



S.A.No.718 of 2013

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : .09.09.2022

CORAM

THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI

S.A.No.718 of 2013

1.Nallammal

2.Sowndirapandian

... Appellants

Vs.

1.Periammal

2.Parvathi

3.Saranya

4.Suganya

... Respondents

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 29.10.2012 passed in A.S. No.40 of 2011 on the file of the Subordinate Court, Namakkal, upholding the decree and judgment dated 31.03.2011 passed in O.S. No.226 of 2008, on the file of the Additional District Munsif Court, Namakkal.

For Appellant

: Mr.K.R.Ramesh Kumar

For R1 to R4

: Mr.T.Dhanyakumar



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JUDGMENT

The appellants herein are the defendants in O.S.No.226 of 2008, on the file of the Additional District Munsif Court, Namakkal, filed by the plaintiffs to declare their easement right to irrigate their land, shown as 'P' from common well 'W' through northern side east, west 'BC' channel crossing the land belongs to the defendants shown as 'D' in the rough plan and also seeking the relief for injunction caused to the defendants.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court and in appropriate places, their ranking in the present appeal would also be indicated.

3.The defendants denied the plaintiffs right to take water from the common well to irrigate their 'P' land through 'BC' channel course and thereby. Hence, the plaintiffs filed suit to declare their easmentary right to take water through 'BC' channel course and also pathway right during the



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non irrigation period.

4.Before the Trial Court. four issues were framed. The Commissioner was also appointed and his report is marked as Ex.C1 to Ex.C4. On the side of the plaintiffs Ex.A1 to Ex.A6 were marked and no documents on the side of the defendants but evidence was adduced.

5.During the trial, on the side of the plaintiffs they made endorsement to given up the plea of easement by prescription and they claimed right over 'ABC' channel by easement by necessity alone. Hence, the Trial Court restricted the plaintiff's claim with regard to easement by necessity.

6.On considering the evidence as well as Commissioner's Report, the Trial Court concluded that the husband of the first defendant purchased the portion of the property shown as 'D' from the common owner who were the husbands of the plaintiffs 1 & 2 and the East West 'ABC' channel course was ever since is in existence through which the



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plaintiffs irrigating their land, more particularly with regard to 'BC' channel portion their land at 'P' as shown in the plan except that no other channel course for them and also held that during the non rainy season the said channel as well as even the land sold to the defendants also could be used as pathway to reach their land to take cattle and manual. Accordingly, the suit was decreed as prayed.

7. Aggrieved over the same, the defendants preferred an appeal in A.S. No.40 of 2011 on the file of the Subordinate Court, Namakkal, wherein the First Appellate Judge framed separate issues and were relying the evidence on both sides held that the plaintiffs are entitled to irrigate their land P, P1 & P2 from common well 'W' through the channel course X, X1 & X2 by relying the Commissioner's Report, but while granting relief, the First Appellate Judge held that the plaintiffs are entitled to use 'BC' channel to irrigate their lands by way of easement by necessity and easement by prescription, confirming the Trial Court findings.



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8.Challenging the findings of the First Appellate Judge, the learned counsel for the defendants / appellants submits that even the plaintiffs themselves given up the plea of easement by prescription but without considering the same, the First Appellate Judge erroneously granted both relief, easement by prescription as well as easement by necessity, which is totally erroneous and liable to be set aside.

9.This appeal is admitted on the following substantial question of law :

"Whether the first appellate Court was right in granting a decree holding that the plaintiff has got easementary right both by prescription as well as by necessity though the plaintiff has already given up the plea of easement by prescription?"

10.The learned counsel for the defendants/appellants submits that the land shown as 'P' in Commissioner's Report in S.F.No.63/3A belongs to the plaintiff was not irrigated from the common well 'W' and it was used as dry land, but the plaintiffs falsely claimed that they are irrigating the said land through channel course northern, east, west



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channel course shown as 'BC' in their plan. But the Courts below erroneously held that those land also cultivated by the plaintiffs as a common owner of the property by way of easement by necessity as well as easement by prescription. When there is no specific pleadings to that effect in their plaint thereby he prayed to set aside the findings given by the Courts below as erroneous one.

11.By way of reply, the learned counsel for the plaintiffs / respondents submits that the portion of the property was purchased by the husband of the first defendant through a sale deed in year 1971 from the husband of the plaintiffs 1 & 2, who are the common owner of the said property. The said land also was irrigated through water from the common well 'W' through east, west, northern side 'ABC' channel course and during non rainy season, the same was used as pathway and except this they have no other access to 'P' portion and no other channel course to irrigate their land, all of a sudden the defendants caused interference and hence, to declare their right through easementary right to enjoy the channel course as well as for the pathway they filed the suit, and both the



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Courts below had rightly granted the said relief which needs no interference.

12. On considering the rival submissions of both sides it reveals that before the trial Court during the pendency of the trial, the plaintiffs given up their plea of easement by prescription, thereby, they claimed their right over 'ABC' channel by easementary of necessity. But the First Appellate Court, while confirming the trial Court findings, erroneously concluded easement by prescription also which was not claimed by the plaintiffs in this suit. But on considering the entire evidence as well as the relief claimed by the plaintiffs, it reveals that originally the lands in P, P1 & P2 along with common well was belongs to the common owner/husband of the plaintiffs 1 & 2 through partition held in their family and the said partition deed is marked as Ex.A1 dated 01.09.1967 from the common well 'W' all the lands were irrigated through 'ABC' channel and the portion of the property was purchased by the defendants husband from them on 26.10.1971 through Ex.A2/sale deed and the said portion is shown as 'D' and the remaining portion retained by the



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plaintiff's family is 'P' portion so the plaintiff is able to establish that originally all these properties were enjoyed by the common owner and irrigated by taking water from the common well 'W'. Though the defendants admits that the plaintiffs irrigated their land taking water from common well through 'AB' channel, but he denied their right to irrigate the land in 'P' portion through 'BC' channel situated on the northern side of the plaintiff's share. He also claimed that the said 'P' portion in S.F.No.33/3A was kept as dry land by the plaintiff but the Commissioner Report reveals that the channel course from 'W' well shown as X, X1 & X2 proves that the land in 'P' portion get irrigated through X, X1 & X2 channel course from the common well. Further, there is no alternative channel course to cultivate the said portion. Therefore, easement by necessity, the plaintiffs are entitled to use this channel course. The Courts below rightly appreciated the Commissioner's Report is sustainable. One another claim of the plaintiffs is that during non rainy season they entitled to take cattle and manual through D1 & D2 lands but the same also denied by the defendants submitting that the plaintiffs have alternative access to reach their land at 'P' portion. Even during the Commissioner's



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visit the defendant not shown that the plaintiffs have alternative access to reach 'P' portion. On the contrary by relying recital of Ex.A1 the plaintiffs able to establish that they are entitled to take cattle and manual across the D1 & D2's land and recitals are as follows :

"நம் பாக சொத்துக்களில் மாகுல் இல்லாத காலங்களில் ஒரு பாகஸ்தன் மற்றொரு பாகஸ்தன் சொத்துக்களின் பேரில் வண்டியில் எரு, தழை முதலானதுகளை ஓட்டிக்கொள்ளும் பாத்தியம் நம்மில் ஒவ்வொருவருக்கும் உண்டென்றும்....."

The first defendants purchased 50 cents in S.No.63/3 and 7 cents in S.No.63/4 and right to use the existing channel course along with other easementary rights. Therefore, at the time of execution of the sale deed / Ex.A2 the channel course was in existence is established by the plaintiffs. Though the plaintiffs given up their claim easement by prescription but the fact reveals that already the right to use the said channel course was prescribed in their title deed and enjoyed by the common owner. The defendants failed to establish that the plaintiff is having alternative access to reach 'P' portion but the plaintiffs proved that under easement by necessity they are entitled to take cattle and manual during the non rainy season through D1 & D2's lands. Both the Courts below rightly held that



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by easement by necessity they are entitled for the declaration reliefs.

Since the plaintiffs given up the plea of the easement by prescription but inadvertently the First Appellate Court granted such relief also, to that effect the said portion is liable to be set aside. Accordingly, the substantial question of law is answered.

13.In the result, the second appeal is dismissed. No costs.

- a) the judgment and decree dated 29.10.2012 passed in A.S.No.40 of 2011 on the file of the Subordinate Court, Namakkal is set aside and
- b) the judgment and decree dated dated 31.03.2011 passed in O.S. No.226 of 2008, on the file of the Additional District Munsif Court, Namakkal is confirmed.

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Index: Yes/No
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T.V.THAMILSELVI, J.
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To

- 1.The Subordinate Court, Namakkal.
- 2.The Additional District Munsif Court, Namakkal.
- 3.The Section Officer, VR Section, High Court, Madras.

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