

Joseph Vs. Joseph and anr.

Joseph Vs. Joseph and anr.

SooperKanoon Citation : sooperkanoon.com/720367

Court : Kerala

Decided On : Jan-15-1973

Reported in : AIR1973Ker206

Judge : K. Sadasivan, J.

Acts : [Easements Act, 1882](#) - Sections 15

Appeal No. : Second Appeal No. 1256 of 1969

Appellant : Joseph

Respondent : Joseph and anr.

Advocate for Def. : S. Narayanan Poti, Adv.

Advocate for Pet/Ap. : K.T. Hareendranath, Adv.

Disposition : Appeal allowed

Judgement :

K. Sadasivan, J.

1. This appeal is by the plaintiff. He sued for declaration of a right of way and consequential reliefs. The plaintiff's property is survey No. 2315/2, known as 'Kangazha Parambu' lying to the east of the 1st defendant's property survey No. 2316/3, known as 'Pazhiyanikal Purayidom'. On the southern boundary of the

defendant's property there are kayyalas and still south of the kayyala a pathway runs east-west up to the plaintiff's property in the east Still south of the pathway is one Attingal Turayidom which also belongs to the 1st defendant. The northern boundary of Attingal purayidom also is bounded by kayyalas. The pathway which is 8 feet in width runs in between the southern kayyala of Pazhaniyankal purayidom and the northern kayyala of Attingal purayidom. The plaintiff has been using this pathway for ingress to and egress from his property for a large number of years now. Defendants are trying to lessen the width of the pathway by shifting the alignment of the kayyalas and also by erecting masonry structures in the pathway under the pretext of putting up steps for access to their property. The plaintiff has acquired a prescriptive right of easement and, therefore, the defendants' action is unjustifiable and has to be prevented. The defendants in their written statement conceded that there is an old 'naattuvashi' passing along in between the Attingal purayidom and Pazhaniyankal purayidom. The vacant space between the two kayyalas is the 'kottapadu' left by the respective owners for taking earth for maintenance of the kayyalas. The plaintiff has been using this kottappadu as pathway with the permission of the defendants. The pathway is not as old as the plaintiff would claim it to be. There are other pathways leading to the plaintiff's property which he could conveniently use. It is not correct to say that the defendants are attempting to lessen the width of the space between the two kayyalas or to put up masonry structures. The defendants had put up steps for access to their property.

2. That the plaintiff has been using the way in question for some years now is conceded. Even though the defendants would put the period of the user for the past 16 years, witnesses on their side D.Ws. 4 and 5 would concede that the way is being used by the plaintiff from the days of their childhood. Both of them are categorical that the plaintiff has been making use of the pathway from the time their memory could reach. D.W. 4 was aged 60 and D.W. 5 aged 40 at the time they were examined. D.W. 5 by way of clarification stated that he could remember things from his 8th year. There can, therefore, be no doubt that the plaintiff has been using the pathway beyond the statutory period.

3. To offset the effect of this evidence, the defendants would contend that the user has been with permission and in that background the user for any length of time would not give the plaintiff any prescriptive right. In other words, the user could never be regarded as user as of right. In support of this position learned counsel relied on *Narayana Sheno v Narayan Kunjan*, (ILR (1956) Trav-Co 842) *Poulose v. Mathew*, AIR 1965 Ker 147. I do not think those decisions have any application to the facts of the present case. There the point decided was that 'in India it is customary for the owner of a piece of waste land not to raise any objection to the passage of strangers over such land and that a mere period of long user will not give rise to any presumption that such user was as a matter of right.' In the present case, on the other hand the position is a little different. The defendants would assert that permission was granted to the plaintiff to use the pathway. The permission, according to them was given not by them, but by their predecessors to the predecessors of the plaintiff. The nature of the permission given, whether it was for all time or for a specific period, we are not in a position to know. In support of the case that permission was given, there is no evidence on the part of the defendants. They would fall back upon the statement of the plaintiff that his predecessors might have been using the pathway by permission of the defendants' predecessors. Explanation I to Section 15 of the Easements Act, which is relevant in this connection lays down that:

'Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or if granted as an easement that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.'

Without knowing the nature of the agreement or the permission given, it is not possible to evaluate the nature of the right now claimed by the plaintiff; but it is certain that no permission was ever sought by the plaintiff and any was ever given by the defendants. So even if the right, to start with was with permission, it must be presumed that by the death of the person granting the licence or permission, the right also must cease, and thereafter the plaintiff must have been using it in his

own right without reference to the defendants. D.Ws. 4 and 5, whose evidence was referred to above are clear and definite that the plaintiff has been using the pathway in his own right from the time their memory can go which, as already seen, is over 20 years. Katiyar on Easements and Licences, 7th Edn. (1970), p. 280, observes :--

'It should, however, be remembered that a person claiming an easement right is not debarred from proving that though his enjoyment was a permissive one to start with, yet subsequently he enjoyed it adversely to the servient owner. Again it is important to bear in mind that it is not every agreement that is a bar to the application of the section, but only such an agreement as answers to the test, laid down in this explanation.'

This fundamental aspect of the question, it appears, has been lost sight of by the courts below.

4. The pathway, admittedly lies beyond the kayyala wall and no prejudice will be caused to the servient owner in the enjoyment of his property if the pathway is used by the plaintiff. For several years now the plaintiff has been peacefully enjoying the pathway and it is probably in view of the strained relationship between the parties that the defendants thought of raising protests against the user of the pathway. In any view of the matter the suit has only to be allowed.

5. The judgment and decree passed by the counts below are, therefore, set aside and the plaintiff's suit is allowed. Reliefs A and B of the plaint are granted. The parties will bear their respective costs throughout.