

(1997) 11 MAD CK 0165
In the Madras High Court
Case No : S.A. No. 1649 of 1990

Basha Reddiar (died) and 4 others

APPELLANT

Vs

Janarthanum and 5 others

RESPONDENT

Date of Decision : 04-11-1997

Acts Referred:

Citation : (1997) 11 MAD CK 0165

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : D. Govinda Reddy, for the Appellant; R. Natarajan, for the Respondent

Judgement

S.S. Subramani, J.—Plaintiff in O.S. No. 2081 of 1986 on the file of the Third Additional District Munsif, Pondicherry is the appellant. The suit filed by the appellant is to declare that the appellant is entitled to enjoy the common passage namely, the schedule item of the property including laying of the underground pipeline in the suit property for the purpose of keeping its drainage and to pass a decree of permanent injunction, restraining the defendants, their men or agents from interfering with the underground drainage work to be done by the plaintiff in the schedule property and to direct the defendants to pay the costs of the suit. In the plaint, it is stated that the property originally belonged to the plaintiff and his two brothers viz. Egambaram and Ramasamy and a partition deed was executed between the brothers. As per the said deed, the schedule property was kept as a common passage for the entry into the other portions of the house and make use of the same as a common passage for the enjoyment of all the co-sharers. It is said that the brothers attempted to close the common well, which was to be enjoyed by all the three brothers and the plaintiff was, therefore, constrained to file a suit for declaration that he is entitled to make use of the well and also for permanent injunction. The suit was decreed. It is stated that the plaintiff's brother Egambaram died leaving behind the first defendant as his legal heir and the other brother Ramasamy died leaving behind the

defendants 2 to 5 as the legal heirs. It is said that the house of the plaintiff is on the eastern side and the house belonging to the defendants is on the western side. In the common passage the plaintiff left open the drainage connection and sometimes it overflows and thereby causes nuisance both to the plaintiff and to the other persons, including his brothers. The said common passage runs from North to South and it ends in the share belonging to the plaintiff on the northern side. Therefore, the plaintiff wanted to keep the drainage underground in order to avoid the inconvenience to the members of the family. The plaintiff made arrangements and purchased pipes for laying the underground drainage in the property. The defendants without any right attempted to prevent the plaintiff from digging pits to lay the pipes for the purpose of keeping the drainage underground in the said common passage. It is said that the plaintiff is entitled to do the same for the purpose for keeping the common passage clean to avoid inconvenience to the other sharers, viz. the defendants. When the defendants have obstructed, the plaintiff issued a lawyer's notice on 30.4.1986, directing the defendants not to interfere in the work which is being done by the plaintiff of keeping the drainage underground. Since the defendants continued to prevent the plaintiff from putting the underground drainage, it necessitated the filing of the suit.

2. In the written statement filed by the defendants, they took a contention that the suit is barred by *res judicata*, in view of the two cases alleged to have been filed by the plaintiff. It is said that the common lane is a small one, having a width of six feet and if every authorised person wants to lay a pipe-line for the purpose of taking water to the field of drainage, it will be highly impossible and will create more problems and completely spoil the common intention of the parents. All the parties are enjoying their respective properties for the past more than 50 years without keeping any separate drainage or underground pipeline in the suit property, which declares that the intention of the plaintiff to lay pipe line is only to give trouble and harassment to the defendants. Along with the suit, the plaintiff has also filed draft plan.

3. The trial Court has held that the suit is not barred by *res judicata* and the defendants failed to prove that there is an earlier finding against the plaintiff in any suit filed by him. It was also found that the suit is not bad for non-joinder of necessary parties. Finally, on Issue Nos. 4 and 5, i.e. whether the suit property is in the possession and enjoyment of the plaintiff as alleged by him and whether the plaintiff is entitled to the judgment and decree as prayed for, the trial Court held that since the suit property is a common pathway, the plaintiff alone is not entitled to have the underground drainage connection drawn through the common pathway. It was held thus:-

"The plaintiff alone cannot claim any absolute right over the suit property deleting the other co-sharers, namely the defendants herein. If the plaintiff is allowed to act according to his whims and fancies, the other defendants may be deprived of that right of possession and enjoyment of the common pathway. In

these circumstances, the plaintiff alone cannot seek declaration for laying underground pipeline in the suit property. Since the other co-sharers object to this modification, plaintiff cannot claim any right to lay underground pipeline."

So holding, the suit was dismissed, when the matter was taken in appeal before the lower Appellate Court in A.S. No. 82 of 1989 on the file of the Second Additional District Judge Pondicherry, that Court also confirmed the decision. The concurrent judgment is impeached in the second appeal and the following substantial questions of law are raised at the time of admission:-

(i) Whether or not the right of common passage conferred on the co-sharers or joint owners given right to passage to men, material; and essentials like water ways, drainage, etc.

(ii) Whether or not the right of the appellant to carry drainage by underground pipelines through a common passage is an easement of necessity.

(iii) Whether or not the right to carry drainage water through the common passage is an absolute easementary right for the appellant.

(iv) Whether or not the right of passage to the appellant include the right to take water and drainage pipes just as a way for men, materials, catties, etc.

(v) Whether or not the appellants is entitled to the easementary right to lay drainage pipe-lines in view of the finding of the Commissioner that the plaintiff has no other way other than the suit passage to take out the waste water.

(vi) Whether or not the Courts below are bound to consider the report of the Commissioner appointed by the trial Court for deciding the rights of easement of necessity to say the drainage pipelines through the common passage. I feel that all these questions of law could be considered together.

4. It is admitted by all the parties that after separating the appellants property from that of respondents, there is a common pathway in between. According to the respondents, it is having only a width of six feet, whereas, according to the plaintiff, it is having little more width and it is in the common enjoyment. Both the courts have declined to grant the relief to the plaintiff, only on the ground that without the consent of the defendants, the plaintiff is not entitled to take underground drainage and the same will be detrimental to the defendants. How far this finding is correct is the only question that has to be decided in this second appeal.

5. Even though in the questions of law that are raised, the right of easement is also claimed, I do not think that the appellant will be entitled to claim such a right. When it is admitted that the plaintiff as well as the defendants are the joint-owners, the plaintiff cannot say that he is holding an easement right, in which he is claiming ownership also. The claim is inconsistent. Further, this question is also settled by various decisions. In Mitra's book on Joint Property and Partition, 1991 Edition, at page 255, the learned Author deals with the right of Co-owners

over a common passage. The learned Author says that:-

"When a common passage belongs to both the plaintiff and the defendant, there is no question of any one party having an easement right over the same."

So, the claim of the appellant that he has got an easement right to take the underground drainage is not correct. But, that by itself will not show that the appellant is not entitled to any relief. Over the passage, the plaintiff and the defendants are the owners. What is the right of the Co-owner or the joint owner of the property, is the question that has to be decided, This question came up for consideration in the decision reported in Bothra Brothers Ltd. Vs. Sm. Pramila Bala Dutt Chowdhury and Others,). A Division Bench of that Court, in para "8 of the Judgment held that:

"As between the Co-owners of a common passage under which both of them have right to lay drains to carry effluence from their respective premises, there is no question of the passage being a servant tenement in respect of any of the co-owner's premises and as such no question of easement arises in the case. Each Co-owner is entitled to make full use of the common passage owned by it jointly with the other co-owner. He can lay underground drains in the common passage if the new drains do not interfere with the existing drain and with the right of the other co-owners of the Common passage".

Our High Court had an occasion to consider a similar question in the decision reported in Subbiah Goundan Vs. Ramaswamy Goundan and Others, of the Judgment in para 4, it was held thus:-

"When co-owners, at the time of partition, get apart a portion of the common property to be used as common for the beneficial enjoyment of their respective shares, that involves a dedication by each of them of a portion of the property, which, but for such dedication, would become his exclusive property. Each of such-Co-owners of the common property is entitled to use the property in the way most advantageous and beneficial to him without at the same time, causing any injury or detriment to the other co-owners. It is for such a co-owner to decide in what way he could so use the common property to his maximum advantage. It is not for the other co-owners to dictate in what manner the other co-owners should enjoy the common property so long as the user of the common property by one co-owner does not materially interfere with the use of the property by the other co-owners or affect their rights or in any way weaken, damage or injure the common property. Such co-owners are not entitled to prevent the other co-owner from using the common property in the way most beneficial to him. When co-owners of lands divide the lands, sometimes they set apart a common pathway for the beneficial enjoyment of their respective shares. Each co-owner is entitled to use the common pathway in a way most beneficial to him. If he happens to acquire a new land adjacent to his share and if that land can be approached through the common pathway he cannot be prevented from using the common pathway provided his user of the common pathway does not

interfere with the rights of the other co-owner in the common pathway. Similar instances are such as setting apart common property for use as thrashing floor or common passage in buildings. A co-owner of a common passage in a building can use such passage not only to reach his portion which he got under the partition but also to reach any addition which he may put or any accretion which he may make adjacent to his property, provided his user of the common passage does not interfere with the user thereof by the other co-owners. Likewise, the common owner of a thrashing floor can use it not only for thrashing the paddy got from the lands which he got for his share in the partition, but also for thrashing the paddy which he may get from a land which he may acquire subsequently. Such user, so long as it does not interfere with the use by the other co-owners, cannot be objected to by the other co-owners. It would be most unreasonable to say that the paddy got by the Co-Owner from the land which fell to his share in the partition should alone be thrashed in the common thrashing floor. Cases of extension of balcony over common passage also stand in the same footing. The principle underlying the enjoyment of common property is that one co-owner can use the common property to his maximum advantage, subject of course to the rights of the other co-owner not being any way materially interfered with and without damaging or weakening the common property".

(emphasis supplied)

6. In Mitra's book on "Joint Property and Partition", the learned Author has considered the right of each co-owners over the common passage. The said paragraph reads thus:-

"It is permissible for a co-owner or co-sharer to change the mode of user of a common passage without the consent of the other co-sharers. As between the co-sharers of a common passage each has the right to lay underground drains. In such a case there is no question of common passage being a servant tenement in respect of any of the premises of the co-owners. Every co-owner has the right to make full use of the common passage. Even though a co-owner has the right to lay a new underground drains in the common passage but such laying of new drains should not interfere with the existing drains and with the right of other co-owners of the passage. A person's right drain his own premises by laying underground pipes in his own land is an incident of legal ownership and is not an easement. The question of tenement arises when two tenements are involved the dominant tenement to which the right belongs and the service tenement on which the obligation is imposed. Such situation does not arise between co-owners common passage having right of drainage through When a right of drainage is given to the co-owners by deed of partition to the erstwhile co-owners, it is right to drain the house and premises specified there is and is a joint right of drainage by the underground process. Moreover, such right is not restricted only to the buildings existing at the time of the partition and the co-shares have not the right to lay new underground drain during the common passage for the new buildings which may be erected on the premises provided

there is no restriction in the deed of partition against construction of a new building. So it is, therefore, clear that when a common passage belongs to both the plaintiff and the defendant, there is no question of any one party having an easement right over the same. It is a joint property and any co-owner has to use such property reasonably in the sense that his user does not amount to ouster of other co-owners. No co-owner can complain that the use of the common passage by the cause an unnecessary of additional burden upon the common passage. A co-owner carrying his carts, bullocks and ploughs through the joint property cannot be said to have caused unnecessary in convenience to the other co-owner."

(emphasis supplied)

7. I had an occasion to consider a similar question and the same is reported in (1997 I M.L.J. 309 (Krishnammal v. Periasamy). In view of the settled legal position, I do not think that the finding of the Courts below, that the plaintiff is not entitled to have the underground drainage over the common pathway could be accepted. As a Co-owner, he is entitled to make use of the land to the maximum benefit, subject to only one condition, i.e. his enjoyment should not affect the right of others. To take an underground drainage connection is a right of enjoyment by a co-owner and the other co-owners cannot injunct the plaintiff on the ground that he interferes with their co-ownership rights. If such a relief is granted, it will amount to negating the right of the co-owner to enjoy his co-ownership right.

8. In this case, the defendants have not stated or proved in what way the laying of the underground drainage pipeline will affect their co-ownership rights. By laying the underground pipeline, there is no interference of the passage or their access to their buildings or their property, except for some minor inconvenience during the time of laying the pipeline. I do not think that the defendants will be put to any hardship or the injury to their co-ownership rights. The only reason found by the Courts below is that without the consent of the defendants, the plaintiff is not entitled to lay the underground pipeline.

9. The said approach of the Court below cannot legally stand. In view of the settled legal position, the plaintiff is entitled to have the drainage connection as prayed for. The declaration should have been granted.

10. The only question that requires consideration is how and in what way the same has to be implemented. The plaintiff on the basis of (his decree, may move the Executing Court and through the appointment of the Commissioner, the underground drainage laying over the common passage, has to be provided under his supervision and after completing the laying of pipeline, the common passage will be restored to its original position, so, that, further obstructions could be avoided. In the result, the question of law No. 1 is found to be in favour of the appellant, declaring that as a co-owner or as a joint-owner, the appellant is entitled to lay the underground pipeline for the purpose of drainage through

the common pathway and the defendants are also restrained from interfering with the same. The claim of easement over the property is negated. In the result, the Second Appeal is allowed to the extent indicated above. The parties are directed to bear their respective costs.