

(2023) 07 KL CK 0098

In the High Court Of Kerala

Case No : Regular Second Appeal No. 850 Of 2016

Asokan

APPELLANT

Vs

Krishna Ezhuthassan (Died)

RESPONDENT

Date of Decision : 12-07-2023

Acts Referred:

Code of Civil Procedure, 1908 — Section 96, 100, Order 9 Rule 9
Indian Easements Act, 1882 — Section 7, 7(b)

Citation : (2023) 07 KL CK 0098

Hon'ble Judges : P.G. Ajithkumar, J

Bench : Single Bench

Advocate : Santhosh P.Poduval, R.Rajitha, Vinaya V.Nair, T.N.Manoj

Final Decision : Allowed

Judgement

P.G. Ajithkumar, J

1. The plaintiff in O.S.No.203 of 2011 before the Principal Munsiff's Court, Irinjalakuda, is the appellant. Having failed in the suit, he preferred an appeal under Section 96 of the Code of Civil Procedure, 1908 before the Additional Sub Court, Irinjalakuda. That appeal ended in dismissal. Hence, the appellant preferred this Second Appeal under Section 100 of the Code.

2. The appeal was admitted on 15.11.2019 on the following substantial question of law:

"Will not the removal of soil from the defendant's property subsequent to the institution of the suit dis-entitle the defendant from raising a claim for easement right of lateral support?"

3. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents.

4. In the suit, the appellant-plaintiff sought a decree of injunction restraining the respondents-defendants from causing any obstruction to the removal of earth

and levelling of plaint schedule property upto the present level of the defendants' property, which are situated on the northern and eastern side of the plaint schedule. Parties are referred to as plaintiff and defendants for convenience. The plaintiff contended that the defendants have already excavated soil from their respective properties and the portions of the plaintiff's property remain on a higher level has to be lowered in order for constructing a compound wall and protecting his property. It was averred in the plaint that property on the eastern side belongs to defendant No.7 and the property on the north belongs to defendant Nos.1 to 6. During the pendency of this appeal, the 1st defendant expired and his legal representatives were brought on record. During the pendency of A.S.No.85 of 2013, the 2nd defendant/2nd respondent expired and his legal representatives were impleaded.

5. The defendants 1 to 6 jointly filed the written statement. They also set forth a counter claim. They also sought an injunction against the plaintiff prohibiting him from excavating and removing earth from the northern extremity of his property. In the counter claim, plaint schedule property was scheduled as C-schedule. Their properties were described in counter claim A and B schedules. Their contentions were that in the event of removing soil from the plaint schedule property, that will cause to lose lateral support to the counter claim A and B schedule properties. They further contended that the plaintiff had executed Ext.B3 agreement dated 07.01.2003 in favour of the original 2nd defendant undertaking not to remove earth from his property at a width of two dhannu adjoining the 2nd defendant's property. Similarly, the plaintiff executed Ext.B4 document dated 16.01.2003 in favour of the 1st defendant reciting such an undertaking. Placing reliance on the contractual obligation bestowed on the plaintiff on the basis of the aforesaid documents and also claiming their natural right to have lateral support to their property from the plaint schedule property, they filed the counter claim.

6. In the replication filed by the plaintiff, he contended that defendants 1 to 6 already excavated soil from their property and therefore they have no right to claim lateral support. Further, it was contended that defendants 1 and 2 filed O.S.No.1 of 2007 claiming a prohibitory injunction of the same kind on the basis of similar contentions. They put forward the right on the basis of Exts.B3 and B4 agreements and also the natural right to get lateral support from the neighbouring property. That suit was dismissed for default and thereby the said defendants are precluded from instituting another suit for the same purpose. Thus, the plaintiff contended that a counter claim was not maintainable. On the merits also, the plaintiff pleaded that the counter claim would not sustain.

7. Before the learned Munsiff, no oral evidence was let in the plaintiff, but produced Exts.A1 to A6. The 4th defendant was examined DW1 and an attesting witness to Exts.B3 and B4 agreements was examined as DW2. Exts.B1 to B6 were produced. The Commissioner appointed in the suit inspected the property thrice. He filed three reports, all appended with rough sketch/survey plan. Those

are Exts.C1, C1(a), C2, C2(a), C3 and C3(a). After hearing both sides the learned Munsiff dismissed the suit as well as the counter claim. In the appeal, the learned Additional Sub Court also took similar views, thereby the judgments and decrees of the Munsiff's Court were confirmed.

8. While the plaintiff preferred the appeal challenging the judgment and decree in A.S.No.85 of 2015, which was filed by him against the decree dismissing O.S.No.203 of 2011, defendants 1 to 5 preferred A.S.No.18 of 2015 challenging the judgment and decree dismissing the counter claim. As against the dismissal of A.S.No.18 of 2015, no second appeal has been preferred, leaving the decree dismissing the counter claim to become final.

9. Exts.B3 and B4 are agreements executed by the plaintiff undertaking not to excavate soil from his property. It is recited in those agreements that the plaintiff had already removed earth from his property after leaving portions adjoining those defendants' properties at a few metres width. The undertaking is that two dhannu wide portion will be retained without excavation in order to ensure lateral support to their respective properties. Defendants 1 and 2, who are now no more, in favour of whom the said agreements were executed instituted O.S.No.1 of 2007 specifically pleading that in the wake of Exts.B3 and B4 the plaintiff, who was the defendant in that suit, had no right to remove earth from his property within two dhannu wide area of his property adjoining to the defendants' property. Their specific additional pleading was that the plaintiff had no right to remove soil from his property in such a way as to lose lateral support to the defendants' property.

10. Ext.A4 is the copy of the plaint in O.S.No.1 of 2007. Ext.A6 is a copy of the judgment in the said suit dated 01.07.2008. That suit was dismissed for default. The courts below concurrently held that having O.S.No.1 of 2007 been dismissed for default, defendants 1 and 2 or their successor in interest are not entitled to sue anew on the same cause of action. Rule 9 of Order IX of the Code creates a total bar for a plaintiff, whose suit was dismissed for default, to bring a fresh suit in respect of the same cause of action. Defendants 1 to 6 filed the counter claim exactly for the same relief as claimed in O.S.No.1 of 2007. Therefore, the findings of the courts below that the counter claim was barred under Rule 9 of Order IX of the Code, do not suffer from any infirmity.

11. As mentioned above, defendants 1 to 6 filed A.S.No.18 of 2015 against the dismissal of the counter claim. The learned Sub Judge, after detailed consideration, confirmed the decree dismissing the counter claim. Since the said judgment and decree of the learned Sub Judge is not challenged, the same have become final. In the light of the adverse findings in regard to the claims in the counter claim, defendants 1 and 2 are precluded from raising their contentions on the basis of Exts.B3 and B4. Therefore, the matter in issue is confined to the sole issue, whether the defendants are able to defend the suit in order to protect their natural right to have lateral support to their respective properties.

12. The question of law mooted is as to what shall be the effect of removal of soil from the defendants' property subsequent to the institution of the suit. In Exts.B3 and B4 it is stated that earth was removed from the plaint schedule property, which means the said excavation was done before 2003. Immediately after filing of the present suit, a Commissioner was deputed. After inspection in the property at 4.30 p.m. on 04.02.2011, the Commissioner has filed Ext.C1 report along with Ext.C1(a) rough sketch. In Ext.C1 it has been reported that soil from the plaint schedule property. At a few portions of the said property adjoining the boundary of the properties of the defendants, earth is not removed, thereby retaining original level. The defendants wanted to retain that original level of the plaint schedule property at a width of two dhannu in order to ensure lateral support to their property.

13. This Court in Kalyani v. Bhaskaran [1993 (1) KLT 415] held that the right of an individual owner of land is subject to the right of lateral support available to his neighbour's land. The right is available to the neighbouring owner so long as he keeps his land in its natural state. Therefore the right of the defendants to claim lateral support to their property is available only if they retained their property in its natural state. The report of the Commissioner in Ext.C1 is that the property of the 7th defendant was lowered than the original level of the plaint schedule property. Similarly, earth was removed from the property of defendant Nos.1 to 6 as well. But portions of both these properties and also that of the plaintiff are retained without excavation. The apprehension of the defendants is that if the plaintiff removes soil from that retained area as well, lateral support to their properties will be lost.

14. It is true that the properties are plots of large extent. While the plaint schedule property is 1.52 Acres, the properties of defendants 1 to 6, which are A and B schedules to the counter claim, has an area of 50¾ cents and 47¼ cents respectively. The area of the 7th defendant's property is 76 cents. The width of the portions of the respective properties left unexcavated at various points are stated specifically in Ext.C3(a). It may be true that if the unexcavated portions of the plaint schedule property are left as such, the lateral support to the defendants' property, which is retained in its original level can be ensured. But when the defendants also lowered the level of their respective properties, they are precluded from claiming natural right of lateral support in view of the provisions of Section 7 of the Indian Easements Act, 1882. Section 7(b) of the Easements Act read,-

"7. Easements restrictive of certain rights.-Easements are restrictions of one or other of the following rights (namely):- xx xx

(b) Rights to advantages arising from situation.- The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation."

15. From the evidence on record and also from the admissions of DW1, the 4th

defendant, it is proved that earth from the defendants' properties was also excavated and thereby its natural state was altered.

16. The relief claimed by the plaintiff was declined for the reason that he did not disclose anything about Exts.B3 and B4. True, while considering an equitable remedy of injunction, such suppression of facts is material. Here is a case where there was a previous round of litigation based on Exts.B3 and B4 between the same parties. In view of that it cannot be said that for the failure of disclosure about Exts.B3 and B4 alone, the relief has to be declined, especially when O.S.No.1 of 2007 was dismissed. The relief claimed by the plaintiff is to restrain the defendants from causing obstruction to the removal of earth from the plaintiff schedule property upto the level of the defendants' property. In the nature of that relief, it is inbuilt that wherever both properties are lying on the same level, the plaintiff cannot remove earth from his property. In other parts, removal of earth from the plaintiff's property cannot be prevented by the defendants since they already lowered level of their property. In the said circumstances, I am of the view that an injunction enabling the plaintiff to excavate and remove earth from his property as mentioned above, certainly, subject to the law including executive orders restricting and regulating removal of earth, is liable to be granted.

17. Accordingly, the Second Appeal is allowed and the defendants are restrained from causing any obstruction to the excavation and removal of earth from the plaintiff schedule property upto the level of the defendants' property, except where both these properties are on the same level. It is made clear that this decree is not a permission to excavate or remove earth from the plaintiff schedule property. Only if he has permission as per the applicable statutory provisions and executive orders restricting and regulating excavation and removal of earth from land, the plaintiff can remove earth from the plaintiff schedule property as mentioned above.