

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 10.07.2017

Coram

The Honourable Dr.Justice G.JAYACHANDRAN

Second Appeal No.1060 of 1999  
and  
C.M.P.No.10648 of 1999

1.Muthammal  
2.Masa Gounder  
3.Chinnammal @ Kannammal  
4.Jayalakshmi ... Appellants/defendants 2,7,9,10

/versus/

1.Kuppusamy  
2.Palanisamy  
3.Palaniammal  
4.Shanmugam  
5.Chinnasamy ... Respondents/1.3.4 Plaintiff &  
Defendants 3,6

Prayer: Second Appeal filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 12.10.1998 and made in A.S.No.100 of 1997 on the file of II Additional District Judge, Coimbatore, confirming the judgment and decree dated 12.02.1997 and made in O.S.No.1618 of 1974 on the file of I Additional District Munsif Court, Coimbatore.

For Appellants :Mr.T.R.Rajagopal, Senior Counsel  
for T.R.Rajaraman

For Respondents :Mr.S.Thangavel for R1 to R3  
Mr.V.Sairam for R4 & R5

J U D G M E N T

The appellants are the defendants 2,7, 9 and 10. The suit for injunction restraining the defendants from interfering with the enjoyment and use of the schedule mentioned cart track as right of easement by prescription and necessity was allowed by the trial Court and confirmed by the lower appellate Court. Aggrieved by the concurrent finding, the present second appeal.

2. Heard the learned Senior Counsel appearing for the appellants and the learned counsels appearing for the respondents.

3. Regarding the claim of easementary right over the cart track by prescription as well as easement of necessity, both the Courts below have held in favour of the plaintiffs/respondents, whereas the defendants 2,7,and 9, who are the appellants herein, have preferred this second appeal against the concurrent finding of the Courts below on the ground of perversity and non-application of mind.

4. This Court, at the time of admission, framed the following Substantial Questions of Law for consideration:

(1)When an alternative cart track is shown to be in existence for the plaintiff, can the lower appellate Court grant a decree to the plaintiff on the basis of easement of necessity?

(2)Is the lower appellate Court right in relying upon the judgment and decree in Ex.A5 & A6, when an appeal against the grant of patta under Ex.B2 by the Settlement Tahsildar was pending before the Inam Abolition Tribunal and when the appeals were also allowed subsequently?

5. The learned counsel appearing for the appellants submitted that the judgment of the Courts below, is perverse in the following manner. Based on the proceeding of the Settlement Tahsildar, who has referred the existence of a cart track, the Courts below have allowed the relief sought for. Whereas the proceeding of the Settlement Tahsildar was set aside by the order of the appellate Court in C.M.A.Nos.188, 259, 275, 374 and 583 of 1969 dated 15.03.1972. The judgment and decree (Exs.B8 and 9) have totally been neglected by the Courts below, while appreciating the evidence.

6. Further, this Court dismissed the appeal in S.T.A.No.48 of 1972 preferred by the plaintiffs and the matter was remanded back for fresh enquiry. Till date, there is no proceeding before the Tahsildar in respect of the cart track claimed by the plaintiffs. While so, the entire proceedings which was emanated from the Settlnent Tahsildar's order dated 30.11.1968 is non-est in law. Reliance on the said proceedings is per-se, improper, illegal and perverse.

7. Furthermore, the learned Senior Counsel appearing for the appellants submitted that though the plaintiffs seek easementary right by necessity, it is an admitted fact that the plaintiffs

are having alternate cart track and admittedly, PW1-in his evidence has categorically stated that he is using the said alternate cart track at present. The Advocate Commissioner, who has inspected the site, has also both in-chief examination as well as cross-examination, stated that the cart track starting from the temple moving towards south and ends with the land of defendants marked as 'E' and there is no further cart track towards the property of the plaintiffs.

8. While so, when both the ocular evidence as well as documentary evidence such as, the Commissioner's Report and title deeds of the defendants indicates that there is no cart track for the plaintiffs from Nageswarswamy temple passing through the land of the defendants, it is improper for the Courts below to rely upon the proceeding of the Settlement Tahsildar, which has been set aside and become non-est in law. Unmindful of the fact that the title deed of the plaintiffs does not wishper about the right over the cart track and lack of evidence regarding the right of way by necessity over the cart track to their property, the Courts below have perversely held in favour of the plaintiffs.

9. For all the reasons, this Court finds that a total neglect by the Court below in appreciating the documents relied in composite manner has led to preverse decision, which has to be set aside.

10. Accordingly, this Second Appeal is allowed and judgments and decrees of the Courts below are set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-  
Asst.Registrar (CCC)

/true copy/ जयते

Sub Asst. Registrar

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To

1. The II Additional District Judge,  
Coimbatore.
2. The I Additional District Munsif,  
Coimbatore.

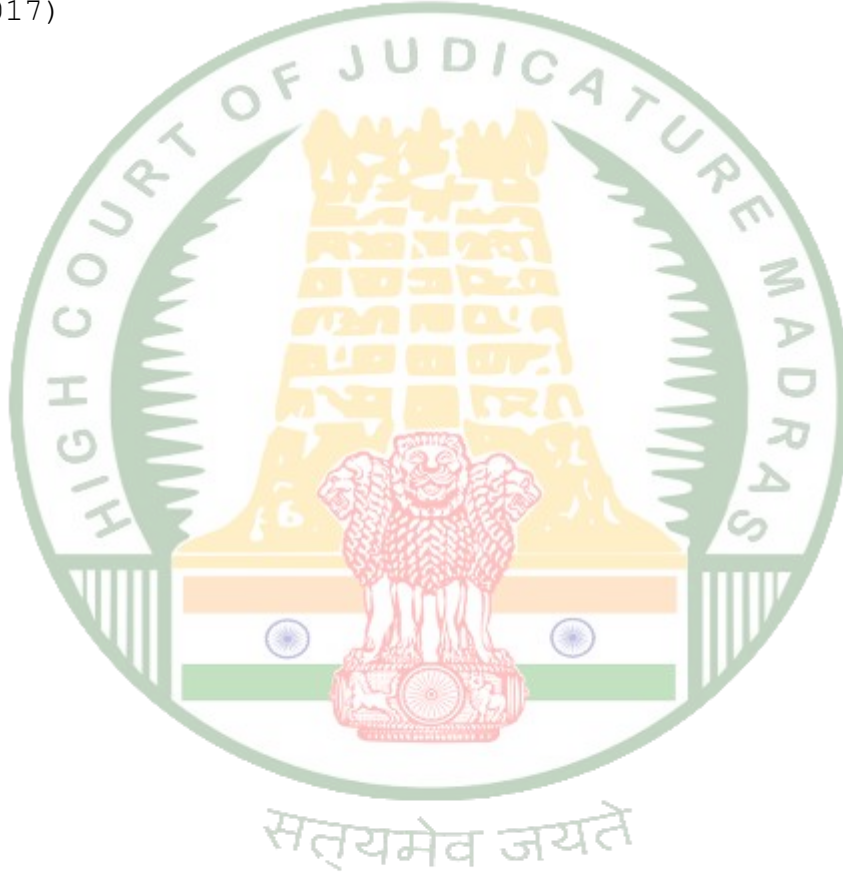
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Copy to: The Section Officer,  
V.R.Section,  
High Court, Madras.

+1cc to Mr.T.R.Rajaraman, Advocate Sr. 47946  
+1cc to Mr.S.Thangavel, Advocate Sr. 47989

S.A.No.1060 of 1999

SSI (CO)  
VR(24/8/2017)



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