



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.03.2019

PRONOUNCED ON : 15.04.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.Nos.1400 of 2005 & 130 of 2007
and

C.M.P. Nos.5660 of 2019 & 18498 of 2005 &
C.M.P. No.362 of 2007

S.A.NO.1400 OF 2005

- 1.D.S.Jagannathan
- 2.Shankar Jagannathan
- 3.Sridhar Jagannathan
- 4.Minor Shalini (rep. by father and natural guardian, 1st appellant)

...Appellants /
Plaintiff 2 to 5

Vs.

1. The commissioner
Hindu Religious and Charitable Endowment
Department
Nungambakkam High Road, Chennai 600 034.
2. The Assistant Commissioner
Hindu Religious and Charitable
Endowment Department,
Coimbatore
3. The Executive Officer
A/M. Visweswaraswami and
Veeraraghavaperumal Temple
Tiruppur.

...Respondents
/Defendant

S.A.NO. 130 of 2007

The Executive Officer
A/M. Visweswaraswami and
Veeraraghavaperumal Temple
Tiruppur.

...Appellant /
3rd Defendant



Vs.

1. T.S.Jagannathan
2. Shankar Jagannathan
3. Sridhar Jagannathan
4. Minor Shalini (rep. by father and natural guardian, 1st appellant) ..Respondents 1 to 4 / Plaintiffs
5. The commissioner
Hindu Religious and Charitable Endowment
Department, Chennai
6. The Assistant commissioner
Hindu Religious and Charitable Endowment
Department, Chennai ..Respondents 5 and 6/
Defendants 1 and 2

Prayer in S.A.No.1400/2005:

Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 29.10.2004 made in A.S.No.50 of 2003, on the file of the Subordinate Court, Tiruppur insofar as it is confirming the judgment and decree dated 28.02.2003 made in O.S.No.273 of 1996, on the file of the District Munsif Court at Tiruppur.

Prayer in S.A.No.130/2007:

Second Appeals filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 29.10.2004 made in A.S.No.50 of 2003, by the learned Subordinate Judge, Tiruppur reversing the Judgment and Decree dated 28.02.2003 made in O.S.No.273 of 1996, on the file of the District Munsif, Tiruppur.

S.A.NO.1400 OF 2005

For Appellants : Mr.V.Raghavachari

For Respondents: Mr.K.Ashok Kumar for R3
Mr.N.Manikandan, Govt. Advocate (CS)
for R1 and R2.

S.A.NO. 130 of 2007

For Appellant : Mr.K.Ashok Kumar

For Respondents: Mr.V.Raghavachari for R1
No appearance for R2 and R3. Set exparte.
Vide order dated 28.03.2019
Mr.N.Manikandan, Govt. Advocate (CS)
for R5 and R6.



COMMON JUDGMENT

The abovesaid second appeals are directed against the judgment and decree dated 29.10.2004 passed in A.S.No.50 of 2003 on the file of the Subordinate Court, Tiruppur, partly reversing the judgment and decree dated 28.02.2003 passed in O.S.No.273 of 1996, on the file of the District Munsif Court at Tiruppur.

2. The second appeal No. 1400 of 2005 has been admitted on the following substantial questions of law.

"1. Whether the plea of easement of necessity is contradictory of the plea of easement of prescription?

2. Whether the misconstruction by the Sub Court on the evidence of P.W.2 with regard to the word ",Ue;jhy;" does not vitiate the judgment altogether?

3. Whether the judgment of the courts below is not vitiated by their failure to consider the objections filed by the appellants to the commissioner's report?"

3. The second appeal No. 130 of 2007 has been admitted on the following substantial questions of law.

"1. Whether the relief can be granted by a court of law however limited it may be, to a person claiming legal rights under the Easement Act, 1882, after finding on facts that the person has failed miserably in his attempt to establish the claimed legal rights?

2. De hors the provisions of the Indian Easement Act, 1882, can any relief such as right of access be given to any person through or over property held by another entity?

3. Can the first appellate court disturb / modify a decree non suiting the plaintiffs without disturbing any of the findings or the consequent conclusions of the trial court?

4. Can the first appellate court being the last court on facts after having completely concurred with the trial court on all factual findings, disturb / modify the conclusion alone without holding that there is any legal



infirmity in the conclusion viz-a-viz the findings?

4. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

5. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

6. Suffice to state that the suit has been laid by the plaintiffs against the defendants claiming the reliefs of declaration and permanent injunction in respect of the suit property. In fact, it is only the third defendant who is contesting the case projected by the plaintiffs.

7. On a reading of the plaint, it is found that, according to the plaintiffs, they are the owners of the properties comprised in S.F.Nos.22/1 and 22/2 of Thottipalayam village. With reference to the abovesaid claim of the plaintiffs, there is no dispute between the parties. It is further seen that the plaintiffs, themselves, have admitted that the third defendant temple is the owner of the properties comprised in S.F.No.21. According to the plaintiffs, from Perumanallur-Tiruppur main road, a road branches towards east upto the plaintiffs' properties in S.F.Nos.22/1 and 22/2 measuring 30 feet breadth and 160 feet in length on the eastern side of the abovesaid main road and it is admitted by the plaintiffs that the abovesaid road lies in S.F.No.21/B belonging to the third defendant's temple and according to the plaintiffs, they and their predecessors in interest have been using the abovesaid road for gaining access to their properties from Perumanallur-Tiruppur main road for more than the statutory period and accordingly the plaintiffs have acquired the right of easement over the said road by way of prescription and also put forth by the plaintiffs that the abovesaid road is the only access to reach the properties from Perumanallur-Tiruppur main road, accordingly also have right of easement to the same as of necessity and while so, the third defendant, without any right or entitlement, attempted to block the plaintiffs' access to their properties through the abovesaid road by putting fencing etc., and accordingly it is stated by the plaintiffs that they had been necessitated to lay the suit for appropriate reliefs.

8. The third defendant resisted the plaintiffs' case contending that though the plaintiffs are the owners of S.F.Nos.22/1 and 22/2, it is put forth that the third defendant temple is the owner of the property comprised in S.F.No.21, which had been subsequently sub divided as S.F.Nos.21/A and 21/B and according to the third defendant S.F.Nos.22/1 and 22/2 are dry



and barren lands and only recently some constructions had been put up in the said properties and the plaintiffs had installed some machineries after completing the construction and denied the case of the plaintiffs that they are having access through the alleged suit road as described in the plaint and in the plaint plan branching of from Perumanallur-Tiruppur main road on the eastern side with measurements 30 feet breadth and 160 feet in length and according to the third defendant, no such road is in existence and further stated that when the lands belonging to the third defendant was lying fallow, occasionally some vehicles used to pass through the said properties belonging to the third defendant, but that cannot be claimed as a matter of right on the part of the plaintiffs to claim a pucca road or right of way in the property belonging to the third defendant's temple and accordingly denied the claim of the plaintiff that they had easementary right over the suit road lying in the third defendant's property by way of prescription as well as they are entitled to use the said road by way of necessity and accordingly contended that there is no cause of action for the plaintiffs and therefore, prayed for the dismissal of the plaintiffs' case.

9. Based on the materials projected, both oral and documentary, the trial court, on an appreciation of the same, was pleased to dismiss the plaintiffs' suit. Aggrieved over the same, the plaintiffs preferred the first appeal. The first appellate court also had, almost on all the points, concurred with the judgment and decree of the trial court, however, based on the commissioner's report and plan and on that footing proceeded to hold that the existence of pathway in the defendant's property cannot be ruled out and also noting that the plaintiffs need the said pathway for gaining access to their properties from Perumanallur-Tiruppur main road as a foot pathway, on that basis, proceeded to dispose of the appeal preferred by the plaintiffs by determining that the plaintiffs are entitled to use a lesser portion of the third defendant's property as the foot pathway for reaching their properties from Perumanallur-Tiruppur main road by way of prescriptive easementary right and accordingly partly reversed the judgment and decree of the trial court and accordingly disposed of the appeal preferred by the plaintiffs. Aggrieved over the abovesaid determination of the first appellate court, both the plaintiffs and the third defendant have come forward with the abovesaid independent appeals.

10. Though the plaintiffs would claim that they had been using the alleged road lying in the defendant's property measuring 30 feet breadth and 160 feet in length for more than the statutory period from the days of their ancestors for gaining access to their properties in S.F. Nos.22/1 and 22/2 from Perumanallur-Tiruppur main road, as rightly determined by the



courts below, absolutely there is no valid and acceptable material projected on the part of the plaintiffs to hold that the plaintiffs and their predecessors in interest had been using the alleged road in the third defendant's property for gaining access to their properties beyond the statutory period. In this connection, as rightly found by the courts below, almost all the documents projected by the plaintiffs have emanated only after the institution of the suit and, in such view of the matter, on the basis of the title documents projected by the plaintiffs as well as on the mere fact that the plaintiffs had been granted water supply connection and EB service connection to their properties during 1992 and 1994, that alone, would not be the basis for holding that the plaintiffs and their ancestors had been using the third defendant's property as a road for gaining access to their properties beyond the statutory period and in such view of the matter, I do not find any valid reason to interfere with the abovesaid determination of the courts below that the plaintiffs have miserably failed to establish that they had been using the alleged road in the third defendant's property as described in the plaint for more than the prescribed period and therefore, the abovesaid relief sought for by the plaintiffs has been rightly turned down by the courts below.

11. However, it is found that the first appellate court, on the basis of the commissioner's report and plan, finding the availability of the existence of the pathway portion in the defendant's property enabling the plaintiffs to gain access to their properties and by determining that the plaintiffs would have been using the said pathway to reach their properties from the days of their ancestors by way of necessity, on that reasonings, the first appellate court had proceeded to grant the limited relief in favour of the plaintiffs holding that they are entitled to use a lesser portion in the defendant's property for gaining access to their properties. The abovesaid determination of the first appellate court does not merit acceptance. Admittedly, the portion in which the plaintiffs seek the reliefs prayed for in the suit lies in the property belonging to the third defendant's temple. Merely because, at some point of time, the property belonging to the third defendant had been used by the plaintiffs or their predecessors in interest one way or the other, that by alone, would not enable them to claim any right with reference to the same as per law. As rightly argued by the third defendant's counsel, when the properties belonging to the plaintiffs had remained barren and uncultivated and not put in use accordingly it is found that they would have gained access to the said properties through the defendant's property which was also vacant at that point of time. However, that cannot be claimed as a matter of right on the part of the plaintiffs that they have acquired the easementary right by way of prescription with reference to the same, particularly, when it is found that



the plaintiffs are having other access to reach their properties as noted by the advocate commissioner and put forth in his report and plan. On a perusal of the advocate commissioner's report and plan projected in the matter, it is found that the plaintiffs have other access to reach their properties as detailed in the commissioner's report and plan and in such view of the matter, to say that the plaintiffs require the portion of the third defendant's property for gaining access to their properties and as determined by the first appellate court, as a foot pathway, cannot, at all, be accepted, particularly, when the plaintiffs are found to have other access to reach their properties. Therefore, the determination of the first appellate court that the plaintiffs would require the third defendant's property as a foot pathway for gaining access to their properties by way easementary right by prescription, cannot, at all, be countenanced when the materials placed on record go to disclose that the plaintiffs have other access to their properties and in addition to that, when the plaintiffs have miserably failed to establish that they have prescribed the easementary right to the so called pathway in the third defendant's property.

12. As rightly put forth by the third defendant's counsel, on the basis of the photographs projected by the plaintiffs, we cannot determine that a pucca road portion is in existence in the defendant's property and that the plaintiffs are entitled, as a matter of right, to gain access through the same by way of the easementary right. When the existence of such road portion in the third defendant's property and the usage of the same by the plaintiffs and the predecessors in interest beyond the statutory period having been failed to be established by the plaintiffs and when the plaintiffs are found to have other access to reach their properties as could be seen from the commissioner's report and plan, in such view of the matter, merely because, at one point or the other, the plaintiffs had the casual access through the third defendant's property to reach their properties, that alone, would not confer them a valid right as per law and in such view of the matter, as put forth by the third defendant, the first appellate court has erred in granting the relief in favour of the plaintiffs by granting them the foot pathway right in the defendant's property to gain access to their properties as determined by it and the abovesaid determination of the first appellate court, cannot be legally sustained in any manner.

13. Though the plaintiffs and the third defendant preferred certain objections to the commissioner's report and plan, however, the fact remains that the plaintiffs are having access to their properties though the other access and there is no need on the part of the plaintiffs to seek approach through the defendant's property for ingress and egress to their properties and in such view of the matter, the occasional use of the



defendant's property for gaining access to the plaintiffs' properties, by itself, would not confer any valid right on the part of the plaintiffs to claim the same as per law that they had acquired easementary right over the same by prescription and the abovesaid position of law has not been correctly appreciated and determined by the first appellate court and in such view of the matter, the judgment and decree of the first appellate court granting the limited relief in favour of the plaintiffs in respect of the property belonging to the third defendant are liable to be set aside.

14. The substantial questions of law formulated in both the second appeals are accordingly answered against the plaintiffs and in favour of the third defendant .

15. Counsel for the plaintiffs in support of his contentions placed reliance upon the decision reported in (1993) 4 Supreme Court Cases 69 (M/s.Gobind Pershad Jagdish Pershad vs. New Delhi Municipal Committee) and the counsel for the third defendant in support of his contentions relied upon the decisions reported in (2006) 5 Supreme Court Cases 545 (Hero Vinoth (minor) vs. Seshammal) and (2010) 2 Supreme Court cases 689 (Sree Swayam Prakash Ashramam and another vs. G.Anandavally Ammal and others). The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

16. For the reasons aforestated the judgment and decree dated 29.10.2004 passed in A.S.No.50 of 2003 on the file of the Subordinate Court, Tiruppur, insofar as granting the relief in favour of the plaintiffs are set aside and consequently, the judgment and decree dated 28.02.2003 passed in O.S.No.273 of 1996, on the file of the District Munsif Court at Tiruppur are confirmed. Resultantly, the Second Appeal No.1400 of 2005 is dismissed with costs and the Second Appeal No.130 of 2007 is allowed with costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

bga



To

1. Subordinate Court, Tiruppur,

2. District Munsif Court at Tiruppur

Copy to

The Section Officer,
V.R.Section, High Court, Madras

+1 cc to Mr.K.Ashok Kumar, Advocate, S.R.No.37151

+1 cc to M/s.V.Raghavachari, Advocate, S.R.No.36658

+1 cc to the Spl. Government Pleader (CS), S.R.No.37126

S.A.Nos.1400 of 2005 &
130 of 2007

SJ(CO)
SSM(25/09/2019)