

**Appu and Others Vs. Rajendran and Others**

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**Court :** Kerala

**Decided On :** Apr-11-2011

**Judge :** M.Sasidharan Nambiar

**Appeal No. :** RSA.No. 1013 of 2004

**Appellant :** Appu and Others

**Respondent :** Rajendran and Others

**Judgement :**

Defendants 2, 3 and 7 in O.S.114 of 1987 on the file of Munsiff Court, Vaikom are the appellants. Respondents are the plaintiffs and the other defendants in the suit. Respondents 1 to 8 instituted the suit claiming a decree for declaration of the right of easement over plaint schedule No.5 pathway and for a permanent prohibitory injunction restraining the defendants by a permanent prohibitory injunction from causing alteration to the said pathway or obstruct the plaintiffs from using that way. They contended that item No.1 of the plaint schedule property originally belonged to deceased Karunakaran, father of respondents 1 to 7 and husband of 8th respondent and on his death, under his will, respondents 1 to 8 are the owners in possession of item No.1 of the plaint schedule property. Before the death of Karunakaran, a house was built in the property and Karunakaran was living there along with the family and subsequent to his death, respondents 1 to 8 are continuing the residence and on the eastern side of the plaint schedule property is the property belonging to the family of first defendant and appellants 1 and 2

(defendants 2 and 3) constructed separate houses therein and as they are entitled to kudikidappu right under the first defendant, first defendant had given item No.2 of the property to the second defendant, item No.3 to third defendant and item No.4 of plaintiff schedule property is the property belonging to first defendant and forms part of plaintiff schedule item No.5, which is the pathway and first defendant had recognized the right of easement by prescription over item No.5 of the plaintiff schedule property and item No.6 of the plaintiff schedule property is the property of 3rd appellant ( 7th defendant) a subsequent transferee from the first defendant. Defendants 4 to 6 are the children of the first defendant. It is contended that the Kochangadi Mekkara road is 150 feet to the south of item No.1 of the plaintiff schedule property and that road reaches Vaikom-Ernakulam road on the east and the predecessors in interest of respondents 1 to 8 and thereafter respondents 1 to 8 have been using item No.5 of the plaintiff schedule way as of right and as an easement, openly peaceably and without interruption and therefore they have prescribed a right of way by easement of prescription and defendants are not entitled to cause any obstruction to the way or to make any alteration. They also contended that item No.5 is the only way available to item No.1 of the plaintiff schedule property and therefore they have a right of easement by necessity also. Only the appellants resisted the suit and defendants 1 and 4 to 6 remained absent and were set exparte.

2. Appellants 1 and 2 filed a joint written statement which was adopted by the third appellant. They contended that the description of the plaintiff schedule property is not correct and the extent of the properties of defendants are not shown correctly and third defendant had obtained 32 cents of land from the first defendant and her children and he is now in possession of 22 cents. The second defendant obtained kudikidappu right over four cents of land and first defendant and her children recognized the kudikidappu right of third defendant and property was assigned to him by first defendant and her children and they together are in possession of four cents of land. The western side of the property is on a higher level and they are intending to construct a house in the property and item No.4 of the plaintiff schedule property belongs to first defendant and it is denied that it was given as a way to the plaintiffs. It is contended that the description of item No.5 is not correct and before the Kochangadi Mekkara road came into existence, there was only a

pathway in that place and that was not convenient for plying vehicles and the road gained the present position only 14 years back and before that there was only a way having a width of four feet and by putting earth in that place, it was made convenient to take vehicles 7 years back and plaintiffs are not entitled to a right of way over item No.5 of the plaint schedule property as claimed and they are not entitled to the decree sought for. It is also contended that the suit was instituted in collusion with the other defendants and even though defendants have no objection for using a narrow strip of land as a pathway to reach item No.1 of the plaint schedule property, they are not entitled to a right of way over item No.5 of the plaint schedule property.

3. Learned Munsiff originally decreed the suit as prayed for. It was challenged before Sub Court, Kottayam in A.S.120 of 1994. Before the first appellate court, the plaintiffs/respondents filed an application to amend the plaint incorporating the necessary ingredients of a right of easement by prescription. Learned Sub Judge allowed the appeal and remanded the suit for fresh disposal after giving an opportunity to the defendants to file an additional written statement and allowing the parties to adduce further evidence, directing the trial court to permit the plaintiffs to amend the plaint. The plaint was thereafter amended incorporating the ingredients of a right of easement by prescription. An additional written statement was also filed. No further evidence was adduced. Learned Munsiff, by judgment dated 30.6.1999, granted a decree declaring the right of easement by prescription over item No.5 of the plaint schedule pathway and restrained the defendants from causing any alteration or obstruction to the pathway. Ext.C1(a) plan submitted by the Commissioner was made part of the decree. Appellant challenged the judgment before Additional District Court, Kottayam in A.S.217 of 1999. Learned Additional District Judge, on re-appreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

4. Second appeal was admitted formulating the following substantial questions of law.

"1) Whether the courts below are justified in overlooking the provisions of law that once the property is vested with the government under the provisions of the Kerala

Land Reforms Act, the property is free from all encumbrances including rights of easement in or relating to lands vested with government shall be extinguished.

2) Whether the courts below are justified in granting a decree declaring easement of prescription over the property of the defendants wrongly casting burden upon the defendants prove that there was no passage as alleged in the plaint since the right of easement is a precarious and special right claimed over the land of another it is the duty of the person who claims such right, to prove all its ingredients by adducing cogent evidence.

3) Whether the courts below are justified in not considering the object of the Kerala Land Reforms Act that the intention of the legislature is to provide land to the kudikidappukaran for his shelter without any encumbrance and if any passage is granted through the property obtained by the second defendant by way of kudikidappu it will defeat the very object of the legislation.

4) Whether the courts below justified in overlooking the provisions of the Kerala Land Reforms Act that all right, title and interest of the land owner, intermediaries, if any, shall vest with the kudikidappukaran and the said land is free from all encumbrance including the right of easement and even assuming that the plaintiffs are entitled to claim easement by prescriptio over the property obtained by the defendants by way of kudikidappu, the statutory period of 20 years as envisaged under Sec.15 of the Easements Act starts from the date of vesting of kudikidappu.

5) Could the plaintiff prescribe an easement right by prescription against a landlord in respect of the properties held by the kudikidappukars so as to bind kudikidappukars?

5. Learned counsel appearing for appellants and respondents 1 to 8 were heard.

6. Learned counsel appearing for appellants, relying on the decision of a learned Single Judge of this court in Vasu V. Sreedharan (1974 KLT 466) argued that under the Kerala Land Reforms Act, when a kudikidappu right is assigned to the kudikidappukaran, the land so assigned is free from any encumbrance including right of easement available and therefore, when the landlord recognizing the right

of the appellants as kudikidappukars, assigned the properties viz, item Nos. 2 and 3 of the plaint schedule property to the appellants, the rights of respondents 1 to 8 over the said property, including right of way by easement of prescription if any is also extinguished and therefore courts below should not have granted the decree. Learned counsel also argued that though appellants did not challenge the order of remand in A.S.120 of 1994, they are entitled to challenge the findings in the order of remand before this court as this court is superior to the first appellate court and learned Sub Judge should not have directed the trial court to permit respondents 1 to 8 to amend the plaint incorporating the ingredients of right of easement by prescription as the necessary plea was not there in the original plaint and in the absence of pleading a right for declaration of the right of easement by prescription could not have been granted and therefore the decree of the courts below is not sustainable. The learned counsel relied on the provisions of Section 80(C) of Kerala Land Reforms Act to strengthen the argument.

7. Learned counsel appearing for respondent argued that appellants did not raise a contention based on Section 80(C) before the trial court or the first appellate court and therefore they are not entitled to raise such a contention in the second appeal. Learned counsel also argued that in any case, appellants are not entitled to claim the benefit under Section 80(C) as there is no order of the Land Tribunal as provided under Section 80 B of Kerala Land Reforms Act. Learned counsel also pointed out that appellants have not challenged the order of remand and did not take it as a ground even in the appeal memorandum and therefore they are not entitled to challenge the order of remand or the finding of the first appellate court that respondents 1 to 8 are entitled to get the plaint amended or the order of learned Munsiff permitting amendment of the plaint. It is pointed out that the amendment was only clarifying the pleading which was not exhaustive originally.

8. Learned counsel appearing for appellants admitted that the rights now pressed in the second appeal were not canvassed originally before the trial court or the first appellate court. The argument is that as it is purely a question of law, appellants are entitled to raise the question.

9. This court in Vasu's case (supra) had occasion to consider the effect of the provisions of Section 60 of Indian Easement Act in view of the provisions of Kerala Land Reforms Act. It was held:-

" The Indian Easements Act is also a law with respect to a matter falling under the same entry. After the commencement of the Constitution, the power to make a law with respect to such a matter is exclusively vested in the legislature of the State. But an existing law is continued in force by virtue of Article 372 of the Constitution, and continuation is only until it is altered or repealed or amended by the competent legislature. The result is that any provision in the Easements Act to the extent it is inconsistent with the provisions of the Land Reforms Act stands repealed. In other words, the provisions of Easements Act cannot prevail over the provisions in the Land Reforms Act. The relation between a kudikidappukaran and his land owner, and their respective rights and liabilities are now completely governed by the provisions contained in the Land Reforms Act. Section 60 of the Easements Act cannot, therefore, be availed of by a kudikidappukaran".

10. Section 80(C)(2) of Kerala Land Reforms Act, relied upon by the learned counsel reads:-

"Deposit of purchase price and issue of certificate of purchase - (1)xxxxx (2) as soon as may be after the order of the Land Tribunal under sub-section (3) of Section 80 B has become final, the Land Tribunal shall issue a certificate of purchase in such form and containing such particulars as may be prescribed, and thereupon the right, title and interest of the land owner, the intermediaries, if any, and the person in possession whether he is not the land owner, in respect of the land allowed to be purchased, shall vest in the kudikidappukaran free from all encumbrances with effect from the date on which the order of the Land Tribunal under the said sub-section (3) has become final".

The question is whether the appellants could claim the benefit provided under Section 80(C)(2) of Kerala Land Reforms Act in the absence of an order in their favour under Section 80 B(3).

11. The learned counsel also relied on the decision of Hon'ble Supreme court in State of H.P V. Tarsem Singh and others (2001 (8) SCC 104) where the Hon'ble Supreme Court held that the right of easement on land is an encumbrance on land and once the land vests under the State free from all encumbrances, the easementary right pertaining to that land shall also vest in the State. The argument of the learned counsel is that when as provided under sub-section (2) of Section 80(C), the property purchased by the kudikidappukaran is free from all encumbrances, in view of the decision in Vasu's case, it is to be found that the property is free from the encumbrance imposed under the Indian Easement Act also.

12. But in the light of sub-section (2) of Section 80, I cannot accept this submission. Sub-section (2) of Section 80(C) specifically provides that as soon as after the order of the Land Tribunal under sub-section (3) of Section 80 B has become final and Land Tribunal issued a certificate of purchase in such form containing such particulars and thereupon the right, title and interest of the land owner, the intermediaries if any and person in possession, whether he is the land owner in respect of the land allowed to be purchased, shall vest in the kudikidappukaran. Therefore for vesting the right provided under sub-section (2), firstly there should be an order of the Land Tribunal as provided under sub-section (3) of section 80 B. Thereafter the order shall become final. A certificate of purchase of kudikidappu right shall be issued thereafter. Then only there could be the vesting as provided under sub-section (2) of Section 80C. Only if the Land Tribunal has passed an order under sub-section (3) of Section 80 B and that order has become final and a kudikidappu certificate is thereafter issued, there could be a vesting as provided under sub-section (2) of Section 80(C). Admittedly, no order was passed by the Land Tribunal under sub-section (3) of Section 80 (B) of Kerala Land Reforms Act in favour of appellants. Their case is that landlord recognizing the kudikidappu right had assigned the property having an extent of four cents in favour of appellants 1 and 2. Therefore, in the absence of an order by the Land Tribunal as provided under sub-section (3) of Section 80(B) of Kerala Land Reforms Act. When no kudikidappu certificate was issued in his favour, appellants cannot contend that the right of easement over items 2 and 3 of the plaint schedule properties was lost because of the vesting provided under sub-section

(2) of Section 80(C) of Kerala Land Reforms Act. Hence on that ground, appellants cannot challenge the judgment of the courts below.

13. Even though appellants are not debarred from challenging the order of remand passed by the first appellate court before this court, though it was not challenged in an appeal earlier, when appellants have not taken a ground of appeal against the order of first appellate court directing the trial court to allow the application for amendment of the plaint or the subsequent order of the learned Munsiff allowing the application for amendment, they are not entitled to challenge the order in appeal. If find no merit in the appeal. The second appeal is dismissed. No costs.

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