

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 25.01.2017

PRONOUNCED ON: 02.02.2017

CORAM

THE HONOURABLE DR.JUSTICE G. JAYACHANDRAN

S.A.No.237/2008

C.Mani ..Appellant/Respondent /
Plaintiff

..Vs..

1.P.R.Sadhasivam ..Respondents/Respondent

2.S.Ramakrishnan ..Appellants/Defendants

Prayer: Appeal filed Under Section 100 C.P.C. To set aside the Judgment and Decree passed in A.S.No.119 of 2006 dated 01.10.2007 on the file of Principal Sub Court, Erode, Erode District reversing the Judgment and Decree passed in O.S.No.1436 of 2004 on the file of I Additional District Munsif Court, Erode dated 02.08.2006 and to allow this second appeal.

For Petitioner : Mr. Naveen Kumar Murthi
for M/s.P.T.Ramadevi

For Respondents: Mr.N.Manokaran

JUDGMENT

This Second Appeal is preferred by the plaintiff aggrieved by the Judgment and Decree of the First Appellate Court which has partly modified the trial Court judgment.

2.The brief facts of the case is as under:

3.The plaintiff is the owner of the property bearing Survey No.56/1, and the defendants are the land owners of the land located on the Northern side of the plaintiff land. The defendants land is 6 feet lower to that of the plaintiff's land. While so, the plaintiff who are irrigating their land through lower Bhavani Irrigation Project have the right to drain the excess water through the defendants land. It is essential as well as by custom and natural justice, the plaintiff right to

let out the excess water into the defendants land as easement of necessity. While so, animosity arose when the plaintiff refused to sale his land to the defendants. So the defendants to cause inconvenience, denied the plaintiff's right to drain excess water into their property. Hence the suit for declaration and Permanent Injunction to the effect that the plaintiff has a right of easement to drain the excess water to the defendants property and restraining them from interfering the said right.

4.The suit was contested by the defendants by filing written statement wherein, the allegations were denied. The averments that the land of the plaintiff is on a higher altitude and the defendants land is at a lower altitude denied. According to the defendants, the land of the plaintiff slopes down from West to East and South to North. The water from lower Bhavani Irrigation Project enters through Koppu Canal and from that Canal, water is taken to plaintiff land for irrigation. The water from the Canal flows towards East. Excess water drain at extreme East through EFG portion marked in the Commissioner's Report and the water joins the Canals on the East of the plaintiff land. The contention of the plaintiff that excess water flows through defendants land is false and the portion marked by the plaintiff has the drainage Canal is owned by the defendants and plaintiff have no right to releasing drain their excess water through the defendants property. The trial Court considering the pleadings have framed the following issues:-

- 1)Whether the plaintiff is entitled for declaration that they have right to drain excess water through defendants property located on the Northern side of the plaintiff's land?
- 2)Whether the plaintiff where draining the excess water to the defendants land?
- 3)Whether the plaintiff is entitled for Injunction as prayed for? and
- 4) what other relief?

5.On the above pleadings, for the plaintiff side three witnesses and seven exhibits were marked. On the side of the defendants two witnesses, and 6 exhibits were marked. The Commissioner's Report and Sketch were marked as Ex.C-1 and Ex.C-2.

6.The trial Court after considering the evidence, allowed the suit as prayed for. Aggrieved by the same, the defendants preferred First Appeal and the First Appellate Court has formulated the following point for determination in the appeal.

- 1)Whether the plaintiff has a natural right and

easement right of necessity to drain excess water through the Canal rendering from West to East on the defendants land?

7. After re-appreciating the evidence, the First Appellate Court partly allowed the appeal holding that based on the Commissioner's Report and the evidence, it is clear that the plaintiff though entitled to drain the excess water into the defendant land, he cannot have the benefit of a declaration to drain the water through all parts of the defendants land. In alternate, the plaintiff can drain excess water through the Nilaviyal Vaikal in S.No.50/1 owned by the defendant. For the said purpose, the plaintiff has to arrange for 2 feet breath Canal along the Eastern boundary and Northern boundary of his land to drain the water. Aggrieved by this, the plaintiff has preferred the Second Appeal. This Court at the time of admission has formulated the following question of law:

" 1. Has not the Lower Appellate Court committed an error of law in not holding that in view of the evidence of D.W.1 once admission to the effect that the plaintiff is discharging excess water through Ex.A-6 channel, the Appeal ought to have been dismissed, since admission made by the party is the best form of evidence.

2. Has not the Lower Appellate Court committed an error of law in modifying the decree and judgment of the trial Court, since it is nobody's case that the drainage is situated in the North eastern corner as the parties have clearly understood each other's case."

8. The counsel for the appellant submitted that it is an admitted fact that the plaintiff's land was situated on the higher altitude and the defendant's land is lower altitude. The excess water finds its own way as it is drain down towards the defendant's land. While so ever since, the lower Bhavani Irrigation Project came functioning from the year 1956 it has been a customary right to drain the excess water into the defendant's land on the Northern side. While so, the First Appellate Court has formulated an alternate suggestion of draining the excess water which force the plaintiff to create a drainage Canal with 2 feet breath along the Eastern and Northern boundaries of his land and to channelise excess water to the North Eastern corner and let it out through the Nilaviyal Canal. Such an alternate suggestion is not only contrary to the existing custom of draining the excess water, but also amounts to forcing the plaintiff to create a new Canal along with its Northern and Eastern boundaries at 2 feet breath and let out water into the Nilaviyal Canal.

9. It is further contended by the learned counsel for

the appellant that it is not only a right of the easement by custom, but also by necessity any water in excess to get drained through servient tenement. The defendants being the owner of the Northern side property are bound to allow the excess water to flow through their land. In support of his submission, the learned counsel for the appellant referred the judgment of the Hon'ble Madurai High Court Gowri Bai and Others .Vs. Elizabeth and Another reported in (2011) 2 CTC 266 wherein, Hon'ble High Court has observed as under in para 17 & 20 and same is extracted below:

"17. Therefore, from the passages from the Book of Easements and License by Katiyar and also as per the judgments of our Court, it has been made clear that the water on a higher ground must by operation of the force of gravity flow on to the lower ground and if the owner of the lower ground raised an obstruction to the natural flow of water, he can be restrained if it causes damage to the owner of the land on the high level. No doubt, in the judgment reported in Saraswathi .v. S.Ganapathy, 2001 (4) SCC 694, the Hon'ble Supreme Court has held that when two properties were owned by a single person and subsequently he sold those two properties to different persons, no easementary rights regarding the drainage of water could have been acquired by one owner and the person cannot claim any right over the land of another by contending that previously the owner was allowing the rain water to drain from the roof on the other property and therefor, he also entitled to have the same facility after his purchase.

20. Though the plaintiff could have applied for the relief of declaration in a Suit for injunction, the Court is entitled to give the findings regarding the rights of the parties and as a matter of right, injunction can be granted only when the Court gives the finding that the Plaintiff's are entitled to prevent the Defendants from causing any obstruction or damages to the Plaintiffs property. Therefore, in a Suit for injunction, the Court has no necessarily give a finding regarding the right of the Plaintiffs. Therefore, it cannot be considered that without the prayer for declaration, the suit for bare injunction is not maintainable. As stated supra, the Plaintiffs are entitled to take the water which flows

naturally from the western tank street through the Defendants

property and when the Plaintiffs are entitled to allow the natural water to flow through the Defendants' property, they are entitled to the relief of injunction, and there is no need to pray for a declaration that they are entitled to take the water from the Defendant's property. Hence, the Suit is not bad for not praying for the relief of declaration and the third substantial question of law is also answered in favour of the Appellants."

10. Per contra, the learned counsel for the appellant submitted that the First Appellate Court has gone into the evidence in detail particularly, the report of the Advocate Commissioner which has considered the physical feature of the property, and based on the report, the Appellate Court modified the judgment of the trial Court which is more equitable and in accordance with law. Hence there is no need to interfere with the finding of the First Appellate Court.

11. Further, the learned counsel for the respondents submitted that no person can have a right to drain water willfully accumulated by him, into their neighbours land causing damage to the neighbour's property. If the appellant is allow to drain water into the respondents land where ever he likes that will cause damage to the standing crops of the defendants. Therefore, water in excess has to be channelized properly by the plaintiff and has to be let out into the defendants land without causing damage. So, the judgment of the First Appellate Court is appropriate and workable. Therefore, there is no need to interfere with the finding of the First Appellate Court.

12. In support of his submission, the learned counsel for the respondents relied upon the judgment of the Hon'ble Supreme Court reported in [2001] 4 SCC 694 in the matter of Saraswathi and Another .v. S.Ganapathy and Another wherein, the Hon'ble Supreme Court has observed that

"19.As the 1st respondent had purchased the property he was entitled to construct on his own property. Mr.Sivasubramaniam seriously submitted that the 1st respondent was bound to allow water from the roof of the triangular room to flow on to the land of the 1st respondent as it had always done in the past. Mr.Sivasubramaniam seriously contended that the 1st respondent could not construct on his own land in a manner which would prevent the flow of such water into the 1st respondent's land. In

our view, this argument merely needs to be stated to be rejected. No person can have a right to have water from his property flow on to the land of his neighbour. No such right was granted under the sale deed. No such easementary right can be claimed in law. All that the appellants can claim is to see that water from the roof of his house is allowed to flow on to his own land."

13. The learned counsel for the appellant also relied upon the judgment of the Hon'ble Bombay High Court rendered in *Sitaram Motiram .v. Keshav Rachandra* reported in AIR (34) 1947 Bombay 4, in this judgment, the Hon'ble Bombay High Court has dealt in detail the easement right of the dominant land owner vis-a-vis the right of the servient land owner in respect of discharging excess water by the dominant tenement into the servient tenement.

14. After considering the rival contention made by the respective counsel and the evidence before this Court it is well found that the plaintiff is a dominant tenement, and the defendant is a servient tenement. From the physical feature recorded by the Advocate Commissioner, one could easily visualise that the excess water has to be necessarily drained into the defendant's land. The contentious issue is that whether the excess water has to be drained into the defendant's land without any channelize or it should be channelized to avoid damage or over flowing of the defendant's land who is the servient tenement.

15. The Hon'ble Bombay High Court in its judgment cited supra has gone at length considering various commentaries of the experts on the issue also referring illustration I to Section 7 of Indian Easement Act 1988 has observed that :-

"9.there is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of nature in undefined channels. This principle is embodied in illust. (I) to S. 7, Easements Act, which says that every owner of upper land has a right that water naturally falling on such land shall be allowed by the owner of the adjacent lower land to run naturally thereto. This right is incidental to the enjoyment of property and partakes of all the characteristics of an easement, but is really a part of the total content of the proprietary rights. This natural right exists ab initio and does not depend for its creation on prescription, grant or custom, but is inherent in the geographical configuration of the property. As this right is

strictly not an easement as defined in the Indian Easements Act, S.23 of that Act does not come into play. Under that section the dominant owner may from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose additional burden on the servient heritage. If S.23, Easements Act, could have been applied to the present case, the matter could have been easily disposed of, for it is obvious that the method of enjoyment of the right of the owner of the upper land to discharge water on the adjacent lower land could be altered only so far as it does not impose additional burden on the servient tenement. In the present instance the defendant could have altered the method of discharging his surface water on to the plaintiff's land in any manner he pleased provided that he did not cast additional burden on the plaintiff's servient tenement. As in point of fact additional burden has been cast, the defendant could be held to have contravened the provisions of S.23, Easements Act."

Now the point is that whether the excess water accumulated in the land of the plaintiff has to be allowed to flow naturally into the adjacent land owned by the defendant as found in the illustration I of Section 7 or the plaintiff should be directed to alter the 'mode and place' of enjoying the easement to avoid burden on the servient tenement by invoking Section 23 of the Indian Easement Act.

16. On analysing the facts of the case in the light of the law prevailing, it is evident that "Every land owner has a natural right to deal with his surface drainage-water as he pleases. He can either let it find its way to his neighbour's land if that is at a lower level than his own, or he can collect it or use it as he pleases on his own land, subject always to the reservation that if he allows it flow for the prescriptive period through defined and permanent artificial channels on to his neighbour's land, his neighbour may acquire a right to its continuance, and, conversely the enjoyments of an out let for his surplus water for over a period of twenty years through defined artificial channels, may give him a right to the continuance of the outlet." as quoted by the Hon'ble Bombay High Court in the judgment cited, from the commentaries on Easement by Peacock. But this right of superior property to discharge water on the land of the inferior property is not an absolute right. It is subject to the condition that he cannot allow the water to go up to the inferior property so as to affect his land in a manner more injurious than was the case

before such use.

17.As per the pleadings of the plaintiff which has been accepted by the Court's below, the defendant is trying to block the free flow of surplus water into his land causing over flooding. Therefore Courts have rightly granted injunction restraining, the defendants from blocking the free flow of the excess water into the defendants property. At the same time, while the trial Court has allow the plaintiff to let out the excess water into the defendants property without any restriction, the First Appellate Court has provided an alternative solution to the dispute by creating an artificial Canal along with Northern and Eastern boundary of the plaintiff land to collect the excess water and drain it into the Canal found in the defendants land. Probably, the First appellate Court has drawn its inspiration based on Section 23 of the Indian Easement Act.

18.It is pertinent to point out that according to the plaintiff, the excess water is not only the natural rain water, but also the artificial water which is collects from the lower Bhavani Irrigation Project. When the water accumulated in the plaintiff's land is not exclusive through natural source, but also by artificial source, then the law on this point is something different. In this regard, the Bombay High Court referring the judgments of Privy Council reported in AIR 1915 PC 165 Gibbons .V. Lenfestey has said, "If the water which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise imposing it, the owner of the inferior is without the positive construction of any servitude, bound to receive that body of water on his property. It would not, for instance, he within his right to introduce water which was foreign to the land, for example, by prousing a pipe supply, or draining another watershed - and then insist all the water so brought on the land should be received by the inferior proprietor to his detriment.

19.As seen from the facts of the case, the plaintiff is not seeking a out let for natural stream, but seeks right to let out excess water likely to be accumulated by him not only by natural stream, but also what he collects from the lower Bhavani Irrigation Project which is an artificial stream. The flow of which he can alter or restrict according to his necessity. Therefore, he cannot have absolute right to let out the excess water into the land of the defendants as he pleases or by the natural course. It is always desirable to channelize the excess water to avoid damage to the survient owner. In this case the Lower Appellate Court has considered the core principle of right of easement and has properly given a solution

to avoid unwanted inconvenience to the owner of the property on the lower level.

20. At the same time, the lower Appellate Court also rightly restrained the owner of the servient land from obstructing the flow of water from the higher land by granting injunction. The result although the plaintiff/appellant has a right to drain the excess water collected in his land into the respondents land such right is not an absolutely one and hurt the defendants. Therefore, as a matter of right, the plaintiff cannot insist on a particular system of drainage affecting the land on the lower level which will be injurious to the owner of the lower level land. More particularly, when the water collected by the upper land owner is not only by natural source, but also from an artificial source namely; lower Bhavani Water Canal. When it is possible to regulate the excess water flow at the inception itself, only in extraordinary circumstances, there will be excess water which need to be drained into the lower land owner. And in such event, plaintiff has to prepare himself to mitigate the injury likely to cause to the servient tenement. In this case the judgment of the lower Appellate Court ensures the same.

21. Therefore this Court of the opinion that there is no necessity to interfere the judgment of the First Appellate Court. In the result, the Second Appeal is dismissed. No Costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

KP
To

1.The Principal Sub Court,
Erode.

2.The 1st Additional District Munsif Court,
Erode.

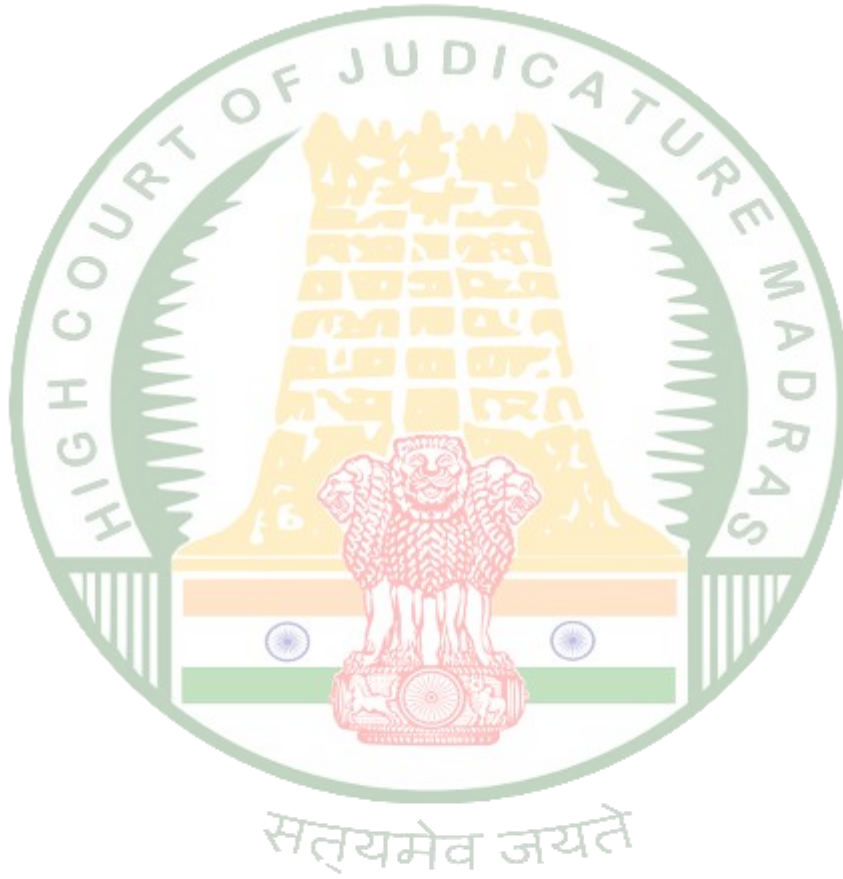
+1cc to Mr.P.T. Ramadevi, Advocate, S.R.No.6557
+1cc to Mr.N. Manokaran, Advocate, S.R.No.6802

GJ(CO)

Eu 22.02. 2017

S.A.No.237/2008.237/2008
To

The Hon'ble DR.JUSTICE G.JAYACHANDRAN
Most Respectfully Submitted
PA: K.P.



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