

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.02.2018

CORAM :

**THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE R.MAHADEVAN**

Review Application No.41 of 2017

1.M/s.Doshi Developers and Builders Pvt. Ltd.,
Rep. by its Director
Mr.Harshad V.Doshi
Doshi Towers 9th Floor
No.156, Poonamallee High Road
Kilpauk, Chennai - 600 010

2.Yashumathi Doshi

... Applicants

Vs.

1.C.R.Vasanthi

2.C.R.Devanand

3.C.R.Varalakshmi

4.C.R.Dhanalakshmi

5.The Commissioner
HR&CE, Uttamar Gandhi Salai
Nungambakkam
Chennai - 600 034

6.The Executive Officer
Sri Muppiliyamman Dewasthanam
Villivakkam
Chennai - 600 049

7.M.S.Ramachandran (died)

8.M.R.Suganya

9.M.R.Sivakumar

10.G.Ambika

... Respondents

Application filed under Section 114 & Order 47 Rules 1 and 2 of the Civil Procedure Code, to review the Judgment dated 17.10.2016 made in O.S.A. No.173 of 2012.

For Applicants : Mr.K.M.Vijayan, Senior Counsel
for K.M.Vijayan Associates

ORDER

(Delivered by **S.MANIKUMAR, J.**)

Review Application has been filed to review the judgment of the Division Bench of this court dated 17.10.2016, made in O.S.A. No.173 of 2012. Judgment sought to be reviewed, reads thus:

"On hearing the learned counsel for parties, it is agreed that as an interim arrangement, without prejudice to the rights and contentions of the parties, the existing pathway may be used by the appellants since the trial is also stated to be in advanced stage. If greater sense dawns on the parties to mutually resolve the controversy in a prudent commercial manner, it is always open for them to do so.

2. Original Side Appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs."

2. Original Side Appeal has been filed by the respondents 1 to 4 herein/appellants/plaintiffs against the order of the learned single Judge dated 26.03.2012 made in O.A. No.370 of 2011 in C.S. No.276 of 2011, by which the learned single Judge, declined to grant interim injunction restraining the review applicants from putting up further construction and from interfering with the peaceful enjoyment of the respondents 1 to 4 herein/appellants/plaintiffs of their right of access through passage measuring 30 feet wide and 700 feet long approximately and lying in the greater part of the lands belonging to Sri Muppilliamman Devasthanam in S. No.166, Villivakkam Village.

3. Respondents 1 to 4 herein are the plaintiffs. Their case is that, after the death of husband of the 1st respondent and father of respondents 2 to 4 herein, namely C.K.Rajaram, they became the owners of Madras Cane Factory and became the lessee in respect of 200 sq. meters of land along with the building and right of passage in the land belonging to Sri Muppilliamman Devasthanam, Villivakkam, Chennai lying adjoining northern side of 'A' Schedule property and the said passage is being used as access to gain entry into 'A' schedule property. The land is situated in S.No.166,

Ramakrishna Puram, Villivakkam Village from East to West Madras - Tiruvallur High Road on the northern side from time immemorial and the title of the temple is also recognised in C.S. No.330/1975 and the tenancy of the plaintiffs along with their right to use the passage is also recognised in O.S.A. No.213 of 1984.

4. The plaintiffs/respondents 1 to 4 acquired the right of passage in the suit pathway through grant, necessity, prescription and by way of accessory rights and that the same is sought to be interfered with by the employees of the defendants 4 and 5/ M/s.Doshi Developers and Builders Pvt. Ltd., who claimed to have purchased a portion of the land from the third defendant by putting up a compound wall adjacent to the passage, so as to obstruct the enjoyment of the same and in the event of their being allowed to put up a wall and in the event of the passage being obstructed, the plaintiffs have no other alternate access to reach their 'A' Schedule property.

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5. Claiming so, the plaintiffs have filed the suit for declaring their easementary right in respect of 'B' schedule passage to reach 'A' schedule property and for a permanent injunction against the

defendants 3 to 5 restraining them from interfering with their peaceful enjoyment of the passage, by putting up any construction in or near the passage or in any other manner. Along with the suit, plaintiffs have filed O.A. No.317 of 2011 for interim injunction.

6. The interim relief sought was seriously opposed by the review applicants by denying the ownership of the temple in respect of the suit property and by denying the existence of regular passage and existence of any easementary right, in favour of the plaintiffs or any one else, in respect of 'B' Schedule passage. According to the review applicants, the property measuring 7.476 acres comprised in S. No.166, Villivakkam village and other properties, originally belonged to one Rajarathina Mudaliar (since deceased) through public auction and his ownership in respect of the property covered under the sale certificate, was also confirmed by the assessment order, and in the Government and revenue records and the properties belonged to Rajarathina Mudaliar were enjoyed as joint family property by a Hindu Undivided Family consisting of himself and three sons of his brother. After the death of Rajarathina Mudaliar, his brother's sons were in possession and enjoyment of the same, and the legal heirs of one of the sons, and

other sons released their 2/3 undivided share in the land comprised in S. No.166, Villivakkam village, in favour of the third son, Ramachandran, who is the 3rd defendant, from whom the defendants 4 and 5 purchased property on 05.06.2008 by way of a registered sale deed and from the date of registration, the defendants 4 and 5 have become the absolute owners of the entire property comprised in S.No.166 and they have been in possession and enjoyment of the same, as absolute owners, without any right in whatsoever manner available to any other individual, in the whole or part of property. Review applicants also denied the existence of common passage in the land and the claim of right to passage, exercised upon the same by either the husband of the first respondent or the respondents 1 to 4 herein.

7. Upon considering the facts and circumstances of the case and after hearing the arguments of the parties, learned single Judge, passed the following order:

"17. Another factor, which cannot be excluded from appreciation is the failure to give full description of the suit passage and the lands adjoining the same. When the existence of passage is claimed in a portion of vast area i.e. out of 7.46 acres, as rightly argued by

the learned senior counsel for the contesting respondents, more accurate particulars are necessary to identify the same. Any decree that may be passed in respect of the subject matter of the lease shall be executable only upon the property which is identifiable and the absence of particulars such extent of right of passage and boundaries on all four sides cannot be slightly ignored.

18. Further, the learned senior counsel for the defendants has also drawn the attention of this court to the claim made in para 5 at page 5 of the plaint that the plaintiffs are the tenants of the portion of the land measuring 200 sq.m along with a building and right of passage from the year 1972 in the land in S. No.166 adjoining northern side of their own premises Madras Cane Factory. In the rough sketch filed in respect of existence of passage, the land through which the course of the passage runs through is not shown. It is also not shown as to whether the whole or part of the land having the existence of the passage lies within 200 sq.meters. The measurement of 200 sq.m of the demised land is not separately demarcated. Under such circumstances, it is seriously argued by the learned senior counsel for the contesting defendants that the right of pathway is claimed in the lands comprised in 200 sq.m. and such claim is hit by section 12 of Indian Easements Act.

19. The relevant provisions of the law under

Section 12 of the Act as pointed out by the learned senior counsel for the defendants, prohibits any claim by the lessee for easement in or over the property comprised in his lease for the beneficial enjoyment of other immovable property of his own. The reading of Section 12 would further reveals that the right of easement can be claimed only by the owner of the immovable property for the beneficial enjoyment of any property either in his possession or by any person. In this case, it is very peculiar that the tenant claims the right of easement in respect of the remaining lands belonging to the owner for the beneficial enjoyment of his own factory situated in the land demised to him. Such right is as rightly argued by the learned senior counsel for the defendants 4 and 5, prima facie shown to be barred under Section 12 of the Indian Easements Act.

20. In my considered view, viewing from any angle, no prima facie case is made out in respect of the plaintiffs' claim for any right of passage in suit 'B' schedule property, as such, no balance of convenience lies in favour of the plaintiffs in continuing the order of injunction.

21. In the result, the injunction application is dismissed."

8. Aggrieved over the order of the learned single judge, respondents 1 to 4 herein/plaintiffs have filed, O.S.A. No.173 of 2012.

9. Record of proceedings shows that on 22.09.2016, a Hon'ble Division Bench of this court, to which one of us is a party (Hon'ble Mr.Justice R.Mahadevan), has passed an interim order. Later, on 17.10.2016, when the OSA No.173 of 2012, came up for further hearing, the same Hon'ble Division Bench, passed the following order:

"On hearing the learned counsel for parties, it is agreed that as an interim arrangement, without prejudice to the rights and contentions of the parties, the existing pathway may be used by the appellants since the trial is also stated to be in advanced stage. If greater sense dawns on the parties to mutually resolve the controversy in a prudent commercial manner, it is always open for them to do so.

2. Original Side Appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs."

Thus, OSA No.173 of 2012, has been finally disposed of.

10. Said judgment is sought to be reviewed among other grounds inter alia that the judgment of the Hon'ble Division Bench is an error apparent on the face of record and clear case of mistake

of acceptance, to an agreement by the applicants. Mr.K.M.Vijayan, learned senior counsel submitted that the applicants having contested O.A. No.317 of 2011 at the initial stage and got the interim order vacated, it is an error apparent on the face of record, to state that the respondents in O.S.A. No.173 of 2012/applicants herein, had given up their right by way of an interim arrangement, in the absence of oral or any written agreement. He further submitted that in the absence of any prima facie case being made out for existence of a pathway, after 25 years, such a right cannot emanate from the disposal of O.S.A. No.173 of 2012 and that the same will prejudice the rights of the parties. He also submitted that before the learned single Judge, it was contended that there is no passage, in the land, as claimed by the appellants in O.S.A. No.173 of 2012, and hence existence of pathway can never be accepted by the review applicants.

11. Learned senior counsel further submitted that the learned single Judge has clearly emphasised that there is no demarcation of passage in the land and clear description of the property is not mentioned and that therefore, the claim for passage will never arise.

12. Review applicants have further averred that when the respondents have not established a prima facie case for existence of a passage, and having held that parties have to establish their rights before the trial court, as an interim measure, the Hon'ble Division Bench, held that the existing passage can be used, which finding is contradictory.

13. According to the learned senior counsel, existence of a passage is a matter, which has to be proved by evidence before the trial court and any finding that the respondents 1 to 4 herein, can use an existing pathway would subvert the course of law, and the same will have a direct impact in the trial. Thus, learned senior counsel would harp on the usage of the word "existing" in the judgment made in O.S.A. No.173 of 2012 dated 17.10.2016, which according to him, would make the trial infructuous and redundant.

14. It is also his submission that only after the receipt of the judgment in O.S.A. No.173 of 2012 dated 17.10.2016, the review applicants came to know that the Hon'ble Division Bench has used the expression "in agreement" and "existing" pathway and hence the instant review application, to correct the error.

15. Though no notice was ordered in the Review Application, Mr.Navin Kumar, submitted that, at the time when O.S.A. No.173 of 2012, was heard, photographs of the site were produced, usage of the pathway to the Madras Cane Factory was shown, and as an interim arrangement, final order came to be passed, in agreement, with all parties concerned.

16. When attention of Mr.K.M.Vijayan, learned senior counsel was invited to the earlier order dated 15.02.2013, for mediation, learned senior counsel, refuted that the review applicants were not ready for mediation and it was the plaintiffs/respondents 1 to 4 herein and the third defendant, who opted for mediation.

17. Heard the submissions of the learned senior counsel for the review applicants and perused the entire materials available on record.

18. As stated supra, when O.S.A. No.173 of 2012, came up for hearing on 22.09.2016, the Hon'ble Division Bench has passed the following order:

"We are informed that the third respondent /

third defendant passed away couple of years ago. Legal heirs have not been brought on record.

2.Learned counsel appearing for the appellants states that the only controversy in the suit is applying the Doctrine of Necessity for access to their property through the property of respondents 3 to 5 by referring to page 19 of the typed set of documents. Learned counsel appearing for the fourth and fifth respondents states that in order to resolve the controversy, in the mediation process, an offer was made to the appellants through the third respondent (then alive) where access would have been provided to the appellants to the Madras Cane Factory from the same Madras-Tiruvallur High Road, not as per the passage shown in the plan, but through a portion of the land owned by the third respondent.

3.Learned counsel for the appellants states that as long some access is available, they are not insistent on the passage from what they claim to be the existing passage.

4.In order to further explore the possibility of resolving this issue, learned counsel for parties will obtain their requisite instructions. Further, the appellants have to bring on record the legal heirs of the third respondent.

5.List for directions on 17.10.2016.

6.We make it clear since the trial is stated to

be in progress, the same is not to be interrupted by pendency of the present appeal."

19. Later, on 17.10.2016, O.S.A. No.173 of 2012, came to finally disposed of as hereunder. At the risk of repetition, the same is reproduced.

"On hearing the learned counsel for parties, it is agreed that as an interim arrangement, without prejudice to the rights and contentions of the parties, the existing pathway may be used by the appellants since the trial is also stated to be in advanced stage. If greater sense dawns on the parties to mutually resolve the controversy in a prudent commercial manner, it is always open for them to do so.

2. Original Side Appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs."

20. Controversy revolves around usage of a pathway, as access to Madras Cane Factory, owned by the respondents 1 to 4 herein/appellants/plaintiffs. Record of proceedings shows that there has been a mediation to settle the dispute. Whether it was at the instance of the review applicants or not, mediation report dated 25.02.2013 indicates that, there was representation on behalf of the review applicants/respondents 4 and 5 in O.S.A. No.173 of 2012. Reading of the order dated 22.09.2016, indicates that in the mediation, an offer was made to the appellants in O.S.A. No.173 of

2012 through the third defendant (then alive), where access would have been provided to the appellants in O.S.A. No.173 of 2012 to Madras Cane Factory from Madras - Tiruvallur Road, and it is the submission of the review applicants that the said passage is not, as per the plan, but through a portion of the land owned by the third defendant. Ownership of the land and existence of pathway is disputed. But, the respondents have confined to access to Madras Cane Factory, and not insisted on the passage, what they claimed, as existing passage.

21. The words "existing passage", have been used in the earlier order dated 22.09.2016. Subsequently, on 17.10.2016, when O.S.A. No.173 of 2012 was finally disposed of, taking note of the fact, that at that time, trial was in the advanced stage, as an interim arrangement, and without prejudice to the rights and contentions of the parties, the Hon'ble Division Bench, has ordered that the existing pathway may be used by the appellants in O.S.A. No.173 of 2012/respondents 1 to 4 herein.

22. According to the learned senior counsel, the word "existing" in the order dated 17.10.2016 in O.S.A. No.173 of 2012,

a finding recorded by the Hon'ble Division Bench, would have an impact in the final decision of the suit, particularly, when a learned single Judge, has categorically held that no specific details have been given in O.A. No.370 of 2011.

23. True that, easementary right, claimed against the review applicants, has to be proved by evidence. Whether such passage claimed, falls within the land, said to be owned by the review applicants or HR&CE, as the case may be, is a matter to be considered at the time of trial. But, it is the case of the plaintiffs/respondents 1 to 4, that there is a passage to Madras Cane Factory from Madras - Tiruvallur Road. In that context, the usage of the word, existing pathway, cannot be construed that the Hon'ble Division Bench has concluded against the review applicants. At best, it can only mean, that whatever passage, if any used by the respondents to have access to the Madras Cane Factory, Madras - Tiruvallur Road, the same be construed as an interim arrangement.

24. On 22.09.2016, learned counsel for the appellants in O.S.A. No.173 of 2012, has submitted that as long as some access

is available, they are not insistent on the passage from what they claim to be the existing passage. Thus reading of the order shows that the appellants in O.S.A. No.173 of 2012, have submitted that there should be a pathway, to have access to Madras Cane Factory. Contention of the respondents 1 to 4 in the review application, that when O.S.A. No.173 of 2012 came up for further hearing on 17.10.2016, photographs shown to this court, is not denied.

25. Though Mr.K.M.Vijayan, learned senior counsel submitted that only after seeing the judgment in O.S.A. No.173 of 2012 dated 17.10.2016, the review applicants came to know that the said judgment has been passed, as if there was an agreement by all parties concerned, which the review applicants deny, we are not inclined to accept the said submission, for the reason that the contention of the respondents 1 to 4 herein/appellants in O.S.A. No.173 of 2012 that at the time of hearing of O.S.A. No.173 of 2012, photographs were produced and only after hearing the parties, O.S.A. No.173 of 2012, was finally disposed of, is not disputed.

26. In the light of the above, we are not inclined to review the judgment made in O.S.A. No.173 of 2012 dated 17.10.2016. Accordingly, Review Application No.41 of 2017 is dismissed. No costs.

27. After the delivery of the order in the review application, Mr.K.M.Vijayan, learned Senior Counsel, appearing for the review applicants submitted that recording of evidence may be expedited and completed within two months. Mr.M.Naveen Kumar, learned counsel appearing for the respondent, has no objection for the request being granted.

28. Hence, Master is directed to expedite and complete the process of recording of evidence, within two months, from the date of receipt of a copy of this order. Therefore, Registry is directed to place the same, before the concerned court.

(S.M.K., J.) (R.M.D., J.)
23.02.2018

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Index : Yes/No
Internet : Yes/No

**S.MANIKUMAR, J.
AND
R.MAHADEVAN, J.**



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