(2011) 12 KL CK 0026

High Court Of Kerala

Case No: S.A. No. 766 of 1998

Kallen Devi		APPELLANT
	Vs	
Raghavan		RESPONDENT

Date of Decision: Dec. 23, 2011

Acts Referred:

- Easements Act, 1882 - Section 13

Citation: (2012) 3 KLJ 142

Hon'ble Judges: P. Bhavadasan, J

Bench: Single Bench

Advocate: Kaleeswaram Raj, for the Appellant; O.V. Maniprasad, for the Respondent

Final Decision: Allowed

Judgement

P. Bhavadasan, J.
The defendants is O.S. No. 72 of 1993 who suffered concurrent decrees at the hands of the courts below are the appellants. The parties and facts are hereinafter referred to as they are arrayed before the Trial Court.

2. The plaintiff is the owner and in absolute possession and enjoyment of the plaint A schedule property. The plaint B schedule property which belongs to the defendants is situated on the southern side. The western boundary of the plaint A schedule property is an old road. That roads goes towards north from Kurumathoor to Vallikkurumbathottam. It is claimed that the road has a width of 18 feet and used by the public of the locality. The road which is shown as C schedule according to the plaintiff passes through the property owned and possessed by the defendants. It is stated that on 15.02.1993, the defendants interrupted the passage of the plaintiff through the road and threatened that he will not permit the plaintiff to use the road any more. It is stated that the plaint C schedule road is the sole means of access to the property owned and possessed by the plaintiff and he has acquired prescriptive right as well as easement by necessity to use the said road. Apprehending further mischief from the defendants, the suit was laid.

3. The defendants resisted the suit. They disputed the identity of the property scheduled in the plaint. It is pointed out that the plaint B schedule property and the adjacent properties were assigned by the Government from the surplus land surrendered by various people. They disputed the existence of C schedule road. It is pointed out that a person by name Baby residing on the northern side of the 1st defendant''s property wanted to take lorry through the property of the defendants for which they were not amenable. It is at his behest that the present suit has been laid. Pointing out that the plaintiff has no manner of right over any portion of the defendants'' property for their egress and ingress to plaint A schedule property, they prayed for a dismissal of the suit.

4. On the above pleadings issues were raised. The evidence consists of the testimony of PWs 1 to 7 and document marked as Ext.A1 from the side of the plaintiff. The defendants had DWs 1 to 5 examined and documents B1 to B4 marked. Exts.C1 to C7 are the Commissioner''s report and plan. Exts.X1 to X4 are the third party Exts.

5. On an appreciation of the evidence in the case, the Trial Court came to the conclusion that the plaintiff has miserably failed to establish the plea of prescriptive right of easement but then found that the plaintiff is entitled to relief on the basis of easement by necessity and accordingly granted a decree in favour of the plaintiff. The aggrieved defendants carried the matter in appeal as A.S. No. 16 of 1994. The appellate court concurred with the findings of the Trial Court and dismissed the appeal. Hence the second appeal.

6. Notice is seen issued on the following questions of law:-

a. whether a person can claim easement over a road which is admittedly used by the public at the locality? What is the difference between the easementary right and public right?

b. Whether the mere averment that the particular road is absolutely necessary in itself constitute a plea of easement of necessity? What is the manner and method of pleading and proof in a case of easement of necessity ?

c. What are the characteristics of the alternate way, so as to constitute a defence to the claim of easement of necessity? Is it correct to say that merely because the alternate way is not a public way, it is not an alternate way at all ?

d. Can there be an easement of necessity when there is (sic) servant heritage and no governance of tenements?

e. What is the correct perspective to be adopted in deciding the question of identity when the plaint schedule and commissioner''s reports contradict each other and when those are vague and uncertain?

7. As could be noticed from the above statement of facts, the dispute in this case relates to C schedule pathway, which according to the plaintiff runs through the property owned

and possessed by the defendants which is shown as B schedule and pathway as C schedule. The plaint would say that the road has been in existence for a considerably long period and they have been using it for a long period. They claimed prescriptive right of easement and also stated that the road is an absolute necessity for them. The defendants disputed the existence of the road.

8. The learned counsel appearing for the appellant pointed out that it is strange that the courts below has found that the plaintiff is entitled to use the way by way of easement by necessity when there was no pleadings to that effect in the plaint and no evidence was adduced to that effect. All that was pleaded in the plaint was that the way is an absolute necessity and the essential ingredients to attract easement of necessity are not seen pleaded in the plaint According to the learned counsel; it is not sufficient to say that the way is an absolute necessity but it is necessary to plead all the ingredients to attract the relevant provision and that will have to be supplemented by the evidence at the time of trial. Both pleadings and evidence in that regard are conspicuously absent and the courts below were not justified in granting a decree on the basis that the plaintiff is entitled to use the way by easement of necessity. Attention was also drawn to the fact that, in fact the reading of the plaint closely and scrutinizing the evidence adduced by the plaintiff, it would clear that what was claimed by the public way not right of easement as such. The courts below have omitted to note this vital aspect and if one has to assume that the way is a public pathway then one fails to understand how easement of necessity could survive. The learned counsel also pointed out that the plea in the plaint are inconsistent and contradictory. Even assuming that plaintiff would take such pleas at the time of evidence he had to elect from one of them and having not done so he should fail on all counts. According to the learned counsel the courts below have committed grevious error in holding that the plaintiff is entitled to use the C schedule pathway as easement of necessity.

9. The learned counsel appearing for the respondent on the other hand contended that both the courts below have found that there does exist a way running through the property of the defendants. It is also found by both the courts that that is the only means of access to the plaintiff to his A schedule property. In the evidence, it is also clear that the plaintiff and others are using the way. Under such circumstances, the plaintiff could not be non-suited for dearth of pleadings, when it is clearly established that a way does exist and it is being used by people along with the plaintiff. In support of his case the learned counsel relied on the decision reported in Thomman v. Kuriako (1988 (1) KLT 361). It is also pointed out that both the courts have concurrently found in favour of the plaintiff. The findings are based on appreciation of evidence and are questions of fact. It is contended that no substantial question of law arises for consideration in this second appeal and it is only to be dismissed.

10. When one looks at the plaint one is not certain as to what is the exact nature of the right pleaded by the plaintiff. Of course the courts below have found that there does exists a way as claimed by the plaintiff. The question that arises for consideration is what right if

any has the plaintiff established to use the said road. In the plaint in fact what is pleaded is that the said road has been used by the public of the locality and plaintiff has been using it for a long time to reach their respective properties. In paragraph 8 of the plaint what is stated is that the plaint C schedule path way has been used by the plaintiff and his predecessors in interest of the plaintiff for last 40 years believing it to be a public pathway. It is further averred the plaintiff has acquired a prescriptive right of easement to use the same. Further averment is that the C schedule road is an absolute necessity for plaintiff and others.

11. The above are the pleadings relating to the right claimed by the plaintiff.

12. Both the courts below have found that the plaintiff had miserably failed to establish the plea of prescriptive right of easement. But then the courts go on to hold that since it is shown that the plaintiff has no other means of access, it is a question of absolute necessity and therefore the plaintiff is entitled to a decree on the basis of easement by necessity.

13. The question is whether the above view is sustainable?

First of all, the plea of prescriptive right of easement and easement of necessity are contradictory and inconsistent in each other. Both cannot co-exist. Even assuming that the plaintiff is entitled to take inconsistent plea, at the time of evidence he has to elect from one among them i.e., prescriptive right of easement or easement by necessity and he cannot go on with both the pleas which are in fact contradictory. In the case on hand the plaintiff pressed both the grounds and failed to establish prescriptive right of easement.

14. It will be useful at this point of time to refer to the decision reported in Ibrahimkutty v. Abdul Rahmankunju (1992 (2) KLT 775) wherein it was held as follows:-

Ordinarily a court can find a case and decree the suit only on the basis of the pleadings of the parties. In case, where the claim is for an easement right, it is all the more necessary that the pleadings should be specific and precise. There is reason therefor. ''Easement'' is a precarious and special right. The right of easement is one which a person claims over a land which is not his own. Since the right of easement is a precarious and special right claimed over the land of another, it is highly essential that the pleadings should be precise. On a careful reading of the plaint in the case, it should be stated that the plaintiffs did not specifically plead the nature of the easement claimed by them. Indeed, the issue framed in the case is also of a general and vague nature. That is why the Trial Court found in favour of easement of necessity and also by prescription. The lower Appellate Court found in favour of easement of necessity and also by prescription. The lower Appellate Court found customary easement and easement by prescription. The qualitative and quantitative requirement for the different kinds of easement are to a great extent mutually exclusive. That is the reason why the courts have always insisted that whenever

a right of easement is claimed, the pleadings should be precise and clear and not vague.

15. As already mentioned, the respondents herein claim a right to use the pathway by way of easement by necessity and prescriptive right of easement. First of all both these cannot go together. While easement of necessity has its origin in a statute, the right of way by easement by prescription is the result of continuous and hostile use to the knowledge of the other person. Both the Courts have found that the plaintiff cannot succeed on the claim of easement by prescription.

16. It will be also useful to refer to the decision reported in Joy Joseph and Ors. v. Jose Jacob alias Thankachan (2010 (4) KHC 167) where in it was held as follows:-

As already mentioned, the defendants who are the appellants herein claim a right to use the pathway by way of easement by necessity and prescriptive, right of easement. First of all both these cannot go together. While easement of necessity has its origin in a statute, the right of way by easement by prescription is the result of continuous and hostile use to the knowledge of the other person. Both the Courts have found that the plaintiff cannot succeed on the claim of easement by necessity.

17. As already noticed the only plea regarding the easement of necessity is that as mentioned in Paragraph 8 of the plaint which merely says that the C schedule pathway is an absolute necessity for the plaintiff and others. What is claimed is the common pathway. Apart from the above fact there are no averments regarding severance of tenements and the origin of easement of necessity as contemplated under S. 13 of Indian Easements Act. In other words there are no specific pleadings containing the ingredients of easement of necessity. Of course, it is stated that the pathway in question is absolute necessity for the plaintiff but that is far from satisfactory. The easement being a precarious right, the pleadings should be precise and definite. It could be seen from the judgment of the courts below, the courts below considered both prescriptive right of easement and easement by necessity. The courts were not sure as to what exactly is the right claimed by the plaintiff.

18. It will be now useful to refer to the evidence of plaintiff who is examined as PW2. He asserts when he examined as PW2 that the road is used by him and about 20 families in the locality and is a public road. It is also asserted that all these twenty families along with the plaintiff has no other means of access. In his cross examination also he categorically stated that the road is a public road and that anybody is entitled to use the said road over which the claim is laid by the plaintiff. To crown it all he would say that he is like any other user of the road. Then he stated that the entire people of the village use the said road. He further stated in cross examination that the road is being maintained by the people of the locality. It is brought out in the cross examination that the alignment of the road had been changed by one Yasoda by shifting the road to the boundary of her property. The road runs by the side of court yard of the defendants'' house. In no less terms he says that the road is being maintained by the people of the locality and the defendants have no manner

of right over the C schedule pathway and that is a public road.

19. It is in the light of the said the evidence one has to view the claim set up by the plaintiff. It is useful to refer to the decision cited by the learned counsel for the respondent in this appeal namely Thomman v. Kuriako (1988 (1) KLT 361). The learned counsel relied on the following extract in the said decision.

4. The question to be considered is whether the Sub Judge was justified in dismissing the suit overlooking the avalanche of materials regarding the existence of the public road on the ground that evidence is lacking with regard to its dedication. In other words, can the suit be rejected solely on the ground that there is no evidence of dedication.

5. The right to enjoy a highway is a free right. Rights over highways are rights in gross unappurtenant in any dominant tenement. Even in a case where evidence is lacking with regard to the dedication and where there is ample evidence with regard to the existence of road which is used by the public it can be inferred that the owners of the adjacent properties intended to make over to the public the right to use their land as a public highway. In J. Anderson v. Juggodumba Dabi (VI Calcutta Law Reports 282) it is held as follows:

In order to establish that a road is a public road, it is sufficient if acts of user by the public are shown to have been acquiesced in by the owner of the land over which the road passes, and that those acts are of such a character as to warrant the inference that the owner intended to make over to the public the right to use the land as a public highway.

6. Highway may be created either by statute or it may come into existence through dedication by the landowner allowing the public the right to pass or repass over his land. Dedication implies a gift. But it is not necessary that the dedication must be made by a deed or by written instrument. The dedication though not made in express terms may well be presumed from uninterrupted use by the public of the right of way claimed. More often, it can be presumed from custom and user than from any definite act of the owner of the land. Animus didicandi on the part of the land owner has to be proved in a case where plaintiff relies on dedication. But in a case where there is evidence of long and open user of the road by the public it can definitely lead to the presumption that the land was dedicated as a highway. Dedication is something equivalent to an irrevocable licence granted to the public by the owner of the land through which the road passes. Even in a case where, dedication as such is not proved a plaintiff who wants declaration of the right of way can succeed in the suit if there is evidence with regard to the continuous user of the way by the public. In a case where there is evidence of public use of the Way to the knowledge of the land owner and without resistance dedication can certainly be inferred. In Laxman v. Tukia (AIR 1918 Nag 166) it is held as follows:

Public rights of way are not easements. Public, differing from private, rights of way originate from a dedication to the public by the owner of the soil over which they pass.

Dedication means a gift not necessarily by a deed or any written document, and it is more often implied from custom and user than from any definite act of the owner of the land. Even when no such overt act can be shown if the public use a way for some time to the knowledge of the land owner and without resistance, dedication will be inferred and a right gained.

20. As could be seen from the reading of the said decision it related to access to a Highway at its end. That stands on a different footing. Of course it is stated in Para. 7 that a right can be claimed individually to a public way but that does not mean that an easement right can be given through a public way. Individual rights which are asserted and causing obstruction to the public way can certainly be agitated in a court. But in the case on hand what is found by the courts below is that the plaintiff is entitled to use the C schedule pathway as easement of necessity.

21. One has to notice that the plaintiff has a case that his predecessors as well as twenty other families in the locality are using the same road. But strangely enough, neither any of his predecessors in interest or any one of the members of family who are actually using the pathway have been examined, even though as many as seven witnesses are examined by the plaintiff. Some of them are residing far away from the property. He says that they too are using the road. The evidence is far from sufficient. At any rate, the finding of the courts below that the plaintiff is entitled to C schedule pathway by way of easement of necessity cannot be supported. Apart from the fact that there is absolutely no pleadings in that regard, evidence is also found wanting in that respect. As already noticed, the easement being a precarious right, the law insists that there should be precise pleadings and supporting evidence also in that regard. Both the courts below have proceeded on the premises that since C schedule pathway is an absolute necessity for the plaintiff, he is entitled to use the same by way of easement of necessity. The origin, continuance and termination of easement of necessity does not mean that it takes in absolute necessity only. It arises on severance of tenements and continues till alternate way is available. It is a statutory right. Easement should be one without which dominant tenement cannot be enjoyed at all. In the case on hand, even assuming that the C schedule is the only pathway the other ingredients are conspicuously absent in the pleadings and in the evidence. Under those circumstances it will be difficult to accept the findings of the court below that the plaintiff is entitled to use C schedule pathway by a way of easement of necessity.

22. Even assuming that the C schedule pathway does exist, it is for the plaintiff to establish the nature of right enjoyed by him to use the pathway. When the plaintiff himself says that the defendants have no manner of right over C schedule pathway and it does not belong to them at all the question of easement does not arise at all. Moreover the plaintiff has no consistent plea also. He says that it is a public pathway and also says that C schedule pathway is an absolute necessity for them and also claims prescriptive right of easement.

23. Under the above unsatisfactory state of affairs it is not possible to concur with the courts below in holding that the plaintiff is entitled to use the plaint C schedule pathway by way of easement by necessity. In the result:- This appeal is allowed, the impugned judgment and decree are set aside and the suit shall stand dismissed. There will be no order as to costs.