HIGH COURT OF KERALA

Bench: Justice C. Pratheep Kumar

Date of Decision: 20th June 2024

Case No.:

REGULAR SECOND APPEAL NO. 989 OF 2006

REGULAR SECOND APPEAL NO. 349 OF 2007

APPELLANT(S):

KUMARAN NAIR .....Appellant

VERSUS

RESPONDENT(S):

RADHA BAI

K. SUKUMARAN NAIR

S. MOHANAN

R. SREEDEVI .....Respondents

Legislation:

Indian Succession Act, 1925 – Section 70, Section 152

Indian Evidence Act, 1872 – Section 68, Section 120

Travancore Nair Act, 1100 – Section 22(1)

Subject: Regular Second Appeals arising from a dispute over the right of easement by grant along a pathway described in the Will and settlement deeds executed by the father of the disputing parties.

Headnotes:

Easement by Grant – Right of Way – Extent of Pathway – Pathway described in the Will of the testator – Dispute over width and location of the pathway – Trial court limits the pathway width to 3 feet – First Appellate Court expands it to 6 feet – High Court finds lack of

substantial evidence for both determinations – Concludes width of pathway to be 1.5 meters on the western end and 1.4 meters on the eastern end based on gate widths described in the Commissioner's report [Paras 1-30].

Indian Succession Act – Section 70 vs. Section 152 – Contention on the cancellation of Will by subsequent settlement deeds – High Court holds that the relevant provision is Section 152 (ademption) and not Section 70 – Finds that Ext.A1 Will is not cancelled by execution of Exts.A2 and A3 settlement deeds [Paras 15-17].

Witness Testimony – Indian Evidence Act – Section 68 – Proving the Will – Contention that the Will is not proved due to non-examination of attesting witness – High Court finds no challenge to the Will by the defendant – Holds that non-examination does not affect the outcome in this case [Paras 18-20].

Travancore Nair Act – Section 22(1) – Non-joinder of necessary parties – Defendant's contention of non-joinder of children of plaintiff under Section 22(1) – High Court finds contention raised for the first time in Second Appeal unsustainable – Holds no merit in the argument [Paras 21-23].

Decision:

RSA No. 989 of 2006 disposed of with the modification that the width of the pathway is limited to 1.5 meters on the western end and 1.4 meters on the eastern end. All other findings of the First Appellate Court sustained. RSA No. 349 of 2007 dismissed. No costs ordered considering the relationship between the parties [Paras 31-32].

Referred Cases:

- Sarada v. Radhamani, 2017 (2) KLT 327
- Vidhyadhar v. Manikrao and Another, 1999 (3) SCC 573

- Parameswaran Pillai Gopinathan Pillai v. Stella Phenes, 1967 KLT 364
- Simon v. N.Jayanth, 1986 KLT 457

JUDGMENT

1. Both these Second Appeals are filed by a brother against his sister. He filed these appeals against the judgment and decree of the Principal Sub Judge, Thiruvananthapuram allowing A.S.47/2003 and dismissing A. S.13/2004. He is the defendant in O.S.1377/1999 on the file of theAdditional Munsiff's Court, Thiruvananthapuram, filed by his sister. For the purpose of convenience, the parties are hereafter referred to as per their rank before the trial Court.

2. Their father Kunjukrishna Pillai executed Ext.A1 Will in the year 1962 bequeathing some of his properties in favour of his children including the plaintiff and the defendant. While allotting separate shares to his children, Kunjukrishna Pillai was vigilant to make specific provision for the ingress and egress of the sharers, with the solemn object of avoiding dispute between his children, in future. Since, even before the execution of Ext.A1 Will deed, there was a well defined pathway starting from the western public road, leading up to the family house which situated on the eastern side of the entire 29 cents of property covered by Ext.A1,the exact width of the said pathway was not specified in the will. The calculations of Kunjukrishna Pillai proved wrong, when the relationship between the children got strained. The suit filed by the sister for enforcing her right of easement by grant over a pathway having a length of 65 feet and width of 6 feet (plaint C schedule way), against her younger brother, is now in it's 25th year. The trial court as well as the First Appellate court found that the plaintiff is entitled to get the way provided in the will. The trial court found that the width of the grant is only 3 feet, while the First Appellate court found that it's width is 6 feet. Before the sister could get a final answer to the disputed question, she left all of us to the heavenly

abode, leaving behind her husband and children to get impleaded in the appeal as additional appellants 2 to 4, to continue the legal fight.

3. The plaint C schedule pathway is through the northern side of the defendant's property (plaint B schedule property), starting from the western public road towards east and ending at the western boundary of the plaintiff's A schedule property. According to the defendant, the pathway claimed is through the courtyard of his residence and that such a pathway through the courtyard will affect his privacy. Further, according to the defendant, while the father was alive, in the year 1972, he had shifted the pathway provided along the norther side of plaint B schedule towards it's southern side. Therefore, according to the defendant, the pathway available for the plaintiff is along the southern side of the plaint B schedule and no pathway as scheduled in the plaint is in existence.

4. The trial court found that the plaint C schedule pathway as claimed in the plaint is not in existence. However, it granted relief to the plaintiff limiting the width of plaint C schedule pathway to 3 feet. Dis-satisfied with the above judgment and decree, the plaintiff preferred A.S.47/2003 and the defendant preferred AS 13/2004. The 1st Appellate Court found that the width of the C schedule pathway is 6 feet, against which the defendant preferred these Second Appeals.

5. At the time of admission, the following substantial questions of law were formulated by this Court in RSA 989/2006:

i) When Ext.A1 will dated 25.10.1962 only mentions about a pathway in between the properties bequeathed thereunder as schedules E and F, was the plaintiff entitled to claim a right of way over a 6 feet wide pathway described as per plaint C schedule property and were the courts below justified in granting a decree as claimed ? ii) When Ext.C1 report and Ext.C1(a) plan prepared by the Commissioner do not identify the plaint C schedule property and also do not describe plot No.II as a pathway, were the courts below justified in granting a decree on the assumption that plaint C schedule property is part of plot No.II in Ext.C2 plan ?

6. No separate questions of law were formulated in RSA 349/2007 as both the Appeals originated from the same judgment and decree.

7. Both sides were heard in detail on the above substantial questions of law. In Ext.A1 will dated 25.10.1962, the testator has specifically stated that already a pathway was in existence, starting from the western road, leading up to the family house situated on the eastern side of the entire 29 cents bequeathed

to the children. Admittedly, the above family house was now allotted to the plaintiff as per Ext.A1 Will. The testator specifically stated in the Will that all the sharers shall use the then existing pathway for the ingress from and egress to their shares and also that the width of the existing pathway shall not be reduced by any of them.

8. Subsequently, in the year 1970, the father executed Ext.A2 gift deed in favour of the plaintiff in respect of 8.25 cents of property covered by Ext.A1. Thereafter, in the year 1976, he had executed Ext.A3 settlement deed also in favour of the plaintiff in respect of another 2.5 cents of property which is also part of the property covered by Ext.A1. Thus, as per Ext.A2 and A3, father had assigned the plaint A schedule property covered by Ext.A1 will, in favour of the plaintiff. In Ext.A2 also there is mention about the pathway which is already in existence and specified in the will.

9. One of the contentions in the written statement is that, though at the time of execution of Exts.A1 and A2 there was a pathway having a width of 3 feet along the northern side of his property leading to the family house on the eastern side, in the year 1972 the father himself shifted the above pathway towards the southern side of the defendant 's property and thereafter, nobody used the pathway which was lying along the northern side of his property. Therefore, According to him, a 3 feet width pathway substituted along the southern side of his property is the only pathway now available for the plaintiff as access to the plaint A schedule property. Further according to the defendant, ever since 1972, nobody used the pathway which was lying along the northern side of his property and as such the right of easement by grant over the earlier pathway has extinguished.

10. Both the trial court as well as the 1st Appellate Court found that there is absolutely no merit in the contention of the defendant that the pathway lying along the northern side of this property is not in existence since 1972 and also that in its place a new pathway was created along the southern side of his property by the father. Similarly, the contention of the defendant that the plaintiff's right of easement by grant over the pathway along the northern side of his property got extinguished was also found against the defendant by the trial court as well as the 1st Appellate Court. At the same time, there is ample evidence to show that at the time of filing the suit and thereafter, there is a pathway lying along the northern side of the defendant's property through which the plaintiff is claiming right of easement by grant.

11. In Exts.C1 and C1(a) commission report and sketch prepared by the Advocate Commissioner deputed by the trial court, the Commissioner

specifically noted that along the northern side of the residential building in the defendant's property, there is a strip of land having a width of 2.5 m. on the west and 2.7 m. on the east. The commissioner further reported that, through the above strip of land there is a pathway, along the line of C schedule, starting from the western public road and ending at the western side of the plaint A schedule property. At the western extremity as well as on the eastern extremity of the said pathway, there are two gates. The width of the gate on the western extremity has a width of 1.5 metres and the gate on the eastern extremity has a width of 1.4 metres. The Commissioner further noted that the gate put up on the western side of the pathway has an age of 30 years and the gate on the eastern side has an age of 15 years at the time of his visit. The Commissioner in Ext.C1 report further noted that about 70% of the above pathway was concreted. However, even in Ext.C1 report, the exact width of the existing pathway was not specified. In the above circumstance, the finding of the 1st Appellate Court that the plaint C schedule pathway has a width of 6 feet, is not substantiated by any reliable evidence. At the same time, the finding of the trial Court that the said pathway has a width of only 3 feet is also not in tune with the evidence on record.

12. The contention of the defendant that in the year 1972, his father hasclosed the then existing pathway lying along the northern side of his property and substituted a new pathway along the southern side of his property cannot be believed for the simple reason that even now a pathway is in existence along the line of the C schedule pathway. The defendant is also using the said pathway as access to his residence. The gate existing at the eastern side leading towards the plaint A schedule property is a clear indication that, the plaintiff also has been using the very same pathway as access to A schedule property. The defendant cannot give any satisfactory explanation for the presence of such a gate at the end of the existing pathway at the eastern side and also for the presence of such a pathway even after the suit. Therefore, the contention of the defendant that the father closed down the pathway provided in Exts.A1 and A2 in the year 1972 and that the above pathway was shifted towards the south of the defendant's property is devoid of any merit and liable to be rejected.

13. It is true that there is a narrow strip of land lying along the southern side of the defendant's residential building having a width of 80 cm at the western end. It is along the backyard of the residence of the defendant. At the time of evidence, it is also revealed that a drain is passing through the above narrow strip of land. Therefore, the finding of the trial Court as well as the 1st Appellate

Court that no such pathway is in existence along the southern side of the defendant's property, as access to plaint A schedule property, is perfectly justified.

14. After the trial court judgment, there was a further development. Thedefendant started constructing a new compound wall along the northern side of his property, after leaving a pathway having a width of 3 feet. The above attempt of the defendant was resisted by the plaintiff by filing an Interlocutory Application along with A.S.47/2003 in which the 1st Appellate Court ordered *status quo*. The plaintiff filed another application complaining that, in violation of the order of status quo, the defendant constructed the wall and praying for it's demolition and the First Appellate Court allowed the said application. The matter was taken up before the High Court by filing a writ petition. The contention taken by the defendant was that he had constructed the above compound wall in compliance of the decree of the trial Court. However, since the plaintiff disputed the width of the pathway, this Court also directed the parties to maintain status quo and directed the 1st Appellate Court to dispose of the Appeals in a time bound manner. The 1st Appellate Court while disposing of the appeals found that the plaintiff is entitled to get a pathway having a width of 6 feet and hence directed the defendant to demolish the compound wall constructed by him during the pendency of this suit, in violation of the order of status quo.

15. The learned counsel for the defendant would contend that since Kunjukrishna Pillai executed Exts.A2 and A3 settlement deeds in respect of plaint A schedule property, subsequent to Ext.A1, the Will stands cancelled by the operation of Section 70 of the Indian Succession Act and as such, Ext.A1 could not be relied upon for any purpose including for the purpose of claiming easement by grant over plaint C schedule pathway.

16. However, the learned counsel for the plaintiff would argue that the testator had executed Exts.A2 and A3 settlement deeds only in respect of part of the properties covered by Ext.A1 and as such, the relevant provision of Indian Succession Act applicable is Section 152 relating to ademption and not Section 70. Section 152 of the Indian Succession Act reads as follows:

Ademption explained – If any thing which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the Will.

17. As per Ext.A1, the father had bequeathed properties in favour of the plaintiff and his other children. Even the defendant got plaint B schedule property as per Ext.A1 Will. Subsequently, the property bequeathed as per Ext.A1 was settled in favour of the plaintiff as per Ext.A2 and A3 documents. Therefore, it can be seen that, Ext.A1 as such was not cancelled by the testator and only a portion of the properties covered by Ext.A1 was conveyed as per Exts.A2 and A3. Therefore, there is no merit in the argument advanced by the learned counsel for the defendant that Ext.A1 as such stands cancelled on the execution of Ext.A2 and A3. In the above circumstance, the contention of the defendant that Ext.A1 became inoperative and that it cannot be used for any purpose including for the purpose of identifying the pathway created along the northern side of the plaint B schedule property, is liable to be rejected.

18. The learned counsel for the defendant relying upon the decision of a Division Bench of this Court in **Sarada v. Radhamani, 2017 (2) KLT 327** would argue that examination of at least one attesting witness, as required under Section 68 of the Indian Evidence Act is mandatory to prove Ext.A1 Will and in the absence of the same, the will stands not proved. In the above decision, the Division Bench held that even if the execution of the Will is not specifically denied or expressly admitted, at least one attesting witness is to be examined to prove the same.

19. In the instant case, the defendant as well as his other siblings obtained properties as per Ext.A1 Will. The defendant claims absolute right and title over plaint B schedule property, by virtue of Ext.A1. In the written statement he has not raised any challenge against Ext.A1 Will. Subsequent to Ext.A1 will, the father executed Exts.A2 and A3 settlements in favour of the plaintiff and as such, with regard to the plaint

A. schedule property, the plaintiff's title deeds are Exts.A2 and A3 and notExt.A1 Will. In the above circumstance, the contention of the defendant that Ext.A1 Will is not proved, does not make any difference in the facts and circumstances of this case.

20. At the same time, if Ext.A1 is considered as not proved, the condition of the defendant would be worse. In that case, it is to be presumed that the father died intestate, in respect of the properties covered by Exts.A1, excluding those covered by Ext.A2 and A3. If so, the plaintiff will be the absolute owner in possession of plaint A schedule property, while the defendant as well as the plaintiff would be the coowners with respect to the plaint B schedule property now claimed by the defendant. Moreover, before the trial court as

well as the 1st Appellate court, no such contention was raised and as such a new contention in that respect cannot be raised in the 2nd appeal.

21. Similarly at the time of evidence, the learned counsel for thedefendant raised another contention that the suit is bad for non-joinder of necessary parties. It was contended that, by virtue of Exts.A1 and A2, the property allotted to the plaintiff enures to her children also and as such, the children of the plaintiff are also necessary parties to the suit. To substantiate the said contention he has relied upon Section 22(1) of the Travancore Nair Act, 1100, which reads as follows:

22 (1) Property acquired by gift or bequest by the wife or widow or child or children from the husband or father, as the case may be, after Regulation I of 1088 came into force, shall unless a contrary intention is expressed in the instrument of gift or bequest, if any, belong to the wife or widow and each of the children in equal shares."

22. On the other hand, the learned counsel for the plaintiff relying uponthe decision of a Single Bench of this Court in **Parameswaran Pillai Gopinathan Pillai v. Stella Phenes, 1967 KLT 364** would argue that by the operation of Section 22 of the Travancore Nair Act, the children born subsequent to the conveyance cannot claim any interest under it. The learned counsel would argue that in this case, the defendant has not taken a contention that any such children who were living at the time of execution of Exts.A1 and A2 were not impleaded and as such, the contention that the suit is bad for non-joinder of necessary parties is not maintainable. He would further contend that during the pendency of these appeals, the plaintiff/respondent died and her LRs were impleaded as additional respondents 2 to 4, and in spite of that, none of them have raised any claim that they have any right over the plaint A schedule property. Therefore, according to him, on that ground also, the contention regarding non-joinder of necessary parties is unsustainable.

23. During the pendency of these Second Appeals, the plaintiff/respondentdied and her LRs were impleaded as additional respondents 2 to 4. None of them have raised any contention that they have obtained any right over the plaint A schedule property by virtue of Exts.A1 and A2. More over, it is interesting to note that neither before the trial court nor before the 1st Appellate Court the defendant had raised such a contention. Therefore, the trial Court has not framed any issues in that respect and no such issue was considered or decided by the trial court as well as the 1st Appellate Court. It is interesting to note that even in the Second Appeal, the defendant has not raised such a

contention. In the above circumstances, such a contention raised for the first time before this court in Second Appeal cannot be entertained.

24. Relying upon the decision of the Hon'ble Supreme Court in**Vidhyadhar v. Manikrao and Another, 1999 (3) SCC 573**, the learned counsel for the defendant would argue that in the instant case the original plaintiff has not entered the witness box to swear her case on oath and as such, an adverse inference is liable to be drawn against her. On the other hand, the learned counsel for the plaintiff relying upon Section 120 of the Indian Evidence Act would argue that examination of the husband, who is a competent witness is sufficient compliance of the above requirement.

25. It is true that in this case the original plaintiff was not examined as a witness. Instead, her husband was examined as PW1 on her side. Section 120 of the Evidence Act states that, in all civil proceedings, the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In the instant case, the dispute is with respect to C schedule pathway as provided in Exts.A1 and A2 documents. Since the plaintiff is only claiming right of easement by grant over the pathway provided in Exts.A1 and A2 documents, the oral evidence of the parties have little reliance in the facts of this case. In spite of that, on behalf of the plaintiff, her husband was examined as a witness, who is a competent witness in this case, in view of S.120 of the Evidence Act. Therefore, no adverse inference is liable to be drawn against the plaintiff for the mere reason that she was not examined as a witness.

26. From the available evidence including Ext.C1 report it can be seenthat the pathway provided by the father along the northern side of the defendant's property starting from the western public road leading upto the plaint A schedule property on the eastern side is still in existence. However, the exact width of the said pathway is not 3 feet as found by the trial Court and not 6 feet as modified by the 1st Appellate Court.

27. Relying upon the decision of a learned Single Bench of this Courtin **Simon v. N.Jayanth, 1986 KLT 457** the learned counsel for the plaintiff would argue that even if Exts.A1 and A2 are silent about the width of the C schedule pathway, the provision therein is to be construed in favour of the beneficiaries of the grant and not in a manner restricting the user of the pathway provided therein. In paragraph 10 of the above decision, the learned Single Judge held that :

".....Where, the grant however is silent about the extent of the user, the grant "must be construed most strongly against the grantor" and a reasonable user in the circumstances of each case is to be inferred. A

right of way cannot be enlarged in such cases to extend the area of the right of easement; it cannot also be unduly restricted within that area either. If, therefore, the right of way admits the use of vehicles, that right cannot normally be refused and a right of way in such cases cannot be reduced to a mere footpath."

28. Therefore, while considering the width of the grant, paramount consideration should be given to the intention of the grantor. For ascertaining his intention, the will as a whole is to be looked into. When Ext.A1 is taken into consideration as a whole, it can be seen that by virtue of the will, the testator has not created any new pathway. On the other hand, in the will, the testator had acknowledged the existence of a well defined pathway in his property. In the will, he unequivocally expressed his intention to retain the existing pathway, as such, without any modification. Therefore, now what remains is to ascertain the width of the pathway, which was in existence at the time when Ext.A1 was executed in 1962.

29. On a perusal of Ext.C1 commission report it can be seen that there are some indications which are useful and sufficient enough to resolve the issue. The indications leading to the exact width of the C schedule pathway are the gates provided at the western entrance and at the eastern end of the said pathway. Both those gates are opening towards the existing pathway. According to the Commissioner, the gate situated on the western entrance has an age of 30 years and the gate on the eastern end has an age of 15 years at the time of his visit. The said pathway which was in existence even before the execution of Ext.A1 Will in the year 1962 was used by the testator and all the family members as access to the family house which situated on the eastern side of the entire 29 cents of property. The said pathway is specifically mentioned in Ext.A1 as well as in Ext.A2 and the father stipulated that the said pathway is to be maintained as such by all the sharers and nobody shall reduce its width or raise any dispute over the same.

30. The parties have no dispute that those gates were put up by the testator himself. Since the above gate on the western side has a width of 1.5 metre and that at the eastern side has a width of 1.4 metre, it is only just and proper to conclude that the width of plaint C schedule pathway is the width of the gates on it's western and eastern ends. Therefore, it is to be held that the plaintiff is entitled to right of easement by grant over a pathway having a width of 1.5 metre on the western end and 1.5 metre on the eastern end, and nothing more than that, along the line of plaint C schedule.

31. In the above circumstance, the relief granted to the plaintiff by the 1st Appellate court is liable to be modified by limiting the width of the C schedule pathway to 1.5 metre on the western end and 1.4 metre on the eastern end. I do not find any irregularity or illegality in the finding of the 1st Appellate Court with regard to all other matters except to the limited extent of the width of the plaint C schedule pathway, as noted above. In the above circumstances, the questions of law formulated by this Court are liable to be answered accordingly. Accordingly, these Appeals are liable to be disposed of limiting the width of the C schedule pathway as noted above.

32. In the result, RSA 989 of 2006 is disposed of as follows :

The impugned judgment and decree of the 1st Appellate Court is sustained, subject to a modification that the width of the plaint C schedule pathway is limited to 1.5 metre on the western end and 1.4 metre on the eastern end. All other findings of the 1st Appellate Court are sustained.

In the result, RSA 349 of 2007 is dismissed. Considering the close relationship between the parties, I order no costs.