

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 19.07.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.NO.153 OF 2010 AND
M.P.NO.1 OF 2010

Munirathinam

... Appellant/
Respondent/Defendant

Vs.

N.B.Venkatesan

... Respondent/
Appellant/Plaintiff

PRAYER:

Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 15.09.2009 passed in A.S.No.16 of 2005 by the Subordinate Judge, Tiruvallur reversing the decree and judgment dated 02.07.2002 passed in O.S.No.287 of 1991 by the District Munsif, Tiruvallur.

For Appellant : V.Nicholas

For Respondent : No appearance

JUDGMENT

The appellant is the defendant in O.S.No.287 of 1991 on the file of the District Munsif, Tiruvallur and respondent in A.S.No.16 of 2005 on the file of the Subordinate Judge, Tiruvallur. The respondent/ plaintiff filed the suit in O.S.No.287 of 1991 before the District Munsif, Tiruvallur for a bare injunction restraining the defendant from interfering with his peaceful possession and enjoyment of the suit channel marked as A,B,C in the plan appended to the plaint.

2. The parties are referred to as per their ranking in the original suit and at appropriate places, their ranks in the present appeal would also be indicated, if necessary.

3. The brief case of the respondent/plaintiff is as follows.

The channel described in the suit schedule and in the plan appended to the plaint is in existence for more than 60 years and the main irrigation of land of the plaintiff is

through this channel. There was a division of joint family properties between the plaintiff's paternal grand father V.K.Natesa Mudaliar and his elder brother V.K.Venkatachalamudaliar. Subsequently, there was another partition between V.K. Natesa Mudaliar and his two sons Kuppusamy and Balasubramaniam through a registered partition deed dated 25.11.1959. In the said partition deed, there is a reference about the existence of the suit channel. Kuppusamy, the senior paternal uncle of the plaintiff got S.No.81, 82, and 83 of Sennavaram Village, Tiruvallur Taluk, Chengalpattu District to his share. There was also a partition through a registered partition deed dated 04.03.1974 between the plaintiff and his father and brothers. In the said partition, 10 acres of lands in S.No.67, 84 and 85 and pump set in S.No.80 of Sennavaram Village, Tiruvallur Taluk, Chengalpattu District were allotted to the share of the plaintiff. Even after the said division, the plaintiff is using the suit channel as usual without any dispute or objection from any one. Kuppuswamy, one of the sharers, sold his lands to a third party and the defendant purchased the lands in S.Nos.81, 82 and 83 from him. The defendant also insisted the plaintiff to sell his property in S.No.89/2A to him. Since the plaintiff refused to sell his property, the defendant is attempting to efface the suit channel. Though the plaintiff's father lodged a complaint with the police, the defendant is threatening to efface the suit channel with a view to cause huge loss to the plaintiff. If the suit channel is effaced, the plaintiff would not be able to irrigate his lands. Hence, he filed the suit for a permanent injunction restraining the defendant from interfering with his peaceful possession and enjoyment of the suit channel.

4. The suit was resisted by the defendant on the following grounds.

(i) The suit channel is not in existence as alleged by the plaintiff.

(ii) The defendant never threatened to efface the suit channel indicated as A, B, C in the plan appended to the plaint, since there was no such channel on ground.

(iii) The property in dispute belongs to the defendant and he has been in possession and enjoyment of the said property, ever since the date of purchase. In fact, the plaintiff attempted to encroach upon the property of the defendant and the same was objected to by the defendant.

(iv) There is no cause of action for filing the suit and therefore, the suit is liable to be dismissed.

5. The trial court framed necessary issues and after full contest, dismissed the suit filed by the plaintiff. Aggrieved over the same, the plaintiff filed A.S.No.16 of 2005

before the Subordinate Judge, Tiruvallur. After analysing the evidence on record, the first appellate court allowed the appeal and granted permanent injunction restraining the defendant from interfering with his peaceful possession and enjoyment of the suit channel by the plaintiff. Aggrieved over the same, the defendant filed the present second appeal.

6. While admitting the second appeal, the following substantial questions of law were framed.

(i) When the defendant denied the rights of the plaintiff to use the suit channel, whether the suit for permanent injunction filed by the plaintiff without seeking the relief of declaration is maintainable in law and that too even after the defendant has made a specific reference about the maintainability of the suit in his additional written statement?

(ii) When there was no specific reference about the existence of the suit channel in the documents relied on by the plaintiff and as such he could not claim any rights in the suit channel, whether the lower appellate court is correct in granting a decree of permanent injunction on assumptions and presumptions and also contrary to the evidence on record?

7. No appearance on behalf of the respondent/plaintiff.

8. The learned counsel appearing for the appellant filed a memo stating that during the pendency of the second appeal, the respondent/plaintiff sold his property to one N.Rajagopal through a registered sale deed dated 27.11.2017 and that the respondent/plaintiff did not give any right with regard to the suit channel to the purchaser N.Rajagopal. He therefore contended that the decree of permanent injunction granted by the first appellate court cannot be enforced and the suit filed by the plaintiff should be dismissed by allowing the second appeal.

9. A perusal of copy of the sale deed dated 27.11.2017 shows that the right over the suit channel had not been alienated by the respondent/plaintiff. However, it is necessary to go to into the merits of the case, since the plaintiff has filed a suit stating that he has right over the suit channel for irrigating his lands.

10. In order to establish that the suit channel is in existence for more than 60 years, the respondent/plaintiff mainly relied on the partition deeds dated 25.11.1959 and 04.03.1974 (Ex.A1 and Ex.A2). It is to be pointed out that the terms contained in a partition deed would bind only the parties to the partition deed and not the third parties. Though the trial court had concluded that the channel existed in survey No.81, 82, and 83, held that the plaintiff has not established his right over the said channel. On the contrary, the first

appellate court held that the plaintiff has got right over the suit channel and the defendant cannot restrain the plaintiff from using the channel for irrigating his lands. The first appellate court observed that even a third party, who purchased the property from one of the sharers can claim all his rights in the suit property.

11. A perusal of the sale deed dated 01.11.1989 (Ex.B1) executed by Perumal Naicker and his sons in favour the appellant/defendant and the sale deed dated 05.12.1983 (Ex.B2) executed by Kuppuswamy Mudaliar and others in favour of Perumal Naicker shows that absolute sales have been made entitling the purchasers to have absolute right over the channels running inside the property.

12. Admittedly, the suit channel runs in the property belonging to the defendant. The plaintiff in the suit filed by him, did not seek for a declaration of his right over the suit channel and on the contrary, he has filed the suit only for a bare injunction restraining the defendant from interfering with his peaceful possession and enjoyment of the suit channel. The defendant in his written statement had clearly averred that the suit channel is not in existence on ground and that the plaintiff has no right over the said channel. In such circumstances, the plaintiff should have amended the plaint seeking for a declaration of his right over the suit channel and for a consequential relief of permanent injunction. Since the plaintiff did not do such an exercise, the first appellate court had clearly erred in decreeing the suit in favour of the plaintiff. Therefore, the decree and judgment passed by the first appellate court is liable to be dismissed.

13. In the result,

(i) The second appeal is allowed. No costs. The connected miscellaneous petition is closed.

(ii) The decree and judgment dated 15.09.2009 passed in A.S.No.16 of 2005 by the Subordinate Judge, Tiruvallur is set aside.

(iii) The suit in O.S.No.287 of 1991 on the file of the District Munsif, Tiruvallur is dismissed with costs.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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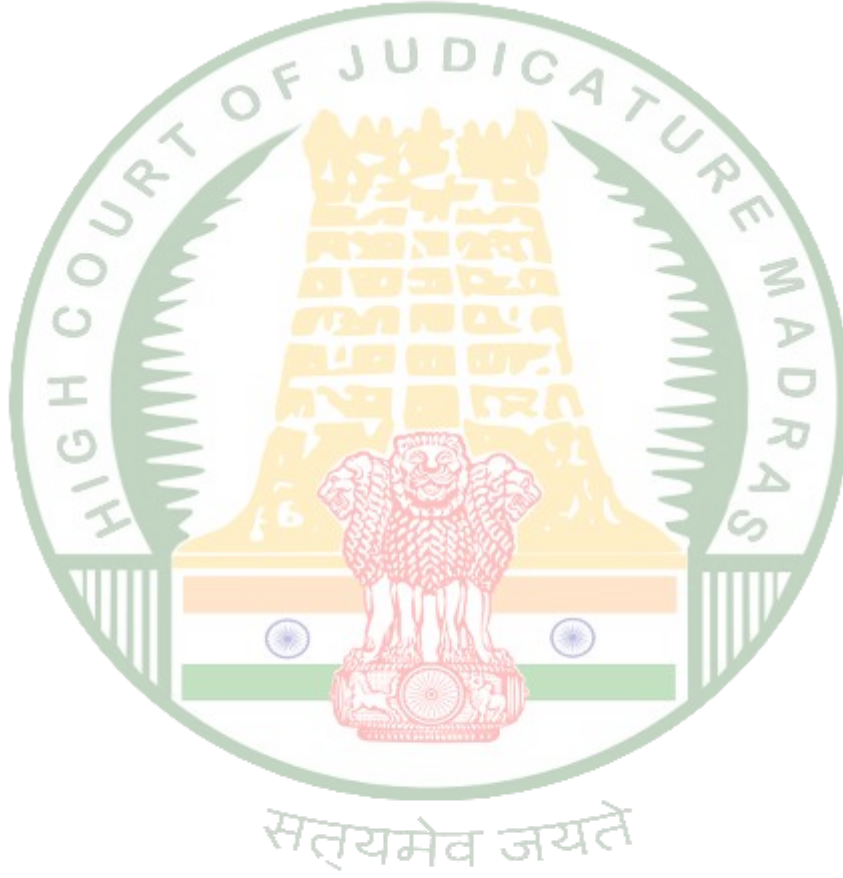
To

1. The Subordinate Judge, Tiruvallur.
2. The District Munsif, Tiruvallur,

+1cc to V.Nicholas, Advocate, S.R.No.62457

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M.P.No.1 of 2010

RSV (CO)
CS/29/01/2020



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