

(1966) 09 KL CK 0021
In the High Court Of Kerala
Case No : A.S. No. 446 of 1963

Asseenar Haji and Others

APPELLANT

Vs

Kunhikannan and Another

RESPONDENT

Date of Decision : 12-09-1966

Acts Referred:

Easements Act, 1882 — Section 8

Citation : (1967) KLJ 105

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;S. Velu Pillai, J

Bench : Division Bench

Advocate : V. Bhaskaran Nambiar, for the Appellant; T.N. Subramania Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Krishnamoorthy Iyer, J.—This is an appeal filed by the defendant against the decision of Mathew J. in which the learned Judge declared that the plaintiffs are entitled to a right of way over plots A and A - 1 in Ex. C. 1 plan as an easement to their holding. In order to appreciate the points raised by the appellant for decision, it is necessary to state a few facts. The plaintiffs and the defendant are in possession of adjacent portions of the property comprised in R.S. No 33/1 which belonged in jenmom to Iyyakattu Illom. The southern portion of the property comprised in R.S. No. 33/1 was taken on lease by the plaintiffs from the Illom. The northern portion of the property comprised in S. No. 33/1 adjoining the public road was taken on Kuzhikanom lease from the Illom by Moosa, who assigned his rights to Abdulla. Abdulla executed Ex. A. 1 marupat on 23-9-1947 to the Illom. The plaintiffs used to go to the public road through the property in Ex. A. 1. When Abdulla obstructed the right of way, the plaintiffs filed O.S. 499 of 1947 in the Munsiff's Court, Taliparamba. The suit was compromised and Ex. A. 3 is the compromise decree which was passed on 16-10-1947. By Ex. A. 3 a right of way was allowed to the plaintiffs through the property in Ex. A. 1 to the public road. Subsequent to Ex. A. 3 the defendant got an assignment of the rights of

Abdulla by taking Ex. A. 5 on 13-4-1960. The defendant subsequent to the institution of the suit, obtained under Ex. B. 2 dated 24-3-1951 the jenmom rights of the Illom over the properties comprised in Ex. A. 5 Since the defendant was obstructing the plaintiffs in the exercise of their right of way granted to him under Ex. A. 3 the suit was filed by him for the necessary reliefs. The learned single judge held that the right of way decreed to the plaintiffs under Ex. A. 3 is through plots A and A. 1 in Ex. C. 1 plan and not through B.1 shown in Ex. C.1 and it is not in any way affected by the defendant purchasing the jenmom right under Ex. B. 2.

2. Both these findings of the learned single Judge were attacked before us by the counsel for the appellant. The case of the appellant that Ex. A. 3 granted the plaintiffs right of way only through the portion marked B. 1 in Ex. C. 1 plan was not accepted by any of the courts. While the learned Judge took the view that the right of way provided in Ex. A. 3 lay through A and A. 1 in Ex. C. 1 the learned Subordinate Judge held that the right of way in Ex. A. 3 was through A.1 and B in Ex. C.1. The learned single Judge agreed with the finding of the learned Munsiff. We do not find any reason to interfere with the finding of the learned Single Judge. The learned single Judge on an appreciation of the evidence came to the conclusion that plots B and C in Ex. C. 1 plan do not form part of Abdulla's property comprised in Ex. A. 1. We agree with the conclusion of the learned Judge. If so the right of way allowed in Ex. A. 3 can only run through plots A.1 and A in Ex. C. 1.

3. The next question to be decided is whether the right which the plaintiffs are entitled to under Ex. A. 3 is extinguished on account of Ex. B. 2. The learned single Judge was of the view that Abdulla though a kanomdar of the property is competent to grant an easement under Ex. A.3 which should enure for the duration of Abdulla's interest in the dominant tenement and since the kanom right in favor of Abdulla conferred a permanent occupancy right, Ex. B. 2 cannot in any way effect the right created under Ex. A. 3. The learned single Judge also took the view that Abdulla and his successors-in-interest would be estopped by the doctrine "estopped by grant" from contending that on account of Ex. B. 2, the right granted under Ex. A.3 is extinguished. We are inclined to agree with the view taken by the learned single Judge.

4. The submission of the learned counsel for the appellant was that the possession of the plaintiffs of the southern property is constructive possession of the Iyyakkattu Illom and as such the southern property cannot become the subject of a dominant tenement with respect to which easement rights might be acquired over other lands belonging to the Illom. It is not necessary for the purpose of the case before us to consider the question raised in the broad manner by the learned advocate for the appellant.

5. There is nothing in law to prevent a tenant from granting a right of easement by express or implied grant commensurate with the extent of his interest. Limited owners having temporary interests in land may grant easement rights

which might last during the continuance of their interests. A tenant may create an easement over the land leased to him for the term of his lease or for a lesser period but no lessee may create over the property held by him an easement to take effect after the expiration of his own interest. Illustration (a) to Section 8 of the Indian Easements Act brings out this principle. There is therefore nothing in law which prevented Abdulla from imposing an easement on the property held by him on lease from the Iyyakattu Illom in favor of the plaintiffs who are the lessees of the same landlord in respect of the dominant tenement. The decisions in Abdul Haque and Others Vs. Sm. Tarabannessa and Others, and Abdul Rashid and Others Vs. B. Braham Saran, relied on by the learned counsel for the appellant only deal with the question whether a tenant of a landlord can acquire right of easement by prescription against the tenant of the same landlord. In the case before us the right of easement is claimed by the plaintiffs in view of the grant under Ex. A. 3. The decision cited on behalf of the appellant cannot therefore assist him.

6. The right of easement granted to the plaintiffs by Abdulla is under Ex. A.3. The right imposed by Abdulla could normally continue during the continuance of his interest in the property. If Abdulla transferred his interest, the right created under Ex. A. 3 will bind his successor-in-interest also. For the creation of easement by grant, it is essential that the grantor should be entitled to an interest in the servant tenement greater than or at least co-extensive with the interest for which easement is created. The right created under Ex. A. 3 could therefore continue until the expiry of the term in Ex. A. 1 or the right of easement is extinguished under the provisions of the Indian Easements Act. But the learned counsel for the appellant contended that a grant of a right of way by a tenant for a term will not bind the reversion and on the expiration of the term in Ex. A. 1 the defendant having acquired the reversion himself under Ext. B. 2 is entitled to obstruct the right of way enjoyed by the quondam dominant tenement. We do not think that the argument can help the appellant. It is not disputed that by the terms of Ex. A. 1 and the law in force on the date of Ex. A. 1 and subsequent thereto, Abdulla or the defendant is entitled to right of permanent occupancy in the property. If so it has to be said that the right under Ex. A. 3 will last as long as the tenant under Ex. A. 1 is entitled to be in possession of the property comprised in Ex. A. 1. In this view the principle of merger on account of the fusion created under Ex. A.1 and B.2 cannot extinguish the right created under Ex. A.3. The terms of Ex. A.3 do not show that the right of way granted to the plaintiffs is limited to the term of 12 years mentioned in Ex. A.1. The granter in Ex. A.3 stated that the property in Ex. A.1, belongs to him absolutely and the right of way can be enjoyed by the plaintiffs permanently. If a person grants an easement upon the representation that he has the title to do so and he has not the title at the time of the grant but subsequently acquires it the easement so granted attaches to the newly acquired property and the conveyance operates by way of estoppel against the denial of the right. In Halsbury's Laws of England, third edition, Volume 12, page 531, the law is

stated thus:

A grant of an easement by general words in a conveyance will be construed as being referable only to the interest which the grantor had in the servant tenement at the time of the grant, and will not bind any larger interest which he may afterwards acquire. If, however, there is any contract or representation that the easement shall be enjoyed for the full term, then if the grantor subsequently acquires a larger interest in the servant tenement, the interest so acquired will be bound. For where a person represents himself as having a larger interest in the servant tenement than he has in fact, and purports to create an easement for an interest in excess of what he actually has, then, if he subsequently acquires the larger interest, that interest so acquired is bound by way of estoppel.

In *Rowbotham v. Wilson* (1867) 8. E. & B. 123, Ex. Ch. at P. 145 Watson, B. observed:

It is true, where a person without title professes to convey an estate or grant an easement, his conveyance operates by way of estoppel, if, at a subsequent period, he acquires the fee: and subsequently acquired estate is bound thereby; or, as it is termed, the newly acquired estate feeds the estoppel.

Applying the above principle to the facts of this case it has to be held that the defendant is not competent to deny the plaintiffs the right created in their favor by Abdulla in Ex. A.3. It is unnecessary for us to decide the question whether a permanent tenure-holder enjoying permanency of occupancy right under Indian Law can as in the case of a tenant in fee simple in English law can acquire an easement. In the result, in confirmation of the decree and judgment of the learned Judge, we dismiss the appeal with costs.