

Raju Naicker Vs. Ananthakrishna Naicker and ors.

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Court : Chennai

Decided On : Aug-13-1991

Reported in : (1992)1MLJ163

Appellant : Raju Naicker

Respondent : Ananthakrishna Naicker and ors.

Judgement :

ORDER

M. Srinivasan, J.

1. The plaintiff is the appellant. He filed the suit for a declaration of his right of easement through the channel marked as A, B, C, D, E in the plaint plan and as described in the Schedule to the plaint, for an injunction restraining the defendants from interfering with the enjoyment and for a mandatory injunction directing the defendants to restore the B-I schedule channel shown as A, B, E, in the plaint plan. The case of the plaintiff is that he purchased an extent of 2 acres and 67 cents in S.Nos.246/1 and 248/4 from Tiripurasundari Ammal for Rs. 1,000 under the registered sale deed dated 4.6.1959. It is also his case that he purchased another extent of 49 cents to the south of the said 2 acres and 67 cents orally and thus he was entitled to an extent of 3 acres and 15 cents in that area. According to him, under the sale deed in his favour, he was given right to take water from the maduvu on the north through a channel to the east of the land purchased by him

as described as A, B, C, D in the plan. He said that he was enjoying the channel ever since his purchase and it was an easement by grant as well as necessity. His further case is that on account of misunderstanding with defendants, who are father and sons, are attempting to efface the channel and they had obliterated A, B, E, F in the plaint plan. Hence he prayed for the reliefs as set out earlier.

2. The defendants contested the suit denying the claim of the plaintiff contending that the plaintiff had no right whatever, and there was no channel in existence as claimed by the plaintiff and claiming title under Exs.B-2, B-3 and B-I, dated 9.7.1962, 17.7.1962 and 9.10.1972 respectively.

3. The trial court appointed a Commissioner who inspected the property and submitted a report as to the existing physical features. The trial court found that the plaintiff has made out a case that he is entitled to take water from the maduvu through the channel to his lands and granted a decree as prayed for by the plaintiff. On appeal, the learned Subordinate Judge, Chengleput, has reversed the conclusion of the trial court and dismissed the suit.

4. Even at the outset it should be said that the conclusion of the lower appellate court, to say the least, is perverse. The learned Subordinate Judge has closed his eyes to the factors staring on the face of the court and has placed reliance on irrelevant matters to hold against the plaintiff.

5. The case of the plaintiff is made out by a sale deed under which he purchased from Tiripurasundari Ammal marked as Ex.A-1 dated 4.6.1959. There is a clear recital in the document that the purchaser was entitled to take water from the maduvu through a channel at the end of the land. It is not in dispute that Tiripurasundari Ammal was also the owner of the land which was sold to the defendants. After selling to the plaintiff under Ex.A-1, dated 4.6.1959, she sold adjacent portion of the land to Ellammal under Ex.A-4 on the same day. She also sold the other adjacent lands which are now owned by the defendants, to Venkatachala Naicker under Ex.B-2 on 9.7.1962 and Ex.B-5 on 20.8.1962. The said Venkatachala Naicker sold in turn to the 1st defendant under Ex.B-1 on 9.10.1972. The 1st defendant had also purchased other lands from Chinnakulandai Ammal under Ex.B-3 on 17.7.1962.

6. The Commissioner who inspected the suit property found that there was a channel in existence in a portion of the land marked as BCDE; that there was no channel in the portion marked as ABEF, but there was only a ridge of about 12 feet width; that there was a mouth like provision at the point AF for bailing out water, indicating thereby that water would be bailed out from the maduvuat that place. When the Commissioner has found that there was a channel in existence in BCDE, it is quite natural and probable that the channel existed at ABEF also. The channel that is found on the southern side should certainly have existed on the northern side as otherwise, the water could not have been taken from the maduvu at the point AF to the plaintiffs lands. But for ABEF, the portion marked as BCDE would have been of no use whatever to the plaintiff.

7. The following passages found in the Commissioner's report are relevant:

Though I have stated that A, B, C, D, E, F is the channel I do not find any Channel in A B E F portion. A, B, E, F portion is simply ridge measuring 12 width But I do not find clear channel in B, C, D, E portion.' (The word 'not' obviously a typographical error as it is clear from the subsequent sentence in the report as extracted hereunder).

The total distance between A, F and C, D nearly 1000' and the distance between A, F and B, E is 400 and the distance between B, E and C, D is 600. As I have already mentioned that the channel B, C, D, E is straight and clear in shape' (underlining is mine). 'The width of the channel here is 22' and the ridges D, E and B, C are of 12'. I do not find any channel in A, B, E, F portion.

8. A reading of the above passage clearly shows that the Commissioner has found a channel in existence at B, C, D, E and not in A, B, E, F. Learned Counsel for the respondents placed reliance on the sentence - 'I do not find clear channel in B, C, D, E portion' and contends that the Commissioner did not find a channel in B, C, D, E portion. As I have already pointed out the word 'not' is a typographical error and that could not represent the intention of the Commissioner correctly and this is evident from the later sentence where the Commissioner says categorically that the channel B, C, D, E is straight and clear in shape. It is also mentioned by the Commissioner in his report that he has seen a heap of fresh mud kept at A, F

portion and the plaintiffs representative pointed out that a similar set up for bailing out water from the maduvu to the lands had been fixed in the adjacent lands on the west.

9. Thus a perusal of the Commissioner's report shows that the lands on the west of the disputed channel were being irrigated with the water from the maduvu which is bailed out by suitable apparatus. A reading of the recitals in Ex.A-1 along with the report of the Commissioner's report will prove beyond doubt that the plaintiff is entitled to take water from the maduvu to his lands through the channel. There is absolutely no suggestion whatever as to why the common owner Tiripurasundari Ammal should insert a false recital in Ex.A-1 which came into existencelong prior to the sale deeds in favour of the defendants and their predecessors-in-title. Further the said Tiripurasundari Ammal had no motive to defraud anybody by including a false recital with regard to the right to take water under Ex.A-1. Hence the recitals in Ex.A-1 should be given proper and due weight. It follows that the plaintiff had the right to take water through a channel from the maduvu situate on the north.

10. Reliance was placed by the respondents on certain discrepancies in the oral evidence adduced by the plaintiff and his clients. It should not be forgotten that the witnesses were examined about 7 1/2 years after the suit was filed. Naturally there are some discrepancies but they are not material and are not sufficient to discredit the evidence given by the witnesses of the plaintiff. In particular, learned Counsel for the respondents submits that P.W.4 deposed that the obliteration of the channel was about eight years prior to his deposition, whereas the case of the plaintiff was that it was a few days prior to the suit. Learned Counsel for the respondents obviously forgets that the suit filed in the year 1982 and the deposition was given in December, 1989. Hence, there is no discrepancy between the deposition of P.W.4 and the case set out by the plaintiff.

11. It is then contended that the channel is not shown in the village map or in the survey map. There is no substance in this argument because the channel in question is purely a private one owned by a person who owned vast lands in that locality and the same was give to the plaintiff when the owner sold certain portions

of the land owned by the owner. The other portions were sold by her later to other persons and therefore the subsequent purchasers are bound by the earlier sale effected by the vendor.

12. The next argument is that the sale deed in favour of the 1st defendant under Ex.B-1 was attested by the plaintiff and therefore he is estopped from contending that he has a right to have the channel through the land of the defendants. It is also submitted that there is no recital in Ex.B-1 as to the existence of the channel or the right of the plaintiff to take water to that land. I do not agree with this contention. There is no question of estoppel here. Mere attestation of a document will not create an estoppel and it should be proved that the contents of the document were known to the attester and that other circumstances were known to him and yet he did not protest against the recitals. At any rate, the absence of a recital in Ex.B-1 regarding the right of the plaintiff to take water to his land from the maduvu through the land of the defendants will not in any way prevent the plaintiff from establishing his right. The document in favour of the plaintiff is much earlier and Tiripurasundari Ammal having conveyed in favour of the plaintiff with a right to take water through her other lands when she sold the suit land to the plaintiff, could not have derogated from that grant and sold any higher right to defendants. The sale deeds in favour of the defendants and their predecessors are subject to the rights conveyed in favour of the plaintiff under Ex.A-1.

13. It is the case of the defendants that both parties were taking water from one Chinna Rasappan and neither of them took water through the channel in question. This case has not been made out by any evidence. The fact that the defendants' lands are in lower level than the plaintiffs lands or that they are in lower level than the disputed channel will not affect the case of the plaintiff. The case of the plaintiff that he is taking water to his lands by bailing out water by a suitable apparatus from lower level to higher level, is made out by evidence on record. Unfortunately the lower appellate Court has not kept in mind these facts which have been proved beyond doubt. It is contended that there is a well in the plaintiffs land and he is taking water from the well and therefore the case of easement of necessity has not been made out. This is a case in which the sale deed in favour of the plaintiff has granted the right of easement and there is no necessity for the plaintiff to rely on

the case of easement of necessity. The case of easement by grant supported by the production of relevant records has to be upheld as done by the trial court.

14. The learned Counsel for the respondents placed reliance on the judgment of Ismail, J., (as he then was) reported in Ramaswamy Gounder v. Anantha Padmanabha Iyer : (1971)1MLJ392 , wherein the learned Judge has held that: Where a person, having a tangible interest in the property affected by a deed, attests that deed, his attestation should be taken as proof of his consent to and knowledge of the correctness of the recitals in the deed.

The judgment therein was rendered on the facts and circumstances of that case. The entire case law on the subject was referred to by me in Nagarathinamma v. Rajammal 100 L.W. 363, and I have held that on the facts it should be proved that the attesting witness consented to the transaction for invoking the rule of estoppel.

15. However, on the facts of this case, the decision relied on by learned Counsel for the respondent will not apply to this case. As pointed out already, there is no necessity for the recital in Ex.B-1 to the effect that the plaintiff had a right to take water over that land. Whatever right is conveyed under Ex.B-1 in favour of the defendants was clearly subject to the rights conveyed under Ex.A-1 in favour of the plaintiff. Hence the principles of estoppel are not applicable to this case.

16. Learned Counsel for the respondents further relied on Samiappa Nainar v. Annamalai Chettiar (1972) 1 M.L.J. 317, wherein the Division Bench of this Court has held that:

Recitals as to boundaries in documents not inter parte are inadmissible in evidence under Sections 11, 13(a), 32(3) and 32(7) of the Act. The only method by which recitals in a document not inter partes could be admitted in evidence is by examination of the executant of the document in which such recitals as to boundaries are found.

This is not a case of boundary recital but it is a case of grant of right to take water through a channel from maduvu. The parties here claim rights under the same owner. The recitals in Ex.A-1 are binding on the defendants who claim under the

subsequent purchases. Therefore, the above decision will not apply to this case.

17. Learned Counsel for the respondents invites my attention to the judgment in *Mohideen Ibrahim v. Mohammed Abdullah* : AIR1978 Mad97 , wherein it has been held that a person cannot acquire an easement unless he acts with the knowledge that it is a case of dominant and servient tenement and he is exercising a right over property which does not belong to him. It is pointed out that if he enjoys a right under the supposition that he is the owner of the property he does not acquire an easement. The above ruling has nothing to do with the facts of present case.

18. My attention was also drawn to a decision reported in *Santosh Kumar v. Krishna Kant Gupta* : AIR1985 Pat124 , wherein it was held that the claim for easement of necessity can arise only if two lands were brought in a single unit under a common owner and if there were two owners, the question of easement would not arise. The above decision is not applicable to the case on hand. Here it is admitted that Tiripurasundari Ammal was the owner of the lands and she sold certain lands on the west to the plaintiff and Ellammal and certain lands on the east to the defendants and their predecessors-in-title. Hence the principles of easement will apply and in this case in favour of the plaintiff.

19. In the result, the judgment and decree of the lower appellate court are wholly unsustainable and are set aside. The plaintiff is entitled to take water through the channel from maduvu as claimed by him. But according to the plaint plan the width of the channel on the northern side marked as A,B, E, F is more than the width of the channel on the southern side B, C, D, E. The plaintiff cannot claim a larger width on the northern side and smaller width on the southern side. As the Commissioner found the channel to be in existence at the portion marked as B, C, D, E, the plaintiff will have the channel of the same width upto the northern end that is upto A, F from B, E. In fact, the Commissioner has marked the point 'F on the northern side by extending D, E upto the northern boundary by drawing a straight line. Therefore, the plaintiff is entitled to a width of 22'. In A, B, C, D, E, F in the Commissioner's plan marked as C-2. There will be an injunction restraining the defendants from interfering with the plaintiffs user and enjoyment of the said channel. There will be a mandatory injunction directing the defendants to restore

the channel at the point A, B, E, F in Ex.C-2. The defendants are granted two months time from this date to restore the channel. If they failed to do so, it will be open to the plaintiffs to get it done through the executing court. The second appeal is allowed on the above terms. The parties will bear their own costs.

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