
(1988) 02 KL CK 0049
In the High Court Of Kerala
Case No : S.A. No. 266 of 1982

Thomman

APPELLANT

Vs

Kuriako

RESPONDENT

Date of Decision : 09-02-1988

Acts Referred:

Citation : (1988) 02 KL CK 0049

Hon'ble Judges : M.M. Pareed Pillay, J

Bench : Single Bench

Advocate : George Varghese Kannanthanam, for the Appellant; V. Parameswara Menon and Joseph J. Therattil, for the Respondent

Final Decision : Allowed

Judgement

Pareed Pillay, J.—Plaintiff who succeeded in the trial Court and routed in the lower appellate Court is the Appellant. The Sub Judge allowed the appeal and dismissed the suit holding that the Plaintiff has failed to prove dedication of the road by the Defendants.

2. Existence of the plaint schedule road since 1121 M.E. is spoken to by PW-1. In an earlier suit (O.S. 50 of 1958) with respect to the very same road PW-3, an Advocate Commissioner had filed Exts.A-2 and B-I reports. PW-3/has reported about the existence of the road in Ext.A-2 and estimated its age as 10 years. Along with Ext.A-2 report PW-3 had also filed a sketch showing the location of the road. In the present case PW-7 Commissioner has prepared Ext.C-1 report and Ext.C-1(a) sketch. The sketch Ext.C-1 (a) shows that the road branches from Kaliyar-Koduveli road and goes south up to Manchodu nilam. It is in evidence that thereafter the road passes through paddy fields leading to Neyyassery. Of course, the width of the road when it passes through the paddy fields is narrower than the road up to Manchodu nilam. PW 7's evidence shows that the road separates the properties on either side by kayal as and fences. PW-7 also noted the presence of tyre marks of vehicles up to the northern boundary of Manchodu nilam. Ext.C-1 report has given elaborate details of the road.

3. Apart from the commission report there is also the evidence of PW-2, the Executive Officer of Kodikul am Panchayat who spoke about the plaint schedule road. Ext.A-3 is the road register maintained by the Panchayat. Item No. 17 in Ext.A-3 is the disputed road. PW-2 stated that this road is maintained by the Panchayat. PW-5 President of the Panchayat since 1964 stated that on the basis of a mass petition that the Panchayat should maintain the road, it undertook the maintenance in 1958. PW-6 deposed that the persons of the locality with the consent of the land owners constructed the road up to Manchodu nilam and that he also participated in the construction works. The evidence unflinchingly establishes the existence of the road.

4. The question to be considered is whether the Sub Judge was justified in dismissing the suit overlooking the avalanche of materials regarding the existence of the public road on the ground that evidence is lacking with regard to its dedication. In other words, can the suit be rejected solely on the ground that there is no evidence of dedication.

5. The right to enjoy a highway is a free right. Rights over highways are rights in gross unappurtenant in any dominant tenement. Even in a case where evidence is lacking with regard to the dedication and where there is ample evidence with regard to the existence of road which is used by the public it can be inferred that the owners of the adjacent properties intended to make over to the public the right to use their land as a public highway. In *J. Anderson v. Juggoduma Dabi* (6 CLR 282) it is held as follows:

In order to establish that a road is a public road, it is sufficient if acts of user by the public are shown to have been acquiesced in by the owner of the land over which the road passes, and that those acts are of such a character as to warrant the inference that the owner intended to make over to the public the right to use the land as a public highway.

6. High way may be created either by statute or it may come into existence through dedication by the landowner allowing the public the right to pass or repass over his land. Dedication implies a gift. But it is not necessary that the dedication must be made by a deed or by written instrument. The dedication though not made in express terms may well be presumed from uninterrupted use by the public of the right of way claimed. More often, it can be presumed from custom and user than from the definite act of the owner of the land. *Animus didicandi* on the part of the land owner has to be proved in a case where Plaintiff relies on dedication. But in a case where there is evidence of long and open user of the road by the public it can definitely lead to the presumption that the land was dedicated as a highway. Dedication is something equivalent to an irrevocable licence granted to the public by the owner of the land through which the road passes. Even in a case where dedication as such is not proved a Plaintiff who wants declaration of the right of way can succeed in the suit if there is evidence with regard to, the continuous user of the way by the public. In a case where there is evidence of public use of the way to the knowledge of the land owner

and without resistance dedication can certainly be inferred. In *Laxman v. Tukia* AIR 1918 Nag 166 it is held as follows:

Public rights of way are not easements. Public, deferring from private rights of way originate from a dedication to the public by the owner of the soil over which they pass. Dedication means a gift not necessarily by a deed or any written document, and it is more often implied from custom and user than from any definite act of the owner of the land. Even when no such overt act can be shown if the public use a way for some time to the knowledge of the land owner and without resistance, dedication will be inferred and a right gained.

Thus the legal position is that if the evidence raises a presumption of dedication the Court shall presume it and not merely ignore it. Dedication can be presumed from the user of the highway whoever was the owner of the site when its user by the public commenced. Reliability of the evidence of the user of the road greatly depends upon the longevity and in interrupted openness of the user. Maintenance of the road by the local authority or government is also a crucial factor to be reckoned. The evidence that the owner of the land has acquiesced in the user of the way is an affirmative circumstance indicative of dedication. The position will be different if the land owner was not aware of the user of his property by the public. In the present case the Defendants have no case that they were not in the locality at the time when the general public began using the road which runs through their property. It is also useful to refer to *Vibudapriva Thirtha Swamy v. Eroof Sahib* (35 Mad 28) where it is held as follows:

Where user as a highway, sufficient to raise a presumption of dedication has been proved, the dedication will, in the absence of evidence to the contrary, be presumed, if possible, to be unrestricted.

7. As the right of easement is claimable on the land of another and as it is not a personal right, a right attached to such land it is essentially different from a claim over a public pathway. A public pathway on another's land can be claimed by a person though he does not have a dominant tenement. It is also not necessary to prove the user and the exercise of right of way for 20 years or even for any fixed period. There can be cases where user will be the only evidence of dedication. In AIR 1936 797 (Lahore) the Lahore High Court held thus:

A right of easement is claimable on the land of another by the owner of land. It is not a personal right but it attaches to land and is exercisable over another's land. A public pathway however may be on another's land but the exercise of a right of passage over it does not necessarily require that the person claiming it must prove that he is owner of some land. In other words the existence of a dominant tenement is not necessary. And it is not necessary to prove the user and the exercise of right of way for 20 years or even for any fixed number of years. User will be only evidence of original dedication in such cases.

The position that no particular period is necessary to prove the user and the exercise of right of way is followed by the Calcutta High Court in *Panchanon Ray*

and Others Vs. Fazlur Rahman Chaudhury and Others, . That decision says:

As regards the length of public user, the period is material only as one element from which the intention to dedicate may be inferred; there is neither a fixed minimum period nor a fixed maximum period which must compel such an inference for it is dedication and not user that constitutes a highway; user is merely the evidence that proves the dedicating but it does not follow that such a person must be proved to be living within the period over which actual user is established. So long, therefore, as dedication may be inferred from user, it is by no means necessary that the evidence of user must go back to the date of dedication. The dedication can be presumed from long user.

Thus there cannot be any doubt that long user of a road by the public openly and as of right is sufficient to raise a presumption of its dedication. It is also fortified by the decision in *Municipal Committee, Karnal v. Muhamad Rustan Ali Khan* AIR 1916 Lah 223.

8. Another contention that the road does not end in a public place and therefore it cannot be considered to be a public way also is not tenable. Most often, a public highway begins from a public place and ends in such a place. But it is not the sine qua non that it is always necessary that the public highway should begin from one public place and end in such a place. A road beginning from a public place and traversing considerable distance may terminate in a paddy field from where further access is barred. This is still a public road catering to the needs of the public. Merely because one end is a blind alley it cannot be held that it is not a public road. In *Surendra Nath Saha and Others Vs. Harendra Kumar Saha and Others*, it is held as follows:

It is usual that a public highway implies a thoroughfare that is, it must begin from and end in a public place, but is not sine qua non. There is no rule that a cul de sac cannot be a public highway. If there is access from a public place at one end only, a piece of ground can be a public highway, if the evidence supports the case of its dedication to public use.

In the case in hand there is evidence that the road branching from the Kaliya-Koduveli main road reaches Manchodu nilam and from there it proceeds to Neyyassery though the road through the fields has only relatively narrow width. Nevertheless persons use this road to reach Neyyassery from Kaliyar-Neduveli road. Hence the contention that it is not a public road is not sustainable.

9. Ext.A-3 as well as the evidence of the Panchayat President and the Executive Officer would unequivocally show that the road has vested with the Panchayat and it is being maintained by it. In view of the above impeccable evidence, dedication even if not prove by the Plaintiff, can be presumed.

The trial Court was justified in holding that the plaint schedule road is in existence from 1121 M.E. that it is a public road and that the Defendants cannot interfere with it. The Sub Judge erred in allowing the appeal. The judgment and

decree of the Sub Judge in A.S. 41 of 1980 are hereby set aside and that of the trial Court are confirmed. The Second Appeal is allowed with costs.