

(2006) 04 KL CK 0011
In the High Court Of Kerala
Case No : S.A. No. 968 of 1992

Badariya Madrassa Committee

APPELLANT

Vs

Antony Robert

RESPONDENT

Date of Decision : 05-04-2006

Acts Referred:

Easements Act, 1882 — Section 15

Citation : (2006) 2 ILR (Ker) 246 : (2006) 2 KLT 636 : (2006) 3 RCR(Civil)
272 : (2006) 2 RCR(Rent) 34

Hon'ble Judges : R. Bhaskaran, J

Bench : Single Bench

Advocate : A. Mohammed Mustaque and Sheji P. Abraham, for the Appellant;
A.P. Chandrasekharan and G. Sreekumar, for the Respondent

Final Decision : Allowed

Judgement

R. Bhaskaran, J.—This second appeal is filed by the defendants in O.S.381/1987 on the file of the Munsiff Court, Kannur. The suit was for declaration and injunction. The plaintiff is the owner of plaintiff A-schedule property. According to the plaintiff the access to the plaintiff's house and property is through the plaintiff B-schedule property to reach Kilasi road situated on the west. The plaintiff further alleged that he was having motor vehicles and the plaintiff used to ply his vehicles through Kilasi road and plaintiff B-Schedule property to reach plaintiff A-schedule property. The defendant started construction of a building encroaching into plaintiff B-schedule property and obstructing the right of way of the plaintiff which he was enjoying for more than 70 years. The plaintiff claimed a right of way by prescriptive easement to use plaintiff B-schedule property for vehicular traffic.

2. The defendants contended that the plaintiff was not entitled for any such declaration or injunction. The plaintiff had no right of way through defendants' property. The Kilasi road itself came into existence recently. It was only a lane earlier. The defendant committee has been constituted to conduct a Madrasa for

imparting religious education to the children of the locality. The committee has purchased the land for construction of a hall for this purpose. The committee has obtained the plan from the municipality for construction of the hall as early as in 1983. Plaintiff had filed a complaint before the Revenue Divisional Officer, Tellicherry alleging that his right of way was infringed. On enquiry the RDO found that there was no passage through defendant's property. The plaintiff has got passage in front of his house on the eastern side which leads to Ayikkara road. Even if the plaintiff used to use the passage occasionally it would not confer any right on the plaintiff.

3. Both the trial court as well as the first appellate court have granted a decree declaring plaintiff's right of way over plaintiff B-schedule property having a width of 6 feet 8 inches by prescriptive easement right and the defendants are enjoined from making any construction so as to prevent free passage enjoyed by the plaintiff to plaintiff A-Schedule property. Ext.C2 plan was directed to form part of the decree.

4. In this second appeal notice was ordered on the following questions of law formulated in the memorandum of appeal.

i) Is it not absolutely necessary and essential that the plaintiff in a suit for establishment of his claim for easementary right should specifically plead and prove such right over the servient tenement?

ii) In the absence of a precise description or measurement of the alleged passage was it proper or legal for the courts below to grant a decree basing on the observation by the Commissioner that he found the distance between the two wall on either side of the passage is 6 feet 8 inches, thereby holding that this distance of 6 feet 8 inches should be presumed to be the passage used for vehicular traffic?

iii) Is it proper and legal to grant a decree when admittedly there was an obstruction of the alleged passage four years prior to the institution of the suit, which obstruction admittedly was not removed and there was no passage for vehicles through the disputed passage within two years next before the institution of the suit?

5. It will be advantageous to bear in mind the law declared by the Apex Court and by this Court before a detailed discussion of the above questions of law formulated in the background of the facts of the case.

6. The Supreme Court in *Justiniano Antao and Others Vs. Smt. Bernadette B. Pereira*, held as follows:

But in order to establish a right by way of prescription one has to show that the incumbent has been using the land as of right, peacefully and openly and without any interruption for the last 20 years. There should be categorical pleadings that since what date to which date one is using the access for the last 20 years. In order to establish the right of prescription to the detriment of the other party,

one has to aver specific pleadings and categorical evidence. In the present case, after going through the pleadings as well as the statement of the witnesses it is more than clear that the plaintiff has failed to establish that she has been using the access peacefully, openly, as of right for the last 20 years.

7. In *Ibrahimkutty v. Abdul Rahumankunju* 1992 (2) KLT 775 Paripoornan, J. (as his Lordship then was) held as follows:

In a case, where the claim is for an easement right, it is all the more necessary that the pleadings should be specific and precise. There is reason therefor. "Easement" is a precarious and special right. The right of easement is one which a person claims over a land which is not his own.

8. Apart from stating that the way has been used by prescription there is no specific pleading involving all the seven ingredients of Section 15 of the Act i.e., (1) There must be pre-existing easement which must have been enjoyed by the dominant owner; (2) the enjoyment must have been peaceable; (3) the enjoyment must have been as an easement; (4) The enjoyment must have been as of right; (5) the right must have been enjoyed openly; (6) the enjoyment must have been for a period of twenty years and (7) the enjoyment for 20 years must have been without interruption. (*Krishnan v. Nanukuttan* ILR 1986 (1) Ker 526)

9. Apart from the absence of such pleadings the finding of the trial court on the admitted facts reveals the following facts. The suit was filed only in 1987. In 1983 there was obstruction to the taking of vehicles at the instance of the defendants and Ext.B7 complaint was filed. The plaintiff also admitted that after 1983 till the filing of the suit that obstruction was never removed. Therefore even assuming that there was a right to take vehicles till 1983 it ceased to exist thereafter till 1987 when the suit was filed. Can it be said that "the right existed for twenty years within two years next before the institution of the suit" as required u/s 15 of the Act for the purpose of taking vehicles for which alone the entire 6 feet width of property is claimed. I think not.

10. The trial court considered this aspect in para 18 of the judgment. The admission of the plaintiff that he filed an application before the R.D.O. complaining obstruction of passage in question by the Madrasa committee in 1983 and further admission that after the filing of that complaint the obstruction caused was never removed were also taken note of by the trial court. According to the trial court when the Commissioner inspected the property in 1987 the distance between two buildings constructed by the defendants in their land was 6 feet and 8 inches. Defendants had no case that the obstruction was there at the time when the Commissioner inspected the property. The trial court found against the contention of the appellants by observing as follows:

Dw 1 has stated during his evidence that the width of the pathway was not reduced after the Madrasa committee purchased the property in question. Therefore the version of the plaintiff that after 1983 the obstruction was not

removed only mean that he was not able to take vehicle through the passage in question after 1983 in view of the obstruction by the defendants. Apparently at the time when the Commissioner inspected the property for the preparation of Ext.C1 and C2 width of the passage in question was 6 feet 8 inches. At this time there was no obstruction to the use of the pathway having a width of 6 feet 8 inches. The defendants have no case that the obstruction was there at that time. Therefore it is to be presumed that even at the time institution of the suit the plaintiff was using the passage in question without any interruption, though not for vehicular traffic- (emphasis supplied). Even if the plaintiff has not been taking vehicles through the passage in dispute within a period of 2 years, the plaintiff will be entitled to have the use of the passage having the same width as that was in use prior to the institution of the suit.

11. In appeal, the first appellate court has confirmed this finding of the trial court. According to both trial court as well as the appellate court there was a way in use and even if there was obstruction for vehicular traffic within two years prior to the filing of the suit the prescriptive right of easement will be available for the entire pathway claimed for vehicular traffic also. The trial court relied on the decision of this Court reported in Simon v. N. Jayanth 1986 KLT 457. In that case the question involved was easement by grant. In the present case we are concerned with a claim of easement by prescription and Section 15 of the Indian Easements Act specifically provides that period of 20 years shall be taken to be a period ending within two years next before the institution of the suit. The finding of the trial court as well as the appellate court that even if there was obstruction for vehicular traffic, for more than two years prior to the suit the mere use of way by walking uninterruptedly, the plaintiff can claim easement for the entire width of 6 feet 8 inches does not seem to be correct in view of the provision contained in Section 15 of the Indian Easements Act. Even in the plaint there is no clear averment that the plaintiff has been using the pathway having a width of 6 feet 8 inches as of right and from what period. The Commissioner has reported that the distance between the two buildings of the defendants through which there is a pathway is 6 feet 8 inches. Therefore the plaintiff wants that entire space to be declared as a pathway available for the plaintiff's use. It is also stated that this is a public pathway and all the members of the public are using this pathway. If that is so there is no question of easement by prescription as against the defendants since it is only if the plaintiff admits the defendant as the owner of the land that easement by prescription can be claimed as against the defendants. The plaintiff himself has admitted in Ext.B7 complaint that he made a complaint before the RDO, Kannur that he had filed a complaint before the municipal authority and they had informed him that it is a private property and the municipality cannot interfere in this matter. Therefore B-schedule property was not recognised as public pathway by the Kannur Municipality.

12. Learned Counsel for the appellants submitted that there was a pathway through plaint B-schedule property and it is having only 4 feet width and the defendants will not prevent the plaintiff from using the pathway. Defendants''

only objection is for making use of the entire area as the pathway of the plaintiff. According to the learned Counsel unless and until the plaintiff satisfies the entire ingredients of Section 15 of the Indian Easements Act no right of prescription can be declared in respect of plaint B-Schedule property for vehicular traffic through B-Schedule property. In view of the provisions contained in Section 15 of the Indian Easements Act and the precedents referred to earlier, the reasoning of the trial court as well as the first appellate court cannot be sustained. The Second Appeal is therefore allowed and substantial questions of law formulated on which notice was issued are found in favour of the appellants. The judgment and decree passed by the lower courts are therefore set aside. But the right of way through 4 feet width now available in the plaint B-schedule property as conceded by the learned Counsel for the appellants for the ingress and egress of the plaintiff to his property is declared. The parties shall bear their costs in this appeal.