

C. Mohammed Vs. Ananthachari

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Court : Kerala

Decided On : Nov-18-1987

Reported in : AIR1988Ker298

Judge : M.M. Pareed Pillay, J.

Acts : [Easements Act, 1882](#) - Sections 4; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 2 - Order 39, Rule 2; [Specific Relief Act, 1963](#) - Sections 38 and 39

Appeal No. : S.A. No. 433 of 1982

Appellant : C. Mohammed

Respondent : Ananthachari

Advocate for Def. : T.P. Kelu Nambiar,; P.G. Rajagopalan and; P. Devakikutty

Advocate for Pet/Ap. : P.K. Balasubramonyam,; S.V. Balakrishna Iyer and; K. Jay

Disposition : Appeal dismissed

Judgement :

M.M. Pareed Pillay, J.

1. Appellant is the plaintiff in O.S. 182 of 1976 of the Munsiff Court, Kasaragod. The suit was filed by the plaintiff for a mandatory injunction directing the

defendants to restore the 'Kattapuni' (bund) between his areca garden in R.S. 135/4 on the north and paddy field in R.S. 135/5 on the south in its original condition and for a prohibitory injunction restraining the defendants from committing any damages to the bund and for other consequential reliefs. It is the case of the plaintiff that the 'bund' lying between his areca garden and the paddy field has been used by him and his ancestors as a pathway and that this is the only pathway for his ingress and egress to his property.

2. The Courts below held that there cannot be any easement by prescription as the plaintiff admitted that the disputed property belongs to him. The only question to be considered is as to whether a plea of ownership and a plea of easement can be advanced alternatively in a suit. Ownership and easement right are inconsistent and cannot co-exist in the same person. Section 4 of the Easements Act defines '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.'

An easement is a privilege, without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former. The following six characteristics 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; and

(6) The something must be of a certain or well defined character and be capable of forming the subject matter of a grant.

As existence of both a dominant tenement and servient tenement is essential to the creation and existence of an easement it is difficult to conceive of a position where a person can claim easement by prescription when he owns both the tenements. It may be permissible in the plaint to advance an inconsistent plea of ownership and easement alternatively, but it is necessary that the plaintiff should press one of them only either at the stage of evidence or a subsequent stage. When the dominant and servient tenement are in the ownership and possession of the same person acts done by him on the servient tenement are clearly referable to his possession of that tenement and hence there cannot be any easement by prescription,

3. As P.W. 1 has admitted that the property, through which he claims right of way be longs to him it is difficult to accept his case that he has prescribed easementary right in the property. P-W. 1 deposed that the demolished bund belongs to him absolutely. He claims ownership under a sale deed and stated that he is prepared to produce the same before the court. In view of the above testimony of P.W. 1 the Courts below were justified in dismissing the suit.

There is no merit in the Second Appeal and hence the same is dismissed. No costs.