

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :18.01.2019

Pronounced on :01.02.2019

Coram:

The Honourable Dr.Justice G.JAYACHANDRAN

Second Appeal No.745 of 2004

and

C.M.P.No.5857 of 2004

Smt.Jasmine Ennasi

.. Appellant/2nd defendant

/versus/

1.Thaiyalnayagi Ammal

...first respondent/
1st defendant

2.Ellammal

3.Jayalakshmi

4.Elangovan

5.C.Gajendran

6.Indirani

7.C.Jayapal

8.Bhuvaneswari

9.C.Jayasankar

... Respondents 2 to 9/

LRS of the plaintiffs 3 to 10

Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 28.08.2003 in A.S.No.18 of 1999 on the file of IV Additional Judge, City Civil Court, Madras, confirming the judgment and decree dated 14.03.1997 in O.S.No.2075 of 1987 on the file of XVII Assistant Judge, City Civil Court, Madras.

For Appellant :Mr.P.B.Ramanujam

For Respondents :Mr.Ashok Menon for

M/s Menon and Goklaney for R2,
R4, R5, R7, R8 and R9

Not ready notice - R1,R3 and R6

J U D G M E N T

The second defendant in the suit is the appellant. Against the concurrent finding of the Courts below, the present second appeal has been preferred.

2. The suit is in respect of pathway measuring North to South 4 feet and East to West 4 feet and further North to South 6.6 feet and East to West 56.6 feet, total extent of 385 sq.ft. in R.S.No.269/1, Door No.19 (known as Plot No.51), Hyder Garden II Street, cutting Krishnadoss Road, Perambur Barracks, Madras 600 012. The suit filed for declaration of Easementary Right of pathway, Mandatory Injunction to remove the wall constructed in the said passage and for Permanent Injunction not to put up further construction in the said passage.

3. The case of the plaintiff S.Chinnakolandai is that the entire extent of the plot bearing No.51, Hyder Garden II Street, Cutting Krishnadoss Road, Perambur Barracks, Madras is 1 ground and 894 sq.ft. Originally, the land was owned by Mrs.Safoora bi, who sold the property to Mr.Sambantha Mudaliar on 21.01.1960. Sambantha Mudaliar constructed a residential house in the back portion of the said plot lying on the west. During the life time of Sambantha Mudaliar, after retaining the house at the back portion of the plot No.51 measuring 1550 sq.ft., he handed over the vacant site of the front portion lying on the east measuring approximately 1260 sq.ft to the Cooks Road Depressed Classes Co-operative House Site Society Limited (hereinafter referred to as "the Society"). Later, in the year 1965, Sambantha Mudaliar received back an extent of 886 sq.ft in the front vacant portion of plot No.51 from the Society. Further, an extent of 385 sq.ft was left by the Society as a common passage for the beneficial use of the front and back portion land owners.

4. After the demise of Sambantha Mudaliar in the year 1967, his wife of Thaiyanayaki Ammal started constructing a house on the front portion of the plot. To meet out the expenses, she sold the back portion of the said plot to the plaintiff on 15.12.1976, wherein to have access to the road an area by $6\frac{1}{2} \times 56\frac{1}{2}$ feet left as a 'common passage' for the beneficial use of front and back portion owners. The said passage is in use ever since Sambantha Mudaliar purchased the property in the year 1960 and the plaintiff continued to enjoy the passage from the date of his purchase in the year 1976. The said passage is the subject matter of the suit morefully described in "C" schedule of the plaint.

5. When the plaintiff came to know that the first defendant is intended to sell her property lying on the front portion of the plot No.51 to the second defendant, the plaintiff issued notice to the defendants on 31.10.1979 indicating his right in the common passage. However, despite the notice, the second defendant purchased the front portion of the plot No.51. In the year 1982, she attempted to put up construction in the common passage claiming that she has purchased the property from Thaiyanayaki Ammal including the portion earmarked as a common passage.

6. Hence, the plaintiff earlier filed a suit for declaration that the plaintiff is entitled to free and uninterrupted use of the common passage and consequential relief of injunction restraining the second defendant from putting up any construction of any sort in the passage. The said suit in O.S.No.2906 of 1982 while pending on the file of the City Civil Court, Chennai, the second defendant completed the construction of the wall in the passage reducing width of the passage by 3 feet 3 inches. So, the prayer seeking mandatory injunction for demolition of wall was made by way of an amendment.

7. The suit in O.S.No.2906 of 1982 was decreed on 10.12.1985. However, it was reversed in the appeal preferred by the second defendant in A.S.No.282 of 1986. In the appeal, the appellate Court though dismissed the suit, it left open the question of easement of necessity in respect of common passage. Therefore, the present suit which is the subject matter of this appeal filed for declaration of easementary right in respect of the common passage and for mandatory injunction to demolish the wall put up in the passage.

8. The suit was contested by the second defendant on the ground that the relief sought for in the present suit has already been agitated in O.S.No.2906 of 1982 and negatived by the Courts. Therefore, the present suit for the same relief is not sustainable in law. It is also contented that in the sale deed dated 15.12.1976 relied by the plaintiff, this defendant is not a party. Therefore, the recitals found in the said sale deed will not bind the defendant. The common passage referred in the title deed of the plaintiff, admittedly, does not belong to the vendor of the plaintiff. It is owned by the Society. Therefore, no right can be conferred by Thaiyanayaki Ammal to the plaintiff in respect of the passage to which Thaiyanayaki Ammal had no right or title to convey. The second defendant purchased the property from the Society which had title over the suit land. In her sale deed, no passage has been provided to the plaintiff. Therefore, the plaintiff is neither entitled for easement by prescription nor easement by grant. The claim of the plaintiff

based on necessity is not an absolute right. The second defendant has completed the construction on the 'C' schedule property in 3 feet leaving 3 ½ feet to the plaintiff to have access to his property. The lay out of the plan approved by the Government does not provide any passage to the defendant in plot No.51. Whiles, the suit is liable to be dismissed.

9. Based on the pleadings, the trial Court has framed the following issues:

1. Whether the plaintiff is entitled for easementary right in respect of C schedule property?

2. Whether the plaintiff is entitled for mandatory injunction to demolish the construction put up in the C schedule property?

3. Whether the plaintiff is entitled for permanent injunction?

4. To what relief?

10. Three witnesses were examined in support of the plaintiff and two witnesses were examined in support of the defendants. Exs.A1 to A26 were marked on behalf of the plaintiff. Exs.B1 to B12 were marked on behalf of the defendants. Advocate Commissioner's report and plan were marked as Exs.C1 and C2.

11. The trial Court held that earlier suit in O.S.No.2906 of 1985 filed by the plaintiff will not be a bar for initiating the present suit claiming right of passage as a easementary right and held that, the right of easement referred in 1976 sale deed executed in favour of the plaintiff was in continuous uninterrupted enjoyment by the owners since 1960. Therefore, the plaintiff has right of easement by prescription. Relying upon the evidence of the parties and the admission of the defendants, the trial Court held that by necessity the plaintiff's right over the pathway is essential to reach the street. The trial Court also held in favour of the plaintiff regarding the right of easement by grant by saying that the words "common passage" used in the sale deed of the plaintiff is to make the passage available of both the owners of rear and front portions. Therefore, the right of passage has to be presumed as easement right by grant. The trial Court has further held that the defendant has occupied 3 feet 3 inches of the lane and put up construction by narrowing down the width of the lane. Therefore, relying upon the Commissioner's report and plan and photographs, the trial Court held that reduced breath of the lane by 3 feet 3 inches will cause inconvenience to the

plaintiff and it amounts to interference with the plaintiff's peaceful enjoyment of their easementary right of passage.

12. Aggrieved by that, the second defendant has preferred A.S.No.18 of 1999 on the file of the Additional Judge, City Civil Court, Chennai. The lower appellate Court, after re-appreciation of evidence, has confirmed the decree and judgment passed by the trial Court.

13. Hence, this second. The following Substantial Questions of Law has been formulated by this Court:-

1. Whether the plaintiff is entitled to easement of necessity under Sections 13 to 15 of the Easement Act without fulfilling/proving the essential ingredients of the provisions?

2. Whether the findings of the Appellate Court in A.S.No.286/1986 stating that the plaintiff herein had given up his right of easement by not pleading in the suit are binding on the plaintiff and also estopped the plaintiff from re-opening the same again?

14. The learned counsel appearing for the appellant would contend that the Courts below failed to see that the land in dispute alleged to be a common passage could not have been sold by the first defendant to the second defendant for the reason that the said land was acquired prior to 1960 by the Government and handed over to the Society. The Society in turn got approval from the local authority for the lay out and sold the plots to various persons including the appellant. The lay out does not indicate any common passage in the plot No.51. While so, the Courts below have considered the document dated 15.12.1976 marked as Ex.A3 alleged to have been executed by Thaiyanayaki Ammal, W/o Sambantha Mudaliar in favour of the plaintiff. When Thaiyanayaki Ammal herself has no right over the property after completion of acquisition proceedings, the alienation of the property by Thaiyanayaki Ammal is invalid.

15. It is further submitted by the learned counsel appearing for the appellant that in any event, the appellant and the respondents have not purchased the property from the common owner to rely upon Sections 13 of the Indian Easements Act, 1882. While the respondents alleged to have purchased the property from Thaiyanayaki Ammal, who had no right to alienate, on the date of his purchase, the appellant herein had got property measuring 1260 sq.ft. from the Society under sale deed dated 16.06.1980 marked as Ex.B1. Referring the lay out, which has been annexed to Ex.B1, the learned counsel appearing for the appellant would submit that neither the sale deed nor the

approved plan given by the local authority disclose anything about the common passage. So, the finding of the Courts below that the respondents have entitled to easement of necessity and grant under Sections 13 to 15 of Indian Easement Act, 1882 is unsustainable.

16. The learned counsel would further contend that in the earlier round of litigation, the respondents herein claimed right over the suit property as common owners along with the vendor of the appellant. Now, in the second round of litigation, contra to the earlier plea, they claim right of passage by prescription, by grant and necessity. The plea in the present suit is diagonally opposite to the plea raised and lost by the plaintiff in the earlier suit.

17. The findings of the Courts below ex facie indicate non application of mind, since plea of easement by prescription and easement by grant are mutually exclusive. However, the Courts below have granted the relief on both grounds, apart from the easement of necessity. As against the claim of passage in 6 ½ feet x 56½ feet length land, the Commissioner has given a report that there is a lane of 3 feet 3 inches up the distance of 32 feet from the entrance of the street and thereafter, the breadth expands to 6 ½ feet. In case of easement of necessity in the said lane, this portion alone can be used by the respondents for ingress and exit. For their access to the street, they cannot claim for larger extent of land on the ground of inadequacy.

18. Relying upon the judgment of the Kerala High Court rendered in *Devaki v. K. Joshi*, dated 04.01.2011, reported in *Indiankanoon*, the counsel emphasised that claim of easement of necessity and prescription cannot co-exist. In the said judgment, the Kerala High Court has observed as below:

"19. It, therefore, follows that a claim of easement of necessity and prescription cannot co-exist. The origin of easement of necessity is on severance of tenements, while easement by prescription originates from express or implied grant. True, easement of necessity is also an implied grant. But that is a statutory right granted to the owner of the dominant tenement. The violation of the servient tenement holder may not be very relevant in the case of easement of necessity except for setting out the pathway which the dominant tenement holder is entitled to make use of. If one goes deep into the matter, in cases where both easement of necessity and prescription are claimed, it can be seen that

easement by prescription commences only when easement of whatever that be, the trial Court was not justified in holding that the plaintiffs are entitled to have a right of use the way both by easement of necessity and prescription."

19. As far as the Easement by grant, the learned counsel appearing for the appellant relies upon the judgment of the Hon'ble Supreme Court in Hero Vinoth (Minor) v. Seshammal reported in (2006)5 Supreme Court Cases 545, wherein the Hon'ble Supreme Court has held as below:

"29.....An easement of necessity is one which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but, it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternative access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily recognised in Section 41. Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant by Section 41 is not applicable in such case."

20. Per contra, the learned counsel appearing for the respondents, who are the legal representatives of the plaintiff would submit that the entire property, which is described under Schedule A, B and C in the plaint, originally owned by Sambantha Mudaliar. He constructed a house on the rear side of the property during his life time. After his demise, his wife Thaiyanayaki Ammal started constructing house on the front portion. To complete the construction she sold the rear portion to the plaintiff. At the time of selling the property, she has left common passage measuring 6 ½ feet x 56 ½ feet on the West of her portion. The recitals of Ex.A3 conferring the right of

way through the common passage cannot be taken away by the subsequent purchaser of the land from his vendor.

21. The learned counsel appearing for the contesting respondents would further submit that Ex.B1-sale deed executed in favour of the appellant by the Society was by consent of Thaiyanayaki Ammal, which could be seen from Ex.B2 executed by Thaiyanayaki ammal in favour of Mrs.Mathecial Jashmine, W/o S.Innasi Fernando. In the said document itself, Thaiyanayaki Ammal has clearly mentioned that she has given consent to the Society to transfer the plot in favour of Mrs.Mathecial Jashmine, who is none other than the appellant. Further, Ex.B4-Resolution of the Cooks Road Depressed Classes Co-operative House Site Society Limited also will reveal that only based on the consent letter given by Thaiyanayaki Ammal for transfer of plot, the Society has registered the plot bearing No.51 to an extent of 1260 sq.ft. in the name of the appellant. The learned counsel would also point out that even in the sale deed relied on by the appellant, respondents are shown as the owners of the western boundary land. Therefore, by grant as found in Ex.A3 sale deed and also based on the necessity, the pathway as mentioned in Ex.A3 is to be left open for the respondents to have ingress and egress. Therefore, there is no error in the finding of the Courts below to interfere.

22. In support of his submission, the learned counsel appearing for the respondents would submit that the right of easement for passage granted by the Courts below is based on the absolute necessity and not as convenient necessity. He relies on *Murugesu Moopanar v. Sivagnana Mudaliar* reported in 1997 (1) CTC 348, wherein the learned Judge has extracted the commentary of BLB Katiyar, in his book "Easements and Licences" stating that the right of way as easement of necessity implies that there is no other means of access, however, inconvenient. When the dominant tenement cannot be enjoyed without imposing burden on the servient tenement, then the question of easement of necessity arises. If an alternative way exists, no question of necessity arises. The learned counsel submit that there is no other way to have access to the respondents' land except 'C' schedule property. Hence, the decree passed by the Court below granting easementary right based on necessity is unassailable.

23. Regarding the claim easement of grant, the learned counsel would also submit that the recital in Ex.A3 suffice to hold that there is a grant of easement in favour of the respondents.

24. Having considered the rival submissions and the judgment relied on by the respective counsels, the legal and factual position in this case goes to show that when the respondents purchased the land from Thaiyanayaki Ammal under Ex.A3 in the year 1976, the acquisition proceedings was under

progress, but not completed. When the acquisition proceedings got completed, out of 1 ground 894 sq.ft at S.No.269/1 situated at Hyder Garden II Street land purchased by Sambanda Mudaliar under sale deed dated 21.01.1960, the Society has made a lay out and plot No.51 has been identified as an area acquired from Thaiyanayagi ammal, W/o Sambanda Mudaliar. In Exs.B1 and B2, which are relied on by the appellant, western boundary is shown as property held by the respondents. Therefore, it is clear as crystal that from out of 1 ground and 894 sq.ft of land held by Sambanda Mudaliar, on his demise, it passed on to Thaiyanayagi ammal. Out of one ground and 894 sq.ft., the Society had only an extent of 1260sq.ft. In Ex.B1, the society has recognised the title of the respondents herein on the western portion. Even if the sale deed relied by the appellant does not disclose the existence of common pathway, the vendor of the appellant and the respondents are one and the same. The appellant cannot say that he purchased the property only from the Society and not from Thaiyanayagi Ammal. As pointed out earlier Ex.B4 Resolution of the Society clearly discloses the fact that the appellant got the sale deed in her favour from the Society only on the consent letter given by Thaiyanayagi Ammal. So, Section 13 of the Indian Easement Act, 1882 squarely applies to the facts of the case.

"13. Easement of necessity and quasi-easements- Where one person transfers or bequeaths immovable property to another-

(a)if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b)if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or

(c)if an easement in the subject of the transfer or bequest is necessary, for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d)if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such

easement.

Where a partition is made of the joint property of several persons,-

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (a), (c) and (e), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee."

25. As per Section 13 of the Indian Easements Act, 1882 which is extracted above, the right of passage given to the transferor cannot be taken away by the transferee by the subsequent sale deed. The grant of passage through "C" schedule given under Ex.A3 will be intact and cannot be infringed upon by the subsequent purchaser.

26. Further, in *Formento Resorts and Hotels Limited and another v. Minguet Martins and others* reported in (2009) 3 SCC 571, the Hon'ble Supreme Court has held that when the land was sought to be acquired for the public purpose, the right of the public having access through the land acquired cannot be taken away. The Hon'ble Supreme Court in para 69 in the said judgment, had held:

"69. Although, no exception can be taken to the appellants coming forward with such an argument despite the fact that in terms of Clause 4(ix) of the agreement which has, by virtue of Section 42 of the 1894 Act, the force of law, they are required to maintain public access to the beach, we are quite surprised with the stance adopted by the State Government. Admittedly, the agreement was executed by appellant 1 under Section 41 of the 1894 Act in the backdrop of acquisition of Survey No.803 (new No.246/2) and survey No.804

(new No.245/2). It is also not in dispute that in terms of Clause 4(ix), appellant 1 is required to maintain access to the beach without any obstruction. This shows that despite Section 16 of the 1894 Act, the parties had consciously decided to protect the traditional right of the members of public to go to the beach by using the existing pathway through the acquired land. Both the appellants and the State functionaries knew that there exists public access to the beach through Survey No.803(new No.246/2), that members of public were using the same since time immemorial and that it was necessary to protect that right. Therefore, it is not possible to find any fault with the view taken by the High Court that access to the beach is not an encumbrance and in any case, the traditional pathway available to the public for going to the beach through Survey No.803 (new No.246/2) cannot be treated as having been extinguished in the face of specific provision contained in the agreement which is statutory in character." (emphasis added)

27. In this case also, recognising the possession of the respondents on the rear side of the plot No.51, the right of passage vested with the respondents as per the sale deed 1976 has to be protected and it will not get extinguished merely because of the acquisition proceedings as contended by the learned counsel appearing for the appellant.

28. In almost identical facts of the case in H.P.State Electricity Board and others v. Shiv K.Sharma and others reported in (2005)2 SCC 164, wherein the State Government acquired larger extent of land for the purpose of electrical substation. A part of his land was earlier sold by the land owner with the benefit of access through the land later acquired by the State, when that access was blocked by the electricity Department by fencing their land and obstructing the access, the Hon'ble Supreme Court has held as follows:

"9. The High Court considered several judgments cited before it and drew a distinction between an easement of an ordinary nature in respect of which compensation could have been claimed in the land acquisition proceedings and an easement of necessity like a right of passage and held that right of passage by way of necessity, as enjoyed by the respondent-plaintiffs over the land of Rikhi

Ram and now acquired by the appellant-defendants, was not extinguished by reason of acquisition."

29. Therefore, by necessity, the respondents are entitled for passage through C schedule property. The extent of passage has already been prescribed under Ex.A3. The appellant, who is the subsequent purchaser of the servient tenement cannot diminish the right of access of the dominant tenement merely because his sale deed does not disclose about the passage. Though the easement by prescription, which was considered in favour of the respondents by the Courts below may not be correct, since the respondents have not proved the existence of passage prior to his purchase in the year 1974, however, having proved his right of easement by grant and necessity, the finding of the Courts below needs no interference. Hence, the first Substantial Questions of Law is answered against the appellant.

30. The learned counsel appearing for the appellant would submit that in the earlier suit in O.S.No. 2906 of 1982 filed by the respondents herein sought for declaration based on common ownership failed. Therefore, for the same cause of action, he cannot seek relief claiming easementary right over the suit property. Further, he would contend that if at all there is any easement of necessity vest to the respondents land, the existing lane with 3 feet and 3 inches breadth is suffice. It is not the adequacy or inadequacy of passage to be taken into consideration but only imminent necessity to have passage has to be considered when the Court grants right of easement on necessity. Therefore, he would submit that the easement of necessity means an easement without which the property cannot be used at all. Mere convenience is not the test of an easement of necessity.

31. To buttress his submission, the learned counsel appearing for the appellant relied upon the following judgments:

(1)The judgment of the Hon'ble Supreme Court in Hero Vinoth (Minor) v. Seshammal reported in (2006) 5 SCC 545

(2)The judgment of the Rajasthan High Court in Hari Ram v. Lichmaniya and others reported in AIR 2003 Raj 319

(3)The judgment of the Kerala High Court in Devaki v. K.Joshi dated 04.01.2011.

(4)The judgment of Madras High Court in Natesa Gounder v. Raja gounder and others dated 01.10.2012.

32. Per contra, the learned counsel appearing for the respondents would submit that in the earlier suit in O.S.No.2906 of 1982 the respondents herein sought for declaration that they are entitled to free and uninterrupted passage right upon "C" schedule property and consequential injunction restraining the present appellant from putting up any construction in the property and for mandatory injunction to demolish the wall constructed by the appellant herein. In the said suit, though the trial Court allowed the relief sought for by the respondents, on appeal, the first appellate Court admitting the respondents right of passage to the suit property allowed the appeal on a technical ground that the concept of easementary right cannot go with the claim of title and both are contrary to each other. A relief claimed based on the title is totally inconsistent with the relief claimed on the basis of easement. Having filed the suit based on the title and failed to prove title, the relief of declaration as prayed for in the plaint cannot be granted. However, the lower appellate Court left open the question whether the respondent herein is entitled to a pathway through the plaint C schedule property as easement of necessity. Aggrieved by this, the respondents herein preferred the second appeal and brought to the notice of this Court in S.A.No.1396 of 1987 that a fresh suit in O.S.No.2075 of 1986 has been filed seeking easementary right over the suit property. After recording the same, the Hon'ble High Court vide order dated 12.07.1979 gave liberty to the respondents to urge all the contentions regarding the claim of easement put forth by the plaintiff in O.S.No.2075 of 1987. Therefore, the contention of the learned counsel appearing for the appellant that the disposal of the earlier suit and the finding of the appellate Court in A.S.No.282 of 1986 will not estop the respondents pursuing this suit.

33. Further, the learned counsel appearing for the respondents also pointed out that the lower appellate Court, in the earlier round of litigation while disposing the appeal in A.S.No.282 of 1986, has clearly observed that the question whether the respondents are entitled to the pathway through the plaint C schedule property as an easement of necessity, is left open. The right has been reaffirmed by this Court in S.A.No.1396 of 1987.

34. To buttress his submission, he circulated the judgment passed by this Court in S.A.No.1396 of 1987 and S.A.No.1396 of 1987 which arose out of the earlier round of litigation in O.S.No.2906 of 1982. The lower appellate Judge in A.S.No.282 of 1986 has concluded his judgment as below:

"16. In the result, the judgment and decree of the lower Court are set aside and the suit(O.S.No.2906 of 1982) is

dismissed. This appeal is allowed with costs in both Courts. Having regard to the fact and circumstances of the case, the question whether the respondent is entitled to a path way through the plaint C schedule property as an easement or necessity is left open." (emphasis added)

35. On appeal, this Court in S.A.No.1396 of 1987 has held as below:

"It will be open to the appellant to put forward all the contentions, which are available to him under law as regards his claim of easementary right over the suit property in O.S.No.2075 of 1987, which is stated to be pending in the Court of the XVI Assistant Judge, City Civil Court, Madras."

36. In the light of the observations made by the first appellate Court and second appellate Court in respect of the relief sought in the subsequent suit, the second Substantial Questions of Law is also unsustainable and held against the appellant. As a result, this Second Appeal is liable to be dismissed.

37. Accordingly, the Second Appeal is dismissed. The judgments and decrees of the Courts below are hereby confirmed. No costs. Consequently, connected C.M.P.No.5857 of 2004 is also dismissed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1.IV Additional Judge, City Civil Court, Madras.

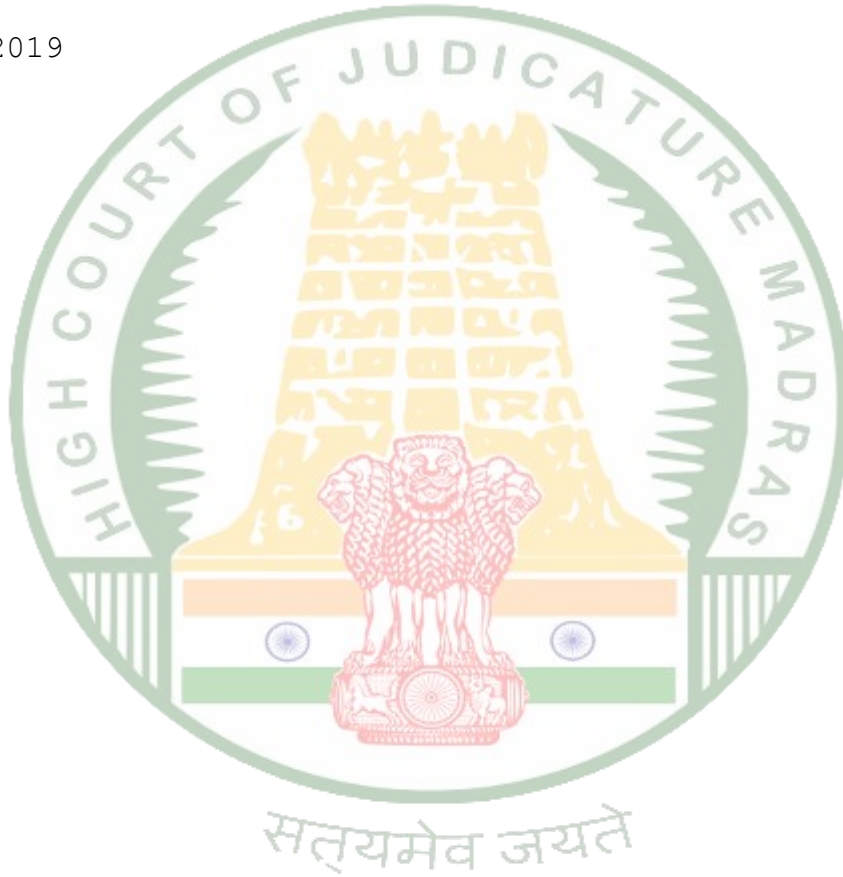
2.XVII Assistant Judge, City Civil Court, Madras.

3.The Section Officer,
VR Section, Madras High Court,
Chennai

+2cc to Mr.Ashok Menon, Advocate sr.no.9854
+1cc to Mr.P.B.Ramanujam, Advocate sr.no.8853

S.A.No.745 of 2004
and
C.M.P.No.5857 of 2004

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