

(1997) 12 KAR CK 0051

In the Karnataka High Court

Case No : Regular Second Appeal No. 125 of 1997

Romeo M.F. Aquinas and Others

APPELLANT

Vs

Florina Mothias and Another

RESPONDENT

Date of Decision : 02-12-1997

Acts Referred:

Citation : (1999) 1 CivCC 639 : (1998) 5 KarLJ 168 : (1999) 3 RCR(Civil) 59

Hon'ble Judges : T.N. Vallinayagam, J

Bench : Single Bench

Advocate : Sri B.L. Acharya, for the Appellant; Sri Sanath Kumar Shetty and Sri Ram Bhat Associates, for the Respondent

Judgement

1. The plaintiffs challenge the dismissal of their suit by the First Appellate Court though they succeeded before the Trial Court.

2. The suit is for injunction in respect of a 3" wide pathway running South to North all along touching the Western boundary of the respective Mulgeni properties of both plaintiffs and defendants. The property belong to one John Joseph Britto on Warga right and the said John Joseph Britto had granted the said property on Mulgeni to one Juvam Menezes, son of Salvadore Menezes under a Mulgeni lease deed dated 12-6-1913. This Juvam died leaving a Will dated 7-4-1930 bequeathing his properties to his wife Seraphine Menezes. On 19-8-1935, she sold the Northern portion of 25 cents of land to one Francis Pinto and that property is mentioned as Schedule "B" in the plaint. The said vendor has given half right in the well situated in the common boundary and also provided for the purchaser a right of pathway of 3" width running South to North touching the Western boundary of 25 cents retained by the vendor. The pathway was intended for the movement of men and cattle to go to and fro. The said Pinto executed a deed of settlement in respect of 8 cents of land shown in "C" Schedule to the plaint on his daughter Nathalis Cutinha and the remaining 0.17 cents to his son Lawrence Pinto, which is shown in Schedule "D" to the plaint. His daughter Nathalis Cutinha was permitted to take water from the well situated

in the property given to his son and she is also given 3" width pathway on the Western side of the portion of the property given to the son in continuation of 3" with pathway given by Seraphine Menezes on the land of 25 cents retained by her. The plaintiff claimed that from the time of Nathalis Cutinha, she has been in possession and enjoyment of the said "C" Schedule property making use of the property running along touching the Western boundary of Schedule "D" and "E" properties to go to and fro and also for the purpose of drawing water from the well situated at the common boundary of Schedule "D" and "E" properties. The 25 cents of land retained by the aforesaid Seraphine Menezes shown in Schedule "E" to the plaint appears to have been sold in Court auction to one Cecy Rogers under Sale Certificate dated 23-6-1975. The said Cecy in turn sold the same to the first defendant. The second defendant also has purchased 17 cents of land on 20-9-1976, Nathalia Cutinha sold her share to one Mrs. Mary Assumption Andrade, the mother of the plaintiffs under the Sale Deed dated 9-11-1978 and since then the plaintiffs along with his parents have been in possession and enjoyment of the same making use of 3" width pathway running along and touching the Western boundary of the property. The purchase made by D. 1 and D. 2 are subject to the aforesaid right of pathway. The plaintiffs Schedule "C" property is the dominant tenement and the defendants' Schedule "D" and "E" properties are servient tenements. On the defendants attempting to block the pathway, the plaintiffs came forward with the present suit.

3. The first defendant specifically contended that he has no intention to cause obstruction to the alleged user of 3" wide approach through the property of the defendant and the apprehension of the plaintiffs are unfounded. The second defendant also contended that she has not at all obstructed the enjoyment of 3" width pathway. On these admissions alone, the plaintiffs suit should have been decreed without embarking upon a trial.

4. The Trial Court accepting the case of the plaintiffs decreed the case as against the first defendant. However, the case of D. 2 was dismissed, as it was not shown by the plaintiffs that the second defendant also caused any obstruction. The Appellate Court holding that there is absence of actual interference or the threat of interference the plaintiffs are not entitled to any decree.

5. This view of the appellate Court is prima facie wrong. The plaintiff has specifically claimed right over 3" passage. This right is not disputed by both the parties. Now the plaintiffs' allegation was that there was an interference or at least apprehended that there is likelihood of interference. For a man to live in peace he resorts to Court and seeks an order of injunction. When the defendant admits the claim of the plaintiffs nobody will be prejudiced by granting the decree for injunction. After all at best may be the security that is granted by the Court to the plaintiffs. If there is going to be no interference the defendant is not prejudiced and passing of such an order of injunction is not going to affect the defendant at all. Once the matter has been seized by the Court it is for the Court to grant the relief, the parties desire to get and when the relief is available on the

basis of the averments made in the plaint and grantable on the basis of the written statement there can be no impediment for granting such a relief at all. The non-grant of the relief by the Appellate Court is error apparent on the face of the record. The lower Court has also declined to grant such a relief on the ground that there is no interference by the second defendant. A man may not know the mind of another. When the fear is in the minds of plaintiffs the Courts must dispel the fear and when admissions are made they should be made matured into a decree.

6. The learned Counsel for the respondent relied upon the dictum in *R.G. Janthakal Vs. Bharat Parikh and Co.*, , for the proposition that an injunction cannot be granted without a proof of actual interference or threat of interference.

"An injunction to restrain the defendant from interfering with the possession of the plaintiff can be issued only on proof of actual interference or threat of interference and not in the absence of it".

He also relied upon a Division Bench decision of the Calcutta High Court in *Babulal Choukhani Vs. Western India Theatres Ltd. and Another*, , for the same proposition:

"The requirement of that section are well known. It says that a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant whether expressly or by implication. In this connection the material part of Section 54 is that when the defendant invades or threatens to invade the plaintiffs right to or enjoyment of property, the Court may grant a perpetual injunction. There is, however, no pleading in the plaint alleging that the defendant Hemmad has invaded or threatens to invade the plaintiff's right to or enjoyment of the shares".

He also contended that in the absence of any interference an injunction cannot be granted. These two decisions are not applicable to the facts of this case because there is an allegation of threat of interference and both the above authorities are to the proposition that threat of interference itself is enough to grant an injunction. In fact, the Division Bench of Calcutta High Court goes on to say that if a pleading is not available then injunction cannot be granted. In this view, relying upon these decisions, I hold that the plaintiff is entitled to injunction. The mere fact that there is a defence raised by the defendant that he has no intention of obstruction does not dispel the threat of interference that has been caused in the mind of the plaintiff.

7. In this view, setting aside the judgment and decree of the First Appellate Court and modifying the decree of the Trial Court the second appeal is allowed and the suit is decreed as prayed for with costs in respect of the injunction alone. The dismissal of the suit in respect of damages is however confirmed.