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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.03.2021

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THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

S.A.No.860 of 2017
and C.M.P.No.21639 of 2017

Ettiyan ... Appellant/ Appellant/ Defendant

Versus

1.Lakshmi
2.Arumugam
3.Elumalai ... Respondents/ Respondents/Plaintiff

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 09.08.2017 made in A.S.No.7 of 2012 on the file of the Additional Sub-Judge, Tindivanam confirming the judgment and decree dated 09.11.2011 made in O.S.No.14 of 2004 on the file of the District Munsif cum Judicial Magistrate, Vannur.

For Appellant : Mr.R.Saravanan
for M/s.Sai and Bharath and Ilan
For R3 : Mr.A.Swaminathan
for Mr.S.Dawood Khan

JUDGMENT

This Second appeal has been filed challenging the judgment and decree dated 09.08.2017 made in A.S.No.7 of 2012 on the file of the Additional Sub-Judge, Tindivanam confirming the judgment and decree dated 09.11.2011 made in O.S.No.14 of 2004 on the file of the District Munsif cum Judicial Magistrate, Vannur.

2.The main dispute in the present case is with regard to the drawing of water from the Well through the channel to the respondents' land.

3.The learned counsel for the appellant submitted that there is no dispute in drawing the water from the common Well but the dispute is with regard to transmitting the water through the channel to the respondents' land, since it will affect the Casuarina Tree planted in the appellant's land. There was no channel in the appellant's land to transmit the water to the respondents' land. He admitted the fact that the respondents' land is situated adjacent to the appellant's land and since no channel is available in the appellant's land, the



respondents can draw and transmit water through the pipeline for which the appellant has no objection. This point was also placed before both the Courts below. However, both the Courts have not considered it in a proper perspective. If the water is drawn through the pipeline without any seepage, the respondents will get benefited and at the same time the appellant will also get benefited by using the land for other cultivating purpose instead of using 200 feet for the provision of channel. The appellant has also admitted the fact that the appellant is not disputing the respondents right to draw the water in the common Well but he is only contesting with respect of drawing of water through channel.

4.He further submitted that there was a channel adjacent to the land of the appellant's land. The water can be drawn through that channel. As of now, there is no channel in appellant's land and therefore he submit that there is no impediment for the respondents to transmit the water through the channel which is available adjacent to the appellant's land. Further, the channel adjacent to his land is coming from the lake and that can be utilised for the purpose of transmitting the water from the Well to the respondents' land. However, the Courts below have not considered these point in a proper perspective. Therefore, he submitted that the judgment and decree passed by the Courts below is liable to be set aside. Accordingly, the learned counsel for the appellant suggested the following substantial questions of law:

"(a)Whether or not the Courts below erred in granting decree on the basis of an easement of necessity on which there is no pleading, issue framed or evidence adduced?

(b)Whether or not the Court below ought to have taken judicial notice of the fact that a channel is no longer a necessity to take water to the land from a common well in view of the advent of Poly Vinyl Pipes?

(c)Whether or not the Courts below erred in decreeing the suit in the absence of any right, title or interest in the plaintiffs' own title?"

5.The learned counsel appearing for the respondents submitted that there is no chance for the respondents to disturb the Casuarina Tree planted in the appellant's land while transmitting water through the channel even if the channel falls in between the Casuarina Trees. Further, he stated that the respondents will not disturb the Casuarina Trees while transmitting water through the channel.

6.Heard the learned counsel for the appellant as well as the respondents and perused the materials available on records.



7.As contended by the learned counsel for the appellant the issue to be decided in the present case is whether the respondents are entitled to draw water through the channel said to have been available adjacent to the appellant's land. Findings of both the Courts below is that there was a channel in the appellant's property as stated in the 'C' schedule property but the facts remains that no channel is available now and everything was removed by the appellant from his land. On perusal of the judgment and other documents, it could be seen that these properties were jointly owned by the vendors of the appellant and respondents. From the said vendors, the appellant and respondents purchased the properties. The thing which commonly affect the parties is that the parties to the suit are entitled to draw water from the common Well but it should be transmitted through both the appellant and the respondents land one after and other, in such case, the issue to be decided whether the water can be transmitted through the channel as stated in the 'C' schedule property.

8.The Court below appointed the Advocate Commissioner and he filed the report that there was no channel available in the 'C' schedule property. Presently, the Casuarina Trees were planted by the appellant. However, both the Courts below found that there was a channel on the appellant's land and it was purposely destroyed by the appellant so as to deny the right of the respondents. Even if the channel was destroyed by the appellant, now the issue is with regard to transmitting the water across the appellant's land to the respondent's land. The channel would be only 3 feet width and 230 feet length, which can set up within 2 to 3 hours time. The channel can be set up temporarily and it can be closed if water is not available in the Well, obviously it will get closed if it is not used continuously for few months. When such being the case, it cannot be decided on the basis that there was no channel available in the land of appellant to draw the water from the Well to the respondent's land.

9.The common right is available for all the parties to the suit to draw the water from the common Well and obviously the water has to be transmitted from one land to another land since all the lands are situated one after another. The 1st party has to provide the way to transmit the water by laying the channel through his land to the 2nd party and accordingly, the 2nd party has to permit the 3rd party to lay the channel and transmit water to his land. In the similar manner, it is duty of the appellant also to permit the respondents to lay the channel on his land to the extent of minimum of 3 feet as in the 'C' schedule property. Even if there is no channel available it should be made available. All the aspects have been considered in a proper perspective by both the Courts below after taking into consideration of the Advocate Commissioner's report and submission of the appellant and the respondents. Therefore, such well considered judgments need not be interfered with by this Court.



10.The entire perusal of the judgment and decree and upon hearing the arguments of both the learned counsel, this Court feels that no substantial questions of law that arises as suggested by the learned counsel for the appellant.

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11.In the result, this Court does not find any infirmity in the order passed by the Court below. Hence, the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To:

- 1.The Additional Sub-Judge, Tindivanam.
- 2.The District Munsif cum Judicial Magistrate,
Vannur.

+1cc to Mr.T.Sai krishnan, Advocate SR.No. 15471

+4ccs to Mr.S.Mashar Khan,Advocate SR.No. 15457

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AD(CO)

A.SK(06.09.2021)