
(1955) 12 MAD CK 0002
In the Madras High Court
Case No : S.A. No. 1026 of 1952

Mariyayi Ammal and Others

APPELLANT

Vs

Arunachala Pandaram

RESPONDENT

Date of Decision : 02-12-1955

Acts Referred:

Easements Act, 1882 — Section 13, 41

Citation : (1955) 12 MAD CK 0002

Hon'ble Judges : Krishnaswami Nayudu, J

Bench : Single Bench

Advocate : B. V. Viswanatha Ayyar, for the Appellant; V. C. Viraraghavan and K. Raman, for the Respondent

Final Decision : Dismissed

Judgement

Krishnaswami Nayudu, J.—The defendants are the appellants. The suit was for a permanent injunction restraining the defendants from using

a passage in front of the plaintiff's house to go to the south into the public lane running from west to east. It may be convenient to refer to the

Commissioner's plan, Ex. A. 6, for the purpose of location of the plaintiff's and defendants' houses and the disputed passage. The site over which

the houses of the plaintiff and the defendants stand was previously owned by a common owner, and on 2nd November 1942, under Ex. A. 1, the

plaintiff purchased the southern most portion, the entire property being divided into three portions, the northern, the middle and the southern, and

began to put up a house construction on the property which he purchased leaving the disputed passage on the eastern side of a width of 5''' to the

entire length of his house and running from north to south open. The defendants purchased on 1st December 1944, under Ex. B. 2, the northern

portion and put up house constructions in the portions which they purchased, leaving similarly a lane running from north to south entering into the public road on the north. The defendants again on 14th December 1944, purchased the middle portion and put up constructions leaving again a lane of the same width in front of their house on the eastern side. The right of the defendants to use the disputed passage was put on two grounds: firstly, the right of way through the disputed passage marked EFDC in front of the plaintiff's house of the width of 5''' on the eastern side and running from north to south was a right acquired by prescription, and secondly, that in any event, it is an easement of necessity, a right which the defendants are entitled to exercise. The contention based on acquisition by prescription WAS given up and arguments were confined only to the defendants' right to use the passage as an easement of necessity. Both the Courts held that the easement of necessity had become extinguished under S. 41 of the Indian Easements Act, as in their view the necessity had come to an end. The view taken by the lower appellate Court is that the passage, which is sought to be required for being used as an access to go into the public lane on the south, was allowed to be used as such to enable the defendants to enter the public lane on the south. The trial Court however found that there was another means of access to the public lane on the south, since the defendants could go through the lane reserved by them in front of their house, go north and enter the public lane on the north, which runs from east to west, and then get into the main road, which proceeds from north to south, and then come into the public lane on the south. It may be mentioned that the northern, western and southern boundaries of this block of houses are, a public road on the north, main road on the west and a public lane on the south, and it was therefore argued that since there was no absolute necessity for the passage to reach the south lane, which can be reached by proceeding to the north and then through the main road, the necessity must be deemed to have come to an end and as such it must be held that the easement had become extinguished. Mr. Viswaratha Aiyar, however, argues that the necessity to get into the southern lane through this passage, which is admittedly the most convenient means of access to the southern lane, cannot be said to be extinguished on the ground that the same lane could be approached through other means, because the right which the defendants have in respect of

the easement is a right in respect of the disputed passage to enter into the southern lane and it cannot be varied or modified and it is not open to the plaintiff to direct the defendants to proceed by other ways which might reach the southern lane.

2. In order to appreciate this contention, it is necessary to understand what an easement of necessity is. An easement of necessity is not as such defined in the Act, but S. 13 deals with an easement of necessity or quasi-easements. S. 13 says that when one person transfers or bequeaths immovable property to another, under C1. (a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement. Similarly there are provisions for apparent, continuous and necessary easements, and all these rights are said to arise on transfer or bequest of immovable property. In the present case, it might be contended that since all the properties were previously owned by a common owner, on the transfer of the respective properties now in the possession of the plaintiff and the defendants, the right which one party would get over the property, in respect of which he has obtained a transfer, will continue to subsist but that right must be one which is necessary for enjoying the subject of transfer.

3. There is a clear exposition of what is easement of necessity in Peacock on Easements, 3rd Edn., at page 20 and onwards, and the following

there from may be extracted:

An easement of necessity is a right which an owner or occupier of land must of necessity exercise on, over, or in another's land for the enjoyment of his own.

4. The most ordinary instance of an easement of necessity arises where a man is unable to obtain any access to, or derive any benefit from, his own land without a right of way over his neighbour's land.

5. The general rule as to a way of necessity is given by Mr. Sergeant Williams in his notes to the well-known case of *Pomfret v. Ricroft* (1):

So when a man having a close surrounded with his own land grants the close to another in fee for life or years, the grantee shall have a way to the close over the grantor's land an incident to the grant; for without it, he cannot derive any benefit from the grant. This principle seems to be at the

foundation of that species of way which is usually called a way of necessity.

6. Coming to the Indian Act, the author observes:

Clauses (a), (o) and (e) of S. 13 of the Indian Easements Act, deal with easements of necessity, and provide that they can arise in favors of either the transferee of the dominant tenement, or the transferor of the servants tenement, according as the dominant or servants tenement is transferred, or retained, as the case may be, and this is the same under general law.

7. With reference to this clause of easements, it is important to remember that they are not founded upon a more convenient or advantageous use of the dominant tenement, but upon absolute necessity as

(1) (1681) 1 Saund. 322. Vol. 69-59 meaning that the dominant tenement could not otherwise be used at all.

8. That the necessity should be absolute seems consistent with the designation of the right and the requirements of reason.

9. For it may fairly be said that if a man is to have an obligation exacted from his whereby, as may be seen from the foregoing illustrations of easements of necessity, his land suffers detriment, and he himself is put to inconvenience, annoyance, and even loss, such obligation ought only to be permitted as a matter of necessity.

10. It has been mooted whether this rule might not be relaxed in India whenever, for reasons of caste or religion, the existence of only one way would be productive of extreme inconvenience. But there has been no actual decision in India that the general principle above stated ought in particular circumstances to be departed from.

11. Since the right relied by the defendants is an easement of necessity and not an easement acquired by prescription, it must be shown that without the use of this passage the enjoyment of the property becomes impossible, i.e., it must be established that there is no other means of access into the southern lane and it cannot be pleaded that the disputed passage is a more convenient means of access to the southern lane. Unless it is shown that the southern lane becomes absolutely inaccessible by an injunction being granted, there can be no right founded on an easement of necessity, however inconvenient may be the access which they may have to the southern lane than the one which they could have by using the

disputed passage.

12. The contention that an easement once having been established cannot be varied or modified may apply to the extent and scope of the easement

of necessity but not to the continuance of an easement of necessity in case it is established that the dominant owner had acquired property or

acquired other means of access which was reached previously through the disputed passage. Necessity in the sense of being indispensable must be

established and without which the property could not be enjoyed at all or without which there can be no access to the southern lane. Such is not

the case here. It may be inconvenient to proceed to the north, go to the public road, then enter the main road on the west and then reach the

southern lane. But that is no consideration why the defendants should be allowed to put the plaintiff to inconvenience and annoyance, when the

right which the defendants claim has not been acquired by prescription. The necessity must be an absolute necessity and not a convenient mode of

enjoyment of the property and that is also the view taken in *Venkatapathiraju v. Subbaraju* 33 L.W. 191. (1), where it was observed that an

easement of necessity is an easement without which the property cannot be used at all and not merely one for the reasonable enjoyment of the

property and that in considering questions of easements of necessity, convenience is not the test but absolute necessity.

13. In that view I consider that the lower Courts have come to the correct conclusion on the application of S. 41 of the Indian Easements Act. It

may be that if the defendants had acquired this right of way by prescription, the existence of an alternate means of access, viz., through the public

road on the north and then through the main road on the west, would not bar them from contending that not with standing any such alternate

access, they would be still entitled to the disputed right of way. But that is not the position in the present case, as the defendants have failed to

establish the right as having been acquired by prescription, the only basis for the claim being that it was an easement of necessity. I am unable to

find how it can be held that when a person has got other means of access, the use of a neighbour's property is the only way of enjoying his

property. The result is, the second appeal fails and is dismissed with costs. No leave.