

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 13-03-2026

PRONOUNCED ON : 18-03-2026

CORAM

THE HON'BLE MR.JUSTICE SUNDER MOHAN

**SA No. 19 of 2010
and M.P.No.1 of 2010**

- 1.Muthusamy Gounder (Died)
2. Selvakumar
3. R.Sadhasivam (Died)
4. Thangavel
5. Thambana Gounder (Died)
6. Subbramani
7. Utthami
8. Dhanalakshmi
9. Karthi
10. Govindammal
11. Rathinam

....Appellants/Defendants 1 to 6

... Appellants 7 to 11 /LRs of
deceased Appellants 1, 3 and 5

Vs.

1. V.Ponnusamy
2. Chinnasamy Gounder

... 1st Respondent/Plaintiff

... 2nd Respondent/7th Defendant

Appellants 7 to 11 brought on record as LR's of the deceased viz., 1st appellant [LRs-7], 3rd appellant [LRs-8 & 9] and 5th appellant [LRs-10 & 11] vide order of Court [CVKJ] dated 30-06-2022 made in CMP Nos.19567, 19569, 19573, 19557, 19561, 19555, 19558, 19556 and 19551 of 2021 in S.A.No.19 of 2010

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the learned Subordinate Judge, Dharapuram, dated 16.04.2009 in A.S. No.4 of 2008 reversing the Judgment and Decree of the learned District Munsif, Kangayam, dated 04.12.2007 in O.S. No.469 of 2004.

For Appellants: Mr. N. Manokaran

For Respondents: Mr.S.Sriram
for Mr.K.Govi Ganesan (for R1)
No appearance (for R2)

Judgment

The second appeal has been filed by the defendants 1 to 6 in the suit filed by the 1st respondent aggrieved by the judgment dated 16.04.2009 in A.S.No.4 of 2008 on the file of the learned Subordinate Judge, Dharapuram, reversing the judgment dated 04.12.2007 in O.S.No.469 of 2004, on the file of the learned District Munsif, Kangayam.

2. For sake of convenience, the parties are described as per their rank before the Trial Court.

3. The facts leading to the filing of the second appeal are as follows:

(i) The 1st respondent herein/plaintiff filed the suit in OS No.469 of 2004 for a declaration that he is entitled to take his men, cattle, bullock cart through the suit cart track shown as ABCFG to reach his field at SF No.214/B1 pursuant to his easementary right and for a permanent injunction restraining the appellants/defendants and their men from putting up any fence or destroying the suit cart track and preventing the plaintiff from using the suit cart track.

(ii) The defendants in their written statement had stated that though there was a cart track as claimed by the plaintiff, the plaintiff had no right to access his land through the said cart track; that the plaintiff had alternative access to his land; that the plaintiff had not acquired any easementary right by prescription or otherwise; and that therefore the suit is liable to be dismissed.

(iii) The plaintiff examined himself as PW1 and four other witnesses as PW2 to PW5 and marked Ex.A1 to A11. The defendants examined four witnesses on their side as DW1 to DW4 and marked Ex.B1 to B8. The reports of the Commissioner and the Plans submitted by him were marked as Ex.C1 to Ex.C5.

(iv) The trial Court found that the plaintiff had not established his easementary right by prescription and that he had alternative access to his property and dismissed the suit and also held that the passage was exclusively used by the defendants.

(v) The plaintiff filed AS No.4 of 2008 before the learned Subordinate Judge, Dharapuram. The first Appellate Court allowed the appeal by holding that the plaintiff had acquired easementary right by prescription; that the alternative access which is stated to be available by the defendants was never used by the plaintiff and that the commissioner's report is of no avail to the defendants. Aggrieved, the defendants 1 to 6 have filed the above appeal.

4. This Court while admitting the second appeal has framed the following substantial questions of law.

“a) Whether the first appellate Court erred in law decreeing the suit for declaration and injunction based on right of easement by prescription especially when the plaintiff having claimed equal right and title over the suit property, later claimed right of easement by prescription even though there is no legal evidence to prove his continuous right of usage over a period of 20 years?

b) Whether the first appellate Court is correct in law in decreeing the suit by overlooking the commissioner’s report and plan (Ex.C1 to C5) particularly when the plaintiff has not pleaded and proved the common tenement in respect of S.F.Nos.214 and 215 belonged to the plaintiff and defendants respectively?

c) Whether the first appellate Court erred in not taking into consideration or giving a specific finding on the admission made in the evidence of P.W.1, more so, the first appellate Court being the final Court of fact is expected to meet the findings of the trial Court before reversing it under Order 41 Rule 31 CPC?”

5. Mr.N.Manokaran, learned counsel for the appellants/defendants 1 to 6 would submit that the plaintiff had stated that he and his predecessors-in-title were using the suit cart track ever since 1911 when a registered Partition Deed was executed between his forefathers; that the said stand is contrary to their plea that they had prescriptive right of easement; that it is well settled that a person claiming easementary right

by prescription has to make definite pleadings and establish that he had been using the land peacefully and openly without any interruption for atleast 20 years; and that PW1, the 1st respondent herein had admitted in his evidence that he does not know whether the pathway mentioned in Ex.A1 refers to the suit cart track; that the reports of the Commissioner would show that the fencing of the land was opened up by the plaintiff just before the filing of the suit; that the plaintiff had alternative access; and that in any event, since the plaintiff had not discharged his burden of establishing his right, the suit ought not to have been decreed by the appellate Court.

6. The learned counsel for the appellants relied upon the following judgments in support of his submissions.

- “(i) Ponnaiyan @ Others v. Karuppakkal & Others
[2003(2) LW 716]
- (ii) Justiniano Antao & Others v. Bernadette B.Pereira
[2005(1) SCC 471]
- (iii) C.Pazhamalai Pillai & Others v. Chinnadurai & Another
[2009(2) LW 752]
- (iv) Natesa Gounder v. Raja Gounder & Others
[2012(7) MLJ 813 : 2012 (5) LW 649]
- (v) Govind Singh v. A.Khaja Mohiddin
[2013 (5) LW 164]”

7. Mr.Sriram, learned counsel representing Mr.Govi Ganesan, learned counsel on record for the 1st respondent/plaintiff would however submit that the fact that alternate pleas were made in the plaint would not affect the plaintiff's case in any manner; that the plaintiff had established that he was using the cart track for more than 20 years uninterruptedly; that since the fencing was put up by the defendants six months before the institution of the suit, the plaintiff had to necessarily break open the fence to access his land; that the Commissioner's report would clearly show that the alternative access, which is claimed to have been in existence was never used; that sale deeds marked as Ex.A1 and Ex.A2 produced by the plaintiff would clearly show that the cart track was used by the 3rd defendant, who had purchased the property to the West of the plaintiff's property and therefore the pathway mentioned in the partition deed of the year 1911 marked as Ex.A11 has to be understood as the suit cart track; and hence, prayed for dismissal of the appeal.

8. It is the case of the plaintiff that his grandfather was allotted the property in S.No.214/B1, pursuant to a partition deed in the year 1911; that he had inherited the said land from his grandfather; and that there is a

reference in the said Partition Deed to a 'pathway', which was the access to the land allotted to his grandfather. PW1, the plaintiff however had admitted in the cross-examination that he is not aware whether the common pathway mentioned in Ex.A11-Partition Deed, relates to the disputed pathway, which is the suit property. There is no specific reference made in any of the documents conferring the right on the plaintiff to use the disputed pathway.

9. The fact that there is a pathway, is not in dispute. It is the case of the defendants that the said pathway was meant only for the use of the defendants to approach their respective lands. In fact, the Sale Deed [Ex.A1] dated 20.03.1940, relied upon by the plaintiff is the document in favour of the defendants' predecessor-in-title. It only establishes that there was a pathway and there is no dispute that there was a pathway. The question is whether the plaintiff had a right over the pathway. As stated above, Ex.A11 document relied upon by the plaintiff is of no avail to the plaintiff to prove his right over the property, since the document only refers to, 'mamool vazhi thadam'. There are no other details mentioned in the said document as to the length, width and the location of the said

cart track. Therefore, the plaintiff had not established his easementary right by grant.

10. In fact, in the plaint, though the plaintiff had stated that he had acquired the right by grant by virtue of the said partition deed in the year 1911 he had also claimed that he had acquired the right of easement by prescription. It is well settled that in order to claim easementary right by prescription one has to show that he has been using the cart track as of right peacefully and openly and without any interruption for at least twenty years and the burden of proof lies on the person who asserts the said right. The Hon'ble Supreme Court in *Justiniano Antao's case* [supra], has reiterated the said legal position.

11. The Hon'ble Supreme Court in *Bachhaj Nahar vs. Nilima Mandal and another*, reported in (2008) 17 SCC 491, had held as follows:

“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 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.

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 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.”

The above observations would squarely apply to the facts of this case.

12. The plaintiff had not produced any evidence to show that he has been using the pathway continuously for about twenty years prior to the institution of the suit. The plaintiff who had not established that he had acquired the right by grant ought to have established that he had acquired the easementary right by prescription. Though in the plaint he claims that his forefathers were using the cart track and therefore, they have acquired the said right by prescription, no acceptable evidence has been adduced to establish his claim. In fact, the reports of the Commissioner also does not come to the aid of the plaintiff. The Commissioner in his reports and plans, marked as Ex.C1 to Ex.C5 has referred to the fact that the plaintiff had alternative access to his property and the said access was 8 links in width, which would be roughly about 6 feet.

13. The lower appellate Court had erroneously held that the cart track mentioned in Ex.A11 document must necessarily relate to the suit property. There cannot be any such inference in the absence of basic particulars such as location, length or width of the pathway in the document. In fact, as stated above, PW1 himself is not sure of whether

the cart track mentioned in Ex.A11 refers to the suit cart track. Further, in the absence of any definite pleadings and proof, the lower appellate Court had erred in holding that the plaintiff had acquired his right by prescription. Hence, this Court is of the view that the substantial questions of law framed have to be necessarily answered in favour of the defendants/appellants and is accordingly, answered. The Second Appeal is allowed. The Judgment and Decree of the learned Subordinate Judge, Dharapuram, dated 16.04.2009 in A.S. No.4 of 2008, is set aside and the suit in O.S.No.469 of 2004 on the file of the District Munsif, Kangayam, is dismissed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

18-03-2026

Index: Yes/No
Speaking/Non-speaking order
Neutral Citation: Yes/No

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SUNDER MOHAN J.

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To

1. The Subordinate Judge,
Dharapuram.

2. The District Munsif,
Kangayam.

**Pre-delivery judgment in
SA No. 19 of 2010**

18-03-2026