

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.07.2020

PRONOUNCED ON: 05.08.2020

CORAM:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No.522 of 2010
(Heard through video conferencing)

Shanmugam,
S/o Govindasami Kounder,
Parasureddipalayam,
Villupuram Taluk,
Villupuram District. Appellant/Plaintiff

Vs.

J.Munusamy
S/o Jayarama Kounder,
Parasureddipalayam,
Villupuram Taluk,
Villupuram District. Respondent/Defendant

PRAYER: This Second Appeal has been filed under Section 100 C.P.C., against the judgement and decree of the learned Principal District Judge of Villupuram dated 17.11.2009 passed in A.S.No.91 of 2009 dismissed the appeal, confirming the judgment and decree of the learned Principal District Munsif of Villupuram in O.S.No.465 of 2006 dated 31.10.2008.

For Appellant : Mr.R.Gururaj

For Respondent : Mrs.Nilaphar

JUDGMENT

This second appeal is preferred by the plaintiff who was unsuccessful before the Courts below in establishing his right of easement to use the channel in the 'C' Schedule property owned by the defendant.

2.The plaintiff case is that, he is the owner of 'A' and 'B' schedule properties. The defendant property described in 'C' schedule property lay between his 'A' and 'B' schedule property.

Originally, the property 'A', 'B' and 'C' schedule properties were owned by one Kesava Odaiyar. His descendants are the vendors of the plaintiff and the defendant. The vendors are the members of two different family tracing common ancestor. The plaintiff purchased 'A' and 'B' schedule properties in the year 1994. The defendant purchased 'C' schedule property a year later. Neither the vendor of the defendant nor the defendant after he purchased the 'C' schedule property object the plaintiff using the channel. Without any disturbance, the plaintiff was enjoying the right till September, 2006. While so, during the second week of September, 2006, the defendant obliterated the channel passing through the 'C' schedule land. This has deprived the plaintiff's right of easement to carry water for irrigation from 'A' schedule property to 'B' schedule property through 'C' schedule property.

3.The trial Court and the First Appellate Court dismissed the suit and the first appeal, respectively. The Courts below held that the plaintiff failed to prove the existence of common channel in the 'C' schedule property. No evidence to prove that the Plaintiff or his vendor was irrigating 'B' schedule property from the bore well situated in 'A' schedule property through the common channel passing through 'C' schedule property.

4.The learned counsel for the appellant submitted that, the Courts below miserably failed to appreciate the facts and law properly. It is an accepted fact that the entire 'A', 'B' and 'C' schedule properties were the properties of Kesava Odaiyar. He had two sons one by name Natesa Odaiyar and other by name Nainapillai Odaiyar. Natesa Odaiyar had two sons one by name Parasurama Odaiyar and other by name Velaytha Odaiyar. Nainapillai had a son by name Kulandaivel Odaiyar. His son name is Annamalai Odaiyar.

5.'A' schedule property was purchased by the plaintiff on 21/07/1994 from Parasurama Odaiyar and his 3 daughters vide sale deed Ex A-1, comprising 49 cents out of 93 cents in S.No. 72/5 including Electrical Service connection No.15, motor pump set, bore well and motor shed and 53 cents of land in S.No. 72/4 totally 1 acre 02 cents.

6.'B' schedule property was purchased by the plaintiff on 11/08/1994 from one Sivakami w/o Velayutha Odaiyar and her children vide sale deed Ex A-2 comprising 81 cents out of 1acre 65 cents in S.No.73 and 16 cents out of 93 cents in S.No.72/5 with the usual right of channel and pathway.

7.'C' schdule property was purchased by the defendant from Annamalai Odaiyar s/o Kulandaivel Odaiyar and his children on 27/03/1995 vide Ex A-3. It comprise 82 ½ cents out of 1 acre 65 cents in S.No.73 and 34 ½ cents out of 93 cents in S.No.72/5 through Ex. A-3 - (Ex B- 3). Though in Ex A-3, the vendor of

the defendant has mentioned that the vendee (defendant) have half share in the 30 feet bore well, 5 HP service connection No. SC 15 and the motor shed, the vendor had no right in the bore well or the motor shed. The bore well and service connection exclusively owned by Parasurama Odaiyar, the vendor of the plaintiff.

8.The learned counsel for the appellant further submitted that, all the above properties were once held as composite unit and was irrigated from the well in S.No. 72. Later, it was divided among the descendants of Kesava Odaiyar. Parasurama Odaiyar who got share in S.No. 72/5 dug bore well and installed 7.5 HP motor. The water from this well was carried through the common channel in 'C' schedule property held by the descendants of Kulandaivel Odaiyar to irrigate 1 acre 65 cents of land in S.No.73 which was held by Velayutha Odaiyar and Kulandaivel Odaiyar.

9.The wife and children of Velayutha Odaiyar sold their shares of 81 cents out of 1 acre 65 cents in S.No. 73 to the plaintiff vide Ex A-2. The Son of Kulandaivel Odaiyar on his behalf and on behalf of his minor children, sold 82 ½ cents out of 1 acre 65 cents in S.No. 73 to the defendant vide Ex A-3.

10.By grant and by necessity, the water from the Well situated in S.No. 72/5 has to pass through the channel in Western portion of S.No.73 owned by the defendant to reach the Eastern portion of S.No. 73 owned by the plaintiff. The plaintiff have no other alternate channel to irrigate his land in S.No.73. While he and his predecessors in title were permitted to carry water through the common channel in the 'C' schedule property by the defendant predecessors and by the defendant for 11 years after he purchased the property in the year 1995, suddenly the defendant forcibly ameliorated the portion of the channel running through his land.

11.Relying upon the judgement of the Hon'ble Supreme Court in Ayyaswami Gounder and others -vs- Munuswamy Gounder and others reported in AIR 1984 SC 1789, it was canvassed that, in case of partition of joint property, enjoyment of common channel by exclusive owner of the Well is permissible. The Courts below ignored to apply section 13 (e) of the Indian Easement Act, 1882 and to follow the dictum laid by the Hon'ble Supreme Court in Ayyaswami Gounder case (cited supra), which upheld the view of the Madras High Court in Subbiah Goundan -vs- Ramaswamy Goundan (AIR 1973 Mad 42) .

12.The Learned counsel for the respondent / defendant who entered appearance on receiving notice for admission, submitted that the Second Appeal deserves to be dismissed with costs, since, no substantial question of law involved in this case. On facts, both the courts have held that the plaintiff has not proved existence of any right to carry water through the land of

the defendant. The allegation of amelioration of the channel in 'C' schedule property not proved. In the sale deed Ex A-2, there is no reference about any share in the Well at S.No 72/5 or easementary right of drawing of water from that Well to irrigate the land in S.No.73 through the channel. In none of the documents relied by the appellant/plaintiff, there is reference of common channel. The cases cited by the appellant counsel are distinguishable on facts and the dictum laid down by the Hon'ble Supreme Court in Ayyaswami Gounder case (cited supra) does not apply to the instant case.

13.Heard the learned counsel appearing for the plainitff and the learned counsel appearing for the defendant. Records perused.

14.The appellant herein to establish that he had right of easement through 'C' schedule property by grant and necessity, has mounted the witness box and deposed. In the cross examination, he has stated that, he is not aware, 'whether water from the Well in 'A' schedule property was used to irrigate 'C' schedule property'. It is also an admitted fact that in Ex A-2 no right in the Well at S.No. 72/5 conveyed to the plaintiff. When no right in the Well is conveyed under Ex A-2, general reference in the deed about the usual right of way and channel (மாழால் வாய்க்கால் வழி பாத்தியம்) cannot be inferred as if it refers to the channel in the 'C' schedule property unless specific evidence available to that effect.

15.Similarly, the documents and oral evidence placed before the trial Court does not indicate that the properties mentioned in the schedules were at one point of time held by same person or enjoyed in common as joint family property. The facts available only establish that the vendors of the litigating parties are descendants of Kesava Odaiyar. We find no recital in Exs. A-1 to A-3 to indicate the properties devolved upon the vendors from Kesava Odaiyar.

16.Whether the Well in S.No.72/5 is the exclusive Well of Parasurama Odaiyar from whom the plaintiff purchased the properties or the vendor of the defendant (Annamalai) had any share in it, is itself a disputed fact, but, not the subject matter of the suit. While the facts pleaded and proved in this case no way establishes that the owners of the property bearing S.No. 73 at some point of time had the right to irrigate the said land using the water from the Well in S.No. 72/5 using the common channel. Therefore fact of the judgments referred by the appellant becomes different and distinguishable from the facts of the instant case.

17.In Subbiah Goundan case (cited supra), the defendant wanted to use the common channel for taking water to their fields from their exclusively owned Well and the plaintiff sued

for injunction to prevent the defendant from making such use. So, the question before the Court was, 'whether the defendant, the common owner of the channel is entitled to use it, during their turn of enjoyment for taking water from the Well. In the said factual background, the Hon'ble Supreme court in paragraph No.5 has held that:-

"5.In the instant case, the defendants make use of the common channel for taking water from their exclusive well in S.No.24 only during their turn of enjoyment of the common well. Such use of the common channel, by no stretch of reason can be said to interfere with the right of the plaintiff in any way. Nor can it be said that the said user of the channel by the defendants would in any way damage or weaken the channel. Unless the plaintiff proves that such use by the defendants in any way interferes with his rights or that the common channel is being or is likely to be damaged or injured or weakened he cannot prevent the defendants from making use of the channel during their turn of enjoyment of the common well by taking water from their exclusive well also which is most advantageous and beneficial from their point of view. It may be that the defendants are able to enjoy their lands more beneficially and advantageously than the plaintiff. But that can hardly be a ground for the plaintiff to make a complaint....."

18.In Ayyasamy gounder case (cited supra), the parties were descendants from a common ancestor and they owned joint properties. A partition took place between the parties whereunder survey Nos.95 and 96 fell to the share of the plaintiffs and 15 cents of land in plot No.96/5 in which the common well was situate and the channel running from that common well were, however, kept joint for the common enjoyment of the parties. Water from common well situate in plot was not sufficient enough to irrigate the lands of both the parties got by them in the said partition. The plaintiffs, therefore, were irrigating their lands from their exclusive well in survey No.103/2 purchased by the father of the plaintiffs and they were irrigating their land obtained in partition through the common channel from their own well in survey No.103/2 by connecting the common channel in the common land in survey No.96/5 by means of a small channel to take water to their lands in survey Nos.96/3, 96/1, 95 and 92. The defendants objected to the use of the common land in survey No.96/5 and the common channel running in survey No.96/5 for taking water from their exclusive well in survey No.103/2. There was no other source of irrigation for the plaintiffs. Hence, the plaintiffs filed the suit-for declaration

of their right to take water from their exclusive well situate in a water in a plot of land exclusively belonging to them, through a portion of a channel to their plots at survey Nos.95 and 96 lying to the north of the common well in the joint land of the parties and for a consequential relief of permanent injunction restraining the defendants-respondents from interfering with the enjoyment of their right to take water from the well through the aforesaid channel. The defendants admitted the plaintiffs right to enjoy the common well, the common land and the common channel in survey No.96/5. They however, pleaded that the plaintiffs were not entitled to use the common property for taking water from their exclusive well to their family lands. They, however, did not plead or prove any damage, injury or hardship suffered by the defendants to show that they were in any way prejudiced by plaintiffs forming a small channel in the common land to take water from their exclusive well to their family lands north of the suit property.

19.In the above narrated factual scenario, the Apex Court held as follows:-

"10.We find considerable force in this contention. In the absence of any specific pleading regarding prejudice or detriment to the defendants-respondents the plaintiffs have every right to use the common land and the common channel. The plaintiffs - appellants were claiming their right on the basis of admitted co-ownership rights which includes unrestricted user, unlimited in point of disposition, and the High Court was not justified in holding that plaintiffs' right to take water was not acquired by any grant from the defendants-respondents or from any other sale deed. The right of co-ownership presupposes a bundle of rights which has been lost sight of by the High Court.

11.The only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment."

20.In both the cases cited, the existence of a common channel never in dispute. The question was 'how and when the common owner can use the channel'. Whereas, in the instant case, the very existence of the common channel is disputed. The appellant / plaintiff claims it was ameliorated by the respondent /defendant just before filing the suit. This fact not been proved with acceptable evidence. Hence, the courts below had rightly rejected this contention.

21.The parties can resort to Section 13 of the Easement Act if such easement is apparent and continuous and necessary for

enjoying the said property and it was enjoyed when the transfer or bequest took effect. In the instant case, no evidence placed by the plaintiff to that effect. Plaintiff's testimony itself is vague about the right and necessity. Further what ever deposed by him, not been supported or corroborated by oral or documentary evidence.

22.For the reasons stated above, this Court finds no substantial question of law arise in this case for consideration. Hence the second appeal is dismissed. Considering the nature of the dispute, no other as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

jbm

To

1.The Principal District Judge,
Villupuram.

2.The Principal District Munsif,
Villupuram.

3.The Section Officer,
V.R.Section,
High Court, Madras.

+1 cc to M/s.R.Meenal, Advocate Sr.No. 26221

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S.A.No.522 of 2010

SJ(CO)

RMP (04/01/2021)

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