

(1999) 10 MAD CK 0063
In the Madras High Court
Case No : S.A. No. 72 of 1988

S. Paramasivam and Mohana	Vs	APPELLANT
Rukmani Ammal and Venkateswaralu		RESPONDENT

Date of Decision : 15-10-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10, Order 26 Rule 10(2), Order 26 Rule 10(3), Order 41 Rule 27, 100

Citation : (1999) 10 MAD CK 0063

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : A. Venkatesan, for the Appellant; K. Chandrasekaran, for the Respondent

Final Decision : Allowed

Judgement

M. Karpagavinayagam, J.—S. Paramasivam and his wife, Mohana, the plaintiffs, are the appellants herein. Rukmani Ammal and her husband, Venkateswaralu, the defendants, are the respondents herein. The plaintiffs filed a suit in O.S. No. 2967 of 1982 on the file of the XIII Assistant Judge, City Civil Court, Madras, as against the respondents herein, seeking for the relief of permanent easementary injunction, restraining the defendants from constructing on the southern side of the plaintiffs' property and for mandatory injunction to demolish the wall erected by the defendants along with the southern wall of the plaintiffs, the encroached portion in the plaintiff's property.

2. The defendants contested the suit, stating that they did not encroach upon the plaintiffs premises and that the plaintiff's had not acquired any easementary right. Upholding the contention of the plaintiff, the suit was decreed by the trial Court.

3. Aggrieved by the judgment and decree, the defendants filed an appeal in A.S. No. 437 of 1986 on the file of the IX Additional City Civil Judge, Madras.

4. During the pendency of the appeal, the defendants, appellants therein, filed an application in C.M.P. No. 2728/86 for appointment of Commissioner, to make a local inspection and submit a report to the Court. Accordingly, the same was ordered. On the report being filed by the Advocate Commissioner, the lower Appellate Court heard the counsel for the parties and allowed the appeal by dismissing the suit filed by the plaintiffs. Hence, the Second Appeal by the plaintiffs, the appellants herein.

5. At the time of admission, this Court formulated the substantial questions of law, which are as follows:-

"1. Whether the lower Appellate Court was right in law in not permitting the second Advocate Commissioner to be cross-examined by the appellants? and

2. Whether in law the appellants' property has no easementary rights to light and air over the respondents' property?"

6. On the strength of the above questions of law, elaborate arguments were advanced by the counsel for the appellants.

7. Arguing contra, the Learned Counsel for the respondents, in justification of the judgment impugned by the lower Appellate Court, would contend that the submissions of the counsel for the appellants have no substance.

8. In the light of the rival contentions, urged by the respective counsel, let me now go into the merits of the same, in order to solve the dispute, which has arisen in the present case.

9. The case of the plaintiffs is as follows:-

"The plaintiffs are the owners of the property bearing Door No. 15, Arani Rangian Street, I Lane, Madras-21. The defendants are the owners of the adjacent premises No. 16, Arani Rangian Street, I lane, Madras-21. The property of the plaintiff is situated at the northern side and the premises of the defendants is situated at the southern side. The defendants, while starting the construction work in their premises, on the southern side, have scratched 4 inches on the southern compound wall of the plaintiffs and erected a wall along with the wall, belonging to the plaintiffs. They have also put up windows and ventilators in the erected wall, and thereby affected the privacy of the plaintiffs and free flow of light and air to the plaintiffs' property. Thus, the defendants have encroached upon the plaintiff's property and prevented the enjoyment of the easementary rights of the plaintiffs."

10. The case of the defendants is as follows:-

"The defendants have not scratched four inches on the southern compound wall of the plaintiffs. The defendants did not erect wall along with the wall, belonging to the plaintiffs. The thickness of the compound wall itself is 4-1/2 inches. Even according to the Commissioner's report, the thickness of the compound wall is 5-1/2 inches. If the defendants have scratched the thickness of the compound

wall of the plaintiffs, the same would have been collapsed. The defendants have not encroached upon the compound wall of the plaintiffs in any manner. The plaintiffs have no right to question the opening of ventilators on the northern wall by the defendants. Moreover, the plaintiffs have not acquired any easementary right."

11. On the above pleadings, various issues were framed by the trial Court. During the course of trial, on behalf of the plaintiffs, first plaintiff examined himself as P.W. 1 and examined one Ramagupta as P.W. 2 and Exs.A1 to A22 were marked. On the side of defendants, second defendant, Venkateswaralu, was examined as D.W.1 and one Raghavendra Rao, an Engineer, was examined as D.W.2 and Exs.B1 and B12 were marked.

12. During the pendency of the trial, a petition was filed by the plaintiffs to appoint an Advocate Commissioner to inspect the property, to take measurements and to file a report. After hearing the parties, an Advocate Commissioner was appointed and after inspection, the report of the Advocate Commissioner was filed before the Court.

13. Though both the parties objected to the said report, the trial Court had taken into account the Commissioner's report, and considered the other materials placed by both the parties and decreed the suit, accepting the case of the plaintiffs.

14. Challenging the said judgment and decree, the defendants filed an appeal before the lower Appellate Court.

15. The first appeal was filed by the defendants in the year 1986 and the same was numbered as A.S. No. 437 of 1986. On 8.12.1986, the defendants appellants therein, filed a petition in C.M.P. No. 2728 of 1986 u/s 107 (2) of C.P.C. and Order 41, Rule 27 of C.P.C. before the lower Appellate Court, to appoint a qualified Engineer, as a Commissioner, to inspect the suit properties and to submit his report as to whether the new construction of the petitioners/ appellants had encroached upon the compound wall of the plaintiffs' property in any manner.

16. Opposing this application, the plaintiffs filed a counter on 19.1.1987, giving the reasons that the request of the appointment of Second Commissioner was not bona fide and the said petition was not maintainable in law and on facts of the case.

17. However, instead of an Engineer, the lower Appellate Court appointed another advocate, as a Commissioner, on 23.6.1987, to inspect the suit property and to take measurements with the help of the qualified Surveyor and to file a- report.

18. In pursuance of the warrant of Commission, the Advocate Commissioner, on 26.7.1987, went to the suit property, inspected the same in the presence of the counsel for both the parties and had filed a report before the lower Appellate Court on 3.8.1987.

19. The plaintiffs filed an objection to the second commissioner's report on 10.8.1987, stating that the Commissioner had exceeded the terms of the Commission Warrant, by giving a finding about the encroachment, that his conduct also, during the time of inspection, was biased and partial, and that the measurements given in the report are not correct. On the same date, i.e., on 10.8.1987, the plaintiffs, respondents therein, filed a petition in C.M.P. No. 1543 of 1987, praying for permitting them to cross-examine the Advocate Commissioner, under Order 26, Rule 10(2) and Section 151 of CPC.

20. The defendants, appellants therein, filed a counter affidavit dated 26.8.1987, opposing for granting of such permission to cross-examine the Commissioner.

21. Admittedly, this application in C.M.P. No. 1543 of 1987, filed by the plaintiffs, requesting for cross-examination of the Commissioner, has not been disposed of by the lower Appellate Court. Instead, the lower Appellate Court heard the arguments of the counsel for the parties, in the main appeal, and disposed of the same by the judgment dated 17.11.1987 and set aside the decree passed by the trial Court.

22. In this context, this Court, while admitting this Second Appeal, formulated the substantial question of law as to whether the lower Appellate Court was right in law in not permitting the second Advocate Commissioner to be cross-examined by the appellants.

23. On going through the judgment of the lower Appellate Court, it is clear that there is no reference about the petition filed by the plaintiffs, praying for the cross-examination of the Advocate Commissioner and the counter, opposing the said prayer, by the respondents/defendants. On the other hand, the lower Appellate Court, without considering the evidence of PWs. 1 and 2, and without advertng to the reasonings of the trial Court, mainly relying upon Ex. C2, the report of the second Advocate Commissioner, filed before the lower Appellate Court, and accepting the measurements contained in Ex. C2, ignoring the objections and request for cross-examination by the plaintiffs, held that the defendants are entitled to 20 feet north to south and as such, they have constructed the compound wall only in their portion and hence, there is no encroachment.

24. As indicated above, without permitting the plaintiffs to cross-examine the Second Advocate Commissioner and even without disposing of the said numbered petition, filed by the plaintiffs, more particularly when, in the said petition, notice was ordered to the other side, who in turn, filed a counter, the lower Appellate Court hastened to dispose of the appeal in favour of the defendants, mainly on the basis of Ex. C2, report of Advocate Commissioner.

25. In regard to the infringement of the easementary right also, the first Appellate Judge simply stated in one sentence, i.e. "It is also not proved that the plaintiffs are entitled for easementary right of light and air", and rejected the relief.

26. This approach by the lower Appellate Court, in my view, is quite wrong and erroneous.

27. The trial Court, on a meticulous analysis, had elaborately dealt with the evidence, oral and documentary, adduced by both parties, and held that there was an encroachment and the plaintiffs would be entitled to the injunction in respect of easementary right.

28. It is also seen from the records of the case that the trial Court appointed an Advocate Commissioner to make a local inspection and submit a report regarding the measurements of the suit property. In pursuance of the said order, the Advocate Commissioner, after inspection, filed a report, which was marked as Ex. C1. Only after filing of the said report, the trial had commenced. In fact, both the parties were permitted to file an objection to the said report. On behalf of defendants, one Raghavendra Rao, an Engineer, was examined as D.W.2. On the request of the defendants, he made an inspection on the suit property and filed a report.

29. The trial Court, after discussing the evidence let in by the plaintiffs, in the light of the documents filed by them, rejected the evidence of D.W.2 and his report, holding that the said report would contain incorrect particulars and they were created for the purpose of helping the defendants.

30. When such a finding had been given by the trial Court, it is the duty of the lower Appellate Court to go into the merits of the case, by considering the entire materials, available on record, taking into consideration all the reasonings given by the trial Court in its judgment, and then dispose of the appeal. Obviously, this was not done.

31. As stated earlier, the lower Appellate Court would heavily rely upon Ex. C2, the report filed by the Second Advocate Commissioner, who was not, admittedly, permitted to be cross-examined by the Counsel for the plaintiffs. In such a situation, the question would arise as to what extent the report, Ex. C2, could be acted upon by the lower Appellate Court.

32. Before dealing with this question, this aspect has to be viewed from yet another angle. The defendants filed an application before the first Appellate Judge on 8.12.1986, requesting for appointment of qualified Engineer to inspect the suit premises and to find out whether the defendants have scratched and encroached upon the compound wall of the plaintiffs property.

33. A perusal of the affidavit in the said petition, filed by the defendants, would show that they have not stated in the affidavit that the measurements contained in the report, Ex. C1, filed by the Advocate Commissioner, before the trial Court, were not correct. On the other hand, their grievance was that a qualified Engineer was examined on their behalf as D.W.2 and his evidence was rejected by the trial Court on the reason that he was not examined as a "Court Witness". Under those circumstances, they requested the lower Appellate Court in C.M.P.

No. 2728/86, to appoint a qualified Engineer to inspect the suit property. Moreover, the prayer in this petition was to appoint a qualified Engineer, to inspect the suit property and to give his report as to whether the defendants had encroached upon the compound wall of the plaintiff's property. It is clear from the records that the prayer was objected to by the plaintiffs, by filing a counter.

34. However, the lower Appellate Court ordered for the appointment of an Advocate Commissioner, instead of an Engineer, to inspect the property and to take measurements of the suit property.

35. It is to be noted, in this context, that though the prayer was to submit a report as to whether there was an encroachment or not, the lower Appellate Court issued a warrant of Commission to the Advocate Commissioner, to inspect the suit property and to take measurements with the help of the qualified Surveyor and to file a report before the Court.

36. It is now pointed out that the said order was passed by the lower Appellate Court, by consent. Even then, a further question would arise as to whether the lower Appellate Court could appoint a Second Advocate Commissioner, during the pendency of the appeal, in the absence of any reason to hold that the first Advocate Commissioner's report was not satisfactory.

37. Order 26, Rule 10 of the CPC deals with the procedure for issuance of Commission. It says that the report filed by the Commissioner shall be evidence in the case and that the same shall form part of the case. It further provides the parties to examine the Commissioner personally in open Court, touching the issue, regarding which reference is made in the report. Sub-rule (3) of Rule 10, Order 26 C.P.C. would read as follows: -

"Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."

38. From this, it is clear, the question of issuing a second Commission, either by the trial Court or by the lower Appellate Court shall be based on the satisfaction entered by Court. In other words, the Court is competent to issue second Commission and shall pass an order under Sub-rule(3) of Rule 10, Order 26 of C.P.C. This order should contain the reasonings for the satisfaction.

39. It is settled law that the appointment of the Commissioner, in appeal, in a rarity and is seldom resorted to.

40. It would be relevant, in this connection, to refer some decisions of this Court as well as the other High Courts, giving out the principles to be followed in making the order of appointment of Second Advocate Commissioner by the trial Court as well as by the lower Appellate Court.

41. In 1984 T.L.NJ. 374, it is held as follows:-

"In a matter of this kind, I am of the view that the Appellate Court ought to have been prima facie satisfied on hearing the appeal, as to whether the appointment

of a Commissioner is a necessity or not.... In other words, appointment of the Commissioner by the Appellate Court cannot be ordered at the mere asking. If the Appellate Court, on examining the evidence adduced before the trial Court, finds that some evidence is apparently lacking or it finds an inherent lacuna or defect in the order of the trial Court which has to be filled up for the just disposal of the appeal, then it can appoint a Commissioner."

42. In AIR 1930 Mad 236 ; 120 I.C. 737 (Visvanadhan v. Mangamma), it is held thus:-

"The practice of appointing a Second Commissioner without formally recording objections to the first Commissioner's report and without considering whether the first Commissioner's report should be superseded or not is a practice which cannot be too strongly condemned. Reasons for superseding the first Commissioner's report must be recorded in writing by the Court."

43. The same was followed in the decision reported in AIR 1939 Mad 73 (Kunhi Kutti Ali v. Md. Haji), wherein it was held thus:-

"A second commission should not be issued to deal with one and the same subject unless it is thought that the report of the first Commissioner is not satisfactory in which case the earlier commission should be wiped out altogether and attention should be paid only to what is reported by the Second Commissioner. Instead of that if the Judge balances the report of one Commissioner against that of the other and expresses a preference for the view of the first Commissioner, he acts with great impropriety and contrary to what is contemplated by O. 26, R.10(3)."

44. In (1985) 1 M.L.J. 254 = 88 L.W.48 (R. Viswanathah v. P. Shanmugham and another), a learned Judge of this Court has held thus:-

"The power is circumscribed by the principles under Order 26, Rule 10(3). The power can be exercised only after the court below renders a finding that the proceedings and the report of the earlier Commissioner are not satisfactory and there is need for a further enquiry."

45. In K. Kandaswamy and Another Vs. K.C. Ramaswami and Others, this Court has held thus:-

"There is no provision of law which would enable a court to appoint a second Commissioner with the consent of the previous commissioner. A presiding Officer of the Court cannot function by relying upon the commonsense aspect as known to him, but has to function within the four corners of the Code of Civil Procedure."

46. In 1983 K.L.T 258 = 1983 Ker.L.J. 125 (Ummer v. Muhammed), the Kerala High Court has held thus:-

"The Court can issue a second commission only under O.26, R.10(3) of the Code. As per the above provision, the Court should, for any reason, be dissatisfied with the proceedings of the Commissioner already deputed.... If, for example, the

Court feels some more details are to be gathered, the Court can depute the same Commissioner for the same purpose and in that case, no setting aside of the report already submitted is necessary. At any rate, the Court no jurisdiction to issue a second commission when it has not only not expressed any dissatisfaction about the work of the first commissioner but has refused to set aside his report."

47. In AIR 1969 Mad. 144 = 81 L.W.374 {Rajagopala Iyer v. Ramachandra Iyer), it is held thus:-

"As I said, the lower Appellate Court seems to have taken it for granted that the application for appointment of a Commissioner at the appellate stage should be granted as a matter of course, which is not the case, the order of the lower appellate Court amounts to this that because the appellate Court possesses the power, according to it, therefore it made an order for appointment of a Commissioner. Clearly that view is wrong. A Commissioner, even if there is power, can be appointed only if it is justified on the merits."

48. Having regard to the above principles laid down in the various decisions cited above, it is clear that the lower Appellate Court, merely appointed the Second Commissioner, without recording reasons as to why the Second Commissioner has to be appointed at the appellate stage, thereby committed a serious illegality.

49. Yet another feature to be noticed, at this juncture, is that the order was passed in C.M.P. No. 2728 of 1986 dated 23.7.1987, appointing a new Advocate Commissioner, to inspect the suit property and to take measurements with the help of a qualified Engineer or Surveyor of his choice and directing him to submit his report before the first Appellate Court.

50. On 3.8.1987, the learned Advocate Commissioner submitted his report before the first Appellate Court. It is noticed from the report that the learned Advocate Commissioner, instead of taking measurements of the suit property and to submit a report in the presence of parties, he has also given his opinion in the report that there is no encroachment. The relevant portion of his report is as follows:-

"Appellant/Petitioner constructed his new construction in his property only. As per patta, the width is 20". But the new construction width is 19". 10". I suggest that by considering the mere touch of the new construction in the wall (suit property), it may not be concluded that there is an encroachment for 2-3/4". It is so clear to mention that Appellant/petitioner constructed his new construction (Length 46".2-1/2) in his own property and there is no encroachment in the respondent's compound wall."

This statement by the Advocate Commissioner would indicate that he has exceeded his terms of duty entrusted to him, by giving his opinion, indicating to the Court what the finding should be. Virtually, the report of the Second Advocate Commissioner is like a written statement filed on behalf of defendants.

51. Curiously, the lower Appellate Court also referred to only that aspect and concluded that the width of north-south suit property is 20 feet and the new construction's width is 19' 10" and therefore, the construction is made in the property of the defendants and therefore, no encroachment. This finding, in my view, does not reflect the realities.

52. The lower Appellate Court compared the two pattas. Ex. B2, the patta filed by the defendants shows the width as 20" from north to south. As per Ex. A9, the plaintiffs also would be entitled to 20" from north to south. Since, as per the report, the plaintiffs' construction measures 20'1-1/2", the lower Appellate Court would hold that the Wall of the plaintiffs only is the encroachment on the land of the defendants and the defendants constructed the Wall at the width of 19'10", which is in their property. This finding, considering the width of Wall of North-South alone, would make it clear that the lower Appellate Court has not considered the other materials available from both the Commissioners report i.e., Exs.C1 and C2, and the oral and documentary evidence adduced by both the parties.

53. The total area of Door No. 15, belonged to the plaintiffs, as per the documents and patta, is 2242 Sq.ft. Similarly, the records produced by the respondents/defendants show that the total extent of the area, which is belonged to them in Door No. 16, as per the document, is 1 ground and 801 Sq.ft.

54. As per the first Commissioner's report filed before the trial Court, from within the defendants' house, the measurement to the plaintiffs house, towards south was 20'1" and the measurement was 20" from north to south at the back of the building. It is also stated in the said report that the new construction made by the defendants at the eastern side, from north to south, measure 18'2", east to west on the northern side measures 40'9" and on western side from north to south is 19'11". It is also stated that the defendants' new construction, made on the eastern side, measures 20'1/2".

55. According to the first Advocate Commissioner's report, the measurement of the plaintiff's house from North to South is 20'1-1/2" on the road side and the measurement from north to south, upto the back of the construction old terrace portion is 18'19". At the end of the plaintiffs' property, on the eastern side, the measurement from north to south is 18'1/4". It is also stated in the said report that there is no gap between the defendants' new house and the plaintiffs' compound wall, and that the newly constructed building measures, from east to west, 46' 2". The same was constructed on 5 pillars with brick wall, from fourth pillar to tenth pillar.

56. A perusal of the second Advocate Commissioner's reports gives the following particulars:-

"From the entrance, the width of the defendants' property is 20'1/2" and the width of the plaintiffs' property is 20'1-1/2". The measurement of the plaintiffs' property (width), from north to south is 20", including the thickness of the north

wall at the distance of 18"3" from the entrance. Then, the width is reduced to 19"11" at the distance of 40"1" from the entrance. Again the width is reduced to 19"9" at the distance of 62T from the entrance. Again the width is reduced to 19M7-1/2" at the distance of 77"5" from the entrance. The measurement of the defendants' new construction (width), from north to south, is 19"19" at the distance of 33" from the entrance. Then the width of the new construction is 19"10" at the distance of 73" from the entrance.

Each pillars width is 10" (Square in shape) 2-1/4" facing South (defendants' property) and 2-3/4" facing north (Respondents' property). One pillar of the compound wall touched the old construction and five pillars touched the new Construction."

Thus, both these reports would show that the width of the suit property, the compound wall, from north to south, both at the western side and at the eastern side, is not even.

57. Though initially, the width of the suit property 20" when the wall is preceded to the east, it becomes less. In such circumstances, the lower Appellate Court is quite wrong in measuring the width of the wall from north to south at the western side alone.

58. On the other hand, it is the duty of the lower Appellate Court to have a comprehensive study of the entire materials, including the oral and documentary evidence, and came to the conclusion whether any encroachment was made.

59. According to the first Commissioner's report, there is an encroachment by 2"3/4". According to the second Commissioner's report, by another Advocate, there is no encroachment as per patta, Ex. B2. But, it is to be noticed from the second report that the width of the plaintiff's property, from north to south is 20", including the thickness of the north wall, at the distance of 18"3" from the entrance. But, the lower Appellate Court would wrongly observe that the plaintiffs house measures 20"1-1/2" from north to south, excluding the compound wall of the plaintiffs' and that therefore, the plaintiffs' are in possession of more extent than they are really entitled to. This finding, in my opinion, is against the evidence available in this case.

60. A reading of the evidence of P.Ws.1 and 2 would clearly show that there is an encroachment by the defendants, by putting the wall on the pillars, constructed by the plaintiffs. The fact that the wall was constructed on the pillars and along with the middle portion of the wall, has been clearly stated in both the reports of the two Advocate Commissioners.

61. In the first commissioner's report, it is stated that from the fourth pillar, the defendants' newly constructed house has encroached 2"1/4" on the plaintiffs compound wall and the new building is constructed on 5 pillars with brick wall. Similarly, in the second Commissioner's report also, it is stated that one pillar of the compound wall touched the old construction and five pillars touched the new

construction. It is also seen from the evidence that there is no gap between the defendants' new house and the plaintiffs' compound wall.

62. Added to this, Ex. A20, which is a Muchalika, which is signed by both the parties, plaintiffs and defendants, in the presence of Panchayatdars, would show that the defendants have scratched the wall belonged to the plaintiffs to certain extent and the defendants have admitted the same and also gave an undertaking that they would rectify the same in course of time. As a matter of fact, D.W.1, the second defendant would admit his signature in Ex. A20. One of the panchayatdars is P.W. 2. He has also clearly spoken about Ex. A20 and other facts with regard to the construction made by the defendants, encroaching the wall of the plaintiffs.

63. Apart from this oral and documentary evidence, the photos with negatives have been marked in this case as Exs.A10, A11, A12 and A13 series. These photos were not challenged.

64. A perusal of these photos would make it evident that the new wall, constructed by the defendants, is on the wall of the plaintiffs.

65. There is no dispute in the fact that the construction of the compound wall and the building by the plaintiffs was only on the basis of the approved plan, which is marked in this case as Ex. A14. On the other hand, D.W.1 himself would state that he has not obtained a plan or approval for constructing the wall and the building.

66. In fact, D.W.1 himself would admit that he paid the fine in the prosecution launched by the Corporation against him for the unauthorised construction. Curiously, he would admit in his evidence that he used to construct the building without any plan. The relevant portion of his evidence is this:-

This admission would show that he has constructed the wall even without any Plan on the pillars, along with the wall, belonged to the plaintiffs. Without considering these materials, the lower Appellate Court has simply relied upon Ex. C2, the Advocate Commissioner's report and concluded that there was no encroachment, that too, by misreading the report.

67. In regard to the easementary right, as 1 indicated earlier, the lower Appellate Court instead of discussing the evidence relating to that, simply rejected that by one sentence by observing that "It is also not proved that the plaintiffs are entitled for easementary right of light and air." This finding is also not correct, in view of the abundant materials available both in the plaint and in the evidence of P.W. 1, who has clearly stated that because of the construction, the plaintiffs were not able to get the air and light.

68. In the plaint, it is stated as follows:-

"The plaintiffs submit that the provision of windows and ventilators in the offending northern wall of the defendants would also seriously infringed the

plaintiffs easementary right or light and air to which the plaintiffs" property is entitled to and which right is being enjoyed for several decades."

69. In the evidence, the plaintiff would state as follows:-

Under these circumstances, on the basis of the materials the trial Court is correct in holding that the plaintiffs would be entitled to the easementary right also.

70. On the strength of the decision reported in AIR 1999 SCC 2216 = 1999-2-L.W 588 (Arumugham v. Sundarambal), the Learned Counsel for the respondents/defendants would submit that this Court in Second Appeal, cannot interfere with the judgment of the first Appellate Court on the ground that the first Appellate Court had not come to close grips with the reasonings of the trial Court and that it is open to the first Appellate Court to consider the evidence adduced by the parties and give its own reasons for accepting the reasons on one side and rejecting the reasons on the other side.

71. It is true that the Apex Court in the judgment, while not accepting the view of the earlier Bench of the Supreme Court, in the decision reported in S.V.R. Mudaliar (Dead) by Lrs. and Others Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Others, where it was said that if the first appellate Court had not adverted to all the reasons given by the trial Court and not come into close quarters with the same, the second Appellate Court could interfere, would prefer to three Judge Bench of the Apex Court in R. Ramachandran Ayyar Vs. Ramalingam Chettiar, , holding that the second Appellate Court could not reverse the judgment of the first Appellate Court, merely on the ground that the first Appellate Court had not adverted to all the reasons given by the trial Court. But, this judgment reported in Arumugham (Dead) By Lrs. and Others Vs. Sundarambal and Another,) would not apply to the present case, since it is the case where the lower Appellate Court had not only failed to consider the reasons given by the trial Court, but also ignored the available materials on record and gave a finding on the basis of the second Advocate Commissioner's report.

72. It is well settled that First Appellate Court cannot interfere and set aside the findings of the trial Court which had the advantage of watching the demeanour of the witnesses, unless there are very strong and compelling reasons to reverse the judgment. It cannot also be debated about the settled position of law that when the first Appellate Court had arrived at its conclusions, ignoring important evidence on record, such findings are not binding in the Second Appeal.

73. It is held by the Apex Court in various decisions that when both the Courts below had recorded diverse findings and where the material evidence and the relevant circumstances had not been adverted to by the first Appellate Court, the High Court would be justified in interfering with the finding of fact. In other words, if the findings of the first Appellate Court are not supported by evidence or are based on misconception or erroneous and perverse, this Court would certainly interfere in the Second Appeal.

74. u/s 100, C.P.C. this Court would be entitled to take into consideration the question whether the material evidence and relevant circumstances were considered by the first Appellate Court and to consider whether the finding of the lower Appellate Court is based on evidence and whether the evidence is based on pleadings. If the finding of the lower Appellate Court is based only on surmises or on wrong application of law, and it is not based on evidence or pleadings, this Court would definitely be entitled to interfere with that finding. These principles, regarding the scope of Section 100, C.P.C have been enumerated in Major Singh Vs. Rattan Singh (Dead) by LR.s. and others, Sonawati and Others Vs. Sri Ram and Another, (Suraain Singh v. Mehenga), Kochukakkada Aboobacker (Dead) by L.R.s. and others Vs. Attah Kasim and others, 1996-2-L.W.465 = D.S. Thimmappa Vs. Siddaramakka, (Rajiah Nadar v. Manonmani Ammal) and 1998 (I) C.T.C. 477 = 1998-3-L.W.333 (Muthu Goundar v. Poosari @ Palaniappan)

75. In the light of these principles, if we look at the materials placed before the trial Court, it can be safely held that the lower Appellate Court did not at all consider the relevant circumstances and vital evidences, while deciding the First Appeal.

76. That apart, admittedly, as indicated above, though the permission was sought for by the plaintiffs' counsel, before the first Appellate Court, for cross-examining the Second Advocate Commissioner, on the ground that his report was biased one, the said permission was not granted by disposing of the petition for the said request.

77. Under those circumstances, the lower Appellate Court is wrong in placing heavy reliance on the said report to hold in favour of the defendants, Similarly, the evidence let in by the plaintiffs, regarding the easementary right, which was not seriously challenged by the defendants, has not at all been taken into consideration by the lower Appellate Court. On the other hand, it simply rejected the said relief by stating that the said plea was not proved. Looking at any angle, in my view, the judgment and decree impugned does not reflect judicial application of mind by the lower Appellate Court on the relevant materials available on record and consequently, the same is liable to be set aside. Accordingly, the appeal is allowed. The judgment and decree of the lower Appellate Court is set aside and the judgment and decree of the trial Court is restored. No costs.