

In the Court of the II Additional District Munsif, Nagercoil

Present: Thiru.R.Sundara Kamesh Marthandan, M.L.,
II Additional District Munsif, Nagercoil.

Tuesday, on this 11th day of June 2024

I.A. Nos. 2 of 2023 & 3 of 2023

in

Original Suit No.50 of 2023.

I.A. No. 2 of 2023

Ayyathurai

.. Petitioner/Plaintiff

-vs-

Madusoothana Perumal

.. Respondent/1st Defendant

I.A. No. 3 of 2023

Ayyathurai

.. Petitioner/Plaintiff

-vs-

1.Madusoothana Perumal

2. Paramachandran

3. Sree Padmanabhan

4. Kavitha

5. Pushpam

.. Respondents/Defendants

These Petitions came up before this Court on 27.02.2024, in the presence of Mr. K. Murugesan Advocate for the Petitioner/Plaintiff and Mr. A. Sahaya Arasu Advocate for the 1 & 2 Respondents/Defendants and Mr. A. Paul Raj Advocate for the Defendants 3 & 5 and 5th defendant set exparte and both side arguments heard and upon perusing the case records and having stood over for consideration till this day, this Court delivers the following:

COMMON ORDER

1. This Petitioner filed I.A No. 2 of 2023 under Order XXXIX Rule 1 and 2 and Section 151 of C.P.C., seeking an order of interim injunction restraining the Respondent/1st Defendant to not obstruct the Petitioner/Plaintiff from using the B schedule property as pathway to reach the Plaintiff A schedule property and also from making any further construction in the Plaintiff A schedule property till the disposal of the suit.

The Petitioner had filed I.A No. 3 of 2023 under Order XXVI Rule 9 and Section 151 CPC seeking an order to appoint an Advocate Commissioner to note the following points mentioned below:

1. To note the physical features of the Plaintiff Schedule Properties
2. To note whether there is any alternative pathway for the Plaintiff to reach the Plaintiff A schedule property.
3. To note the new construction made in the Plaintiff B schedule property
4. To note and report whether the new construction made in the Plaintiff B schedule property will cause obstruction to use the B schedule property.
5. To note the age of the new construction made in the Plaintiff B schedule property.
6. To note the construction materials collected at the spot by the 1st defendant to make new construction.
7. To note the graves available in the Plaintiff A schedule property.

8. Such other points that may be requested by the Plaintiff to be noted at the spot at the time of visit of the Advocate Commissioner.

2. In the affidavits filed in support of the above Petitions, the Petitioner had stated that he had filed the suit for declaration of easementary right and for Permanent Injunction and for Mandatory Injunction. The Petitioner claimed that the suit properties originally, belonged to one Ananchaperumal. The said Ananchaperumal executed Will dated 05.05.1993 in favour of his daughter Pushpam and his sons Iyyadurai, Paramachandran, Madusoothannaperumal and Bhoopathy, the Plaintiff and defendants herein.

3. The Will was registered as Doc.16 of 1993 Rajakkamangalam Sub Registrar Office, under the said Will five schedules were mentioned. The 5th respondent herein namely, Pushpam was allotted, A schedule in the Will. The 2nd respondent Paramachandran was allotted B schedule in the Will. The 4th respondent's husband Bhoopathy was allotted C schedule in the Will. The Petitioner/Plaintiff was allotted D schedule in the Will, The 1st respondent Madusoothanaperumal was allotted E schedule in the Will.

4. In the said Will there is a specific provision that out of the total area of 9.5 Ares, the western 5 cents 40 links was set apart for the common cemetery, the same is described as A schedule in the Plaint. The common cemetery was provided with the intention to bury the family members in the common cemetery. The Road is running from Alenkottai to Kovilpuram, on the eastern side of the 1st respondent/1st defendant's property. The pathway leads to

cemetery start from the above said Road. Running on the western side of the 1st respondent/1st Defendant's Property and insert the plot set apart for the common family cemetery. To reach the pathway which starts from 1st respondent's property one has to pass through the pathway which starts from the road available on the western side of the road and ends at the common family cemetery. The said pathway is schedule as B Schedule property in the plaint. The Plaintiff A schedule property is the graveyard. The Plaintiff C schedule is the pathway left as per the Will Deed.

5. The family members used the B schedule pathway to reach the C schedule pathway allotted as per the Will, to get access to the common cemetery that is the A scheduled property. There is no other alternative pathway to reach the common cemetery except the Plaintiff B & C schedule properties. Since the date of Will the Plaintiff and the family members are using the pathway available in B schedule property. The same is used for more than 50 years. The respondents 4 and 5 have no objection using the existing pathway lying on the northern side of their property. Though respondents 2 and 3 are also not objecting the Plaintiff from using the B & C schedule pathway, they are also impleaded as formal parties.

6. In the common cemetery the graves of Plaintiff's father Ananchaperumal, Sree Krishna Perumal, the husband of Pushpam, 5th defendant, husband of the 4th defendant namely Boopathy are there. The 1st respondent is attempting to cause obstruction to the Plaintiff from using the

said pathway. One such attempt was made on 04.03.2023. However the same was successfully thwarted by the timely intervention of the Plaintiff. However still the threat is subsisting. The Petitioner preferred a complaint before Rajakkamangalam police and they issued C.S.R. No. 132 of 2023 and as they found the issue is civil in nature they advised, the Petitioner to approach Civil Court. However immediately on 07.03.2023, the 1st respondent hurried in making unauthorized construction over the Plaint B schedule pathway so as to obstruct the pathway.

7. The Petitioner had perfected easementary right of pathway, through B & C schedule property to reach the common cemetery. Hence pending disposal of the suit. The Petitioner had prayed for Interim Injunction and also for issuance of Commission. The Plaintiff and also stated to have prayed for Mandatory Injunction to remove the unauthorised construction.

8. The 1st and 2nd respondents have filed adoption memo adopting their written statement as counter in the above I.A. in the written statement they have admitted about the Will executed by Ananchaperumal dated 05.05.1993 bearing Doc. No. 16 of 1993 and also stated that the said Will had taken effect. The 1st and 2nd respondents have pleaded that the common cemetery was not provided with intention to bury the family members. The Ananchaperumal was buried in Plaint A schedule property and the mother of the Plaintiff and defendants was buried in a separate place which belonged to the 3rd defendant.

9. In the Will dated 05.05.1993, it is clearly stated that persons in the A, D & B schedule property was allotted 5 links pathway and it never binds the E schedule property. The E schedule property in the Will is allotted to the 1st respondent herein, it starts from the road. The 1st defendant/respondent had purchased property from the 3rd defendant on 01.10.2019, vide Doc. No. 3001 of 2019 measuring an extent of 2.248 cents. The said property starts from the road. The pathway is not mentioned in the 1st respondent/defendant's documents. The 1st respondent/defendant had purchased the pathway which starts from the road.

10. The 1st respondent/1st defendant is in need to construct a house in his property and a compound wall. The same do not bind the Plaintiff. There is no specific document or there is no specific provision, about the pathway to enter into the cemetery. The 1st defendant purchased the pathway from the 3rd defendant for a valid consideration. The complaint launched before Rajakkamangalam Police station was a false complaint. The Investigation Officer had warned the Plaintiff and advised him to seek remedy before this Court of law. By suppressing those facts, he had filed the above false suit. The 1st respondent and 2nd respondent are law abiding citizens. The Petitioner is disturbing the peaceful possession of the 1st and 2nd respondents. There is no cause of action for filing the above suit. The suit is liable to be dismissed in the preliminary stage itself. There is no bonafide in it. Hence the 1st and 2nd respondents prayed for dismissal of the above Petition.

11. The 3rd and 5th respondent have filed memo stating that may have filed written statement and the same may be adopted as counter in the above I.A. They have stated that they have admitted the Will. In deed, they have admitted that 5 cents and 40 square links property was allotted for common cemetery. The 3rd and 5th respondents have prayed that the public road running North to South is situated on the eastern side of the 1st respondent's property from the road, through the 1st respondent's property all of them could have access to the common cemetery. All the family members have been using the said pathway for more than 50 years to access the common cemetery and that there is no other pathway. The defendants 3 and 5 also in need of such declaration of their easement right. The 1st respondent without honouring his father's intention in the Will is putting up construction. Hence the relief sought for by the Petitioners is very much necessary. Hence the respondents 3 and 5 have submitted for allowing the above Petition.

12. The point for consideration is whether the above Petitions have to be allowed or not?

13. In so far as the pleadings made in the affidavit filed in support of the above Petition as well as in the 1st and 2nd respondents in their written statement and 3rd and 5th respondents in their written statement, the execution of the Will by the Plaintiff's father Ananchapermal is not in dispute and with regard to the bequest of five properties in favour of his five children namely, the parties here too is also not in dispute. The Petitioners' claim that from the

road there is a pathway lying to the West of the 1st respondent's property and through the pathway, the 5 cents 40 square links pathway created under Ex.B1 Will lead to reaching the common cemetery provided under the said Will. The 1st respondent and 2nd respondent in the written statement have contended that there is no common cemetery and that the father of the parties here in namely, Ananchaperumal was buried in 3rd respondents property and that the mother of the parties herein was buried in a separate place or not in the common ancestry, as claimed by the Petitioners and respondents 3 and 5.

14. The Petitioner had filed the above suit seeking declaration of easementary right over the Plaint B schedule property and for Permanent Injunction and for Mandatory Injunction. From the said prayer it prima facie appears that the 1st Respondent had put up construction in the Plaint B schedule property namely having breadth of 1 meter and length of 30 meter. The 1st and 2nd respondent in his written statement had in one place denied the very existence of the pathway and in another place had pleaded as if he had purchased the pathway from the 3rd respondent herein. The parties have not exhibited the said Will before this Court while submitting their oral arguments. As discussed above the said Will was admitted and it's coming into force was also admitted. The dispute is with regard to the provision made for common cemetery and the provision made for a common pathway to have access to the common cemetery.

15. The 1st and 2nd respondents contention is that in the documents executed in favour of the 1st respondent there is no provision for any pathway. Even the Petitioner had come before this Court seeking declaration of easement of necessity. Since it prima facie case appears before this Court that properties of both the Petitioner and the respondents have been devolved from common testator namely, Ananchaperumal and that he had bequeathed the properties to the parties here under the same Will and it is stated that a common cemetery had been earmarked, in such circumstances, unless and until it is shown before this Court that each of the shares bequeathed under the said Will, have its own right of access to any public Road, street or pathway, each of the legatees under the said Will, have the right of ingress and egress to their respective bequested shares. The said right had remained enjoined with the total property, prior to bequest by partitioning the same. Such right will continue unless and until it is established that each bequested share has independent right for ingress and egress, to the exclusion of the other bequest. In view of the discussions this Court is of the considered view that the Petitioner had made out prima facie case.

16. The Petitioner in suit prayer C had sought for Mandatory Injunction stating that the 1st respondent had put up construction in Petition B schedule property. It is settled proportion of law that pending disposal of the suit the nature of the suit property should not be altered unless and until there is utmost exigencies. Since it is prima facie shown that except the Petition B Schedule

Property, there is no other access to the Cemetery, the balance of convenience is also in favour of the Petitioner. Since prayer for Mandatory Injunction is made, ascertaining the extent of alleged construction will be beneficial for the due adjudication of the suit. Also for the reason that the Petitioner had rested his right on the ground of easement of necessity, ascertainment of alternative access needs to be ascertained. Hence issuance of commission will facilitate due adjudication of the suit. If the 1st Respondent puts up further constructions, the Petitioner will be put irreparable loss. Hence this Court is of the considered view that the Petitioner is entitled for the Petition relief.

In the result I.A. No 2 of 2023 is allowed. No cost.

In the result I.A. No 3 of 2023 is allowed. Advocate Miss. P. Vijaya Mayil, Enrollment No. 2067/2011 (Cell Phone No.9600634486), is appointed as Advocate/Commissioner. Her remuneration is fixed at Rs. 8,000/- (Rupees Eight Thousand Only) to be payable by the Petitioner directly to the Advocate Commissioner. The Advocate Commissioner, is directed to inspect the petition schedule properties and note down the following:-

1. To note the physical features of the Plaintiff Schedule Properties
2. To note whether there is any alternative pathway for the Plaintiff to reach the Plaintiff A schedule property.
3. To note the new construction made in the Plaintiff B schedule property
4. To note and report whether the new construction made in the Plaintiff B schedule property will cause obstruction to use the B schedule property.

5. To note the age of the new construction made in the Plaintiff B schedule property.

6. To note the construction materials collected at the spot by the 1st defendant to make new construction.

7. To note the graves available in the Plaintiff A schedule property.

8. Such other points that may be requested by the Plaintiff to be noted at the spot at the time of visit of the Advocate Commissioner.

and file report with plan, at the earliest from the date of receipt of Commissioner's warrant.

This Common Order is dictated to the steno-typist directly, typed by her in computer, corrected and pronounced by me in Open Court, this the 11th day of June 2024.

Sd/-R.Sundara Kamesh Marthandan
II Additional District Munsif,
Nagercoil.

Petitioners side witnesses and documents : Nil

Respondents side witnesses and documents : Nil

Sd/-R.Sundara Kamesh Marthandan
II Additional District Munsif
Nagercoil.

IIADM, Nagercoil.
I.A. Nos.2 of 2023 & 3 of 2023
in
O.S. No. 50 of 2023
Fair Order
Date: 11.06.2024.