

Varkey John Vs. Varkey Stanselose and ors.

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Court : Kerala

Decided On : Feb-20-1973

Reported in : AIR1973Ker198

Judge : V.P. Gopalan Nambiyar, J.

Acts : Easements Act - Sections 15

Appeal No. : S.A. No. 515 of 1969

Appellant : Varkey John

Respondent : Varkey Stanselose and ors.

Advocate for Def. : George Vadakkal,; Varghese Kalliath and; Joseph Vithayat

Advocate for Pet/Ap. : P.K. Kesavan Nair,; K.N. Narayana Pillai and; M. Ramacha

Disposition : Appeal allowed

Judgement :

V.P. Gopalan Nambiyar, J.

1. In accordance with my order dated 5th September, 1972, the Additional District Judge has returned the findings called for on the question as to whether the plaintiff-appellant is entitled to relief (F) or, in the alternative, relief (G) contained in

the plaintiff The findings are in favour of the appellant; and counsel for the 1st respondent has preferred objections to the findings.

1-A. The learned Additional District Judge has recorded:

'The defendant does not dispute the existence of the canals on the 4 sides of the plaintiff B schedule not only at the time of the institution of the suit, even at the time of the controversial original central channel in B Schedule was in existence. So also he has no serious dispute that after the destruction of the central channel in E schedule water from plaintiff's A schedule property was being carried and drained out towards south through the north, south, west and eastern canals.'

Adverting to the question how far the plaintiffs can claim the relief (F) or alternatively relief (G) claimed in the amended plaintiff, the learned Judge observed :

'Upon considering the allegations in the plaintiff as well as the evidence of P.W. 1, plaintiff's case that the canals were dug up by the defendant in pursuance to the mediation cannot be wholly accepted as the probability is even before that the defendant had either started digging up the canal or was contemplating to have such canals all round his property. Whatever that may be, the fact remains as is disclosed by the evidence of P.Ws. 1 and 2 that the defendant Save a gentleman's assurance that water could be drained out from these canals in substitution of the original channel. P.W. 2 who is the brother of defendant swears that when plaintiff made a complaint to him about the action of the defendant he approached the defendant and asked about the same. Then he stated to him that he would be digging a canal on the western side of the B schedule property and a portion of the said canal had already been completed and through that canal water from A schedule property could be drained out' He eventually recorded:

'I have no hesitation to hold that there has been in fact an understanding arrived at in regard to the substitution of these canals on the north, west, south and east of plaintiff B schedule property in the place of the original channel filled up, for draining out the water from plaintiff's A schedule property.' XX XXxHowever. I would like to add that this (G) relief claiming restoration or reinstatement of the original channel running in the middle of B schedule is neither feasible nor practicable inasmuch as

restoration of the original channel in the B schedule, at this stage, no doubt will again result in cutting this holding into two parts which in the interest of convenient enjoyment of the property of the defendant as a compact holding should as far as possible be avoided. Upon considering the balance of convenience of parties as well considering the fact that this original channel has been filled up long time past and canals on the outskirts of the property have been substituted in its place, granting of relief (G) appears to be either not desirable or one that could be avoided as far as possible in the circumstances of the case. For all that, if for any reason, granting of 'F' relief is found to be not possible or expedient, alternative 'G' relief, the plaintiff is entitled to be granted viz. restoration of the original central channel in B schedule property. To put it more precisely plaintiff is entitled to have either of the reliefs 'F' or 'G' preferably 'F' relief.'

2. On these findings, counsel for the 1st respondent argued that the claim of the plaintiff was to drain water through a well-defined channel, namely, through the middle channel that ran through the A and B schedule properties, that an easement to this effect not having been established by enjoyment for the statutory period of 20 years, a right to drain the water through the channel running from west to east in the north of the B schedule property and then through its western and eastern sides from north to south, can also be acquired only by uninterrupted use or enjoyment for the statutory period, of which there was no evidence. I think the argument proceeds on a misconception. It is true that the plaintiff's claim was to drain water from the A schedule to the B schedule property, but not confined to the middle channel that ran through both. The court below found--as I will show wrongly--that there was an interruption of this right, within the statutory period of 20 years, and that after such interruption the plaintiff was draining the water through the channels in the north, west and east of the B schedule property, as noticed in the findings now sent up BY the Additional District Court. This, the plaintiff was doing under circumstances, now found and recorded by the District Court, in the finding sent up in pursuance of this Court's order. If so, it is clear that there has in fact and in law been no interruption of the plaintiff's right of drainage. The third paragraph of Section 15 of the Indian Easements Act, 1882. which is the relevant provision, reads as follows:

'15

where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years.

the right to such access and use of light or air, support or other easement shall be absolute.'

Explanation II to the Section, which is of particular relevance, reads:

'Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.'

Section 15 only requires that the easement should have been peaceably enjoyed without interruption. In this case, the easement claimed, which on a reading of the plaint, seems to be to drain the water from the A schedule property through the B schedule property, was peaceably enjoyed without interruption, for the requisite period. There was no doubt a change in the mode of enjoyment at a certain period, when, instead of draining the water through the middle channel in the B schedule property, the plaintiff drained it through the northern, western and eastern channels. But this did not constitute an interruption of the right having regard to the circumstances under which the difference in the mode of the enjoyment of the easement happened to be brought about, as recorded in the finding of the District Judge. This is further reinforced by Explanation II to the section. Counsel for the 1st respondent has no doubt filed objections to the finding. But the finding is essentially one of fact based on an appreciation of the evidence, with which I see no ground for interference. I therefore accept the finding; and in view of the said finding. I hold, that there was no interruption of the plaintiff's right of drainage, of water through the B schedule property but only a change in the mode of enjoyment of the right.

3. Support for this position is afforded by the decision in *Nasiruddin v. Deokali*, (AIR 1929 Pat 124). There, the plaintiff and the defendant were both permanent tenure holders under the Municipality of two plots of land adjoining each other. The plaintiff's plot was on the west side of the Mangal Bazar Road. A part of it was occupied by his house and a strip along the southern edge was left vacant except for a well dug in the middle. This strip furnished access from the road to the rear of the defendant's house through a door in the wall of the plaintiff. The Municipal Methrani used to pass from the road to the rear of the defendant's house through the southern strip, north of the well, and through the plaintiff's door in the wall to the defendant's house in the west, for the purpose of clearing the defendant's privy. At some time within the statutory period of 20 years, the plaintiff closed and locked the door in his wall. Thereafter, at the request of the defendants, the Municipality bored a hole through the wall a few paces south from the door and the Municipal Methrani continued to pass over the southern strip to the defendant's property but entered it not, by the door, but by the breach in the wall, and in order to approach the breach, he passed south of the wall, instead of north, as formerly. On these facts, it was held that there was no interruption of the easement. Terrell, C. J. who delivered the judgment (concurring in by Jwala Prasad J.) observed :

'In my opinion, and with the greatest deference to the learned Judge, this view is not correct. The easement exercised was merely one of access from the road, over the strip of land, to the defendant's land and for a limited and special purpose and if an alternative path from the road over this land to the defendant's land had been provided by the plaintiff the defendant would have had no grievance and could not have claimed to pass along any specified track or to have emerged by any specific door or passage; in other words the easement, if any, claimed, and exercised continuously is not a specific right of way limited to a particular track but a mere right of transit for a specific purpose. It is a discontinuous non-apparent positive easement and there is nothing in its nature which limits it to a particular path. This being so the fact that a particular path left by the owner of the servient tenement for the exercise of the easement was blocked in April, 1920 but another path was opened in August and has since been used does not constitute an interruption of the easement.'

4. Despite the attempt made by counsel for the 1st respondent to distinguish the decision. I am satisfied that the principle of the decision must apply here. Following the same. I hold that there was no interruption of the plaintiff's right of drainage through the B schedule property. On the finding that there was no interruption of the right claimed, the plaintiff-appellant might well be entitled to ask for restoration even of the middle channel, but the court below has recorded that that is not feasible, and is productive of far greater inconvenience and mischief to the 1st respondent than the alternative relief (F) prayed for by the plaintiff, which it found the plaintiff was entitled to. In the circumstances. I find no ground for interference with this finding. I accept this appeal, and in modification of the decree of the court below, I find that the plain-tiff is also entitled to the relief (F) claim-ed by him in the plaint, in addition to the reliefs granted to him by the lower appellate Court. In the circumstances. I make no order as to costs.