

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

S.A.NO.1285 OF 2019

AND

CMP.NO.27861 OF 2019

Dharmalingam

.. Appellant/1st Defendant

Versus

1. Krishnan

.. 1st Respondent/Plaintiff

2. Thoplan

.. 2nd Respondent/2nd Defendant

Prayer:-

Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 03.08.2019 made in A.S.No.32 of 2013 on the file of Sub Court, Kallakurichi reversing judgment and decree dated 27.06.2013 made in O.S.No.426 of 2008 on the file of the Principal District Munsif, Kallakurichi.

For Appellant : Mr.S.Sounthar

For Respondents : Mr.Ali Hasan Khan
for M/s.B.Mohan,
Caveator for 1st Respondent

JUDGMENT

The first defendant in O.S.No.426 of 2008 on the file of the District Munsif, Kallakurichi is the appellant herein. The suit was filed by the first respondent herein, as plaintiff for declaration of his right over the water channel, permanent injunction and mandatory injunction.

2. It is the case of the plaintiff that his father Krishna Mooper became the absolute owner of the property to an extent of 1.70 cent in Survey No.86/4 by virtue of the sale deed dated 13.12.1949. Since then, he has been taking water from the Well situated in Survey No.85/8A to irrigate his land. The plaintiff would further state that his father has acquired the right of taking water from one Ramasamy by a registered deed dated

24.07.1961 and a joint patta was issued in respect of Survey No.85/8. According to the plaintiff, the Well dug in 85/8A is a common Well, in which, the plaintiff's father had 1/4th share.

3. It is alleged that the plaintiff's son is an Advocate and he was appearing against one Irusayee, the first defendant in O.S.No.99 of 2007. The first defendant therein also filed another suit in O.S.No.360 of 2008 against the plaintiff and thereafter he obliterated the suit water channel. Hence, a Police complaint was given on 02.06.2008. Subsequently, from 05.06.2008, the plaintiff is taking water from the suit water channel, which is being objected by the defendants. Eventually on 30.04.2010, the first defendant damaged the water channel. Hence, the suit.

4. The suit was resisted by the first defendant contending that the suit property is a patta land belongs to him and there was no water channel as alleged by the plaintiff.

5. Based on the above pleadings necessary issues were framed. On behalf of the plaintiff, PW1 and PW2 were examined and Exs.A1 to A7 were marked. On the side of the defendants, two witnesses were examined, but no document was produced. The Trial Court after analysing the entire evidence both oral and documentary dismissed the suit. The plaintiff had taken up the matter to the Appellate Court in A.S.No.32 of 2013. The finding of the Trial Court was reversed and the suit was decreed. Assailing the judgment, the present appeal has been filed.

6. Mr.S.Sounthar, learned counsel appearing for the appellant would argue that admittedly in the document Ex.A2 relied on by the first respondent, there is no reference about his right to take water through the suit property. It is further argued that there is no specific pleadings and proof for the alleged right of taking water through the suit property. The Commissioner's report and plan were not properly appreciated by the Appellate Court while reversing the well considered judgment of the Trial Court.

7. Per contra, Mr.Ali Hassan Khan, learned Counsel appearing for Mr.B.Mohan Foa CAV, learned counsel for the respondents made submissions in support of the findings of the Appellate Court.

8. In the matter on hand, it is not disputed that the plaintiff is the owner of the property in Survey No.86/4, the first defendant owns property in Survey No.86/1 and there is a common Well in Survey No.85/8A. It is the case of the plaintiff that he is taking water from the common Well to his land through the land of the first defendant in Survey No.86/1. It is objected by the first defendant on the ground that the plaintiff

is taking water through the land of Irusayee and there is no water channel in Survey No.86/1.

9. The Trial Court having found that there is no reference about the suit water channel in Ex.A2 sale deed dated 04.07.1961 and the plaintiff has also admitted the same in the cross-examination, rejected the case of the plaintiff. It is also observed that the suit water channel is not found in the report filed by the learned Advocate Commissioner. However, the Appellate Court taking note of the fact that the Well situated in S.F.No.85/8A is a common Well belonging to the plaintiff, the first defendant and Irusayee and the learned Advocate Commissioner's report reveals obliteration of the water channel between L and M and there is no water channel in the land of Irusayee as stated by the first respondent, decreed the suit.

10. It is not in dispute that the plaintiff is entitled to take water from the common Well and his land in S.F.No.86/4 is being irrigated all along. The case of the first defendant / appellant that the appellant is taking water through the land of Irusayee is not proved and on the other hand the evidence of PW1 and the report of the Advocate Commissioner and plan Exs.C1 and C2 would establish that the suit channel was obliterated by the first defendant.

11. In my considered opinion, there is no illegality or perversity in the findings of the lower Appellate Court. In such view, the Second Appeal fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

pvs

To

1. The Subordinate Judge, The Sub Court, Kallakurichi.
2. The Principal District Munsif Court, Kallakurichi.

+1cc to Mr.S.Sounthar, Advocate, S.R.No.1396
+1cc to M/s.B.Mohan, Advocate, S.R.No.2010

S.A.No.1285 of 2019

NRJK (CO)
CS/11/12/2020