

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 23.03.2022

PRONOUNCING ORDERS ON : 25.03.2022

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

S.A.No.190 of 2013
& M.P.No.1 of 2013

Arulmighu Palapattarai
Mariamman Tirukoil
Rep. by its Executive Officer
Namakkal.

... Appellant

vs.

1.Pappayee

2.Pavayee (Died)

3.The Commissioner
Namakkal Municipality,
Namakkal,
Namakkal District.

4.P.Kalavathi

5.P.Punithavathi

6.Gunasundar

7.P.Senthilselvan

...Respondents

[R4 to R7 brought on record as Lrs of the deceased R2 viz., Pappayee vide order of Court dated 20.02.2020 made in CMP.No.13083 of 2019 in S.A.No.190 of 2013]

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 28.03.2012 in A.S.No.48 of 2011 on the file of the Additional District Court Judge, Namakkal, reversing the judgment and decree in O.S.No.683 of 2005, dated 31.10.2007 on the file of the Principal District Munsif's Court, Namakkal.

For Appellant : Mr.S.Kalyanaraman

For Respondents : R1 & R2 Died

Mr.P.Srinivas for R3

Mr.A.Arulmozhi
for R4 to R6

R7 – Not ready in notice

J U D G M E N T

The 1st defendant is the appellant in this Second Appeal.

2.The 1st and 2nd respondents/plaintiffs filed the suit seeking for the relief of permanent injunction against the 1st defendant and to restrain the 1st defendant from interfering with the usage of the suit property by putting up any structure or barricade and thereby, prevent the ingress and egress to the property belonging to the plaintiffs. The plaintiffs also sought for the relief of mandatory injunction to restore the suit AB portion to its original position.

3.The case of the plaintiffs is that they became entitled to the properties on the demise of their mother on 20.01.1984. According to the plaintiffs, the portion shown as AB in the rough plan filed along with the suit is a street called as Mariamman Koil Street which is classified as a Poramboke in the revenue records and it is a public street vested with the 2nd defendant Municipality. On the southern side of this street exists the Mariamman Temple at S.No.43. The street is in S.No.42 and the schedule properties are in S.Nos.30, 31 and 32.

4.The further case of the plaintiffs is that for all the tenements in S.Nos.30 and 31, their only access is from Mariamman Koil Street in S.No.42 from time immemorial. Therefore, according to the plaintiffs, it will not be open to anyone to prevent the user or cause obstruction to the ingress and egress from any point in S.Nos.30 and 31 to this street in S.No.42.

5.The grievance of the plaintiffs is that the 1st defendant was making arrangements to put up a barricade in order to raise a structure in the place that has been earmarked as a public street. The plaintiffs further state that the said attempt was prevented by the 2nd defendant and in spite of the same, hectic preparation was done to barricade and put up a

structure. According to the plaintiffs, if the same is done, it will virtually block the ingress and egress to the property belonging to the plaintiffs. It is under these circumstances, the suit came to be filed seeking for the reliefs stated *supra*.

6.The 1st defendant filed a written statement and they took a stand that S.No.42 is vested with the Mariamman temple and the temple car was parked in that place and during the festival days, the temple car used to be pulled and it was taken around the Mariamman temple. A further stand was taken in the written statement to the effect that the renovation and construction is done by the Committee and they should be made as party in the suit. The 1st defendant denied all the claims made by the plaintiffs and sought for the dismissal of the suit.

7.The 2nd defendant filed a written statement and took a stand that S.No.42 has been categorized as a Sarkar Poramboke and Mariamman temple street is situated in this survey number which runs from the Mariamman temple to the Salem road. According to the 2nd defendant, the 1st defendant is putting up construction in the place belonging to them and the plaintiffs do not have any right to question the same. Accordingly, the 2nd defendant also sought for the dismissal of the suit.

8.The trial Court on considering the facts and circumstances of the case and after analyzing the oral and documentary evidence, dismissed the suit through a Judgment and Decree dated 31.10.2007. Aggrieved by the same, the plaintiffs filed an appeal in A.S.No.48 of 2011. The lower Appellate Court on reappreciation of the oral and documentary evidence and after considering the findings of the trial Court, allowed the appeal through Judgment and Decree dated 28.03.2012 and thereby, the Judgment and Decree of the trial Court was set aside. As a result, the suit was decreed as prayed for. Aggrieved by the same, the 1st defendant has filed the Second Appeal.

9.This court while admitting the Second Appeal, framed the following substantial questions of law:

"1. Is not the lower Appellate Court wrong in returning a finding that the T.S.No.42 was a public street vested with a municipality contra to the case of the second defendant in its pleadings and evidence that it is a government porambooke land?"

2. Is not the lower Appellate Court wrong in decreeing the suit when the suit is bad for non-joinder of necessary party namely the government in the face of evidence in the shape of Ex.B1 and B2

and the testimony of PW2, DW3 that T.S.No.42 is government porambooke land and not a street vested with the municipality namely the second defendant?

3. Was the lower Appellate Court right in concluding that T.S.No.42 was a public street when the plaintiff had failed to produce the acceptable evidence to show that indeed it was a public street vested with the second defendant?

4. Did not the lower Appellate Court commit an error in decreeing the suit as prayed for when through the recitals in Ex.A2 and A3 it was shown that T.S.No.42 was not the only access to their property and that they had no right of easement of necessity to use T.S.No.42?"

10.Heard the learned counsel for the appellant and the learned counsel appearing on behalf of the respondents.

11.This Court carefully went through the pleadings and also the findings rendered by both the Courts below based on the evidence available on record.

12.the trial Court dismissed the suit mainly on the ground that Mariamman Koil Street is situated in a Sarkar Poramboke and it is not within the control of the 2nd defendant and since the Government was not made as a party, the same was put against the plaintiffs on the ground of non-joinder of necessary party. The trial Court also gave a finding to the effect that the access to the property of the plaintiffs was not through the Mariamman Koil Temple street and there was no evidence to show that the general public was using this as a public street and accordingly, the suit was dismissed.

13.The lower Appellate Court went into the entire case by reappreciating the oral and documentary evidence. The lower Appellate Court held that S.No.42 has been categorized as a Sarkar Poramboke. For rendering this finding, the lower Appellate Court took note of the evidence of P.W.2 and the documents marked as Exhibits.A9, B1 and B2. Exhibit A9 was a notice that was sent by the 2nd defendant to the 1st defendant calling upon them to stop the illegal construction put up in S.No.42 and to remove the construction that has already been started by the 1st defendant. By relying upon this document, the lower Appellate Court gave a specific finding that the 2nd defendant was very much in control of the street in S.No.42 and they cannot be allowed to take a different stand in the suit. The lower Appellate Court further gave a finding that there is no

necessity to add the Government as a party to the suit. This finding was given, since the street fell within the jurisdiction of the 2nd defendant Municipality and it was maintained by them and they have all the rights to remove any encroachment that takes place in the public street.

14.The lower Appellate Court also rendered a finding to the effect that S.No.42 does not belong to the 1st defendant and it is clearly categorized as a Sarkar Poramboke. That apart, there is a mention about the street in the official records marked as Exhibits B1 and B2. While that being so, the 1st defendant does not have any right to put up any structure in the property which was used as a street accessible to the general public. Hence, whoever is affected in using the street from among the general public, will have the right to approach the Court to remove the encroachment/ obstruction put up in the public street.

15.The lower Appellate Court also exhaustively dealt with the Report of the Advocate Commissioner along with the sketch. The lower Appellate Court found that there was a thar road in the street when the suit was filed and during the pendency of the suit, it was removed and a structure has been put up by the 1st defendant. On going through the details provided in the Report of the Advocate Commissioner, the lower Appellate Court found that there was space for only one person to go through the

street, since almost the entire street was blocked by the 1st defendant by putting up the construction. The lower Appellate Court also found that the 1st defendant was proceeding further to put up the construction in spite of a *Status Quo* order operating against them and the entire construction was completed resulting in the shrinkage of the entire street to the extent that only one person can go through the street at any given point of time. This construction had also virtually prevented the plaintiffs from having ingress and egress to their property.

16.In view of all the above findings, the lower Appellate Court by assigning proper reasons, differed with the findings of the trial Court and the appeal was allowed. The lower Appellate Court directed the rough sketch and the sketch submitted by the Advocate Commissioner and marked as Exhibit C4 to form part of the Decree and directed the removal of the obstruction.

17.In the present case, it is quite unfortunate that the 2nd defendant Municipality virtually attempted to wash off their hands by blindly supporting a flagrant encroachment made by the 1st defendant Temple. This sudden change of stand taken by the 2nd defendant was probably due to some official who was handling the case wrongly understanding the term "God Fearing". Admittedly, S.No.42 is classified as a Sarkar

Poramboke and the street is situated over this property and it was well within the jurisdiction of the 2nd defendant and it was maintained by them. That is the reason why they had issued Exhibit A9 notice to the 1st defendant to immediately stop the encroachments made upon the public street. While so, they took a completely contrary stand as if the Government was in control of the street in S.No.42. This issue was properly dealt with by the lower Appellate Court and it was rightly held that such a technical plea will not in any way justify the act of the 1st defendant in encroaching upon a public street and putting up a construction. There was absolutely no requirement to add the Government as a party to the proceedings just because S.No.42 has been categorized as a Government poramboke. This is a hyper-technical plea which will not come to the aid of the 1st defendant who had committed a public wrong by encroaching upon a street which was used by the general public. In cases of this nature, the Courts should not be swayed by technical objections and the over all interest of the public must be the guiding factor. All these issues have been properly dealt with by the lower Appellate Court and this court does not find any ground to interfere with the findings rendered in this regard. The first, second and third substantial questions of law are answered accordingly.

18. There is no requirement to approach this case from the stand

point of right of easement. It is not necessary for the plaintiffs to prove that S.No.42 is the only access to their property. Even assuming that the plaintiffs have an alternate access to their property, that does not mean that the plaintiffs can be deprived of their right to use a public street for ingress and egress to their property. The law on this issue is too well settled and it will be more beneficial to take note of the judgment of this court in ***K.Sudarsan and others vs. The Commissioner, Corporation of Madras and others*** reported in ***AIR 1984 MADRAS 292***.

19.The relevant portions in the judgment are extracted hereunder:

14.Before considering the preliminary objections raised by Mr. Kesava Iyengar with regard to the maintainability of the writ petitions, it is necessary to consider the common law right of highway and also the right of the petitioners to use Ranganathan Street and Rattan Bazaar Road and N. S. C. Bose Road to pass and repass, The highway is a passage over which members of the public are entitled to pass and repass. The essential characteristic of a highway is that every person should have the right to use it for the appropriate kind of traffic. The road or part over which only a particular class of people or a few individuals are allowed to pass and repass cannot be a highway. In Halsbury's Laws of England, Third Edition, Vol. 19, at page 12, highway is defined thus:

"A highway is a way over which all members of the public are entitled to pass and repass; and

conversely, every piece of land which is subject to that public right of passage is a highway or part of a highway. It is, however, an essential characteristic of a highway that every person should have a right to use it for the appropriate kind of traffic, subject only to any restrictions affecting all passengers alike. It follows that a road or path over which only individuals, or a limited class of the public (for example, the inhabitants or occupiers of a particular house, field, or village) have a right of passage, is not a highway."

As regards the extent of the right of the public over the highway, it is stated thus at page 73: "The right of the public is a right to pass along, a highway for the purpose of legitimate travel, not to 'be on' it, except so far as their presence is attributable to a reasonable and proper user of the highway as such. A person who is found using the highway for other purposes must be presumed to have gone there for such purposes and not with a legitimate object, and as against the owner of the soil he is to be treated as a trespasser."

Again with regard to the right of access to the highway by adjoining owners, the law is stated at page 78 thus:

"An owner of land adjoining a highway is entitled to access to such highway at any point at which his land actually touches it, even though the soil of the highway is vested in another, but he has no such right if a strip

of land, however narrow, belonging to another and not subject to the public right of passage, intervenes.

An adjoining owner's right of access from his premises to the highway and vice versa is a private right, and is distinct from his right to use such highway as soon as he is upon it, which (at any rate if the soil of the highway is not his)' he enjoys only as a member of the public. The right of access is not limited to the right to pass from the premises to the highway and vice versa, but includes the right of access to a wall on the boundary of the premises."

As regards the remedy for interference with the right of access to highway Halsbury states at page 79 thus:

"Interference with a private right of access will, if wrongful, support an action and an adjoining owner may accordingly recover damages where an unreasonable use of the highway has rendered access to his shop unnecessarily inconvenient to himself or his customers. If the interference is also a public nuisance, he is entitled to recover in respect thereof if he can show particular damage, and if the obstruction, though near to a person's premises, interferes only with his public right, and not with his private right of access, his claim must be based on the ground of a public nuisance causing special damage to him.

Where, however, the interference is authorised by

statute no action will lie, and there will be no remedy unless compensation is provided for by the statute." Again at page 283 it is stated as follows:

"At common law the duty of repairing a highway includes the duty of preventing and removing obstructions, and if a highway authority sustains special damage it may bring an action for damages. This duty and power is supplemented by general statutory powers and by specific statutory powers to abate nuisances summarily or to prevent their creation."

Salmond in his Law of Torts, 17th edition, at page 79 describes highway thus:

"A highway (including in that term any public way) is a piece of land over which the public at large possesses a right of way. A highway extends to the whole width of the space between the fences or hedges on either side partly in order to admit light and air to, it ' and partly because Macadam's system of road-making with broken stone was not introduced at the earliest until just before the end of the eighteenth century."

The learned author again states at page 80 thus:

"Every person who occupies land immediately adjoining a Highway has a private right of access to the highway from his land and vice versa., and any act done without

lawful justification whereby the exercise of this private right is obstructed is an actionable wrong. This right of access is a private right of property, and if what is complained of is sufficiently substantial to constitute an interference with that right, he may recover at least nominal damages, for it is an example of an action on the case succeeding without Proof of special damage.

..... At common law a frontager had the right of entrance and exit from his land on to a highway at any point. But this common law right has been greatly cut down by statutes (see, for example, the Highways Act, 1959, S. 155) especially since local authorities have had vested in them the surface of the highway. ... This right of access to a highway by the occupier of land abutting upon it must be distinguished from the right of passing along the highway. The former is a private and the latter a public right, and for any infringement of the former an action will lie: whereas, as we shall see in the next section, no action will lie for an infringement of the public right of passing except on proof of some special or particular consequential damage suffered by the plaintiff. The private right of access thus protected includes merely the right to get from the highway into the plaintiff's land, and from his land into the highway; and does not include a right to get to and from the plaintiff's land by going along the highway, for this is merely the public right of passage. A disturbance of this private right of access may or may not be at the time a

disturbance of the public right of passage."

In Harvey v. Truro Rural District Council (1903 LR 2 Ch 638) Joyce, J. has observed as follows:-

"In the case of an ordinary highway running between fences, although it may be of a varying and unequal width, the right of passage or way prima facie and unless there be evidence to the contrary, extends to the whole space between the fences, and those public are entitled to use the entire of it as highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers." The learned Judge has again observed:

"..... as Lord Tenterden observed in Rex v. Wright (1832, 3 B & Ad 681). 'The space at the sides' (that is of the hard road) is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the part actually used as road it could not be kept sound."

In the Madras City municipal Corporation Act, a public street is defined in S. 2 (20) thus:

"Public street means any street, road, square, court, alley, passage, or riding path over which the public have a right, of way, whether a thoroughfare or

not and includes-,

(a) the roadway over any public bridge Or causeway,

(b) the foot-way attached to any such street, public 'bridge or causeway and

(c) the drains attached to any such street, public bridge or causeway and the land, whether covered or not by any pavement, veranda, or other structure, which lies on either side of the roadway up to the boundaries of the adjacent property whether that property is private property or property belonging to the Government.

Street-alignment 'is defined thus under S. 2 (26) of the: Act: ' "Street-alignment means A line dividing the land comprised in adjoining a part of a street from Adjoining land."

Section 203 of the Acts deals with vesting of public streets and their appurtenances in the corporation. It reads thus:

"All public streets in the city were served under the control of the Central or the State Government, with the pavements, stones and other materials there of, and all works, materials, implements and other things provided for such streets, drains, drainage works, tunnels and culverts whether made at the cost of the

municipal fund or otherwise in, alongside or under any street. Whether public or private, and all works, materials, implements and other things, appertaining thereto and all trees not being private property growing on public streets or by the side thereof, shall vest in the corporation.

(2) The State Government may by notification withdraw any such street, drain, drainage, work , tunnel, culvert or tree from the control of the corporation.

Section 204 reads thus:

.."The corporation shall cause the public streets to be maintained and repaired, and may make all improvements there to which are necessary or expedient for the Public safety or convenience e.g. Section 220. reads thus:

"No one shall build any wall or erect, any fence or other obstruction or projection or make any encroachment in or over any street or any public place the control of -which is vested in the corporation except as hereinafter provided."

Section 221 reads thus:

"(1) The Commissioner may by notice, require the owner or occupier of any premises to remove or alter

any projection, encroachment or obstruction (other than a door, gate, bar, or ground-floor window) !situated against or in front of such premises and in or over any street or any public place the control of which is vested in the corporation.

(2)If the owner or occupier of the premises proves that any such projection, encroachment or obstruction has existed for a period sufficient under the law of limitation to give him a prescriptive title or where such period is less than thirty years, (for a period of thirty years) or that it was erected with the' consent of any municipal authority duly empowered in that behalf, and that the period, if any,' for which the consent is valid has not expired. the corporation shall make rea-, s0nable compensation to every person who suffers damage by the removal or alteration of the same."

Section 223 reads Section 223 (1)

(2) With, the concurrence of the Commissioner of Police the Commissioner may' grant a licence subject to such conditions and restrictions as he may think fit, for any temporary construction in any street or any public Place the control of which is vested in the corporation.

(3) No licence shall be granted under sub-,section (1) if the projection or construction is likely to be injurious to health or cause public inconvenience or

otherwise materially interfere or result in material interference 'with the Use of the road as such..

(4) On, the expiry of any period for which a licence has been granted under this section or after due communication of an order of suspension or revocation of such licence the Commissioner may without notice, cause any projection or construction put up under sub-sections (1) or (2) to be removed, and the cost of so doing shall be recoverable in the manner provided in Section 387 from the Person to whom the licence was granted.

(5) The council shall have power to lease road sides and street margins vested in the corporation for occupation on such terms and conditions and for such period as it may fix. Provided that no such lease for any term exceeding three years shall be valid unless the sanction of the State Government therefore shall have been first obtained :

Provided further that if the State Government consider that any occupation of a road side or street margin under a lease granted by the council under this section is likely to, be injurious to health or cause public inconvenience or otherwise materially interfere with use of the road side or street margin as such, the State Government may direct the council to cancel or modify the lease and the council shall thereupon cancel or

modify the lease accordingly".

15.From the above provisions of the Act, it is clear that all public streets and their appurtenances vest in the Corporation. No one has got a right to build any wall or erect any fence or other obstruction or projection or make any encroachment in or over any street, which is vested in the Corporation except as otherwise provided. Section 223(2) of the Act confers power on the Commissioner of the Corporation of Madras with the concurrence of the Commissioner of Police to grant licence for any temporary construction in any street or any public place the control of which is vested in the corporation and the licence will be subject to such conditions and restrictions as he may think fit, Under Section 22 (1)the Commissioner has got the power grant a licence to the owner or occupier of any premises to put up certain projections or constructions. But such projection or construction shall not be likely to be injurious to health or cause public inconvenience or otherwise materially interfere or result in material interference with the use of the road as a road. On the expiry, of the period 'of the licence the projection or temporary construction is likely to be removed .Section 223 (5)confers; power on the Commissioner to lease out road sides and street margins vested in the corporation for occupation on such terms and conditions and for such period as it may fix. Any lease for a term years shall not be valid unless the sanctions of the State Government is obtained. Any such lease shall not be injurious to health or cause public inconvenience or otherwise materially interfere

with the use of the road side or street margin.

16.The Vesting of public street in the Municipalities under the Madras District Municipalities Act 18984 came up for consideration before a Bench of this Court in S. Sundaram Ayyar v. Municipal Council of Madras and The Secretary of State for India in Council (1902 ILR 25 Mad 635) where it is observed as follows:

"When a street is vested in, a Municipal Council, such vesting does not transfer to the Municipal authority the rights of the owner in the site or soil over which the street exists. It does not own the soil from the, centre of the earth usque ad caelum, but, it has the exclusive right to manage, and control the surface of the soil and so much of the soil below and of space above the surface as is necessary to enable it to adequately maintain The street as a ~treel. It has also a certain property in the soil of the street which Would enable it, as owner to bring a possessory action against trespassers."

In Municipal Board Of Agra v. Sudarshan Das Shastri (1915 ILR 37 All 9) : (AIR 19.14 All 341) a Division Bench of the Allahabad High, Court observed'. as follows:

" in our opinion all the ground, whether metalled or not, over which the public had a right of way, is just as much the public road as the metalled part. The Court

would be entitled to draw the inference that any land over which The public from time immemorial had been accustomed to travel was a public street or road, and the mere fact that a special part of it was metalled for the greater convenience of the traffic would not render the unmetalled portion on each side any the less a public road or street."

The scope of the words "public" street or road or any part thereof" occurring in Article 146-A of the Limitation' Act arose for consideration in Anukul Chandra v. Dacca Dist. Board (AIR 19.28 Cal 485) where Suhrawardy, J. observed as follows :-

"The expression road or high way has been considered in many cases in England and it seems that the interpretation put there is not confined to the portion actually used by the public life but it extends also to the side lands. See the cases in Rex v Wright (1882 3 B & Ad. 681) and turner v. Ringwood Highway Board (1870 LR 9 Eq 418). I am not prepared to put too narrow meaning on the expression 'public street' or 'road' in Article 146-A ,as it is intended to safeguard the interest of public bodies which are not expected to be as vigilant over their rights as private individuals. I am of opinion that road in that article includes the portion which is used as road as also the lands kept on two sides as parts of the road for the purposes of the road."

In Municipal Board v. Mahadeoji after referring to the above decisions, the law is summarised thus (Para 8):-

"The law on the subject may be briefly stated thus: Inference of dedication of a highway to the public may be drawn from a long user of the highway by the public. The width of the Highway so dedicated depends upon the extent of the user. The side lands are ordinarily included in the road, for they are necessary for the proper maintenance of the road, In the case of a pathway used for a long time. by the public, its topographical and permanent landmarks and the manner and mode of its maintenance usually indicate the extent of the user.', The Supreme Court again observed thus (Paras 9 and 10):

"In the present case it is not disputed that the, metalled road was dedicated to the public. As we have indicated earlier the inference that the side lands are also included in the public way is drawn easily as the said lands are between the metal road and the drains admittedly maintained by the Municipal Board. Such a public pathway vests in the Municipality, but the Municipality does not own the soil. It has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street. It has also a certain property in the soil of the street which would enable it

as owner to bring a possessory action against trespassers. Subject to the rights of the Municipality and the public to pass and repass on the highway the owner of the soil in general remains the occupier of it and therefore he can maintain an action for trespass against any member of the public who acts in excess of his rights.

If that is the legal position, two results flow from it, namely (1) the Municipality cannot put up any structures on the public pathway which are not necessary for the maintenance or user of it as a pathway, (2) it cannot be said that the putting up of the structures for installing the statue of Mahatma Gandhi or for piyo or library are necessary for the maintenance or the user of the road as a public highway. The said acts are unauthorised acts of the Municipality"

17.The extent of the right of a member of the public to pass and repass over a public street came up for consideration before a Bench of the Andhra Pradesh High Court in M. Butchamma v. Venkateswararao . There, the prayer for mandatory injunction for the removal of obstruction placed upon a public street was rejected by the trial Court and the lower appellate Court, on the ground that notwithstanding obstruction placed by plaintiff the street was wide enough to afford passage to cattle and carts and the plaintiff had not established any special damage entitling her to the relief by way of mandatory injunction. On appeal, Chinnappa Reddy J

(as he then was) has observ-2d as follows (Para 5):

"The defendant cannot be heard to say that the obstruction placed by him cannot be removed so long as he has left a passage of sufficient width to enable men, cattle and carts to go. As we have said, the right of the public to pass and repass extends over every inch of the street and the defendant cannot in any manner restrict the right and compel the plaintiff to confine herself to a part of the street of the choice of the defendant."

In this context, the learned Judge extracted the following passage from Peacock in his 'Law Relating to Easements in British India:-

"As already explained, a public right of way, being unconnected with a dominant tenement is a right in gross and clearly distinguishable from an easement. It is exercised over what is called a 'Highway.....The extent and mode of enjoyment of a high way must be measured by the user as proved, or by the terms of the deed when the right is so granted, but in the absence of evidence to the contrary the public are entitled to the whole width of the way without any such restriction as may be imposed by the owner of the servient tenement in the case of a ore scriptive private way. In Regina v. United Kingdom Electric Telegraph Co. (1862) 6 LT 378, Martin B., laid down the proposition which was accepted

by the Court on a motion for a new trial: 'In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences one on each side the right of passage or way, prima facie, and unless there be evidence to the contrary, extends to the whole space between the fences; and that public are entitled to the use of the entire of it as the highway and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers'.

18. In Damodara v. Thirupurasundari , Raghavan, J., had to deal with the right of owners of land adjoining the highway to go upon the highway from any point on their land. The learned judge observed thus (para 7):-

"The plaintiffs being owners of land abutting the highway have an undoubted right of access to the street from any part of their premises. In Mackenzie's Law of Highways, 21st Edn. at page 58 it is stated as follows:-

"The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so whether he or his predecessors originally dedicated the highway or part of it and whether he is entitled to the whole or some interest in the ground adjacent to the highway or not. The rights of the public to pass along the highway are subject to this right of access. Just as the right of access is subject to

the right of the public, an must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway .The right of the owner of land adjoining a highway to access to or from the highway from or to any part of his land is a private right, distinct from the right to use the highway as one of the public and the owner of the l2nd whose access to the highway is obstructed may maintain an action for the injury whether the obstruction does or does not also constitute a public nuisance".

Thus it is seen that where there is a public highway the owners of land adjoining the highway have a right to go upon the highway from any point on their land; and if that right is obstructed by any one of the owner of the land abutting the highway is entitled to maintain an action for the injury, whether the obstruction does or does not constitute a public nuisance."

19.From the above decisions the following principles emerge. Every member of the public has got a right to pass and repass over a highway or a public street. The said right of the public is a right to pass along the highway for the purpose of legitimate travel, not to be "on it" except to the extent their presence is attributable to a reasonable and proper user of the highway as such. The right of the public to pass and repass extends over the whole width of the highway or the street, in other words, over every inch of the street. A

member of the public cannot be compelled to -confine himself to a part of the street at the choice of another. The owner of a property adjacent to a highway or a public street has got a right of access to such highway or street at any point at which his land actually touches it. His right of access from his premises to the highway and vice versa is a private right. However, his right to use such highway or public street as soon as he is "on the highway" or the public street becomes a public right.

20.This court exhaustively extracted the portions of the above judgment, since the above judgment had beautifully captured the right of the member of the general public to use every inch of a highway or a public street. It was further held that the owner of the property adjacent to a public street has got the right to access to such street at any point at which his property actually touches the street. This judgment is the direct answer for the fourth substantial question of law that has been framed by this Court.

21.In the considered view of this Court, whoever commits an illegal act of encroaching upon a public street, even if it is a temple, should be prevented from undertaking such an illegal act. If any structure is put up in the public street and thereby, the access to the public in using the street is restricted or prevented, such a structure has to be removed immediately. There used to be a time when some individuals developed an impression that they can encroach upon a public space in the name of

a temple or by planting an idol in that place. Courts are no more concerned about who or in what name such encroachments take place. We have reached a situation where even if GOD encroaches upon a public space, Courts will direct removal of such encroachments, since public interest and rule of law must be safeguarded and upheld by Courts. Courts cannot be hoodwinked by encroaching and constructing a temple in the name of God. We have enough temples and no God has made any request to construct new temples by encroaching upon public space or by raising a structure in the name of the temple.

22.In the present case, it is quite unfortunate that the 1st defendant Temple proceeded to put up the construction in spite of a status quo order and they virtually completed the construction. The photographs that were produced before this Court shows that the plaintiffs have been completely prevented from having any access to the public street from their property. They have to be literally air dropped in to their property. The conduct of the 1st defendant Temple is highly condemnable.

23.in view of the above discussion, this court does not find any ground to interfere with the Judgment and Decree of the lower Appellate Court and all the substantial questions of law are answered against the appellant.

24.In the result, the second appeal is dismissed with cost through out. The suit is decreed as prayed for. There shall be a direction to the 1st defendant to remove the entire construction put up in S.No.42, within a period of two months from the date of receipt of copy of this order. If the 1st defendant fails to remove the illegal structure within the time stipulated by this Court, the 2nd defendant is directed to remove the structure and ensure that the public street is kept free from any encroachment and the public is able to have easy access. Consequently, connected miscellaneous petition is closed.

25.03.2022

speaking order/Non-speaking order

Index : Yes

Internet : Yes

ssr

To

1.The Additional District Court Judge, Namakkal.

2.The Principal District Munsif's Court, Namakkal.

S.A.No.190 of 2013

N. ANAND VENKATESH, J.

ssr

Pre-Delivery Order made in
S.A.No.190 of 2013
& M.P.No.1 of 2013

25.03.2022