

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :10.04.2018

PRONOUNCED ON:17.04.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1115 of 2004

1. Ponnayal @ Dhanamani

2.D.Mathialagan

3.D.Maharajan

4.D.Robert

Appellants/Defendants

Vs.

S.P.Arumugham

Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 13.12.2001 made in A.S.No.39 of 2001 of the file of the Sub Court, Bhavani confirming the judgment and decree dated 23.10.2000 made in O.S.No.700 of 1996 on the file of the II Additional District Munsif Court, Bhavani.

For Appellants : Ms.P.Saritha
for M/s.F.Deepak

For Respondent : Mr.N.Manokaran

सत्यमेव जयते
J U D G M E N T

This second appeal is directed against the judgment and decree dated 13.12.2001 passed in A.S.No.39 of 2001 on the file of the Subordinate Court, Bhavani confirming the judgment and decree dated 23.10.2000 passed in O.S.No.700 of 1996 on the file of the II Additional District Munsif Court, Bhavani.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for permanent injunction.

4.The case of the plaintiff in brief is that he had

purchased an extent of 0.46 ¾ acres in RS.559/1 of Kavindhapadi village, by way of a registered sale deed dated 07.09.1987 along with the right of taking LBP irrigation, Koppu Madhagu, Paaly, land channel course connected with the abovesaid lands and prior to the abovesaid sale deed, there was a registered sale agreement between the plaintiff and his vendor K.Arumugam on 19.03.1987 and the abovesaid land including the irrigation rights had also been the subject matter of the sale agreement between the parties concerned and pursuant to the purchase, the plaintiff had paid the Kists for the acquired property and enjoying the same. The plaintiff has filed a plan along with plaint and the suit property, a Koppu from LBP madhagu water is being used for irrigation to the plaintiff's lands and the plaintiff has been taking or using the LBP water to his lands only through the suit Koppu channel as depicted in the plaint plan and even the defendants and other neighboring land owners abutting to the said Koppu are taking or using the LBP water respectively and no one is entitled to either restrain or obstruct the usage of the suit Koppu channel and even assuming for the arguments seen, the suit Koppu channel is situated in others lands, every cultivator abutting the Koppu channel is entitled to have the easementary right over the same for the purpose of irrigation and availment of LBP water and accordingly, the plaintiff has been taking and using LBP water only through the suit Koppu channel since the date of the sale, as the same is the only source of irrigation facility. While so, the defendants without any legal authority, attempted to restrain the plaintiff's farm servant from taking water through Koppu channel for irrigating the plaintiff's lands and hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5.The case of the defendants in brief is that the suit laid by the plaintiff is not maintainable either in law or on facts and the plaint plan is not correct and misleading and the purchase of the plaintiff of his land is admitted and the lands of the defendants and the north-south strip of the plaintiff's lands are being irrigated through LBP water and the rights of the plaintiff to irrigate his lands using LBP water is not in dispute and the defendants have attached the plan to their written statement and the Koppu channel through which LBP water is being taken all the years to the lands of the plaintiff and the defendants is shown in blue colour in the plaint annexed with the written statement and it is running only in the eastern side and southern side of the eastern plot of the defendants as shown in the plan of the written statement and the suit Koppu channel is not running in the northern and western sides of the said eastern plot as shown in the plaint plan and the plaintiff is an advocate and keeping the lands uncultivated and hence, the channel course was not used and cleaned for two years and the

defendants also did not use the channel and accordingly, the channel became over flowing due to seepage and covered with full of grass and shrubs and on receipt of the summons in connection with the suit, the defendants approached the plaintiff and the plaintiff agreed to get the suit dismissed as settled out of court provided the defendants cut and remove guava and coconut trees standing on their lands and slightly hanging over the plaintiff's land and the defendants accordingly, cut and removed those trees in the presence of the plaintiff and also executed a memo to be filed in the court for getting the suit dismissed as "settled out of court" and accordingly, believing the words of the plaintiff, the defendants kept mum. Only after receiving the arrest notice from the court in the contempt petition initiated by the plaintiff, the defendants became aware that the plaintiff had not got the suit dismissed as settled out of court and the defendants were kept in dark of the proceedings and hence, there is no cause of action in the suit and the suit is liable to be dismissed.

6. In support of the plaintiff's case, P.W.1 was examined. Exs.A1 to A11 were marked. On the side of the defendants, D.W.1 was examined. No document has been marked. Exs.C1 and C2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to accept the plaintiff's case and accordingly granted the reliefs sought for. Aggrieved over the same, the present second appeal has been laid.

8. At the time of admission of the second appeal the following substantial questions of law were formulated for consideration.

(i) When the suit is dismissed as settled out of court, whether such suit can be restored on the ground that the defendants have gone back on the compromise?

(ii) Whether a suit can be decreed on the basis of mutually contrary pleadings?

9. The suit property is a small channel, which according to the plaintiff is being used for taking water from LBP channel for the purpose of irrigating the lands. As per the plaint plan and also as per the plan annexed by the defendants along with written statement, it is found that the suit Koppu channel is running from the main LBP channel through the lands of various parties including the plaintiff and the defendants. Now, according to the plaintiff, right from the date of purchase

of his property abutting the suit Koppu channel in RS.559/1, by way of the sale deed dated 07.09.1987, he has been irrigating the land by utilising the water of LBP channel through the said Koppu channel and while so, the defendants without any legal entitlement, obstructed the plaintiff's usage of the suit Koppu channel and thereby, prevented the plaintiff from irrigating his lands and hence according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

10.Per contra, the defendants have resisted the plaintiff's case by contending that the suit channel though in existence, is not in existence as depicted in the plaint plan and the said Koppu channel is in existence as depicted in the plan annexed with the written statement and further according to the defendants, they have admitted the right of the plaintiff to the land purchased by him, as well his entitlement to use the Koppu channel for irrigating the lands, however, disputed that the defendants prevented the plaintiff's usage of the channel and on the other hand, according to the defendants, the plaintiff being an advocate had not cultivated the lands for two years or more and thereby the Koppu channel has been not put in use and covered fully with grass and shrubs and therefore, the plaintiff has no cause of action to institute the suit, as regards the Koppu channel . Further, according to the defendants, on the receipt of summons, they approached the plaintiff and as per the advise of the plaintiff, they cut the trees standing in their lands and hanging on the plaintiff's lands as directed and they were assured that the suit would be got dismissed as "not pressed" by the plaintiff and believing the words of the plaintiff, they did not endeavor to contest the suit at the first instance and only after the receipt of the arrest notice, they had come to know that the plaintiff has not acted upon his promise and hence, it is stated that the plaintiff is not entitled the reliefs sought for and the suit is liable to be dismissed.

11.As above seen, the defendants have not disputed the purchase of the lands by the plaintiff from Arumugam, by way of the sale deed dated 07.09.1987, which document has come to be marked as Ex.A1 and prior to the abovesaid sale deed, it is found that, in respect of the property covered under the sale deed, the plaintiff and his vendor had entered into the sale agreement, with reference to the same on 19.03.1997 and the said sale agreement has been marked as Ex.A2. According to the plaintiff, by way of Exs.A2 and A1, he had not only acquired the land covered under the said document, but also, the said land along with the rights of taking LBP irrigation water, Koppu Madhagu, Paaly land channel course annexed with the said land and the said fact has not been specifically disputed in the written statement. As above seen, the defendants have admitted

the above purchase of the land by the plaintiff. On a perusal of Exs.A1 and A2, as rightly determined by the Courts below, it is found that the plaintiff had acquired all the rights annexed with the land including the right to take water through the Koppu channel from the LBP channel course for the purpose of irrigating his lands. In the written statement, the defendants have also admitted that, the plaintiff is also entitled to irrigate his lands utilising Koppu channel, by taking water from LBP channel.

12.In this matter, the Advocate Commissioner had inspected the properties concerned and filed his report and plan and it is found that, on a perusal of the report and plan of the Advocate Commissioner marked as Exs.C1 and C2 and coupled with the plaint plan of the plaintiff, it is found that the Koppu channel is in existence and taking its course from the main LBP channel only as depicted in the plaint plan and accordingly, it is found that, on the date of the inspection of the Advocate Commissioner, the water was flowing through the Koppu channel as depicted in the plaint plan and is in existence and being used by the plaintiff for the purpose of irrigating his lands for drawing water from the land LBP channel. Thus, it is found that the case of the defendants that the Koppu channel has not been put to use for several years and thereby the same had been covered full of grass and shrubs etc., as such cannot be accepted. The defendants have in the written statement admitted the entitlement of the plaintiff to use the Koppu channel, however, all that they have stated is that the Koppu channel is not in existence as depicted in the plaint plan and on the other hand, the same is in existence as described by them in the plan annexed with the written statement. However, considering the report and plan of the Advocate Commissioner and the plaint plan, it is found that the Koppu channel is in existence as claimed by the plaintiff and accordingly, it is seen that the plaintiff is entitled to utilise the Koppu channel as claimed in the plaint for irrigating the lands by drawing water from the LBP channel.

13.The contention has been put forth by the defendants' counsel as to the plaintiff not coming forward to claim the nature of the right, which he seeks to exercise in respect of the Koppu channel. It is stated that the plaintiff has not come forward as to whether his claim of right over the Koppu channel is absolute right or easementary right and therefore as there are contrary claims in respect of the same by the plaintiff in the plaint as well as during the course of his evidence, it is contended that the plaintiff cannot be granted the reliefs sought for. However, as rightly put forth by the plaintiff's counsel, all the rights acquired by the plaintiff annexed with the property purchased by him, by way of Ex.A1, the

plaintiff would be entitled to claim right and accordingly, it is found that the plaintiff has based his right to use the suit Koppu channel only on the strength of Exs.A2 and A1 and accordingly, when the defendants themselves have not disputed the right acquired by the plaintiff, by way of the abovesaid documents, as rightly determined by the Courts below, the plaintiff has got all the right to utilise the suit Koppu channel. All that the plaintiff had averred in the plaint is that, inasmuch as, the Koppu channel is running abutting the lands of various parties including the plaintiff and the defendants and thus, according to the plaintiff's case, even if the Koppu channel runs in the lands of others, all the cultivators, who own lands abutting the Koppu channel are entitled to use the same for the purpose of irrigation and thereby also would be having easementary right in respect of the Koppu channel. In so far as this matter is concerned, there is no clear record on the part of the defendants that the area over which the Koppu channel is running as found by the Advocate Commissioner and also as shown in the plaint plan absolutely belongs to them, hence it is seen that the defendants as such cannot also claim any exclusive right over the Koppu channel. Accordingly, it is found that all the land owners abutting the Koppu channel while acquiring rights over the said lands had also acquired all the inherent rights in respect of the said lands inclusive of the right to use the Koppu channel lying adjacent to the said lands and accordingly, it is found that all the cultivators owning the lands abutting the Koppu channel is entitled, as a matter of right, to utilise the Koppu channel for the purpose of irrigating their lands. In such view of the matter, it is seen that the defendants are not entitled to obstruct the plaintiff's usage of the Koppu channel for irrigating his lands as claimed in the plaint. It is thus found that the plaintiff has not taken any contrary pleas as regards his right to utilise the Koppu channel in the plaint and also during the course of his evidence and on the other hand, as rightly determined by the Courts below, the plaintiff has preferred the suit only to enforce his right, which he had acquired as regards the Koppu channel by way of Exs.A2 and A1. The second substantial question of law formulated in the second appeal is answered against the defendants and in favour of the plaintiff.

14. Materials placed on record go to show that, before the trial had commenced in the matter, it appears that the parties had endeavored to settle the issues arising between them, in respect of the Koppu channel and accordingly, it is seen that the defendants have also cut a portion of the trees standing in their lands and hanging over the plaintiff's lands. Following the same, it is found that a compromise memo has been recorded by the parties, which has come to be marked as Ex.A7/A11. On a

perusal of Ex.A7/A11, it is seen that, the plaintiff had agreed to get the suit dismissed as "settled out of court" as the defendants had cut the trees standing on their lands and hanging on the plaintiff's lands. However, it is found that, for one reason or the other, the said memo has not been presented before the concerned Court by the parties inviting the attention of the Court to pass orders on the basis of the said memo. It is found that even thereafter, the suit continue to be proceeded with and during the course of trial, it is found that, the compromise memo has come to be marked as Ex.A7/A11. Now, according to the plaintiff, inasmuch as, the defendants had failed to cut all the trees as agreed to and further, even after the entering of the compromise memo, the defendants continue to obstruct his usage and enjoyment of the Koppu channel, it is the contention of the plaintiff that the compromise memo was not given effect to and accordingly, the trial was further proceeded. However, according to the defendants, believing the words of the plaintiff, they had entered into the compromise memo and accordingly, at the first instance, did not seriously contest the suit and only after getting the arrest notice from the court, they had come to know of the fraud made by the plaintiff, in respect of the obtainment of the compromise memo.

15.Be that as it may, considering the arguments/submissions of the respective parties as regards the compromise memo, though it is found to have been entered into between the parties concerned, still, if really, the parties had intended to give effect thereto as per law, they should have presented the memo before the court concerned and invited the attention of the court to the compromise memo and to pass an order on the basis of the said memo. However, it is found that the said memo has not been presented to the court for recording the same and pass appropriate orders and on the other hand, despite, entering of the abovesaid compromise memo Ex.A7/A11, the trial of the suit continued with and during the course of the trial, it is seen that the memo had come to be marked as Ex.A7/A11. Accordingly, the Courts below had also taken into consideration the said compromise memo, whereunder, the defendants had unambiguously admitted the entitlement of the plaintiff to use the suit Koppu channel and that they would not obstruct the plaintiff's usage and enjoyment of the same. This determination of the Courts below is being contested by the defendants' counsel in the second appeal by contending that the Courts below had erred in relying upon the terms of the compromise memo, which had not come to be recorded by the Court as per law.

16.Even if the said compromise memo had been earlier accepted by the Court, on the revival of the suit later, it is seen that the same loses its force and therefore the defendants cannot, even after the revival of the suit, insist that the

compromise memo should not be looked into. The defendants on coming to know that the compromise memo had not been given effect to, atleast should have invited the attention of the court in respect of the same, on the revival of the suit and prayed the court concerned, to pass suitable orders on the compromise memo by filing a necessary application. However, no such recourse has been made by the defendants. Resultantly, the position being, as according to the plaintiff, the compromise memo was not given effect to, as the defendants failed to keep their promise as assured and on the other hand, according to the defendants, all the directions of the plaintiff for entering into the compromise had been performed by the defendants and nothing remains to be further done, however, as regards the above contentions, there is no consensus ad item between the parties and that apart, when the parties concerned particularly the defendants, had not invited the attention of the court to pass suitable orders on the basis of the compromise memo before taking up the suit for trial, it is seen that the defendants cannot be allowed to contend that the plaintiff's right cannot be upheld based on the terms of the compromise memo. That apart, as rightly put forth by the plaintiff's counsel, the Courts below had not accepted the plaintiff's case solely based on the terms of the compromise memo Ex.A7/A11. On the other hand, the plaintiff's case has been accepted by the Courts below on the basis of the oral and documentary evidence projected by the plaintiff, particularly, the acquisition of the right by the plaintiff to use the Koppu channel by way of Ex.A1 and also the admission of the defendants as regards the entitlement of the plaintiff to use the Koppu channel and when further the Koppu channel is found in existence as per the plaint plan based on the report and plan of the Advocate Commissioner Exs.C1 and C2, accordingly, on that basis, the court has upheld the right of the plaintiff to use the Koppu channel. In addition to that, they had also placed reliance upon the terms of the compromise memo Ex.A7/A11 for sustaining the plaintiff's case. It is thus found that the Courts below had not squarely placed reliance upon the Ex.A7/A11 for granting the reliefs prayed for by the plaintiff. In such view of the matter, it is found that the defendant's counsel, cannot be allowed to contend that the Courts below had erred in relying upon the terms of the compromise memo Ex.A7/A11 for upholding the case, particularly when the suit has been revived, the memo of compromise filed earlier in the suit, would cease to retain the force and accordingly, it is found that the parties accordingly, with open eyes, proceeded with the trial and none had endeavored to invite the attention of the court to pass further orders on the compromise memo as provided under law and particularly, when the parties are vying with each other, for their own reasons, that the compromise memo had not been given effect to, it is found that , no flaw could be attributed on the part of the Courts

below for also placing reliance upon the terms of the compromise memo Ex.A7/A11. The first substantial question of law formulated in the second appeal is accordingly answered in favour of the plaintiff and against the defendants.

17.In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS II)

//True copy//

Sub Assistant Registrar

mfa

To

1. The Subordinate Judge,
Sub Court, Bhavani.
- 2.The II Additional District Munsif,
II Additional District Munsif Court,
Bhavani .

Copy TO

The Section Officer,
VR Section, High Court. (2 Copies)

+1cc to Mr.N.Manokaran, Advocate SR.No.28600
+1cc to Mr.Zeenath Begum, Advocate SR.No.28549

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