Narayanan Nair and another Vs Mariamma Kurian and another

Court: High Court Of Kerala

Date of Decision: Aug. 10, 1988

Acts Referred: Easements Act, 1882 â€" Section 12, 15, 4

Citation: (1988) 2 KLJ 551

Hon'ble Judges: S. Padmanabhan, J

Bench: Single Bench

Advocate: C. D. Jose, T. V. Ananthan and D. S. Warrier, for the Appellant; V. C. James and K. A. Abdul Salam, for the Respondent

Final Decision: Allowed

Judgement

S. Padmanabhan J

1. Plaintiffs are the appellants. They stud for declaration of a right of way scheduled in the plaint through the properly of the defendants both as an

easement of necessity and by prescription. Consequential injunction was also prayed for against obstruction to the user. While admitting existence

of the pathway the defendants contended that it is for their own use and that the plaintiffs who are having alternate access cannot claim any

necessity. Prescriptive right was also denied and it was contended that occasional user with permission will not enable any prescriptive right.

Accepting the oral and documentary evidence including the reports and depositions of two commissioners and the admissions of defendants, the

trial court and the appellate court found that the pathway scheduled in the plaint is there and it is being used by the plaintiffs and defendants. The

trial court further found that the user of the way by the plaintiffs is only by permission and not as of right. The appellate court went to the extent of

saying that it is only a licence. Both the courts negatived the easement of necessity on the ground of availability of alternate access. Though that

finding is disputed, plaintiffs now claim only prescriptive easement right. The other grounds, on which the prescriptive easement right was

negatived, are:

i) the documents of title in favour of the plaintiffs are within twenty years of the date of suit;

ii) the dominant tenement was outstanding on mortgage from 1963 to 1966;

iii) the pathway is not mentioned in the title deeds; and

iv) the predecessors of the plaintiffs, who used the pathway, were not examined.

The suit was dismissed and the decision was confirmed in appeal.

2. The Appellate Judge did only an easy job. He did not care to consider the evidence or arrive at conclusions of his own. He only agreed with the

Munsiff without even looking into the evidence.

3. Findings regarding permissive user and licence are from vacuum without any material and against the weight of the plaintiffs" evidence. As many

as eight witnesses were examined by the plaintiffs. PWs 1 and 2 are plaintiffs and PWs 3 and 4 are independent witnesses. PW 5 is the

commissioner who prepared Exts. C1 and C2 PWs 6 to 8 are also independent witnesses. PW6 was discarded as interested while PWs 7 and 8

were rejected an inimical. All these witnesses except PW 5 gave evidence categorically that the way was in existence for the past more than 100

years and plaintiffs and their predecessors were using it openly as of right for all these times. Suggestion of permission or alternate access were

denied by them PW3 is the mother of the vendor of the defendants. Her evidence was rejected not on the basis of any interest or enmity or want

of trustworthiness, but solely on the ground that she was never in possession of the properly sold to the defendants PW 4 was rejected solely for

the reason that he was not a user of the pathway. It is really an illegality to reject the otherwise acceptable evidence of PWs 3 and 4 for the above

reasons. In order to become competent give evidence one need not be owner or possessor of the properties involved or user of the disputed

pathway. What is relevant is only his personal knowledge regarding the user and the consequent competence and trustworthiness On these

aspects. PWs 3 and 4 were not at all discredited. Even discarding the evidence of PWs 6 to 8 for the reasons assigned by the courts below, there

are ample materials to show that the pathway was there for more than 100 years and plaintiffs and their predecessors were using it as of right

openly and continuously.

4. Exts. C1 to C3 and the depositions of the two commissioners examined as PW5 and DW2 also proved the existence of the old pathway and its

user. It was PW5 who visited the property first in 1979. He was not able to find any alternate access. Disputed pathway was the only access he

found. DW2 who visited nearly one year later found two alternate paths one crossing six properties and, the other five. They could evidently be

accesses used after PW2 visited, presumably because the plaint schedule pathway was obstructed. Even otherwise in considering the prescriptive

right, the availability of another access is only of ratiocinative aid in the appreciation of evidence. It cannot affect the otherwise available

prescriptive right, Such an access could negative only the easement of necessity and not the prescriptive easement. Ext. B5 rough sketch produced

by the defendants noting alternate passages is only a self serving document. The facts noted therein were denied by the witnesses when put to

them. The evidence conclusively established the existence of the schedule pathway and its user peaceably and openly, as an easement and as of

right, interruption for more than twenty years within two years prior to the date of suit.

5. Normally in second appeal the factual findings of the trial court and the appellate court may not be disturbed. But when the findings are

completely against the weight of evidence, without the support of any materials and are perverse and on wrong understanding of the legal

provision, it is the duty of this court to intervene and correct in an attempt to do justice. Both the courts were prejudicially influenced in the

appreciation of evidence by wrong notions on certain legal and factual aspects. As I have earlier stated the finding of permissive user or licence is

not only without any evidence but against the evidence also.

6. The first fundamental error of law committed by both the courts below is the finding that a person who claims prescriptive easement of a right of

way must by himself use it for the statutory period before suit and after the sale deed in his favour. In this ease, Ext A1 gift deed by which the first

plaintiff got the property is in 1975 and Ext. A2 sale deed in favour of the second plaintiff is in 1960 and the suit was in 1979. 20 years interval is

not there. So also in between these periods the property went out to a mortgagee for three years from 1963 to 1966 under Ext. B6.

7. The very definition of easement in section 4 of the Easements Act shows that it is a right which the owner or occupier of certain land possesses,

as such, for the beneficial enjoyment of that land. Section 12 makes it clear that not only the owner of immovable property, but somebody on his

behalf also could acquire that right and such acquisition can also be by any person in possession of the property. Enjoyment as an occupier could

also be tacked on to enjoyment as owner on the basis of a subsequent purchase. For acquiring the right one need not necessarily be the owner

(see Chinnasami Goundan v. Balasundara Mudaliar and others - AIR 1933 Mad 575 Till the acquisition of the right by user for the statutory

period as an easement peaceably and openly as of right and without interruption, it is only an inchoate right, which also the courts will protect in

case of necessity from invasion. When once the right is acquired it passes with the land as an advantage to the dominant tenement in the hands of

the successors also and likewise as an obligation to the servant tenement As in the case of adverse possession of land, the user could be tacked

on. What is essential is that there should be privity between the successive occupants either of can tract, estate or blood. User of persons between

whom such privity is there could be tacked on to make up the time necessary to acquire an easement by prescription even daring the inchoate

period provided it is not interrupted and exercised for the statutory period. This could be had as between ancestor and heir, landlord and tenant,

vendor and purchaser, mortgager and mortgagee or persons claiming under the same title.

8. There may be days and weeks and months during which the right may not be exercised at all and yet during all these periods the person claiming

the right could be deemed to be in full enjoyment of it. The essential requirements of continuous and uninterrupted user will be sufficiently satisfied,

provided, the cessation of actual user are consistent with the enjoyment required by law Explanation II to Section 15 makes it clear what

interruption is. It is actual cessation of the user by reason of an obstruction by the act of some person other than the claimant. So also such

obstruction must be submitted to or acquiesced in for one year after the claimant had notice thereof. Otherwise it cannot be interruption to deny the

right. The question of tacking may not be possible when an interval has elapsed between the periods of enjoyment of the successive owners during

which the easement has not been used. So also when the adverse enjoyment of an easement has been for a time interrupted by the unity of seizin

and possession of the dominant and servant estates, the times of enjoyment before and after, such interruption cannot be added together to make

up the full period of prescription, because during the period of unity of holdings in the same persons there is no question of user of an easement in

ones own land.

9. Even though a mortgagee or a tenant cannot prescribe an easement against the mortgagor or lessor on account of the derivative title, their user

against another tenement can be tacked on by the mortgagor or lessor. So also when an easement of way was enjoyed by the owner or occupier

of the dominant heritage and the prescriptive right acquired, it would pass with the transfer of the dominant tenement, no matter that right of way

does not find special mention in the transfer deed. At the best such omission could only be used for appreciation of the evidence of acquisition or

existence of the right in doubtful cases. So also no rule of law says that acquisition of the prescriptive right could be proved only by the evidence of

the owners or possessors of the dominant or servant heritage or persons who had occasion to use the way. What is relevant is only the knowledge

of the person giving evidence and his credibility. If his evidence stands these tests nothing prevents his evidence being accepted, though actual

acceptance of evidence is a matter to be decided on the facts of each case. Going by these standards, I have no doubt that both the courts in

ignorance of legal and factual positions rejected the evidence, influenced and prejudiced by the mistakes. The witnesses examined were competent

and trustworthy (except probably PWs 6 to 8). The dominant heritage belonged to the family of the plaintiffs and possessed and enjoyed by the

predecessors from very early times. The user is proved to be continuous also. Parties appear to be relatives also. There is no allegation or

evidence of any cessation or interruption of the user. The prescriptive right matured even before Exts. A1 and A2 by which plaintiffs came by the

property. The right goes with the land and plaintiffs are entitled to it. The second appeal is allowed and in reversal of the decrees of the courts

below the suit is decreed as prayed for with costs throughout