

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

<i>Reserved on</i>	<i>15.03.2024</i>
<i>Pronounced on</i>	<i>22.03.2024</i>

CORAM :**THE HONOURABLE MR.JUSTICE P.B.BALAJI**

S.A.No.586 of 2018
&
CMP No.17651 of 2018

N.Karuppusamy

... Appellant

Vs.

1.P.Karuppusamy

2.P.Duraisamy

...Respondents

Prayer:- This Second Appeal has been filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 23.10.2017 made in A.S.No.65 of 2012 on the file of the Sub Court, Dharapuram modifying the judgment and decree dated 22.11.2012 passed in O.S.No.316 of 2006 on the file of the learned District Munsif, Dharapuram.

For Appellant : Mr.R.Asokan

For Respondents : Mr.N.Manokaran

JUDGMENT



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This Appeal has been preferred as against the Judgment and decree dated 23.10.2017 made in A.S.No.65 of 2012 on the file of the Sub Court, Dharapuram, modifying the judgment and decree dated 22.11.2012 passed in O.S.No.316 of 2006 on the file of the learned District Munsif, Dharapuram.

2.The unsuccessful plaintiff in a suit for declaration and enjoyment is the appellant herein.

3.The parties are described as per their litigative status before the trial Court.

4.The brief facts of the case pleaded by the parties are hereunder:

The case of the plaintiff is that the suit properties are the separate properties of the plaintiff and he has been in enjoyment of the property situated in S.F.No.1488/7, while the defendants were in enjoyment of the property situated in S.F.No.1488/5 & 6. According to the plaintiff, there was a Itteri road running north to south on the western side of the



plaintiff's property and it was already sub-divided and the same has been used by the co-pattadars for their ingress and egress. The plaintiff dug a well in the middle portion of his land and similarly, the defendants also dug a well in their land. Taking advantage of the absence of the plaintiff from the Village, the defendants have destroyed the live fence and attempted to create a passage through the plaintiff's land to reach the east- west pathway on the southern side. Hence the suit.

5. Resisting the suit, the defendants have filed a written statement, *inter alia*, stating that the plaintiff has not produced any documents to establish his title over the suit property. The defendants admitted that the co-pattadars were using the east-west Itteri road to reach the well in R.S.No.1488/8. According to the defendants, they have got right of way in the suit property to reach the common well and to take water for irrigation of their lands. The defendants, therefore, prayed for dismissal of the suit.

6. The trial Court, on consideration of both oral and documentary



evidence, found that the common well in R.S.No.1488/8 was "Sigasthu Kinaru", meaning of the term being, "ruined well" and also in the Report of the Advocate Commissioner, it is mentioned that the well has never been used by the defendants and therefore, the defendants do not have a right of way to reach the common well in plaintiff's property for the purpose of taking water from the said well. The trial Court also found that the defendants have got a well of their own in their land itself and the right of easement over the plaintiff's land got extinguished.

7. However, the First Appellate Court, finding that under Exs.B1 and B2, the defendants were given a right to take water through channels from the common well located in R.S.No.1488/8 and right of way was granted through the lands of Nachimuthu Gounder and Periyasamy Gounder and admittedly, Nachimuthu Gounder being the father of the plaintiff, the plaintiff cannot deny the grant in favour of the defendants. The First Appellate Court therefore, reversed the findings of the trial Court. Hence the appeal.



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8.The above Second Appeal was admitted by this Court on 29.10.2018, on the following substantial questions of law:

(i) In the absence of pleading by the defendants that they have an easement by grant to the pathway across the plaintiff's land, whether the Appellate Court is right in holding that the defendants are entitled to use the pathway as an easement by grant?

(ii) In the absence of any agreement or contract between the plaintiff or his predecessors-in-title with the defendants or their predecessors in title as to the pathway, whether the Appellate Court was right in holding that the defendants have the right to use the said pathway across the suit property as an easement by grant?

(iii) When, neither the plaintiff nor his predecessors in title were parties to the documents Exs.B1 and B2, whether the recitals in the said documents would bind the plaintiff and whether the lower Appellate Court could modify the decree holding that the defendants are entitled to the right as an easement by grant based on the recitals found in those documents?



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9. I have heard Mr.R.Asokan, learned counsel for the appellant and Mr.N.Manokaran, learned counsel for the respondents.

10. I have gone through the pleadings, oral and documentary evidence adduced by the parties as well as the judgments of the trial Court and the Appellate Court. A short question that needs to be decided is as to whether there has been a valid grant of easement in favour of the defendants. If the valid grant is made out or established, then there is no question of extinguishment of the said grant or abandonment of the said grant, and consequently, the plaintiff's claim will have to be rejected. However, if the defendants are not successful in establishing their plea of grant of easement, then the plaintiffs would necessarily have to succeed.

11. The defendants have claimed the grant of easement under Exs.B1 and B2. Admittedly, both the documents viz., Exs.B1 and B2 are not concerning either the plaintiff or the plaintiff's predecessors -in- title.



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12. The trial Court has rightly found that the grant made in favour of the defendants would not bind the plaintiff or the plaintiff's predecessors -in- title as they are not the parties to the said documents and thereby, the right in respect of their property cannot be conveyed by the defendants.

13. The learned counsel for the appellant would also state that the First Appellate Court has presumed that the grant has been given by the father of the plaintiff and therefore, the plaintiff has established his case, contrary to fact. He would refer to the findings of the First Appellate Court in order to fortify his contention. The learned counsel for the appellant would also placed reliance on the decision of the Hon'ble Supreme Court in “***Hero Vinoth(minor) Vs. Seshammal***” reported in (2006) 5 SCC 545, wherein, the Hon'ble Supreme Court dealt with the grant of easement acquired by the grant of easement of necessity. The learned counsel for the appellant has also placed reliance on the decision of this Court in “***Natesa Gounder Vs. Raja Gounder & Others***” (2012)



5-LW.649, wherein, this Court held that in the absence of persons or their ancestors being parties in the right of pathway contemplated, it would not be binding on such persons. He would therefore, prayed for the Second Appeal being allowed.

14. Per contra, Mr.N.Manokaran, learned counsel for the defendants would submit that the defendants have been enjoying the right of pathway for the past 20 years, right from 1987, till the filing of the suit and the question of abandonment of grant acquired would never arise and Section 41 of the Easement Act cannot be pressed into service to deny right in favour of the defendants.

15. In fact, the learned counsel for the defendants would also place reliance on the same decision of the Hon'ble Supreme Court in “***Hero Vinoth(minor) Vs. Seshammal***” cited supra, wherein, the Hon'ble Supreme Court has held that the nature of acquisition of grant is relevant to claim right of easement and held that Section 41 relating to extinguishment of right of easement would apply only to easement of



necessity and not to easement obtained by way of grant.

16. I have considered the rival submissions advanced by the learned counsel on either side. Admittedly, Exs.B1 and B2 contain a covenant, granting right in favour of the defendants to use the suit property for the purpose of drawing water from the common well. If the grant in favour of the defendants is established to be valid, as rightly contended by the learned counsel for the respondents, the said right can never be abandoned or extinguished. However, at the out set, it needs to be seen as to whether the defendants 1 and 2 have successfully established a grant in their favour. On a perusal of Exs.B1 and B2, it is clear that even though there is reference to the plaintiff's property in S.F.No.1488/7 being the plaintiff's property and the common well situated in S.No.1488/8, the evidence on record would clearly establish that the well has been ruined and dilapidated. The Advocate Commissioner has also inspected the property and filed a report stating that wild bushes have grown and there is no pathway that could have been used by the defendants through the plaintiff's property, to reach the



common well. Even *de hors* the factual findings arrived at by the trial Court, when admittedly neither the plaintiff nor the plaintiff's predecessors -in- title are parties to Exs.B1 and B2, any right concerning their property cannot be dealt with under the said Exs.B1 and B2. Unfortunately such a right has been conferred under Exs.B1 and B2. Though Mr.N.Manokaran would contend that the original survey number was 1488 and it has been subsequently sub-divided and the plaintiff would be bound by the covenant contained in the documents namely, Exs.B1 & B2, I do not find that there is any evidence that there was common ownership of the parties in S.No.1488. The parties also do not claim under any common ancestor. That being the position, no right of the plaintiff can be infringed upon in any document to which he is not a party. Thus the First Appellate Court has clearly fall in error in holding that Exs.B1 and B2 would bind the plaintiff. The decision of this Court in ***Natesa Gounder Vs.Raja Gounder & Others*** cited supra would squarely apply to the facts of the present case. There is no dispute with regard to the ratio laid down by the Hon' ble Supreme Court in ***Hero Vinoth(minor) Vs. Seshammal's*** case cited supra. However, when the



grant has not been established in the first place, the said decision will not come to the aid of the defendants. Therefore, I am constrained to interfere with the findings of the First Appellate Court. The substantial questions of law are answered in favour of the appellant.

17. In fine, the Second Appeal is allowed. The Judgment and decree dated 23.10.2017 made in A.S.No.65 of 2012 on the file of the Sub Court, Dharapuram are set aside and the judgment and decree dated 22.11.2012 passed in O.S.No.316 of 2006 on the file of the learned District Munsif, Dharapuram are confirmed. No costs. Consequently, connected miscellaneous petition is closed.

22 .03.2024

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To

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



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P.B.BALAJI,J.

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**Pre-delivery Order in
SA.No.586 of 2018**

22.03.2024