

(1994) 09 MAD CK 0025
In the Madras High Court

Andal Ammal and Others

APPELLANT

Vs

V. Susheela

RESPONDENT

Date of Decision : 23-09-1994

Acts Referred:

Citation : (1995) 1 MLJ 188

Hon'ble Judges : Rengasamy, J

Bench : Single Bench

Judgement

Rengasamy, J.—This revision is filed against the order of the learned 1st Additional District Judge, Coimbatore permitting for the amendment of the plaint.

2. The suit was filed by the respondent/plaintiff for declaration that she is entitled to use the suit passage. She claimed only an easementary right in the property describing the same as the property of the corporation. The suit has been dismissed by the trial court and the appeal is now pending

before the learned 1st Additional District Judge, Coimbatore. At this stage the petitioner filed a petition to amend the plaint for easement by

prescription on the ground that she is enjoying the passage from 1927 onwards and also for demolition of the wall said to have been put up

subsequent to the filing of the suit,

3. The defendants contested this petition on the ground that as the suit was based on easement of necessity and the same has been rejected by the

trial court now the plaintiff should not be allowed to plead for the easement by prescription and with regard to the mandatory injunction for

demolition, it has been contended that with the consent of the plaintiff after dismissal of the suit, the wall was put up and therefore, the plaintiff is not

entitled to ask for demolition. The learned 1st Additional District Judge has allowed for the amendment of the plaint taking into consideration of the representations on both sides. Aggrieved by this order, the defendants who are the revision petitioners herein have come forward with this revision.

The learned Counsel for the revision petitioners would argue that when the plaintiff has taken a specific plea that she has the right of easement by necessity and that plea has been negatived by the trial court, the plaintiff shall not be allowed to take up a new plea that she is entitled to the

easement by prescription which will completely alter the basis of the suit and therefore, the order of the court below for amendment is contrary to

law. On a reading of the plaint we are able to see that the plaintiff claims only easementary right to the property which is described as "" A, B, C.

D"". No doubt in the plaint it is mentioned that it is a lane belonging to the Municipality. However, the defendant would contend that they are the

owners of ""A, B, C, D,"" lane. The basis of the plaintiffs claim is only the easementary right to use this ""A, B, C, D,"" portion which according to her

is a passage. Further she also has specifically pleaded in para, 6 of the plaint that she is using this property which is a lane since 1927 without any

interference by anybody. Therefore, the usage of this property by her for more than 60 years is pleaded in the plaint itself. It is true that only in the

appellate court she pleads that this mode of enjoyment has conferred on her a prescriptive right over the disputed property. In the plea raised now,

there is no change in the nature of the suit, because even now the plaintiff claims only easementary right over the property for her use and the

period of her use also is not introduced in the new amendment. Whether it was an easement of necessity or continuous enjoyment from 1927

onwards which has enabled her to claim the prescriptive easement, is a matter to be considered in the light of the evidence. Anyhow the proposed

amendment will not in any way change the character of the suit, as it remains a suit for easementary right. Therefore, the objection of the revision

petitioners viz., the defendants opposing this amendment is not sustainable.

4. Then coming to the mandatory injunction, in the counter itself these petitioners have admitted that a wall was put up subsequent to the dismissal

of the suit. However, they have stated that with the consent of the plaintiff, this wall was put up. Whether the plaintiff gave consent or not is a

matter of evidence. At the same time, as the wall has been put up subsequent to the suit, naturally the aggrieved person is entitled to ask for the removal of the wall by way of mandatory injunction. As this relief was unavailable at the time of the suit, because the cause of action has arisen only subsequently the objection for mandatory injunction also carries no weight. The learned Counsel for the revision petitioner would contend that in the pleading regarding the mandatory injunction, a gate also is referred to, which has been dealt with in another suit, in which the finding is against the present respondent and therefore, that part of the relief should not be allowed. There is no evidence to show that the gate portion of the wall in the pleadings for the mandatory injunction has been dealt with in any other suit. If really any portion of the property relating to the mandatory injunction has been dealt with in any other suit, the revision petitioners herein are entitled to raise that in their additional written statement and evidence also can be let in at the time of the enquiry. Therefore, we cannot presume that this property has been dealt with in any other suit when the relief itself is sought for only now. Hence the court below was right in allowing the amendment. I may also refer to the apprehension of the revision petitioner with regard to the observation made in para, 9 of the impugned order of the court below. As the trial court has considered the user of the lane by the plaintiff as permissive, the court below has observed that the trial Judge without justification has given a finding that it is permissive and according to the learned Counsel for the revision petitioner this observation will affect the merit of this appeal. Whatever has been observed in this interim application is not going to have any bearing to the main appeal which will have to be disposed of on merit. Therefore, the observations in para, 4 will certainly have no adverse effect on the revision petitioners. Subject to this observation, the revision is dismissed at the stage of admission.