 IN AS 3/2010 OF THE ADDITIONAL DISTRICT COURT II, MAVELIKARA.