

(2005) 04 AP CK 0036
In the Andhra Pradesh High Court
Case No : SA No. 149 of 1997

Thudimella Lakshminarayana and Another	APPELLANT
Vs	
Thummala Narasaiah Naidu and Another	RESPONDENT

Date of Decision : 07-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 39 Rule 1, 91
Evidence Act, 1872 — Section 101
Limitation Act, 1963 — Article 146A, 149, 23, 28

Citation : AIR 2005 AP 357 : (2005) 3 ALD 804

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : K.G. Krishna Murthy, for the Appellant; K. Soma Konda Reddy, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Heard Sri Mahadeva, the learned Counsel representing the appellants and Sri Somakonda Reddy, the learned Counsel representing the respondents.

2. The substantial questions of law raised in the present second appeal as per the order made on 21-3-1997 are:

(A) Whether on the facts and circumstances of the case a suit for mandatory and perpetual injunction can be entertained after a long lapse of the construction of the hut in question for removal of the same?

(B) Whether on the facts and circumstances of the case can the Court below substitute the Advocate Commissioner report and Mandal Surveyor report so far as the free ingress and egress of the plaintiffs without there being any objections filed by the plaintiffs to the said report?

(C) Whether the Court below is right in shifting the burden on the defendants on the face of Section 101 of the Evidence Act?

(D) Whether the order in appeal is sustainable in view of the judgment reported in Mall Suranna Vs. Kalla Somulu and Others, without there being any necessity to remove the encroachment in view of Ex.X-4?

In C.M.P. No. 3092/97, interim suspension also had been granted. Both the Counsel had taken this Court through the respective pleadings of the parties, the findings recorded by the Court of first instance, the findings recorded by the Appellate Court, the report of the Commissioner and also the oral and documentary evidence available on record.

2. The respondents herein, plaintiffs, filed O.S. No. 323/87 on the file of District Munsif, Badvel against the appellants/ defendants praying for mandatory injunction to remove encroachments E1 and E2 and also for permanent injunction restraining the Appellant No. 1/Defendant No. 1 from making further constructions in respect of E2 in the plaint plan and pass such other suitable orders. The Court of first instance recorded the evidence of PW-1 to PW-3, DW-1 to DW-3, marked Exs.A-1 and A-2 and Ex.B-1 and also Exs.X-1 to X-4 and ultimately dismissed the suit without costs. Findings recorded by the Court of first instance are that the plaintiffs are not entitled to the mandatory injunction and the suit is bad for misjoinder of necessary parties and the 2nd defendant is in possession of rasta poramboke for about 15 years. Aggrieved by the same, the unsuccessful plaintiffs had carried the matter by way of Appeal A.S.No. 38 of 1993 on the file of Subordinate Judge, Rajampet and the Appellate Court reversed the same and aggrieved by the same the defendants had preferred the present second appeal.

3. Here itself it may be noted that though the suit was dismissed by the Court of first instance, finding had been recorded relating to the encroachment on the rasta poramboke and the same finding had been recorded even by the Appellate Court and thus the said finding, a finding of fact, is a concurrent finding by both the Courts below though the ultimate result is different.

4. For the purpose of convenience the parties are hereinafter referred to as plaintiffs and defendants.

5. The plaintiffs instituted suit O.S.No. 323/87 for the reliefs referred to supra. The case of the plaintiffs in nutshell is that the first plaintiff purchased the land in S.No. 841/1. Through a registered sale deed and the defendants encroached on the public road in S.No. 855 in front of their site on East and made constructions shown as E1 and E2 and inasmuch as the said constructions are causing inconvenience for the ingress and egress of the plaintiffs to have access to be public road, the suit was filed.

6. The defendant resisted the suit by filing a written statement. It is pertinent to note that the defendants also admitted that the land in S.No. 855 of Madakalavaripalli is earmarked for road and that the 2nd defendant constructed the house and laid foundation in S.No. 855 but however stand was taken that the plan is incorrect. Further, initially in the original written statement the 2nd

defendant had taken a stand that he had put up the hut in question about 15 years ago but however I.A. No. 65/ 90 was filed praying for amendment of the written statement wherein stand had been taken that he has been in possession for 45 years and not 15 years as originally pleaded in the written statement. Further specific stand was taken that it is not an objectional obstruction and hence the relief cannot be granted.

7. On the strength of the respective pleadings of the parties, Issues 1 to 4, as referred to supra had been settled by the Court of first instance:

1. Whether the plaintiff is entitled for mandatory injunction for removal of the encroachments marked as E1 and E2 in the plaint plan?
2. Whether the suit is bad for misjoinder of necessary parties?
3. Whether the defendant is in possession and enjoyment of the suit rasta for about 15 years?
4. To what relief?

The plaintiffs examined themselves as PW-1 and PW-2 and yet another neighbour as PW-3 and Ex.A-1 sale deed executed by Kona Subbireddy in favour of Tummula Narasaiahnaidu dated 20-4-1981, Ex.A-2 plaint plan had been marked. Likewise, defendants examined themselves as DW-1 and DW-2 and also examined one Subbanna as DW-3 and marked Ex.B-1, the special notice of house tax new assessment by the Executive Officer, Grama Panchayat of Madakalavaripalli. Apart from this Ex.X-1, the Commissioner's report, Ex.X-2 Commissioner's plan, Ex.X-3 Surveyor's plan, Ex.X-4 Surveyor's Report also had been marked. On appreciation of the evidence available on record, the Court of first instance having recorded a finding that it is an encroachment on rasta poramboke ultimately dismissed the suit. The report of the Commissioner also had been referred to and the relevant finding in this regard recorded by the Court of first instance in O.S. No. 323/87 at Para-9 may be relevant which is referred to infra:

"In this matter an Advocate Commissioner was also appointed to see the physical features of the disputed property and accordingly the learned Commissioner visited the suit locality on 29-11-1987 along with Surveyor and he filed his report and plan as in Ex.X-1 and X-2 and the Surveyor also has filed his report and plan as in Ex.X-3 and X-4. Accordingly to the reports and plans of the Advocate Commissioner and Surveyor it is clear the thatched houses of the 2nd defendant are situate in S.No. 855 which is rasta poramboke whereas the plaintiffs site is located in S.No. 840 and in between the two places there is a rasta. It was also observed by the learned Commissioner and the Surveyor that the thatched houses constructed by the 2nd defendant are old and the total extent of S.No. 855 is Ac.4-58 cents and it is classified as rasta poramboke and the encroachment made by the second defendant measures about three cents only."

Aggrieved by the same, A.S.No. 38/93 on the file of Subordinate Judge,

Rajampet had been preferred and the following points for consideration had been framed by the Appellate Court;

1. Whether the plaintiffs are entitled to the relief of mandatory injunction to remove the encroachment described as Schedule 2 in the plaint and E1 and E2 in Ex.A-2 plaint plan and also for perpetual injunction?
2. Whether the impugned judgment and decree dated 28-8-1993 is correct, legal and sustainable in law?
3. To what relief?

As far as the report of the Commissioner is concerned, the following findings had been recorded at Para-23 by the Appellate Court:

"Ex.X-1 is the Commissioner's Report and Ex.X-2 is the Commissioner's plan showing physical features of the encroachments and the locality. Ex.X-3 is the sketch and Ex.X-4 is the report of the Mandal Surveyor who assisted the learned Commissioner, Advocate who filed Exs.X1 and X2. Admittedly both parties did not choose to file any objections. Ex.X3 the sketch prepared by the Mandal Surveyor coupled with Ex.X2 rough plan prepared by the learned Commissioner-Advocate makes it crystal clear that the 2nd defendant encroached the rasta poramboke in S.No. 855 and made construction on the western margin very near to the eastern boundary of the site of the plaintiff. In view of the encroachment and construction of the structures marked as A, B, C, D in Ex.X-2 Commissioner's plan, the width of the road on east of the plaintiff's site diminished. Ex.X2 makes it crystal clear that the plaintiffs may not be in position to have ingress and egress into the main road on north by going through the rasta poramboke on east in his site. Exs.X1 to X4 makes it crystal clear that the encroachments are nothing but a clear case obstruction for the free passage. The learned District Munsif except referring Exs.X1 to X4 to support his view that the structures are old did not consider them in the right perspective".

It may also be appropriate to have a look at Paras 17 and 26 of the Appellate Court judgment which read as hereunder:

"From a reading of the impugned judgment it would go to show that the structures described as E1 and E2 are the encroachments in S.No. 855 rasta poramboke and they are on east of the site of the plaintiff. The above finding of the learned District Munsif on Issue No. 1 that the defendants encroached the earmarked rasta poramboke bearing No. 855 on eastern side of the plaintiff's site and also constructions is neither disputed nor challenged by the defendants by way of preferring cross objections and therefore the above finding of the learned District Munsif became final. The above finding of the learned District Munsif that the structures in question earmarked as E1 and E2 in the plaint plan are encroachments in S.No. 855 classified as rasta poramboke is based on the evidence on record. In fact DW-1 and 2nd defendant in his written statement as well as in the evidence adduced clearly and categorically admitted that the

structures in question are in S.No. 855 of Madakalavaripalli which is classified as rastha poramboke abutting east of the site of the plaintiffs.

DW-1, the 2nd defendant, during the course of cross-examination clearly and categorically admitted that he has a house in Gunthapalli Gramapanchayat and he resided in the said village upto 1981. DW-1 further has deposed that his father has been residing in the suit house. But DW-1 was made to admit that his father died about 30 to 35 years ago. It is pertinent to note that 2nd defendant did not choose to allege that his father constructed the hut about 45 years ago and had been residing therein. Even otherwise according to DW-1, the 2nd defendant, he resided in the house at Gunthapalli till 1981 and that his father died about 30 to 35 years ago. Therefore the above inconsistent and self-contradictory evidence of DW-1 demolishes his case about his possession and enjoyment of the house since 45 years or 15 years as the case may be. DW-1 in this connection has clearly and categorically admitted that nobody objected at the time of construction of the house by him except the 1st plaintiff. Therefore according to DW-1, the 2nd defendant, 1st plaintiff made objection when 1st defendant made constructions in the suit land. As can be seen from Ex.A-1 the 1st plaintiff purchased property in S.No. 840/1 on the west of rastha poramboke only in the year 1981. Therefore the objection from 1st plaintiff must be after 1981 which improbabilises the case of the 2nd defendant that he constructed the house about 45 years ago or even 15 years and probabilises the case of the 2nd defendant that he constructed the house about 45 years ago or even 15 years and probabilises the case of the plaintiffs. DW-1, the 2nd defendant, has deposed that the house in the disputed property is bearing Door No. 7/20. Ex.B-1 is the special notice for levying the house tax and it was issued by Madakalavaripalli Grama Panchayat in the year 1986. Ex.B-1 is relating to the house bearing Door No. 7/4 but not 7/20 which is the door number of the house located in the disputed property. Therefore it is crystal clear that Ex.B-1 special notice for levying the house tax is not relating to the house of the 2nd defendant in the rastha poramboke. But the learned District Munsif observed that 2nd defendant paid house tax under Ex.B-1 ignoring that it is only a special notice issued by the concerned panchayat but not the house tax receipt. Even assuming for a while that Ex.B-1 is in respect of the house in rastha poramboke it is not in any way advance the case of the defendants that the structures are old since it is of the year 1986 the origin of Ex.B-1 is 1986."

8. The specific case of the plaintiffs is that the entire land in S.No. 855 of Madakalavaripalli is earmarked as rastha poramboke and there is a public road running from South to North connecting Badvel-Nellore Road on the North and the 1st plaintiff purchased the land abutting West of the said road under Ex.A-1 registered sale deed and just 3 months prior to the institution of the suit the defendants encroached a portion of the earmarked rastha on East of the plaintiffs land and made constructions E1 and E2 causing inconvenience to the ingress and egress of the plaintiffs. The fact that S.No. 855 is earmarked as rastha poramboke and same constructions had been raised in the rastha poramboke by

the defendants is not in controversy. However, initially stand was taken that the construction was made by the 2nd defendant 15 years ago but subsequently the same was amended that his father constructed the house about 45 years ago. Further, the specific stand of the defendants is that there is a pathway in between the encroachment and the land of the plaintiffs and the same is sufficient to have ingress and egress and in substance the pleading is that it is not an objectionable encroachment. It is pertinent to note that the fact that this is a rasta poramboke and public road is not in controversy. The only stand taken by the defendants is that it is not an objectionable encroachment. It is also pertinent to note that the Court of first instance having recorded that the constructions had been made at the earmarked rasta poramboke dismissed the suit on the ground that the said encroachments are their for sufficiently a long time and the rest of the place leftover may be sufficient for ingress and egress to the plaintiffs and the defendants are poor persons and there is no objection either from the revenue authorities or from the Grama Panchayat and hence the plaintiffs are not entitled to the relief. On appreciation of the evidence available on record the Appellate Court recorded findings in detail commencing from Paras 16 to 39 and ultimately decreed the suit as prayed for. In *S. Someswara Rao and Ors. v. S. Tirupattamma and Ors.* 1988 (1) ALT 105 (NRC) (S.A. No. 316/82 dated 29-4-1988), on difference of opinion between Amareswari, J., and Upenderlal Waghray, J., Jeevan Reddy, J., observed:

"It is true that Section 39 expressly speaks of a discretion in the Court in the matter of granting a mandatory injunction; but the said discretion has to be exercised in accordance with law and having regard to the facts and circumstances of a given case. May be that granting a mandatory injunction would result in eviction of the poor people living in the huts, or the displacement of the school which is said to be running there for the last several decades; but that can be taken care of by making appropriate directions. No person can be allowed to occupy a portion of a public road, a highway, or even a public pathway and argue that even after his encroachment there is sufficient space left for public to pass by. He cannot be the Judge of the requirements of the public, nor can he decide for himself what extent must be left for public use and what extent must be occupied by him."

In *Kedarnath Sah and Others Vs. Narendra Prasad Shah and Others*, , the Division Bench of Bombay High Court held at Paras 7 and 8 as hereunder:

"Then remains the only question which was rather vehemently argued by learned Counsel for the appellants. Learned Counsel relying upon a Bench decision of this Court in *Smt. Chandrawati Devi and Others Vs. Rameshwar Kaviraj and Others*, , urged that a distinction has to be made between a public road in which the public in general has a right of way and a quasi public road where the privilege is used by only one particular section of the community. In the earlier type of cases unless it is a suit in a representative capacity, special damage need be proved. According to the learned Counsel, the present case is one in which the plaintiffs

base their right in a public highway and as such in the absence of proof of special damage, their suit ought not to have been decreed. Before advertng to the features of the case referred to above, I may here indicate some well established principles of law about which there has been no serious controversy at the Bar. A person interest immediate neighbour and entitled to use a local public thoroughfare has a special cause of action and that irrespective of whether he has proved special damage or not. The principle is that a person of an immediate community or section of the public who is deprived of the amenity provided for that particular section may be deemed to have suffered loss without proof of such loss. The case of Dasrath Mahto and Others Vs. Narain Mahto and Others, , was a -case of this nature where two eminent Judges of this Court Harries C.J. and Fazl Ali, J., held that where the roadway in question passed the houses of the plaintiffs and the defendants, who proceeded to make certain constructions on their land and encroached upon the thoroughfare roughly, two-thirds of the highway so that the persons residing in the vicinity were compelled to use only a third of the width of the roadway, the inhabitants were entitled to seek the removal of the obstruction without proving special damage. The objection to the non-maintainability of the suit on account of its not having been framed under either Section 91 or Order 1, Rule 8 of the Code was negatived. To the same effect is the decision of this Court in the case of Pahlad Maharaj and Others Vs. Gauri Dutt Marwari and Another, . The case of District Board of Manbhum Vs. Bengal Nagpur Railway Co. and Another, may also be referred to in this connection for the proposition that the right of access to the highway at all points where a land adjoins the highway belongs not only to the owner of the land, but also to the occupier and the occupier can sue for removal of an obstruction interrupting his right of access to the highway. Even the fact that the owner or occupier of the adjacent land has fenced it off or raised a gateway on the other side cannot affect his right of access to the highway as aforesaid.

A case very much in point laying down a number of principles in this connection is that decided by the Supreme Court in the Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj, . That was a case under the Uttar Pradesh Municipalities Act. There was a metalled road running through a plot of land belonging to the plaintiff and on either side of the metalled road there was open space, on either side of which there was a municipal drain. The public had been using the road for decades and the Municipality had been maintaining the road and the drains. The Municipality was seeking to erect a structure on the vacant site lying between the drains and the road. The plaintiff having brought a suit for permanent injunction against the Municipality restraining it from putting up the structure, the Supreme Court held that - (1) inference of dedication of a highway to the public way may be drawn from a long user of the highway by the public; (2) the fact that only a part of the pathway is metalled does not necessarily limit the width of the pathway; (3) the Municipality has the exclusive right to maintain and control the surface of the soil and so much of the soil below and the space above the surface as is necessary to enable it to adequately maintain the street as a street.

It has also certain property in the soil of the street which would enable it to adequately maintain the street as a street. It has also certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers; (4) the Municipality could not put up the structures which it intended to erect on the vacant site for that was not necessary for the maintenance or user of the road as a public highway. It is true that in that case the plaintiff was also held to be the owner of the soil in general subject to the rights of the Municipality and the public to pass and re-pass on the highway, but the principles enunciated by their Lordships of the Supreme Court are equally applicable to the facts of the present case. In the instant case, the findings of the lower Appellate Court based on the evidence on record are that the plaintiffs have their houses abutting the Bye-Lane in question. They have been using the same for long time past and even the other members of the public used the same. The sale of the disputed portion of land substantially reduced the width of the path in front of the houses of the plaintiffs and that the fact that even after the sale of the disputed portion some width of the Bye-Lane was still left for use of the plaintiffs does not in law make any difference. In such circumstances, it must be held that the plaintiffs had succeeded in establishing their right apart from the rights that the public in general may have had in this public Bye-Lane, and that, as such, even if special damage need be proved, it had been proved. The question, therefore, raised by learned Counsel for the appellants remains academic in nature. Be that as it may, the case of Smt. Chandrawati Devi and Others Vs. Rameshwar Kaviraj and Others, strongly relied upon by learned Counsel may be referred to in this connection. In that case the plaintiffs were the Central Bank of India and its employees and one member of the public. Originally the plaintiffs had instituted that suit on behalf of the public under Order 1, Rule 8 of the Code as also in their individual capacities on the ground that they suffered special damages. After the decision of the Trial Court the Bank vacated the holding No. 94 where its office was situate at the time of the institution of the suit, namely, by the side of the Halliday Road in the town of Gaya and during the pendency of the appeal before the first Appellate Court the seventh plaintiff, who alone had originally joined as a member of the public as one of the plaintiffs filed a petition alleging that he had never felt any inconvenience on account of the settlement of the suit land with the defendants of that suit yet he had joined the Bank and its employees as a plaintiff under the pressure of the Manager of the Bank. The original Defendant No. 1 of that suit, who had supported the original plaintiff's case was subsequently transposed to the category of a plaintiff as Plaintiff No. 8 by orders of the High Court. Taking into consideration the subsequent event which had happened since after the institution of the suit, namely, that the original plaintiffs had moved away from the area in question and had no special injury affecting the plaintiffs individually or damage peculiar to any one of them this Court held that in the absence of proof of special damage the suit could not be decreed, as it was a case of allegation of encroachment upon a public road in the full sense of term as distinguished from a quasi public road. The distinction was focused by one of the learned Judge Ramratna Singh,

J., in Paragraph 21 of the judgment at Page 431 where it was said that where the privilege to use a road is enjoyed only by one particular section of the community or by inhabitants of two or three villages and not by others, the road is not a public road. Such private ways generally have their origin in custom, but such ways can be converted into a public highway after user by the general public sufficient to raise the presumption of dedication. The contention which was negated in that case was that irrespective of the fact whether a person of Gaya Town lived by the side of the Halliday Road every person of the town would be deemed to suffer particular inconvenience justifying the inference of special damage. While overruling this argument, it was held that unless the plaintiffs prove that they had frequently to pass through the footpath of which the suit land formed a part they could not succeed without proving special damage. It will thus be seen that even on the authority of *Smt. Chandrawati Devi and Others Vs. Rameshwar Kaviraj and Others*, , the plaintiffs-respondents first party had sufficiently proved their special rights and the special injury caused to them apart from any injury that may be caused to the public of Bhagalpur Municipality in general."

Likewise in *Pyarelal v. Santlal*, AIR 1972 Raj. 103, at Paras 40, 41 and 47 it was observed:

"Next we come to the plea of the defendants that the suits are barred by limitation. The Tehbazari Stalls had been in existence from 25 to 30 years when the present suits were brought. The learned Single Judge was of the opinion that the plaintiffs had a recurring cause of action within the meaning of Section 23 of the old Limitation Act and the present suits were consequently within time. A number of decisions were cited by the learned Counsel for the parties. Before considering these decisions, we may state that the contention on behalf of the defendants was that as a result of the putting of the Tehbazari Stalls on parts of the public way, the plaintiffs were "dispossessed" or "ousted" from those parts of the public way and Section 23 has no application to the present case.

We are of the opinion that no question of the dispossession or ouster of the plaintiffs from any part of the public street can arise as they had no right of possession over the public street. Only a party having a right of possession over something can be dispossessed from it. In the present cases, the stall-holders do not claim adversely to the municipality. They are in possession of parts of the public street as Tehbazari holders from the municipality. In the *Municipal Commissioners v. Sarangapani Mudaliar* ILR (1896) 19 Mad. 154, the Municipality was sued to recover a strip of land forming a part of public highway on which the defendant had made an encroachment more than 45 years before the suit. It was held that the defendant had acquired title by adverse possession against the municipality. Here the municipality was originally in possession over the strip of land which had been encroached upon by the defendant. When the encroachment was first made, although it was an act of trespass, there was complete dispossession of the municipality and Section 23 of the Limitation Act

therefore did not apply. By then Article 146-A had not been enacted and it was held that Article 149 was not applicable. Therefore, it was held that the right of the municipality over the strip of land was extinguished u/s 28 of Limitation Act on the expiry of 12 years and it could not recover back possession.

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In *Bhagwan Dutt Kamat Vs. Asharfi Lal Mahtha*, , the plaintiffs had a right of way over certain land which was obstructed. The obstruction had taken place much more than 12 years before the date of the suit. It was contended that the dispossession being completed more than 12 years ago, Section 23 had no application and reliance was placed upon the decision of the Madras High Court in *Municipal Commissioners"* case ILR (1896) 19 Mad. 154 (supra). It was pointed out that the decision was not applicable as the defendant had been in adverse possession against the plaintiff and had acquired a right thereby. The decision in *Nazimullah v. Wazidulla* AIR 1916 Cal. 733 : 29 Ind. Cas. 385 was followed in which it was held that a wrongful interference with a right of way constitutes a nuisance and that it is a continuing wrong u/s 23 of the Limitation Act. In the *Calcutta* case, the decision of the Judicial Committee in *Rajrup Koer v. Abdul Hossein* (1880) 7 Ind. App. 240 (PC) was followed. The learned Judge of the Patna High Court also referred to the decision of the Judicial Committee in AIR 1933 193 (Privy Council) in which Section 23 was applied to certain act on the part of the Swetambari Jains interfering with the Digambaris right of worship and it was held that it was a continuing wrong as to which u/s 23 of the Limitation Act, a fresh period begins to run at every moment on the day on which the wrong continues."

9. Apart from the decisions referred to supra, certain other decisions also had been relied upon. In *Mall Suranna Vs. Kalla Somulu and Others*, , the Court while dealing with the language of Order 39 Rule 1 CPC held that the same is very wide and includes issue of a mandatory injunction and the conditions necessary for the issuance of mandatory injunction and the discretion how to be exercised in this regard had been explained. Reliance also was placed on *K. Venkatasubba Reddy Vs. Bairagi Ramaiah* (died) by LRs., , wherein it was held that the plaintiff must succeed by establishing his own title by adducing satisfactory evidence and he cannot succeed on the weakness of the defendants case. Reliance also was placed on *Kathala Yellaiah and others Vs. Kathala Chandraiah*, , where while considering an application for temporary injunction pending trial of the suit it was held that the petitioner has to prove his exclusive possession over the suit property and when the documents filed by the petitioner-appellant do not disclose his possession of the lands, the Court below is justified in dismissing the said application. Yet another decision was relied upon *M.M.T.C, Ltd v. Sterlite Industries (India) Ltd.* AIR 1997 SC 605. On a perusal of these decisions, this Court is of the considered opinion that these decisions may not be relevant to decide the present dispute in controversy. In the light of the decisions referred in

S. Someswara Rao and Ors. v. S. Tirupattamma and Ors. case (supra) and also in the light of the decisions referred in Kedarnath Sah and Ors. v. Narendra Prasad Shah and Ors. and Pyarelal v. Santlal (supra), this Court is of the considered opinion that the plaintiffs being the public, apart from being the abutting owners of a public road, have a right to have free ingress and egress from each and every point from the public road. This principle is well settled principle and on the ground that some portion had been left and the appellants/defendants are poor persons, the relief cannot be negated and hence the Court of first instance had erred in recording such a finding having arrived at the conclusion that the encroachment was on the public road or just adjacent thereto on rasta poramboke. Having recorded such a finding, definitely there is no justification in refusing the relief prayed for by the plaintiffs. The Appellate Court on appreciation of both oral and documentary evidence and also referring to the report of the Commissioner and also the report of the Surveyor had arrived at the correct conclusion. No doubt certain submissions were made in relation to Ex.X-4 and contentions were advanced that in the light of the same since some path way is available, the livelihood of these poor persons who are residing in the hut need not be disturbed by exercising the discretionary relief in favour of the plaintiffs and instead it would be just to dismiss the suit in the facts and circumstances of the case. In the light of the protection available to the public road vis-a-vis the rights of the public inclusive of the adjacent house owners and the landowners in this regard to have free ingress and egress from every point on the public road, the said contention cannot be accepted. Thus the findings which had been recorded by the Appellate Court are in accordance with law. Even otherwise when a concurrent factual finding relating to encroachment had been recorded, the relief cannot be refused to the plaintiffs and hence the judgment and decree of the Appellate Court are just, reasonable and in accordance with law and are liable to be confirmed and accordingly the second appeal being devoid of merit, shall stand dismissed. No order as to costs.