

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.12.2017
PRONOUNCED ON:03.01.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A. No.1068 of 2002

Poovathal Appellant/Appellant/Plaintiff
Vs.

Duraiswami Gounder ... Respondent/Respondent/Defendant

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree of the court of the Subordinate Judge,Dharapuram made in A.S.No.55 of 2001 dated 27-02-2002 confirming the decree and judgment of the Court of the District Munsif, Kangeyam made in O.S.No.218 of 1999 dated 31-08-2001.

For Appellant : Mr.K.Narayanan
for M/s.M.V.Krishnan

For Respondent : Mr.S.Saravanan
for M/s.K.S.Jeyaganeshan

सत्यमेव जयते
J U D G M E N T

In this second appeal challenge is made to the judgment and decree dated 27-02-2002 passed in A.S.No.55 of 2001 on the file of the Sub Court Dharapuram confirming the judgment and decree dated 31-08-2001 passed in O.S.No.218 of 1999 on the file of the District Munsif Court, Kangeyam.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for declaration, permanent injunction and mandatory injunction .

4.The case of the plaintiff in brief is that the suit properties in S.F.No.746/1B1- 1.17 acres, S.F.No.746/1B3 - 1.21 acres and 746/1A - 0.50 cents were purchased by the plaintiff from one Duraisamygounder on 16.04.1992 and the plaintiff is enjoying the said lands and there is a cart-track running to a width of 15 feet in the North-South direction on the eastern edge of S.F.No.746/1B3 and S.F.No.746/1A and also on the eastern edge of the defendant's lands in S.F.No.740/1 and it is running from the bymash 'Ittery' towards the Northern direction and all the sharers are using the cart- track for taking their vehicles, carts and also cattles and likewise the plaintiff is also enjoying the cart-track from the date of purchase of the lands above stated and on the western side of the plaintiff's land, LBP main canal is running north-south direction as shown in the plaint plan and the above said canal branches towards east and it crosses the cart-track at point 'B' and runs towards north, on the eastern edge of the cart-track and since the plaintiff's lands are adjacent to the main canal, the seepage water has been drained for the past 40 years at point 'B' in the suit cart-track through the LBP branch canal and the plaintiff and the predecessors in interest were enjoying such right and the same cannot be objected to by the defendant and while so the defendant attempted to cut and sell the trees located on the plaintiff's lands, which was objected to by the plaintiff and on account of the strained relationship between the parties, the defendant attempted to interfere with the plaintiff's right to drain the seepage water in the channel running in the suit cart-track and also attempted to prevent the plaintiff from using the suit cart-track and hence the suit for appropriate reliefs.

5.The case of the defendants in brief is that the plaintiff has to prove that the suit cart-track is running through S.F.No.746/1B1, 746/1B3 and 746/1A. It is for the plaintiff to prove that the pathway measures 15 feet in breadth and without impleading all the sharers, the suit laid by the plaintiff is not maintainable. The plaint plan is not correct, the seepage vaikkal was not found and hence the right to drain the seepage water as claimed in the plaint is false and the suit channel is not in existence as put forth and taking advantage of the order of interim injunction and without taking the Advocate Commissioner to inspect the suit property on the date of the filing of the suit, the plaintiff with the help of his henchmen, created a new channel and thereafter took the Commissioner to the property and thus the plaintiff has newly laid the pipeline and hence the claim of the plaintiff that the channel is running towards north on the eastern side of the cart-track is false, neither the LBP channel nor seepage channel were running in the suit cart-track at any point of time and it is false to state that the seepage channel was in existence for the past 40 years and if the plaintiff is allowed to form a channel in the cart-track, the cart-track would become unfit for the use of nearby

land owners and both the parties are having right to water their respective lands through the seepage rent through the east-west cart-track and the plaintiff has recently laid the cement pipe after obtaining the order of the Court and not entitled to any easementary right for draining the seepage water through the pipe and hence the plaintiff is not entitled to obtain the reliefs as sought for and the suit is liable to be dismissed.

6. In support of the plaintiff's case, P.Ws.1 and 2 were examined. Exs.A1 to A5 were marked. On the side of the defendant, D.W.1 was examined and no document has been marked at his side. Exs.C1 to C3 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to grant the relief for permanent injunction only as regards the suit ABC cart-track and in other aspects dismissed the suit and the same had also been confirmed by the first appellate court. Aggrieved over the same, the present second appeal has been laid.

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

(1) Whether the Courts below ought to have followed the judgment reported in A.I.R.1961 S.C.1821 and held that the plaintiff, the owner of the land on the higher level, has the natural right to drain excess water through the lower level land of the defendant under Section 7 Illustration I of the Easements Act?

2. Whether the Courts below ought to have held on the basis of evidence of P.W.'s 1 and 2 and Exhibit A-1 and the Commissioner's report and plan that the plaintiff had made out easementary right of drainage as easement of necessity and easement by prescription?

9. As regards the relief for permanent injunction sought for by the plaintiff against the defendant from interfering with his right to use the suit cart track, it is seen that as against the above said relief granted in favour of the plaintiff by the trial court, the defendant had not preferred any appeal. It is thus found that the relief of permanent injunction granted by the trial court as regards the suit cart track has become final.

10. From the materials placed by the respective parties it is found that the LBP canal is running on the western side of the plaintiff's land and branches towards the east and according to the plaintiff at point "B" as shown in the plaint plan, it

crosses the suit cart-track and thereafter runs towards north along the eastern edge of the cart-track and according to the plaintiff, inasmuch as his lands are at a higher level than the lands of the defendant, he is entitled to drain the excess water or the seepage water from his lands through the branch canal and according to the plaintiff, he had been draining the seepage water from the lands through the branch LBP canal at point "B" for several years from time immemorial and on account of enmity inasmuch as the defendant attempted to interfere with the above said right, it is the case of the plaintiff that has been necessitated to lay the suit for appropriate reliefs. The plaintiff as regards the right of draining the seepage water through LBP branch canal through the suit cart track claims the necessary reliefs of declaration and permanent injunction. It is the case of the plaintiff that he has the easementary right to drain the seepage water and the excess land water from his lands through the branch canal across the suit cart-track and the defendant is not entitled to interfere with the said right and on the other hand inasmuch as the defendant attempted to interfere with the said right, it is stated that the plaintiff has been forced to lay the suit.

11. Per contra, it is the specific case of the defendant that the plaintiff had never been draining the seepage water or the excess rain water from his lands through the suit cart-track to the branch canal as put forth in the plaint and according to the defendant by taking advantage of the ex-parte order of injunction, the plaintiff had formed a new channel across the cart-track and thereafter took the Advocate Commissioner to inspect the property concerned and therefore the plaintiff cannot be allowed to seek the relief of easementary right for draining the seepage water in the above mode and hence the reliefs sought for by the plaintiff should be negatived.

12. As above seen, admittedly the lands of the plaintiff are situated at a higher level than the lands of the defendant, therefore it is seen that naturally any water that falls on the plaintiff's lands would normally flow to the lands of the defendant as per the lie of the properties of the respective parties. The fact that the LBP canal running on the west of the plaintiff's property and branches to the east is not in dispute. However, the question is whether the plaintiff is entitled to drain the seepage water and excess rain water through the pipe line imbedded across the said cart-track through the branch canal is an issue that has been determined in this matter.

13. As rightly found by the first appellate court, the plaintiff has not clearly spelt out on what basis he claims the easementary right for draining the seepage water and rain water through the branch canal across the pipe laid near the suit cart-track. It is seen that the plea has been taken by the

plaintiff that on the basis of customary easement, he is seeking the relief, however as rightly determined by the first appellate court, the plaintiff has not pleaded that he is seeking the right of draining the seepage water on the basis of customary easement. That apart, the plaintiff has also not established that such a right was available to him and his predecessors in interest from time immemorial and in the absence of pleadings with reference to the same, as rightly found, the plaintiff cannot be permitted to seek the relief beyond the scope of the pleadings set out in the plaint.

14. Considering the contentions of the respective parties, the plaintiff is entitled to drain the seepage water through the branch canal into the lands of the defendant and the said natural right of the plaintiff to drainage the same cannot be prevented. As rightly found by the Courts below, the defendant is not preventing the plaintiff from drain the seepage water / rain water in the normal course of events. The only objection put forth is that the plaintiff cannot be permitted to lay a new pipeline as done in the present case for draining the seepage / rain water through the branch canal.

15. With reference to the above said point in issue, it is seen that the plaintiff had been granted an ex-parte order of injunction initially and also the plaintiff had been permitted to take the Advocate Commissioner to inspect the property concerned. Accordingly, it is seen that though the appointment of Advocate Commissioner had been ordered on the date of institution of the suit, it is seen that the Commissioner had inspected the property only on 22.09.1999 and according to the defendant, meanwhile misusing the order of injunction granted by the Court, the plaintiff had formed a new channel across the suit cart-track for draining the seepage water/rain water into the branch canal which the plaintiff is not entitled to. In this connection, it is seen that the Advocate Commissioner who had inspected the property at the first instance has noted in the report marked as Ex.C1 that the pipe has been laid in the portion shown as "JK" in Ex.C2 plan and nearby the red sand jelly and sands were found heaped and they are found to be a new origin. Further, from Exs.C1 and C2, it is found that the plaintiff and the defendant had been having access to drain the seepage water at the point of "N" and "O" respectively as shown in Ex.C2 plan and therefore it is seen that only just prior to the inspection of the property by the Advocate Commissioner, it is seen that the plaintiff had laid the pipe line at point "JK" cutting across the suit cart-track for the purpose of draining seepage water/rain water into the branch canal and therefore it is seen that the plaintiff had laid the suit only to drain the seepage water /rain water through the newly formed pipe as found by the Advocate Commissioner and in such view of this matter the Courts below have rightly noted that in the light of the above

position, the plaintiff cannot be granted the easementary right as prayed for as the said relief is sought for by the plaintiff on the basis that he and the predecessors in interest has been using the said right from time immemorial. However, when it is found that the pipe through which the plaintiff seeks to drain the excess water through the branch canal is of a new origin and the plaintiff had not established any right of easement over the same and also set out in the plaint, it is seen that the Courts below were right in rejecting that portion of the above plaint reliefs sought for.

16. The plaintiff's counsel relies upon the decision of the apex court reported in AIR 1962 Supreme Court 182[Patneedi Rudrayya Vs. Velugubantla Venkayya and others] and contended that in the light of the lie of the lands, the plaintiff is entitled to claim the aforesaid relief. It is contended by the plaintiff's counsel that considering the lie of the lands of the respective parties and as the lands of the plaintiff are lying on upper level than the lands of the defendant naturally, the water falling on the lands should be allowed to be drained into the lands lying low and in this connection he also seeks the support of the illustration, I given in Section 7 of in the Indian Easement Act. No doubt, as per the said illustration, the plaintiff would be entitled to the natural advantages of the position of the lands for draining the excess water falling on his lands through the branch canal. However, for enforcing the said right, the plaintiff cannot be permitted to lay a new pipe cutting across the suit cart-track and thereby claim the easementary right over the same as if the said right had been used by the plaintiff and his predecessors in interest from time immemorial. It is found that the plaintiff cannot be permitted to take the above said illustration to his advantage and seek the reliefs claimed in the plaint without establishing his entitlement of easementary right to drain the excess water through the newly formed pipe laid at "JK" point as reflected in Ex.C2. The Advocate Commissioner had also inspected the property concerned for the second time and in the second plan of the Commissioner marked as Ex.C4, it is seen that the plaintiff is having access for draining the seepage water at point "K" and therefore it is seen that as rightly determined by the Courts below, the plaintiff under the guise of draining the seepage water cannot be allowed to form a new pipe across the suit cart-track. As rightly found, P.W.2 is also unable to state clearly about the existence of the new pipeline laid by the plaintiff for draining the excess water through the branch canal and in such view of the matter, the Courts below are justified in not granting the reliefs of easement right and permanent injunction as sought for by the plaintiff with regard to the drainage of the excess water into the lands of the defendant as claimed in the plaint.

17.The defendant's counsel placed reliance upon the decision reported in CDJ 1970 MHC 117 [Balammal Vs. PHK.S.Muthuswami Chettiar & Others] The principles of law outlined in the above said decision are taken into consideration and followed as applicable at case at hand.

18.In the light of the above position, I do not find any infirmity or error in the judgment and decree of the Courts below, for negating the relief of easementary right sought for by the plaintiff, for draining the excess water through the lands of the defendant on the footing that he has easementary right over the same, as the plaintiff has failed to establish that he has any kind of easementary right for draining the excess water through the defendant's lands other than that by natural means and when it is seen that the plaintiff has attempted to have acquired the said right by forming the new pipe across the suit cart-tract, as rightly found by the Courts below, the plaintiff cannot be granted any easementary right with reference to the same, i.e., by customary easement right, by easement of necessity and by easement by prescription inasmuch as the plaintiff has failed to establish that he is entitled to the said rights with reference to the newly formed pipeline as above discussed. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff.

19.In conclusion, the second appeal fails and is accordingly dismissed with costs. Connected miscellaneous petition if any is closed.

-s/d-

Assistant Registrar(CS-II)

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Sub-Assistant Registrar

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To

- 1.The Subordinate Judge, Dharapuram.
- 2.The District Munsif, Kangeyam.

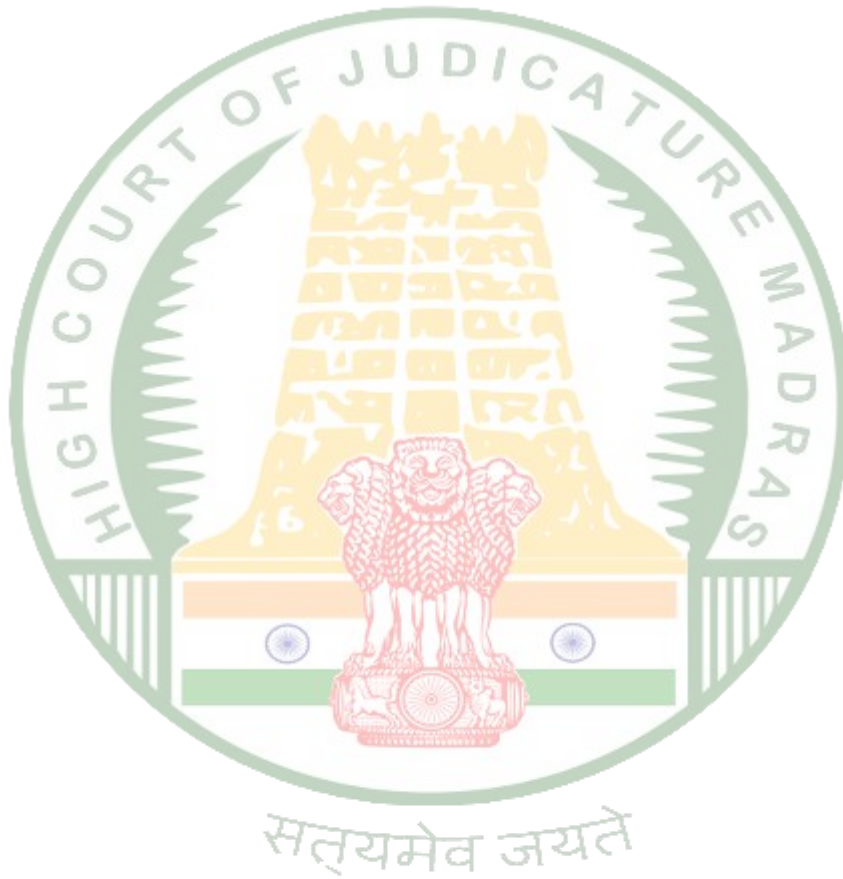
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