

(2014) 03 KL CK 0010
In the High Court Of Kerala
Case No : R.S.A. No. 796 of 2012

Jeevan Jose P.K. and Others

APPELLANT

Vs

Mariamamma Chakkapan and Others

RESPONDENT

Date of Decision : 17-03-2014

Acts Referred:

Citation : (2015) 3 KHC 988 : (2015) 3 KLJ 532

Hon'ble Judges : P. Bhavadasan, J

Bench : Single Bench

Advocate : C.N. Joseph, Advocate for the Appellant; S. Sreekumar, Senior Advocate, M.S. Narayanan, Jijo Thomas, Aneesh Paul and M.B. Prajith, Advocate for the Respondent;

Final Decision : Dismissed

Judgement

P. Bhavadasan, J.

1. Defendants 1 and 2 who suffered a decree at the hands of the Trial Court which was confirmed in appeal are the appellants before this Court. The facts of the case have been narrated in detail by the Courts below and it is unnecessary to reiterate them since the issue involved in this appeal is a narrow one. It relates to the use of a pathway shown as D Schedule in Ext. C4 plan. The appellants own properties on the eastern side as well as on the western side of the said pathway.

2. The property originally belonged to one Paily who was inherited by his grandchildren and on the death of one of the daughters, the property was partitioned between her legal heirs and the other children of Paily. The assignor of the appellants was one Shaju who obtained the property as per the above partition deed. He assigned 5 cents of property which is situated on the eastern side of D schedule pathway. He while doing so, also conferred the right of use D schedule pathway with respect to 5 cents he sold to defendants 1 and 2.

3. The way was provided for in the partition deed entered into between the legal

heirs of Smt. Naithy and Smt. Ely in the year 1963 and subsequent deeds.

4. It must be noticed here that defendants 1 and 2 had purchased E schedule property from strangers and not from any of the legal heirs of Smt. Naithy or Smt. Ely or from the successors-in-interest of Smt. Naithy or Smt. Ely so as to have the right of way through D schedule with respect to E schedule property.

5. When the plaintiffs found that defendants 1 and 2 are using plaintiff D schedule without authority for the enjoyment of E schedule property, they laid the suit for declaration and other consequential reliefs. Defendants 1 and 2 resisted the suit on the basis of Ext. B1 which is a document of title with respect to 5 cents situate on the eastern side of D schedule which was conveyed to them by Shaju who obtained the property being the successor-in-interest of Smt. Naithy and Smt. Ely and he also assigned the right to defendants 1 and 2 to make use of D schedule pathway to have access to E schedule.

6. The stand taken by the plaintiffs was that the assignor of defendants 1 and 2 as per Ext. B1 document had no authority to grant permission to defendants 1 and 2 to use the D schedule pathway for access to E schedule property which did not belong to the family at all. They pointed out that they were unaware of the recital in Ext. B1 conferring right on defendants 1 and 2.

7. According to defendants 1 and 2 they purchased five cents from Shaju in order to have access from their property to the road on the western side of the property covered by Ext. B1 document. It is also contended on their behalf that Shaju had the authority to grant right of way from E schedule property also. They also pointed out that they have been using the way from 1998 onwards when they purchased 5 cents by Ext. B1 document and the suit in the year 2006 is misconceived as the declaratory relief is far beyond the period of limitation. It is also pointed out that the plaintiffs have no authority to restrain their use of D schedule pathway to have access to the property covered by Ext. B1.

8. The Trial Court raised necessary issues for consideration. The evidence consists of the testimony of PW1 and documents marked as Exts. A1 to A7 from the side of the plaintiffs. The defendants had examined DWs. 1 and 2 and had Exts. B1 to B8 marked. Exts. C1 to C5 are the Commissioner's report and plan. Both the Courts below on an independent evaluation of the evidence came to the conclusion that E schedule property shown in the Commissioner's report Ext. C4 did not belong to the family which had partitioned in the year 1963. The assignee had no right to use the way and he could not assign that right independent of any tenement.

9. Accordingly the Court granted declaratory decree as well as decree for injunction restraining the defendants from using the D schedule property. The Trial Court made it abundantly clear that the decree will not enable the plaintiff to interfere with the right of defendants 1 and 2 to use the 5 cents assigned under Ext. B1 document.

10. At the time of admission, the following questions of law were raised in the memorandum of appeal:

"(i) Can the Court below decree the relief which is already infructuous long before the filing of the suit?

(ii) Can a prohibitory order of injunction be passed restraining making of an opening which was already there long before the filing of the suit?

(iii) Can an equitable relief be granted in a case where the grant of the same, most inequitable and against admitted facts?

(iv) Can as a Court of law grant a relief which goes against the principal embodied in easement by grant?

(v) Can Article 58 of the Limitation Act be allowed to be defeated by invoking Article 17 even when there is no evidence tendered no pleadings are brought on record in that regard?

(vi) Was the Trial Court as well as the Lower Appellate Court justified in relying on the ruling in Unneenkutty Vs. Taluk Land Bord. Tirur and Others, [Unneenkutty Vs. Taluk Land Bord. Tirur and Others,] and 1986 KLT 1130 [Rahelamma Koshy v. Yohannan and Others 1986 KHC 290] to decree the suit as if the property conveyed is a co-ownership property, whereas it has ceased to be a co-ownership property as per Ext. A6?

(vii) Is not the burden of proof upon the person who alleges a fact, is the Court justified in shifting that burden on the person who denies the same?

(viii) Has not the Court below exceeded its jurisdiction when it granted a decree for declaration and injunction despite a finding that the plaintiff has the right of passage over plaint D schedule?

(ix) Can a Court of law deny a right to a person who was granted such a right a document, when such grant is given by a competent person?"

11. Learned counsel appearing for the appellants contended that the prayer for declaration was barred by limitation as the right to use the pathway was conferred under Ext. B1 document in the year 1998 and ever since then they have been using the pathway for access to E schedule. According to the appellants the plaintiffs were well aware of the use of the pathway by defendants 1 and 2 and therefore, the Court should have held that the suit is barred by limitation. It was further contended that the allegation in the plaint that defendants 1 and 2 are attempting to cut upon a portion of their property to gain access to E schedule property is not correct because already there is an opening at the time of institution of suit and therefore, the decree as of now cannot stand and the third contention of defendants 1 and 2 is that having obtained right under Ext. B1 from a person who had authority to use the pathway, the plaintiffs cannot restrict the use of the pathway by defendants 1 and 2 to have access to E schedule property also.

12. Learned counsel appearing for the respondents on the other hand contended that none of the above contentions have any merit or substance. Admittedly, according to the learned counsel, plot E was bought from a total stranger who had nothing to do with the family in which partition had effected in 1963 consequent to which the assignor under Ext. B1 had obtained the right to use the pathway. Of course, as far as the way to property covered by Ext. B1 is concerned, learned counsel appearing for the respondents fairly conceded that they have no genuine grievance in the defendants using D schedule pathway. It is pointed out by the learned counsel that they were unaware regarding the conferment of the right by the assignor of Ext. B1 regarding the pathway to defendants 1 and 2 for access to E schedule property also. When they came to know about the same, they have assailed the claim of defendants 1 and 2 to use the same. It was pointed out by the learned counsel that it could not be said that the right of way now claimed by the defendants is by way of easement and there is no document to show how the claim could be attached. Plot E in Ext. C4 plan was obtained by defendants 1 and 2 from a total stranger as could be seen from Ext. B1 document. Even assuming that defendants 1 and 2 had been using the pathway for access to plaint E schedule, they have no right to do so and unless they establish any right, they cannot seek to use the pathway. Learned counsel also contended that the Courts below have fairly accepted the right of defendants 1 and 2 to use D schedule pathway to reach plaint E schedule.

13. It has to be said that there is considerable force in the submission of the learned counsel for the respondents that the assignor of Ext. B1 had only a right to use the way to gain access to his property. It is not in dispute that the property obtained by the first and second defendants as per Ext. B2 document dated 05/01/1990 is not from any of the sharers of 1963 partition deed or not from successors-in-interest of Ely or Naithy, to be more precise, it is bought from a total stranger to the parties in the partition deed. True, the partition deed of the year 1963 does provide a way for access to the sharers in that document. But that way as it exists now stands could not enure to the benefit of defendants 1 and 2. The property bought by defendants 1 and 2 did not belong to the members of the family who partitioned the property in the year 1963.

14. Ext. B2 document clearly shows that defendants 1 and 2 had access to the outside world through their western side and a pathway is described in Ext. B2 document.

15. True, by Ext. B1 one of the successors-in-interest of Ely assigned five cents of property to defendants 1 and 2. Obviously if Shaju the assignor had right to use that pathway, that right would go along with the property sold to defendants 1 and 2. But that right can remain confined to the use of the pathway to reach the property sold under Ext. B2 for, Shaju himself had only the right to use the pathway to gain access to his property.

16. The plaintiffs have clearly said that they were unaware of the recital in Ext. B1 document. May be there was an opening which defendants 1 and 2 might

have been using as a way for having access to their property. But as rightly contended, mere use of way will not clothe them with any right unless they are able to establish that they have legally recognised right to use the pathway. The right of Shaju, the assignor under Ext. B1 document is rather limited, in that his right is confined to use of his property and right of way to his land. But his right to give access to somebody who had nothing to do with the property partitioned in the year 1963 under which Shaju gets right cannot be countenanced. As already noticed, defendants 1 and 2 have no case that E schedule in Ext. C4 plan ever belonged to the predecessor-in-interest of Shaju who executed Ext. B1 document.

17. The contention that the suit is barred by limitation has no legs to stand. The plaintiffs have stated that they have come to know about right created under Ext. B1 recently and they instituted the suit thereafter. There is nothing to show that they were aware of such a recital in Ext. B1 and they could not even expect that such a claim would have been included in Ext. B1. Defendants 1 and 2 occasionally use that way, but when it was claimed as a matter of right, the plaintiffs were alerted and they laid the suit. Therefore the contention that the suit is barred by limitation has no legs to stand.

18. There may be some substance in the contention that there was already an opening at the time of laying of the suit on the eastern boundary of E schedule property. But the objection taken by the plaintiffs was not regarding the opening created in E schedule property but regarding the creation of an opening on the eastern boundary of E schedule property by defendants 1 and 2 so as to use D schedule pathway of which they had no right. The Courts below have held that in that defendants 1 and 2 have not proved that they are entitled to use plaintiff D schedule pathway. The right of the plaintiffs to secure plaintiff D schedule pathway by proper means has to be recognized. Therefore, even assuming that there was an opening on the eastern boundary of E schedule as on the date of the suit will not help defendants 1 and 2 to claim that they are entitled to use the pathway.

19. The third contention that the assignor of Ext. B1 had a right to use the pathway as he liked has to fail. It must be remembered that the pathway was laid only for the use of the sharers to reach their respective properties obtained under the partition deed. One could say that it is an easement by necessity or even grant as the case may be with regard to the properties covered by 1963 partition deed. But as already noticed, defendants 1 and 2 obtained E schedule property from a total stranger and not from any of the persons who are the successors-in-interest of Naithy and Ely. That means that the assignor of the property under Ext. B1 document had a limited right over D schedule pathway. If that be so, Shaju, the assignor under Ext. B1 could not have right to deal with the pathway for ingress and egress as he liked. He can assign only what he has. Shaju could not assign a right which he himself did not have. The Courts below came to the conclusion that the plaintiffs are entitled to a decree. It is significant to notice that the Courts below safeguarded the interest of defendants 1 and 2

by making it clear that they have the right to use plaint D schedule pathway for their beneficial enjoyment of the property covered by Ext. B1 document. That alone defendants 1 and 2 can seek for.

This appeal is dismissed confirming the judgments and decrees of the Courts below. There will be no order as to costs.