

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.11.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.No.258 of 2015

1. P.Shanmugam
2. S.Dharmaraj
3. S.Chinnamurugan .. Appellants/Defendants

-vs-

1. A.Gopalsamy
2. G.Saravanan
3. Kathirvel .. Respondents/Plaintiffs

Memorandum of Grounds of Civil Miscellaneous Appeal under Order XLIII, Rule 1(u) of the Civil Procedure Code, against the judgment and decree dated 23.7.2014 made in A.S.No.68 of 2013 on the file of the First Additional Sub Court, Erode, remanding the judgment and decree dated 21.12.2012 made in O.S.No.5 of 2009 on the file of the Principal District Munsif Court, Erode.

For Appellants :: Mr.S.Sounthar

For Respondents :: Ms.J.Prithivi for
Mr.S.Kaithamalai Kumaran

JUDGMENT

This civil miscellaneous appeal has been directed against the impugned judgment and decree passed by the learned First Additional Subordinate Judge, Erode in A.S.No.68 of 2013 dated 23.7.2014, remanding the matter back to the trial Court for the limited purpose of examining the witnesses related to the documents produced in the lower appellate Court in I.A.No.44 of 2014 and also for appointment of Commissioner to find out the existing physical features of the suit L.B.P channel as well as to find out whether it runs through the land from east to west as shown in the plaint plan or whether it runs from west to east from the L.B.P channel which runs on the west of the property of the plaintiffs.

2. The appellants herein are the defendants in the suit. Mr.S.Sounthar, learned counsel for the appellants/defendants

argued that the respondents 1 & 2/plaintiffs 1 & 2 are the father and son and the third respondent/third plaintiff is the eastern side neighbour. Hence, they jointly filed the suit for their alleged common cause to restore the alleged channel by way of mandatory injunction. According to the respondents/plaintiffs, their lands were irrigated by a channel running in the land of the second appellant and the defendants destroyed the same on 26.10.2008. Therefore, they filed the suit for restoration of the irrigation channel. It is also the claim of the respondents/plaintiffs that the alleged channel runs in R.S.No.292 and about 160 feet length of the channel is sought to be restored by way of mandatory injunction without giving any particulars or description of their properties. They have shown their lands in the plaint rough plan and also shown the suit channel in the rough plan. It was also the further case of the respondents/plaintiffs that the appellants/defendants have obliterated a portion of the channel running into the third respondent's land and after crossing the third respondent's land, enters into the land of the first and second respondents. Since a portion of the channel was obliterated, the water cannot run into the respondents' land. Hence they filed the suit for restoration.

3. On the other hand, the claim of the appellants/defendants was that the land of the respondents/plaintiffs are on the higher side on the west and slopes towards east. Hence the water cannot run towards west. Therefore, it turned towards south and ends with the respondents' land. When the lands of the respondents are on the higher side, the respondents cannot take water against the gravity, for the simple reason that the lands are higher on the west and slopes towards east.

4. In order to find out the physical features, the trial Court appointed one Tmt.D.Malathy as an Advocate Commissioner, who also visited the spot on 7.1.2009. After appearance of the defendants, on their request, the Commissioner again visited the property on 2.11.2009 and thereafter, she filed her report and rough sketch on 7.11.2009 and they are marked as Ex.C1 & C2. The Commissioner has shown the irrigation channel in red colour in the Ex.C2 rough sketch and the Advocate Commissioner has also found that the channel after running from east-west to some distance from the appellants land, does not run further west, but it turns towards south. These physical features supported the case of the appellants/defendants, because, the case of the respondents/defendants was that the appellants obliterated a portion of the channel, therefore, by ascertaining the remaining portion which is not obliterated, the bare existence of the disputed channel can also be ascertained as the said portion should be situated on the land of the respondents/plaintiffs

herein. The Advocate Commissioner on visiting the spot found as many as five irrigation channels running through west in the third plaintiff's land. But the Commissioner has stated that the said channels are continuation of the channels running in the appellants land. Further, one of such east-west channels in the third plaintiff's land appears to be continuation of the alleged suit channel. Finally, the Commissioner was not able to find any such continuation channel in the land of the respondents/plaintiffs. If the channel runs continuously towards the respondents land, the remaining portion of the channel could be in existence of the respondents land. Moreover, there is a ridge in between the land of the first and second respondents and the land of the third respondent, the Commissioner also has shown in Ex.C2 rough sketch the said ridge in green colour, which runs north-south continuously without any opening in the middle. Therefore, it is obvious that there is no channel to take the L.B.P water from the third respondent's land to the lands of the first and second respondents. When the respondents filed the suit, they have to prove the existence of the alleged obliterated channel in the defendants land and they also have to prove the continuance of the same in their land. When the Commissioner has clearly found that there was no continuance of the suit irrigation channel in the land of the respondents and the Commissioner also further found that the land of the third respondent is 1/4th feet higher than the land of the appellants, the water would never flow to the lands of the respondents, hence, there is no chance of any water channel from the land of the appellants to the respondents land. This has been rightly found by the trial Court and the respondents also miserably failed to make out their case. Holding so, the suit was dismissed.

5. As against that, when an appeal was filed, the lower appellate Court, citing more than three reasons that the Commissioner's report is totally contra which does not reflect the nature of the suit property; that if the respondents lands are on the higher level, there is no possibility of flow of water from north to south direction and that there is a possibility of water flowing from east to west direction is not correct when the Commissioner's report itself is not clear and is contradictory, set aside the judgment and decree of the trial Court and remanded the matter back to the trial Court for fresh consideration. Hence the appeal.

6. On the other hand, the learned counsel for the respondents/plaintiffs pleaded that on the basis of the evidence of P.W.1 and D.W.1, the lower appellate Court reasoned that the respondents lands are being irrigated through the L.B.P channel and that the dispute is only with regard to where actually the L.B.P channel runs, whether it runs from east to west or west to

east and since the report of the Advocate Commissioner is also not clear, as the Advocate Commissioner has not specifically stated the real physical features of the continuous existence of the channel, to find out the truth only, the lower appellate Court has correctly remanded the matter back to the trial Court, which cannot be opposed by the appellants/defendants.

7. I also find merits on the submissions made by the learned counsel for the respondents, because, the trial Court appointed the Advocate Commissioner to note down the physical features, who visited the spot not only once but twice. Even during her second visit, it was found that the physical features were totally changed and that has been mentioned by the Commissioner. Therefore, the lower appellate Court has come to the conclusion that the matter should be remanded back to the trial Court for the limited purpose of examining the witnesses relating to the documents produced in I.A.No.44 of 2014 and also for appointing an Advocate Commissioner to find out the existing physical features of the suit L.B.P channel where it actually situated and whether it runs through the lands from east to west as shown in the plaint plan or whether it runs from west to east from the L.B.P channel which ultimately runs on the west of the property of the respondents/plaintiffs. Therefore, when the purpose of remand is only to find out the existence of the channel on the basis of the documents produced in I.A.No.44 of 2014, no prejudice would be caused to the appellants/defendants, because both the appellants and the respondents are farmers cultivating their lands and eking out their livelihood. Hence, when the respondents have complained that the appellants have obliterated the water channel running into their lands by which they are irrigating their lands, this Court finds no error or infirmity in the judgment and decree passed by the lower appellate Court. Accordingly, the civil miscellaneous appeal fails and it is dismissed confirming the judgment and decree of the lower appellate Court. Consequently, interim order stands vacated and the M.P.No.1 of 2015 is also dismissed. No costs.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

Ss

To

1. The First Additional Subordinate Judge
Erode

2. The Principal District Munsif
Erode

+1cc to Mr.S.Sounthar, Advocate, S.R.No. 98816

+1cc to Mr.S.Kaithamalai Kumaran, Advocate, S.R.No. 98780

C.M.A.No.258 of 2015

NMI (CO)
GN(29/07/2020)