

N THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 05.09.2018
DELIVERED ON: 06.09.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA

S.A.No.1675 of 1997

1. Metilda Sulochana Bai David
2. Victor David (deceased)
3. Suganthi David
4. Priya David
5. Preethi David
6. Ashwin Daivid

(Appellants 3 to 6 brought on record as LRs of the deceased 2nd appellant vide order dated 11.08.2018 made in CMP No.13951 to 13953/2018 in S.A.No.1675 of 1997)

... Appellants/Defendants

Vs.

1. Mehruarcha Meharjee (deceased)
2. Behroze
3. Coomie
4. Jalu
5. Rohintan Erachsha Meherrjee

(Respondents 2 to 5 brought on record as Lrs of the deceased sole respondent vide order dated 11.08.2018 made in CMP No.13535 to 13537 of 2008 in S.A.No.1675 of 1997)

...Respondents/Plaintiff

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 26.08.1997 made in A.S.No.15 of 1997 on the file of the District Court, Udagamandalam by partly allowing the appeal and reversing the decree and judgment dated 17.12.1996 made in O.S.No.260 of 1994 on the file of the District Munsif Court, Udagamandalam.

For Appellants : Mr.Muthumani Doraisami
Respondents 2 to 5 : Mr.B.Ramamoorthy

JUDGMENT

The appellants 1 and 2 are the defendants in O.S.No.260 of 1994 on the file of the District Munsif, Udagamandalam. The

legal heirs of the deceased 2nd appellant are impleaded as appellants 3 to 6 and the legal heirs of the deceased plaintiff are brought on record as respondents 2 to 5.

2. The first respondent (since deceased) filed the suit in O.S.No.260 of 1994 before the District Munsif, Udagamandalam for a declaration that she is entitled to use the suit pathway and also for a permanent injunction restraining the appellants 1 and 2/defendants from interfering with her peaceful possession and enjoyment over the suit property. She has further prayed for a mandatory injunction directing the defendant to remove the obstacles made by the appellants 1 and 2/defendants in the suit pathway.

3. Briefly stated the case of the 1st respondent/plaintiff is as follows. The plaintiff and her husband late Erachсна Meherjie purchased a land in R.S.No.4059 of Udagamandalam measuring 13-6/8 cents along with a superstructure bearing door Nos.118 and 119 from one Nazeer Ahamed Sait on 15.07.1964 (Ex.A2). A map showing the suit property and the pathway was annexed to the said sale deed. The defendants/appellants though in know of the fact that the plaintiff was using the suit pathway for reaching her property, the defendants started preventing the plaintiff from using the said pathway during the year 1990 by locking the wicket gate, which was at the entrance of the suit pathway. Subsequently, the said wicket gate was removed and an iron gate was put up by the defendants completely closing the pathway. According to the plaintiff, the suit pathway is the only way to reach her house.

4. The appellants 1 and 2/ defendants filed a written statement contending that the plaintiff does not have any right over the suit pathway and that the first defendant purchased a land and a house in R.S.No.4056 (Old S.No.2706) measuring 16 cents through a registered sale deed dated 21.09.1977 (Ex.B1). According to them, the main road which is 'Club Cross Road' is situate on the northern side of the first defendant's property and that the suit pathway mentioned by the plaintiff is situate within the defendant's property. They have further averred that the plaintiff's contention that she and her predecessors in title were using the pathway for more than 20 years is false. They have therefore, prayed for the dismissal of the suit.

5. The trial court framed the following issues and additional issues.

1. Whether the plaintiff is entitled to the relief of declaration as prayed for?
2. Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for?
3. Whether the court fees paid is correct?
4. Whether there is no cause of action to file the

suit?

5. To what relief the plaintiff is entitled?

Additional Issues

1. Whether the suit is bad for non-joinder of necessary party?

2. Whether the suit is maintainable

6. After full contest, the suit filed by the plaintiff was dismissed by the trial court on the ground that the plaintiff has not impleaded one Mohammed Ayub as a party in the suit. However, he gave liberty to the plaintiff to file a fresh suit showing the said Mohammed Ayub, as one of the parties. In fact, the trial court found that there is a pathway in R.S.No.4056 and that the same was blocked by the defendants. It is further observed that since a portion of the pathway is in the land of the Mohammed Ayub, the suit is liable to be dismissed for not impleading him.

7. The appeal filed by the plaintiff in A.S.No.15 of 1997 was partly allowed by the learned District Judge, Udagamandalam and a decree of declaration and permanent injunction was granted in favour of the plaintiff. However, the pathway was restricted to 3feet wide though the plaintiff claimed right over six feet wide pathway. It is also observed that since the easementary right was specifically given to the plaintiff over the pathway in her sale deed dated 15.07.1964 (Ex.A2), she is entitled to 3 feet wide pathway. In fact, the suit pathway is mentioned as 6 feet wide through R.S.No.4056 leading to plaintiff's house. The plaintiff has not filed any cross appeal.

8. The following substantial questions of law were raised in the present appeal.

1. Whether the appellate court was right in reversing the judgment of the trial court without framing the points for determination?

2. Whether the appellate court committed error in passing a decree to the extent of 3 feet width, when the prayer of the plaintiff was in respect of 6 feet?

3. Whether the appellate court was justified in interfering with the judgment of the trial court when the trial court has dismissed the suit on the ground of non-joinder of necessary parties?

9. The suit property is described as 6 feet wide pathway in R.S.No.4056 of Udagamandalam. The main road is situate on the northern side of the pathway. The plaintiff's property is on the southern side of the pathway. The plaintiff/1st respondent and her husband had purchased the property in S.No.4059 measuring 13-6/8 acres through a registered sale deed dated 15.07.1964. The appellant's/defendant's property situate adjacent to the

plaintiff's property. The contention of the plaintiff is that in order to reach her house from the main road, she has to pass through the pathway in R.S.No.4056 and the defendants had completely blocked the same by putting up an iron gate.

10. According to the defendants, the plaintiff has an alternate pathway through Commissioner's Road. However, a perusal of the sale deed dated 15.07.1964 (Ex.A2), which is earlier in point of time to the sale deed in favour of the defendant, clearly indicates a pathway in R.S.No.4056. The same is extracted here for better understanding

"The vendors do hereby grant convey and assign unto the purchasers all that piece of parcel of land situate at Ootacamund and more particularly described in the schedule hereto and more particularly delineated in the plan hereto attached and coloured red therein together with the buildings thereon generally known as "West Nook" together with all trees and plants if any on the said piece or parcel of land together with all rights of way including the full right of easy over the footpath leading from the Government Road through R.S.No.4056 on to the piece of land hereby conveyed to the purchasers and more particularly shown in the plan hereto attached with red lines and black dots together with the rights as enjoyed by the vendors and their predecessors over the tub properties leading from Commissioner's Road through R.S.No.4057 and 4058 on to the piece of land hereby conveyed to the purchasers and shown in the plan attached hereto with black dotted lines together with the benefit of all arrears of rent due by the several tenants to the vendors together with all rights of water together with all other rights easements and privileges appertaining to the said premises and all the right title and interest of the vendors into and upon the said premises".

A sketch is also attached with the sale deed, which clearly indicates the pathway in R.S.No.4056. However, the measurements of the pathway is not indicated in the sale deed.

11. The defendants had purchased their property through a sale deed dated 21.09.1997 (Ex.B1). The defendants had admitted that they put up an iron gate only during the year 1994. Till such time, there was only a wicket gate in the pathway leading to the main road on the northern side. Therefore, it appears that the defendants were in know of the fact of the easementary right of the plaintiff in R.S.No.4056. The field map Ex.A6 prepared in the year 1899 is filed by the plaintiff. This has

not been disputed by the defendants. The old survey numbers of both the plaintiff and the defendants are 270C. A perusal of Ex.A6 shows that a pathway is shown from Church Cottage leading to plaintiff's property. Ex.B2 is proceedings of the Tahsildar, Udagamandalam, dated 30.07.1981, which shows the existence of the Church Cottage even during the year 1981. Though it is contended by the defendants that the plaintiff has an alternate pathway, the plaintiff is entitled to use the pathway to reach her house as mentioned in her sale deed and it is also evident from the records that the plaintiff was using the said pathway well over 20 years, without any interruption. The first appellate court was right in concluding that the plaintiff is entitled to 3 feet pathway, though she had claimed 6 feet wide pathway in R.S.No.4056.

12. Both the courts below have concurrently held that the plaintiff is entitled to easementary right over the pathway in S.No.4056. When such a right is conferred upon the respondents/ plaintiffs, there is no necessity for the trial court to hold that Mohammed Ayub is a proper and necessary party to the suit. It is not also the case of the plaintiffs that the said Mohammed Ayub prevented the plaintiffs from enjoying the suit pathway. The conclusion of the courts below is based on facts and evidence adduced on both sides. In the circumstances, I do not see any reason to interfere with the findings given by the first appellate court.

13. In the result, the second appeal is dismissed. No costs.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

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To

1. The District Judge, Udagamandalam
2. The District Munsif, Udagamandalam.
3. The Section officer, VR Section, High Court, Madras 104.

+1 CC to Mr.B. Ramamoorthy, Advocate sr 61895.

+1 CC to Mr.Muthumani Doraisami, Advocate sr 61656.

S.A.No.1675 of 1997

NRI (CO)

SP(16/10/2018)