

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :29.10.2020

Pronounced on :3.11.2020

CORAM:

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.835 of 2009

and

M.P.No.1 of 2009

Kaliyammal

.. Appellant

/versus/

1.Senthil @ Chinnaiyan

2.Periyasamy

3.Umaiyan @ Arumugam

.. Respondents

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.01.2009 in A.S.No.172 of 2004 on the file of the Subordinate Court, Kallakurichi confirming the judgment and decree dated 27.10.2004 in O.S.No.656/2002 on the file of III Additional District Munsif's Court, Kallakurichi.

For Appellant :Mrs.R.Meenal

For R1 :Mr.P.Valliappan

For R2 :No appearance

J U D G M E N T

(The case has been heard through Video Conferencing)

This second appeal is directed against the concurrent finding of the Courts below, declining to grant the relief of Permanent Injunction restraining the defendants from interfering the plaintiff's right to irrigate his land in S.No.106/10 by drawing water from the common well situated in S.No.106/14-A through the common channel passing through the lands of the plaintiff and defendants.

2.The case of the plaintiff, who is the appellant before this Court is that, on 14/10/1986 she purchased half share in the well at S.No.106/14-A and land in S.No. 106/10 along with other lands from Natesan and others. The defendants are the co-

sharers of the well. The lands in the said survey numbers are irrigated through the common channel passing through the plaintiff and defendants land. The plaintiff's predecessor in title had sold the property with the usual right of irrigation through the common channel. The Manimutha Dam water also passes through this common channel and land in S.No.106/10 has irrigation right from the dam water for more than 50 years. While so in the year 1997, the third defendant and others obliterated the channel and obstructed the water flowing to her land. On complaint to the Revenue Thasildar, Kallakuruchi, the channel was restored. Now, again the defendants are trying to obstruct the channel and preventing the plaintiff from taking water from the common well in S.No.106/14A, to irrigate the land in S.No.106/10.

3.The defendants case is that, the plaintiff's right in common well and right to take water from the well through the channel are admitted. However, the said right to draw water from the common well and right to use the common channel is for other lands purchased by the plaintiff under the sale deed dated 14/10/1986 and it does not cover S.No.106/10. The common channel from the common well in S.No.106/14A does not pass through S.No.106/10. It runs north south and turns towards East where S.No.106/12 located. This land is owned by the defendants. There is no channel in existence to take water from the well in S.No.106/14 A to irrigate the land in S.No.106/10. The plaintiff is claiming right over a non-existing channel. Through the suit the plaintiff is trying to carve out a new channel in the patta land of the defendants. The plaintiff's claim over the channel is disputed. Hence, without prayer for declaration of right, bare injunction suit is not maintainable.

4.The trial Court, on the basis of the rival pleadings, framed issues and subsequently recasted as below:-

- 1.Whether the suit channel runs through S.No.106/10?
- 2.Whether the land in S.No.106/10 has right of irrigation from well in S.No.106/14A?
- 3.Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?

5.On the side of the plaintiff, two witnesses examined and 6 documents were marked through them. On the side of the defendants, one witness was examined. The Commissioner appointed

at the behest of the plaintiff, filed his report and sketch, which are marked as Ex.C-1 and Ex.C-2.

6.The trial Court relying upon Ex.C1-Commissioner Report, Ex.C2-sketch and the evidence of PW-2, who is the vendor of the plaintiff, held that, there is no channel shown as 'AB' in the plaint exist on the field. It is evident from the plan and report of the Advocate Commissioner that there is a 4 feet gap between the ridge of S.No.106/10 and the suit channel. When the suit channel is 4 feet away from the plaintiff land and when there is no sub-channel or way to flow water from the common channel, water could not be taken to S.No.106/10 as alleged. Therefore, the claim of the plaintiff that the suit channel has been used for irrigating S.No.106/10 is not tenable.

7.The trial Court rejected Ex.A-4 the copy of the Field Map issued by Revenue Department, which shows that the suit channel runs through S.No. 106/10 by observing that the said map is of the year 1984 and for the suit for injunction the physical feature on the date of filing the suit is relevant. While the Commissioner Report depicts the current situation, Ex.A-4 Field Map is a stale map. The trial Court held that the plaintiff failed to prove the existence of channel and usage of the same to irrigate her land in S.No.106/10. It negated the claim of the plaintiff that the suit channel passes through S.No.106/10.

8.Aggrieved by the judgment of dismissal, the plaintiff had preferred appeal. 3 additional documents were marked to show, that the land in S.No. 106/10 is water fed land and under cultivation. It has irrigation right from the Manimutha Dam water flowing through the suit channel.

9.The first appellate Court confirmed the trial Court's judgment and decree reiterating the reasons stated by the trial Court. The memorandum of the Thasildar to the Inspector of Police reporting about the obliteration of the channel passing to S.No.106/10 and obstruction by the third defendant and others, when the revenue staff tried to restore it, is Ex A-6. The document was overturned by the appellate Court, on the ground that the complaint Ex.A-6 is in respect of an incident, which has occurred in the year 1997. If the channel was actually restored based on the complaint, then the Advocate Commissioner, who visited the suit property in 14/12/2002 should have noted channel extending to S.No.106/10.

10.Ex.A-8, issued by the Assistant Engineer, PWD is the list of lands entitled for irrigation from Manimutha Dam. In the said

list, land in S.No.106/10 is also included. Referring this document, the lower appellate Court has observed that, this exhibit proves that the plaintiff has right of irrigation from the Manimutha Dam. However, from the Commissioner Report it is seen that the common channel does not extend upto to the plaintiff's land in S.No.106/10. Therefore, to restore the right, the plaintiff ought to have sought for mandatory injunction impleading the Government to get the Dam water right. Having failed to make proper prayer and for not impleading the Government, which is a necessary party, the lower appellate Court dismissed the appeal confirming the trial Court judgment.

11.In the second appeal before this Court, the learned counsel for the appellant submitted that, the Courts below failed to give due value for the revenue records and erred in overlooking the documents filed by the plaintiff. The Field Map Sketch Ex.A-4, the Adangal Ex.A-7, the list of beneficiaries of Manimutha dam water irrigation Ex.A-8, the classification of the land in S.No.106/10 as Nanja and no other alternate, except the dam water for irrigation through the common channel carrying the dam water are facts perversely overlooked. The Courts below failed to apply the law of easement and law of specific relief in this case and misapplied the law. The judgments of the Courts below have perversely and illegal. Hence, it requires interference under Section 100 of CPC.

12.The learned counsel for the respondents counter the appellant submission by stating that for relief of permanent injunction, the plaintiff ought to have first proved the common channel is passing through her land in S.No.106/10. Having failed to produce document to show that at the time of filing the suit for bare injunction, there was channel in existence as shown in the plaint annexed sketch and she had been using the common channel to irrigate the land in S.No.106/10, the Courts below have rightly dismissed the relief claimed in the suit. There is no perversity in the finding of the Courts below to interfere under Section 100 CPC.

13.Heard the learned counsels on either side. Records perused.

14.Ex.A-1 sale deed though not specifically say about the right to use the common channel to irrigate the land in S.No. 106/10, the sale deed is inclusive of the property in S.No.106/10 and half share in the common well. The Courts below

had heavily relied upon the sketch and report of the Commissioner wherein it is observed that there is gap of 4 feet from the ridge of the plaintiff land in S.No. 106/10 and the common channel. There is no sub channel found to connect the plaintiff land and the common channel.

15.The Field Map sketch maintained by the Revenue Department is relevant to decide the physical feature on record. It does not become a stale map as observed by the trial Court. It is also to be noted from the Commissioner Report that the common channel is the only source through which the water from the common well and the water from the Manimutha Dam has to run to irrigate the lands in that area including the lands of the plaintiff and defendants. While so contrary to the Field Map Sketch Ex.A-4 and contrary to the list of beneficiary found in Ex A-8, the field as on the date of the Commissioner visit (14/12/2002), the common channel does not touch the plaintiff land in S.No.106/10 and the plaintiff was not enjoying the benefit of irrigating her land with Manimutha Dam water. The Commissioner in his report has stated that, the exact measurement of the common channel, its lie and location could not be assessed without the assistance of the Surveyor.

16.While the fact being so, as pointed by the lower appellate Court, the right of irrigating the land through Manimutha Dam water is the right given by the Government through PWD. If the plaintiff is one of the beneficiaries and her right is denied or deprived, the Government is a necessary party to restore the right. Further, the plaintiff has failed to prove that on the date of filing the suit, her land in S.No.106/10 had access to the common channel. The Commissioner Report says that the plaintiff land is disjoint to the channel at least by 4 feet. The evidence of the witnesses indicates that the course of the channel stay unchanged for years together. If so, the plaintiff ought to have sought for mandatory injunction to restore the channel enabling her to irrigate her land with Manimutha Dam water by impleading the Government as a party defendant.

17.For the said reasons, the Second Appeal is dismissed with liberty to the appellant to approach the authority concern for measuring her land and common channel and to seek for appropriate remedy. The dismissal of the Second Appeal will not be a bar for fresh suit. Any observation made in this suit, the first appeal or second appeal thereon shall not be considered as heard and decided finally or used prejudicial to the parties.

18. Accordingly, this Second Appeal dismissed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

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Sub-Assistant Registrar

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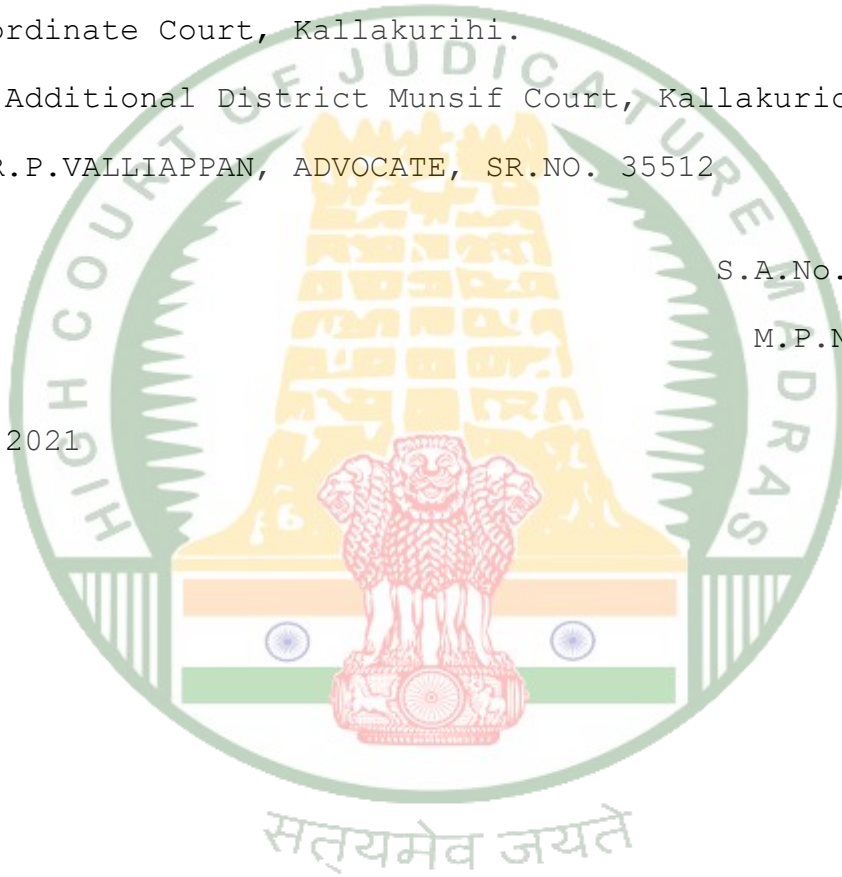
1. The Subordinate Court, Kallakurihi.

2. The III Additional District Munsif Court, Kallakurichi.

+1cc to MR.P.VALLIAPPAN, ADVOCATE, SR.NO. 35512

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RGN (CO)
KKN 28.04.2021



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