
(2011) 03 KL CK 0342

In the High Court Of Kerala

Case No : Regular Second Appeal No's. 1267 and 1270 of 2005

Mathai

APPELLANT

Vs

Jordi Poulouse

RESPONDENT

Date of Decision : 24-03-2011

Acts Referred:

Easements Act, 1882 — Section 4, 8
Registration Act, 1908 — Section 17, 24, 52
Transfer of Property Act, 1882 — Section 54, 6

Citation : (2011) 3 CivCC 333 : (2011) 2 ILR (Ker) 484 : (2011) 2 KLJ 676 :
(2011) 2 KLT 605 : (2011) 3 RCR(Civil) 141 : (2011) 1 RCR(Rent) 420 : (2011)
1 RCR(Rent) 420

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Advocate : Jose Joseph Arayakunnel and Varghese Parambil, for the Appellant;
N. Subramaniam and M.S. Narayanan, for the Respondent

Final Decision : Allowed

Judgement

M. Sasidharan Nambiar, J.—Appellant is the Plaintiff in O.S. No. 201/2001 and the Defendant in O.S. 146/2001 on the file of Munsiff Court, Perumbavoor. Respondents in R.S.A. 1270/2005 are the Defendants in O.S.201/2001 and first Respondent therein who is the sole Respondent in R.S.A. 1267/2005 is the Plaintiff in O.S. 146/2001.O.S.201/2001 is filed by the Appellant seeking a decree for declaration that under Ext. A-3 agreement dated 14-2-1988, Appellant has every right to continue the pipeline through the plaint B schedule property and to pump water from plaint C schedule property to the plaint A schedule property and also to restrain Respondents by a permanent prohibitory injunction from interfering with the plaint D schedule pipeline or taking water through it. O.S. 146/2001 was instituted seeking a decree for mandatory injunction directing the Appellant to remove the pipeline which passes through the plaint schedule property, not being used and is in a dilapidated condition and a permanent prohibitory injunction restraining Appellant from trespassing into the plaint

schedule property or using it as a way. Plaintiff schedule property in O.S. 146/01 is the plaintiff B schedule property in O.S.201/01. Both the suits were tried jointly. Learned Munsiff on the evidence dismissed O.S.201/01 and granted a decree for mandatory injunction in favour of the Respondent in O.S. 146/01. Appellant challenged the said common judgment in A.S.234/2004 and A.S.235/2004 before Additional District Court, North Parur. Learned Additional District Judge on reappreciation of evidence confirmed the decree of the trial court and dismissed the appeals. R.S.A. 1267/2005 is filed challenging the judgment in O.S. 146/2001 as confirmed in A.S. 234/2004. R.S.A. 1270/2005 is filed challenging the judgment in O.S. 201/2001 as confirmed in A.S. 235/2004. The appeals were admitted formulating the following substantial questions of law.

(1) Does Ext. A-3 document stand cancelled automatically on the death of grantor Varkey due to the non-mentioning of it in Ext. B-I Will. What is the effect of the will deed on Ext. A-3 agreement?

(2) What is the legal effect of the acquiescence of the Defendants allowing the Plaintiff to take water for many years after the death of late Varkey? Will it constitute acquiescence by the Defendants of the Plaintiff's right under Ext. A-3 document?

2. Learned Counsel appearing for the Appellant and Respondent were heard.

3. The argument of the learned Counsel appearing for the Appellant is that courts below did not properly appreciate the pleadings or the ambit and scope of Ext. A-3 agreement or the right claimed by the Appellant. It was argued that Ext. A-3 agreement as such was extracted in the plaint and the necessary ingredients of the right claimed was also pleaded, though the particular right of easement was not specifically mentioned, the recitals in Ext. A-3 with the contentions raised in the plaint would establish that the right claimed by the Appellant is a right of easement by grant and courts below failed to take note of this material aspect. Learned Counsel argued that a proper appreciation of Ext. A-3 would establish that a right of easement was granted thereunder and plaintiff A schedule property belonging to the Appellant is the servient tenement and plaintiff B schedule property belonging to the Respondent is the dominant tenement and under Ext. A-1 a right was granted to the Appellant by the predecessor of the Respondent to take water from plaintiff C schedule property to the plaintiff A schedule property for its beneficial enjoyment and plaintiff E schedule is the pipeline through which water is being taken and in such circumstances the right granted under Ext. A-3 is not a licence as found by the courts below but a right of easement by grant and courts below should have granted the decree as sought for in O.S. 201/2001. Learned Counsel also argued that findings of the courts below that a document granting easement must be registered u/s 17 of Indian Registration Act is not sustainable and only if the dominant tenement is to be transferred and along with the dominant tenement the right of easement is also transferred, then only the document needs registration and when under Ext. A-3, a right of easement is granted, findings of the courts below that Ext. A-3 is bad for non registration is

unsustainable. Learned Counsel relied on the decisions the High Court of Madras in *Musunoori Satyanarayana Murti v. Chekka Lakshmayya* AIR 1929 Mad 79, *Gum Sone v. Cassim Dalla* Indian Cases 1916 (34) 95. Learned Counsel relying on the decision of the Apex Court in *Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others*, argued that it is not desirable to place undue emphasis on the form of pleadings and instead substance of the pleadings should have been considered and when all the essential ingredients were pleaded in the plaint, courts below should have treated the right claimed was only a right of easement by grant.

4. Learned Counsel appearing for the Respondent argued that a reading of Ext. A-3 agreement establishes that it is only a licence and not an easement. It was pointed out that the right given thereunder is only a personal right to take water from plaint C schedule property to the property of the Appellant through the property of the Respondent by laying down a pipe for the consideration of providing water to the use of the property of the first executant and in such circumstances it will not amount to a right of easement by grant. Learned Counsel also argued that when the licensor under Ext. A-3 licence is no more, the licence stands terminated and thereafter Appellant cannot exercise the right under the licence and therefore courts below rightly granted the decree in O.S. 146/2001 and dismissed O.S. 201/2001. Learned Counsel relying on the decisions in *Sorab alias S.P. Kavinda v. Viswanatha Menon* 1974 KLT 606, *Vimala v. Sankarankutty Nair* 2004 (2) KLT 57 Case 67, *Velayudhan v. Padmanabhan* 1988 (2) KLT 417, *Shantabai Vs. State of Bombay and Others*, , *Sunder Lal Vs. Sita Bali and Another*, , *Karselal v. Badriprasad* AIR 1922 Nag 162, *Dhool Singh v. Smt. Bardhu Bai* AIR 1974 Raj 90, *Saraswathi v. Bharath Textiles* 1992 (1) KLT 863, *B.S.N.L. and Others Vs. Subash Chandra Kanchan and Another*, , *Sant Lal Jain Vs. Avtar Singh*, argued that as Ext.A-3 creates only a licence Appellant is not entitled to the relief sought for.

5. The crucial question is what is the nature of the right created under Ext. A-3. Whether it creates an easement of grant as claimed by the Appellant or the right created is only a licence, as claimed by the Respondent. The facts are not disputed. Plaint A and C schedule properties belong to the Appellant and plaint B schedule property to the Respondent. Ext. A-3 was admittedly executed on 14-2-1988. The first executant was Mathai Varkey and the second executant the Appellant. Respondent is the successor in interest of the first executant. Under Ext. A-1 Mathai Varkey permitted Appellant to lay pipeline across the plaint B schedule property two feet below the ground level, to take water from plaint C schedule property to the property of the Appellant which lies to the west of plaint B schedule property. The plaint B schedule property was intended to be settled in favour of his third son N.V. Varghese. Before considering the nature of the right created under Ext. A-3 the distinction between a right of easement and a right created under a licence is to be born in mind.

6. Section 4 of the Indian Easements Act (hereinafter referred to as the Act),

defines an easement as follows:

An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own.

Section 52 of the Act defines a licence as follows:

Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

7. An easement is a right or interest in immovable property. When a right of easement is validly created, it is annexed to the land. The benefit of it passes with the dominant tenement and its burden passes with the servient tenement. The following characters are essential to an easement.

- (1) There must be a dominant and servient tenement.
- (2) An easement must accommodate the dominant tenement.
- (3) The right of easement must be possessed for the beneficial enjoyment of the dominant tenement.
- (4) Dominant and servient owners must be different persons.
- (5) The right should entitle the dominant owner to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of the servient tenement;
- (6) That something must be of a certain or well defined character and must be capable of forming the subject-matter of a grant.

8. When a person is granted a right which he otherwise does not have in or upon an immovable property of the grantor to do or continue to do something which would, in the absence of a grant would be illegal which is neither easement nor an interest in the property is called a licence. Thus license is a right granted by the owner of some immovable property to do or continue to do in or upon such immovable property of the grantor, something which in the absence of such right would be unlawful.

9. Once an easement is validly created, it is annexed to the land. The benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement, to every person into whose occupation the dominant and servient tenements respectively come. But a licence is distinguishable from an easement right as being personal to both grantor and grantee, unless it is coupled with a grant. The grant of licence may consist in the legalisation of only one particular act or a series of particular acts. Both the licence and easement legalises

unlawful acts but the legalisation in the case of a licence is limited while that in the case of an easement it is unlimited. A licence is only a right to do something and not a right to prevent something being done on the property of the grantor as is the case with the easement. Licence only legalises certain acts of the grantee and does not render any acts of the grantor unlawful. For a licence it is not necessary that the holder thereof must be the owner or occupier of certain land and he should hold the right for the beneficial enjoyment of such land. A licence is purely a personal right while an easement is a right appertaining to the land. Where the right concerned arises by grant and is a right to do some positive act or a series of such acts, it could either an easement or licence. It could even be an interest in the land itself. The Law of Easements and Licences by B.B. Katiyar Thirteenth Edn. at page 893 dealt with the distinction between a licence and easement. It reads as follows:

If the grant authorises the doing of only a single act or a limited number of acts it is purely a licence, but where the grant is couched in such words that such limitations cannot be ascertained with any amount of certainty, it is not easy to construe such grant. The difficulty is increased if the doing of such act is also beneficial to the land of the grantee. If the grant to do such positive act gives to the grantee the exclusive use of a certain interest in the land thereby excluding the grantor totally from the use of such interest himself, it amounts to the transfer of such interest and is neither a licence nor an easement. But if the grant is such that the grantor is not totally deprived of any use of his property which vests in the grantee but is only subject to the obligation of allowing certain acts of such user to be done by the grantee, the question arises whether it is an easement or only a licence. If such acts are not done for the beneficial enjoyment of some other property of the grantee the question simplifies itself and one can safely infer that it is only a licence. But if such acts are done for the beneficial enjoyment of the property of the grantee the right is generally an easement. But there may be cases in which although the right granted may consist in the doing of some positive acts for the beneficial in character and enjoyment as to constitute a personal right of licence. In the case of easement the legalisation of the acts of the grantee is only a means to an end which consists of the beneficial enjoyment of the grantee's own property, while in the case of licence such legislation is an end in itself without requiring any ulterior object to be served thereby, though incidentally, it may help the grantee in the beneficial enjoyment of his own property. A right of easement when granted or acquired becomes part and parcel of the right of property in the soil to which it is annexed and runs with it like any other right of property, while a licence only legalises certain acts of the particular person to whom it is granted on the property of the grantor and does not entitle him to delegate the authority thus granted to him to anybody else. So the points of difference between an easement and a licence may be summed up as follows:

(1) An easement is a right appertaining to property while a licence is only a personal right.

(2) An easement is a right in rem and is enforceable by all and against all into whose hands the servient and the dominant tenements respectively may come, while a licence is only a right in personam and, therefore, not so enforceable.

(3) An easement can be assigned with the property to which it is annexed, but a licence cannot be assigned at all except where it is a licence to attend a place of public entertainment.

(4) A right of easement is not revocable at the will of the grantor while a licence is so revocable, except where the grantor is estopped by his conduct from exercising the power of revocation conferred by law.

Where a deed of partition between two brothers recited that the brother without a well should be allowed the use of a well fallen to the share of the other brother, out of brotherly affection and not as of right, it was held that as the licence was granted as part of a partition, it was a licence coupled with transfer of property falling under Clause (a) of Section 60 and, therefore, irrevocable.

(5) A licence is permissive right traceable to a grant from the licensor either expressly or impliedly. But an easement is acquired either by assertive enjoyment by the dominant owner or by a negative covenant between the parties or by grant or by statute.

(6) An easement may be positive or negative in character, a licence is invariably positive and cannot be negative in character. It may be that there are cases in which a negative obligation might be cast on the licensor with the object of protecting a licence coupled with a grant but such obligation is due to the grant accompanying the licence and not to the licence per se.

10. Thus whether a particular agreement creates an easement or a licence depends on the construction of its language. In case of ambiguity or inconsistency the surrounding circumstances have to be considered. The points which generally arises for determination are whether the right in question is appertaining to land or is merely personal. Whether the benefit as well as the burden are annexed to the land or whether they are merely personal both to the grantor and the grantee. Whether the right in question creates an estate or it does not.

11. Learned Munsiff held that Ext. A-3 is a grant and hence the transaction requires registration and in the absence of registration the grant cannot be legal. Learned Additional District Judge also upheld the said finding. As rightly argued by the learned Counsel appearing for the Appellant the said finding is not legal. An easement can be acquired by an express grant or even by implied grant. The express grant could be oral and need not even be written and no form is prescribed. It will be sufficient if the words stated or written convey the idea of grant of a right of easement unequivocally. In B.B. Katiyar Law of Easements and Licences Thirteenth Edn. at page 12(14) the position is explained as follows:

an easement may be acquired by express grant. It may be oral and need not be

in writing or registered.

As a right of easement is a right available to the beneficial enjoyment of the dominant tenement, such right could be transferred along with the transfer of the dominant tenement. Without the transfer of the right of dominant tenement, a right of easement alone by itself cannot be transferred. When the dominant tenement is transferred, along with it the right of easement. But such transfer could only be by a registered document. Even otherwise the easement being annexed to the dominant tenement, it gets transferred along with the transfer of the dominant tenement. If the value of the dominant tenement exceeds ₹ 100 it should necessarily be registered. But it is not correct to say that a right of easement by grant could be created only by a registered document, for the reason that the transfer of right of easement along with the transfer of dominant tenement could only be by a registered document. As a right of easement by grant could even be created orally, the finding that the right of easement by grant could be created only by a registered document is erroneous.

12. Justice Madhavan Nair in *Musunoori Satyanarayana Murti v. Chekka Lakshmayya and Ors.* AIR 1929 Mad 79 quoting Peacock in his Tagore Lectures on the Easement Act by Mitchell that "by the law of India, wherever the Transfer of Property Act applies, the grant of easement by way of sale must be made by a registered instrument, an easement being an intangible thing, and if made by way of gift must also be by a registered instrument signed by or on behalf of the grantor and witnessed by at least two witnesses" held:

If I may say so with respect, very carefully and elaborately considered in *Bhagwan Sahai v. Narasingh Sahai* 1909 31 All. 612 and I cannot do better than refer to the exposition of the law on this point contained in that judgment in answer to the Appellant's argument. In that case "the owner of a house undertook by an "argument" to permit the owner of an adjoining house when he built a second storey which was in contemplation, to discharge rain water and also water used for daily household purposes into the premises of the former".

Referring to the argument that by this "agreement" its executant transferred a portion of his right of ownership as contemplated in Section 54 T.P. Act, Tudball, J. made the following observations:

Prior to the execution of the deed he had the right to prevent the discharge by the Appellant of the soiled water upon his tenement, as that would have been an invasion of his right. He did not transfer this right to the Defendant. He relinquished it, and it then ceased to exist pro tempore. It was not that right which arose in the Defendant but a totally opposite right, one hostile to the right which till then had reposed in the Plaintiff's vendor. The one right came into existence when the other came to an end. A fresh burden was imposed on the servient tenement the owner of which lost one of his rights; but he did not transfer the right so lost to the owner of the dominant tenement. The right lost was one which might possibly revive in the future. It seems clear to me that the

creation of a right of easement by grant is not such a transfer of ownership as is contemplated by Section 54 of the Act. Where under that section an easement is transferred it must be so transferred along with the dominant heritage. There is no other way of transferring it and this arises by reason of the nature of the right. It exists only for the benefit of the heritage and to supply its wants. There is nothing in law which necessitates the creation of an easement being evidenced by writing.

Then the learned Judge proceeded to discuss the authorities to which I have already drawn attention. Banerji, J., also expressed a similar view. This decision was followed by Jackson, J., in (Addepalli) Kondayya Vs. Yandru Veeranna, . A Bench of the Calcutta High Court in Sital Chandra v. Allen J., Delanney 20 C.W.N. 1158, has pointed out that the provisions of the Transfer of Property Act have no application to the creation of easements and that the Act was not intended to deal with them.

Justice Maung Kin of Lower Burma Chief Court in Indian Cases Vol.34 page 95 considering the decision in Bhagwan Sahai's case, which was relied by Justice Madhavan Nair in Satyanarayana Murti's case (supra), held:

In that case there was an unregistered document creating a right to discharge water on to a neighbours premises. It was contended that Section 54 of the Transfer of Property Act did not apply and that the document had a binding effect. Tudball, J. observed: -The argument is that the document now in question evidences not the transfer of an easement, but the creation of that right; that prior to the passing of Acts IV and V of 1882, the law did not require the express imposition of an easement to be evidenced by writing at all; vide Krishna v. Ruyappa Shanbhaga that Act V of 1882 made no change in the law in this respect; that Section 54, Act IV of 1882, related to the transfer of an easement and not to the creation thereof. Attention is called to Section 6, Clause (c) of that Act, which shows that an easement cannot be transferred apart from the dominant heritage and that the Act contemplates the transfer of a pre existing easement, and not the creation of a new one. In my opinion, these arguments are well-founded". The learned Judge further observed: - "It seems clear to me that the creation of a right of easement by grant is not such a transfer of ownership as is contemplated by Section 54 of the Act. Where under that Section an easement is transferred, it must be so transferred along with the dominant heritage. There is no other way of transferring it and this arises by reason of the nature of the right. It exists only for the benefit of the heritage and to supply its wants. There is nothing in law which necessitates the creation of an easement being evidenced by writing".

Banerji, J. who took part in the decision remarked with reference to Section 54 of the Transfer of Property Act as follows: -"That section contemplates the existence of a subsisting right of ownership in immovable property and provides for the transfer of such right. It cannot apply to the creation of a right. By the document referred to above, no existing right of easement was transferred but a new

easement was imposed on the property of the grantor. Section 54 has, therefore, no application.

In my opinion, nothing can be said against the arguments of the learned Judges of the Allahabad High Court. I would, therefore, hold that a right of way can be created by a verbal agreement.

Therefore courts below were erroneous in holding that a right of easement by grant could only be created by a registered document and as Ext. A-3 is unregistered, a right of easement cannot be created thereunder.

13. The question is whether a right granted to lay pipe across the property to another by the owner of the property would create a right of easement. It is profitable to appreciate Section 24 of the Act. u/s 24, the dominant owner is entitled as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Illustration (a) to Section 24 reads:

(a) A has an easement to lay pipes in B 's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

14. It is thus clear that laying pipe in another's land to convey water would create a right of easement.

15. Chancery Division Vol. XXV 183 gives further light into the controversy. The facts of the case show that there was the land called the Carrington estate. At a distance of 300 yards from the house of the Plaintiffs there is a deep spring of water called the Bottomless pit existed from which water passed by pipes through the Carrington estate for the supply of Plaintiffs' house and grounds. Considering the question whether the said right to take water through the land would amount to an easement, North J. held:

Then the question is how far the Defendant has done anything to interfere with that right. These pipes certainly are a conduit, and no doubt are the property of the Plaintiffs, and the right to have the pipes there as an easement upon the land, part of which the Defendant claims, carries with it the necessary right to enter on the land in order to do what is necessary to preserve the right as it exists. On this subject Gale quotes from Bracton this statement(1) "Ad aque ductum pertinet purgatio si cut ad viam pertinet refectio". Of "purgatio" of course, the literal English is cleansing that is, keeping it free from obstructions, whether the obstruction is caused by leaves or dirt, deposit fallen into it, or anything which would obstruct the flow of water as it had previously flowed. Then there is another right in connection with this, and Gale says(2):

"It would appear on the principles hereafter considered that where the enjoyment of the easement is had by means of an artificial work (opus manufactum) the owner of the dominant tenement is liable for any damage arising from its want of repair. Thus if a man carries water by means of conduit-pipes through his neighbour's land he must keep those pipes in repair", and *Bell v. Twentyman* is cited as an authority for that statement. It is quite clear that where a man has the right to cleanse a stream or to repair the banks for the purpose of keeping the stream going, he has the right to enter on the land for that purpose.

Thus it is clear that if a right is granted to lay pipe in a property by its owner, to the neighbouring owner to take water to his property, the owner thereby creates a burden on his property. Thus it becomes the servient tenement. The property of the neighbour for which the beneficial enjoyment is granted is the dominant tenement. Thus the right created is a right of easement which is annexed to the land.

16. The question then is what is the right created under Ext. A-3. Recital in Ext. A-3 could be summarised as follows: First executant is the owner of the properties in survey No. 838/6C,6D,6E,773/5,9 of Mazhuvannoor Village. Admittedly it is the plaint B schedule property. It is described as decided to be settled in favour of his third son N.V. Varghese. N.V. Poulouse, the eldest son of the first executant has installed a motor in a tank. To the south of that tank, second executant is having 1 cent of property in Survey No. 838/4A of the same village. It is the plaint C schedule property. Second executant is thereby granted right to lay two inch pipe across plaint B schedule property, two feet below the earth level, to take water from the motor pump house installed in the plaint C schedule property, to the property of the second executant which lies to the west of the plaint B schedule property and the Panchayat road. Appellant, the second executant, was thereby granted a right to take water by laying a pipe across the plaint B schedule property. According to the Appellant plaint D schedule is the pipeline installed as permitted under Ext. A-3. First executant thereunder undertook not to effect any permanent improvements over the land under which the pipeline is laid. He also granted a right to Appellant, the second executant, to make any repair to the pipeline, in case of any damage to the pipe, at his expense. At the same time it was provided that by such repair Appellant shall not cause any damage to the cultivation made and if any damage is caused, Appellant agreed to pay its compensation. It is also provided that without causing any damage to the property of the first executant, Appellant has a right of way to the pump house over the land where the pipeline is laid. It also provides that first executant has no right to cause obstruction to such entry. It also provides that in consideration of the said right Appellant has to give water for two crops necessary for the paddy fields belonging to the first executant, which lies to the east of the property of the first executant, free of costs. Appellant has agreed to give water free of cost. It is seen signed by both the Appellant and the first executant and two witnesses and the document writer.

17. A reading of Ext. A-3 makes it clear that the right given thereunder is not a personal right to the Appellant but a right for the beneficial enjoyment for the property of the Appellant which lies to the west of the plaint B schedule property and the road. Though the survey number or other details of the property for which the beneficial enjoyment is granted, is not specifically shown in Ext. A-3, it shows that the said property lies to the west of the plaint B schedule property of the first executant and the Panchayat road. It is not disputed that the said property is the plaint A schedule property. Under Ext. A-3 first executant granted right to the Appellant to lay a two inch pipe, two feet below the earth, to take water from the plaint C schedule property to the plaint A schedule property, across the plaint B schedule property. Apart from providing that the first executant shall not effect any permanent improvement on that portion of the property whereunder the pipeline is laid, a right was provided to the Appellant to effect repairs to the pipeline if necessary. It was also specifically provided that if the Appellant causes any damages to the cultivation while effecting repairs to the pipeline, the first executant shall be compensated. Apart from the said right to take water through the pipeline, Ext. A-3 further provides a right of way across the plaint B schedule property, over the portion where the pipe is laid, to the pump house in the plaint C schedule property. That right is not for the purpose of effecting repair if any to the pipeline. It is a right of access from plaint A schedule property through plaint B schedule property, to the plaint C schedule property, providing that the exercise of the right of way shall be without causing any damages to the cultivation in the plaint B schedule property. A negative covenant is provided against the first executant that he shall not obstruct the said right of way. It is profitable to quote the relevant recitals in Ext. A-3 as such:

Therefore it is clear from proper appreciation of Ext. A-3, which was omitted to be taken note of by the courts below, that under Ext. A-3 Appellant was granted a right to lay two inch pipe, two feet below the earth level across the plaint B schedule property from plaint C schedule property to plaint A schedule property, providing a right to effect repairs if any to the pipe and providing a negative covenant on the first executant not to effect any permanent improvements over that portion of the plaint B schedule property. In addition to this right, Appellant was also granted a right of way to reach the plaint C schedule property from his property which admittedly lies to the west of the plaint B schedule property, specifying that the said right of way is on the plaint B schedule property above the pipeline laid, from plaint A schedule property to the pump house in the plaint C schedule property. Ext. A-3 provides a specific covenant that the first executant shall have no right to prevent or cause obstruction to the said right. In such circumstances the right given under Ext. A-3 cannot be termed a licence as found by the courts below. Under Ext. A-3 a right of easement by grant is created over the plaint B schedule property, the servient tenement, for the beneficial and enjoyment of the plaint A schedule property, the dominant tenement. Two rights are provided under Ext. A-3. The first one is to lay a pipeline across the plaint B schedule property, two feet below the earth level,

from the plaintiff A schedule property to the plaintiff C schedule property. Incidentally in case of any damage caused to the pipeline right was granted to the Appellant to effect necessary repairs. To prevent causing any obstruction to that right, a duty was imposed on the first executant, not to effect any permanent improvements on the land, under which the pipeline is laid providing that in case Appellant causes any damages while effecting repair, first executant shall be compensated. The second right created under Ext. A-3 is a right of way from the plaintiff A schedule property, across the plaintiff B schedule property, to the plaintiff C schedule property over the land where the pipe is laid imposing a negative covenant on the first executant that he shall have no right to deny the said right or to cause any obstruction to the enjoyment of that right. If that be so, as far as the right of way is concerned, plaintiff A and C schedule property should be the dominant tenement, as the right granted thereunder is to have a way from plaintiff A schedule property to the plaintiff C schedule property. The rights granted thereunder is through the plaintiff B schedule property, which is the servient tenement. First executant being the owner of the plaintiff B schedule is competent to grant a right of easement by grant in favour of the Appellant as provided u/s 8 of the Easement Act. u/s 8 an easement may be imposed by any one in the circumstances and to the extent in and to which he may transfer his interest in the heritage on which the liability is to be imposed. The liability created under Ext. A-3 is in the plaintiff B schedule property. First executant was the absolute owner of that property at that time, though he had decided to settle it in favour of his third son. u/s 8, first executant is definitely competent to impose an easement on the plaintiff B schedule property. Under Ext. A-3, a right for the beneficial enjoyment of plaintiff A and C schedule properties was created. The right so created is not a personal right to the Appellant but a right to the beneficial enjoyment of plaintiff A and C schedule properties. The right created thereunder could only be a right of easement and not a licence.

18. True, the plaintiff did not specifically show that Appellant has claimed a right of easement by grant. But as rightly argued by the learned Counsel appearing for the Appellant, a pleading must be liberally construed and placing undue emphasis on the form is not in the interest of justice. The Honourable Supreme Court in *Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others*, held:

It is well-settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not

expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

Though there is no doubt that the relief should be founded on pleadings, when substantial matters relating to the dispute and the relief claimed are clear from the substance of the pleadings which is understood by the Respondent, placing undue reliance on the absence of pleading is detrimental to the interest of justice.

19. In paragraph 9 of the plaint Appellant has pleaded as follows:

The Defendants predecessor Varkey had every right to impose restriction on his absolute right over B schedule property. The restriction affecting the land and the right of owner was co-extensive with his interest in B schedule land.

It is clear that by the said pleading Appellant has contended that the first executant of Ext. A-3 has every right to grant an easement. Appellant has also quoted the entire Ext. A-3 agreement in the plaint and contended in paragraph 10 that the right granted, under all circumstances is of permanent nature and thus Varkey and his successors in interest cannot derogate from the grant, though it was thereafter pleaded that an estoppel by way of grant was created. It is clear from the written statement filed by the Respondent that the allegations in paragraph 9 and 10 of the plaint were denied and Respondent contended that it is only a licence and Appellant is not entitled to a right of easement. In such circumstances, I find that it is not in the interest of justice to deny the right of easement by grant available to the Appellant under Ext. A-3 for the sole reason that a right of easement by grant as such was not specifically pleaded. The relief sought for in the plaint was declaration of a right obtained under Ext. A-3 contending that the said right is a permanent right which cannot be taken away. Though a licence granted would stand terminated by the death of the grantor or the grantee and will not get transferred to the legal representatives of a grantor or the grantee as it is not a right which is annexed to the property but a personal right, a right of easement is alienable and is binding on the legal heirs of the grantor and also to the legal heirs of the grantee or his transferee. If Plaint B schedule property is burdened with a right of easement, when the first executant transferred his right, that burden would shift to the transferee and Respondent is therefore bound by the burden and the Appellant is entitled to the beneficial enjoyment not only against executant but also his legal heir or transferee. When the property was transferred by the first executant of Ext. A-1, the burden

created earlier being the right of easement, will not be terminated on such transfer. The right of easement which runs with the property would get transferred to the transferee. Hence non mentioning of the right provided under Ext. A-3, in Ext. B-I will, is of no consequence. The Plaintiff in O.S. 146/2001 is therefore not entitled to get a decree for mandatory injunction as sought for because Respondent is entitled to a right of easement by grant. Appellant is entitled to get a decree in O.S. 201/2001 declaring that he has every right under Ext. A-3 agreement to continue the pipeline laid across plaint B schedule property and to pump water from plaint C schedule property. He is also entitled to get a decree for permanent injunction from causing any interference in that right.

Appeals are allowed. The judgment of the Additional District Court, North Paravoor in A.S. 234/2004 and A.S. 235/2004 confirming the common judgment and decree in O.S. 146/2001 and O.S. 201/2001 are set aside. O.S. 146/2001 stands dismissed. O.S. 201/2001 stands decreed as follows: It is declared that Appellant Plaintiff has every right to continue the pipeline laid across plaint B schedule property and to pump water from plaint C schedule property to the plaint A schedule property, though plaint D schedule pipeline and to effect its repair if any as provided under Ext. A-3 though he is liable to pay damages if any caused to the cultivation in the plaint B schedule property by such act. The Respondent is restrained by a permanent prohibitory injunction from interfering with the repairs of the plaint D schedule pipeline as and when necessitated. Parties to bear their respective costs.