
(1989) 05 KL CK 0011
In the High Court Of Kerala
Case No : Second Appeal No. 680 of 1983

Leela	Vs	APPELLANT
Ambujakshy and Others		RESPONDENT

Date of Decision : 31-05-1989

Acts Referred:

Easements Act, 1882 — Section 13
Transfer of Property Act, 1882 — Section 11, 40

Citation : AIR 1989 Ker 308 : (1989) 2 ILR (Ker) 690

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : P.K. Balasubramanyan, for the Appellant; N.P. Samuel, for the Respondent

Final Decision : Dismissed

Judgement

S. Padmanabhan, J.—Plaintiff in O.S. No. 13 of 1978 is the appellant. Her suit for declaration of the right to use the pipe line, motor and pump set for drawing water from the plaint Schedule 56 cents to irrigate her land was dismissed by both the courts below. O.S. No. 13 of 1978 was tried jointly with O.S. No. 15 of 1978 filed by the first defendant for injunction restraining plaintiff and others from obstructing the flow of water through the pipe connecting the lank in B schedule property and the tank well in A schedule property. That suit was decreed. But the decision was reversed in appeal and that suit was also dismissed. The decision was not appealed against.

2. Plaintiff and first defendant are sisters. They are owners of adjacent lands, which originally formed a compact plot owned by their father Krishnan. He installed a motor and pump set in the lank-well in the land which now belongs to first defendant. The entire land was irrigated through pipes from the lank-well. Supply of water to the tank-well was through underground pipes from a lank in the plaintiffs property. O.S. No. 15 of 1978 was filed because plaintiff obstructed flow of water to the tank-well.

3. Now the short question for consideration is whether the appellant, especially after she successfully contested O.S. No. 15 of 1978, is entitled to the declaration and injunction. Appellant got the property by Ext.B1 sale deed of 1961 from her father. First defendant also got her land by a sale deed from the father. That was in 1975. It is Ext.A1. Both the sale deeds were transferring absolute rights and possession though the defendants have a case that in spite of the sale deeds, the father was in possession till his death. But there is no case that title did not pass under Exts. B1 or A1. In Ext.B1, there is no condition at all restricting the right transferred to any extent. In Ext.A1 of 1975 also, there is no restriction in the body. But, while describing the schedule of properties, it is said that his second wife and other daughter will have the right to take water from the tank-well through the pipe lines for irrigating their lands subject to certain conditions. The claim of the appellant is based on this provision.

4. The motor, pump set and pipe lines are now more or less in disuse because flow of water to the tank-well in the first defendant's property from which water has to be taken through the pipe lines for irrigation of the other lands also is effectively blocked by the appellant and the parties have other irrigation facilities. Further by the dismissal of O.S. No. 15 of 1978 on the contest of the appellant the right to take water to the tank-well is also lost for ever to the first defendant. For that reason alone, the claim of the appellant will have to be rejected even if it is taken for granted that originally there was the right under Ext. A 1.

5. The trial Court dismissed O.S. No. 13 of 1978 on the ground that the reservation in the schedule in Ext.A1 will not confer any right because it is only a pious wish. The appellate Court said that the impugned provision in Ext.A1 is hit by the first part of Section 11 of the Transfer of Property Act and the second part is not applicable. Before this Court, there were two more claims, one u/s 40 of the Transfer of Property Act and the other as a quasi-easement u/s 13 of the Easements Act. So also, a claim in equity was put forward. I do not think that any of these claims could stand.

6. There is no question of the first part or second part of Section 11 of the Transfer of Property Act being applied in this case. By Ext. B1, absolute right was transferred to the appellant in 1961. Thereafter, the father had no right over that portion. Ext.B1 does not contain any direction or restriction which is void under the first part of Section 11. The direction or restriction is contained only in Ext.A1 of 1975. At that time, the father had no right over appellant's property since he parted with his rights 14 years earlier. By Ext.A1 also, absolute right was transferred to the first defendant. There cannot be any dispute that u/s 11 of the Transfer of Property Act, no restriction on the enjoyment of property transferred absolutely is justifiable *Lilawati and Others Vs. Firm Ram Dhari Suraj Bhan and Another*, The vendee is entitled to ignore a condition which cuts down his enjoyment of the absolute right of property, and any direction in the sale deed which is contrary to the enjoyment of such absolute estate is void and

unenforceable and could be treated as nonest under the first part of Section 11.

7. Second para of Section 11 is rather an exception to the first para. It was incorporated in recognition of the rule in *Tulk v. Moxhay* (1848) 41 ER 1143 (reprint) that the transferor may impose conditions restricting enjoyment of the land transferred if such restrictions are for the benefit of his adjoining land. The second para relates to the enforcement of the restrictions by the transferor against the transferee. The words used are "nothing in the section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of the breach thereof and it is for "securing beneficial enjoyment of another piece of such property" which belonged to the transferor at the time of the transfer on the basis of which the right is claimed. The only person entitled to impose and enforce such a condition is the transferor and that too only for the beneficial enjoyment of the portion retained by him at the time of transfer. It cannot be enforced by the transferee of another portion. A contract only binds the parties or their privies. The transferor cannot impose such a condition for the benefit of another person. The restrictive covenant could be enforced only by the transferor or a subsequent assignee from the transferor of the property for the benefit of which the covenant was made *Bhagwat Prasad Vs. Damodar Das and Others*,). Even if the provision in Ext. A1 is treated as a restrictive covenant and not a pious wish, the father was not entitled to make such a restriction for the benefit of the appellant's property, which was sold to her 14 years back.

8. Section 40 of the Transfer of Property Act deals with enforcement of the restriction by the transferor or his assignee against a purchaser from the transferee. That section also pre-supposes existence of a right to restrain the enjoyment in a particular manner for the beneficial enjoyment of his own property. Even under the second para of Section 40, there must be a right or obligation for that purpose arising out of a contract and annexed to the ownership of immovable property for the purpose of its enforcement against a gratuitous transferee or a transferee for consideration with notice of the right or obligation. Here, under Ext. A1, there cannot be such a right in favour of the appellant or an obligation for the first defendant. Therefore, Section 40 also cannot apply because validity of the covenant creating the right is a condition precedent.

9. The right cannot be claimed as a quasi easement u/s 13(b), (d) or (f) of the Easements Act also. The other clauses of Section 13 deal with easements of necessity while these three clauses concern quasi easements. Like easements of necessity, quasi easements , also arise only on severance of tenements, testamentary or inter vivos. It can arise in cases of partition also. The transferor, transferee, testator, legatee or parties to partition could get such rights. Quasi easement is an accommodation as it existed during the common ownership. That must not only be necessary for the enjoyment of the transferred, retained or severed portion, but also must be apparent and continuous during the common

ownership till the transfer, bequest or severance. The quasi easement is only to the extent it was enjoyed when the transfer, bequest or partition took effect. An apparent easement is one which could be perceived. Continuous easement is one which is or may be continued without the act of man. Unless it is also apparent and continuous, quasi easement cannot be claimed simply because it may be necessary for enjoyment. These two conditions viz. apparent and continuous, are not necessary for an easement of necessity. What is required is only that it must be necessary for the enjoyment. But in cases of I easements of necessity the necessity must be absolute in the sense that without it the property could not be enjoyed in any way or any state much less in the way or state in which it was enjoyed before. So also, as soon as the necessity ceases the easement of necessity also gets extinguished. But in the case of a quasi easement, the necessity is not absolute, but only qualified. It is available even in cases where the property is otherwise enjoyable. The only condition is that without the easement it is not otherwise enjoyable in the way in which it was enjoyed till the severance.

10. The property of the appellant was severed from that of the respondent and given to her in 1961 under Ext.B1. Thereafter, the property of the respondent continued with the father till 1975 and given to her only then under Ext.A1. Either as a transferor or as a transferee under Ext.B1 or Ext.A1 the appellant is not entitled to the right as a quasi easement. There is also no evidence of necessity or apparent and continuous nature of the user. Further the evidence shows that the right is not existing and the user is not now necessary or possible. Conduct of the appellant itself disentitles her also.

11. Then what remains is only whether the relief could be granted in equity. This is not a case in which the respondents agreed for consideration to restrict the enjoyment of the property transferred to them absolutely. The condition even if not a pious wish is repugnant to the absolute estate transferred and is void. It cannot be said to be a covenant running with the land or a covenant at all. But courts of equity, in the exercise of their equitable jurisdiction, use to enforce covenants in personam in deserving cases where third parties acquire the burdened land with notice of the previous lawful contract.

But that principle is also not applicable in this case because there is no covenant in favour of the appellant restricting the enjoyment of the respondents' property and the respondents taking Ext. A1 with notice of that covenant. *Tulk v. Moxhay* (1848) 41 ER 143 (reprint), relied on by the appellant, also considered only a case where it would become impossible for an owner of land to sell part of his property with such a covenant without incurring the risk of rendering what he retains worthless. Such a situation has not arisen in this case and no question of equity comes in.

12. Further injunction is an extraordinary discretionary relief. A person approaching the Court for such a relief must come with clean hands and he must do equity. He who seeks equity must do equity. Appellant obstructed water being

taken to the tankwell and successfully resisted the injunction relief claimed by the first respondent. Her suit was dismissed and the decision has become final. Now it is impossible to enforce the provision in Ext. A1 because water cannot be made available in the tank-well. Further the evidence is that each tenement is having independent irrigation facilities and the original arrangements fell into disuse.

Continuance of the suit could only be for a sadistic pleasure. The underground pipes installed by the father for taking water from the lank through the channel to the tank-well thus became useless for that purpose. The alleged admission in Para 5 of the written statement, even if it is an admission, will not help the appellant, under the changed circumstances. Further there is no admission at all as contended.

The second appeal is dismissed without costs.