



S.A.No.392 of 2012

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on	21.12.2023
Judgment Pronounced on	08.03.2024

CORAM

THE HON'BLE MRS. JUSTICE K.GOVINDARAJAN THILAKAVADI

S.A.No.392 of 2012
and M.P.No.1 of 2012

D.Pachaiappan

... Appellant

Versus

M.Chinnathambi

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Respondent

Prayer : This second appeal is filed under section 100 of Code of Civil Procedure, against the judgment and decree dated 12.01.2011 made in A.S.No.5 of 2010 on the file of the Principal Sub Judge, Tiruvannamalai, in confirming the judgment and decree dated 03.11.2009 made in O.S.No.290 of 2007, on the file of the Additional District Munsif, Tiruvannamalai.

For Appellant : Mr.A.Gouthaman

For Respondent : No appearance



S.A.No.392 of 2012

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JUDGMENT

The second appeal is preferred against the judgement and decree 12.01.2011 made in A.S.No.5 of 2010 on the file of the Principal Sub Judge, Tiruvannamalai, in confirming the judgment and decree dated 03.11.2009 made in O.S.No.290 of 2007, on the file of the Additional District Munsif, Tiruvannamalai.

2. The unsuccessful plaintiff before the Courts below has filed the present Second Appeal.

For the sake of convenience, herein after the parties would be referred as described by the trial Court.

3. The plaintiff filed a suit in O.S.No.290 of 2007 before the District Munsif, Tiruvannamalai, seeking the following reliefs:



S.A.No.392 of 2012

WEB COPY

a. Declaring the plaintiff's easement right to irrigate his lands in S.No.137/4A, 137/4B, and 137 through the suit mamool channel from the well in S.No.137/2.

b. Granting a permanent injunction restraining the defendant, his men, agents and servants from in any manner obliterating the suit channel.

c. Directing the defendant to pay the plaintiff the cost of the suit.

d. granting such other or further relief.

5. The case of the plaintiff in nutshell is as follows:

4. The suit property described as mamool channel through which the plaintiff irrigates his properties from time immemorial . The grandparents of the plaintiff executed a registered settlement deed on 11.09.1959, in favour of their five daughters and in which, the 'B' schedule properties were allotted to Mannammal, mother of the plaintiff. To the said properties, water was taken from the well situated in S.No.137/2 through the suit mamool channel. The mamool channel right was conferred in the settlement deed. The plaintiff purchased the properties from Mannammal under a registered sale deed dated



S.A.No.392 of 2012

22.05.1962. Likewise the plaintiff purchased the entire properties covered under the settlement deed dated 11.09.1959 from the other sisters of Mannammal. The plaintiff is having half right in the well in the S.No.137/2 and installed 3 HB Electric motor and pumpset and the service connection stands in the name of the plaintiff about 35 years back. The said mamool channel starts from the well to eastern side and then turns towards northern side and again turn towards eastern side and then reach the plaintiff's property. The said mamool channel is in existence for more than 100 years. The properties of the plaintiff are classified as wet lands and the mamool channels are used as Eri Channel and also found place in the revenue records. There is no other irrigation facility except the suit mamool channel to the plaintiff's properties.

5. The defendant is having half right in the well in S.No.137/2 and owner of the land in S.No.137/2, installed the electric motor and pumpset on the western side of the well. The mamool channel runs through S.No.137/2 and 137/10 which belongs to the defendant. While so, during January 2007, the defendant is trying to obliterate the suit channel and therefore, the plaintiff was



S.A.No.392 of 2012

WEB COPY

constrained to issue a legal notice on 26.02.2007, requesting the defendant to give an undertaking in writing not to obliterate the suit mamool channel, otherwise legal action will be taken against him. In the reply notice dated 08.03.2007, the defendant has stated that he never attempted to obliterate the channel and it is still existing. However, the defendant is still attempting to obliterate the channel and therefore, the plaintiff has filed the above suit.

6. On the other hand, the defendant in the written statement has submitted that the plaintiff has already dug a well in another survey number which belongs to him and he is taking water from the above well for several years. The defendant never issued any reply notice on 08.03.2007 and no undertaking was given by him as alleged by the plaintiff. The defendant further submits that no mamool was in existence at any point of time. The defendant insisted the plaintiff to divide the well mond which stands jointly in the name of the plaintiff and the defendant for a long period and the plaintiff is postponing the same for a long period. Hence, prayed for dismissal of the suit.



S.A.No.392 of 2012

WEB COPY

7. The trial Court, after framing necessary issues, dismissed the suit filed by the plaintiff.

8. Aggrieved over the same, the plaintiff filed an appeal in A.S.No.5 of 2010 on the file of the Principal Sub Judge, Tiruvannamalai. The learned Principal Sub Judge, Tiruvannamalai, after analyzing the evidence on record, upheld the findings of the trial Court and dismissed the appeal suit filed by the plaintiff.

9. Now, the second appeal is filed by the plaintiff.

10. Mr.A.Gouthaman, learned counsel appearing for the plaintiff/appellant would submit that the recitals in the original title deeds clearly shows the existence of the suit channel. The suit channel is in existence for more than 100 years. The plaintiff and his predecessors were enjoying the easementary right more than the statutory period and have prescribed right of easement by necessity. The defendant failed to prove the existence of alternative



S.A.No.392 of 2012

WEB COURT

channel through which the plaintiff is irrigating his properties. When the plaintiff established the existence of the suit channel through oral and documentary evidence, the burden is on the defendant to prove the non-existence of suit channel. His further contention is that, when the real dispute is with regard to the existence of the suit channel, the genuineness of the reply notice is irrelevant. Moreover, the defendant failed to establish that the said reply notice was not issued by him. The Courts below failed to appreciate the materials placed on record, erroneously dismissed the suit filed by the plaintiff, which requires interference by this Court.

11.Despite of notice, the respondent remained absent.

12.Heard, records perused.

13.The plaintiff claims easementary right by way of necessity over the suit channel, stating that the said channel starts from the well in S.No.137/2 run towards East and turn towards North and again turn towards East and reaches



S.A.No.392 of 2012

WEB COPY

the property, which is described as A, B, C, D in the plaint plan. Admittedly, the lands in S.No. 137/2 and 137/10 belong to the defendant. The suit channel runs through S.No.137/2 is also not in dispute. The plaintiff's contention is that he has been drawing water for irrigating his lands from immemorial from the suit channel. The existence of the suit channel is also mentioned in Ex.A1 settlement deed dated 11.09.59 executed in favour of the mother of the plaintiff and her sisters. His further contention is that, after purchasing the property allotted to his mother in the above settlement deed, the plaintiff is also taking water from the well situated in S.No.137/2 through the suit channel. While so, the defendant is now attempting to obliterate the suit channel. The plaintiff has no other irrigation facility except the suit channel. The further case of the plaintiff is that the defendant himself admitted in the reply notice dated 08.03.2007 about the existence of the suit channel.

14. On the other hand, the defendant denies the existence of the suit channel and also submits that the plaintiff is having irrigation facility from the well dug by him in his property and therefore, the plaintiff cannot claim



S.A.No.392 of 2012

WEB COURT easementary right over the suit channel. The defendant denies the issuance of the alleged reply notice on 08.03.2007.

15. Since the plaintiff filed the above suit for a declaration that he is entitled to draw water through the suit channel as he has right over the same by way of easement of necessity, the plaintiff has to establish his case by adducing acceptable evidence. The plaintiff must establish the existence of the suit channel as described in Ex.A.5-plaint plan. The plaintiff mainly relied upon Ex.A.7 reply notice, stating that the defendant himself admitted in the said reply notice about the existence of the suit channel. On perusal of Ex.A7 reply notice dated 08.03.2007, it is found that as if the defendant admits the existence of the suit channel and also the same is not obliterated by the defendant. According to the defendant, the said reply notice was not sent by him and the same is fabricated by the plaintiff and the signature found in Ex.A.7 do not belong to the defendant. While so, the plaintiff ought to have established that the same was sent by the defendant. In fact, the plaintiff failed to establish the receipt of Ex.A.6 legal notice by the defendant. Moreover, the plaintiff in the cross



S.A.No.392 of 2012

WEB COURT

examination categorically admitted that, the defendant did not send any reply notice, for the legal notice issued by him. Therefore, the contention of the plaintiff that the defendant admitted the existence of the suit channel cannot be believed. Moreover, the plaintiff relies upon Ex.A1 settlement deed to prove the existence of the suit channel. The plaintiff himself admitted in his cross examination that, even before 20 years the channel was obliterated for quite some extent. The evidence of Village Administrative Officer (P.W.3) is extracted as hereunder:

"ஏரியில் இருந்து வரக்கூடிய கால்வாய் என்று புலப்பட வரைபடத்தில் கண்ட சர்வே எண்கள் வழியாக ஏறக்குறைய 30 வருடங்களாக பூமியில் இருந்து வரவில்லை. அதை அழித்து விட்டார்கள். 30 வருடங்களாக அந்த கால்வாய் கிடையாது என்றாலும் அதனால் கால்வாய் பயன்பாடு பற்றிய பேச்சே கிடையாது என்றாலும் சரிதான். புலப்படத்தில் காட்டப்பட்டுள்ள கால்வாய் பற்றிய குறிப்புகளை அரசாங்கத்தின் இருந்து அவ்வப்போது பதிவுகளை அப்டேட் செய்வார்கள் என்றால் சரிதான். அந்த இடங்களை சர்வே செய்துவிட்டு அவ்வாறு அமைப்புகளை எதுவும் இல்லை என்றால் அதை



S.A.No.392 of 2012

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எடுத்துவிட வேண்டும் என்றால் சரிதான். யாராவது மனு கொடுத்தால் தான் சர்வே செய்வார்கள். இல்லாவிடில் பூமியில் அமைப்பு இல்லாவிட்டாலும் அந்த அமைப்பு பற்றிய குறிப்பு ஆவணத்தில் வருவதாகவும் கொண்டே இருக்கும். வாதி சொல்வது போல் பூமியில் கால்வாய் இருந்து வருவதாகவும் அந்த கால்வாயின் வழியாக தண்ணீர் எடுத்து செல்ல முடியுமா என்றால் இல்லை."

16. Therefore, from the evidence of P.W.3 it is found that no such channel is now in existence as claimed by the plaintiff. Moreover, the defendant submits that the plaintiff is having irrigation facility to his lands through another well dug by him in his property. The same is not disproved by the plaintiff. Moreover, an easement of necessity is an easement without which the property cannot be used at all and not one merely necessary to the reasonable enjoyment of the property. In the instant case, as observed earlier, the plaintiff has not proved the existence of water channel in the land of the defendant and that he has easementary right by way of necessity over the same. The Courts below upon appreciating the oral and documentary evidence on record declined to grant the reliefs claimed by the plaintiff and this Court do not find any reason to



S.A.No.392 of 2012

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interfere with the same. In fact, cogent reasons have been assigned by the Courts below for dismissing the suit filed by the plaintiff. Therefore, this Second Appeal deserves to be dismissed.

17. In the result, the Second Appeal is dismissed. The decree and judgement dated 12.01.2011 made in A.S.No.5 of 2010 on the file of the learned Principal Sub Judge, Tiruvannamalai, upholding the decree and judgement dated 03.11.2019 passed by the learned District Munsif, Tiruvannamalai in O.S.No.290 of 2007 are upheld. No cost. Consequently, connected miscellaneous petition is closed.

08.03.2024

vsn

Internet:Yes/No

Index:Yes/No

Speaking/Non-speaking order

To

1.The Principal Sub Judge, Tiruvannamalai

2. The Additional District Munsif, Tiruvannamalai

12/13



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S.A.No.392 of 2012

K.GOVINDARAJAN THILAKAVADI, J.

vsn

Pre- delivery judgment made in

**S.A.No.392 of 2012
and M.P.No.1 of 2012**

08.03.2024