
(1998) 3 CivCC 344 : (1998) 3 RCR(Civil) 388 : (1998) 2 RCR(Rent) 121

High Court Of Kerala

Case No: S.A. No. 101/97

Ramanunny Vaidyar

APPELLANT

Vs

Govindan Kutty Nair
and Another

RESPONDENT

Date of Decision: May 25, 1998

Citation: (1998) 3 CivCC 344 : (1998) 3 RCR(Civil) 388 : (1998) 2 RCR(Rent) 121

Hon'ble Judges: P.K. Balasubramanyan, J

Bench: Single Bench

Advocate: P.N.K. Achan and P.N. Ravindran, for the Appellant; R. Bhaskaran, for the Respondent

Final Decision: Allowed

Judgement

P.K. Balasubramanyan, J.

The Defendant is the Appellant. The Defendant is the owner of the property lying to the south of a lane. The

Plaintiffs are the owners of the property lying to the north of the lane. To the west and north of the property of the Plaintiffs there are lanes. There is

an old house situate in the property of the Plaintiffs facing towards the west and having access to the lane on the west going from north to south. A

flight of steps from the property of the Plaintiffs to that lane establishes that this was their access to their property. The Plaintiffs constructed a new

building on the eastern portion of their property. They claim that they took loaded vehicles to the property from the eastern road through the lane

lying in between the properties of the Plaintiffs and the Defendant and had expended monies for raising the level of that lane. The Plaintiffs

approached the court praying for a permanent injunction restraining the Defendant from altering the nature and lie of the lane and restraining him

from preventing the taking of vehicles to the property of the Plaintiffs through the lane. The Plaintiffs pleaded that the Defendant was attempting to

construct a wall to the north of his property by encroaching into the lane and seeking to reduce its width with a view to prevent the Plaintiffs from

taking vehicles from the road on the east of their property lying to the north of the lane and towards the west. The Defendant resisted the suit by

contending that when the Plaintiffs wanted to construct a new building in their property, they were permitted to take loaded vehicles through the

lane to transport materials for the construction as a matter of concession, on the understanding that the land would be restored to its original width

and position, once the construction was over, that the Plaintiffs were resiling from that position and the Plaintiffs had no right to seek any injunction

in respect of the lane or to claim that they have got a right to take vehicles through the lane. The Plaintiffs sought an interim injunction pending suit

restraining the Defendant from constructing a compound wall on the northern side of their property. Though they obtained an order of interim

injunction from the trial court, the injunction was vacated in appeal and according to the Plaintiffs, the Defendant constructed a wall to the north of

his property and in that process, reduced the width of the lane. On that basis, the Plaintiffs got the plaint amended and incorporated a prayer for a

mandatory injunction directing the Defendant to remove the wall and to restore the land to its original width.

2. In the trial court, Exts. A-1 to A-7 were marked on the side of the Plaintiffs and P.Ws. 1 to 7 were examined. Exts. B-1 to B-5 were marked

on the side of the Defendant and D.Ws. 1 to 3 were examined. The Commissioner's reports and plans were marked as Exts. C-1 to C-4. The file

from the Koyilandy Municipality was got produced and marked as Ext. X-1. On this evidence, the trial court dismissed the suit holding that the

Plaintiffs have not established any right over the lane and hence they were not entitled to the injunction sought for. The Plaintiffs filed an appeal. The

lower appellate court reversed the decree of the trial Court and granted the Plaintiffs a decree for mandatory injunction directing the Defendant to

demolish the compound wall for a specified length, indicated as the portion AB in Ext. C-4 plan. Feeling aggrieved, the Defendant has come up

with this Second Appeal.

3. It was contended on behalf of the Defendant that the Plaintiffs have not established any right over the lane which would entitle them to a decree

for injunction either prohibitory or mandatory as against the Defendant. It was contended that the Plaintiffs were only the owners of a property

lying to the north of the lane in question and they have not established any right over the lane which would entitle them to a decree. Counsel for the

Plaintiffs countered by submitting that the Plaintiffs have been using the lane, right from the time of the purchase of the northern property in the year

1979 and since the action of the Defendant reducing the width of the lane was illegal and unauthorised, the Plaintiffs would be entitled to a decree

for injunction and the circumstances of the case justify the decree for injunction passed by the lower appellate court.

4. In the plaint, though the Plaintiffs did not plead specifically any right over the lane or to its user, they stated that the lane was lying as a public

way for a long time and was being used. The claim that the lane was a public way, was denied by the Defendant. No evidence was adduced to

prove that it was a public lane. The evidence of P.W. 2, the Village Officer who was directed to conduct an enquiry pursuant to a complaint made

by the Plaintiffs, indicates that the lane was formed of portions of the southern properties of the Plaintiffs and their eastern neighbour and of the

northern property of the Defendant. Thus the claim that it is a public way or a public lane, has not been established by the Plaintiffs. The Plaintiffs

have not set out any case of a right of easement over the lane. The Plaintiffs have not also set up any customary right to use the lane in question. In

short, the Plaintiffs have not put forward or established any legal right to the user of that lane or to its preservation. The only facts clearly

established are that there existed a lane and it was used by the Plaintiffs and probably by Ors. also. No legal right over the lane as such has been

pleaded or proved by the Plaintiffs. Since the Plaintiffs purchased their property to the north of the lane only in the year 1979 and the suit was laid

in the year 1987, there could also arise no right by way of prescription. The Plaintiffs have in fact not pleaded or attempted to prove any right over

the lane by way of prescription. The lower appellate court has not entered a finding on the right on the basis of which the Plaintiffs were being

granted relief by that court.

5. In *Jeffris v. Williams* (1851) 5 Ex. 792 dealing with the claim for damages by an adjacent owner for careless mining by a neighbouring owner in

his own property, Parke, B. observed:

If a house is de facto supported by the soil of a neighbour, this appears to us to be sufficient title against anyone but that neighbour or one claiming

under him. Just as one who should prop his house by a shore resting on his neighbour's ground, would have a right of action against a stranger,

who, by removing it, causes the house to fall; but none against his neighbour, or one authorised by the neighbour to do so, if he took it away and

caused the same damage.

Thus it was held that a person without title cannot interfere with the enjoyment of the property by one whose title does not even extend beyond

possession. In *Bibby v. Carter* (1859) 4 H and N 153 the above decision was followed and Pollock, C. B. observed;

On the authority of *Jeffris v. Williams*, the Defendant must be taken to be a mere stranger and therefore liable to an action.

In *Jootoor Acchanna v. Vanamala Vankamma* 5 M.L.J. 24 the Madras High Court took the view that:

It was not necessary for Plaintiff to establish prescriptive rights of easement against a wrongdoer and that the mere fact of Plaintiff's enjoyment is

sufficient to entitle him to an injunction.

The decision in Jeffris v. Williams (1851) 5 Ex. 792 was relied on in support. In Kondappa Rajan Naidu v. Dewarakonda Suryanarayana ILR 34

Mad. 173 it was held;

It is well settled law that a trespasser, in enjoyment of land for less than the statutory period, is entitled to be maintained in possession against all

persons except the true owner. The same principle is applicable to incorporeal rights such as rights to light and water courses. A person in

enjoyment of a water course for less than 20 years is entitled to protection in such enjoyment against persons who have no right to such water

course.

In Narasappayya v. Ganapati Rao I.L.R 38 Mad. 280 Anr. Division Bench held that unless an easement had ripened into a prescriptive one, mere

enjoyment of the user for any length of time short of the full period of prescription gave no right for the enjoyer to maintain an action against any

person infringing such a user. The existence of the apparent conflict between the two decisions led to a reference of the question to a Full Bench of

the Madras High Court. The question that was referred was whether a person who is in the enjoyment of an easement, but who has not acquired a

title to it by prescription or otherwise, can maintain an action to prevent its obstruction by any person other than the owner of the servient

tenement? The Full Bench reframed that question as follows:

Can a person who has been using a particular way over the land adjoining his, but for less than the prescriptive period, maintain an action to

prevent a stranger from obstructing him using the way?

After considering the earlier authorities on the subject and passages from text books, the Full Bench in the decision in Chinatalapati

Venkatanarasimharaju Vs. Suriseti Ramaswami and Another, gave the answer as follows:

In my opinion where a right of way has not been acquired by enjoyment for the prescriptive period there is ordinarily no right of action for

interference. In a very exceptional case where access to the Plaintiff's land would otherwise be cut off altogether a suit might be maintained

against a stranger on the principle propounded in (1851) 5 Ex. 792 but not otherwise. The answer that I would give to the question referred in its

altered form is that an action cannot be maintained in ordinary circumstances. It can only be maintained if the obstruction to user will have the effect

of substantially depriving a person of the enjoyment of his property.

In *A. Lakshminarayana v. Heera Chand* AIR 1960 Kar 317, the Mysore High Court after an exhaustive survey of the decisions on the subject

relied on the decision of the Madras High Court in *Venkatanarasimharaju v. Ramaswami* AIR 1911 Mad. 176 to take the view that if a right is

claimed as an easementary right then it is good both against the owner of the servient tenement as well as against the entire world. But if it is

claimed as a natural right it can be enforced only against strangers and a suit cannot be maintained by a trespasser into the Government land unless

the trespasser had prescribed for a title against the Government, as regards the dominant tenement. In *Hajisa Imamsa v. Kalyan Rao* AIR 1961

Kar 86 it was held that one trespasser can maintain a suit against Anr. trespasser, if the Plaintiff proved that he had dug out a water channel

through which he was claiming a right and had maintained it till he is obstructed by Anr. trespasser. In *D. Ramanatha v. S. Razaack* AIR 1982

Karnataka 314 it was held that it was necessary that in a suit for injunction based on a prescriptive easement right the Plaintiff should seek for a

declaration from the court that he has so acquired a prescriptive right and easement and only after establishing such a right he would be entitled to

relief. In *Krishna Pillai v. Kunju Pillai* 1990 (1) KLT 136. His Lordship Justice Padmanabhan disagreed with the view of the Karnataka High

Court in AIR 1982 Kar 314 and held that "even an inchoate right which is at the stage of user alone without having matured into a prescriptive right

is a right that will be protected by a court of law in a deserving case against invasion within the limits of law just like the possessory title of a person

who has not acquired full right. That right could be put forward as a sword as well as shield within permissible limits"". That was a case where the

suit was filed by the Plaintiff for a perpetual injunction restraining the adjacent owners Defendants in that suit from taking forcible possession of the

suit property or disturbing the peaceful possession of the Plaintiffs. The Defendants admitted the title and possession of the Plaintiffs and set up in

defence only a plea that there was a pathway from the plaint Schedule property over which they had acquired a prescriptive easement for ingress

into and egress from their property and the object of the suit was only to deprive them of that right. The decree for injunction was sought without

disclosing the real facts. The courts below having dismissed the suit the plaintiffs had filed the appeal. It was while dismissing the Second Appeal at

the stage of admission that His Lordship Justice Padmanabhan made the above observations. The case, as I see it, turned more on the Plaintiffs not

having approached the court with clean hands. The grant of the relief of injunction being discretionary the Defendants had put forward a case that

the Plaintiffs have no absolute possession over the property in the sense that they had a right of way through the property of the Plaintiffs and they

were using a portion of the plaint Schedule property for their ingress into and egress from their property. With respect, I do not think that the

decision in Krishna Pillai's case 1990 (1) KLT 136 has laid down any law different from what has been stated by the High Court of Madras in

Chinatalapati Venkatanarasimharaju Vs. Suriseti Ramaswami and Another, . In my view, the said decision is no authority for holding that a person

who has not acquired a right or perfected a right can maintain an action against the owner of the land over which the right is claimed. In my view,

on the basis of an inchoate right or a right which has not ripened into an easement by prescription, but is merely one of user, no relief can be

granted to the user of their as against the owner of that land. In other words, a right, proprietary or otherwise has to be shown for obtaining relief.

6. The position obtaining in the present case is that the Defendant is the owner of the property lying to the south of the lane and on the evidence it is

clear that the lane was formed by portions of the northern property belonging to the Plaintiffs and portions of the southern property belonging to the

Defendant and their eastern neighbour. The present case is therefore one where the Plaintiffs are seeking relief against the owner of a portion of the

lane (as claimed by the Plaintiffs) and in such a case, unless the Plaintiffs establish a legal right to maintain the lane in the form in which they want it

maintained, by clearly establishing a right over that lane by way of easement of necessity or by prescription, they would not be entitled to relief. The

Plaintiffs made no attempt to plead or prove any prescriptive right by way of easement by prescription. No case of easement of necessity was

involved. In such a situation it is clear that the Plaintiffs could not maintain the suit for injunction restraining the Defendants from constructing the

wall or for directing the Defendant by way of a mandatory injunction to remove the wall which had already been put up. This is because, the

Defendant is the owner of a portion of the property that formed the lane and not a stranger causing obstruction. The lower appellate court in my

view was in error in granting the Plaintiffs relief without the Plaintiffs establishing a right over the lane in question. Since the suit was against the

owner of a portion of the property that formed the lane, the Plaintiffs had to establish clearly a right over the lane. No such right was established or

found. The Plaintiffs came forward with a case that the lane was a public lane and that was found against by both the courts. In such a situation, the

trial court was right in dismissing the suit and the lower appellate court was in error in reversing the decision of the trial court even without being

able to find that the Plaintiffs have established any right to have the lane maintained in the form in which they wanted it. Since the decree granted by

the lower appellate court is not supported by the necessary finding of fact and the grant of the decree is based on a misconception of the law on

the question, I am satisfied that the decision of the appellate court is vitiated by a substantial error of law warranting interference by this Court in

Second Appeal.

I therefore allow this Second Appeal, set aside the judgment and Decree of the lower appellate court and restore the judgment and Decree of the

trial court dismissing the suit, in the circumstances of the case I direct the parties to suffer their respective costs in this Court.