2024 INSC 956

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2024
(Arising out of SLP (Civil) No. of 2024
arising out of Diary No.2098 of 2020)

JAYANANDAN & ANOTHER ... APPELLANTS

VERSUS

SURESH KUMAR & ANOTHER ... RESPONDENTS

O R D E R

NAGARATHNA, J.

1. Application for permission to file the petition is allowed.

Delay in filing the applications for substitution and setting-aside abatement is condoned.

Applications for substitution and setting-aside abatement are allowed.

Leave granted.

2. Being aggrieved by the judgment of the Kerala High Court passed in R.S.A. No.1432/2011 dated 01.10.2019 by which the

judgment passed by the First Appellate Court in A.S. No.69/2010 dated 30.11.2011 was partly sustained, the appellants-plaintiffs have preferred this appeal.

3. It is stated that in 2004, by virtue of Sale Deed No.3363/2004, the original plaintiffs, who were husband and wife, got title and possession over the suit property being Sy. No. 258/3 (Re. Sy. O. 293/14) and the shops AP x 460, 461 etc in Athiyanoor village, Kamukincode P.O Kodangavila, District Trivandrum in State of Kerala, and have been in absolute possession since then.

4. The suit property is bounded by specific boundaries on all four sides of and, pertinently, the defendants' property is immediately to the north of the suit property.

5. The present controversy finds its origins in the defendants' act to cut and remove six jack fruit trees on 02.05.2007 on the western side of the suit property with the object of, according to the plaintiffs, creating a new pathway through the suit property. Per contra, according to the defendants, this was done only to widen an existing pathway. It was submitted that again on

20.05.2007, the defendants, to the same end, attempted to cut and remove the coconut trees standing on suit property.

6. Aggrieved by this overt act of the Respondents, the Appellants filed the suit bearing O.S. No. 389 of 2007 on the file of the Addl. Munsiff Court-1, Neyyattinkara("Trial Court") seeking permanent prohibitory injunction restraining the defendants from trespassing into the suit property and from constructing a pathway through the suit property by cutting and removing the trees standing therein or from committing any acts of waste in the suit property etc. Furthermore, the plaintiff sought damages amounting to Rs. 10,000/- i.e. and for putting up a boundary wall on the Northern boundary of suit property, etc.

7. The Trial Court appointed an Advocate Commissioner to submit a report on the status and description of the suit property. On 27.07.2009, the report of the Advocate Commissioner and Survey Plan was submitted. Therein, it was reported that there indeed is a way through the western side of

the suit property towards defendant's property and there is no alternate way available to the defendants than the aforesaid way.

8. Considering the pleadings, issues framed and evidence presented before it, the Trial Court on 07.12.2009 decreed the suit and restrained the defendants from trespassing into the suit property and from constructing a pathway through it by cutting and removing the coconut trees standing therein and from committing any act of waste therein and from interfering with the plaintiffs peaceful possession and enjoyment of the suit property while also allowing the plaintiffs to put up a compound wall along with existing Northern boundary on the 'GY line' as was placed before it in the Survey Plan. Though the Trial Court made a reference to a way through the western side of the suit property towards the land of the defendants, it decreed the suit on the ground that the defendants had not claimed any special right over the pathway. The trial *qua* Defendant No. 2 was *ex-parte*, as were the proceedings before the First Appellate Court which are discussed hereunder.

9. Aggrieved by this decision of the Trial Court, the defendants challenged the decree in first appeal bearing number A.S. No. 69/2010 before the Sub-Court, Neyyattinkara ("First Appellate Court"). Notably, before the First Appellate Court, the defendants filed I.A. No. 2375 of 2010 for amending the written statement under Order VI Rule 17 of Code of Civil Procedure, 1908 ("CPC"). It was contended before us that by way of this amendment application, the defendants intended to incorporate a new claim of prescriptive right of easement over the way in existence reported by the Advocate Commissioner.

10. An objection raised by plaintiffs against I.A. No. 2375 of 2010 was ultimately rejected by the First Appellate Court and the amendment application was allowed on 30.11.2011. On the very same day i.e. 30.11.2011, the First Appellate Court allowed the appeal and, consequently, reversed the decree. It is the case of the Appellants herein that the First Appellate Court erred in dismissing the suit without there being any evidence on the basis of the new averments raised in the amendment application.

11. Soon thereafter, aggrieved by the decision of the First Appellate Court, the plaintiffs preferred regular second appeal in RSA No.1432 of 2011 in the High Court of Kerala at Ernakulam. During the pendency of the regular second appeal, due to the passing away of second plaintiff i.e. the wife, the daughter of plaintiffs was substituted as a party on 03.07.2018. *Vide* Impugned judgment dated October 1st, 2019, the High Court partly allowed the appeal by allowing the construction of boundary wall along the northern end of the suit property. However, the High Court found no reason to interfere with the finding of the First Appellate Court on the prescriptive easementary right over the way towards the property of the defendants.

12. As noted above, the Trial Court decreed the suit filed by the plaintiffs herein. Being aggrieved, the respondents-defendants preferred A.S. No.69/2010 before the Court of the Sub-Judge, Neyyattinkara (First Appellate Court). During the pendency of the said appeal, an application was filed under Order VI Rule 17 of the CPC seeking amendment of the Written Statement. On 30.11.2011, the said application was allowed and the first

defendant was permitted to amend the Written Statement. Interestingly, on the very same day i.e. on 30.11.2011, on the basis of what was averred in the amended Written Statement, the appeal, being A.S. No.69/2010 was allowed and the judgment and decree passed by the Trial Court dated 07.12.2009 in O.S. No.389/2007 was set aside. It is against the said judgment of the First Appellate Court that the appellants herein preferred R.S.A. No.1432/2011 which has been allowed in part. Hence, this appeal.

13. We have heard learned senior counsel for the appellants and learned counsel for the respondents and perused the material on record.

14. Although several arguments were advanced at the bar, we have considered only one argument made by the learned senior counsel for the appellants being the permission granted by the First Appellate Court to seek amendment of the Written Statement in A.S. No.69/2010. On such Written Statement being permitted to be amended there was no further consideration of the matter inasmuch as the impact of the

amendment of the Written Statement on the merits of the case was not considered. This is so as on the very day the amendment of the written statement was allowed the First Appellate Court also disposed of the appeal by setting aside the judgment and decree of the Trial Court. There was no reasoning given as to why in the absence of any further evidence being recorded by the First Appellate Court on the basis of the amended Written Statement, the judgment and decree of the Trial Court could be set aside. We find that an opportunity had to be given to both sides to let in evidence on the amended Written Statement as, in sum and substance, the first defendant by the said amendment had in a way sought a counter claim by averring that the first defendant had the right to the pathway by way of a easementary right and had been using it so for over fifty years. It may be that there is a reference to a pathway in the judgment and decree of the Trial Court but the fact remains that there was a decree granted by the Trial Court which could not have been set aside merely because there was an amendment to the Written Statement made by the first defendant and in the absence of any evidence being let in support of the claim made

by the respondent herein on the basis of the Written Statement being amended.

15. In our view, the amendment to the Written Statement called for recoding of evidence particularly on behalf of the first defendant herein in order to prove his claim and *contra* evidence, if any, on behalf of the appellants-plaintiffs herein.

16. We find that any averment made in a plaint or Written Statement must be supported by evidence. In the absence of there being any evidence, the First Appellate Court could not have implied that there was already evidence in regard to what has been stated in the Written Statement without recording any evidence in support of the amended pleading.

17. In the circumstances, we set aside the impugned judgment and decree of the High Court passed in R.S.A. No.1432/2011 as well as the judgment and decree dated 30.11.2011 in A.S.No.69/2010; the matter is remanded to the First Appellate Court to reconsider A.S. No.69/2010 in view of the amendment made to the Written Statement and to pass an order as to whether a further recording of evidence is required on the basis

of the said amendment and to proceed to dispose the appeal in accordance with law.

The appeal is allowed and disposed of in the aforesaid terms. No costs.

. . . . . J.
[B.V. NAGARATHNA]

. . . . . J.
[NONGMEIKAPAM KOTISWAR SINGH]

NEW DELHI;
DECEMBER 02, 2024