

IN THE COURT OF THE MUNSIF, CHENGANNUR

Present: Sri. Biju.T.V., B. Sc., LL.B, Munsiff

Saturday the 24th day of February, 2018/5th day of Phalgunam, 1939

OS NO.185/2011

(Filed on 22.07.2011)

Plaintiff:-

Jayasree, aged 44 years,
D/o. Jagadamma, Poovannal house,
Kurattickadu Muri, Mannar Village,
Chengannur Taluk.

By Adv. Sri. P.K.Ajithkumar.

Defendants:-

1. Rekhabei, aged 33 years,
Radha Nivas, Kurattickadu Muri,
Mannar Village, Chengannur Taluk.
2. Venu, (***Died***) aged 40 years,
-do- -do- -do-.

Additional Defendants:-

3. Sandeep.S., aged 18 years,
S/o. Venu, Radha Nivas,
Kurattickadu Muri, Mannar Village,
Chengannur Taluk.

***Additional D3 impleaded as the legal heir of deceased D2 as
per order in IA.788/2017 dated 12.07.2017.***

D1, D2, Adddl. D3 - By Adv. Sri. Suresh Mathai

This suit having been finally heard on 01.02.2018 and the Court
on 24.02.2018 delivered the following:-

JUDGMENT

Suit for declaration of easement by grant in respect of a pathway, fixation of boundary and for injunction.

2. Plaintiff averments, in brief, are as follows;

Plaintiff schedule item No.1 property got devolved upon the plaintiff by virtue of the Gift deed No.1528/90 and she has been in possession of the same since the date of the deed. Property on the immediate eastern side of item No.1 belongs to the defendants and it is described under item No.2. Item No.1 and 2 were part of the family property of the parents of the plaintiffs and the defendants and they situated as a compact plot earlier. In 1119 ME, a partition deed was executed as deed No. 823 and the properties were allotted to the shares of the family members. A pathway having a width of 3 metre and length of about 75 metre had been in existence along the southern side of item No.2 property and it was being used by the plaintiff as their means of access towards the eastern side panchayath road. The way is described under item No.3. When the family properties were partitioned in the year 1119 ME, a right of

way through item No.2 property towards item No.1 was expressly provided in the partition deed. In violation of the above stipulation, the defendants have diminished the width of the way by planting trees and other saplings by encroaching into the way portion. Plaintiff is having no alternative way other than item No.3 towards her access to the eastern side public road. The right over the way has expressly been provided in the partition deed and it is further stated that the other co-owners have no right to cause any obstruction to its user by the plaintiff and her family. The present defendant who is the grand daughter of the fourth party to the partition deed has reduced the width of the way by planting trees and hence it is highly necessary to declare plaintiff's right of easement by grant over the way and the way is also to be restored to its original position. In addition to this, the northern boundary of item No.3 way is also to be fixed through the process of court. Plaintiff on her return from Chennai, where she is presently residing has approached the defendants and pleaded with them to clear off the trees and wild growth in item No.3 way and the defendants did not pay heed to it. They had further threatened to

enclose the way portion by fencing for which they have no right. Hence the relief of prohibitory injunction is also sought for to restrain the defendants from causing any obstruction to the pathway along with a mandatory injunction directing the defendant to clear off the foliage and to remove the fencing stones placed there. Hence the suit is filed.

3. Defendants entered appearance and filed written statement where the contentions, in brief, are as follows;

Suit is not maintainable either in law or on facts. The description of item No.2 property is not correct. Defendants are having right over 22 cents of property and not 52 cents as averred in the plaint. The fact that item No.1 and 2 were originally belonged to the family of the parties is admitted. The existence of a way having 3 metre width along the southern side of item No.2 from the eastern side panchayath road is denied. The said way is having 2 metres width at its point of origin and its width is upto 2¼ foot at the south-western portion of item No.2. The way is demarcated from item No.2 property by an age old barbed wire fencing on the southern

side of item No.2. Though the major portion of the wire fencing got corroded with the efflux of time, the fencing poles still remain in tact. The said boundary demarcation is having 20 years old and it was installed by the defendants' father during his life time. Nearly half portion of the way, widthwise, was given from the share of the first defendant's mother which devolved upon her in partition. Plaintiffs and the other property owners in the vicinity have been using the way which is situated on the southern side of the fencing poles for the last 20 years without any dispute. In the partition deed relied on by the plaintiff, there is no provision for a way as averred in the plaint. Had it been really meant, then the limits of the way would also have been defined in clear terms. Plaintiff is bound to prove the location of the pathway and its exact dimensions as claimed by her. Defendants have never caused any obstruction to the user of the pathway presently available in the locality, nor had they tried to fix fencing poles by encroaching upon the way portion. Plaintiff does not have a cause of action against the defendant and the suit is liable to be dismissed with costs.

4. The plaint was subsequently amended and the reliefs of declaration of easement by grant and for mandatory injunction was incorporated by way of amendment, consequent on which the defendants filed additional written statement raising the following contentions;

There does not contain any reference to a pathway in the partition deed No. 823 of 1119 ME as claimed by the plaintiff. A right of way is provided along the southern side of item No.4 property mentioned in the partition deed and it is further stipulated that the fourth party to the deed shall not have any right to cause obstruction to such user. The way thus being used by the plaintiff is having a width of 2 metre at its eastern point and in its western side it is having a width of 2 $\frac{1}{4}$ metre. There exists a barbed wire fencing which clearly demarcates the way portion from defendant's item No.2 property. On the immediate northern side of the boundary, there situates several trees having more than 25 years of age. A way having 3 metre width has never come into existence following the partition deed. This suit itself is filed on an experimental basis to

some how try to obtain a way having more width than the one presently being used by the plaintiff. Plaintiff seeks declaration in respect of a way which is not in existence. As she claims right over a way described as item No.3, she is bound to prove that such a way is in existence in the locality. As there already exists a boundary demarcating defendants item No.2 and the way portion, there is no necessity to fix the boundary through the process of court. The additional reliefs incorporated by way of amendment are not grantable and they are also to be dismissed.

5. Based on the aforesaid rival pleadings, the following issues came up for consideration;

1. Is the prayer of the plaintiff for mandatory injunction allowable?
2. Is the permanent prohibitory injunction as prayed for allowable?
3. Reliefs and costs.

Taking the amended reliefs also into consideration, the following issues were additionally raised;

4. Is the plaintiff entitled to a declaration of easement by grant over item No.3 way?

5. Is the plaintiff entitled to get the northern boundary of item No.3 fixed as sought for?

6. If so, which is the dividing boundary between item No.2 and 3 properties?

6. Plaintiff's evidence consists of the oral testimonies of PW1 to PW5 and Exts. A1 to A6 were marked. Defendants' evidence consists of the oral evidence of DW1 and DW2 and Ext.B1 document was marked on their side. The reports prepared by the commissioner appointed in this case were marked as Exts.C1 to C3, C4 to C6 and C7 to C9. Exts. X1 to X3 were marked as court exhibits.

7. Additional Issue Nos. 4 ,5 and 6:

According to the plaintiff, she after her predecessors in interest, has got right of way along the southern side of defendants' property as per the stipulation in the partition deed No. 823 of 1119 ME, which is marked as Ext.A1. Plaintiff's item No.1 property is situated on the western side of defendants' item No.2. Both item No.1 and 2 were admittedly their family properties. In Ext.A1 partition deed, item No.1 belongs to the plaintiff was described

under schedule No.5 and allotted towards the share of her maternal grand mother and her mother, who was a minor at that time. Defendant's item No.2 was described as item No.4 in the partition deed and allotted to the maternal grand mother and the mother of the first defendant. On perusal of Ext.A1 partition deed, it is seen that a right of way is provided therein along the southern side of the property described under schedule No.4 in the deed. There it is provided that the fourth sharers (defendants' mother and maternal grand mother) shall not cause any obstruction to the fifth sharers (plaintiff's mother and maternal grand mother) right of passage along the southern side of item No. 4 property towards the public road on the eastern side. Thus it is indisputed that right of way along the southern side of plaintiff item No.2 property is provided to the use of the plaintiff as per the aforesaid recital in Ext.A1 partition deed. But it is pertinent to note that the limits of the said way is not defined anywhere in the said deed.

8. The definite case of the plaintiff is that, following the partition deed a way having a width of 3 metre and a length of about 75 metre was being used by them along the southern side of item

No.2 and that the said way was subsequently obstructed by the defendant and her mother by planting trees and other saplings along the track and diminished its width. In this case, the partition deed relied on by the plaintiff where the grant is provided was executed in 1119 ME, corresponding to the year 1943. As the limits of the way is not clearly specified in the deed, a reasonable way, considering the nature of the dominant tenement can be presumed against the grantor. The plaintiff in this case claims that a way having a width of 3 metre and length of about 75 metre had been in existence following the execution of the partition deed. That being so, the burden is squarely upon them to prove the existence of such a way in the locality at any point of time. Here the dominant tenement, ie item No.1, is situated on the rear side of servient heritage, ie item No.2 owned by the defendant. The public road lies in the north south direction along the eastern side of the defendant's property. At the time of executing Ext.A1 deed there is a reference to a house in the share allotted to the predecessors in interest of the plaintiff's herein. Ext.A1 partition deed does not contain any suggestion that the way

granted there in is to be put to any extra ordinary use otherwise than the ordinary and normal one concomitant to the nature of the tenement at the time of its execution.

9. The commissioner and the Surveyor appointed in this case have conducted local inspection and the report prepared by them is available on records as Exts.C4 to C6. In the said report , prepared after measuring out the properties on the basis of the title deeds and the re-sy. plan, property allotted to the share of the plaintiff and her family as per Ext.A1 partition deed is shown in numerals 1, to 11 as having 15.40 Ares in re-sy. 224/1 and in numerals 6, 7,8, E, 12 , 13,14,15 having an extent of 4 Ares in re-sy. 225/8. The property allotted towards the share of the defendant and her predecessors as per Ext.A1 deed is shown in numerals 14,13, E,F,B, 17,16 having an extent of 12.92 Ares in re-survey 225/9 and in numerals 17,18,19 , 20,21, AHGB in survey 217/4 having an extent of 14.38 Ares. Thus going by the plan, the plaintiff's property is situated in re-sy. No. 224/1 and 225/8. Similarly, the defendant's property is in re-sy. 225/9 and 217/4. The plaintiff in his commission application has sought to

set out a 3 metre width pathway along the southern side of defendant's item No.2 property in the east-west direction. The pathway thus set out by the commissioner is shown in Ext.C6 plan in letters ABDEFGH. The portion shown in the plan in letters ABGH passes through the property in survey No. 217/4 and the portion marked with letters BCDEFG passes along the survey No. 225/9, both owned by the defendants. The commissioner when examined as PW4 has deposed that the way portion having 3 metre width was set out as sought for in the commission application and as described under item No.3 of the plaint schedule. He did not find such a way therein existence. He further deposed that the way actually available in the locality passes along the southern side of defendant's property. He added that the way passes along the properties having survey Nos. 217/6 and 225/10. The said way is shown in Ext.C6 plan in dotted lines. He was appointed as an ex parte commissioner in this case and at that time the existing way was found having an approximate width of 1 ½ foot at its point of origin and 2 ½ foot width at the point where it terminates at the defendant's property.

10. According to the plaintiff, the way presently available in the locality is not the one provided in Ext.A1 partition deed. As is evident from Ext.C6 plan prepared by the commissioner, it passes along the properties having re-sy. Nos. 217/6 and 225/10. The re-sy. Nos. of the defendant's properties are 217/4 and 225/9. According to the plaintiff, this itself proves the fact that the way existed along the southern side of the defendant's property, pursuant to the execution of Ext.A1 deed, has now become non-existent owing to the incursions made by the defendant. It has come out in evidence from Ext.C6 plan that there are fencing stones on the southern boundary of the defendant's property in the east-west direction. The existing way passes along the southern side of the fencing poles in the east-west direction. It commences from the eastern side public road and terminates at the plaintiff's property on the western side of defendant's item No.2. Plaintiff when cross-examined as PW1 has deposed that she got the plaint schedule item No.1 property as per the gift deed executed by her parents in the year 1990. The said document is marked as Ext.A2. Plaintiff conceded that during the

period of execution of A2 deed also there existed fencing poles on the southern boundary of the defendant's property. She was 23 years of age at that time. She did not know when the fencing poles were laid on the boundary. While she was studying, she used to pass along the northern side of the fencing poles and not through the southern side. She used the way along the northern side of the fencing poles till her marriage in the year 1986. Thereafter, she was in Chennai and during her visit to home, she used to pass along the way on the northern side of the fencing poles. When specifically questioned as to what happened to the way on the northern side of the fencing poles after the year 1986, she answered that her mother got bed ridden following paralysis and father was also not well. Both of her parents did not go out of the house due to their physical ailments. She conceded that the said aspects were not stated in her pleadings. She further says that there exists a way along the southern side of the fencing stones along the southern side of the defendant's property. But it was the private way belonged to the southern side property owners and it is being used by her with their permission. She

categorically asserted that there existed a way having 3 metre width along the northern side of the fencing poles laid on the southern side of the defendant's property. She further adds that the said way was in existence since the execution of the partition deed in the year 1119 ME. She then deposed that her mother was having some congenital illness in the form of paralysis and she started walking at the age of 10 years. Her mother was taken along the way in bullock cart. Her mother was examined as PW2. She also deposed that she was paraplegic at the time of execution of Ext.A1 deed and she was taken to hospital and other places along the way in bullock cart. She recovered after 10 years and used the way until she has again got afflicted with the illness.

11. Apart from the self serving statements made by PW1 and PW2 nothing has been brought on record to show that there existed a way as described under plaint item No.3 along the southern side of the defendant's property. Admittedly, there exists a way there and it is having an approximate width of more than 1 metre as is discernible from the commission report and the oral testimony of the

witnesses. PW2 is having six years at the time of Ext.A1 deed and her name is also referred to in the said document. As already stated, the deed was executed in the year 1943 and there is no reference therein suggestive of any special purpose for which the way is to be put to use otherwise than its normal and ordinary course. The pleadings is also conspicuously silent with regard to the plying of any bullock carts along the way at any point of time. That being so, it can only be seen as a new case without having any foundation in pleadings.

12. The period during which the way as described under item No.3 was being used by the plaintiff or the period during which the alleged diminution of the way was carried out by the defendants is not stated anywhere in the pleadings. The oral testimonies of PW1 and 2 are also vague and evasive in that regard. It is the case of the plaintiff that there exists a way having a width of 3 metre and length of 75 metres as described under item No.3 along the northern side of the fencing poles laid on the southern boundary of the defendant's property. This claim has to be analysed with respect to the

commission reports available on records. Ext.C5 report contains a vivid description of the various trees standing in the way portion set out by the commissioner as sought for by the plaintiff. Several Jack fruit trees, Mahagonies and Anjili trees are reportedly standing on the immediate northern side of the fencing poles laid along the southern boundary of the defendant's property. In Ext.C9 plan prepared by the commissioner, the position of 13 fencing poles along the southern boundary in the east-west direction in a row is shown. The commissioner in his C7 report has stated that the barbed wire fencing laid along the poles got worn out with the ebb of time and that the area is covered with wild growth and bushes and trees having approximately 25 to 30 years of age. The commissioner had thus reported after conducting site inspection on 5-4-16. The present topography of the way rules out the possibility of a way as claimed by the plaintiff along the northern side of the fencing poles, especially in the absence of any other evidence in that regard.

13. In order to reinforce his contention that the existing way is not the one provided under Ext.A1 partition deed, plaintiff places

heavy reliance on the survey records and Exts. C6 plan prepared by the commissioner. In Ext.C6 plan, the existing way is shown in dotted lines and it is stated as passing along the properties having re-sy. numbers 217/6 and 225/10. Plaintiff's contention is that the said way belongs to the southern side property owners, one Kottuvila family, and they had provided the way when a portion of their property on the western side was sold to some third parties. Certified copy of a sale deed executed by one Omana Amma of Kottuvila family was produced and marked as Ext.X1. In the said deed, a way described as having 3 foot width along the northern side of their property, which was situated on the eastern side of the property conveyed by the said deed, towards the eastern side public road was provided to the use of the buyers there in. According to the plaintiff, the way now available in the locality is the way thus parted by the southern side property owners as per Ext.X1 deed. But as per Ext.C6 and C9 plan the way available in the locality is having 90 cm width at the point of its origin on the eastern side and its width on the western side is 1.2 metre. The Surveyor when examined as PW3 has also deposed

that the way is having a width of 90 cm at its point of origin and having 1.2 metres at its western side. The said dimension of the way is clearly at variance with the limits expressly provided in Ext.X1 deed. More over, the defendants and her family who got item No.4 property as described in Ext. A1 deed had subsequently partitioned the share thus allotted to them in the year 1974 and the partition deed produced by DW2, the witness examined on the side of the defendants, was marked as Ext.B1. DW2 is a party to the original partition deed of the year 1119 ME and he was referred to as a minor in the said deed. DW2 is the maternal uncle of the defendant and plaintiff is the daughter of his mother's sister. In the partition effected in the year 1974, the original parties who were allotted with item No.4 property in Ext.A1 deed had partitioned their share in to two. The property described under item No.2 in Ext.B1 deed was allotted to plaintiff's mother and the remaining property was allotted jointly in favour of the other co-shareres. DW2 further deposed that at the time of effecting partition in the year 1974, a way as provided in Ext.A1 along the southern side of the property was set apart and

boundary was fixed on its northern side by installing barbed wire fencing. During cross examination, he has deposed that a way facilitating conveyance through an auto rikshaw was set apart to the user of the plaintiffs at the time of effecting partition in the year 1974. He further deposed that the said fact is discernible from the partition deed. But on perusal of Ext.B1 deed, it does not contain any reference to a way set apart at the time of its execution. The commissioner in this case has reported the existence of an age old barbed wire fencing and trees aged nearly 30 years on the northern side of the way presently available . Both the commissioner and the surveyor during their cross examination had deposed that the fencing pole on the northern side of the way was fixed towards north of the actual boundary line . The said distance between the boundary stone and the fencing pole on its northern side is not ascertained by the commissioner. But the fact that the fencing poles are situated on the north of the actual boundary line renders probable the defendants case that the fencing was done after leaving out the way. The suit properties were not measured out on the basis of old survey plan. If it

had been done, then the portion of the properties which now forms part of the way would have been ascertained. The fact that the way passes along the resurvey numbers of the southern side property is not sufficient to make an inference that it is the way provided by the southern side property owners as per Ext.X 1 deed. This is especially so as the limits of the way presently available in the locality does not tally with the description of the way provided in Ext.X1. Furthermore, the way identified by the commissioner passes along the southern side of defendants item No.2 property in the east-west direction and it terminates at the defendants' property on the western side. The way thus available conforms to the description of the way specified in Ext.A1 deed. The plaintiff has failed to prove that a way as described under item No.3 has existed in the locality at any point of time and this disentitles him to have the relief of declaration as sought for. In the absence of any such evidence, the relief of setting out a way having a width of 3 foot is not granable. It has further come out in evidence that there exists fencing poles on the northern side boundary of item No.3 way and this also rules out the necessity

of fixing boundary between the way and the defendant's property. Thus the issues are found against the plaintiff and they are answered accordingly.

14. Issue No. 1 & 2:

Plaintiff has sought for a directive to the defendants to cut down the trees standing in the way portion described under item No. 3 and remove the fencing stones installed there. The relief of permanent prohibitory injunction restraining the defendant from interfering with the plaintiff's conveyance along item No.3 way is also sought for. Based on the discussions under the aforesaid issues, it has come out that the plaintiff fails to prove the existence of item No.3 way in the locality. As the relief of injunction, both prohibitory and mandatory, have been sought for, the plaintiff is obligated to prove the existence of the way as claimed by him and his right over the same. Plaintiff fails on both counts and thus he is found not entitled to the reliefs of injunction as sought for. The issues are thus found against the plaintiff.

In the result, the suit is dismissed. Considering the fact that the parties are standing in close relation to each other, the costs shall be borne by them.

Dictated to CA, typed by her, corrected by me and pronounced in open court on this the 24th February, 2018.

Sd/-
BIJU T.V
Munsiff

APPENDIX:-

Witness for the plaintiff's side:-

PW1	10.11.2017	Jayasree K.G.
PW2	13.11.2017	Jagadamma
PW3	15.11.2017	K.N.Balakrishnan Nair (Surveyor)
PW4	25.11.2017	Adv. K.R.Rajesh Kumar (Commissioner Advocate)
PW5	12.12.2017	Aneetha.B.V.

Exhibits for the Plaintiff's side:-

A1	18.02.1119 ME	Certified copy of Partition deed No.823 of SRO, Mannar.
A2	08.11.1990	Original dift deed No.1528/90 of SRO, Mannar.
A3	15.07.2011	Tax receipt No.2502295 of Mannar Village Office

A4	16.12.1967	Certified copy of Sale deed No.3475/67 of SRO, Mannar.
A5	28.07.2000	Certified copy of Sale deed No.1329/2000 of SRO, Mannar.
A6	25.01.2006	Certified copy of Sale deed No.114/2006 of SRO, Mannar.

Witnesses for the defendants side:-

DW1	18.12.2017	Rekha Bai.P.R.
DW2	09.01.2018	Gopalan Nair.

Exhibits for the defendants side:-

B1	21.02.1974	Original Partition deed No.454/74 of SRO, Mannar.
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Court Exhibits:-

C1	22.08.2011	Commission report filed by Adv.K.R.Rajesh Kumar as per IA.903/11.
C2	23.07.2011	Mahazar
C3	23.07.2011	Rough Sketch
C4	30.07.2015	Commission report filed by Adv.K.R.Rajesh Kumar as per IA.19/14
C5	13.06.2015	Mahazar filed by Adv.K.R.Rajesh Kumar
C6	13.06.2015	Plan prepared by Special Commissioner Sri. K.N.Balakrishnan Nair.

C7	12.07.2016	Commission report filed by Adv.K.R.Rajesh Kumar
C8	02.04.2016	Notice given to Counsel on the both sides by the Commissioner Advocate.
C9	12.07.2016	Plan prepared by Special Commissioner Sri.K.N.Balakrishnan Nair.

Other Exhibits:-

X1	16.12.1967	Certified copy of Sale deed No.3475/1967 produced by the Sub Registrar, Mannar.
X2	28.07.2000	Certified copy of Sale deed No.1329/2000 produced by Sub Registrar, Mannar.
X3	25.01.2006	Certified copy of sale deed No.114/2006 produced by Sub Registrar, Mannar.

Munsiff

Typed by :Str
Compd.by

Copy of Judgment

in OS NO.185/2011

Dated.24.02.2018.