

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 08.02.2017****PRONOUNCED ON : 28.02.2017****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.632 of 2011****and****M.P.Nos. 1 & 2 of 2011**

1. K.Devabalkan

2. Sagunthala

...

Appellants

Vs.

Arumugam

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree in A.S.No.6 of 2010 dated 15.02.2011 on the file of the Subordinate Judge, Gingee, confirming the judgment and decree in O.S.No.281 of 2004 dated 29.12.2009 on the file of the Principal District Munsif, Gingee.

For Appellants : Mr.N.Suresh

For Respondent : Mr.V.R.Appaswarnee

JUDGMENT

In this second appeal, the plaintiffs have impugned the judgment and decree dated 15.02.2011 made in A.S.No.6 of 2010 on the file of the Sub Court, Gingee, confirming the judgment and decree dated 29.12.2009 made in O.S.No.281 of 2004 on the file of the Principal District Munsif Court, Gingee.

2. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in this second appeal;-

" (i) Whether the courts below are right in dismissing the suit when the plaintiffs have proved that the irrigation for their property is by way of underneath pipelines passing through the defendant's land and there is no other way for irrigation?

(ii) Whether the courts below are right in dismissing the suit of the plaintiffs when the plaintiffs have proved that there is easement of necessity to take underneath pipelines through the defendant's land and there is no other alternative way?

(iii) Whether the judgments rendered by the courts below are perverse and liable to be set aside mainly on the ground that the courts below have granted the reliefs to the defendant by directing the plaintiffs to remove the pipeline when there is not even a counter claim or separate court fees for the same paid by the defendant?

3. The suit has been laid by the plaintiffs for declaration and permanent injunction.

4. The suit is laid in respect of the "B" schedule property and the same pertains to the underneath pipeline to the length of about 200 feet in the defendant's land situated in Survey No.55/6. As regards the above said underneath pipeline more fully described in the "B" schedule property, the plaintiffs have claimed their declaratory relief both on the ground of easement as well as adverse possession. However, as rightly found by the Courts below, the reliefs sought for by the plaintiffs both on the ground of easement as well as on the ground of adverse possession are found to be contradictory and therefore, it could be seen that as such, the plaintiffs' suit is not maintainable as regards the relief of declaration.

5. Be that as it may, it has to be found whether the plaintiffs are entitled to seek the reliefs sought for, as regards the "B" schedule property. In this case, for noting down the physical features, particularly, the existence of the suit pipeline, as put forth by the plaintiffs, the commission was appointed and accordingly, the advocate commissioner had visited and inspected the properties concerned and found that the suit pipeline is in existence to a length

of 208' underneath the land in survey No.55/6, which admittedly belongs to the defendant. It is found that the defendant had purchased the property situated in 55/6 under Ex.B1. It is also noted that the pipeline commenced from the Well situated in survey No.55/1 and proceeds through the survey No.55/2b1 and there from proceeds to/ through the survey No.55/6 belonging to the defendant and further, proceeds through the survey No.55/3 and finally, reaches the tank as depicted in the Commissioner's report and plan. The disputed pipeline is the pipeline lying underneath the survey No.55/6. Thus, we have to see whether the plaintiffs have established their right to lay and use the pipeline underneath the survey No.55/6.

6. A reading of the plaint would go to show that the plaintiffs have only claimed easementary right, as regards the suit pipeline, only by way of easement by prescription. It is stated that the plaintiffs have been using the pipeline for more than 20 years to the knowledge of the defendant's vendor Sangukrishnan and the defendant without any interruption and thus, the plaintiffs have acquired easementary right by prescription as regards the suit pipeline, particularly, the pipeline running in Survey No.55/6.

7. The suit has come to be laid by the plaintiffs on 28.04.2004. As seen from the evidence adduced in the matter, it is found that the

property situated in Survey No.55/3 had been purchased by the plaintiffs only on 07.10.1985. The pipeline, in question, also proceeds through survey No.55/3. Therefore, it could be seen that as rightly found by the Courts below that prior to the purchase of the property in Survey No.55/3 in the year 1985, the plaintiffs would not have laid the pipeline underneath the said land. It is not the case of the plaintiffs that their vendors had already put the pipeline underneath the survey No.55/3, prior to selling of the said land to the plaintiffs, during the year 1985. Further, as rightly found by the Courts below, the properties situated in survey No.55/1, 55/2b1, 55/6 and 55/3 are not shown to be having any nexus or connection whatsoever and as such, even the predecessor in interest of the above said survey numbers are not shown to have been using the above said properties in common one way or the other. It is, thus, seen that the pipeline, in question, even according to the case of the plaintiffs, has been laid only by the plaintiffs. It has not been established by the plaintiffs that the pipeline had been put up by them, even at the time of the acquisition of the other survey numbers during the years 1974 and 1983. Inasmuch as the pipeline, in question, is found to be emanating from the Well situated in the Survey No.55/1 and proceeds through survey Nos.55/2b1, 55/6, 55/3 and culminating in the tank, when admittedly survey No.55/3 had been acquired by the plaintiffs

only during the year 1985, it cannot be held that even prior to the same, the pipeline, in question, had been laid by the plaintiffs. It is therefore found that only after 1985, the pipeline, in question, would have come into existence. In such view of the matter, the case of the plaintiffs as projected during the course of arguments that the pipeline, in question, had been laid much prior to 1985, as such, cannot be accepted, sans any reliable and convincing evidence.

8. As seen from the evidence adduced in the matter, it is found that at one point, the plaintiffs had also been cultivating the lands in survey No.55/6 on bokkiam/Vaaram basis. This has been admitted. According to the defendant, prior to their purchase, the said land had been under the bokkiam cultivation of the plaintiffs. On the other hand, according to the plaintiffs, during the year 1981 and 1984, the lands in survey No.55/6 were under their bokkiam cultivation, but, no evidence to establish the same on the side of the plaintiffs. Now, according to the plaintiffs, on the permission granted by the defendant's vendor Sangukrishnan, the pipeline, underneath survey No.55/6, had been laid. During the course of evidence, it appears that the plaintiffs have also let in evidence that permission had been also obtained from Sangukrishnan's father-in-law. Further, the Courts below have also noted that the defendant cannot feign ignorance as

to the running of the pipeline underneath the survey No.55/6 by the plaintiffs, prior to their purchase. It is, therefore, evident that as rightly found by the Courts below, the defendant is also aware as to the existence of the pipeline underneath the property in survey No.55/6. As such, it is noted that knowing the existence of the underneath pipeline in survey No.55/6, the defendant had purchased the same under Ex.B1.

9. The plaintiffs have failed to establish that they had put the pipeline in question, particularly, the pipeline, underneath the survey No.55/6 several years ago, so as to claim the entitlement of elementary right by prescription in respect of the same. Accordingly, it is found by the Courts below that the plaintiffs have failed to establish that they had been using the pipeline, in question, for the period prescribed under Section 15 of the Indian Easements Act, 1882. No infirmity is found in the findings of the Courts below that the plaintiffs have failed to establish the easementary right by prescription as regards the said pipeline.

10. When it has been admitted by the plaintiffs that only under the permission granted by the defendant's vendor, the suit pipeline had been laid, as rightly noted by the Courts below, the plaintiffs cannot plead adverse possession for claiming right of taking the

pipeline underneath the property situated in Survey No.55/6. Therefore, the Courts below have also rightly found that the plaintiffs cannot claim the relief of adverse possession, as regards the suit pipeline and also correctly held that the plaintiffs have failed to establish their plea of adverse possession as regards the suit pipeline. No infirmity is noted in the findings of the Courts below as regards the same.

11.The plaintiffs' counsel vehemently contended that inasmuch as the defendant had purchased the property in survey No.55/6 knowing the existence of the underneath pipeline, he also having acquiesced to the same and not revoked the permission, as such, either expressly or impliedly cannot interfere with the usage and enjoyment of the pipeline by the plaintiffs and inasmuch as the defendant had attempted to interfere with the possession and enjoyment of the plaintiffs in respect of the said pipeline, the plaintiffs had been necessitated to lay the suit. However, the above contention of the plaintiffs cannot be countenanced. No doubt, the defendant would have been aware of the existence of the underneath pipeline in Survey No.55/6, prior to his purchase under Ex.B1. However, it could be seen that as per Section 59 of the Indian Easements Act, 1882, when the grantor of the license transfers the

property affected thereby, the transferee is not as such bound by the license. Therefore, it could be seen that the permission or licence, which had been granted by the defendant's vendor may not bind the defendant. That apart, it could be seen that as per the Section 61 of the Indian Easements Act, 1882, the revocation of a license may be express or implied. It is found that the second, illustration to Section 61 squarely applies to the present case and it is, therefore, evident that on the selling of the property in survey No.55/6 to the defendant under Ex.B1, the permission or licence granted by the defendant's vendor stands revoked. Merely because, the defendant had acquiesced to the same, for some period that, by itself would not entitle the plaintiffs to claim that the defendant has granted or acquiesced the usage of the suit pipeline by the plaintiffs underneath his property. It is, therefore, found that as rightly found by the Courts below also, by the sale of the property in survey No.55/6 under Ex.B1, the license or permission granted to the plaintiffs stands revoked as per Section 61 of the Indian Easements Act, 1882. Thereafter, it is found that the plaintiffs would not be entitled to continue the usage of the underneath pipeline, particularly, in survey No.55/6. Some concession granted by the defendant to the plaintiffs for continuing them to use the underneath pipeline even after the purchase under Ex.B1, for a limited period by itself could not be

construed that the defendant had agreed and permitted the plaintiffs to use the underneath pipeline, in question perpetually. Therefore, it is found that the Courts below have rightly held that the plaintiffs have failed to establish the reliefs sought for as regards the suit pipeline on the ground of easement by prescription and also, on the ground of adverse possession.

12. It is not the case of the plaintiffs in the plaint that the plaintiffs have no other way to irrigate their lands other than the suit pipeline, particularly, the pipeline underneath the survey No.55/6. In this second appeal, the plaintiffs have taken a plea that the plaintiffs are entitled to use the suit pipeline on the ground of easement of necessity as there is no alternative way or source to irrigate their lands. However, it is found that the plaintiffs are also using the porambokku lands as noted by the Courts below. Accordingly, the Courts below have also found that the plaintiffs could make use of the poramboku lands in their occupation for taking the pipeline underneath the said lands and thereby, irrigate their lands. In such view of the matter, the contention of the plaintiffs that there is no alternative way for irrigating their lands other than the suit pipeline, in question, as such, cannot be accepted. Therefore, the contention of the plaintiffs' counsel that at least, the plaintiffs should have been

granted the easement of necessity as regards the suit pipeline, as such, cannot be accepted.

13. The trial Court, on finding that permission or license granted to the plaintiffs had been revoked or stood revoked, invoking section 63 of the Indian Easements Act, 1882, on the ground of avoiding multiplicity of suits, granted three months time to the plaintiffs to remove the same. However, as rightly argued by the plaintiffs' counsel, the defendant having not made a counter claim in the written statement for seeking a direction to the plaintiffs to remove the suit pipeline, particularly, the pipeline underneath survey No.55/6 within a time frame, in such view of the matter, it is found that the trial Court has, without the defendant's making a counter claim and also paying the necessary courts fees as regards the same, proceeded to give a direction to the plaintiffs to remove the pipeline within a period of three months. The first appellate Court has also concurred with the same. However, it is found that sans any relief sought for by the defendant with reference to the same and also the defendant having not paid any separate court fees for the said relief, the Courts below have erred in law in giving a direction to the plaintiffs to remove the pipeline within three months. Therefore, the aspect of the above direction of the Courts below is not sustainable in

the eyes of law and liable to be set aside.

14. Barring the above aspect, as regards the findings and conclusions of the Courts below for declining the relief sought for by the plaintiffs as regards the suit pipeline on the grounds of easement and adverse possession are found to be based upon proper reasonings and conclusions and also on the proper appreciation of the evidence on record.

15. In the light of the above discussions, the direction of the Courts below to the plaintiffs to remove the pipeline within three months alone is set aside and in other respects, the judgment and decree of the Courts below are confirmed. Accordingly, the substantial questions of law are answered.

In conclusion, the judgment and decree of the Courts below dismissing the suit laid by the plaintiffs are confirmed. The judgment and decree of the Courts below giving a direction to the plaintiffs to remove the suit pipeline described in "B" schedule within a period of three months from the date of decree are set aside. Accordingly, the second appeal is partly allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Index : Yes/No
Internet: Yes/No
sms

28.02.2017

To

1. The Sub Court, Gingee.
2. The Principal District Munsif Court, Gingee.

T.RAVINDRAN,J.

sms

Pre-delivery Judgment in
S. A.No.632 of 2011
and
M.P.Nos. 1 & 2 of 2011

28.02.2017