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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.02.2021

PRONOUNCED ON : 09.03.2021

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No. 34 of 2008

1. Thilai Gounder (deceased)  
S/o. Pattinamar Gounder  
.. Appellant/ Respondent/Plaintiff
2. Pachaiammal, W/o. Thillai Gounder
3. Kannammal, D/o. Late Thillai Gounder
4. Raju, S/o. Late Thillai Gounder
5. Chandra, D/o.Late Thillai Gounder
6. Gunasekaran, S/o. Late Thillai Gounder
7. Manoharan, S/o. Late Thillai Gounder
8. Yasodha, D/o. Late Thillai Gounder
- 9.Thenmozhi, D/o. Late Thillai Gounder  
...2 to 9 Appellants/LRs of the 1<sup>st</sup> Appellants

Appellants 2 to 9 brought on record as LRs of deceased sole appellant vide order of this court dated 09.12.2016 made in CMP Nos.16719 to 16721/2016 in S.A. No.34/2008.

Vs.

1. Chinnasamy  
S/o. Mooka Gounder
2. Vengiammal  
W/o. Mani
3. Parvathi  
W/o. Raji
4. Thanikachalam  
S/o. Late Puttan @ Vengan
5. Kumudha  
S/o. Sivalingam

... Respondents/2 to 6 Appellants/2 ot 4,6&7  
defendants

Prayer: Second Appeal filed under Section 100 of CPC, 1908 against the judgment and decree dated 27.10.2005 made in A.S.No.35 of 2004 on the file of the Sub Court, Dharmapuri reversing the judgment and decree dated 09.07.2004 made in O.S.No.12 of 1992 on the file of the District Munsif Court, Harur.

For Appellants : Mr. T. Murugamanikam, Senior Counsel  
for M/s.V. Rajesh

For Respondents : Mr. J. Nandagopal



## JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 27.10.2005 passed in A.S.No.35 of 2004 on the file of the Subordinate Court, Dharmapuri, reversing the judgment and decree dated 09.07.2004 passed in O.S.No.12 of 1992 on the file of the District Munsif Court, Harur.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. The plaintiff in O.S.No.12 of 1992 is the appellant in the Second Appeal.

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

5. The case of the plaintiff, in brief, is that he is the absolute owner of the lands in Survey Nos.181/2C, 181/14, 183/7 of the suit village and enjoying the same by obtaining the patta and paying the kists, etc., and the abovesaid lands and the other lands belonged to the ancestors of the plaintiff and the defendants 1 and 2 are the adjacent owners and further put forth the case that there is a well in Survey No.181/2C and the plaintiff had been drawing water from the said well and irrigating his other lands and the irrigation channel passes in between the land of the defendants 1 and 2 in Survey Nos.183/1B and 181/8B and then to the lands of the plaintiff' and there is a pathway also along with the irrigation channel and the abovesaid irrigation channel and the pathway had been used by the plaintiff and his ancestors for more than 100 years continuously without any interruption and the irrigation channel is the only way for taking water to the plaintiff's land, which is shown as ABCD in the rough plan attached to the plaint and the same is the suit property and thus the plaintiff and his ancestors had perfected their right of easement over the suit property by way of prescription by using the same over a period of 100 years and also other than the irrigation channel, there is no other channel and pathway for taking the water to the plaintiff's land. While so, the defendants, out of jealousy, attempted to interfere with the plaintiff's right of enjoyment over the suit irrigation channel and pathway one way or the other, without any authority or entitlement, and also endeavoured to obliterate the suit channel by removing the stone and mud, etc., and after the institution of the suit, the defendants had damaged the suit channel and hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

6. The defendants resisted the plaintiff's case contending that it is false to state that the plaintiff is irrigating his lands from the well in Survey No.181/2C and as the well in Survey No.181/2C has no sufficient source of water, the plaintiff has resorted to dig new borewells in his lands and further disputed the claim of the plaintiff that the water has been taken through the suit irrigation channel lying in between the lands of the defendants as alleged in the



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plaint and according to the defendants, there is no irrigation channel or pathway in their land as shown as ABCD in the plaint. Only with a view to create a new channel in the lands of the defendants, the suit has come to be laid by the plaintiff falsely and accordingly denied the case of the plaintiff that he and his ancestors had been enjoying the suit irrigation channel for more than 100 years and thereby prescribed the right of easement by prescription and also seeking the easementary right by way of necessity and disputed the case of the plaintiff that they had endeavoured to disturb the plaintiff's possession and enjoyment of the suit irrigation channel one way or the other and that they had destroyed the channel after the institution of the suit as claimed in the plaint. The documents projected do not disclose the existence of the channel and therefore, according to the defendants, the plaintiff is not entitled to seek any of the reliefs claimed in the plaint and sought for the dismissal of the plaintiff's suit.

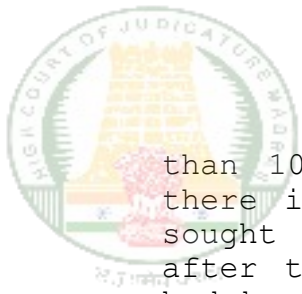
7. In support of the plaintiff's case P.Ws.1 to 2 were examined and Exs.A1 to A7 were marked. On the side of the defendants, D.Ws.1 to 2 were examined and Exs.B1 to B3 were marked. Further Exs. C1 to C5 were also marked.

8. On a consideration of the oral and documentary evidence adduced in the matter and the submissions put forth by the respective parties, the trial court was pleased to grant the relief in favour of the plaintiff as prayed for. Impugning the same, the first appeal has been preferred by the defendants. The first appellate court, on an appreciation of the materials available on record and the submission projected by the respective parties, was pleased to set aside the judgment and decree of the trial court and by way of allowing appeal preferred by the defendants, dismissed the plaintiff's suit. Challenging the same, the present second appeal has been laid by the plaintiff.

9. At the time of admission of the second appeal, the following substantial question of law was formulated for consideration.

"Whether the judgment of the lower appellate court is vitiated in that it has held, that, permission has to be proved for exercising a right of easement by prescription?

10. The plaintiff has laid the suit against the defendants claiming easementary right over the suit irrigation channel and pathway shown as ABCD in the plaint plan by way of prescription and necessity on the footing that only through the suit irrigation channel, the plaintiff had been taking water from the well lying in Survey No.181/2C for irrigating his other lands lying in Survey No.181/14 and 183/7. According to the plaintiff, the suit irrigation channel runs in between the lands of the defendants lying in Survey No.183/1B and 181/8B. According to the plaintiff, he and his ancestors had been using the suit irrigation channel for more



than 100 years and other than the suit irrigation channel, there is no other way to irrigate his lands and accordingly sought for the easementary right and put forth the case that after the institution of the suit, a portion of the channel had been destroyed by the defendants and thereby come forward with the relief of mandatory injunction also.

11. The defendants, in toto, disputed the case of the plaintiff and according to them the suit irrigation channel is not in existence and not running in their lands as alleged in the plaint and further putting forth the case that only with a view to create a new channel, the case has been falsely laid by the plaintiff and therefore, there is no question of the defendants damaging the alleged channel and further disputed that the plaintiff and his ancestors had been enjoying the suit irrigation channel for more than 100 years and accordingly prayed for the dismissal of the plaintiff's suit.

12. In this matter, the parties are not disputing the ownership of their respective lands. In fact, the defendants have also not disputed the existence of the well in Survey No. 181/2C belonging to the plaintiff, but, according to the defendants there is no sufficient water in the abovesaid well and the plaintiff has dug borewells in his lands for irrigation. On the other hand, according to the plaintiff, only through the suit irrigation channel, he has been drawing water from the well to irrigate his other lands as claimed in the plaint.

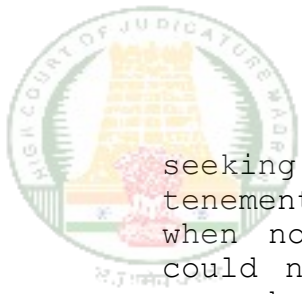
13. Considering the materials available on record, it is found that the advocate commissioner appointed by the trial court had inspected the suit property and noted the existence of the irrigation channel on ground as claimed by the plaintiff and accordingly, the advocate commissioner had inspected the properties twice and submitted his reports and plans marked as Exs.C1 to C5. Considering the commissioner's reports and plans in toto, when it is seen that the advocate commissioner had inspected the properties and taken the measurements with the aid of the surveyor and the VAO, as rightly concluded by the trial court, it is evident that as depicted in the commissioner's reports and plans marked as Exs.C4 and C5, the suit channel is found to be in existence running from north-south and thereafter turn to the west and turns towards the south and accordingly water is found to be flowing through the channel lying underneath and also the pathway is in existence as put forth by the plaintiff. Therefore, when the existence of the suit channel particularly having been noted by the commissioner and as depicted in the plaint and when they are not found to be of a new origin and on the other hand when it is found that the suit channel had been in existence over a considerable period of time, therefore, as concluded by the trial court, the case has been falsely projected by the defendants that no channel is in existence in their lands for the purpose of irrigating the plaintiff's land. Furthermore, when according to the



plaintiff, there is no other channel other than the suit channel to irrigate his lands, the defendants have not endeavoured to project any case to evidence that the plaintiff has the other source of irrigating their lands or having other channel to irrigate their lands and accordingly it is seen that the trial court had rightly granted the reliefs in favour of the plaintiff as prayed for.

14. Whereas the first appellate court, after considering the commissioner's reports and plans exhibited in the matter and after clearly holding that the suit channel is running in the lands of the defendants and the channel runs upto the lands of the plaintiff, as rightly contended by the plaintiff's counsel, should have upheld the judgment and decree of the trial court. Per contra, after concluding the reasonings and conclusions of the trial for upholding the plaintiff's case particularly on the strength of the commissioner's reports and plans, the first appellate court also having held that the suit channel is running through the lands of the defendants as depicted by the commissioner in his reports and plans, however, chose to dismiss the plaintiff's suit solely on the ground that inasmuch as the plaintiff has failed to establish that he had obtained the permission of the defendants to take the channel through their lands, on that premise, rejected the plaintiff's case.

15. As rightly contended by the plaintiff's counsel, the abovesaid approach of the first appellate court vis-a-vis the issues involved between the parties is not legally tenable when the plaintiff is claiming easementary right over the suit channel running in the defendants land and when the existence of the suit channel has been established by way of the commissioner's reports and plans exhibited in the matter and when further it is seen that the features obtaining in the properties qua the suit channel depict that the suit channel had been in existence for several years and in such view of the matter, when the existence of the suit channel beneath the lands of the defendants has been clearly established by the plaintiff through the commissioner's reports and plans, it is for the defendants to show as to how the third parties pipelines came into existence beneath their lands. With reference to the same, there is no plausible explanation on the part of the defendants and when the defendants have failed to establish that the pipelines had been embedded beneath the lands stealthily by the plaintiff after the institution of the suit or without their knowledge, on the other hand, the features obtaining in the properties go to disclose that the suit channel had been in existence over a period of time and not a newly created one, all put together, as rightly contended by the plaintiff's counsel, when the plaintiff is only seeking a right of easement over the suit channel by way of perspection and necessity and, as above discussed, the defendants have not established that the plaintiff has got the other source of irrigation other than the suit irrigation channel and when the right of easement, right over the irrigation channel could also be exercised by a person without

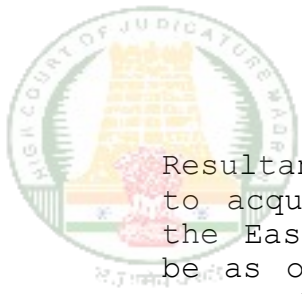


seeking permission or consent of the owner of the servient tenement as a right of user and in such view of the matter, when normally the right of easement by way of prescription could not be established by way of documentary evidence and proved only by the other evidence and when the case has been buttressed by the plaintiff by way of the commissioner's reports and plans, as above discussed, and when the courts below had concurred with the reports and plans of the advocate commissioner, resultantly, the reasonings of the first appellate court that, sans permission of the defendants, the plaintiff is not entitled to take the water through the channel lying in the defendants land, as such, cannot be readily accepted.

16. Considering the features available in the properties belonging to the parties, when it is seen that the suit channel is not recently developed as sought to be projected by the defendants and on the other hand, the same is found to be in existence over a considerable period of time, accordingly, the plaintiff having established his claim of easementary right over the suit irrigation channel beyond the statutory period, the determination of the first appellate court that only on the permission granted by the defendants the plaintiff would be entitled to seek the easementary right, as such, cannot be countenanced. When no express permission is required for exercising the right of easement by way of prescription and when, as above discussed, the suit irrigation channel has been in existence beneath the defendants' land over a considerable period of time and when the defendants have not explained as to how the suit irrigation channel is lying beneath their lands, accordingly, it has to be held that by way of the implied permission granted by the defendants only, the plaintiff and his ancestors had been irrigating their lands through the suit irrigation channel and in such view of the matter, the reasonings and conclusions of the first appellate court for rejecting the plaintiff's case, as such, cannot be accepted.

17. In this case, the plaintiff's counsel would rely upon the decision reported in 1917 Vol.6 LW 564 (Konda Reddy vs. Ramasamy Reddi and others), wherein it has been held that the prescriptive right of easement could be exercised by a person over the land belonging to another by adverse enjoyment without lawful right or by way of incorporeal right of certain kinds and accordingly held that

"If a person walks along the land of another for the beneficial enjoyment of another land and if the enjoyment of the other's land does not amount of exclusive possession, such walking without the permission of the true owner and in assertion of a right to walk would create a prescriptive right of an easement of way even though the enjoyer may mistakenly suppose that he is the owner of the land walked upon or that his act of enjoyment is sufficient to give him the ownership by prescription".



Resultantly, in the abovesaid decision, it has been held that to acquire the easement within the meaning of Section 15 of the Easement Act all that is necessary is the enjoyment must be as of right and without interruption and it must be as an easement and it is not necessary that the enjoyment should be in the assertion of a claim of easement and the position of law has been outlined in the abovesaid decision as follows:

"We took time to consider our judgment and we have arrived at the conclusion that the appellants contention must be upheld. By adverse enjoyment i.e. by enjoyment without a lawful right, a person may acquire either an estate in property belonging to another or an incorporeal right of certain kinds. In the former case it may be either an absolute estate or a limited estate. If the adverse enjoyment amounts to exclusive possession of the land of the true owner, then in the absence of evidence to the contrary the trespasser would acquire the absolute ownership of the property. It could be open to the real owner to show that he did not while on adverse enjoyment assert the right to hold the lands as a absolute owner but asserted only a lesser right such as that of a lessee or a mortgagee or a life tenant. In that case the animus possidendi of the adverse enjoyer would determine the title which he would acquire by prescription. It might also be open to the real owner to say that only an easement right was asserted by the person in adverse enjoyment and in that case the right acquired would be only an easement. It is the adverse enjoyment or enjoyment without a lawful right that gives right to a title by prescription. No doubt if the enjoyment was not adverse but by licence of the real owner then no right would be acquired. Now if a person walks along the land of another for the beneficial enjoyment of another land if the enjoyment of the others land does not amount to exclusive possession there seems to be no reason why "his walking along the land without the permission of the true owner and in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement simply because he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription".

Applying the abovesaid principles of law to the case at hand when as could be gathered from the materials placed on record the plaintiff and his ancestors had been enjoying the suit irrigation channel running beneath the lands of the defendants beyond the statutory period and when no other explanation has been given by the defendants as to how come the suit irrigation channel is running beneath their lands accordingly, the first appellate court is not justified in rejecting the



plaintiff's case and when the right of easement could be exercised by a party without the permission of the owners of the servient tenement as a matter of right and without interruption beyond the statutory period that would constitute an easement.

18. The counsel for the defendant in support of his contentions placed reliance upon the decision of the Apex Court reported in 2004 Lawsuit(SC) 1383 (Justiniano Antao vs. Bernadette B Pereira), where in it is stated that without establishing the easementary right beyond the statutory period, the plaintiff would not be entitled to claim the right. The abovesaid proposition of law enunciated in the abovesaid decision is not disputed by the plaintiff's counsel. According to the plaintiff's counsel when from the materials placed on record, particularly, the commissioner's reports and plans, the plaintiff has established that he has exercised the right of easement by way of prescription over the suit irrigation channel from the days of his ancestors and when no other alternative channel is also projected by the defendants, all put together, it is seen that the first appellate is not justified in holding that only on the permission of the owner of the servient tenement, the right of easement could be exercised by the owner of the dominant tenement.

19. In view of the abovesaid discussions, the substantial question of law formulated in this second appeal is accordingly answered in favour of the plaintiff and against the defendants.

20. For the reasons aforesaid, the judgment and decree dated 27.10.2005 passed in A.S.No.35 of 2004 on the file of the Subordinate Court, Dharmapuri, reversing the judgment and decree dated 09.07.2004 passed in O.S.No.12 of 1992 on the file of the District Munsif Court, Harur, are set aside and resultantly, the judgment and decree in O.S.No.12 of 1992 are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS I)

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Sub Assistant Registrar

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To

1. The Subordinate Judge, Dharmapuri.

2. The District Munsif, Harur,

3. The Section Officer,

VR Section, High Court, Madras

+1 cc to Mr.V.Rajesh, Advocate Sr.NO. 14644

S.A.No.34 of 2008

SSD(CO)