

(2012) 10 MAD CK 0090

In the Madras High Court

Case No : S.A. No. 65 of 2011 and MP. No. 1 of 2012

State of Tamil Nadu and Others

APPELLANT

Vs

D. Samiyathal

RESPONDENT

Date of Decision : 08-10-2012

Acts Referred:

Citation : (2012) 8 MLJ 41

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : S. Pattabiraman, for the Appellant; A.K. Kumarasamy, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J.—The defendants in the original suit are the appellants herein. Respondent Samiyathal filed the original suit for bare injunction alleging that her right of access to the road from her property through the road margin was sought to be obstructed by the appellants/defendants by putting up a construction for housing the office of a wing of the Police Department, namely CBCID office. The suit was resisted by the appellants/defendants by filing a common written statement containing parawar denial of the plaint allegations and also a contention that a sufficient space had been left to be used as an access to the property of the respondent/plaintiff from the road. The learned trial Judge, after framing necessary issues, conducted a trial and at the end of trial, relying on an answer given by the plaintiff as P.W.1. during cross-examination, that she would not have any objection for the defendants putting up a construction after leaving a space sufficient for taking lorries to her godown and a further admission that a space with a width of 5 meter was left to be used as an access from the road to the property of the plaintiff, came to the conclusion that the respondent/plaintiff had not proved her entitlement to the relief of injunction as sought for. Accordingly, the learned trial Judge dismissed the suit with cost by its judgment and decree dated 30.9.2004.

2. Aggrieved by the decree of the trial Court and challenging the same, the respondent herein/plaintiff preferred an appeal in A.S. No. 124 of 2007 in the first appellate Court, which came to be disposed of by the first appellate Judge, namely 1st Additional Subordinate Judge, Erode. The learned 1st Additional Subordinate Judge, Erode, heard the appeal, re-appraised the evidence and relying on various precedents regarding the right of the land owners adjacent to the road margins, came to the conclusion that the defendants did not have a right to obstruct access to the property of the respondent/plaintiff from the road through the road margin at any point and accordingly, allowed the appeal, set aside the decree of dismissal of the suit passed by the trial Court and decreed the suit as prayed for without costs.

3. The said judgment and decree of the first appellate Court dated 28.7.2008 is challenged in the present second appeal. In the grounds of second appeal, the following questions have been formulated as the substantial questions of law involved in the second appeal:

- 1) Whether the lower appellate Court misread and misconstrued the evidence of P.W. 1, when she herself curtail her rights?
- 2) Whether the lower appellate Court in setting aside the well considered judgment of the trial Court?
- 3) Whether the lower appellate Court is right in holding that the plaintiff is entitled to the relief of permanent injunction against the admission made by the plaintiff?
- 4) Whether the lower appellate Court has misconstrued Exhibits C-1 and C-2?

4. This Court, opining that the appeal could be disposed of at the stage of admission itself, issued notice of hearing to the respondent/plaintiff and thus, the respondent/plaintiff is before this Court represented by a learned counsel. Accordingly, this Court heard the arguments advanced by Mr. Pattabiraman, learned Special Government Pleader on behalf of the appellants and by Mr. A.K. Kumarasamy, learned counsel for the respondent. The materials available on record including the judgments of the Courts below were also perused.

5. The present second appeal can be disposed of on a short point as to whether the Government or the local body can put up any construction which shall not be for the maintenance and upkeep of the road for the use of the public on the road margin so as to obstruct access to the adjoining lands. Admittedly, the plaintiff is the owner of the properties described in plaint "A" schedule as Items 1 and 2. Those two properties about the property described in plaint "B" schedule which is admittedly classified as road margin/cart track. It is also not in dispute that the suit "B" schedule property classified as road margin lies in between the black topped road and the properties of the respondent/plaintiff, which have been described as Items 1 and 2 in plaint "A" schedule. It is also an admitted fact that the Government sought to allot the said land described in "B" schedule to the

Police Department for construction of an office for the use of CBCID, a special wing of Police Department. Therefore, the contention of the plaintiff that a road margin in between the road and the property of the respondent/plaintiff is sought to be used for putting up constructions and thereby providing a barrier for free access to the property of the respondent/plaintiff from the public road seems to be one admitted and not disputed.

6. The learned Special Government Pleader would contend that the property shown in plaint "B" schedule, classified as Cart track/road margin, is not a small piece of land but is a vast land having a breadth of 35 feet along the road and that hence, the said stretch of land was sought to be used for housing the office of the CBCID leaving sufficient space, namely a space of 5 meters to be used as an access by the plaintiff to reach her property from the road. The further contention raised on behalf of the appellants is that the respondent/plaintiff, who does not claim title or ownership in the plaint "B" schedule property and on the other hand, claims only right of easement, ought to have sought for a declaration and since the respondent/plaintiff had not chosen to seek declaration, the respondent/plaintiff should be non-suited for the relief sought for.

7. Per contra, Mr. A.K.. Kumarasamy, learned counsel for the respondent/plaintiff would submit that none of the questions formulated and included in the grounds of second appeal by the appellants can be accepted as a substantial question of law involved in the present second appeal and on that score alone, the second appeal deserves to be dismissed. It is the further contention of the learned counsel for the respondent/plaintiff that the right of the owners of the land adjoining the road to use the road margin as an access to reach the road from their properties and to see that no obstacle is made either by the Government or by the local body or by anybody else, excepting the small constructions needed for maintenance and upkeep of the road, have been repeatedly sustained by the High Courts and the Apex Court in a number of cases and hence, against those pronouncements the appellants cannot now contend that the claim of right of passage by the land owners, who own land adjoining the road margin, should be restricted to a particular portion alone as in the case of easement by necessity. It is the further contention of the learned counsel for the respondent/plaintiff that the appellant's contention that the suit is not maintainable for want of prayer for declaration is also untenable as held in earlier cases by the Apex Court and the High Courts.

8. In *Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj*, the Supreme Court has held in clear terms that the Municipality which is given the right of maintaining the road cannot put up structures on the vacant site adjoining the road/street which are not necessary for the maintenance or up-keep of the same as road/street. In the State of Tamil Nadu rep. by the Collector of Salem, etc., and 3 Others 1995-1-L. W.451. In *Govinda Asari v. The Kancheepuram Municipal Council*, rep. by its Commissioner 1994 LW 697, in *Kullammal v. I.K. Perumal and Cuddalore Municipality* by its Commissioner 1996-1-L. W. 550, in *Bharathamatha*

Desiya Sangam, Madhavaram and Another Vs. Roja Sundaram and Others, in Damodara Naidu and Others Vs. Thirupurasundari Ammal and Another, in O.N. Natarajan and Another v. The Municipal Council, Thraiur rep. by its Executive Authority and Commissioner, 1994-1-L. W. 470 and in The Commissioner, Panruti Municipality Vs. Sri Kannika Parameswari Amman Temple, , this Court has held in clear terms that the Municipality does not have a right to deprive the owners of the property abutting a public street or public road of their right to ingress and egress though the public street vested with the Municipality, It has also been held that the vesting of the public street/public road in the authority shall not give a right to such authority to deprive the owners of the adjacent lands of their right to have access to the public road/public street from any point. It is unnecessary to reproduce the observations made in all those judgments. Suffice to state that it has been uniformly held that the owners of the land adjoining the street or road margin are entitled to see that access to their property from the street; or road to the entire length is not obstructed by any construction which is not necessary for the maintenance and upkeep of the property as a road or street, as the case may be. In some of the above said cases also, especially in State of Tamil Nadu rep. by the Collector of Salem, etc., and 3 Others (supra), it has been clearly held that the adjacent land owner, seeking injunction not to put up any construction in the road margin or for mandatory injunction for the removal of obstructions put up, need not ask for a declaration and the failure to seek declaration will not defeat the claim of such person for injunction or mandatory injunction as the case may be. The above said discussion shall be enough to reject the contention of the learned Special Government Pleader that the property being road puramboke with a width of 35 feet could be beneficially used by the Government by allotting the same to the Police Department for housing the office of a special Wing of the Police Department and also the contention that the prayer for injunction without seeking declaration as not maintainable and hence untenable. The learned First Appellate Judge, on proper application of law, has held in clear terms that the respondent/plaintiff is entitled to an injunction against the appellants not to put up any construction so as to cause obstruction to her access to her property from the road through out the entire length of the property abutting the road margin.

9. The other contention raised by the Special Government Pleader at the out set seems to have some substance in it. The said contention is that the respondent/plaintiff herself has made a concession by deposing before the trial Court that she would not have objection if a passage sufficient for the passing of lorries from the road to her godown is left free without obstruction and that she would not have objection for the appellants/defendants putting up constructions in the rest of the portions. Of course, during cross-examination such an admission was elicited from P.W. 1, the plaintiff. "Whether such an admission will have the effect of taking away her right to have the entire length of her property abutting the road margins to be left free without obstruction?" and "Whether such an admission will be capable of conferring a right on the appellants/defendants to

put up construction on the road margin?" are the questions to be considered. A careful scrutiny of the said admission will go to show that the same was elicited making her to believe that she could only claim the right of access as an easement of necessity and that was the reason why she had given such an answer. The right of the owners of the land abutting the road or public street is not one of easement of necessity. They are distinct rights. Public do have a right to see that the public street and road margins are kept for the purpose for which they are left. It does not mean that the authorities having the duty to maintain the road can use the road margin for any purpose. They could use it for providing drainage or laying the cables or for similar use which shall not affect or abridge the right of the owners of the adjacent properties. Similarly, the constructions like culverts etc., which are necessary for the maintenance and upkeep of the road and the public street also can be put up by the authority. But, the local body or the Government, on whom the road or street might have vested, shall not have the right to put up any construction so as to block the entry to the adjacent properties from the public road or the public street at any point, excepting the erections which are necessary for the maintenance of street and the road. The respondent/plaintiff is entitled to ensure and protect her right of uninterrupted access to the road all along the length of her property described in "A" schedule. Therefore, even the first question sought to be projected as a substantial question of law deserves to be rejected. The learned first appellate Judge, on a proper re-appreciation of evidence and on applying correct principles of law, has arrived at a right conclusion that the respondent/plaintiff is entitled to the relief of injunction preventing the appellants herein/defendants from putting up construction for the office of CBCID in plaint "B" schedule property so as to cause obstruction to the very access to her property described in plaint "A" schedule from the road. This Court does not find no defect or infirmity in the judgment of the first appellate Court. There is no reason to interfere with the same. For all the reasons stated above, this Court comes to the conclusion that the judgment of the first appellate Court deserves confirmation and the second appeal deserves to be dismissed. Accordingly, the second appeal is dismissed. However, considering the nature of the case, this Court directs the parties to bare their respective costs. Consequently, the connected miscellaneous petition is closed.