

Radhamani vs Indiramma

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Court : Kerala

Decided On : Nov-23-2022

Judge : Honourable Mrs. Justice M.R.Anitha

Appeal No. : RSA/132/2021

Appellant : Radhamani

Respondent : Indiramma

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE M.R.ANITHA
WEDNESDAY, THE 23RD DAY OF NOVEMBER 2022 / 2ND
AGRAHAYANA, RSA NO. 132 OF 2021 AGAINST THE JUDGMENT
AND DECREE DATED 06.11.2020 IN AS 63/2017 OF ADDITIONAL
DISTRICT-III, MAVELIKKARA AGAINST JUDGMENT DATED
31.03.2017 IN OS 115/2014 OF MUNSIF COURT, MAVELIKKARA
APPELLANTS/APPELLANTS/PLAINTIFFS: RADHAMANI AGED 66
YEARS W/O. RAGHAVAN ACHARY, KOTTAVATHUKKAL,
KOTTARKAVU MURI, MAVELIKKARA VILLAGE, MAVELIKKARA
TALUK. BY ADV R.JAYAKRISHNAN (MUTHUKULAM)
RESPONDENTS/RESPONDENTS/DEFENDANTS: 1 INDIRAMMA

AGED 68 YEARS W/O. KRISHNAN POTTY, JYOTHIS VEEDU, KOTTARKAVU MURI, MAVELIKKARA VILLAGE, MAVELIKKARA TALUK 690101 2 JAYAKRISHNAN AGED 47 YEARS S/O. INDIRAMMA, JYOTHIS VEEDU, KOTTARKAVU MURI, MAVELIKKARA VILLAGE, MAVELIKKARA TALUK 690101 BY ADVS. SMT.ASHA ELIZABETH MATHEW RINNY STEPHEN CHAMAPARAMBIL - R1 AND R2. THIS REGULAR SECOND APPEAL HAVING COME UP FOR ORDERS ON 09.11.2022, THE COURT ON 23.11.2022 DELIVERED THE FOLLOWING: M.R.ANITHA, J ***** R.S.A.No.132 of 2021 ----- Dated this the 23rd day of November, 2022

JUDGMENT

This R.S.A has been directed against the judgment and

decree in A.S.No.63 of 2017 on the file of Additional District Court-III, Mavelikkara which arise out of the judgment dated 31.03.2017 in O.S.No.115/2014 on the file of Munsiff's Court, Mavelikkara. Suit is one for declaration and for permanent prohibitory injunction. (Parties will hereafter be referred as per their status before the trial court)

2. Plaintiff A schedule property belongs to the plaintiff who

obtained the same as per Ext.A2 sale deed and Ext.A3 settlement deed. Plaintiff's husband and his brother obtained title over the plaintiff A schedule property as per Ext.A1 partition deed described as item Nos.2 and 3. Plaintiff B schedule property belongs to the

defendants which lies immediately on the north of plaintiff A schedule property. Plaintiff C schedule is a pathway having width of 2 meters and length of 17 meters which starts from the southern side of plaintiff B schedule property and reaches upto Budha Junction-Railway Station, Public Road. Plaintiff has been using C schedule pathway from 03.03.1987 onwards openly peacefully without any interruption as of right as an easement. There is no access to plaintiff A schedule property. When the

defendant

attempted to beautify the plaint C schedule way paving interlocked tiles, O.S.No.84/2012 was filed. That suit was withdrawn with liberty to file fresh suit. Defendants are causing obstruction for erecting electric line and drawing water line through plaint C schedule property. Hence the suit.

3. Defendants filed joint written statement denying the

claim of right of easement by prescription over C schedule property to the plaintiff. First defendant and her husband purchased pathway for having access to the public road on the southern side as per Ext.B1 in the year 1969. Thereafter, property owners on either side dedicated property whereby the present road came into existence. The use of plaint C schedule pathway with the consent of the defendant is admitted. Plaintiff has no right to draw water line and telephone connection through C schedule way.

4. PW1 to PW3 were examined. Exts.A1 to A6 series were marked from the side of the defendants. Exts.B1 to B4 were marked from the side of the defendants.

5. On appreciating the facts and circumstances and

evidences adduced, the learned Munsiff dismissed the suit on the ground that the plaintiff failed to prove the right of easement over C schedule pathway. Against which the plaintiff filed appeal and first appellate court, by the impugned judgment and decree, dismissed the suit confirming the judgment and decree passed by the trial court. Aggrieved by the same, plaintiff approached this Court in second appeal.

6. Notice was issued to the respondents/defendants and both sides were heard.

7. According to the learned counsel for the plaintiff, the

suit was dismissed mainly on the ground that plaintiff claims ownership right over the plaint C schedule pathway and is not admitting the ownership of the defendant over C schedule pathway. O.S.No.84/2012 was filed by the plaintiff against the defendant and it was withdrawn when it was found that plaint C schedule way is

owned by the defendant. It is also his contention that in the plaint schedule description, plaint B schedule is described specifically including plaint C schedule also. According to him, the plaintiff has shown the C schedule as the property of the defendant and hence the findings of the court below that the plaintiff did not admit ownership of the defendant over the C schedule property is incorrect. It is also his contention that plaintiff has filed I.A.No.03/2020 for amendment of the plaint but that was dismissed by the first appellate court. So, at any rate, according to him, the dismissal of the suit by the trial court as confirmed by the first appellate court is illegal and is liable to be interfered with.

8. Learned counsel for the defendants, on the other

hand, would contend that the defendant has no objection in plaintiff using plaint C schedule pathway as passage to plaint A schedule property. It is his specific contention that it was purchased by him as per Ext.B1 and plaintiff is using the said way with the permission of the predecessors of the defendant. It is also contended that there is no specific averment in the plaint that plaint C schedule property belongs to the defendant. The plaint averment is silent as to the ownership of plaint C schedule property. Moreover, during evidence, PW1 repeatedly stated that plaint C schedule property belongs to the plaintiff and her predecessors. He would further contend that apart from the interested testimony of the plaintiff and her daughter as PW2, no

independent witnesses were examined to prove the long continuous uninterrupted open use of C schedule way by the plaintiff as an easement. It is also his contention that the plaintiff actually wanted to draw a pipeline through the plaint C schedule pathway for which she has no right. When they took steps for

paving tiles through C schedule pathway, plaintiff filed O.S.No.84/2012 and that was subsequently withdrawn. It is also his contention that earlier, admittedly by the plaintiff, when there was attempt on his part to draw electric line through plaint C schedule way it was not permitted by the defendant and thereafter the plaintiff drew the electric line through another neighbour's property. That would itself indicate that the plaintiff has no right to draw pipeline through plaint C schedule way, the learned counsel contends.

9. Ownership of plaint A and B schedule properties to the

plaintiff and defendant is not in dispute. The use of plaint C schedule as a pathway to plaint A schedule property is also not in dispute. Though plaintiff claims a prescriptive right of easement over plaint C schedule way, that has been concurrently found against the plaintiff by the courts below. The main reason for denying the right of easement by prescription is the absence of pleading in the plaint that the defendant is the owner of the plaint C schedule servient tenement. So also, PW1 during cross-

examination as well as in re-examination reiterate that plaint C schedule property is owned by her. In this context, the learned counsel for the defendant placed reliance on Lilly and Others v. Wilson and Others : 2018 (1) KHC 623 : 2018 (1) KLT 772 wherein while dealing with a right of easement by prescription, it has been held that easement is a right by which an owner or occupier of a land has for the beneficial enjoyment of his land over the land belonging to another - both ownership and easement right thereto cannot co exist simultaneously. Further, the phrase not his own in Section 4 make it clear that owner of servient tenement and dominant heritage must be different. Definition of Section 4 of Easement Act also would make it explicit that 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. So, there won't be any dispute to the point that in order to exercise a right of easement

the plaintiff should admit that the property through which the right is claimed belongs to another person.

10. In the present case, during evidence plaintiff

repeatedly states about her ownership over plaint C schedule property. Though PW2 the daughter of PW1 would state that C schedule property belongs to the defendant, her evidence is in conflict with that of PW1 and has been rightly discarded by the courts below.

11. It is true that learned counsel would contend that

I.A.No.3/2020 has been filed for amendment of the plaint before the first appellate court. But, the order in I.A.No.3/2020 would show that it has been filed after the hearing of A.S.No.63/2017. On finding that PW1 tendered evidence to the effect that plaint C schedule property belongs to her, the learned Additional District Judge was pleased to dismiss that petition. In this context, learned counsel for the plaintiff placed reliance on Lakshmi and Others v. Yatheendradas and Others : 2020 (2) KHC 204 wherein while dealing with Order VI Rule 17 amendment to

pleadings it has been held that a duty is cast upon Court to see whether amendment is intended to delay or frustrate suit. In paragraph 28 it has been discussed that the power of a Court, be that of the Trial court or Lower Appellate Court, to entertain an application for amendment cannot be said to be not available,

merely because the trial had commenced. That being so said, the imperative criterion, inter alia, is that a Court must examine, before allowing an application for amendment after the trial has commenced, whether it is intended to delay or frustrate the suit and if the party seeking such amendment has conducted himself/herself until then diligently, but still could not have sought the amendments before the commencement of the trial.

12. In the present case, first of all the petition for

amendment has been filed after hearing the appeal by the first appellate court. So also, during evidence, PW1 deposed that she is not admitting the ownership of the defendant over C schedule pathway and it belonged to her. During re-examination, though there was an attempt made by the plaintiff's counsel to clarify that aspect, she reiterated that C schedule pathway belongs to her. So, no amount of amendment can rectify the evidence so tendered by PW1. So, there is nothing illegal in dismissing I.A.No.3/2020 by the first appellate court.

13. As stated earlier, the defendant has no objection in the

plaintiff using plaint C schedule way as passage to plaint A schedule property. The earlier suit has been filed by the plaintiff when the defendant collected materials for paving tiles on C schedule property. In the present suit also, the plaintiff sought for an injunction for restraining the defendant from causing any alteration or committing any waste or causing any obstruction in drawing the electric connection, telephone connection and water connection through C schedule way. So, the real dispute between the parties is for drawing the water line, electric connection and

telephone line etc. through the pathway. Even in the plaint, plaintiff has alleged that when she attempted to draw electric connection through C schedule way the defendants did not permit her and thereafter electric connection was drawn through

the eastern side with the permission of the owner of the property on the eastern side. So, that itself would indicate that the defendant objected in drawing electric connection through the plaint C schedule property on earlier occasion. Even if the plaintiff acquired any right of easement by prescription for passage through C schedule way, that by itself would not confer any right upon the plaintiff to draw the pipeline through C schedule way. It is relevant in this context to quote Section 24 of the Indian Easement Act, 1882 wherein it has been provided that 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. It also provides about accessory rights -- Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

Illustration (a) would provide that 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. The above provision would make it clear that in order

to draw a pipeline through one's land by the other there should have an easement right. Only if such an easement right has been acquired, he can enter and dig the land in order to ment

the pipes. In the present case, it has already been found that the plaintiff failed to prove the right of easement over C schedule way by prescription. So, the question of the right of plaintiff to lay pipe or draw the electric line or telephone line would not arise. In this context, learned counsel for the defendant drew my attention to *Mansha Ram Payal and Another v. Dr.Ved*

Prakash : 2009 SCC Online Utt 607 wherein it has been held

that acquisition of a way by prescription for the long continuous uninterrupted peaceful open use for more than 20 years will not confer any right for laying sewer line in the land of another person. Quoting *Bankey Lal v. Kishan Lal : 1967 Allahabad Law Journal 107* it is also held that prescriptive right to commit

nuisance on another man's land cannot be acquired as easement. So, the drawing of pipeline through another's property if at all a property over which the other person has right of easement by prescription for passage by itself will not confer any accessory right of drawing pipeline or electric line telephone line etc without a specific acquisition of right of easement for that purpose.

15. Learned counsel for the defendant also bring to my

attention *Alexander .P.C. v. K.E.Joseph @ Benny : 2017 (4) KLT 971 : 2017 (5) KHC 307* wherein it has been held that when user of pathway was permissive, it cannot be said that its user is 'as of right' and it is also held that permissive user, for whatever period, will never create any right of acquisition by prescription within the meaning of Section 15. Defendant has got a specific contention that plaintiff has been using plaint C schedule way with the permission of the predecessors of the

defendant. Plaintiff also could not establish a right of easement by prescription as sought for. So, naturally the case of the defendant that the plaintiff has been using the C schedule way with the permission of the defendant and his predecessors is

only to be accepted.

16. In effect, I am of the considered view that the courts below have evaluated the facts and circumstances and evidence adduced and law involved in a correct perspective and no

substantial question of law arises for consideration for entertaining this second appeal. In the result, appeal is found to be devoid of any merit and hence dismissed. No cost. (sd/-) M.R.ANITHA, JUDGE jsr True Copy P.S to Judge

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