
(1984) 07 KL CK 0052
In the High Court Of Kerala
Case No : S.A. No. 237 of 1978

Karthiyani Amma and Others

APPELLANT

Vs

Kunhi Thommen and Others

RESPONDENT

Date of Decision : 19-07-1984

Acts Referred:

Easements Act, 1882 — Section 15(2), 47

Citation : (1984) KLJ 713

Hon'ble Judges : K. Sukumaran, J

Bench : Single Bench

Advocate : P.K. Kesavan Nair and K.N. Narayana Pillai, for the Appellant; V. Sankara Menon and V.C. Aravindaksha Menon, for the Respondent

Final Decision : Allowed

Judgement

K. Sukumaran, J.—The second appeal was filed by the plaintiffs in a suit for declaration of easement right. The 1st plaintiff was the mother and the 2nd plaintiff, the son. During the pendency of the second appeal the 1st plaintiff passed away. Her legal representatives are appellant No. 2 and additional appellants 3 and 4. The plaintiffs are members of a family known by name Pavattassery. They have a house in the property shown in the sketch prepared by the Commissioner, the rough sketch being Ext. CI and a more detailed one being Ext. C3. On the northern side, about 24 dhannoos away from the boundary of the plaintiffs' compound there is a panchayat road. On the eastern side also there is such a panchayat road. The pathway connecting the northern panchayat road to the plaintiffs compound is the one on which the controversy revolves. On either side of that pathway are the residential houses and compounds of the defendants: The pathway after touching the plaintiffs' compound proceeds in the southern direction and leads to the house of one other defendant.

2. The properties now owned by the defendants and served by the pathway aforesaid originally belonged to one Velu. By Ext. A2 assignment, Veiayudhan, one of the sons of Velu obtained the rights of the other heirs of Velu. Those

rights were conveyed by him under Ext. A4 dated 16-3-1927 in favor of the 1st defendant. Similarly Raman, P.W. 2 obtained the rights of other heirs of Velu under Ext. A3 dated 31-3-1925. The ultimate landlords' rights were obtained by the 1st defendant under Ext. B1 dated 27-6-1943.

3. According to the plaintiffs, the pathway to the panchayat road had been used by them from time immemorial and they had acquired an easement right over the same. This claim was disputed by the defendants. According to them, the pathway was opened only for the purpose of the convenient enjoyment of the properties of the defendants and "to serve as an access to their respective residential compounds and houses.

4. An ex parte commissioner who went to the spot prepared the sketch and plan Exts. C1 and C2 on 16-8-1971. The same commissioner made a further inspection of the property and submitted a more detailed report Ext. C4 on 30-8-1971. On the side of the plaintiffs, the 2nd plaintiff gave evidence as P.W. 1. P.W. 2, as noted earlier, was the assignee of the rights under Ext. A3 and had been residing in the property till about 20 years back when he shifted his residence to Valiyaparambu. P.W. 3 is one of the children of one Thariyath, and in possession of the property situate immediately to the east of the lane. P.W. 4 is a neighbour but his testimony has been rejected by the trial court as being artificial. The Commissioner who prepared the reports is P.W. 5. On behalf of the defendants, the 2nd defendant gave evidence as D.W. 1. D.W. 2, Poullose is the only other witness examined on the side of the defendants. On an evaluation of the evidence in the case, the trial court came to the conclusion that the plaintiffs had established the case. The appellate court, however, took a different view. It is in the above background that the second appeal has come up before this court.

5. The finding of the lower appellate court was that there was no acceptable evidence to hold that the plaintiffs had been enjoying the pathway for a period of 20 years ending within two years of the institution of the suit. In arriving that conclusion, it had been largely swayed by the fact that a panchayat road was in existence on the eastern portion of the plaintiffs' compound. That the passage through the plaintiffs' house along the disputed pathway and the narrow footway from the gate was not a straight one and that there was obstruction along the way by the branches of cashew trees, also created doubt in its mind about its having been used as a pathway. It could not accept the evidence of P.W. 2 and 3 in substantiation of the plaintiffs' claim. The reports of the Commissioner, and particularly the improvement made in the gate after the first visit also put the plaintiffs in bad light as regards that court.

6. It was submitted on behalf of the appellants that the entire approach of the court below was fundamentally erroneous and that the principles of law, particularly those relating to Section 47 of the Easements Act had been disregarded by the court below. Reference was made to the decisions of *Sri Ram v. Mani Ram*, AIR 1924 Allahabad 97, *Joseph Chandra v. 5m. Sachchhanda*, AIR 1935 Calcutta 282 and *Girdharsingh v. Gokul*, AIR 1976 Rajasthan 10.

7. After hearing the arguments on either side, I am of the view that the court below misdirected itself and did not approach the case from the proper perspective applying the correct legal principles.

8. The existence of the pathway connecting the panchayat road on the north and the plaintiffs' compound is not in dispute. The plea actually raised by the defence, is very crucial and relevant in this context. It is to the effect that such a pathway had been made by the defendants for having access to their respective houses and to their compounds. In other words, they were questioning the very fact of there having been a pathway and its use by the plaintiffs prior to their appearance in the scene. It must be straight away pointed out that the plea is completely falsified even by the documentary evidence in the case. Way back in 1925, the existence of this pathway is recognized in Ext. A2. Ext. A4 of the year 1927 also contains the same boundaries. Similarly Ext. A1 also establishes the existence of a pathway on the western side of the property obtained by P.W. 2 under Ext. A1. The contention in paragraph 3 of the written statement that the defendants opened the pathway is therefore absolutely baseless.

9. The circumstances which have emerged in the case also establish the use of that pathway by the plaintiffs. Even during the first visit of the Commissioner, he noticed a gate having a width of one kole at the point where the pathway touches the northern boundary of the plaintiffs' compound. That is not without significance. When the Commissioner visited the property on the second time, the gate was widened. That, however, is no justification to completely overlook the existence of a gate at that point even initially. The description of the winding way which leads to the house of the plaintiffs as given in the report also leaves no room for doubt about the use of the pathway by the plaintiffs. When the Commissioner says that the access towards the panchayat road on the east is in greater use, that clearly implies, a continuous even if lesser, use of the other pathway too. The fact that the branches of a cashew tree obstruct a quick passage along that path does not annihilate a case of the use of the pathway. One must appreciate the rural scene where pathways are not necessarily straight (as some of the highways of advanced countries). Neither the fact that such pathways meander through the paddy fields, nor the fact that they are sometimes intercepted by over-hanging branches of trees, would not militate against the existence of or use of a pathway by the people. The first report of the Commissioner makes it abundantly clear that the pathway was being used by the plaintiffs. The Commissioner expressed his inability to report the age of that pathway. He stated that it would have been in existence for a longer period than a nuxvomica tree found therein. He also stated that the pathway was one found to be needed by the plaintiffs and the defendants. The documentary evidence and the facts established by the report of the Commissioner would therefore be sufficient to uphold the plaintiffs' case and to decree the suit. Further support to the plaintiffs' case is, however, available in the form of evidence of P.Ws. 2 and 3. P.W. 2 is a person aged 71. He was born and brought up in a property dealt with under the documents referred to above; and that abuts the pathway. He

was residing in the property till about 20 years back when he shifted his residence to another property. His evidence is lucid and pointed. He speaks to the use of the pathway by the family of the plaintiffs. He has distinct memory about the gate through which the members of the plaintiffs' family used to have access, after proceeding through the pathway in dispute. Counsel for the respondents attacked his evidence on the ground that the age might have dimmed his vision about the things past, and would have impaired his memory. Seventy one is not an age where memory need be fatally feeble. (It had been noted that the average age of a British Prime Minister was 70). The evidence of P.W. 2 Could not be shaken in the cross-examination. I have no hesitation to accept and act upon his testimony. Even the appellate court did not disbelieve him. It found difficulty only in the fact that his evidence would be unhelpful in relation to the state of affairs for the last 20 years. In so doing, that court overlooked the fact that his evidence completely demolishes the defence theory of their introducing the pathway after coming to the scene. About the current use of the property as a pathway by the plaintiffs' family, there is the evidence of P.W. 3. His being a bus conductor does not preclude his being aware of the use of the pathway by the people of the area. The lower appellate court misguided itself in thinking that his being a bus conductor would shut him off from all happenings of the area. The evidence of P.Ws. 2 and 3 had been discussed by the trial court very elaborately in the light of the criticism levelled against them. The trial court found it absolutely safe to act upon their testimony. I am clear in my view that court acted correctly in so doing. The appellate court was unjustified in adopting a different approach without any tenable or justifiable reason.

10. The appellate court also overlooked the well-settled principles of law in its approach to the question. The principles of law, particularly those underlying Section 47 of the Easements Act, could have been usefully borne in mind by the court below. As noted earlier, the evidence establishes the use as of right of the pathway at least from the year 1925. The evidence is sufficient to establish an easement in relation to the right of way along the disputed pathway. A question might arise whether there has been a discontinuance of such easement. More than a century back, the Calcutta High Court in *Koylash Chunder Ghose v. Sonatun Chung*, (1881) 7 Calcutta 132, pointed out how a right may have been in full enjoyment notwithstanding occasional breaks. The enjoyment necessary to qualify for a right of easement is different from actual user. "In order to establish a right to an easement, the enjoyment of it must continue for twenty years; but in the case of discontinuous easements, this does not mean that the actual user is to continue for the whole period of twenty years. On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and weeks and months, the person claiming the right may have been in full enjoyment of it, when necessary." (See *Sri Ram v. Mani Ram*, AIR 1924 Allahabad 97). A later decision of the Calcutta High Court gives further light. Mitter, J. while rendering the decision has surveyed the English cases dealing with the principles. It was noted that an interruption which

will disturb the crystallization of a right of easement (as is referred to Section 15(2) of the Easements Act) refers to an adverse obstruction and not a mere discontinuance of user. (Smith v. Baxter, (1900) 2 Ch. 138). Cessation of user is not an invariable indication of the abeyance of enjoyment of a right. (See Gopal Chandra v. Bankim Behary, AIR 1919 Calcutta 357). Mitter, J. took the view in that case that the mere fact that a person had a divided residence for sometime would not disentitle such a person to a right of way, which going by the other materials and evidence in the case had been acquired by prescription. The learned Judge observed:

...plaintiff 1 began to live in her daughter's house off and on only after the enjoyment had been completed for more than 20 years.

In other words when the 20 years enjoyment had been completed, before the intermittent absence happened, the acquisition of the easement was upheld. The decision has much relevance to the facts of the present case. The use of the pathway for over half a century had been established by the evidence. A mere fact that the plaintiffs were having access to another panchayat road on the east and that that access was being more frequently used would not, in the light of the legal principles, fatally affect or extinguish the easement right already acquired. The judgment of the lower appellate court is not in conformity with the well established principles of law. It is totally unsustainable in the light of the evidence and materials on record. The judgment and decree of the lower appellate court are accordingly set aside. The second appeal is allowed, restoring the judgment and decree of the trial court. The appellants will have their costs through out.