

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.06.2018
Pronounced on : 29.06.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A. No.1260 of 2001

1.Ramaswamy
2.Kanniappan

.. Appellants/Defendants 2 & 3

Vs.

1.Kannan @ Arumugha Gounder

2.Raji Gounder

... Respondents/Plaintiff/1st Defendant

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the judgment and the decree made in A.S.No.88 of 1998 dated 28.09.1999 on the file of Subordinate Court, Maduranthakam, confirming the judgment and decree made in O.S.No.82 of 1992 dated 25.02.1998 on the file of District Munsif, Maduranthakam.

For Appellants : Mr.D.Rajagopal

For Respondents : Mr.V.Selvaraj

J U D G M E N T

This second appeal has been filed by the defendants 2 and 3 against the judgment and decree passed by the learned Subordinate Judge, Maduranthakam in A.S.No.88 of 1998 dated 28.09.1999 confirming the judgment and decree passed by the District Munsif, Maduranthakam in O.S.No.82 of 1992 dated 25.02.1998.

2.The first respondent herein has filed a suit in O.S.No.82 of 1992 on the file of the District Munsif, Maduranthakam, to declare his easementary right of taking water from Mathur Periya Eri (Lake) through the channel running through 'B' schedule properties to his 'A' schedule properties and for permanent injunction to restrain the defendants, their men, etc., from in

any way interfering with his right of taking water through the aforesaid channel to his 'A' schedule properties. The learned District Munsif, Maduranthakam by the judgment dated 25.02.1998 has decreed the suit as prayed for. Feeling aggrieved, the defendants 2 and 3 have filed an appeal in A.S.No.88 of 1998 on the file of the Subordinate Judge, Maduranthakam. The learned Subordinate Judge, Maduranthakam by the judgment dated 28.09.1999 has dismissed the said appeal, confirming the judgment and decree passed by the Trial Court. Aggrieved by the same, the defendants 2 and 3 have preferred the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the Trial Court.

4. The averments made in the plaint are, in brief, as follows:-

The plaintiff is the absolute owner of the suit 'A' schedule properties, by virtue of the registered sale deeds dated 22.12.1957 and 26.02.1963. From the date of purchase, the plaintiff is in possession and enjoyment of the suit 'A' schedule properties. The suit properties are wet lands. The plaintiff is irrigating the said properties through the channel running through the suit 'B' schedule properties (herein after referred to as "suit channel"). The suit 'B' schedule properties belonging to the defendants. The said channel is in existence from time immemorial i.e., for the past several decades. There is no other source for irrigation to the plaintiff except from the lake through the aforesaid channel. So, the plaintiff is entitled to use the said channel by exercising his right of easement by necessity and also easement by prescription. The plaintiff has raised paddy crops in the suit 'A' schedule properties by irrigating it through the suit channel. The suit 'A' schedule properties come under the 'Aayarkattu' of Mathur Periya Eri (Lake). The defendants, due to recent enmity with the plaintiff, are trying to prevent the plaintiffs from taking water from the lake to his suit 'A' schedule properties through the suit channel. Hence the plaintiff has filed the above suit to restrain the defendants by means of permanent injunction from interfering with his right of taking water through the suit channel. Subsequently, he amended the plaint to declare his easementary right of taking water through the said channel.

5. The averments made in the written statement by the defendants 1 to 3 are, in brief, as follows:-

The allegation that the plaintiff is irrigating his lands from the Mathur Periya Eri (Lake) through the suit channel is denied. The plaintiff never enjoyed any right over the defendants' properties in any form and therefore, the claim of

the plaintiff that he acquired easementary right by prescription is denied. The plaintiff has no right to take water through the defendants' properties. The defendants never allowed the plaintiff to irrigate his lands with the aid of any channel through their lands. In fact there never existed any channel providing facility to the plaintiff. The defendants have purchased the suit 'B' schedule properties from several people and they are in possession of the same as absolute owners. The allegation that the defendants attempted to prevent the plaintiff from taking water through their land is denied. As per the Village records and the plan, the channel has not entered into the fields of the plaintiff and therefore, the plaintiff is not entitled to any irrigation through the fields of the defendants. The defendants, on the contrary, are entitled to proper irrigation through the plan marked channel, in which, the plaintiff has no right. Therefore the defendants prayed to dismiss the above suit.

6.The averments made in the additional written statement filed by the third defendant and adopted by the defendants 1 and 2 dated 17.08.1996 are, in brief, as follows:-

There is no channel in survey Nos.172 and 173. In survey No.172, one Chellappa Gounder is having land and hence, he is a necessary party to the suit. The channels mentioned in the Commissioner's report were formed by the defendants for their personal use. Those channels were in absolute and exclusive possession of the third defendant over which neither the plaintiff nor anyone has any manner of right or title. Now, none of the channels available in the suit property. The suit is barred for non-joinder of necessary parties. Hence, the suit is liable to be dismissed.

7.The averments made in the additional written statement filed by the third defendant and adopted by the defendants 1 and 2 dated 31.01.1997 are, in brief, as follows:-

The plaintiff is not entitled for declaration of easementary right. The plaintiff has filed the suit as if he had right of irrigation and now he wants to declare his easementary right. As such, he has admitted the title of the defendants. Hence, the suit is liable to be dismissed.

8.Based on the aforesaid pleadings, the learned District Munsif, has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW.1 and also examined two more witnesses as PW.2 and PW.3. He also marked Exs.A1 to A13 series as exhibits. On the side of the defendants, the third defendant examined himself as DW.1 and one more witness was examined as DW.2 and also marked Exs.B1 to B6 as exhibits. The Advocate Commissioner was examined as CW.1. His report and plan were marked as Exs. C1 and C2 respectively.

9.The learned District Munsif, after considering the materials placed before her found that the plaintiff is entitled to irrigate his lands through the suit channel. Accordingly, she decreed the suit as prayed for. Aggrieved by the same, the defendants 2 and 3 have filed an appeal in A.S.No.88 of 1998 on the file of the Subordinate Judge, Maduranthakam. The learned Subordinate Judge has dismissed the said appeal confirming the judgment and decree passed by the Trial Court. Feeling aggrieved, the defendants 2 and 3 have preferred the present second appeal.

10.At the time of admitting this second appeal, this court has formulated the following substantial questions of law:-

"1.Whether the plaintiff has discharged his burden in proving his alleged easementary right as required under Section 15 of the Indian Easements Act?

2.Are not the Courts below erred in granting the relief in favour of the plaintiff especially when the plaintiff has not proved his alleged easementary right with any documentary evidence?

3.Whether the existence of channel can be presumed in the absence of existence of such channel in the Village Map and when it has not been proved by the plaintiff?"

11.Heard, Mr.D.Rajagopal, learned counsel appearing for the appellants / defendants 2 and 3 and Mr. V.Selvaraj, learned counsel appearing for the first respondent / plaintiff.

12.Question Nos. 1 to 3:-

The learned counsel for the appellants / defendants 2 and 3 has submitted that there is no dispute that the plaintiff is the absolute owner of the suit 'A' schedule properties. He further submitted that the plaintiff has purchased his properties under Exs. A1 and A2 sale deeds, but in the said sale deeds, it is not mentioned that the plaintiff is entitled to take water from the Mathur Periya Eri (Lake) through the suit channel.

13.He further submitted that the plaintiff has not produced any evidence to show that he has been using the suit channel. He further submitted that in the Village plan (Ex.B6) also, it is not mentioned that a channel is running up to the plaintiff's properties. He further submitted that as per Section 15 of the Easements Act, for acquisition of easementary right by prescription, the said right should have been exercised for more than 20 years, but in this case, the plaintiff has failed to

prove that he acquired easementary right by prescription.

14.He further submitted that Ex.B2 would show that one Chellappa Gounder is also having property in survey No. 172/3, but he has not been added as a party and hence the suit is bad for non-joinder of necessary party. He further submitted that the Courts below failed to consider the aforesaid facts and hence, he prayed to allow the second appeal and set aside the judgments and decrees passed by the Courts below and to dismiss the plaintiff's suit. In support of his contention, he relied upon the decision in O.K.Venkatramani and others Vs Coimbatore Diocese Society, 2017-4-LW 439.

15.The learned counsel for the first respondent / plaintiff, on the contrary, contended that even though, it is not specifically mentioned in Exs.A1 and A2 that the plaintiff is entitled to take water from the Mathur Periya Eri (Lake) to his land through the suit 'B' schedule properties, in settlement register (Ex.A4) and Adangal extract (Ex.A5), it is clearly stated that suit 'A' schedule properties are being irrigated from the Mathur Periya Eri (Lake). He further submitted that the third defendant has purchased a portion of the property in survey No.173/2 from the plaintiff on 27.06.1991 under Ex.A6 sale deed, wherein, it is clearly stated that the said owner of the property is having right to take water through Mathur Periya Eri (Lake) channel and as such, the third defendant is estopped from denying the existence of channel and also the easementary right of the plaintiff.

16.He further submitted that the Commissioner's evidence , his report and plan would also clearly show the existence of the channel in the suit 'B' schedule properties and the plaintiff is taking water through the said channel and there is no other source of irrigation for the plaintiff's land. He further submitted that oral and documentary evidence of PWs.1 to 3 also would establish that the plaintiff is entitled to the easementary rights of necessity and by prescription and hence, the Trial Court has rightly decreed the plaintiff's suit and the First Appellate Court also has rightly confirmed the same and therefore he prayed to dismiss the present second appeal.

17. There is no dispute with regard to the fact that the plaintiff is the absolute owner of the suit 'A' schedule properties. In para 8 of the original written statement, the defendants have stated that they have purchased the various items of properties from several people including the suit 'B' schedule properties and they are in possession of the same as absolute owners. But, in the additional written statement dated 17.08.1996, for the first time, the defendants have stated that one Chellappa Gounder purchased lands in survey No.172 and hence, he is a necessary party to the suit. The third defendant while, examining himself as DW1, has produced the sale deed

which stands in the name of the said Chellappa Gounder and marked it as Ex. B2, in which, it is stated that the said Chellappa Gounder has purchased 65 cents in survey No.172/3.

18.The learned counsel for the first respondent / plaintiff has submitted that even though the said Chellappa Gounder is also having property in survey No.172, he has not interfered with the plaintiff's right of using the suit channel and hence, he has not been added as a party. The said contention is an acceptable one. Even though the DW1 has produced the sale deed which stands in the name of the said Chellappa Gounder and marked as Ex.B2, the said Chellappa Gounder has not come forward to implead himself as defendant to deny the plaintiff's claim. It shows that he has not objected the plaintiff for using the suit channel. Therefore, the suit is not bad for non-joinder of the said Chellappa Gounder as a party.

19.It is true that in Exs.A1 and A2, it is not specifically mentioned that the plaintiff is having right to take water from the Mathur Periya Eri (Lake) through the channel which is running in suit 'B' schedule properties (suit channel). In the sale deeds filed by the defendants (Exs.B1 to B4) and in the mortgage deed (Ex.B5) also, it is not specifically mentioned that the defendants are having right to take water from the Mathur Periya Eri (Lake). So, merely, because the right to take water from the Mathur Periya Eri (Lake) through the channel which is running in the 'B' schedule properties is not mentioned in Exs.A1 and A2, it cannot be presumed that the plaintiff is not entitled to take water from the Mathur Periya Eri (Lake) through the suit channel.

20. It is to be pointed out that the plaintiff has not claimed easementary right by grant, but he claimed easementary right by necessity and also by prescription. If he claims easementary right by grant, then only he has to prove that the said right has been granted to him under the sale deeds.

21.It is also to be pointed out that the third defendant has purchased 16 cents in survey No.173/2, from the plaintiff through Ex.A6 sale deed dated 27.06.1991. In the said sale deed, it is clearly stated that the purchaser is having right to take water through Mathur Periya Eri (Lake) channel. Unless, the plaintiff has got right to take water from the aforesaid lake through the suit channel he could not have conveyed the said right in Ex.A6 in favour of the third defendant. After enjoying the said benefit, the third defendant cannot deny the plaintiff's right. The principle of estoppel will apply.

22.It is also to be pointed out that though the defendants in the main original written statement have denied the existence of the channel in their land, in the additional written statement they have categorically admitted the existence of the

channel. In the Commissioner's report and plan (Exs.C1 and C2), the Commissioner has clearly stated the existence of the channel in the defendants' lands and the said channel leads to plaintiff's properties. Though, the Commissioner has stated in his report that in few places the defendants have obliterated the said channel, the physical features would clearly show, the existence of channel. The Commissioner has also stated in his report that on the date of his inspection, in the plaintiff's land, paddy crop has been raised and that also would show that the plaintiff has irrigated his lands by taking water from the Mathur Periya Eri (Lake) through the suit channel. Though the defendants have stated that the plaintiff had irrigated his land through well, the Commissioner has not mentioned in his report about the existence of any well in the plaintiff's properties.

23. Ex.A4 is the extract of the Mathur Village Settlement Register issued by the Deputy Tahsildar, Maduranthakam, wherein, it is clearly mentioned that the plaintiff's properties have been irrigated from Mathur Periya Eri (Lake). Ex.A5 is the Adangal extract issued by Deputy Tahsildar, Maduranthakam. In the said document also, for the Fasli year 1389, the plaintiff's properties were irrigated from Mathur Periya Eri (Lake) for six months. Further the oral evidence of the PW1 to PW3 would also show that the plaintiff and his predecessor in title have been taking water from the aforesaid Lake through the suit channel for more than 40 years. The oral and documentary evidence adduced by the plaintiff would clearly establish that the plaintiff has acquired easementary right by prescription and is entitled to use the said channel by easement of necessity also. Therefore, the Courts below have rightly found that the plaintiff is entitled to the relief of declaration and also permanent injunction as prayed for. In the said concurrent factual findings, this Court cannot interfere.

24. In the decision, cited by the learned counsel for the appellants / defendants 2 and 3, the facts are totally different. In that case, a permission was granted to the plaintiff to use the Cart Track as pathway in the land belonging to the fourth defendant. But the plaintiffs projected their claim that they are entitled for easementary right. However, they have not proved their case by adducing satisfactory evidence. But in the present case, the plaintiff has established his case by adducing oral and documentary evidence. Therefore, the aforesaid decision will not be applicable to the facts of this case.

25. For the above said reasons, this court is of the view that the Courts below have rightly accepted the case of the plaintiff and rejected the defence set up by the defendants. Accordingly, the substantial questions of law are answered against the appellants/defendants.

26. In the result, the second appeal fails and it is dismissed. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

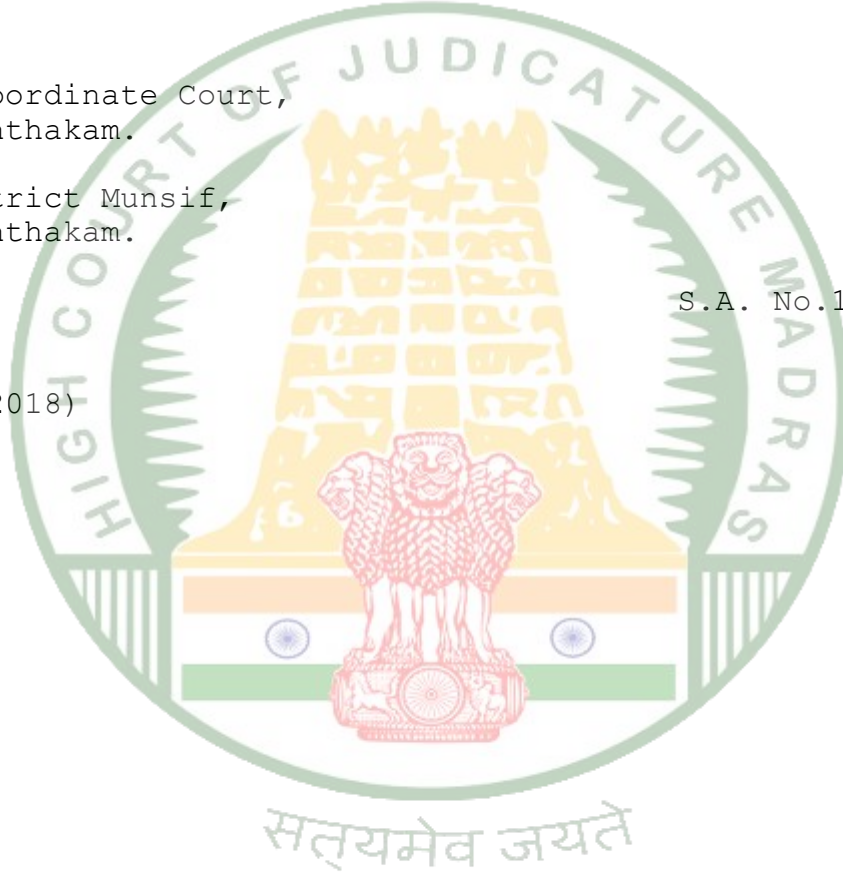
To

1.The Subordinate Court,
Maduranthakam.

2.The District Munsif,
Maduranthakam.

S.A. No.1260 of 2001

AK(CO)
SP(27/07/2018)



WEB COPY