
(1994) 03 MAD CK 0133

In the Madras High Court

Case No : Civil Revision Petitions No's. 3165 and 3166 of 1992

K.V.K. Janardhanan

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 10-03-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Easements Act, 1882 — Section 28, 7
Limitation Act, 1908 — Section 23

Citation : AIR 1995 Mad 179 : (1995) 1 LW 451

Hon'ble Judges : K.M. Natarajan, J

Bench : Single Bench

Advocate : M.K. Kabir, for the Appellant; R. Swaminathan, Additional Government Pleader, for the Respondent

Judgement

1. This revision is directed against the order passed by the Appellate Court below (learned District Judge, Salem) in C.M.A. Nos. 53 and 54 of 1992 confirming the orders passed by the trial court in I.A. Nos. 1247 of 1991 and 390 of 1992.

2. The brief facts, which are necessary for disposal of this revision can be stated as follows:

The revision petitioner herein plaintiff filed the suit for the relief of permanent injunction restraining the defendants and their subordinates from in any way altering the fence or putting up any sort of obstruction in the suit road and preventing the plaintiff from using the road to reach his property. The case of the revision petitioner is that he is the owner, of the lands in S.Nos. 64/3, 64/4A, 64/5B and 64/2 in Meeyanur village. The said property originally belonged to his grandmother Thulasammal as per the registered sale deed dated 6-9-1944, She executed a registered Will in favour of one K. V. Krishna Iyer on 1-9-1960. On her death, Krishna Iyer succeeded her and became the owner of the property and he died leaving the plaintiff and his other sons and daughters as his legal heirs. The mother of the plaintiff, one Ramathay-ammal, executed a registered Will

dated 1-6-1987 and as per the Will the plaintiff is entitled to S. Nos. 64/2,64/3,64/4A and 64/5B. The Salem Bangalore Main Road is running east of the plaintiff's property. There is a road running north to south and the said road is a public road. It is classified as road poramboke under a settlement deed and situate in S. No. 64/8 and shown in red colour in the rough plan. On the east of the said road is Achuvan Eri wherein the new bus stand of the Salem Municipality is situate and the same is shown as blue colour. It is stated that the said road is in existence from time immemorial and it has been classified as road poramboke even in the settlement proceedings and it has been declared as a public road. It is used by the public including the plaintiff and his predecessor-in-title for a long time. The road is an access to the plaintiff's property and is now used by the vehicles in the new bus stand also. The Government cannot prevent the plaintiff from using the road to have access to their property. The Government cannot convert the road as road margin at any other place. They also cannot put up any fence or construction in the road and road margin in such a way to prevent the plaintiff to have access on the property. While so, the defendants and its subordinates on 19-10-1991 came in a body at about 11 p.m. during midnight and attempted to put up construction in the road and road margins and attempted to alter the road by which the defendants have attempted to prevent the plaintiff from having an access to his property through the suit road. The illegal act of the defendants was prevented by the plaintiff. However, they are proclaiming that they are going to prevent the plaintiff from using the suit property as road to reach his properties. Hence the petitioner is constrained to file a suit and also filed an application for the grant of temporary injunction of the same nature till the disposal of the suit, in I.A. No. 1247 of 1991.

3. In the counter filed by the third respondent in the application, which was adopted by the other respondents, it is stated that the property described in S. No. 64/8 is classified as cart track poramboke. It has never been used by any one including the plaintiff as a right or a pathway. Moreover the property in S. No. 64/8 cannot be used as a road as the land is lower in level by 8 feet and surrounded by the drainage water from Alagapuram village, Echuvaneri, moffusil bus stand. There is no such road in S. No. 64/4A in his patta land. Since the suit land is situate abutting the Highway road and the Municipal road and which is a very valuable land, there were attempts by people to encroach the suit land with ulterior motive to have wrongful gain in order to avoid encroachment and to avoid loss to the Government property the Government has fenced the property sometime in the middle of October, 1991 to the knowledge of the petitioner. Since the fencing has already been done, this petition is not maintainable. It is further stated that there is a parkyard from Salem Bangalore Road running in S. No. 64/4 A in which the Panchayat has laid a road by spending huge amount. The said road alone is used by the plaintiff and others. No case has been made out by the petitioner for grant of injunction. Hence he prayed for dismissal of the application.

4. When the application was pending enquiry he has also filed another

application in I.A. No. 390 of 1992 for a mandatory injunction to remove the fence put up by the respondents in the suit property and in the affidavit the revision petitioner has stated that he has already filed the injunction application in I.A. No. 1247 of 1991 and the suit was filed on 23-10-1991 and the respondents appeared, through the Government Pleader, Salem and they filed a counter and the matter is pending enquiry. During the pendency of the suit, taking advantage of the fact that interim order has been passed, the respondents have put up the fence in the suit property and they prevented the petitioner from using said road to reach his property. It is also again reiterated that the suit property is classified as road and this would clearly show that the physical features in the suit property due to the acts of the fencing done by the respondents the petitioner has been prevented from using the said road to reach his property. The respondents are bound to maintain the road only as a road and the road margin only as road margin and they are not entitled to prevent any public including the plaintiff from having access to their respective properties, and the fencing by the respondents is against law and is an illegal Act. The said Act infringes the petitioner's right to use the property as a road. Hence the application.

5. In the counter affidavit filed by the fourth respondent which was adopted by respondents I to 3, while denying the allegations in the affidavit filed in support of the application, it is submitted that this respondent has put up the fence before ever he filed the suit to protect the Government property. The petitioner has tried his maximum level to remove the fence and encroach the property. He has filed the above application to get illegal gain in the suit but he is not entitled to any relief as alleged in the affidavit. Even though the village records show that it is a cart track and at any point of time no one used the property as road. If any one is allowed to use he can easily encroach the land. It is only with that intention the petitioner has filed the above application also (I.A. No. 390 of 1992). The petitioner has not come to Court with clean hands. Hence it is liable to be dismissed in limine.

6. A Commissioner was appointed and he also submitted his report, which is marked as Exs. C1 and C2. No witness was examined on either side. On the side of the petitioner Exs. A1. to A5 and C1 and C2 were marked. No exhibit was filed on the side of the respondents. Learned trial Judge for the reasons assigned in his common order, dismissed the applications. He was unsuccessful before the Appellate Court also. Hence these revisions.

7. Learned counsel for the petitioner, Mr. Kabir, took me through the pleadings as well as the documents and the impugned orders and made his submissions. According to learned counsel, admittedly the suit property viz., S. No. 64/8 is classified as road poramboke and it is a cart track as seen from Ex. A4, the field measurement book and Ex. A3 adangal. It vests within the municipality as well as the Government. A Commissioner was appointed who also noticed a road. The other side also admitted that it has been described as a road and it is a road

poramboke. If that is so, the petitioner has got every right to have access to his property from the suit cart track and nobody can prevent it. He also pointed out in para 11 of the judgment of the learned Appellate Judge wherein Ex.A5 was referred to, in which it is recorded that "my notes of inspection and the sketch would show that the cart track laid by the Panchayat Board as found on ground at present is not only the suit land but also the patta land of the petitioners" and it is clear from that, that the suit cart track is not only the suit land but also the patta land of the petitioner. According to him, learned Appellate Judge as well as the trial Judge are not correct that it has not been established that there is a cart track in S. No. 64/8 and it has been used by the plaintiff, but it is found that for a long time only it has been used for a drainage and hence the petitioner is not entitled to any interim relief as prayed for. But, learned counsel for the petitioner submits that the said contention is not correct and in view of the Commissioner's report as well as various documents, the existence of the cart track has been established and in the affidavit filed in support of the application it has been clearly stated that the suit cart track has been used for having access to the petitioner's land and also the lands of others and the physical features clearly establish the existence of the can track. He would submit that the petitioner can have access to enjoy every inch of the suit ,. property and if there is any encroachment or obstruction, it is for the Government to remove and to maintain it as a road and it is not open to the Government to say that it is not a road even though it is classified as a road and in support of his contention he drew the attention of this Court to various decisions. According to learned counsel, both the courts below have not properly appreciated the legal aspect and that led to the miscarriage of justice and they have also not properly appreciated the relevant documents filed in this case and the wrong approach to the facts of these cases led to the miscarriage of justice also. Per contra, learned Addl. Government Pleader took me through the pleadings as well as the impugned orders and submitted that the Government has not maintained the same as road on ground and the suit is only for a bare injunction and in view of the finding of both the courts below it was not used as a road and since the easementary right is not clearly claimed and no objection to the Commissioner's report was filed, it cannot be said that the finding rendered by the courts below suffers from any infirmity so as to warrant interference by this Court. He would submit that since the fence has already been put up, the suit has become infructuous, and no mandatory relief can be asked for without amending the plaint for the relief of mandatory injunction.

8. The question is, whether the plaintiff is entitled to the relief of interim injunction prayed for, and whether the order passed by the court below is liable to be set aside for the reasons stated in these revision petitions.

9. Admittedly the suit cart track lies in S.No. 64/8, which is a Government poramboke and it is classified as a cart track in Ex. A3 adangal and "Ex. A4 field measurement book sketch. In Ex. A5 the existence of the cart track is also noted by the Assistant Settlement Officer. The Commissioner has stated in para 3 of his

report that S. No. 64/8 has been shown in green colour, i.e., on the south of Salem-Omalur Road, which is running east lowest. East of the suit S. No. 64/8 he noticed the tar road as well as the new bus stand. In para 6 it is stated that to connect S. No. 64/4A and S. No. 64/8 there is a cart track running up to the temple on the south. The Commissioner also noticed the iron fencing on the eastern side of the plaintiff's property and on the west of S. No. 64/8. The physical features noticed by the Commissioner does not rule out the possibility of the existence of the cart track. Even though there is a drainage running and there is no pucca cart track but, yet, it shows that on either side of the drainage mud which is used for putting up road was heaped and those places are of equal level. When once it is established that S. No. 64/8 adjoins the plaintiffs land and it is a public cart track leading from the Omalur Main Road on the northern side, the question is, whether the respondents have got any right to obstruct the adjoining land owners from using the cart track for access, by putting up any fence and that too only up to a portion. In this case, it is stated that the fence was put up up to a length of 219 1/2 which is shown as II in the Commissioner's plan. The width of S. No. 64/8 which is lying vacant has been shown as 23 feet on the north and 16 1/2 feet on the south. It is clear that the fence has been put up only recently and that too not throughout but only a portion of the plaintiff's land. It is only in these circumstances, learned counsel for the petitioner drew the attention of this Court to the decision in Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj, , wherein the Apex Court has observed as follows (at pp. 1148, 1149):

"(1) that the suit site was a part of the public pathway as in the circumstances it was reasonable to hold that the entire pathway between the two drains" was dedicated to the public. The fact that; only a part of the pathway is metalled does not necessarily limit the width of the pathway, but it is evidence of the user of the pathway by the public and its maintenance by the Municipality.

(2) that such a public (pathway vests in the Municipality by virtue of S. 116(g), U.P. Municipalities Act but the Municipality does not own the soil. It has the exclusive, right to manage and control the surface of the soil and "so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street". It has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers. Subject to the rights of the Municipality and the public to pass and repass on the highway, the owner of the soil in general remains the occupier of it and, therefore, he can maintain an action for trespass against any member of the public who acts in excess of his right.

(3) that the Municipality could not put up the structures which it intended to erect on the vacant site as it could not be said that they were necessary for the maintenance or user of the road as a public highway. The said acts were unauthorised and the plaintiff, who was the owner of the soil, would certainly be entitled to ask for an injunction restraining the Municipality from acting in excess

of its rights. But the plaintiff could not ask for possession of any part of the public pathway, as it continued to vest in the Municipality".

In *Damodara Naidu and Others Vs. Thirupurasundari Ammal and Another*, wherein it is held as follows (at pp. 387, 388):

"The right of owners of land adjoining the highway to go upon the highway from any point on their land is a private right distinct from his right to use the highway as a member of public. If the right to access is obstructed by anyone the owners of the land abutting the highway are entitled to maintain action for the injury, whether the obstruction does or does not constitute a public nuisance. Hence where the plaintiff's right to such access is completely obstructed by the defendants by putting up a Wall, they are entitled for a mandatory injunction directing the defendants to remove the wall when there is no proof that they had abandoned their right of access to public highway on the side of the wall".

In *Bharathamatha Desiya Sangam, Madhavaram and Another Vs. Roja Sundaram and Others*, , wherein at p. 185 it is held as follows:

"The only question is, whether the first respondent has a right of access to the street on the north from every point along A-D line free from the obstructions caused by the appellants and respondents 2 and 3. There is no dispute that Sundara Vinayakar Koil Street is a public street. Owners of houses of premises abutting a roadway are entitled to have access to that roadway from all points on the boundary of their land and if any obstruction is caused over the road margin securing such access, the person entitled to have such access can certainly enforce that right".

In *Godavari Bhai Vs. Cannanore Municipality, Cannanore*, , wherein it is held as under (at p. 7):

"Where the Municipal Council constructed bunks on the road margin, pathway, of a public street and the land adjoining the street was owned by a private party, the construction could not be said to be permissible in that the road margin is a part of the public street and the Municipality has no right to construct buildings on public streets vested in the Municipal Council under S. 77 and also because the plaintiff, the owner of land adjoining the public street, has a right of access at every point where her land adjoins the public street".

It is clear from the ratio laid down in the above decisions that neither the Government nor, the Municipality or any local body has got every right to put up any obstruction over the public street so as to prevent it from having any access to the adjoining land. It has been repeatedly held that the owner of the land adjoining the public street has got a right of access at every point where his or her land adjoins public street. In view of the above ratio, the fencing of an iron fence put up between the land of the petitioner and that of the suit cart track is illegal and on that ground alone the petitioners are entitled to an order of injunction as prayed for. As held in the decision in *Bharathamatha Desiya*

Sangam, Madhavaram and Another Vs. Roja Sundaram and Others, , relying upon the decision in K. Kanakamma v. T. Ranga Rao, AIR 1957 A P 419, that by the construction the exercise of the right of access by a person entitled to have such access is interfered with every time he wants to exercise that right by the offending constructions. In such a situation it was held in K. Kanakamma v. T. Ranga Rao, AIR 1957 AP 419, by Viswanatha Sastri, J., that if the obstruction to a right of way is caused by the erection of a permanent wall or structure once for all, it does not make it any the less a continuing wrong within the meaning of S. 23 of the Limitation Act, 1908. The said decision was confirmed by this Court in Bharathamatha Desiya Sangam, Madhavaram and Another Vs. Roja Sundaram and Others, , and was further observed that a defendant, who, by his wrongful act, has brought a state of affairs into existence, the continuance of which every moment is a new tort and who, though in a position to terminate it at his will, causes the state of affairs to continue, commits a continuing wrong within the meaning of S. 23 of the Limitation Act, 1908. On the mere fact that the petitioner has filed a suit for a permanent injunction and not for a declaration, it cannot be said that he is not entitled to any interim relief as in view of the settled proposition that in a case of a public road or a cart track every public has got a right of access to the adjoining land. There is no need to ask for a declaration and if there is any obstruction they can ask for the relief of a mandatory injunction. In this case, according to the petitioner, the fence was put up after the filing of the suit, taking advantage of the fact that no injunction was granted and hence he prayed for the interim mandatory injunction and hence it cannot be said that such a relief cannot be granted. When once it is held that the petitioner is entitled to have access to his adjoining land from the public cart track directly the Government or the Municipality have no right to put up any obstruction by way of construction or fence, certainly the petitioner is entitled to the relief prayed for. The prima facie case only rests in favour of the petitioner in view of the admitted case that it is a public cart track. The mere fact that the petitioner has not filed any objection to the Commissioner's report will not affect his case. It is the duty of the Government or the Municipality to maintain the suit cart track as the public cart track and if they fail to do so, it is not open to them to say that it is not a cart track. On the other hand, the physical features noticed by the commissioner and by his plan also clearly show that though a drainage runs, in the middle of the suit property in view of the fact that the mud which are used for levelling the road are heaped up on either side of the drainage and the ground is of the same level, and it is only lying vacant and adjoining the same on the east is only a tar road and then the new bus stand is on the survey numbers of the plaintiff and further towards south it clearly esta-Wishes that it is a cart track. When once it is stated in plaint that the plaintiff is having access from the suit cart track to the plaintiff's property, there is absolutely no force in the argument of learned. Additional Government Pleader that it has not been specifically pleaded that the plaintiff's possession is claimed on the easementary right. But, it is clear from the plaint allegations that the plaintiff as a public has claimed a right to the public road being owner of the adjoining land on the

ground that the Government is bound to maintain the road as the "road" and is not entitled to obstruct or put up any construction. Therefore, the mere fact that they have not asked for easementary right, his claim will not in any way be affected. Both the Courts have not properly appreciated the case of the petitioner in proper perspective and that led to the miscarriage of justice. The contention of the respondents that even though it is classified as public road and it should be established that it is a road on ground and that it has been used as a public road and then only the petitioner is entitled to a relief is not sustainable in view of the ratio laid down in the above decisions. Since both the courts below have not properly applied the legal principles to the facts of the case on hand and which led to the miscarriage of justice and they are not sustainable in law, this Court is of the view that the revisions have to be allowed in the interests of justice and accordingly both the revision petitions are allowed, the orders of the courts below are set aside and there will be an order of injunction as prayed for. There will be no order as to costs.

10. Petitions allowed.