

IN THE SUPREME COURT OF SEYCHELLES

1. **YVETTE JULIETTE**
2. **GERARD JULIETTE**
PLAINTIFFS

VERSUS

1. **YVON DUBEL**
2. **VIONA**
DEFENDANT

LOUISE

Civil Side No 23 of 2002

Miss. K. Domingue for the Plaintiffs

Mr. W. Lucas for the Defendants

JUDGMENT

Perera J

The plaintiffs claim damages from the defendants for allegedly trespassing on their land by constructing a road over it without consent or with any lawful authority. Admittedly, the plaintiffs are the registered owners of a land bearing title no. H. 3869, and the defendants are the owners of two adjacent lands registered as title no. H. 3867 and H. 3868. The 1st plaintiff is the sister of the 1st defendant. It is averred that while the plaintiffs purchased the land from the Government of Seychelles on 19th December 1994, (P1) the defendants also purchased both lands from the Government in 2001. The plaintiffs aver that the approved survey plan drawn in December 1994 shows a reserve of a 3 metre right of way over the edge of the plaintiffs property for access to the defendant's property, and that such reserve does not give the defendants any rights of ownership over that reserve and also does not entitle the defendants to build, construct or erect any structure or road thereon. It is also averred that despite repeated warnings from the plaintiffs, the defendants, on 17th September 2001 used heavy machinery to demolish the plaintiffs' roof, louvres, a wall, and plantations in the process of building a road over the property. The plaintiffs aver that these acts amount to faute and claim damages in a sum of Rs.125,000. They also seek an injunction restraining the defendants from building any road over Parcel H. 3869, and to cease construction of the access road. This Court, by order dated 25th March 2002 granted an interim injunction pending the determination of the case.

The defendants admit that there was no sale agreement or court order for them to exercise the said right of way, but aver that by virtue of Article 682 of the Civil Code they are entitled to such a right of way, and that in any event, such right of way was a pre-condition for planning approval in

respect of sub-divisions of Parcels H. 3867 and H. 3868. The defendants further aver that the damage caused to the plaintiffs was caused by a third party, and hence disclaims liability.

According to the testimony of the 1st plaintiff, her title deed (P1) did not stipulate any right of way in favour of anyone, although in a survey plan dated 26th April 1994 (P2) there was a metre road reservation to serve her own land Parcel H. 3869. The defendants were occupying a land bearing Parcel no. H. 3111. It was later subdivided into Parcel H. 3867 and H. 3868. The government sold Parcel H 3868 to the defendants as their house was already built on that land. They then applied to purchase Parcel H. 3867 which was adjoining Parcel H. 3869 belonging to the plaintiffs, for the purpose of constructing a motorable access to serve Parcel H. 3868 belonging to the plaintiffs, for the purpose of constructing a motorable access to serve Parcel H. 3868. In an internal memorandum of the Ministry of Land Use and Habitat, produced as exhibit D3, the Technical Officer had advised the Director of Lands that the Construction of an access road as proposed would involve the demolishing and reconstructing a retaining wall belonging to the defendant's mother who was living with the 1st plaintiff.

In her evidence, the 1st plaintiff stated that she was prepared to grant a footpath over her land but not a motorable access. She also stated that the defendant used a footpath in an adjoining land, but after it was sold to someone by the Government, he started to widen the existing footpath on her land and to use it to access his land. While constructing that road, her fruit trees, a wash basin and several louvres of her house were damaged. The wash basin and the soak away pit was damaged by the 1st defendant, while the damage to the louvres was caused by rock blasting done by a person hired by the defendants. She therefore claimed damages and a permanent injunction prohibiting the defendants from continuing with the construction of the road or any access over her property.

Brian Jean Felix (Pw3) a Surveyor produced a plan (P13) prepared by him showing the location of the road being constructed by the defendants and the damage, as observed by him. He stated that about 50 square metre of land had been encroached from the plaintiff's land when constructing the access road by the defendants. Mr Daniel Blackburn (Pw4) Quantity Surveyor, in his report dated 9th February 2004 (P14), estimated a sum of Rs16,000 as the amount needed to restore the property in a good state of repair. That estimate however does not include the damage caused to a big boulder on the plaintiffs' land. He testified that he charged Rs.3000 for the inspection and report.

Jena Dubel (Pw2), a sister of both the 1st plaintiff and the 1st defendant testified that earlier there was only a footpath leading to the 1st plaintiff's house. However the 1st defendant started to construct a motorable road over it, and in the process, cut down trees, damaged a wash basin and blasted part of a big boulder. The 1st defendant used the broken rocks to construct the road. The blasting also caused damage to louvres of the 1st plaintiff's house. She also testified that the 1st defendant blocked the access road with a chain which he removed

only when he was using his vehicle.

The 1st defendant testified that he was constructing a 3 metre right of way as shown in plans D1 and D2 in respect of Parcel H. 3867 and H. 3868 belonging to him. He stated that 75% of that road had been constructed when the Court issued an injunction preventing him from proceeding further. The blasting work was done by one William Charlette whom he engaged. As regards the right to construct the road, he stated that he sought to purchase Parcel H 3867 from the Government in order to have a motorable access to his property, but that involved the demolition and construction of a retaining wall on the 1st plaintiff's land. The Parcel of land was subsequently sold to him on condition that the Government would not construct the proposed road. He also stated that this road also benefits the plaintiffs as they now have a concreted motorable road on their property. He stated that he was agreeable to compensate whatever has been demolished by him, namely the wash basin and the retaining wall. As regards other damages, he stated that the blaster was responsible.

On being cross examined, the 1st defendant stated that he asked the 2nd plaintiff permission to construct the road jointly as it benefited both parties, but he disagreed. He however stated that he had no objections to the plaintiffs using the road, as a footpath, but not as a motorable road as they did not contribute towards its construction.

William Charlette (Dw2), the blaster engaged by the defendants testified that in the course of blasting a boulder, debris damaged six louvre blades and some corrugated iron sheets belonging to the plaintiffs. He stated that he replaced the louvre blades, and the 1st plaintiff told him that she would have the corrugated iron sheets repaired herself. He however did not fix the louvre blades on the window frame.

Ms. Bernadette Boniface, Technical Officer of the Ministry of Land Use and Habitat testified that Parcel H. 3867 was sold to the defendants so that they could access their property Parcel H. 3868. They were required to obtain planning permission to construct although a 3 meter right of way was reserved on the plan.

Basically, the action is based on the delict of trespass on land and causing damage thereto. The plaintiffs also seek a permanent injunction on the defendants from continuing with the construction of the motorable road. The plaintiffs are however agreeable to the defendants using a footpath instead. On the other hand, the defendants are agreeable to the plaintiffs using the motorable road that is being constructed. In the case of **Azemia v. Ciseaux (1965) S.L.R. 199**, the defendant, in spite of objections from the plaintiff, obtained access to the Public road over the plaintiff's land, on the basis that he had no other right of way. The plaintiff sought damages for trespass and also prayed for a permanent injunction. ***Souyave ACJ*** (as he then was) identified the main issue as whether the defendant was entitled to a right of way under Article 682 of the Civil Code. In that case part of the land belonging to the defendant had become "enclaved" as his predecessor in title had sold him that part of the land, reserving to

himself the remaining part adjoining the public road, which he later sold to a third party. It was held that "*If the inaccessibility is the result of the property having being divided by sale exchange, a partition or any other contract, a right of way can only be asked for over the properties affected by such contracts*". This principle is now contained in Article 684 of the Civil Code. The Court found that the defendant in the case ought to have obtained a right of way from his predecessor in title as the encroachment arose from the sale of the balance portion to a third party, and held that there was trespass over the plaintiff's land. Accordingly damages were awarded, and a permanent injunction was issued restraining the defendant from crossing the plaintiff's land.

In the present case, the defendants sought to purchase Parcel H 3868 from the Government and had paid Rs.10,900. At that time he had been using an access over the adjoining Parcel H. 3112. The 1st defendant stated that it was not possible to have motorable access and hence applied to purchase Parcel H. 3867 which was also a subdivision of Parcel H. 3111. The approved survey plan of Parcel H. 3867 (D1) shows a 3 m right of way along the southern boundary. The Government sold that land to the defendants in the year 2001 on condition that the Government would not assist the defendants to construct the access road to serve Parcel H. 3868. The copy of the departmental memorandum (D3) and the evidence of Miss Boniface show that Parcel H. 3867 was sold to the defendants so that they could have access to their property Parcel H. 3868. Exhibit D3 shows that the Government was aware that the proposed construction of the access road would involve demolition and reconstruction of the retaining wall of the plaintiffs, and that the defendants were intending to construct a motorable access.

Admittedly, Parcel H. 3869 was sold to the plaintiffs by the Government on 19th December 1994 (P1) with the approved plan dated 31st October 1994 (P2) wherein a 3 meter right of way is marked. Although the plaintiffs claim that this right of way was for their exclusive use, the plan shows an extension to Parcel H. 3867 which was also State property at that time. Hence it was on this basis that the Government sold H. 3867 to the defendants on the understanding that the defendant when constructing the motorable access, compensates the plaintiff's for the inevitable damage that would be caused to the retaining wall. In these circumstances, there has been no trespass over the plaintiffs' land. However Article 682 requires that adequate compensation be paid for any damage caused. In this respect I would accept the valuation of the restoration work as assessed by Mr. D.G. B. Blackburn Quantity Surveyor in his report (*exhibit P14*). However I deduct Rs.1500 therefrom in respect of the louvre glass blades that were supplied by the Blaster, and the galvanized sheets which the plaintiffs had undertaken to repair on their own. There was also damage to the boulder, which the valuer had not assessed. Mr Blackburn in his testimony stated that the boulder was about 25 square metre in volume and about 200 tons in weight. P13 shows that this boulder was only less than $\frac{1}{4}$ on the plaintiffs' land. The damage to it cannot be repaired nor the boulder replaced. The defendant admitted that he used some of the rock to build the wall. Hence a sum of Rs.2000 would be sufficient compensation to the plaintiffs. The encroachment on the plaintiffs' land assessed by Surveyor Brian Felix to be about 50 sq. metres has not been valued. In any event the defendant should restore the encroached area to the plaintiffs.

As regards the claims for inconvenience and moral damages, I award a global sum of Rs.5000.

Accordingly, judgment is entered in favour of the plaintiffs in a sum of Rs.20,500 together with interest and costs taxed on the Magistrates' Court scale of fees and costs.

In the circumstances, the injunction issued on 25th March 2002 prohibiting the defendants from continuing with the construction of the road is hereby rescinded. However the plaintiffs shall have motorable access to their property. The defendants shall not however block the entrance of that road by fixing a chain or by any other means. They shall also complete the construction of the motorable access without causing any further damage to the plaintiffs.

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A.R.PERERA

JUDGE

Dated this 20th day of January 2005