Kerala High Court
Purushothaman vs Chandrasekharan on 19 October, 2010

IN THE HIGH COURT OF KERALA AT ERNAKULAM

SA.No. 592 of 1999(D)

1. PURUSHOTHAMAN
... Petitioner

Vs

1. CHANDRASEKHARAN
... Respondent

For Petitioner :SRI.DILIP J.AKKARA

For Respondent :SRI.G.PRABHAKARAN

The Hon'ble MR. Justice S.S.SATHEESACHANDRAN

Dated :19/10/2010

O R D E R

S.S.SATHEESACHANDRAN, J.

S.A.NO.592 OF 1999

Dated this the 19th day of October, 2010

J U D G M E N T

The 2nd defendant in O.S.No.96 of 1988 on the file of the Munsiff Court, Kodungalloor had preferred this second appeal. He passed away pending the appeal and then his legal heir (son) was impleaded as additional 2nd appellant. Challenge in the appeal is against the concurrent decision rendered by the two courts below granting a decree declaring the right of prescriptive easement over plaint B schedule, a pathway by the respondents/plaintiffs and also a perpetual prohibitory injunction against the defendants in the suit from causing any obstruction to the plaintiffs in enjoyment of such right.

2. The dispute involved in the case, admittedly, is confined to the width of the pathway and also whether plaint B schedule takes in portions of a thodu running along the northern extremities of the

property of the 1st defendant in the suit. The 1st defendant is the wife of the 2nd defendant. Plaintiffs alleged that the B schedule pathway running through the northern extremities of the properties of the 1st defendant in east west direction, is being enjoyed by them as of right for the last more than fifty years uninterruptedly and peacefully and they have acquired prescriptive easement over that pathway for ingress and egress to their residential building comprised in the property situate to the west of that pathway. The immediate cause for filing of the suit, according to the plaintiffs, was the attempt made by the defendants to put up a boundary wall on the northern side of their property encroaching upon portions of B schedule pathway. The defendants, both of them, together filed a joint written statement contending that the plaintiffs have no right of easement over B schedule pathway and its description was per se wrong. Contending that the 2nd defendant was an unnecessary party to the suit, the plaintiffs resisted the suit claim asserting that the pathway situate on the north of the property of the 1st defendant is only having a width of 2 to 3 feet. It was the further case of the defendants that just to the south of that pathway through the northern extremities of the property of the 1st defendant, there is a water channel, which, by the flow of rain water from east to west to a water tank situate on the south western side, at some places had been filled up and the portions covered by the water channel running through the property of the defendants are mischievously included in B schedule pathway by the plaintiffs as if over such a pathway they have obtained right of prescriptive easement. The defendants have a right to put up a boundary wall to the north of the channel which pass through the property of the 1st defendant was their case to resist the reliefs canvassed by the plaintiffs in their suit. The trial court, after appreciating the materials tendered in the case by the parties, which consisted of PWs.1 to 3 and Exts.A1 to A4 for the plaintiffs and DW1 for the defendants, and Exts.C1 to C4, the reports and plans prepared by an advocate commissioner, found the claims of the plaintiffs for declaration of prescriptive easement over B schedule and also for perpetual prohibitory injunction against the defendants from causing any obstruction to their enjoyment over that pathway are well-founded and thereupon, negativing the challenges raised to such claims by the defendants, the suit was decreed as canvassed for. The lower appellate court, after re-appreciating the materials, confirmed the findings of the trial court and dismissed the appeal preferred by the defendants against the decree granted in favour of the plaintiffs. The decision so rendered by the two courts below holding that the plaintiffs are entitled to the declaration of their right of prescriptive easement over B schedule pathway and also an injunction against the defendants is challenged in this appeal filed by the 2nd defendant, and after his death, prosecuted by his legal representative, the additional 2nd appellant. Pending the appeal before the courts below, it is stated in the memorandum of appeal, the 1st defendant had passed away, but evidently none was brought on record as her legal representative in such appeal.

3. The learned counsel for the appellant assailed the concurrent findings entered by the two courts below with respect to the existence of B schedule pathway and its enjoyment by the plaintiffs contending that the materials tendered in the case, especially the reports of the advocate commissioner, clearly demonstrate that such pathway is having uneven width at different places, and when a claim for a declaration of prescriptive easement is canvassed for, the plaintiffs were bound to state with precision the material particulars of the pathway and its identity with concrete evidence. The learned counsel further contended that the case of the plaintiffs was that B schedule was outside the property of the defendants, and such being the case advanced, no decree for

declaration of prescriptive easement over B schedule pathway could have been granted by the courts as was wrongly done in the present case. The width of the footsteps on the east for getting to the public road and also the features noticed by the commissioner that a major portion of B schedule claimed by the plaintiffs are at uneven levels by the flow of rain water from east to west, according to the counsel, substantiated the defense raised that a water channel pass through the northern extremities of the property of the 1st defendant and B schedule is described as taking in that water channel as well to claim prescriptive easement by the plaintiffs. Reliance was placed by the counsel in Smt.Anguri and others v. Jiwan Dss and another (AIR 1988 SC 2024) to contend the plaintiffs cannot be permitted to increase the burden of easement on servient owner setting up a larger claim than that was available and enjoyed by them as a right of easement. By seeking a declaration of easement over B schedule as described in the plaint, according to the counsel, the plaintiffs were blocking the natural water channel flowing through the northern extremities of the property of the 1st defendant and the right of easement so claimed by them was not at all allowable. But both the courts, without appreciating the materials in the proper perspective, forming wrong conclusions, granted the decree imputed in the appeal in favour of the plaintiffs and it is liable to be set aside, according to the counsel.

4. Though the learned counsel for the appellant had raised some arguments that the declaration of easement of the plaint schedule was claimed by the plaintiffs as if they were setting up such a right contending that part of the plaint schedule is a public way and the rest formed part of the property of the 1st defendant, after going through the pleadings and also the materials tendered and also adjudication made by both the courts on the issues involved, I find there was no such case for the defendants either in the pleadings or before the courts below. Further more, there is nothing on record to indicate that the plaintiffs had at any point of time set up a case over B schedule as if the part of it was enjoyed as a public way and the rest alone under the servient tenement of the 1st defendant. Perusing the concurrent decisions rendered by the two courts below, I find that the challenges raised against the decree that the plaintiffs are entitled to the declaration of easement and also injunction are meritless. It has come out from the evidence that the 1st defendant examined as DW.1 that the fence put up in her property is to the south of the plaint schedule, that is, beyond the water channel claimed as running through her property. Further more, during the pendency of the suit, she had executed A4 sale deed in respect of ten cents of land in north south direction on the eastern side of her property. In that document also, the northern boundary of the property conveyed was shown as the pathway. A3 was executed in favour of one Co-operative Society and it has come out that its execution was after that society obtaining approval from the competent authorities. If the case of the 1st defendant is to be accepted over the water channel, which is claimed as running from east to west through the northern extremity of her property, she retained her proprietary right after execution of A3 deed even in respect of partition of the channel situate to the north of the ten cents of land conveyed under that deed. During the rainy season, water from the public road situate on the north runs through a portion of the pathway, to a nearby water bank situated on the southwest in no way indicate that there is only a pathway of two or three feet, and not as described in the plaint schedule. The 1st defendant had obtained right over the property situated to the south of the plaint schedule pathway under A2 partition deed. In that deed also the northern boundary of the property allotted to the 1st defendant is described as 'idavazhy' (pathway). Similarly in A3 deed relating to the property owned by a close-by neighbour situate to the north of the plaint schedule,

the southern boundary of that property is shown as the 'idavazhi'. In none of these documents there is any mention of any water channel close to the pathway or such a channel running through the northern extremities of the 1st defendants property. Plaint schedule is lying on a lower level from the rest of the property of the 1st defendant situated on its southern side is not indicative of the existence of a water channel through the northern extremities of the 1st defendant's property. Similarly, the width of the stepping stones near the public road which are comparatively less when compared to the width of the pathway is also not a determining factor to hold that the description of the plaint schedule is wrong and the pathway has got only a lesser extent. The commissioner has reported that the pathway has uneven width of ten to twelve feet at various places and not ten feet uniform by, as described in the schedule, is hardly sufficient to negative the claim for declaration canvassed by the plaintiff where the existence of the pathway, though, disputed by the defendants, and its right of enjoyment by the plaintiffs is established by the materials. The decision relied by the counsel Smt.Anguri and others v. Jiwan Dss and another (AIR 1988 SC 2024) has no application to the facts of the case. That was a case where additional burden over the servient tenement was attempted to be brought in by the dominant tenement holder, and in that context, adverting to Section 23 of the Indian Easements Act, it was held that such increasing burden of easement on the servient owner cannot be approved or permitted. That decision no way helps the present appellant where the resistance put by him that a water channel forming part of his property is claimed as a pathway has been found unacceptable by the courts below after appreciating the materials tendered in the case.

5. It is also noticed that the second appeal has been preferred by the 2nd defendant in the suit, the husband of the 1st defendant. In the memorandum of appeal, it is stated that pending the appeal before the lower appellate court, the 1st defendant, the servient owner, through whose property easement was claimed by the plaintiffs, had passed away. It appears that the appeal was continued and prosecuted by the 2nd defendant, who was the 2nd appellant, without impleading any other legal heirs of the deceased 1st defendant/the 1st appellant. Pending second appeal, the appellant/2nd defendant too had passed away and his son had been impleaded as additional appellant. It is a moot point how far the challenge against the concurrent decision rendered by the courts below could be assailed by the 2nd defendant or his legal representative when in the joint written statement filed by both the defendants, it was contended that the 2nd defendant was an unnecessary party to the suit and, further, the 1st defendant was the servient owner of the property. Irrespective of that question, as indicated earlier, there is no merit in the challenges raised to impeach the concurrent decision rendered by the courts below holding that the respondents/plaintiffs are entitled to the decree of easement and also decree of injunction against the defendants. There is no question of law, leave alone any substantial question of law in this appeal.

Appeal is devoid of any merit, and it is dismissed directing both sides to suffer their respective costs.

S.S.SATHEESACHANDRAN JUDGE prp