

St.Mathews Convent. Vs. Varkey Mathai.

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Court : Kerala

Decided On : Nov-26-2010

Judge : Thomas P. Joseph, J.

Appeal No. : CRP.No. 25 of 2005

Appellant : St.Mathews Convent.

Respondent : Varkey Mathai.

Advocate for Def. : SRI.M.D.SASIKUMARAN, Adv.

Advocate for Pet/Ap. : SRI.P.R.VENKITESH, Adv.

Judgement :

1. A dispute regarding right of way was settled between the parties to the litigation by a compromise decree dated March 25, 1996 in O.S.No.102 of 1992 of the court of learned Munsiff, Thodupuzha. Later, dispute arose between the parties as to the interpretation of that decree - whether respondent/defendant No.7 was given a right of way from the disputed road to his property situated on its western side. Respondent, alleging that access from the said road to his property on the western side was closed down by petitioners filed E.P.No. 53 of 2003 (in O.S.No.102 of 1992). Petitioners opposed the execution petition on various grounds including that respondent has no right to execute the decree since there is no decree in his favour, the compromise decree does not permit any relief as prayed for in the execution petition and further contending that it was after opening a hole on the

existing wall on the western side of the disputed road that the execution petition was preferred. Both sides adduced evidence in support of their respective contentions. An Advocate Commissioner inspected the property and submitted report and sketch (Exts.C1 and C1 (a)). Based on the materials on record executing court found that compromise decree entitled respondent to have access from the disputed road to his property on the western side and accordingly directed petitioners to remove the construction made on the side of the road to make it convenient to have access to the property of respondent along its entire frontage. That order is under challenge. Learned Senior Advocate appearing for petitioners has contended that the decree is not executable at the instance of respondent since there is no decree in his favour and at any rate, the decree does not provide any relief granted to the respondent as prayed for in the execution petition. It is contended that the interpretation given by the executing court to the compromise decree is wrong in that the compromise decree does not enable respondent to gain access from the road to his property on the western side. Learned Senior Advocate has referred to me the evidence recorded in the executing court and the report and sketch submitted by the Advocate Commissioner on the trial side in support of his contentions. Learned Senior Advocate contends that Exts.B4 and B5 would cut at the root of the case of respondent regarding right of way to his property on the west through the disputed road. Learned counsel for respondent supported the order of executing court. It is pointed out that the only property belonging to the respondent which was in the contemplation of the parties at the time compromise was entered into is the property on the west of the road and hence the right of access granted to the respondent as per compromise decree is to the said property as well.

2. Before going into the dispute it is appropriate to refer to the compromise decree which is extracted in page No.3 of the paper book. The compromise decree states that respondent and other defendants in the suit agreed to pass a decree declaring title and possession of petitioners over 3.140 cents towards the western side of the plaint schedule road in survey No.607/11 and the petitioners agreed to allow respondent and other defendants to use the disputed road under the title of petitioners and that petitioners will keep the said road in good condition by making necessary maintenance. The compromise decree also directed that respondent

shall not commit waste in the said 3.140 cents of land. It is relevant to refer to the description of plaint schedule - the disputed road in the plaint. There, the said road is described as bounded on the west by the property of respondent and one Joseph. It is not disputed before me that the 3.140 cents referred to in the compromise decree has nothing to do with that portion of road now in dispute and the property of respondent on the western side.

3. Learned Senior Advocate has referred to me the report and sketch submitted by the Advocate Commissioner on the trial side as well the execution side(marked as Exts.C1 and C1(a) on the execution side). No doubt, report shows that there was an old compound wall on the west of the disputed road (forming eastern boundary of property of respondent). In the sketch and report submitted on the trial side Commissioner has referred to a ramp (slopping area) towards north-eastern corner of property of respondent (ie. towards the northern portion of the compound wall on the west of the disputed portion of the schedule road). The Commissioner on the trial side after inspection reported that the said ramp has the oldness of one week. The Commissioner on the execution side also referred to the existence of that ramp. Commissioner stated that he found at the portion of the ramp cement plastering on the compound wall newly done at a length of 28" and width of 12". This according to the petitioners is a mischief committed by the respondent who attempted to make an opening through that part of compound wall and regarding which a complaint was preferred to the local police as deposed to by CPW3, Sub Inspector. On the other hand, respondent contended that attempt was made by petitioners to close down that part of access from the disputed road to the property of respondent on the western side. It is not disputed that on the trial side and execution side at the time the Advocate Commissioner inspected the property there was a ramp towards the south-eastern corner of the property of respondent situated on the west of the schedule road. On going through the evidence of PW2, the Advocate Commissioner who visited the property in the execution proceeding it is seen that he found a lane leading from the said ramp extending towards north through the property of Joseph and terminating at a point where there was access to the property of the said Joseph from the disputed road. According to the learned Senior Advocate that was the way which the respondent was using before institution of the suit. Learned Senior Advocate invited my attention to the finding

in Ext.B5, judgment in O.S.No.134 of 1979. That was a suit filed by the respondent against petitioners contending that the boundary wall on the west of disputed road (on the east of property of respondent) belonged to him and that he was gaining access to his property from the said road. That suit was contested by petitioners and it ended in a dismissal as per Exts.B4 and B5. In paragraph No.9 of Ext.B5 the court observed that petitioners had no objection in respondent using the disputed pathway for access to his tarwad property which is situated on the further south of the hospital compound. Learned Senior Advocate contended that in the light of Exts.B4 and B5 it is idle for petitioners to contend that the compromise decret permitted respondent to gain access to the property on the western side of the disputed road.

4. Assuming that Exts.B4 and B5 went against the claim of respondent, now the question is whether respondent is entitled to relief as prayed for in E.P.No.53 of 2003 based on the compromise decree in the present case. The tarwad property belonging to the respondent and situated on the further south of the hospital compound is not shown in the plaint as any of the boundaries of the disputed road. On the other hand, western boundary of the disputed road is shown as property belonging to the respondent and Joseph. It is true that the compromise decree does not say to which property of the respondent right of access through the disputed road is allowed. But, to resolve that controversy it is relevant to refer to plaint schedule description which I stated say the western boundary of disputed road as property of respondent and Joseph. I must bear in mind contention raised by respondent in paragraph 9 of his written statement that he owned 2.12 Ares on the western side of the road with two others and that access to the said property was from the schedule property (ie. the disputed road). When parties entered into the compromise and compromise decree was passed, I am persuaded to think, parties were aware of the said contention of respondent in paragraph 9 of the written statement. Though the report prepared by the Advocate Commissioner on the trial side noted the opening from the road to the property of respondent on its west as having oldness of one week, it was when that opening was there, that parties entered into the compromise. Going by the compromise decree I do not find anything to negate that claim of respondent in paragraph 9 of the written statement. On the other hand compromise decree granted respondent and others

the right to use the disputed road (though under the title of petitioners). Hence it is idle for the petitioners to contend that the compromise decree did not permit respondent to gain access to the property on the western side of the disputed road.

5. There are other circumstances persuaded me to think so. The alternative way shown by petitioners in Ext.C1(a) goes through the property of one Joseph. It is not shown that respondent had any access through the said lane as of right so that at the time compromise decree was entered into respondent had the view that he has a right of access through the said lane. Nor is the said Joseph examined as witness to prove that respondent has any access through his property as of right. I do not forget that in Ext.C1, PW2 has shown that leading from the lane passing through property of Joseph there was a small lane for entry into the property of respondent on the west of the disputed road. But reading the compromise decree I am unable to hold that the parties were under the impression that at the time compromise was entered into, right of access to the property of respondent on the western side of the disputed road was through the said lane.

6. Next question is whether the respondent is entitled to get the compromise decree executed. Learned Senior Advocate contended that the relief prayed for in E.P.No.53 of 2003 is a mandatory injunction to direct petitioners to remove a portion of wall on the western side and to remove the obstruction on the western side, but there is no such relief granted in the compromise decree. Certainly it does not provided any mandatory injunction. It is seen from clause (2) of the compromise decree that it permitted respondent and other defendants to use the disputed road. That user means user without obstruction. The user of the way granted and provided under compromise decree when obstructed, certainly person entitled to the user is entitled to get the obstruction removed. Explanation to Sub-rule 5 of Rule 32 of Order XXI of the Code of Civil Procedure also is in that line. Hence though the relief in execution petition is couched in the form of mandatory injunction that need only be understood as a prayer for enforcement of the decree. Respondent is entitled to execute the decree and request the executing court to direct petitioners remove the obstruction. In that view of matter the contention that respondent is not entitled to execute the decree cannot also stand.

7. Having regard to the facts and circumstances I do not find reason to negate the claim of respondent that he has a right of way through the disputed road to the property belonging to him and situated on the west of the said road. But it is not as if respondent is entitled to get access through the entire southern boundary of his property. Such a claim cannot be made so far as the disputed road belonged to the petitioners and that fact is not disputed. Hence respondent can only have a limited right of access to his property on the western side. Commissioner has shown the width of ramp situated towards the north-eastern corner of property of respondent as having width of 75". (See the report on the trial side). So the relief to which respondent is entitled is to be limited to that much extent. Resultantly this revision petition is allowed in part to the extent that the order under challenge is modified permitting portion of the compound wall and other obstruction to be removed at a length of 75" towards south from the north- eastern corner of the property of respondent on the western side of the disputed road.

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