

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.01.2020

Date of Verdict : 28.02.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1730 of 2004

K.Rajasekara Kumar

Appellant/II Defendant/
IInd Respondent

Vs.

1. Yasodha Purushothamman (Died)

2. K.Sumithra

3. L.Prameela

4. A.J.Prathap

5. A.J.Shailaja

... Respondents/Plaintiffs/Appellants

(R1- Died vide order of court dated
16.10.2019 made in S.A.No. 1730 of 2004
as per memo dated 16.10.2019 are
recorded)

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree of the learned Subordinate Judge, Poonamallee dated 08.12.2003 and made in A.S.No. 24 of 2002 reversing the Judgment and Decree of the learned District Munsif, Poonamallee dated 24.07.2002 and made in O.S.No. 65 of 1991 and to set aside the same.

For Appellant : Mr.S.Subbiah
Senior Counsel
for Mr.G.Bharadwaj

For Respondents: Mr.N.Manoharan
for R4.

R1 - Died

R2, R3 & R5 - No appearance.

JUDGMENT

This appeal is preferred as against Judgment and Decree dated 08.12.2003 passed in A.S.No. 24 of 2002 on the file of the learned Subordinate Judge, Poonamallee reversing the Judgment and Decree dated 24.07.2002 passed in O.S.No. 65 of 1991 on the file of the learned District Munsif, Poonamallee.

2. For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

3. The case of the plaintiffs in brief is as follows :-

3.1. The suit properties originally belonged to the plaintiff's father. He executed a Will dated 07.02.1946. A-Schedule property was bequeathed in favour of deceased sole plaintiff. After his demise, the said Will was also probated. In the same will, the suit B-Schedule property was bequeathed to the first defendant who is none other than the sole plaintiff's own sister. The suit C-Schedule property is a portion of the B-Schedule property and the plaintiff has to pass and re-pass over C-Schedule property to and from A-Schedule property. The street is situated to the south of B-Schedule property. Except the C-Schedule property, there is no other access for the plaintiff to reach A-Schedule property from the street. They are using C-Schedule property to have ingress and egress from A-Schedule property to the street ever since the date when the Will came into force. Thus, they prescribe right to use the C-Schedule property as a passage to have ingress and egress from A-Schedule property to the Street on the south. Whiles, the first Defendant negotiated for sale of B-Schedule property. First defendant had made arrangements to convey B-Schedule property to a third party ignoring the plaintiff's easementary right over the B-Schedule property. When it was questioned by the plaintiff, the first defendant had started obstructing plaintiff's access over C-Schedule property.

4. The second defendant, purchased the property from the first defendant. Hence the plaintiff filed a petition to implead the second defendant and he has been impleaded. Thereafter, the sole plaintiff died and her legal heirs were impleaded as plaintiffs 2 to 5 in the suit. Hence the suit.

5. Resisting the same, the first defendant had filed her written statement stating that the A - Schedule Property was acquired by the plaintiff by Will dated 07.02.1946 and B-Schedule property was acquired by the first defendant through the same Will. There is no portion of C - schedule property situated in the B-Schedule property and it was never used by the plaintiff at any point of time as ingress and egress. There is no pathway as alleged in the plaint. The C - Schedule property is only created by the sole plaintiff for the purpose of this

case. The Will dated 07.02.1946 never stated anywhere about the C - Schedule property pathway. The plaintiff has got a separate entrance and at no point of time, she used the B - Schedule portion of the property as pathway. The further allegations that except the C - Schedule property, there is no other access for the plaintiff to reach A Schedule property from the street are all false, baseless and the defendant denied the same.

6. On the side of the plaintiffs, PW1 was examined and Exs.A1 to A12 were marked. On the side of the defendants, DW1 & DW2 were examined and Exs.D1 and D2 are marked.

7. The trial court dismissed the suit filed by the plaintiff. Aggrieved by the same, the plaintiffs preferred an appeal suit in A.S.No.24 of 2002 and the first Appellate Court reversed the Judgment and Decree passed by the trial court and decreed the suit in favour of the plaintiffs. Aggrieved by the same, the second defendant filed this Second Appeal.

8. At the time of admission of the second appeal, the following substantial questions of law were framed :-

(i) Whether the finding of the lower appellate Court that the plaintiff had prescriptive right over 'C' Schedule property can be sustained in law, especially when it was neither pleaded nor established?

(ii) Whether the entries in panchayat records or sale deed Ex.A11 as regards boundaries can establish the right of easement?

9. Mr.S.Subbiah, learned senior counsel appearing on behalf of the second defendant submitted that the plaintiffs are not entitled for any easement right. Further, he would submit that if the plaintiff had claimed a right of easement by way of necessity, such a right should fall within the provisions under Sections 13 & 14 of the Easement Act, whereas the claim of the plaintiff would not fall within the said provisions. In fact, when there was no grant of any such easement by the testator, the plaintiff ought to have pleaded without any ambiguity as to how she claimed such right over the property that too belonged to the deceased first defendant. There cannot be any easement of necessity, especially, when there is a regular passage available to the plaintiff to reach her share through a common area set up as right of passage by way of grant, and so, under a grant, there cannot be any need or necessity to claim right over the B Schedule property exclusively belonging to the first defendant. Thus, the plaintiffs cannot claim any right to his easements over the B Schedule property. Further, he submitted that when the plaintiff did not claim her right either on the easement of

necessity, by grant or the prescriptive right of way, and also in the absence of any specific pleading choosing any one of rights, she is not at all entitled for any relief. She has also failed to satisfy the provisions contended under Section 15 of the Easement Act, as to whether they had established their case both by pleadings supported by the evidence, and in the absence of any such pleadings or evidences, the First Appellate Court completely erred in allowing the appeal. The learned senior counsel for the second defendant in support of his contentions relied upon the following Judgments;

(i) Justiniano Antao and others vs. Bernadette B.Pereira (smt) reported in (2005) 1 SCC 471.

(ii) Bachhaj Nahar vs. Nilima Mandal and another reported in 2009 2 LW 485.

(iii) Durairaj and others vs. Philip reported in 2019 5 LW 230.

(iv) K.Kalianna Gounder and another vs. Sundararaj and another reported in 2019 (5) CTC 80.

10. Per contra, the learned counsel for the plaintiff submitted that pending the suit, the second defendant purchased the suit property. The first defendant filed a written statement before the Tribunal and the second defendant did not even file any written statement. On the side of the defendants, they did not examine the second defendant and instead, they examined the mediator for the sale between the first defendant and second defendant as PW1 and one of their relatives was examined as PW2. Therefore, they did not even examine the person who submitted the written statement and such deposition of DW1 cannot be accepted and the First Appellate Court rightly considered the facts and circumstances of the case and allowed the suit filed by the plaintiffs. In order to support his contentions, he relied upon the following Judgments;

(i) Vidhyadhar vs. Manikrao and another reported in (1999) 3 SCC 573.

(ii) Sree Swayam Prakash Ashramam and another vs. G.Anandavally Amma and others reported in (2010) 2 SCC 689.

(iii) S.B.Noronah vs. Prem Kumari Khanna reported in (1980) 1 SCC 52.

(iv) Des Raj and others vs. Bhagat ram (dead) by lrs. and others reported in (2007) 9 SCC 641.

(v) Usha Sinha vs. Dina Ram and others reported in (2008) 7 SCC 14.

11. The learned counsel for the plaintiff submitted that the evidence of the plaintiff has to be taken for consideration, since the plaintiff has been continuously using the pathway, in suit C - Schedule property from 1961. He therefore prayed for dismissing the appeal.

12. Heard, Mr.S.Subbiah, learned Senior Counsel appearing on behalf of the petitioner and Mr.N.Manoharan, learned counsel appearing for the 4th respondent.

13. The first plaintiff and the first defendant are sisters. The suit A Schedule property and B Schedule property were bequeathed in favour of the first and second defendants, by their father, through a Will dated 07.02.1946, which was marked as Ex.A1. The said Will was probated before this Court in O.P.No. 104 of 1995. The Will was executed in respect of the two properties in which one property situated at Avadi and another in Royapuram. Therefore, the plaintiff cannot claim any right as an easement of necessity, through the property bequeathed in favour of the first defendant. The Sections 13, 14 and 15 of the Easement Act, 1982 are extracted hereunder;

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

(a) if a 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;

(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 the 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 (3), 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.

14. Direction of way of necessity. When a right to a way of necessity is created under section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

15. Acquisition by prescription. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years. .

and where support from one person's land or things affixed thereto has been peaceably received by another person's land subject to artificial pressure or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years, the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

It is also seen from the pleadings of the plaintiff and the evidences in support of the pleadings of the plaintiff that they do not satisfy the provisions as contemplated under Section 15 of Easement Act, 1882 to claim right by prescription.

14. In A-Schedule property, the sale deed executed in favour

of the second defendant was marked as Ex.A11 and it is only to the extent of 3284 square feet and it comes around to 7 1/2 cents. Even according to DW2, 14 cents was bequeathed in favour of the first defendant and 8 cents was bequeathed in favour of the first defendant. There is absolutely no mention about the common pathway situated in the B Schedule property. Only on the assumption, the First Appellate Court concluded that the sale deed executed by the first defendant in favour of the second defendant was except the road on the south no easementary right. In this regard, the learned senior counsel for the second defendant relied on the Judgment reported in Bachhaj Nahar vs. Nilima Mandal and another reported in 2009 2 LW 485. The relevant paragraphs are extracted hereunder:

"8. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are : (i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court. (ii) A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint. (iii) A factual issue cannot be raised or considered for the first time in a second appeal. Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfillment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation, should not be a ground to float the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.....

.....13. A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing

title are different from the facts that are to be pleaded and proved for making out an easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right, relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner/occupier of such property. 14. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. Bachhaj Nahar vs Nilima Mandal & Ors on 23 September, 2008 Indian Kanoon - <http://indiankanoon.org/doc/170697/> 6 For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to

support of a roof or right to water course. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence."

15. The Hon'ble Supreme Court of India held that easements can be acquired by different ways and are of different kinds ie., easement by grant, easement of necessity, easement by prescriptive etc. The dominating owner seeking any declaratory or injunctive relief relating to an easementary right shall have plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant.

16. In the case on hand there is no pleading or evidence for claiming easementary right by grant. It is fundamental that in a Civil Suit relief to be granted can be only with reference to the prayers made in the pleadings. In the absence of pleadings, the First Appellate Court ought not to have decreed the suit in favour of the plaintiffs.

17. The decision in Sree Swayam Prakash Ashramam and another vs. G.Anandavally Amma and others reported in (2010) 2 SCC 689, is relied on by the learned counsel for the plaintiffs. The relevant paragraphs are extracted hereunder:

"17.The High Court limited itself to the issue whether the decree of the first appellate court granting the original plaintiff (since deceased) right of easement over 'B' schedule property by way of grant concurring with the findings of the trial court was sustainable. 18.Before the High Court, the defendants pleaded that there had been no appeal or cross objection filed by the original plaintiff (since deceased) against the order of the Appellate Court which disallowed the claim of easement of necessity and, therefore, the finding that there existed no easement of necessity in favour of the original plaintiff (since deceased) over the 'B' schedule property stood confirmed. Further they contended that the alternative pathway on the western side of the 'A' schedule property was rendered inconvenient by the very act of the original plaintiff (since deceased) who sold that portion of the property to a third party who began digging that pathway resulting in the difference in

level. The High Court, on consideration of these contentions, held that though the claim of right of easement by way of necessity over 'B' Schedule property may be affected by the subsequent sale of the said plot by the plaintiff in 1983, the claim of right of easement by way of grant over 'B' schedule property stood unaffected by the said conduct.

21.The High Court relied on a number of observations in Katiyars Law of Easement and Licences (12th Edition) on law with respect to "implication of grant of an easement." It may arise upon severance of a tenement by its owner into parts. The acquisition of easement by prescription may be classified under the head of implied grant for all prescription presupposes a grant. All that is necessary to create the easement is a manifestation or an unequivocal intention on the part of the servient owner to that effect.

23.Applying these observations to the facts of the case, the High Court held that though the original grant was by Yogini Amma that grant could not perfect as an easement for the reason that Yogini Amma herself was the owner of both 'A' schedule and 'B' schedule properties and consequently there was no question of 'B' schedule property becoming the servient tenement and 'A' schedule property becoming the dominant tenement. However, it was the desire of Yogini Amma that was implemented by her disciples by virtue of the settlement deed. Therefore, the right of the plaintiff to have 'B' schedule property as a pathway could not have been taken away by the very same deed. In fact, there was implied grant of 'B' schedule property as pathway as can be inferred from the circumstances, namely, i) no other pathway was provided for access to 'A' schedule property in the settlement deed and ii) there was no objection to the use of 'B' schedule as pathway.

25.We have heard Mr. T.L. Viswanatha Iyer, learned senior counsel for the appellants and Mr. Subramaniam Prasad, learned senior counsel for the respondents. We have carefully examined the impugned judgment of the courts below and also the pleadings, evidence and the materials already on record. It is not in dispute that the trial court as well as the First Appellate Court concurrently

found on a proper appreciation of the evidence adduced in the case that the 'B' Schedule Property of the plaint was being used by the original plaintiff (since deceased) and thereafter, by the respondents even after construction of the building in 1940 in 'A' Schedule property of the plaint. The appellants also did not dispute the case of the original plaintiff (since deceased) that he was in continuous occupation of the building even after its construction in the year 1940. It is also not in dispute that the appellants were not able to establish that the original plaintiff (since deceased) was using any other pathway for access to 'A' Schedule Property of the plaint and the building therein, which was in the occupation of the original plaintiff (since deceased). The case of the appellants that since there was no mention in the deed of settlement enabling the use of 'B' schedule pathway for access to 'A' schedule property and the building therein, cannot be the reason to hold that there was no grant as the grant could be by implication as well. It is not in dispute that the fact of the use of the 'B' schedule property as pathway even after execution of Exhibit A1, the settlement deed in the year 1982 by the original plaintiff (since deceased) would amply show that there was an implied grant in favour of the original plaintiff (since deceased) relating to 'B' schedule property of the plaint for its use as pathway to 'A' schedule property of the plaint in residential occupation of the original plaintiff (since deceased). In the absence of any evidence being adduced by the appellants to substantiate their contention that the original plaintiff (since deceased) had an alternative pathway for access to the 'A' schedule property, it is difficult to negative the contention of the respondent that since the original plaintiff (since deceased) has been continuously using the said pathway at least from the year 1940 the original plaintiff (since deceased) had acquired an easement right by way of an implied grant in respect of the 'B' Schedule property of the plaint. It is an admitted position that both 'A' schedule and 'B' schedule properties of the plaint belonged to Yogini Amma and her disciples and it was the desire of Yogini Amma that was really implemented by the disciples under the settlement deed executed in favour of the original plaintiff (since deceased). Therefore, the High Court was perfectly justified

in holding that when it was the desire of Yogini Amma to Sree Swayam Prakash Ashramam & Anr vs G.Anandavally Amma & Ors grant easement right to the original plaintiff (since deceased) by way of an implied grant, the right of the original plaintiff (since deceased) to have 'B' schedule property of the plaint as a pathway could not have been taken away. In Annapurna Dutta vs. Santosh Kumar Sett & Ors. [AIR 1937 Cal.661], B.K.Mukherjee, as His Lordship then was observed : "There could be no implied grant where the easements are not continuous and non-apparent. Now a right of way is neither continuous nor always an apparent easement, and hence would not ordinarily come under the rule. Exception is no doubt made in certain cases, where there is a 'formed road' existing over one part of the tenement for the apparent use of another portion or there is 'some permanence in the adaptation of the tenement' from which continuity may be inferred, but barring these exceptions, an ordinary right of way would not pass on severance unless language is used by the grantor to create a fresh easement." 26. In our view, therefore, the High Court was also fully justified in holding that there was implied grant of 'B' schedule property as pathway, which can be inferred from the circumstances for the reason that no other pathway was provided for access to 'A' schedule property of the plaint and there was no objection also to the use of 'B' schedule property of the plaint as pathway by the original plaintiff (since deceased) at least up to 1982, when alone the cause of action for the suit arose."

After going through the facts of the aforesaid case, this Court is of the view that the same is not applicable to the case on hand.

18. In view of the above discussions, the reasons for the conclusions of the First Appellate Court for reversing the trial court Judgment is found to be based on erroneous appreciation of the materials placed on record as well as the evidences and the materials placed on record on the part of the defendants and also not in accordance with the principles of law. In such view of the matter, the same could only be totally perverse, illogical and irrational and as such, the Judgment and decree of the First Appellate Court upholding the case of the plaintiffs cannot be sustained and is liable to be set aside. The substantial questions of law formulated in this appeal are accordingly answered against the plaintiffs and in favour of the

defendants.

19. In fine, the Judgment and Decree dated 08.12.2003 passed in A.S.No. 24 of 2002 is set aside and the Judgment and Decree dated 24.07.2002 passed in O.S.No.65 of 1991 is confirmed. The Second Appeal stands allowed. No costs.

Sd/-

Assistant Registrar(I)

//True Copy//

Sub Assistant Registrar

kmm

To

1. The Subordinate Judge,
Poonamallee

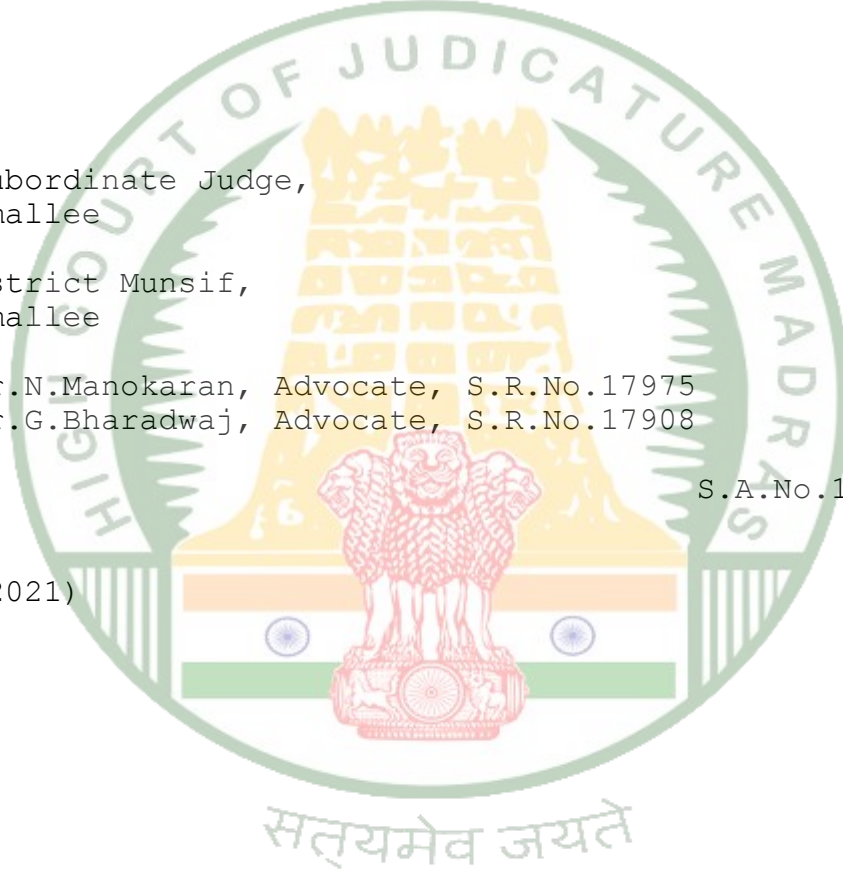
2. The District Munsif,
Poonamallee

+1cc to Mr.N.Manokaran, Advocate, S.R.No.17975

+1cc to Mr.G.Bharadwaj, Advocate, S.R.No.17908

S.A.No.1730 of 2004

AD(CO)
CB(26/04/2021)



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