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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.03.2021

PRONOUNCED ON : 07.04.2021

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.NO.425 OF 2009

AND

M.P.NO.1 OF 2009

Kumar
Son of Ramu,
Allamarathukuppam,
Kondur hamlet,
Villupuram Taluk.

... Plaintiff/Respondent/Appellant

Vs.

Rajaram
Son of Samikannu,
Allamarathukuppam,
Kondur hamlet,
Villupuram Taluk.

... Defendant/Appellant/Respondent

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.33 of 2007 on the file of the Principal Sub-Court, Villupuram and dated 20.01.2009 in reversing the judgment and decree in O.S.No.240 of 2002 on the file of the Principal District Munsif Court, Villupuram and dated 30.11.2005.

For Appellant : Mr.V.Raghavachari

For Respondent : Mr.R.Veeramani

J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 20.01.2009 passed in A.S.No.33 of 2007 on the file of the Principal Subordinate Court, Villupuram reversing the



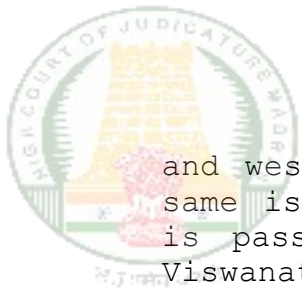
judgment and decree dated 30.11.2005 passed in O.S.No.240 of 2002 on the file of the Principal District Munsif Court, Villupuram.

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

3. Suit for declaration and permanent injunction.

4. The case of the plaintiff in brief is that the suit property originally belonged to Rathina Gounder by way of a registered sale deed dated 23.12.1963 and enjoyed the same along with other properties and he died intestate and while he was alive, he divided the family properties into five shares by way of a oral partition and allotted each one of them to his five sons namely, Venu, Parthasarathi, Balasubramanian, Ramu and Sundararaju during 1970 and the sharers were in the possession and enjoyment of their respective shares and in the abovesaid partition, the suit property had been allotted to the share of Ramu along with some other properties. The UDR patta stands transferred in his name and he was enjoying the same by paying land revenue to the Government. The plaintiff Saravanan, Karthiban, Kumaresan and Jayakumar are the sons of Ramu and Ramu disappeared from the family and the village and his whereabouts are not known and the plaintiff and his brothers had taken over all the family properties inclusive of the suit property and been in the possession and enjoyment of the same and the plaintiff is filing the suit for himself and on behalf of the other co-owners. The defendant has no manner of right or title or interest over the suit property and he is owning the landed properties far away from the suit property, however due to enmity, he has been attempting to interfere with the plaintiff's possession and enjoyment of the suit property by making a false claim that the portion on the northern side belongs to the Government as poramboke and the abovesaid claim of the defendant is false and hence according to the plaintiff, he has been necessitated to lay the suit against the defendant for appropriate reliefs.

5. The defendant resisted the plaintiff's suit by filing the written statement and after denying all the averments contained in the plaint in toto would putforth the case that the patta had been wrongly issued in the name of Ramu and according to the defendant, the suit is bad for non-joinder of the Government and to the west of the suit property, the lake is lying and when the lake gets filled up, the water flowing from the lake would pass through Kalingam and there is a detailed channel to the east of the lake through which the water flows and the detailed channel for the past 100 years passes through on the north, east



and west of the suit property to the width of 20 feet and the same is reflected in the village plan and the detailed channel is passing through the north of the properties belonging to Viswanathan and Parthasarathy whose lands are lying to the west of the suit property and the defendant and 20 others had been enjoying the channel for more than three generations and when water is not flowing through the channel, they are using the same as the cart track for taking their products to their property and only through the said pathway, the defendant and others have access to their properties and the abovesaid pathway proceeds from the village south -north and thereafter towards east-west and further proceeds on the northern side of the suit property and only through the said path, the defendant and others are having access to their respective properties and inasmuch as, the plaintiff attempted to encroach into the channel, the defendant petitioned the revenue authorities and the plaintiff using his influence had obtained the patta and encroached into the channel portion and planted coconut plants unlawfully and come forward with the suit and therefore according to the defendant, the suit property does not belong to the plaintiff's family as claimed in the plaint and inasmuch as, the defendant and his ancestors are enjoying the pathway on the north of the suit property for more that 100 years, the defendant is having the easmentary right over the same and the plaintiff has no cause of action and the suit is liable to be dismissed.

6. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

i. Whether the lower appellate court is justified in upsetting the finding of the trial court especially when the respondent had failed to prove easement of necessity?

ii. When Section 41 of Easement Act applied to the respondent, is the lower appellate court right in applying Section 13 of the Act?

7. In support of the plaintiff's case, P.Ws.1 to 4 were examined. Exs.A1 to A6 were marked. On the side of the defendant, D.Ws.1 to 4 were examined. Exs.B1 to B3 were marked. Exs.C1 to C8 were marked.

8. On an appreciation of the oral and documentary evidence adduced in the matter and the submissions put forth by the respective parties, the trial court was pleased to decree the suit in favour of the plaintiff as prayed for. On appeal by the



defendant, the first appellate court, on a consideration of the oral and documentary evidence and the submissions put forth by the respective parties, was pleased to set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the defendant, dismissed the plaintiff's suit. Impugning the same, the present second appeal has been preferred by the plaintiff.

9. The plaintiff has come forward with the suit seeking the reliefs of declaration and permanent injunction qua the suit property on the footing that the suit property belongs to the plaintiff and his brothers and the defendant without any manner of right, title or interest over the same, has attempted to interfere with the plaintiff's possession and hence according to the plaintiff, he has been necessitated to lay the suit against the defendant for appropriate reliefs. The defendant in the written statement, has not admitted the title of the plaintiff and his brothers qua the suit property and on the other hand, he would stoutly dispute the claim of the title of the plaintiff and his brothers to the suit property as put forth in the plaint. Despite the same, the defendant would claim that he and others are having the right of pathway over the suit property and enjoying the same for more than 100 years and accordingly contended that the defendant is having the easementary right over the suit property by way of the abovesaid plea. The defendant is endeavoring to seek the easementary right over the suit property by way of prescription. He has not sought for any easementary right over the suit property by way of necessity. However would plead that only through the pathway running in the suit property ie., on the northern side, he and others are gaining access to their respective properties and according to the defendant, to the west of the suit property, the lake is situated and when water flows from the lake, it passes through the detailed channel about 20 feet width running on the northern side of the suit property and the detailed channel runs through the lands of Viswanathan and Parthasarathy and it is put forth that when the water do not flow in the channel, the same is used as a pathway by the defendant and others for gaining access to their respective properties as a cart track as well as pathway for taking their articles, agricultural produce etc., and accordingly it is the case of the defendant that he is having the easementary right in the suit property.

10. Though the defendant had marked Exs.B1 to B3 in support of his defence version, in none of the said documents, there is any reference of the detailed channel or pathway running through the suit property. If there had been any hint or mention about the same marked in Exs.B1 to B3, the defendant would have averred about the same in detail in the written statement. As



above pointed out, the defendant in the written statement, has completely challenged the plaintiff's claim of title to the suit property as averred in the plaint. But quiet inconsistent to the same, the defendant would also putforth the plea that he is having easementary right over the suit property ie., he is having the right of pathway through the suit property for gaining access to his property. Admittedly the defendant's property is not lying adjacent to the suit property and it is found to be lying far away from the suit property. Be that as it may, when the defendant is endeavoring to lay a claim of easementary right over the suit property, other than vaguely stating that he has easementary right over the suit property ie., to use the same as the pathway on the northern side by way of necessity and prescription, the defendant has not come out clearly as to on what basis, he has claimed the abovesaid easementary right in the written statement. The defendant has not even pleaded and proved that the easementary right claimed by him was enjoyed independent of any agreement with the owner of the property over which the right is claimed and has also not pleaded that his dominant tenement and the plaintiff'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 and the defendant has also not pleaded that he has no other alternative pathway to gain access to his property other than the suit property and when it is found that the defendant is endeavoring to enforce the right of easement over the suit property not belonging to him, having the effect of restricting the natural rights of the owner/occupier of such property and for seeking the enforcement of such easementary right, the defendant has to specifically come out with the clear case as to on what basis he seeks to enforce the easementary right claimed by him. It is further noted that the facts to be pleaded and proved for establishing the title are different from the facts that are to be pleaded and proved for making out a easementary right and the defendant not having come forward with the clear pleas as to on what basis he is claiming the easementary right other than making very vague pleas as referred to above, in such event, it cannot be assumed or inferred that the case of easementary right projected by the defendant is well founded and the abovesaid aspects of law had been outlined by the Apex Court in the decision reported in 2008 (17) SCC 491 [Bachhai Nahar Vs Nilima Mandal and another] . The principles of law with reference to the same had been outlined by the Apex Court in the abovesaid decision as follows:

"A.Civil Procedure Code, 1908 - S.100 -
Second appeal - New case made out -



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Propriety - High Court in a title suit granting relief based on easementary rights which was not pleaded - Sustainability of - Respondent- plaintiffs' suit for declaration, possession and injunction dismissed by first appellate Court on the ground that neither there was encroachment by appellant-defendants nor did the suit land belong to respondent-plaintiffs - High Court though holding that respondent - plaintiffs had not title over suit land, granted injunction by making out a new case that plaintiffs had an easementary right to use the schedule property as a passage - in the absence of pleadings and an opportunity to the first defendant to deny such claim, held, High Court court not have granted the relief of injunction by assuming that plaintiffs had an easementary right to use the schedule property as a passage - At best liberty could have been reserved to plaintiffs to file a separate suit for easement - Easements Act, 1882 - Ss.33 and 35 - Relief under, different from relief under provisions of Specific Relief Act, 1963 - Specific Relief Act, 1963 - Ss.36 & 37.

B.Civil Procedure Code, 1908 - S.100 and Or.6 R.1, Or.7 R.7, Or.14 R.1 and Or.18 R.2 - Second appeal - Relief - Relief on the strength of evidence alone (without pleading and an opportunity of hearing) - Permissibility - Without pleading and an opportunity of hearing to defendant, no amount of evidence, held, can be looked into to grant any relief - Exceptions and permissible limits, stated - Practice and Procedure - Relief - Basis for

C.Civil Procedure Code, 1908 - S.100 - Second appeal - Relief - Expeditious justice, by flouting fundamental rules of CPC, held, is not permissible.

D.Civil Procedure Code, 1908 - Or.6 Rr.1 to 3, Or.2 Rr.1 & 2 and Or.14 Rr.1,3 & 4 - Pleadings and issues - Object and purpose, stated



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The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. The object of issues is to identify from the pleadings the questions or points required to be decided by the Courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief.

18. 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.

19. 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 watercourse 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



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relating to an easementary right shall have to 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.

20. 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. 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 watercourse. 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.

21. A right of easement can be declared only when the servient owner is a party to the suit....."

11. Applying the abovesaid principles of law to the case at hand, when it is noted that the defendant has failed to come forward with necessary facts enabling him to make out a particular claim of easementary right and thereby when the



plaintiff is prevented from placing necessary proof adequately or enabling him to repudiate or challenge the claim of the defendant to the alleged easementary right put forth by the defendant, in such view of the matter, on the abovesaid score alone, the defendant's claim of easementary right over the suit property on vague pleas, should not have been entertained by the first appellate court.

12. When as per the abovesaid decision of the Apex Court, the right of easement sought for by the defendant could be sustained only when he is admitting the title of the servient owner and accordingly the right of easement can only be asked against the servient owner ie., the owner of the servient tenement, when as above pointed out, the defendant in the written statement having stoutly denied in toto, the plaintiff's claim of title to the suit property as put forth in the plaint, in such view of the matter, the case projected by the defendant that he is entitled to seek the easementary right qua the suit property against the plaintiff as such cannot be countenanced.

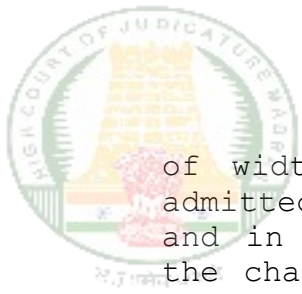
13. Only during the course of evidence, the defendant has admitted that the plaintiff's claim of title to the suit property as put forth in the plaint. Accordingly the defendant examined as D.W.1, during the course of cross examination, has clearly admitted that he does not know where the suit property is located and does not know whether the same had been purchased by Rathina Gounder and admitted that Rathina Gounder had five sons and further admitted that Rathina Gounder owned several properties and further admitted that Rathina Gounder's five sons partitioned the family properties and further admitted that the suit property had been allotted to Ramu in the abovesaid partition and the partition was effected about 35 years ago and further admitted that the suit property had been enjoyed by Ramu from the date of partition and further admitted that the suit property had been enjoyed by the sons of Ramu and further admitted that he does not have any title to the suit property. Thus it is noted that though the defendant in the written statement had in toto disputed the plaintiff's claim of title to the suit property, however during the course of evidence ie., in the cross examination has clearly admitted the plaintiff's claim of title to the suit property as averred in the plaint. In addition to that considering the materials projected by the plaintiff marked as Ex.A1, the sale deed dated 23.12.1963 in the name of Rathina Gounder, the plaintiff's ancestor and the patta marked as Exs.A2 and A3 and the Kists receipts marked as Exs.A4 and A5, it is found that, in all, the suit property had been originally acquired by the plaintiff's ancestor Rathina Gounder and in the oral partition effected qua the family properties belong to Rathina Gounder inclusive of the suit property about



35 years ago, the suit property and other properties had been allotted to his son Ramu and accordingly the patta had been effected in the name of Ramu and the patta stood on the name of Damodharan, the vendor of Ex.A1 and the suit property is found to have been enjoyed by Ramu and thereafter by his sons by obtaining patta, paying Kists and the same could be gathered from Exs.A1 to A5, accordingly the same had also been admitted by the defendant during the course of cross examination and when the defendant has clearly admitted that it is only Ramu and thereafter the plaintiff and his brothers who had been in the possession and enjoyment of the suit proeprty from the date of partition, his present claim that the detailed channel/pathway is running on the northern side of the suit property, as such, cannot at all be believed and therefore, his further claim that he and 20 others had been enjoying the channel/pathway running on the northern side of the suit property for gaining access to their respective properties also cannot at all be countenanced in the absence of any acceptable and reliable materials projected on the part of the defendant.

14. As above pointed out, in none of the documents projected by the defendant marked as Exs.B1 to B3, any reference is made about the existence of channel/pathway in the suit property and the right to enjoy the same provided to the parties to the abovesaid sale transactions.

15. Now according to the defendant, the lake is situated on the western side of the suit property and when the water overflows from the lake, it used to pass through the detailed channel running on the eastern side ie., on the northern side of the suit property and other properties measuring about 20 feet in width and further according to the defendant when the water is not flowing in the channel, the same is used as a cart track / pathway by the defendant and others for taking their agricultural produce and for gaining access to their respective properties. After pointing to the abovesaid defence version, particularly when the defendant during the course of cross examination having admitted the plaintiff's claim of title to the suit property and on the other hand, when he is claiming only easementary right over the suit property as putforth by him, it is for the defendant to establish that there is a channel / pathway running in the suit property on the northern side and that he and others had been using the same for several years as putforth in the plaint. The Circle Inspector has been examined as D.W.4 and he has in the course of evidence, deposed that the suit property is lying in S.No.160/8 measuring an acre 0.38 and from the evidence of D.W.4, it is found that the channel is running from the lake only in S.No.112 and S.No.159 is Pudhukuttai and further according to D.W.4, if the channel is



of width 4 feet, the same would not be subdivided and also admitted that the S.No.160 has not been subdivided as channel and in the FMB plan, in S.No.160, there is no indication that the channel is running in the same and the S.No.160 is a patta land and the pathway is only running in S.No.216 and 229 and further admitted that the pathway and cart track are different and there is no indication of pathway in S.No.160 and the above being the evidence of D.W.4, as rightly concluded by the trial court, it is evident that the suit property has not been subdivided or classified as channel/pathway in the village records and if as putforth by the defendant the channel / pathway had been in existence over the suit property on the northern side for more than 100 years that too, to the width of 20 feet, the same would have been reflected in the village records and on the other hand, as the same had not been in existence in the suit property at any point of time, accordingly it is found that, as above noted, the defendant has also admitted that it is only Ramu and his sons who had been enjoying the suit property independently right from the date of partition effected about 35 years ago and therefore the claim of the defendant that the channel/pathway had been in existence over the suit property for more than 100 years has to be rejected in toto.

16. In addition to that, the Advocate Commissioner examined as D.W.3 has also deposed that in the plan submitted by him, the suit property shown as ABCD and at the time of inspection with the surveyor, the surveyor has not pointed out the existence of any detailed channel in the suit property and only in S.Nos.1 and 2, the reference about the pathway shown as dots and in S.No.177, 173 there is a pathway and through the same the defendant can gain access to his property and further testified that there is a pathway in S.Nos.210, 216, the coconut thoppu of one Raju and through the same, the defendant's property could be accessed and further admitted that there is no existence of carttrack in the suit property and also no existence of any pathway in the suit property and the suit property in entirety is raised with the plants and further stated that only to the south of the suit property the proamboke pathway is lying and therefore considering the abovesaid evidence of Advocate Commissioner, in toto, as rightly concluded by the trial court, the defendant is having other access/way to reach his property and therefore the claim of the defendant that he is having access to his property only through the channel/pathway said to be lying in the suit property cannot at all be believed and accepted and when according to the defendant, the channel/pathway running in the suit property belongs to the Government and the same is also passing through the lands of Vishwanathan and Parthasarathy, Sundhararaju etc., when



according to the defendant the abovesaid persons are not objecting to the use of the pathway running in their lands and when the defendant is claiming easementary right over the channel/pathway running from the lake through the lands of several other persons in toto and as above pointed out when the defendant has also not admitting the plaintiff's claim of title to the suit property as averred in the plaint, if at all the defendant is entitled to seek any easementary right over the alleged channel/pathway putforth by him, as rightly concluded by the trial court, the defendant should have endeavored to examine the other owners through whose lands the channel/pathway is said to be running and should have made them as parties to the suit and also should have endeavored to implead the Government as a party particularly, when according to the defendant the channel/pathway portion belongs to the Government and when it is only the defendant who is claiming the easementary right over the same and in such view of the matter, the defendant having failed, at the foremost, to establish the existence of the channel/pathway said to be running on the eastern side of the lake portion through the northern portion of the properties belonging to Vishwanathan, Parthasarathy and Sundhararaju, the plaintiff and accordingly the same is the property belonging to the Government, having also failed to implead the Government as a party in the matter, all put together, and as above pointed out when the defendant is having other access to reach his property, in such view of the matter, the claim of the easementary right of the defendant over the suit property belonging to the plaintiff cannot at all be countenanced in any manner and the defendant having failed to establish the existence of channel/pathway over the suit property for more than statutory period as provided under law by acceptable and reliable materials and on the other hand, having clearly admitted that the suit property has been in the possession and enjoyment of the plaintiff's father Ramu and thereafter by the sons of Ramu inclusive of the plaintiff from the date of partition effected about 35 years ago, in all, it is found that the claim of easementary right putforth by the defendant in the suit property is without any basis or materials and accordingly the first appellate court should have also concurred with the correct reasonings and conclusions of the trial court in upholding the plaintiff's case.

17. Furthermore the defendant has also not sought for any counter-claim with reference to the alleged easementary right putforth by him qua the suit property in the written statement. Based on Exs.C1 to C8, ipso facto, we cannot uphold the defendant's claim of easementary right and further as rightly putforth by the plaintiff's counsel, Exs.C1 to C8 also do not buttress the alleged easementary right putforth by the defendant.



18. The first appellate court without any basis or proof adduced on the part of the defendant over the existence of the channel/pathway over the suit property more than the statutory period and the usage of the same by the defendant continuously and uninterruptedly beyond the statutory period and when the defendant has not putforth the necessary pleas pointing to the same in the written statement as above pointed out, and on the other hand having admitted the usage of the suit property in entirety and independently by the plaintiff and his ancestors for several years, in such view of the matter, the reasonings and conclusions of the first appellate court for negating the reliefs sought for by the plaintiff are found to be based on the incorrect and improper appreciation of the pleas and the materials putforth by the respective parties, both on factual matrix as well as on the point of law and in such view of the matter, it has to be held that the reasonings and conclusions of the first appellate court are totally perverse, illogical and irrational and liable to be set aside.

19. In support of his various contentions, the defendant's counsel placed reliance upon the decisions reported in

1. 2012 (2) MWN(Civil) 591 [Malaya gounder(died) and others Vs.Nachiappa gounder and others.

2. 2012 (3) MWN(Civil) 574 [M.Palanisamy and others Vs. The District Collector, Erode and others]

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

20. In conclusion, the judgment and decree dated 20.01.2009 passed in A.S.No.33 of 2007 on the file of the Principal Subordinate Court, Villupuram are set aside and resultantly the judgment and decree dated 30.11.2005 passed in O.S.No.240 of 2002 on the file of the Principal District Munsif Court, Villupuram are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS-I)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Subordinate Judge,
Principal Subordinate Court,
Villupuram.

2. The Principal District Munsif,
Principal District Munsif Court,
Villupuram.

Copy To

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

+1cc to M/s.V.Raghavachari, Advocate, S.R.No.21952

S.A.No.425 of 2009
and
M.P.No.1 of 2009

AD(CO)
RLP(18/04/2022)