

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :09.03.2018

PRONOUNCED ON:26.03.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.2209 of 2003

and

C.M.P.No.20710 of 2003

Palanisamy

... Appellant

Vs.

- 1.Subramaniam
- 2.Gnanasundaram
- 3.Nachimuthu Gounder (Deceased)
- 4.Dakshinamurthi
- 5.Natarajan
- 6.Duraisami
- 7.Govindasami
- 8.Shanmugam
- 9.Ravi
- 10.Govindammal
- 11.Shanmugasundaram
- 12.Achi Ammal (Deceased)
- 13.Thayathal
- 14.Chinnammal
- 15.Thangamani
- 16.Subramani

[(i) R14 Brought on record as LR of the deceased R3 vide order of court dated 23.02.2018 made in CMP.No. 1973 to 1975 of 2018 in S.A. No.2209/ of 2003.

(ii) RR15&16 Brought on record as LR's of the deceased R12 vide order of court dated 23.02.2018 made CMP.No.1976 of 2018 in SA.2209 of 2003.]

... Respondents

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 06.09.2001 passed in A.S.No.35 of 2000 on the file of the Subordinate Court,

Dharapuram, partly confirming the judgment and decree dated 10.07.2000 passed in O.S.No.75 of 1999 on the file of the District Munsif Court, Kangeyam.

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

For Respondents : Mr.N.S.Sivakumar

J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 06.09.2001 passed in A.S.No.35 of 2000 on the file of the Subordinate Court, Dharapuram, partly confirming the judgment and decree dated 10.07.2000 passed in O.S.No.75 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 and permanent injunction.

4.As regards the reliefs sought for by the plaintiff for declaration and permanent injunction pertaining to the OP wall as depicted in the plaint plan, inasmuch as the first appellate court has partly granted the relief in respect of the OP wall on certain conditions by modifying the judgment and decree of the trial court, as it is found that as against the above said determination of the first appellate court, the plaintiff has not raised any dispute in this second appeal, and further the defendants also having not filed any appeal or cross-objections in this appeal as regards the same, it is thus found that the present second appeal is confined only to the relief sought for by the plaintiff, in respect of his right to drainage the sewage water from his house through the XY underneath pipe towards south-west as shown in the plaint plan.

5.As regards the case of the plaintiff with reference to his entitlement to the drainage of sewage water from his house through XY underneath pipe to the property of the defendants, it is stated that the suit property had been purchased by the plaintiff's great grandfather, by way of a sale deed dated 17.07.1922 and thereafter, it is only the plaintiff's family, which had been draining the water from the house portion to the defendants' property through the XY pipe embedded underneath the ground towards the south-west as shown in the plaint plan and it is thus stated that, for more than 30 years, the plaintiff and his predecessors in interest had been draining the sewage water

through the XY pipe and the same could not be objected by the defendants and while so, the defendants with a view to prevent the plaintiff from draining the sewage water through the XY pipe attempted to damage the said pipeline, to which course the defendants are not entitled to do so, and hence, according to the plaintiff, he has been necessitated to seek the relief of permanent injunction for restraining the defendants from destroying the XY pipe as above enjoyed by the plaintiff.

6. The case of the defendants as regards the above issue is that, it is false to state that the plaintiff and his predecessors in interest had been draining the sewage water from his house portion through XY pipe into the land of the defendants for more than 30 years and it is false to state that the defendants are not entitled to object the same and on the other hand, the XY pipe had been laid only just prior to the laying of the suit and therefore, the plaintiff's case that, they had been draining the sewage water through the XY pipe for several years as put forth in the plaint is false and the plaintiff has been hitherto draining the sewage water into the open space available within his property and therefore, when the property lying to the south of the plaintiff's OP wall entirely belonged to the defendants and in such view of the matter, the plaintiff is not entitled to drain the sewage water into the defendants' property and the plaintiff's reliefs as regards the same for permanent injunction without seeking the relief of declaration is not maintainable and therefore the case of the plaintiff that the defendants attempted to destroy or damage the said pipe is false and on the other hand, the plaintiff taking advantage of the absence of the defendants, had laid the pipe and instituted the suit falsely without any cause of action and hence the suit is liable to be dismissed.

7. In support of the plaintiff's case, P.Ws.1 to 3 were examined. Exs.A1 to A5 were marked. On the side of the defendants, D.Ws.1 and 2 were examined. No document has been marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the suit laid by the plaintiff. On appeal, the first appellate court has modified the judgment and decree of the trial court and on an appreciation of the materials placed, thereby granted the reliefs of permanent injunction and declaration and sought for by the plaintiff's in respect of the OP wall with certain conditions and concurred with the dismissal of the plaintiff's suit by the trial court as regards the XY pipe and thereby, disposed of the appeal. 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.

i) Whether the lower appellate court is correct while decreeing the suit for white washing and repairing by accepting plaintiff's case in dismissing the prayer to discharge sewage water through XY underneath pipe from the appellant/plaintiff's house?

ii) Whether the plaintiff/appellant has not pleaded in the plaint regarding the ingredients required for claiming easementary right by prescription and of necessity ?

iii) Whether the court below is precluded from moulding and granting proper relief, even though there are laches or inadvertence in the pleadings in the plaint ?
"

9. A reading of the plaint does not disclose clearly as to what is the nature of the right sought for by the plaintiff as regards the XY pipe said to be in existence underneath the ground. As per the case of the plaintiff, he has been draining the sewage water from his house portion into the property belonging to the defendants. The plaintiff has appended a plan to the plaint and the XY pipe has been shown laid underneath the ground from the property belonging to the plaintiff to the property of the defendants and it is the case of the plaintiff that from the days of his predecessors in interest for more than 30 years, he had been draining the sewage water through the said XY pipe and hence the same should not be prevented by the defendants and on the other hand, according to the plaintiff, as the defendants attempted to interfere with his enjoyment of the above said right by damaging the pipe, it is stated that the plaintiff has been necessitated to lay of the suit for appropriate reliefs.

10. Per contra, the defendants have pleaded that the case of the plaintiff that he had been using the XY pipe to drain the sewage water from the house portion to their property for more than 30 years is false and on the other hand, according to the defendants, taking advantage of their absence, the plaintiff has laid the XY pipe prior to the filing of the suit and had come forwarded with the suit containing false allegations and therefore, it is stated that the plaintiff is not entitled to the relief sought for, as regards the alleged XY pipe and therefore,

it is stated that the plaintiff is not entitled to seek the relief of permanent injunction with reference to the same and hence the suit laid by the plaintiff, in respect of the above said relief is liable to be dismissed.

11.As regards the claim of the plaintiff that he had been using the abovesaid XY pipe laid underneath the ground for draining the sewage water from his house portion into the property of the defendants for more than 30 years, there is no acceptable proof with reference to the same. It is admitted by the plaintiff that there is no document to point out the said usage of the plaintiff and the predecessors in interest as claimed in the plaint. It is found that the property lying to the south of OP wall admittedly belongs to the defendants. In such view of the matter, the case of the plaintiff that, he and his predecessors in interest had been draining the sewage water through the XY pipe laid underneath the ground into the defendants' property for several years cannot be accepted sans any proof pointing to the same.

12.The plaintiff has not come out clearly as to what is the nature of the right that he seeks to enforce with reference to the XY pipe. It has not been specifically claimed in the plaint as to whether he is seeking any absolute right in respect of the same or any kind of easementary right. If according to the plaintiff, he is seeking an easementary right, as to what kind of easementary right he seeks to enforce as regards the claim of the usage of XY pipe for draining the sewage water, no clean pleas had been set out in the plaint. It is contended by the plaintiff's counsel that, though the plaintiff has not clearly spelt out the nature of the right that he seeks to enforce as regards the XY pipe, according to him, the same could be inferred from the pleadings read together. In this connection, he placed reliance upon the decision reported in CDJ 1998 MHC 1062 [Mangayarkarasi Vs. Veerappan Ambalam and others]. It is thus found from the abovesaid contention of the plaintiff's counsel, that the plaintiff is seeking only easementary right as regards the usage of the XY pipe.

13.However, as regards the alleged easementary right sought for by the plaintiff, the plaint does not disclose as to what is the nature of the easementary right, that is being sought to be enforced or claimed by the plaintiff, in respect of the XY pipe. In this connection, it has to be noted that when a party seeks the relief by way of an easement, the pleas contained in the plaint should clearly spelt out as to what is the nature of the easement sought for and the principles of law with reference to the same are elucidated in the decision of the Apex Court reported in 2008 (17) SCC 491 [Bachhaj Nahar Vs. Nilima Mandal

and another] 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 watercourse, 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 to 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 the 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 watercourse. 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.

21. A right of easement can be declared only when the servient owner is a party to the suit.

However, on a reading of the plaint involved in this matter, it cannot be inferred as to whether the plaintiff is seeking the eastmentary right as regards the XY pipe, by way of prescription or necessity or any other kind of eastement. As rightly determined by the first appellate court, when it is found that there is an open space available between the OP wall and the house portion of the plaintiff as could be seen from the materials placed on record, the plaintiff could very well drain the sewage water from the house portion into the said open space and in such view of the matter, when adequate space is available in the plaintiff's property as above noted for drain the sewage water, the case of the plaintiff that he is entitled to drain the sewage water into the property belonging to the defendants through the alleged XY pipe laid underneath the ground as such cannot be accepted. It is thus found that the plaintiff cannot seek any eastmentary right as regards the XY pipe by way of necessity when it is found that the sewage water could be very well drained or discharged into the plaintiff's property. It is thus found that the plaintiff cannot lay any claim of eastmentary right by way of necessity as regards the XY pipe. For the abovesaid determination, we could gather support from the decisions relied upon by the defendants' counsel reported in 2001 (4) CTC 193 K.Kolandaisamy Gounder (dead) and another Vs. Mnickam], 2009 (1) CTC 753 [Chellam Iyer and another Vs. J.Ranganathan and 3 others], 1997 (1) CTC 348 [Murugesu Moopanar Vs. Sivagnana Mudaliar], 2008 (1) CTC 137 [N.Boriah Vs. The Nilgiri Co-operative Printing Press, by its Special Officer, Charring Cross, Ootacamund]. When it is noted that for claiming the eastment of necessity, the plaintiff should establish the common ownership of the properties involved in the matter and also establish that the XY pipe is absolutely necessary for draining the sewage water from the house portion and on the other hand when as abovenoted, it is seen that there is adequate open space available in the property of the plaintiff itself to discharge the sewage water, it is seen that in the light of the principles outlined in the abovesaid decisions, the plaintiff cannot be granted any right in respect of the XY pipe, by way of necessity.

14.As above seen, there is no material placed on record worth acceptance that the plaintiff and his predecessors in interest had been using the XY pipe for draining the sewage water for more than 30 years as putforth in the plaint. The Commissioner's report and plan do not reveal anything about the alleged XY pipe's existence for several years as claimed in the plaint. That apart, when it is found from the materials placed that the DEFG pathway has come into existence and put up by the defendants only subsequent to the partition effected amongst themselves on 15.02.1999 and prior to the same, there has been no

such pathway in the said portion and the same formed part and parcel of the property belonging to the defendants, it is found that the case of the plaintiff that he had been draining the sewage water from the house portion through the XY pipe laid underneath the said pathway for several years cannot be accepted and in such view of the matter, it is found that the first appellate court has rightly determined that the plaintiff has miserably failed to establish any easementary right in respect of the alleged XY pipe by way of prescription.

15. Considering the defence raised by the defendants, when the defendants are found to have seriously controverted the claim of the plaintiff that he has a right to discharge the sewage water through the XY pipe as put forth in the plaint and the plaintiff also not come forward with any material to show that any such right had been exercised by him or his predecessors in interest as claimed in the plaint and when no document has also been placed to buttress the same, as rightly put forth, the suit laid by the plaintiff for seeking the relief of permanent injunction as regards the alleged right without seeking any declarative relief with reference to the same is found to be not maintainable and on that score also, it is seen that the plaintiff's suit should fail with reference to his case of XY pipe.

16. The principles of law outlined in the other decisions relied upon by the defendants' counsel reported in 2016 (2) MWN (Civil) 100 [Damodar Lal Vs. Sohan Devi and Others], 2016 (3) MWN (Civil) 554 [Syeda Rahimunnisa Vs. Malan Bi by L.Rs and Ors] as well as the decisions relied upon by the plaintiff's counsel reported in CDJ 1964 MHC 264 [N. Kamalammal, wife of A. Manjia Pillai Vs. S. Chakravarthy & Others] are taken into consideration and are followed as applicable to the case at hand.

17. In the light of the above discussions, the Courts below are found to be justified in dismissing the relief sought for by the plaintiff as regards the alleged right to discharge the sewage water through the XY pipe underneath pipe from his house portion and the lower appellate court as well the trial court had rightly determined that the plaintiff's averments do not disclose as to what kind of easementary right, the plaintiff is seeking to enforce as regards the XY pipe and further it is noted that the Courts below, on proper reasonings and conclusions, based on the factual matrix as well as the legal principles involved in respect of the same, determined that the plaintiff is not entitled to any relief as regards the XY pipe as put forth in the plaint. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendants.

18.In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

mfa

To

1.The Subordinate Judge,
Sub Court,
Dharapuram.

2.The District Munsif,
District Munsif Court,
Kangayam.

Copy to

The Section Officer,
VR Section,
High Court.(2 COPIES)

+1cc to Mr.S.SARAVANAN, Advocate, S.R.No.22766
+1cc to Mr.N.S.SIVAKUMAR, Advocate, S.R.No. 23183

Pre-delivery judgment made in
S.A.No.2209 of 2003

RSY (CO)
TR(23/04/2018)

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