

**Sinon v Dine & Or  
(2001) SLR 88**

Antony DERJACQUES for the plaintiff  
Kieran SHAH for the defendant

**Judgment delivered on 19 March 2001 by:**

**KARUNAKARAN J:** The ruling delivered by this Court on respect of an application for interlocutory injunction in this mutandis as part of the judgment hereof.

September 1999 in  
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The plaintiff originally instituted this suit against two defendants seeking the following relief:

- (i) A declaration that the plaintiff has a right of way over the defendant's land parcel S1040 to have access from the plaintiff's land parcel S1171.
- (ii) An injunction preventing the defendants from interfering with the plaintiff's peaceful use and enjoyment of the said right of way; and
- (iii) An award of R50,000 for the plaintiff against the defendants towards loss and damage the plaintiff allegedly suffered as a result of the obstruction the defendants had put up on his right of way.

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When the matter was pending before this Court for hearing, the first defendant passed away. Hence, the plaintiff withdrew the case against the first defendant and proceeded only against second defendant.

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The facts of the case as transpired from evidence are briefly as follows:

At all material times, the plaintiff and defendant were and are tenants in common of the land known as Anse Aux Pins, Mahe. The plaintiff owns a parcel of land registered as S1171 situated on that property. The defendant also owns and lives on a parcel of land registered as S1040. The plaintiff testified, in essence, that he has been using a right of way over the defendant's land to have access from the public road to the plaintiff's property. In the plaint, the plaintiff has averred that he has been using this right of way for the past 52 years. However, in his testimony under oath that his family had been using the same for the past 52 years. The plaintiff also testified that the defendant in March 1999 blocked the said right of way with wooden boards and barbed wires causing inconvenience and hardship to the plaintiff. According to him, it is unlawful for the defendant to do so. Hence, the plaintiff suffered moral damages, which he estimated at R50,000. Further, the plaintiff testified that his land is so enclosed on all sides and that the said right of way is the sole

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and practicable access to his land from the public road. In the circumstances, the plaintiff seeks this Court for the relief hereinbefore mentioned.

On the other hand, the defendant denied all the claims and allegations made by the plaintiff in this matter. According to the defendant, the plaintiff has no right of way over his property. The plaintiff had no document of title for any right of way over parcel S1040 nor is parcel S1040 so burdened. Therefore, the defendant contended that he never blocked the plaintiff's right of way, as the plaintiff at first place had no such right of way at any point of time over the defendant's property. Further, it is the contention of the defendant that the plaintiff's property is not an enclave and the plaintiff has other accesses without having to go through the defendant's property namely, parcel S1040. Moreover, the defendant produced a copy of a judgment of the Supreme Court in Civil Side 11/1973 dated 28 February 1975. In that judgment the Court inter alia, restrained the plaintiff his predecessor in title from trespassing on the defendant's property S1040, which was then in possession and owned by Mrs and Mr Hilaire. The defendant further testified that the plaintiff has caused a lot of annoyance to the defendant and in particular has been entering the defendant's property, burning and spraying chemicals on fruit trees and causing damage to the property. In the circumstances, the defendant seeks dismissal of the suit.

I meticulously perused the evidence including the documents adduced by the parties in this matter. Besides, I took into account the physical observations and inspection I made during my visit on locus in quo. I gave diligent thought to the submissions made by the counsels on points of law and on facts.

Firstly on the question of the right of way it is trite law that a right of way is a discontinuous easement, which cannot be created by possession even from time immemorial. Needless to say, it requires a document of title for its creation in terms of article 691 of the Civil Code of Seychelles, see *Payet v Labrosse and another* (1978) SLR 222 and *Delorie v Alcindor and another* (1978-1982) SCAR 28. To my understanding of the case laws I find that the right of way is a distinct easement attached to an immovable property. It is a real right as opposed to personal. Therefore, it requires a document of title or a declaration of the Court for its creation. In the absence of such creation of the right of way in this particular case, I find the plaintiff has no legal right of way over the defendant's property. In any event, the fact remains that the Supreme Court has already granted an injunction in CS 11/1973 restraining the plaintiff's mother from trespassing on the defendant's land in question. Obviously, the century-old right of way as claimed by the plaintiff over the defendant's property is nowhere mentioned in the said judgment. Had the plaintiff or his mother or the predecessor-in-title of their land been using the alleged right of way over the defendant's property – as the only access – for the past one hundred years as claimed by the plaintiff, then in 1975 the Court certainly would not have restrained the plaintiff's mother from using the defendant's property. At any rate, had there been such a necessity the Court then should have declared or reserved the right of way for the use by the landowner in favour of parcel S1171. In the circumstances, I find that neither the defendant nor his predecessor in title ever had a right of way over the defendant's land.

For these reasons, I decline to grant the injunction sought by the defendant in this matter. Consequently, the claim for damages should automatically fall.

On the question of enclave, from my visit of the *locus in quo* I find that the plaintiff's property is not an enclave. It has at least three possible accesses from the other directions through adjacent properties, which all once formed part of the same parent parcel. In fact, the defendant has purchased his property under exhibit D1 in 1975. The plaintiff has subsequently purchased his parcel S1171, which is a subdivision of parcel S1105, by a deed dated 15 July 1993. There is no document of title granting any right of way in favour of parcel S1171. The parent parcel has subsequently been divided into several plots, which all belong to the plaintiff's family and relatives. If the plaintiff's property is enclaved he should claim his right of way or access in terms of article 684 from the parent parcel. As rightly pointed out by Mr Shah, counsel for the defendant if the non-access arises from exchange or a division of land or from other contract the passage may only be demanded from such land, as has been the subject of such transaction. In addition, if the landowner is enclaved and requires an access over another's property, the Court should consider all the relevant circumstances of the case including how the non-access arose. Obviously, the plaintiff who came to this Court originally seeking an injunction and damages against the defendant has now converted his claim to the one based on enclave. Indeed, in *Azemía v Ciseau* (1965) SLR 199 it was held:

- (i) The land owner whose property is enclaved and who has no access whatsoever to the public road can claim a right of way over the property of his neighbour for the exploitation of his property, conditioned on giving an indemnity proportionate to the damage he may cause.
- (ii) A property may be deemed to be enclave not only from the fact that it has no access to the public road but also in the case where such road is impracticable.
- (iii) If the accessibility is the result of the property having been divided by sale, exchange, partition or any other contract, a right of way can only be asked for over the properties affected by such contract.

Applying the above principles to the facts and pleadings of this case, I find that the plaintiff is not entitled to claim any right of way over the defendant's property. In the circumstances, I find that the defendant's claim based on enclave is also misconstrued and not maintainable either in law or on facts.

Therefore, the suit is accordingly dismissed with cost.

**Record: Civil Side No 177 of 1999**