



SA(MD)No.134 of 2005

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated: 14/03/2025

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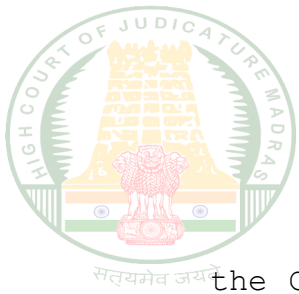
The Hon'ble Mr.Justice **G.ILANGOVA**

SA(MD)No.134 of 2005
and
CMP(MD)No.1255 of 2005

Samuel : Appellant/Respondent/
(Sole Appellant declared 2nd plaintiff
as Major and Guardian is
discharged, vide order,
dated 18/02/2013 and made
in MP(MD)No.1 of 2012 in
SA No.134 of 2005)

Vs.

1.Chelladurai
2.Petchiappa Nadar (Died) : Respondents 1 and 2/
Defendants
3.Seethalakshmi
4.Boopathi
5.P.Ammaiappan (Died)
6.P.Gurusamy
7.P.Jeyaseelan
8.P.Thangalah : Respondents 3 to 8/
(Respondents 3 to 8 are L.Rs of the deceased
brought on record as L.Rs 2nd respondent
of the deceased 2nd respondent
vide court order, dated 25/07/2003
made in CMP(MD)Nos.6522 to 6524
of 2018 in SA(MD)No.134 of 2005)
9.Thilagarani
10.P.Parabrahman : Respondents 9 and 10/
L.Rs. Of the deceased
5th respondent
(R9 and R10 are brought on record
as L.Rs of the deceased R5, vide
court order, dated 08/07/2024 made
in CMP(MD)Nos.7674, 7676 and 7677
of 2024 in SA(MD)No.134 of 2005)



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PRAYER:-Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 17/03/2004 in AS No.103 of 2003 on the file of Sub Court, Sankarankoil, reversing the judgment and decree dated 20/08/2003 in OS No.26 of 1998 on the file of the District Munsif court-cum-Judicial Magistrate, Sivagiri.

For Appellant : Mr.F.X.Eugene
For R1, R3, R4,
R6 and R7 : Mr.M.P.Senthil
For R2 and R5 : Died (Steps Taken)
For R9 and R10 : No appearance
For 8th Respondent : Dismissed

J U D G M E N T

This Second Appeal is filed against the judgment and decree, dated 17/03/2004 passed in AS No.103 of 2003 by the Sub Court, Sankarankoil, reversing the judgment and decree, dated 20/08/2003 passed in OS No.26 of 1998 by the District Munsif Court-cum-Judicial Magistrate, Sivagiri.

2.The averments in the plaint in brief:-

(i)Along with the plaint, a rough sketch was annexed to show the lie of the property. The house property belongs to the plaintiffs is denoted as '**HIJG**'. The property belongs to the first defendant is shown as



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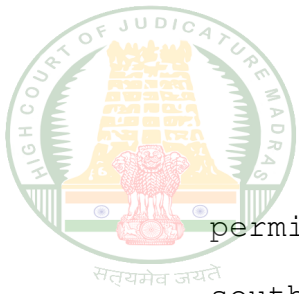
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'ABCD' and the second defendant as 'CDEF1'. The lane situated on the west of the plaintiffs' property is mentioned as 'EFGH'. The common pathway, which belongs to the 1st plaintiff and the defendants are shown as 'KLIM' and 'NOPQ'.

(ii) In the plaint, the first schedule belonged to the plaintiffs. The second schedule belongs to the defendants and 3 and 4th as a common pathway to the 1st plaintiff and the defendants.

(iii) The first schedule belongs to the ancestor of the plaintiffs. After that, it was inherited by the first plaintiff and is in possession and enjoyment over 50 years without any interruption. The plaintiffs ancestor and the defendants ancestor were relatives. The first plaintiff and the defendants are using the 3rd and 4th schedule to reach the southern road from time immemorial without any interruption. So, the plaintiffs prescribed easementary right, apart from easement of necessity.

(iv) The defendants requested the plaintiffs to sell the property, which was denied by them. So, on 18/09/1993, the defendants are blocking the 3rd schedule and put up construction. If the construction is



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permitted, then the plaintiffs right of way to reach the southern east-west road will be affected. In fact, they blocked the road by raising a wall in **A, AI, D, D1, E, E1** area. The first plaintiff executed a settlement deed in favour of the second plaintiff, on 25/07/1994. The first plaintiff died, on 16/06/1997. The settlement deed came into effect and the 2nd plaintiff is in possession. So, the suit is laid for declaration that the suit 3rd and 4th schedule are common pathway to the 2nd plaintiff and for permanent injunction, mandatory injunction to remove the structure put up in **A, AI, D, D1, E, E1** area and costs.

3. The statement: -The 3rd schedule belongs to the defendants absolutely as Mutram. The 4th schedule belongs to the defendants absolutely. The defendants and his brother Marimuthu Nadar and others on the east of the second defendant, enjoying the 4th schedule as their pathway. The plaintiffs and their ancestor were using the pathway situated on the eastern side of the first schedule. They were reaching the northern street and southern street through that pathway.

4. On the basis of the pleadings, the trial court formulated the following issues:-



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(1)Whether the suit property is used as a common pathway by the plaintiff, defendants and other persons?

(2)Whether the 3rd and 4th schedule suit pathway is the separate pathway of the defendants and others?

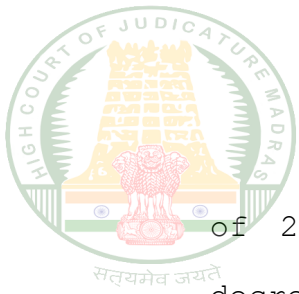
(3)Whether the plaintiff has no other alternative pathway, except the 3rd and 4th schedule of the suit pathway?

(4)Whether the plaintiff is entitled to the relief of injunction as prayed for?

(5)To what other relief, the plaintiff is entitled to?

5.On side of the plaintiff, 2 witnesses examined and 12 documents were marked. On the side of the defendants, 2 witnesses examined, but not document was marked. The Commissioner's report and plan were marked as Exs.C1 and C2.

6.At the conclusion of the trial process, the trial court decreed the suit as prayed for with costs. Against which, the defendants filed appeal before the appellate court namely the Sub Court, Sankarankovil, in AS No.103



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of 2005. The appeal was allowed and the judgment and decree of the trial court were set aside by the appellate court.

7.Against which, this second appeal is preferred by the appellant/2nd plaintiff.

8.At the time of admission, substantial question of law was framed, which is not happily worded. So, the substantial question of law is recasted as under:-

"Whether the lower appellate court has committed any error in holding that the 3rd and 4th schedule properties are not the common pathway of the plaintiffs and the defendants?"

9.Heard both sides.

10.It is admitted by both sides that the property belongs to the plaintiffs and the defendants and the disputed property originally owned by their ancestors. It is not in dispute that the first schedule belongs to the plaintiffs. The second schedule belongs to the defendants. The third schedule lies between the second



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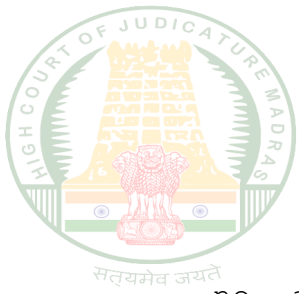
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item and one Pechiappa Nadar. The 4th item lies between one Marimuthu Nadar's house and Pechiappa Nadar. The third schedule is connecting to south Nadar Keela Theru through the 4th schedule. That property is now under dispute.

11.Now, we will straightaway go to the Commissioner's report and plan for appreciating the fact, so that the lie of the property and the dispute can be discussed in a proper manner.

12.According the plaintiffs, the portion marked as '**HIJG**' also part and parcel of the third schedule.

13.But it is the case of the defendants that the 2nd plaintiff put up or extended his kitchen area towards south. Now blocking that portion, he claims pathway right over the 3rd and 4th schedule; In fact, the 2nd plaintiff had pathway only on the east of his house, connecting the north area and south Nadar Keela Theru. According to the defendants, the plaintiffs got that alternative pathway. The portion marked as the 3rd schedule belongs to them as Mutraveli. The 4th schedule belongs to them absolutely.



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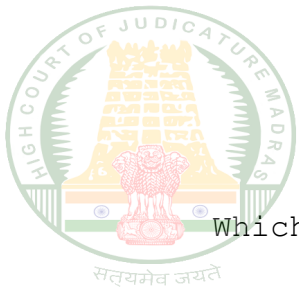
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14.The trial court has found that the plaintiffs had no alternative pathway on the east, connecting the property to the south Nadar Keela Theru. But the appellate court differed from that finding and recorded a contra fact that the plaintiffs failed to establish, neither prescriptive title of easementary right or easement of necessity. There is suppression of fact by the plaintiffs and so, it non-suited the plaintiffs.

15.Against the reversal finding, this second appeal is preferred by the appellant.

16.There is apparent contra findings by the both the courts. At the time of hearing the appeal, an important aspect was brought to the notice of this court by the respondents. He would submit that in the plaint, the plaintiffs claimed two contradictory rights. One is that by long peaceful enjoyment of the 3rd and 4th schedule, the prescriptive easementary right as defined under section 15 of the Easement Act, another one is easement of necessity are claimed conjointly.

17.According to the counsel for the respondents 1, 3, 4, 6 and 7, these are mutually exclusive and contradictory in nature. Both will not go together.



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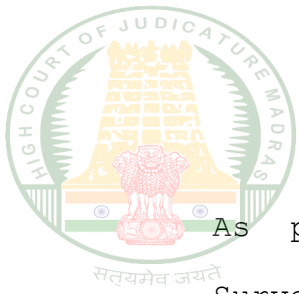
Which, according to him, is a settled proposition of law as per the judgment reported in **Arunachalam Pillai and another Vs. Sorimuthu Pillai (2004(4)CTC 414)] ; K.Krishnamoorthy Vs. Nagammal and others (2015-1-L.W. 570) .**

18.No doubt that such pleas are raised by the plaintiffs in the plaint not alternatively but conjointly.

19.Now, we will go to the evidence of PW1. It is repetition of the plaint averments in the chief affidavit.

20.In reply to the above said argument, the learned counsel appearing for the appellant would submit that pending appeal, step was taken by this court in directing the learned Government Advocate to file a report to find out whether any alternative pathway is available to the plaintiff/appellant to reach his house.

21.In response to the above said argument, the learned Government Advocate has taken steps to measure the property with the help of the Surveyor and the revenue records. He submitted a report, dated 23/09/2024.



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As per the report and plan prepared by the Taluk Surveyor, it is noted that Survey No.1338, which is shown as 4th schedule is a poramboke pathway. Pathway exists in survey Nos.1339 and 1340 to reach the survey No.1325. Survey No.1325 refers to the plaintiff's house.

22. Another pathway exists in Survey No.1334. It ends on the northern boundary of that survey number. It does not extend beyond that. In short, the alternative pathway, pointed out by the respondents and the appellate court does not exist upto survey No.1325. So, there is no alternative pathway on the eastern side of the plaintiff's property as observed by the appellate court.

23. Now pointing out this report, the learned counsel appearing for the appellant would submit that now it is established even by the Surveyor report that no other alternative pathway exists to him. So, the doctrine or principle of easement of necessity may be invoked and the relief must be given to the appellant/2nd plaintiff.

24. Per contra, the learned counsel appearing for the respondents 1, 3, 4, 6 and 7 by relying upon the judgment of the Hon'ble Supreme Court reported in **Bachhaj Nahar Vs. Nilima Mandaql and another [(2008) 17 SCC 491]** would



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submit that the parties are bound by the pleadings.

Violating the procedure or rule, no relief can be granted to a party more particularly, in the suit of this nature.

According to him, the report submitted by the learned Government Advocate has no relevancy and should not be taken into account. In fact, objection was filed by the respondents to the report submitted by the Tasildhar. In the objection, it has been stated that Survey Nos.1339 and 1340 are admitted to be the patta lands of the respondents as per the revenue records. Without any document, the report is filed as if pathway exists in two survey numbers. The plaintiffs blocked or closed the eastern pathway and claimed right over the respondents patta lands. So, according to him, the block was made only subsequent to the suit. Now, the appellant wants to take advantage of his own wrong.

25.Now the question, which arises for consideration is whether the report submitted by the Tasildhar, Sivagari can be placed on record and proceeded to consider the same for rendering a finding.

26.But I am of the considered view that it may not be proper. The report and plan prepared by the Tasildhar and the Surveyor must be brought on record in the form of



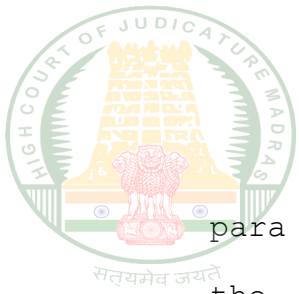
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additional evidence. But no steps have been taken by the appellant/2nd plaintiff to mark or exhibit these two documents as additional evidence. So, no finding can be recorded by this court on these two documents without proper evidence.

27.As mentioned above, the appellant raised a plea of easement of necessity at the time of argument. But this court observed that the election of right ought to have been made by the appellant at the time of trial before the trial court. But such election of right cannot be made for the first time before this court.

28.In fact, such a plea was raised before the appellate court. Para 19 of the appellate court judgment is devoted to this point. So, it appears that doctrine of election was invoked by this appellant before the appellate court itself. But the appellate court refused to entertain that argument, pointing out some defects in the pleadings.

29.Now, we will go to the judgment of the trial court to see whether election was made. There is no specific indication that election was made by the plaintiff in the specified term. But the discussion in



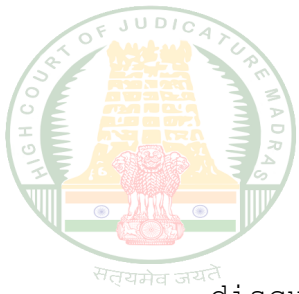
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para 10 starts with the sentence of argument advanced by the plaintiff/appellant. It has been argued that the plaintiff has no other pathway. This means that the plaintiff claimed only easement of necessity. In conclusion, the trial court has recorded that except 3rd and 4th schedule, the plaintiff has no other alternative pathway. So, it appears that before the trial court as well as the appellate court, such election was made by the appellant/plaintiff. But the trial court has committed an error in placing burden of proof upon the defendants to show that the plaint 3rd and 4th schedule are their absolute property. But contra, as pointed by the appellate court, the primary duty casts upon the plaintiff to prove his case.

30. But the appellate court has also committed an error in recording a finding that alternative pathway is available to the plaintiff. Since there is no clear indication in this regard by the Commissioner. The respondents have not filed any objection to the Commissioner report before the trial court.

31. Now coming to the main point, as mentioned above, on the basis of the report submitted the Tasildhar, Sivagiri and the Surveyor, Sivagiri, no finding can be recorded by this court.



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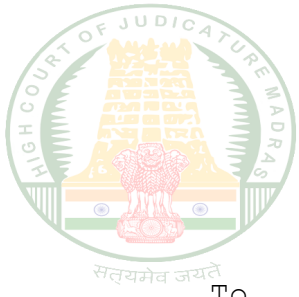
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32.For the reasons stated in the first para of the discussion, I hold that such a course is not available to this court. The only course available to this court is to remit the matter back to the trial court, leaving the trial court to re-issue the Commissioner warrant, either to the very same Commissioner, if available or to some other Commissioner with a direction to re-visit the property with reference to the revenue records, to note down the physical features, measure the property in reference to title document of both parties if available and file a detailed report. The parties are at liberty to lead further evidence in this regard. The trial court is also at liberty to summon the Surveyor, who prepared the report, dated 23/09/2024 filed before this court, if it is so required and if the parties are willing. Let the suit be disposed of afresh within a period of six months from the date of receipt of a copy of this order, considering the oldness of the matter.

33.With the above said direction, this second appeal is **allowed**. The judgment and decree of the courts below are set aside. The matter is remitted back to the trial court. No costs. Consequently connected CMP is closed.

Index:Yes/No
Internet:Yes/No
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14/03/2025



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To,
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- 1.The Sub Judge,
Sankarankovil.
- 2.The District Munsif,
Sivakari.
- 3.The Section Officer,
VR/ER Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGOVAN, J

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