

(1990) 09 KL CK 0003
In the High Court Of Kerala
Case No : S.A. No. 185 of 1986

Kochan Ramanathan

APPELLANT

Vs

Kochan Natarajan

RESPONDENT

Date of Decision : 24-09-1990

Acts Referred:

Easements Act, 1882 — Section 13, 14, 27, 28

Citation : (1990) 2 KLJ 617

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : V.N. Swaminathan and A. Antony Jr, for the Appellant; C.P. Sudkakara Prasad, for the Respondent

Final Decision : Allowed

Judgement

S. Padmanabhan, J.—Plaintiff is the appellant. He filed O.S. 311 of 1981 before the Munsiff, Cherthala for declaring the right of easement as of necessity to use a pathway and for prohibitory injunction to restrain the defendant from obstructing user of the way. He also alleged that the pathway was closed by the respondent. He wanted the pathway to be restored to its original position. The respondent denied the right and its user. He also denied having obstructed the pathway. The trial court found that there was a pathway as alleged by the appellant and that it was obstructed. The respondent was therefore directed to restore the pathway to its original condition. The prayer for injunction was also allowed. In A.S. 39 of 1985, the appellate judge also agreed with the trial court that an easement of necessity was established. But the decree was modified and the pathway was limited to a foot-path. That is how the plaintiff happened to come up in second appeal. This is an unfortunate litigation between two consanguine brothers. They are the children of sisters, who were the common wives of one Karamban Kochan. Karamban Kochan is their father. He had an item of property touching a public road on the southern side leading from Kanichukulangara to the National Highway. That portion of the property touching the public road was gifted by him

on 5-1-1976 under Ext. A1 to the respondent. The remaining portion of the property lying away from the public road to the north of Ext. A1 property was used by Kochan for his residence. Through the western portion of Ext. A1 property, Kochan formed a cartable road for access to Ext. A1 property and the remaining portion where he was residing. That portion of the property in which he was residing subsequently came to the share of the plaintiff under Ext. A2 partition dated 5-5-1977 entered into by the appellant, respondent and others after the death of Kochan. The case of the appellant is that the pathway is 15 feet wide extending upto the extremity of his property and that it was used for taking automobiles also-As earlier stated, the existence of such a pathway was denied by the respondent who contended that alternate ways are also available to the appellant.

2. The respondent examined himself as Dw. 1. One independent witness was examined by him as Dw. 2. Appellant was examined as Pw. 1. Pws. 2, 3 and 4 are independent neighbours. PWS. 5, 6 and 7 are Commissioners. Exts. C1, C2 and C3 are the reports submitted by them. The other items of documentary evidence are Exts. A1, A2 and B1.

3. It is admitted by the parties that even though Kochan was not having a car of his own, he was regularly using cars for access to his house. On the southern extremity of Ext. A2 property belonging to the appellant under Ext. A2 partition deed, there are two sheds near the gate constructed north of the boundary wall. It is said that one of the sheds was used by Kochan for parking cars. That is the evidence of Pw. 1 and that version was supported by Pws. 2, 3 and 4. Pw. 2 is a neighbour, who is running a tea shop nearby. Pw. 3 is an Advocate practising at Alapuzha and residing near Exts. A1 and A2 properties. He was also a local Panchayat Member. Pw. 4 gave evidence that he had occasion to come to Kochan's property (Ext. A2) in cars. Pws. 2 and 3 also said that to their knowledge Kochan was using the disputed pathway for vehicular access to his residence in Ext. A2 property. There is absolutely no reason to disbelieve these items of evidence especially in view of the reports submitted by the Commissioners and the evidence given by them in the box.

4. Pw. 5 was the first Commissioner who made local inspection immediately after suit. His evidence that he made local inspection and prepared the report after due notice to the respondent is not disputed and it is so stated in his report also. Therefore, Ext. C1 report prepared by Pw. 5 could be accepted as evidence along with his deposition.

5. The report and deposition of Pw. 5 is to the effect that starting from the southern public road, there is a well-marked pathway 27 metres in width leading to the gate of Ext. A2 property which is now owned by the appellant. The further evidence is that it is a gravelled and metalled road through which there was regular vehicular access. It is also seen that in Ext. A1 property as well there is a gate for access to this pathway. Even though Ext. A1 property is having road access to its full width on the southern side, that portion of the property is not

used by the respondent for access to his residential building or compound. In that portion of his property facing the road, there is a shed and a factory. It is therefore clear that for access to Exts. A1 and A2 properties and the residential buildings in them, the disputed pathway alone was being used by Kochan and the respondent. Evidently, it was not a mere foot-path. It was intended and used as a convenient pathway for taking automobiles also inside the two residential buildings. The construction of the gates is also in such a way that automobiles could be taken inside the respective compounds.

6. When an application came later alleging that the temporary injunction was violated, Pw. 6 was deputed as Commissioner. Ext. C2 is the report prepared by him on 9-7-1984, more than three years after the first Commissioner visited the property. When Pw. 6 visited the property, the pathway upto the gate of the respondent for entrance to the residential building was in tact. Obstruction was found caused only to the north of it. That means the respondent wanted to cause obstruction only to the user of the pathway by the appellant and at the same time he wanted the pathway to be conveniently used for his purposes. But by the time when Pw. 6 visited the property the pathway to the north of respondent's gate was completely tampered by spading and ploughing. Even then the Commissioner was able to find, on digging the earth, that the remnants of the old pathway was there with metal and gravel.

7. A third Commission was also deputed on identical allegation of violation of the order of temporary injunction. Pw. 7 was also able to notice symptoms of the old pathway underneath the leveling work.

8. The Munsiff found these items of evidence sufficient to come to the conclusion that Karamban Kochan who was the common owner of both the properties formed a road and used it for vehicular access to the different portions covered by Exts. A1 and A2. The appellate judge also agreed with the trial court that there was such a pathway. Both the courts came to the concurrent conclusion that the alternate access pleaded by the respondent is a myth and that the only access to Ext. A2 property is the disputed pathway. I do not think that there is any reason to disagree on these aspects in view of the strong evidence available. The evidence is sufficient to conclude that during his life time Karamban Kochan formed the pathway for access to Exts. A1 and A2 properties not only by foot but by using vehicles also.

9. Therefore, the only question that remains to be considered is whether the appellate judge was justified in restricting the way to a foot-path on the ground that an easement of necessity could be claimed only to the extent of absolute necessity and not for convenient and reasonable enjoyment.

10. Easement of necessity arises on severance of tenements by transfer inter vivos, bequest or partition as envisaged in clauses (a), (c) and (e) of S. 13 of the Indian Easements Act. If such an easement is apparent and continuous and necessary for enjoying the subject as it was enjoyed when the transfer or

bequest took effect, the transferee or legatee, unless a different intention is expressed or necessarily implied, shall be entitled to such easement. Sub-sections (b) and (d) of S. 13 deal with what is called quasi-easements. Easement of necessity is one which is claimed without any express grant and it is on the basis of an implication of law alone. In such a case, it must be confined to an absolute necessity and no question of convenient and reasonable enjoyment may arise. So also, the easement being one of necessity must automatically come to an end when that necessity ceases by owner of the dominant tenement acquiring some other access or otherwise. But the alternate access should be one which could be used as a matter of right and not at the sufferance of somebody.

11. In this case what is claimed is really not an easement of necessity but a quasi easement. Quasi easements also arise by implied grant by fiction of law on severance of tenements by bequest, transfer or partition just like easements of necessity. It is an accommodation which existed during common ownership. Over and above necessity, the apparent and continuous nature of its use at the time of severance is necessary. But the necessity is not so absolute as in the case of easements of necessity, but only qualified. Quasi easement is available even when the property is otherwise enjoyable. Its limit is not restricted to absolute necessity, but controlled by the extent of the apparent and continuous user which existed at the time of severance. That limit cannot be increased or reduced except by consent (*Leela v. Ambujakshy*-1989 (2) KLT 142). A right of way will not generally come under quasi easements except when there is a formed road which was apparently and continuously used. In such cases, even without a grant, law implies a grant. The way which was in apparent and continuous use cannot be unilaterally interfered by the servient owner. The pathway was formed by the owner and he was regularly using it for a particular purpose. The user was apparent and continuous and necessary for enjoying Ext. A2 portion of the property at the time when Exts. A1 and 2 were executed. The respondent, who is the owner of the servient tenement, cannot, according to his own whims and fancies, say that so much width is not necessary or that vehicles need not be taken. He cannot compel the dominant owner to reduce or restrict the user which was available at the time when Exts. A1 and 2 were executed.

12. As is evident from Section 14 of the Indian Easements Act, when a right of way of necessity is created u/s 13, the transferor, the legal representative of the testator, or the owner of the share, over which the right is exercised, as the case may be, is entitled to set out the way but it must be reasonably convenient for the dominant owner. When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out. u/s 27 of the Indian Easements Act, even though the servient owner is not bound to do anything for the benefit of the dominant heritage and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement, he is not entitled to do any act tending to restrict the easement or to render its exercise less convenient. As provided in Section 28, an easement of necessity is co-extensive with the necessity as it existed when the easement was

imposed. At the time when the easement was imposed, if it was one intended and used for access by vehicular traffic, the servient owner has no right at a subsequent stage to say that vehicular traffic cannot be had and only access by foot will do.

13. An identical question was considered in *Varkey v. John* (1956 KLT SN page 35) (S.A. No. 491 of 1953). That was a case from the erstwhile Travancore State, where the Easement Act was not in force, but the English Law, based on principles of justice, equity and good conscience, was followed. That decision said :

Where two tenements are severed, the grantee takes by an implied grant all quasi-easements of an apparent and continuous nature. A right of way is not closed generally amongst quasi-easements of an apparent and continuous character. It is only when there is a formed road that the quasi-easement can be classed as one of an apparent and continuous nature. When there is a definite marked road, the plaintiff is entitled to use the same by way of an easement.

It is, therefore, clear that the Appellate Judge was not justified in reducing the extent of the easement and confining it to a mere foot-path. Even though the appellant claimed the pathway 15 feet in width, the evidence is to the effect that it is only 27 metres wide extending from the southern road upto the extremity of the appellant's southern gate. That pathway, which was obstructed by the respondent, will have to be restored by him. The appellant is also entitled to the injunction prayed for.

The second appeal is, therefore, allowed and the decree of the Appellate Judge is vacated and that of the Munsiff is restored. To make matters more clear, it is hereby declared that the appellant is entitled as a quasi-easement the pathway shown in Ext. C1 report starting from the southern public road and extending upto his gate. The pathway is a gravelled and metalled road, which is having a uniform width of 27 metres as shown in Ext. C1. That much portion of the pathway which was obstructed and tampered by the respondent will be restored by him to its original position. If not, it will be restored to its original position at the expense of the appellant through court and he will be entitled to realise all the costs and expenses from the respondent. The respondent is also restrained by injunction from interfering with the use of the pathway by the appellant in future. In view of the close relationship between the parties and the necessity of cordial relationship between them in future, I direct them to suffer their respective costs. The sketch attached to Ext. C1 report will be appended to the decree for easy reference.