

(1992) 08 KL CK 0024
In the High Court Of Kerala
Case No : S.A. No. 821 of 1986-F

Ibrahimkutty Koyakutty

APPELLANT

Vs

Abdul Rahumankunju Ibrahimkutty and Others

RESPONDENT

Date of Decision : 10-08-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Easements Act, 1882 — Section 15

Citation : AIR 1993 Ker 91 : (1993) 1 ILR (Ker) 331

Hon'ble Judges : K.S. Paripoornan, J

Bench : Single Bench

Advocate : B. Krishnamani, for the Appellant; B. Sankarasubban and D. Sreekumar, for the Respondent

Final Decision : Allowed

Judgement

K.S. Paripoornan, J.—The second defendant in O.S. No. 321 of 1979, Munsiffs Court, Karunagapally is the appellant in this appeal. Plaintiffs 1 to 5 and the third defendant in the suit are the respondents herein. The first defendant's rights have been sold to the second defendant. The suit was filed for declaration of an easement right over C Schedule property which is a pathway 4 1/2 feet wide through the eastern extremity of B Schedule property. The plaintiff A Schedule property belongs to plaintiffs 1 to 5 and the third defendant and they are owners of different plots in A Schedule property. B Schedule property which belongs to defendants 1 and 2 lies to the south of A Schedule. To the south of B schedule, there is a public road. The plaintiffs stated that from A schedule property for access to the public road there is a pathway through the eastern extremity of B schedule property having a width of 4 1/2 feet which is described in the plaint as C schcdue. The said pathway is so being used for more than 100 years. The defendants are trying to obstruct the use of the C schedule as a pathway. The plaintiffs claimed an easement right over the C schedule pathway. The suit is filed for declaration of the easement right and for a permanent injunction restraining defendants 1 and 2 from interfering with the plaintiffs' use of the C

schedule as a pathway.

2. Defendants 1 and 2 denied the claim of title by the plaintiffs and the 3rd defendant over the A schedule property. They denied that there was a pathway as mentioned in the C schedule. The easement right claimed by the plaintiffs was also denied. It was pleaded that C schedule is not a pathway; but it is only a bund constructed by the second defendant to prevent water from the eastern Thodu entering into the B schedule property, which is a paddy field. It was also pleaded that the plaintiffs have an alternate pathway. The trial court held that the plaintiffs have an easement right of way by necessity and by prescription. The suit was decreed on 10-8-1981. The injunction prayed for was allowed. It was declared that the plaintiffs have a right of easement of way along the C schedule "nadavarambu" over the plaintiff B schedule property, since the easement right has arisen out of necessity and by prescription.

3. Defendants 1 and 2 filed an appeal before the District Court, Kollam as A.S. No. 140 of 1985. By judgment dated 22-1-1986, the learned District Judge held that the plaintiffs have a customary easement and also an easement by prescription which can be inferred. In this view, the appeal filed by the defendants was dismissed. The second defendant has come up in second appeal.

4. The following three questions of law, as formulated in paragraph 12 of the Memorandum of Appeal, are the substantial questions of law that have been framed for consideration in the Second Appeal:

I. Whether the mere existence of pathway is sufficient to acquire an easement by prescription u/s 15 of the Easements Act when proving the other ingredients mentioned in the section?

II. Whether the courts below were right in granting a decree to the plaintiffs on a question which was not pleaded by the plaintiffs in the plaint?

III. Whether the suit by different owners of different plots and on behalf of the 3rd defendant maintainable in the circumstances of the case?

5. I heard counsel. Appellants' counsel heavily stressed on the fact that the courts below have granted a relief which was not pleaded by the plaintiffs in the suit. It is seen that all that is claimed in the plaint is that there is a pathway 4 1/2 feet wide, north to south, through the eastern side of the B schedule property, that it exists so for over 100 years and the owners of the plaintiff A schedule properties could reach the public road from their properties, which is of the southern part of B schedule property, only using the "nadavarambu", which is C schedule property, and there is no other pathway. It is further stated in the plaint that the plaintiffs have acquired an easement right over the C schedule property and there is no other way for the plaintiffs to reach the public road. The prayer in the plaint is for a declaration of the easement right of the plaintiffs and the third defendant. In the plaint, there was no specific pleading with regard to the particular easement claimed by the plaintiffs. On the basis of the pleadings,

the trial Court framed the following issues:

- " 1. Have the plaintiffs an easement right of way over B schedule property?
2. Whether the injunction prayed for, is allowable?
3. Reliefs and costs."

The evidence in the case was elaborately adverted to and whereas the trial court found the easement right by necessity and by prescription, the lower appellate Court found" customary easement and easement by prescription.

6. There is considerable force in the pica of the appellants¹ counsel, that the pleadings in the case are not specific or precise. They were not sufficient to highlight the particular easement claimed by the plaintiffs, and so the defendants were not able to meet the plaintiffs' case effectively. Though the courts below have found that the plaintiffs have got an easement right over C schedule property, the trial court would have it that there is an easement of necessity and by prescription, whereas the lower appellate Court would have it that there is a customary easement and easement by prescription. The lower courts themselves were not sure about the particular easement claimed and proved by the plaintiffs in the case. It has considerably prejudiced the defendants from meeting the plaintiffs' case. The findings and the judgments of the courts below are not based on the pleadings and so the judgments and decrees of the courts below deserve to be set aside.

7. Counsel for the respondents very vehemently contended that the plaintiffs have pleaded that they have got a right of easement. They have also pleaded that the right of way exists for more than 100 years and from the evidence it is established that the plain- tiffs have got a right of easement by necessity and by prescription. Both the courts have concurrently found that the plaintiffs have got a right of easement by prescription. The trial court has found easement of necessity also and the lower appellate court also found a customary easement. But, with regard to the right of easement by prescription, both the courts below have concurrently found in favour of the plaintiffs, based on evidence in the case. This is not a case where the defendants were prejudiced by lack of sufficient pleadings. They were not surprised by lack of pleadings. Counsel for the respondents, Mr. Sankarasubnan, submitted that the pleadings should be liberally construed and this court should have regard to the fact that the parties understood the case pleaded and argued the matter and the purpose of the pleading is only to put the opposite party on notice which is satisfied in this case. This is a case where the parties have understood the case pleaded and on the basis of evidence, the courts below were justified in decreeing the suit. Counsel also brought to my notice the following decisions: Kidar Lall Seal and Another Vs. Hari Lall Seal, ; Union of India (UOI) Vs. Khas Karanapura Colliery Ltd., ; Madan Gopal Kanodia Vs. Mamraj Maniram and Others,); Haji Abdulla Haji Adam Sait Dharmasthapanam Vs. T.V. Hameed,) and Mulla on the CPC (14th Edn.) Volume II page 970.

8. Counsel for the appellants relied upon the following decisions to contend that the courts below acted illegally and without jurisdiction in granting a decree which was not based on the pleadings of the parties: AIR 1930 57 (Privy Council) (I); Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, Bhagat Singh v. Jaswant Singh AIR 1966 SC 1861; Nirod Baran Banerjee Vs. Dy. Commissioner of Hazaribagh, ; Lakshmikutty Amma and Others Vs. Narayana Pillai Velayudha Pillai and Others, Mohammed Kunhi v. Lakshmana Pai 1969 KLR 894; Abubakcr v. Union of India 1972 KLT 74 and Elizabeth v. Saramma 1984 KLT 606 : AIR 1985 NOC 159

9. I do not think that it is necessary to deal at length with the various decisions brought to my notice, since they lay down well established broad propositions. Suffice it to say, that ordinarily a court can find a case and decree the suit only on the basis of the pleadings of the parties. 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. Gale on Easements (15th Edn.) (Pages 3 and 4) states the precise nature of the right of easement thus :

"It is of the essence of an easement that, as between two pieces of land, there is a shift in the equilibrium of natural rights incident to their ownership, a dimunition in the natural rights of one being accompanied by a corresponding artificial addition to the natural rights of the other; the result being that a conveyance of either operate automatically, and can only operate, as a transfer of natural rights diminished, or of natural rights plus an additionally acquired right."

At page 415 of the same book, the learned author states thus:

"Under the present system of pleading, it is conceived that, whether the section be brought against the servient owner or a stranger, a party cannot safely allege his right to an easement generally, but should state specifically the manner in which he claims title to the easement, whether by grant (actual or lost), prescription at common law, or under the Prescription Act, and in many cases it is advisable to plead, alternatively, a title by all three methods."

In Surendrasingh v. Phirosahah AIR 1953 Nag 205, a Division Bench of their Lordships Sinha C.J. and Hidayatullah, J. stated, at page 206 (para 9), that the pleadings in a case dealing with easement have to be very precise. Their Lordships quoted the following passage from Peacock -- "Law Relating to Easements in British India" Third Edn., at page 608:

"As an easement is not one of the ordinary rights of ownership, it is necessary that either Party claiming or relying on an easement should plead the nature of his title thereto so as clearly to show the origin of the right, whether it arises by statutory prescription, or express or implied grant, or the old common law method of a lost grant".

Mulla - CPC (14th Edn.) Volume II, at page 986, states the law thus :

"Easement -- A party claiming or relying on an easement should plead the nature of the title thereto, so as to clearly show the origin of the right, whether it arises by statutory prescription or express or implied grant, or the old common law method of a lost grant."

Since the right of easement is a precarious and special right claimed over the land of another, it is highly essential that the pleadings should be precise. On a careful reading of the plaint in the case, it should be stated that the plaintiffs did not specifically plead the nature of the easement claimed by them. Indeed, the issue framed in the case is also of a general and vague nature. That is why the trial court found in favour of easement of necessity and also by prescription. The lower appellate Court found customary easement and easement by prescription. The qualitative and quantitative requirement for the different kinds of easements are to a extent mutually exclusive, That is the reason why the court, have always insisted that whenever a right of easement is claimed, the pleadings should be precise and clear and not vague.

10. Bearing the above principles in mind, if we scan the plaint in the instant case, it cannot be stated that there is any precise or clear pleading with regard to the nature of easement claimed by the plaintiffs. The appellants' counsel is fortified in his submission that in granting the decree, the courts below did not bear in mind lack of precise pleading in the case. On the other hand, on the basis of evidence adduced, the courts below have found different kinds of easements and granted a decree.

11. I am of the view that the courts below did not apply their mind to the question that arose for consideration and made generalisations which are not based on pleadings. In this view, the judgments and decrees of the courts below cannot stand. When the above aspect was highlighted, cannot for the respondents, Mr. Sankarasubhan, pleaded that he may be given an opportunity to amend the plaint, in an appropriate manner, stating with precision the nature of the right claimed. Though it is belated, I do not think that the plaintiffs should be put out of court due to a technical error or mistake that has crept in the proceedings. If the plaint is amended, the appellants/ defendants should be given an opportunity to file additional written statements. It may even be on the basis of the amended pleadings, further evidence may be required. Therefore, while setting aside the concurrent judgments and decrees of the courts below, I remit the matter to the trial court, so as to afford an opportunity to the plaintiffs to amend the plaint. The trial Court shall permit the plaintiffs to amend the plaint and also permit the defendants to file additional written statements. Precise issue shall be formulated and then the case disposed of in accordance with law. Question No. II is answered as above. It is unnecessary to answer the other questions, at this stage.

12. The second appeal is allowed. The judgments and decree of the courts below

are set aside and a remit is ordered to the trial court for a fresh consideration of the suit in accordance with law.

13. The suit is posted in the trial Court, for appearance of parties and for further steps, to 25th of August, 1992. Since the suit is of the year 1979, the trial Court will give an expeditious disposal of the matter.