

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.07.2017

PRONOUNCED ON : 26.07.2017

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1461 of 1999

1.Samiappa Gounder

2.Kaliappa Gounder

...Appellants/Plaintiffs

Vs

1.Subbanna Gounder

2.Sambayee

3.Minor Kannammal

4.Minor Pappathi

5.Minor Boopathi

(minor respondents 3 to 5 are rep by
Guardian mother sambayee, R2 herein)

... Respondents 1 to 5/Defendants 1,3 to 6

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 10.11.1998, in A.S.No.167 of 1994 passed by the learned Subordinate Judge, Namakkal District, confirming the judgment and decree dated 18.07.1994 in O.S.No.455 of 1986, passed by the learned Principal District Munsif, Namakkal.

For Appellants : Mr.R.M.Krishnaraju

For R.1 : Mr.S.Saravanakumar

For RR.2 to 5 : Exparte

JUDGMENT

The appellants are the plaintiffs in the suit. Aggrieved by the concurrent finding of the Courts below, the present Second Appeal is filed.

2.Brief facts, pleaded in the plaint, are as under:-

The plaintiffs are the owners of the land bearing S.No.771, 771/1, 772, 772/2 at Vadagarathur Melmugam Village, Namakkal District. The lands are wet lands irrigated through Well water.

On the south of their lands, a canal running from East-West carries excess water through various lands to Rajavaikal. According to the plaintiffs, the excess water gathered from various lands passes through the branch of river Kaveri locally called as "Vadikal Kavuru" marked as "AB" in the plaint sketch. The plaintiffs are draining their excess water through this "Vadikal Kavuru" for more than 60 years. Their right has been open and continuous for years together thus, their right of easement by prescription and natural right to drain excess water AB "Vadikal Kavuru" is vested to them.

3.While so, the defendants who are the adjacent land owners on the Southern side, due to some personal grievance arose in the temple festival between them and the plaintiffs, have blocked the water drainage at point "X" marked in the plaint schedule. Therefore, the plaintiffs' land was flooded with water and the standing crops were damaged on 29.04.1986. Therefore, the present suit is filed for declaration that the plaintiffs' right to drain excess water through point 'X' to canal 'AB' and permanent injunction restraining the defendants from interfering the peaceful possession and enjoyment of draining water through the canal.

4.The defendants in their written statement have denied the right of the plaintiffs in draining the water through "Vadikal Kavuru" and it is contended by the defendants that there was no natural right for the plaintiffs to drain the excess water into the said canal running through the property of the defendants. Since, the plaintiffs collect water artificially, the question of draining the excess water through their land does not arise and further, to seek easementary right, a continuous uninterrupted enjoyment for a period of 20 years ought to have been pleaded and proved by the plaintiffs. Only occasionally when on the Eastern side of the plaintiffs land, overflows with rain water, bunk in S.No.777/3 is used to cut off to drain the excess water collected. Otherwise, there is no necessity to use the "Vadikal Kavuru" to drain the water collected at the lands of the plaintiffs. The trial Court after considering the pleadings, has framed the following issues:-

1.Whether the plaintiffs are entitled for easementary right through "XY" point ?;

2.Whether the blockage of draining water as made by the plaintiffs is true ?;

3.Whether the suit is bad for non joinder of necessary parties ?;

4.Whether the suit is maintainable ?;

5. Whether the plaintiffs are entitled for the relief of declaration & permanent injunction? And

6. To what relief, the plaintiffs are entitled to ?”

5. After appreciating the evidence both oral as well as document, the trial Court dismissed the suit. The First Appeal preferred by the plaintiffs was also dismissed. Hence, the present second appeal has been filed by the plaintiffs.

6. This Court at the time of admission, has framed the following substantial questions of law for consideration:-

“a) Whether the very existence of the channel for over fifty years raise presumption in favour of the cultivation of the suit wet lands with the facilities of the drainage after the extension of new irrigation system for the suit locality about fifty years ago ?

b) Whether the drainage facility in the suit locality is in easementary right running with the suit wet lands ever since the channel came into existence, just a furlong away from the Cauvery River?”

7. The learned counsel for the appellants submitted that though the field sketch maintained by the Government does not reflect the existence of “Vadikal Kavuru”, the Advocate Commissioner who inspected the disputed land at the instance of the Court direction has clearly identified the “Vadikal Kavuru” in his plan and the block caused by the defendants at point 'X'. It is also borne by record by the Commissioner's report that the land of the plaintiffs slopes downward towards South and further South of the land, the defendants land bearing S.No.773 is situated. It is also recorded by the Commissioner that water collected from the higher altitude comes down to the Southern end of the plaintiffs land and got stagnated due to the block at point 'X'. If the blockage is removed, the excess water will naturally run through the “Vadikal Kavuru” and join at “Perumal Kombu Vellavari”.

8. Further, the learned counsel for the appellants also pointing out the portion of the written statement wherein, the defendants admits that in case of excess rain water stagnate in the land of the plaintiffs, they used to cut open the bunk in S.No.773 and drain the excess water. However, the first defendant/Subanna Gounder when examined as D.W.1, has deposed

that when the water stagnates due to excess rain, the bunk gets breached and excess water go drained. By pointing out this admission by the first defendant, the learned counsel for the appellants submitted that there is a clear admission on the part of the first defendant regarding the excess water getting drained through the "Vadikal Kavuru" and this natural right been enjoyed by the plaintiffs for more than 50 years, the plaintiffs are entitled for right of easement to drain the excess water through the "Vadikal Kavuru".

9.Per contra, the learned counsel for the respondents submitted that both the Courts below have held that the plaintiffs have not proved the right of easement to drain the excess water through "Vadikal Kavuru" and furthermore, the water is collected by the plaintiffs artificially, so the question of natural right to drain the water does not arise.

10.Since, he further submitted that, both the Courts below have found that the plaintiffs have not proved the continuous independent enjoyment of draining water through "Vadikal Kavuru" passing through the land of the defendants, there is no substantial question of law found to interfere with concurrent finding on facts by the Courts below. It is also submitted by the learned counsel for the respondents that the pipeline carrying water to irrigate the respondents land is laid underneath along with the "Vadikal Kavuru" and any water let in to the "Vadikal Kavuru", will damage the pipeline of the respondents.

11.After considering the rival submissions and the judgments relied by the respective parties, it is clear that the right to drain excess water can be either by right of easement by prescription or it may be a natural right vsted to the dominant land owner. From the Commission's report, it is clear that the land of the plaintiffs followed by the defendants slopes down towards South and excess water gets collected on the Southern end of the plaintiffs land. Unless the water is allowed to flow further to join the "Vadikal Kavuru", water will get stagnated, in the land of the plaintiffs. But whether accumulation of water is by natural course or artificial is a point for consideration which will determine the right to drain the excess water through the "Vadikal Kavuru".

12.Admittedly, the water to the plaintiffs lands are irrigated drawing water from the Well located in a distant place. Therefore, accumulation of water in the plaintiffs land is not by natural course but by artificial means. In Sheik Hussain Sahib v. Subbayya (AIR 1926 Madras 449), a Full Bench of this Court has held that the natural right mentioned in

illustration (i) of Section 7 of the Easement Act 1882, namely, "the right of every owner of upper land that water naturally rising in or falling on such land and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto, " was not an absolute right but was the right to pass such water without incurring any liability for damages caused thereby and held that when that right came in conflict with the right mentioned in illustration (a) namely, "the exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force" the latter must prevail."

13. It is found from the judgment of the trial Court that though the Court has found that there is natural right inured upon the plaintiffs to drain the water collected, naturally, since, they have pleaded their right to drain water based on the right of easement and since, they have failed to prove the fact that the time immemorial, they have been draining the water through "Vadikal Kavuru" as pleaded in the plaint, it has declined to grant the relief sought.

14. From the pleading and evidence, it is clear that the water is collected in the plaintiffs land artificially. Occasionally, when there is heavy rainfall by nature, there is excessive water which requires draining. From the evidence, it appears that in such circumstances, the defendants have allowed the excess water to drain through their land which ultimately joins the river Kaveri after Perumal Kombu Vellavari.

15. Under these circumstances, it is relevant to refer the judgment of the Hon'ble Supreme Court in Patneedi Rudrayya v. Velugubantla Venkayya and others (1961 AIR 1821) wherein, it has been held as follows:-

"(1) the only right which a riparian owner may have is to protect himself against extraordinary floods. But even then they would not be entitled to impede the flow of the stream & long its natural course (2). We may repeat that the finding here is that, the floods from which the defendants 1 and 2 are seeking to protect themselves are not of an extraordinary type. In the circumstances, therefore, the bund erected by them and the trenches dug up by them must be held to constitute a wrongful act entitling the plaintiff to the reliefs claimed by him."

16. Taking note of the said observation, this Court is of the opinion that the plaintiffs have no right of easement to drain

the water through "Vadikal Kavuru" as claimed in the plaint. However, when there is accumulation of excess water due to natural rain fall, the natural right of draining the water lower riparian cannot be taken away or deprived by means of artificial blockage. Therefore, whenever there is excess water, accumulated in the land of the plaintiffs, by natural means, riparian land owner shall not prevent the draining of excess water through the point 'X'.

17. The only apprehension expressed by the defendants is that by letting out excess water through "Vadikal Kavuru", the water pipeline embedded by them along with "Vadikal Kavuru" will get damaged. To safeguard and protect the said pipeline, while declaring the right of plaintiffs to drain excess water accumulated by natural course, through "Vadikal Kavuru", it is also pertinent to protect the property of the defendants embedded along with "Vadikal Kavuru".

18. Under such circumstances, while dismissing the Second Appeal, on the ground the substantial questions of law raised are not in favour of the plaintiffs, and no easementary right by prescription proved by the plaintiffs, the natural right though not pleaded by the plaintiffs, being proved, to preserve the natural right of draining the excess water collected by natural course of event, it is necessary to point out that the servient land holder cannot block the flow of naturally collected water getting drained through point 'X' to the canal marked as 'AB'. Therefore, whenever the plaintiffs drains the excess water accumulated in their land by natural course through "Vadikal Kavuru", they shall ensure that no damage is caused to the water pipe line embedded along with "Vadikal Kavuru" by the respondents/defendants. With these observations, the second appeal is disposed of. The Commissioner report shall form part of the decree. No costs. **

-s/d-

Assistant Registrar (CS-II)

True Copy

Sub-Assistant Registrar

jbm

WEB COPY

To

1.The Subordinate Judge,
Namakkal District.

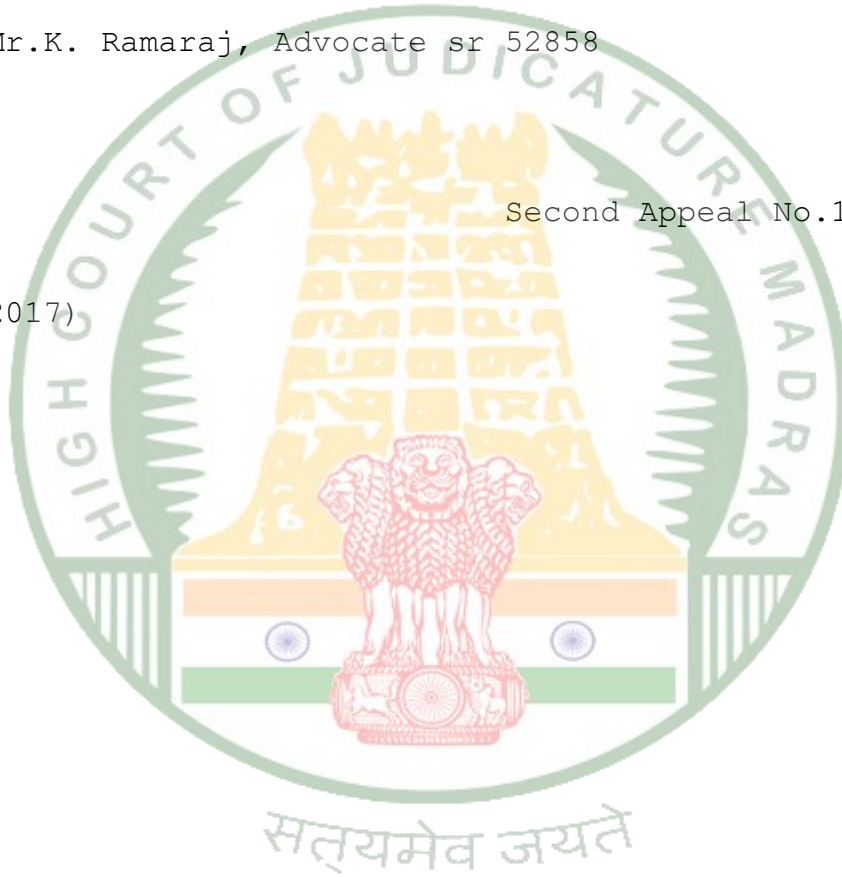
2.The Principal District Munsif,
Namakkal.

Copy to
The Section Officer
VR Section, High Court, Madras.

+1 cC to Mr.K. Ramaraj, Advocate sr 52858

Second Appeal No.1461 of 1999

VD(CO)
SP(15/11/2017)



WEB COPY