

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.03.2018

PRONOUNCED ON : 03.04.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.2131 of 2003

1. Sundaram Reddiar (Died)
2. Jayalakshmi @ Ramathilagam Appellants/Appellant/Defendant

(2nd Appellant brought on record
as LR of the deceased sole appellant
vide order of Court dated 07.08.2015
made in C.M.P. 2102 to 2104 of 2008)

Vs.

1. V.Dayalan
 2. K.Varada pillai (died)
 3. K.Subbiah
 4. Vasantha Respondents/Respondents/Plaintiff
- (4th Respondent brought on record
as LR of the deceased 2nd respondent
vide order of the Court dated 16.03.2006
made in CMP No.15160 to 15162/04)

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 31.03.2003 made in A.S.No.12/99 on the file of the Additional District Fast Track Judge, Kancheepuram, confirming the judgment and decree dated 24.11.1998 made in O.S.No.694/94 on the file of the Additional District Munsif Court, Kancheepuram.

For Appellants : Mr. Y.Jyothish chander

For Respondents: No representation, set ex-parte
vide order dated 14.03.2018

JUDGMENT

This second appeal is directed against the judgment and decree dated 31.03.2003 passed in A.S.No.12/99, on the file of the Additional District Judge, Fast Track Court, Kancheepuram, confirming the judgment and decree dated 24.11.1998 passed in

O.S.No.694/94, on the file of the Additional District Munsif Court, Kancheepuram.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for declaration and permanent injunction.

4. The case of the plaintiffs, in brief, is that the plaintiffs are the owners of the rice mills in Achukattu village and Netteri village, Kancheepuram Taluk. The first plaintiff's mill called Sakthi rice mill is situated in the land S.No.69/1B, Achukattu village in Kancheepuram Taluk and it was built more than 15 years ago. Next to the Sakthi rice mill is the defendant's rice mill and in between the two mills, there is a plan channel running starting from the lake of Netteri and runs from south to north, width is 10 feet and 6 feet in depth and on the further side of the defendant's mill, the two rice mills belonging to the plaintiffs 2 and 3 are located and all the rice mills are in existence for more than 15 years. The paddy soaked water and other waste water of the 3 rice mills are discharged into the lake channel and through the channel AC shown in the plaint plan and the discharge of water, as above stated, have been going on for the past 15 years and in the same plan channel, lake water was also flowing and it is a plan marked channel. The plaintiffs have filed a rough sketch showing the plan marked channel as AB and another channel AC, the plan marked channel is crossing the main road and further, runs towards north and there is no other channel for the plaintiffs to let out their water. Whiles, the defendant recently started to construct a compound wall for his mill starting near point A and in that attempt destroyed the AB channel, which is a plan channel, illegally and the plaintiffs have acquired prescriptive title to take the mill water through the plan marked channel and the defendant started digging foundation for his compound wall and thereby, preventing and closing the AB channel and if he is allowed to do so, the plaintiffs cannot let out their paddy soaked water and other waste water through the plaintiffs channel and hence, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit laid by the plaintiffs is not maintainable either in law or on facts and the allegations that the first plaintiff's mill was built up 15 years ago and there is a plan channel from south to north with a width of 10 feet and 6 feet deep and the allegations that the mills of the 2nd and 3rd plaintiffs also exist for the past 15 years and that the plaintiffs are entitled to discharge the paddy soaked water and other waste water in the plaint channel and another channel shown as AB and AC in the plaint

plan and accordingly, discharging the same for the past 15 years are all false and the plaint plan is incorrect and the plaintiffs have no such right to let polluted water into the defendant's land and the plaintiffs have not acquired any prescriptive right to take the water through the alleged plan marked channel and it is false to state that there is no other source for the plaintiffs to let out the paddy soaked water and other water from their mills and it is false to state that the defendant has encroached into the Government channel and put up the compound wall. There is no public channel as claimed in the plaint and the patta property of the defendant is comprised in S.No.69/1A and the said land absolutely belong to the defendant by virtue of his purchase by way of the sale deed dated 09.06.86 and accordingly, he had constructed his rice mill called as Thirumurugan modern rice mill and the defendant had earmarked an extent of 75 cents separately for stagnating the water so as not to cause pollution or nuisance to anybody and the first plaintiff had put up the compound wall by encroaching about 3 feet in the defendant's property in S.No.69/1A and the lands in question are all dry lands and there is no question of any lake channel coming from any tank and the very tank claimed also is not in existence now and if the plaintiffs are permitted to drain waste water, the same will destroy the soil and also emanate foul smell and odour, which is injurious to the health and the plaintiffs have no such right in any manner to discharge the waste water from their mills and the plaintiffs at the time of filing the suit by obtaining an ex-parte order of injunction began creating a channel by digging and trespassing into the defendant's land and after creating such evidence, taken out the commission application and hence, the suit laid by the plaintiffs without any cause of action is liable to be dismissed.

6. In support of the plaintiffs' case PWs 1 to 2 had been examined, Exs.A1 to A8 were marked. On the side of the defendant, DW1 was examined, Exs.B1 and B2 were 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 plaintiffs' case and accordingly, granted the necessary reliefs in their favour. Aggrieved over the same, the present second appeal has come to be laid.

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

1. Whether the Courts below were right in granting a relief of permanent injunction to drain the polluted water into the plan

channel which leads to the lake contrary to the specific restriction contained in Section 24 of the Water (Prevention and Control of Pollution) Act, 1974, even assuming that the channel is in existence?

2. Whether the Courts below were right in granting a relief of declaration that the AB channel exists in S.No.69/1A contrary to the categorical admission of PW1 and PW2 that the channel does not exist in S.No.69/1A?

9. It is not in dispute that the plaintiffs and the defendant own rice mills and the rice mills are located in their respective properties. It is found that the first plaintiff's rice mill is situated in S.No.69/1B and the defendant's rice mill is located in S.No.69/1A and next to the defendant's rice mill, the rice mills of the plaintiffs 2 and 3 are located. As regards the above position, there is no dispute between the parties. The plaintiffs have filed a plan along with the plaint which has come to be marked as Ex.A1. Now, according to the plaintiffs, there is a plan marked channel shown as AB in the plaint plan running north to south with a width of 10 feet and 6 feet in depth and there is also another channel shown as AC and according to the plaintiffs, the above said channel proceeds towards northern side by crossing the main road and according to the plaintiffs, for more than 15 years they had been draining the paddy soaked water and other waste water from the rice mills through the plan marked channel, as shown in the plaint plan and accordingly, entitled to use the channel for the abovesaid purpose and it is stated that the defendant had put up a compound wall recently and by way of the same, attempting to close the plan marked channel AB and thereby, preventing the plaintiffs from discharging their waste water as abovestated and hence, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

10. Per contra, it is the case of the defendant that no such plan marked channel is in existence as putforth by the plaintiffs and the plaintiffs at no point of time had been discharging the paddy soaked water and other waste water through the alleged plan marked channel and it is the further case of the defendant that the first plaintiff had encroached a portion of 3 feet in his property by putting up a compound wall and the further case of the defendant is that the plaintiff, by way of the suit, is attempting to drain the waste water into his property and accordingly, it is stated that taking advantage of the ex-parte order of injunction, the plaintiffs had hurriedly dug a new channel by trespassing into the property to create evidence. Hence, according to the defendant, there is no cause

of action to institute the suit and the suit is liable to be dismissed.

11. As rightly found and determined by the Courts below, from the village maps of Achukattu village marked as Exs.A2, A5 and A8 as well as the village map of Netteri village marked as Ex.A7 and the sketch issued by the survey department as regards the municipality of Sirukaveripakkam marked as Ex.A6, read and seen cumulatively would go to indicate that there is a plan channel running through the properties of the parties located in S.No.69 and it is found that accordingly the plan channel is shown to be in existence in the above said village maps and it is found that thereafter S.No.69 has come to be sub divided later. In the light of the above position, when there are clear indications available in the abovesaid village maps as to the existence of the plan channel and when seen from the evidence adduced by the defendant and also his defence, the tank from which the channel originates is admitted to be in existence and further, as per the version of the defendant, the channel which had been in existence at one point of time, does not exist as of now, the materials projected all together seen cumulatively would lead to the conclusion that the plan channel as claimed by the plaintiffs has been in existence right from the beginning and accordingly, it is found that the said channel had been running through S.No.69 belonging to the parties concerned.

12. In addition to that, on a perusal of the commissioner's report and plan, marked as Exs.C1 and C2 wholly, it is found that the commissioner had inspected the properties of the parties concerned after giving notice and it is found that he had also given notice of inspection to the defendant's son, namely, Mani and accordingly, as per the physical features noted by the Advocate commissioner, it is found that in front of the rice mill of the parties concerned, there runs a channel, which flows from west to east and the entire waste water used for paddy and rice baking, washing and cleaning purposes flows only through the said channel and the channel flows upto the compound wall of Sakthi rice mill, belonging to the first plaintiff and from there, the channel runs towards south to north upto Sirukaveripakkam lake towards south and upto Lala Channel towards north and the commissioner had also noted the newly constructed compound wall starting from Sakthi rice mill compound wall running from east to west and noted that the said compound wall had been constructed with rock stones, nearly 28 feet east to west was constructed and approximately 3 to 4 feet from the ground level was raised and also noted that the remaining entire portion to the whole extent in the portion of the defendant's rice mill, a foundation pit which was dugged upto a depth of 5 to 6 feet and also noted a common road which runs from Kancheepuram to Vellore road is situated in the suit

site and the disputed channel flows through the main road and the newly constructed compound portion and the commissioner had also noted that near to the Sakthi rice mill and the newly constructed compound wall, he found a (culvert) bridge and water flows through it from north to south beneath the main road and also further noted that due to the newly constructed compound wall, the water had stagnated at that place and also noticed men were working to construct the compound wall during the time of inspection and accordingly, filed his report and plan in the Court. The above said features had been depicted by the commissioner in the plan marked as Ex.C2 and thus, it is found that on a perusal of the report and plan of the Advocate commissioner coupled with the village maps provided by the plaintiffs as above noted, it is found that the plan channel shown as AB and AC in the plaint plan, is in existence and accordingly, the commissioner had noted the existence of the same during the time of his inspection and also found that the paddy soaked water and other effluents of the rice mill had been discharged through the said channel and further, it is found that on account of the compound wall raised by the defendant recently, as noted by the commissioner, the passage of the channel has been blocked resulting in the stagnation of waste water and accordingly, it is found that the Courts below had also derived strength in coming to the conclusion that the suit channel, as depicted in the plan, has been in existence for several years and the abovesaid determination of the Courts below, based on the materials placed before them, in my considered opinion do not warrant any interference as such.

13. However, the defendant's counsel contended that the commission had been taken ex-parte by the plaintiffs and the Advocate commissioner appointed had also not issued notice to the defendant or his son namely Mani as claimed in the report and therefore, according to him, the Courts below had erred in accepting the plaintiff's case based on the commissioner's report and plan, which according to the defendant's counsel, is one sided and cannot be relied upon, particularly, when no opportunity has been given to him by way of notice to explain the physical features obtaining on the ground and therefore, it is his contention that the judgment and decree of the Courts below upholding the plaintiffs' case should be set-aside. However, the above contention does not merit acceptance in any manner. At the foremost, it is found that the defendant has not preferred any objection whatsoever to the commissioner's report and plan. This has been admitted by the defendant during the course of his evidence that he has not filed any objection to the commissioner's report and plan. If really, the physical features obtaining on ground and as noted by the Advocate commissioner are not really available as such, at least on entering appearance in the matter, the defendant should have

endeavoured to file his objections to the same in the manner known to law and invite the attention of the Courts below to issue a fresh commission as to the noting of the physical features available on ground for the second time. However, the defendant has not endeavoured to proceed further on the abovesaid lines. That apart, from the evidence of the defendant examined as DW1, it is found that he has clearly admitted that at the time of inspection of the Advocate commissioner, his brother's son was available and according to him, he does not know whether his brother's son pointed out the features obtaining in the area to the Advocate commissioner and in addition to that, the defendant, during the course of his evidence, has also admitted that during the inspection of the commissioner of the properties concerned, there had been stagnation of water outside the compound wall and further, according to him, if the compound wall is not in existence or available, the stagnated water would enter into the property and further, according to him, the compound wall had been raised adjoining the plaintiff's compound wall and with reference to the same, he has not obtained the permission of the VAO and further according to him, the water flow would enter into his property, if there had been no compound wall and does not know where the said water crosses. Further according to him, he has not raised any specific objection to the report of the Advocate Commissioner that the channel proceeds to run beyond the compound wall raised by him, further north, by crossing the bridge and according to him, further the lake in Achukattu village is not in existence. However he would state that he does not know how long the same had not been in existence. Further, he has also admitted that there is a channel running next to the building, however, the same is not a plan marked channel and thus, when the above evidence of the defendant is scanned and assessed, it is found that the contentions put forth by the defendant's counsel that the commissioner appointed by the Court had inspected the property without prior notice to him, is found to be unacceptable and on the other hand, it is found that the defendant's representative was available at that point of time and accordingly, notice was given to the said party and accordingly, the commissioner proceeded with the work assigned by the Court. Accordingly, it is found that unable to place any resistance to the features noted by the Advocate commissioner as put out in the report and plan, it is found that the defendant has not chosen to file any objection to the same. Not stopping there, it is also found that the defendant has also admitted about the stagnation in the properties concerned at the time of inspection and also admitted that but for the compound wall raised by him, the water flowing thereon would enter into his land and such being the position, when the plaintiffs had placed adequate and acceptable materials to show the existence of the plan marked channel by producing the village maps

concerned and the same is fortified by the commissioner's report and plan placed on the inspection of the properties concerned, it is found that the defendant has, with an ulterior motive, put up the compound wall recently in the property and preventing the plaintiffs from discharging their paddy soaked water and other effluents of the rice mills through the channel and therefore, from the village maps placed for consideration, it is found that the channel had been in existence for several years. It is seen that the defendant as such cannot lay any claim of exclusive right over the same and also cannot raise any wall in such a manner so as to prevent the plaintiffs from utilising the channel for the purpose of discharging the waste water. In such view of the matter, it is seen that there is a valid cause of action for the plaintiffs to institute the suit against the defendant.

14. The defendant has taken a plea in the written statement that the first plaintiff while putting up the compound wall has encroached about 3 feet of the defendant's property. However, with reference to the said case of the defendant, there is no material forth coming. If really, any such encroachment had been made by the first plaintiff, it has not been explained by the defendant, as to why he has not taken further course of action as regards the alleged encroachment into his property in the manner known to law. It is thus found that the abovesaid defence has been projected with a view to twist the case so as to lend a true colour to the defendant's case one way or the other. As rightly found by the Courts below, the defendant has not raised any serious dispute as regards the AC channel through which the plaintiffs 2 and 3 are discharging the waste water of the rice mills and when it is found that the AC channel also join the plan channel shown as AB in the plaint plan and thus, it had been observed and noted by the Advocate commissioner, as above discussed, it is found that as putforth by the plaintiffs, there is a plan marked channel on ground, through which, the mill owners had been discharging their effluents and therefore, the defendant cannot be allowed to lay any claim of right over the same and when the defendant has not placed any material that the area through which the plan channel is running, he has any right in respect of the same and as above seen, when the defendant has failed to establish that the first plaintiff has encroached into the portion of his property and similarly, when there is no material placed on record by the defendant to show that the plan channel runs through his property, it is found that as rightly determined by the Courts below, the plaintiffs are entitled to discharge the waste water of the mills through the plan marked channel and merely because the water had not been flowing from the lake through the plan channel at recent times, that by itself would not be the decisive factor to hold that the plan channel had not at all been in existence at any

point of time and in such view of the matter, the Courts below are justified in entertaining the plaintiffs' case based on the correct appreciation of the materials placed on record.

15. It is further contended by the defendant's counsel that if the plaintiffs are permitted to discharge the waste water through the channel, the same would cause pollution in the area and would be in violation of the Water (Prevention and Control of Pollution) Act, 1974, and thus, according to the defendant, the plaintiffs, without any permission of the authorities concerned of the abovesaid Act, are not entitled to discharge the waste water through the said channel and therefore, the plaintiffs should not be granted the reliefs as prayed for. However, it has not been established by the defendant as such by placing acceptable materials that the act of the plaintiffs in discharging the waste water through the plan marked channel had caused any pollution to the public in violation of the provisions of the abovesaid Act and if there is any truth in the abovesaid defence, the defendant would have moved the concerned authorities, in connection with the same for taking necessary action against the plaintiffs. However, other than making bald pleas that the acts of the plaintiffs in discharging the waste water cause pollution, to sustain the said defence, no material has been placed by the defendant and in such view of the matter, the contention that the act of the plaintiffs in discharging the waste water in the plan marked channel would be in violation of the abovesaid act and could not be countenanced. The contention has been raised by the defendant that the witnesses examined on the side of the plaintiffs, PWs 1 and 2 have admitted about the non existence of the suit channel. However, when the evidence of PWs 1 and 2 are read wholly and coupled with the defendant's evidence and the materials placed, it is found that PWs 1 and 2 have not admitted about the non existence of the suit channel as claimed by the defendant and thus, it is found that as rightly found by the Courts below, a reading of the evidence of PWs 1 and 2 as well as the evidence of DW1 coupled with the materials placed on record and further also seen in conjunction with the commissioner's report and plan, as above noted, it is found that the plaintiffs have clearly established the existence of the plan marked channel AB as well as the channel shown as AC in the plaint plan and the usage of the same by the plaintiffs for discharging the waste water of the mills and in such view of the matter, the defendant cannot be allowed to obstruct the same by raising a compound wall so as to prevent the free flow of the waste water through the plan marked channel and the substantial questions of law formulated in the second appeal are accordingly answered against the defendant and in favour of the plaintiffs.

16. The principles of law outlined in the decision relied on by the defendant's counsel reported in 2004 (4) CTC 158 (R.Vellingiri and nine others Vs.Kuppathal) are taken into consideration and followed as applicable to the case at hand.

17. In conclusion, the second appeal fails and is accordingly dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District Judge,
Fast Track Court, Kancheepuram.
2. The Additional District Munsif Court,
Kancheepuram.
3. The Section Officer,
V.R.Section,
High Court, Madras. (2 COPIES)

+1cc to Mr.Y.JYOTHISH CHANDER Advocate, S.R.No. 24421

Pre-delivery Judgment in
S. A.No.2131 of 2003

PVS (CO)
TR(17/05/2018)

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