
(2012) 01 MAD CK 0283
In the Madras High Court
Case No : S.A. No. 1452 of 1996

Alagesan, Thangavel and Rangasamy	APPELLANT
Vs	
Ramanujam (Died) and Others	RESPONDENT

Date of Decision : 03-01-2012

Acts Referred:

Easements Act, 1882 — Section 2, 7

Citation : (2012) 1 CTC 839

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : J. Muthiah for Sarvabhuman Associates, for the Appellant; Avinash Wadhvani for V. Raghavachari, Advocate for Respondent Nos. 2 to 7, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The Appellants/Defendants have filed the present Second Appeal as against the Judgment and Decree dated 10.4.1996 in A.S. No. 127 of 1994 passed by the Learned Principal District Judge, Villupuram. The First Appellate Court viz., the Learned Principal District Judge, Villupuram, while delivering the Judgment in A.S. No. 127 of 1994, dated 10.4.1996 (in the Appeal preferred by the Appellants/Defendants), has among other things observed that "it is to be accepted that as prayed for by the Respondent/Plaintiff in the Plaint in the suit land, as seen from the Commissioner's Report, through AB Channel, the Arumpattu lake water flows and in the said channel, the Appellants/Defendants have destroyed the "DC portion" and further, the water is not flowing to the land of the Respondent/Plaintiff and moreover, the Appellants/Defendants in AB Channel have no right to destroy any portion" and consequently, confirmed the Judgment and Decree of the Trial Court in regard to grant of the relief of mandatory injunction and permanent injunction and dismissed the Appeal with costs.

2. Earlier, in the main Suit before the Trial Court, Issues 1 to 5 have been framed

for determination.

3. On behalf of the Respondent/Plaintiff, witnesses PW 1 to PW 4 have been examined and Ex. A.1 to Ex. A.3 have been marked. On the side of the Appellants/Defendants, witnesses DW 1 to DW 3 have been examined and Ex. B.1 to Ex. B.15 have been marked. However, Ex. C.1, Commissioner's Report and Ex. C.2, Commissioner's Plan, dated 2.3.1987, have been marked.

4. The Trial Court, on an appreciation of oral and documentary evidence available on record, has come to a resultant conclusion that "in the suit property through channel AB, the Respondent/Plaintiff has cultivated the land and further, it is held that the Appellants/Defendants have not spelt out any reason as to why they have destroyed the DC portion and accordingly, granted the relief of permanent injunction in favour of the Respondent/Plaintiff and furthermore, granted the relief of mandatory injunction and decreed the Suit with costs. It also granted two months" time to execute the relief of mandatory injunction.

5. Feeling aggrieved against the Judgment and Decree of the Trial Court in O.S. No. 34 of 1987, dated 15.2.1994, the Appellants/Defendants have projected A.S. No. 127 of 1994 before the First Appellate Court viz., the Learned Principal District Judge, Villupuram, after contest, the Appeal filed by the Appellants/Defendants by upholding the Judgment and Decree of the Trial Court and dismissed the Appeal with costs.

6. Being dissatisfied against the Judgment and Decree of the First Appellate Court dated 10.4.1996 in A.S. No. 127 of 1994, the Appellants/Defendants have preferred this Second Appeal before this Court.

7. At the time of admission of the Second Appeal, this Court has formulated the following substantial questions of law for determination.

(1) Whether in law there could be a decree by picking loopholes in the evidence of the Defendants especially when the Plaintiff had failed to prove the claim made by him regarding the existence of a detailed channel in S. No. 264, which is the land belonging to the Appellants ?

(2) Whether the Courts below are correct in law in granting a decree by relying upon the report and plan filed by the Advocate Commissioner pursuant to an ex-parte order and the Plaintiff had not taken any steps to examine him as a witness to prove the report and plan ?

(3) Have not the Court below committed a grave error in law in not non-suited the Plaintiff by drawing an adverse inference against him for not producing the revenue records to prove the existence of a detailed channel as claimed by him ?

8. The Contentions, Discussions and Findings on substantial questions of law Nos. 1 to 3:

According to the Learned Counsel for the Appellants/Defendants, the Trial Court as well as the First Appellate Court have committed an error in granting the relief

of permanent injunction and mandatory injunction, when the Respondent/Plaintiff has failed to produce proper evidence to establish that the channel referred to in the plaint plan is a "detailed channel".

9. It is the contention of the learned Counsel for the Appellants/Defendants that the First Appellate Court has not taken into account the evidence of DW 3 to the effect that the channel mentioned by the Respondent/Plaintiff is not a detailed channel of the Respondent/Plaintiff and further, the Village Plan and other records have not been produced to prove the case of the Respondent/Plaintiff. Added further, as a matter of fact, the First Appellate Court should have drawn an adverse inference and dismissed the Suit filed by the Respondent/Plaintiff.

10. The plea of the Appellants/Defendants is that the Suit channel runs on the land belonging to the Appellants admittedly and therefore, it cannot be described as a detailed channel, as per the claim made by the Respondent/Plaintiff. In short, it is the contention of the Appellants/Defendants that the Respondent/Plaintiff has miserably failed to plead and prove any of the Easement rights.

11. The learned Counsel for the Appellants/Defendants urges before this Court that the channel described in the plaint plan has not been described as a suit property and the relief is claimed only with reference to Survey No. 270, which is shown as the suit property and the channel marked AB in the plaint plan is in Survey No. 264, which belongs to the Appellants/ Defendants.

12. Per contra, it is the submission of the learned Counsel for the Respondent/Plaintiff that on 27.1.1984, the Appellants/Defendants have destroyed the channel to an extent of 20 feet and that the Appellants/Defendants have no manner of right in the channel and that through the channel, water has been irrigated to the suit property for the purpose of cultivation for well over 50 years by the Respondent/Plaintiff under ancestors and when the lake goes dry at that point of time through oil engine, water will be drained out and taken through the channel and cultivation will be done in the suit property and that both the Trial Court as well as the Appellate Court have taken into consideration of the attendant facts and circumstances of the case in an integral fashion and has arrived at a concurrent finding that the Respondent/Plaintiff is entitled to claim the relief of permanent injunction as well as the mandatory injunction, which need not be disturbed by this Court at this distance point of time.

13. At this juncture, the learned Counsel for the Appellants/Defendants relies on the decision of this Court in Govindarasami Naidu v. Shanmuga Nattar and another, 2007 (2) CTC 553, wherein it is laid down that "it is well settled that the Plaintiff must establish/prove his case and cannot succeed automatically on the weakness of the Defendant's case."

14. Before the Trial Court, it is the evidence of PW 1 (Respondent/Plaintiff) that the suit property 1 acre and 73 cents initially belongs to Ramachandra Chettiar, from whom he purchased the property for a sum of Rs. 16,000/- on 13.1.1982 as per Ex. A.1-Sale Deed and from the date of sale viz., Ex. A.1, dated

13.1.1982, he has been in enjoyment of the same and Ex. A.2 is the Kist Receipt and water irrigation in respect of the suit property is through Arumpattu Lake and the water irrigation for the suit land will be made through the channel which passes through the 1st Appellant/1st Defendant property and the breadth of the channel is 3 feet and the extent of the channel is approximately 250 feet and the channel passes from Northern side to Southern side, near the land of the 1st Appellant/1st Defendant and he is doing agricultural cultivation by utilizing the water of the channel.

15. The evidence of PW 1 is to the effect that the channel to an extent of 20 feet is passing through the Defendant's property and therefore, he has declined and hence, he has filed the present Suit. That apart, it is the evidence of PW 1 that he does not know whether the channel described in the Plaint is a channel and the Appellants 1 & 2 /Defendants have purchased 2 acres and 5 cents from Athinarayana Chettiar and before him, the Appellants/Defendants have purchased the property and he does not know from whom he purchased the property.

16. Continuing further, it is the evidence of PW 1 that the Appellants/Defendants have dug a well ten years ago and it is wrong to state that for the channel, there is a well water and the description of "Mamool" refers to only the channel and the "Mamool channel" is coming to an end in his land.

17. PW 2 in his evidence has deposed that the channel is 3 feet breadth and the length is 250 feet and through the channel, the water of Arumpattu lake will pass through and from the initial days, the water is flowing and the water will flow to his land from the Southern side and it is incorrect to state that there is no channel.

18. PW 2 (in his cross-examination) has deposed that in Survey No. 271, the Government channel is passing through and only through the Government channel for his uncle's land, water is passing through and on the Northern, Eastern and Southern side of the Ganapathy's land, the channel is passing through and on the Eastern as well as the Southern side, the Government channel is situated and in the Defendant's land on the Southern and Northern side, on the upper portion, there is no Government channel.

19. The evidence of PW 2 goes to the effect that the 1st Appellant/1st Defendant has dug a well and on the Western side of upper portion, he has dug a well and he is draining the water through oil engine and he is utilizing the channel.

20. PW 3 in his evidence has stated that the Respondent/Plaintiffs land is situated on the Southern side of his brother's irrigation land and for the Respondent/Plaintiffs land, the irrigation is done through Arumpattu lake and the breadth of the channel is 3 feet and the length of the channel is 250 feet and to his knowledge, there is a channel and the Respondent/Plaintiff through channel water is irrigating his land.

21. PW 3 (in his cross-examination) has deposed that the channel is passing through the 1st Appellant/1st Defendant and his brother's land and adjacent to his brother's land on the Southern side, the Respondent/Plaintiffs land is situated, etc., and before the purchase effected by Alagesan, there is no well and Alagesan dug a well and on the upper portion of the Northern side, there is a well and only through the channel, the water is to pass through.

22. PW 4 (in his evidence) has deposed that water is passing through the channel for the past one year and the channel to an extent of 30 feet from the land has been destroyed and presently, the Respondent/Plaintiffs land is in the state of uncultivation and further, it is wrong to state that the channel which is in the 1st Appellant/1st Defendant's land, is in separate channel of the 1st Appellant/1st Defendant and that it is incorrect to state that no water can be drawn by the Respondent/Plaintiff.

23. It is the evidence of DW 1 (1st Appellant/1st Defendant) that he has a Nanja land bearing Patta No. 264 of an extent of 2 acres and 9 cents and initially, the said land belongs to Appaji Chettiar and that Appaji Chettiar has sold the property on 5.8.1972 as per Ex. B.1-Sale Deed and he along with the 2nd Appellant/2nd Defendant has purchased the property for a sale consideration of Rs. 11,000/- from Athinarayana Chettiar and the copy of the Sale Deed is Ex. B.2 and on the Southern side of the land, the Respondent/Plaintiffs land is situated and on the Northern side of the land, there is a Government channel and that Ganapathy Naicker land is situated on the Eastern side of the land and through the lake channel, the water is passing through on the Southern and eastern side and through his channel, the Respondent/Plaintiff has no right to draw/take water and the lake channel cannot pass through each land and for all lands, there is no lake channel and the channel will be formed when there is necessity and when there is no necessity the channel will be destroyed and the channel is not in enjoyment of the Respondent/Plaintiff.

24. It is the evidence of DW 2 that the 1st Appellant/1st Defendant has purchased the property and has dug a well and for his land, there is a channel passing through and the 1st Appellant/1st Defendant has dug a well and has formed a channel ten years ago.

25. DW 2 (in his cross-examination) has deposed that in the Respondent/Plaintiffs land, for the past seven years, Punja cultivation is being raised and the lands situated on the river side are irrigated through the channel water.

26. DW 3 (in his evidence) has deposed that on the Northern and Southern side of Survey No. 264, the channel is passing through and the channel is passing through from the Northern side at Arumpattu-Mamandoor Bridge under the bridge and through Mamool channel, the land is also irrigated and in Survey No. 264, there is a sugarcane and in others, there are six months old paddy and the channel is entering into the land of Alagesan and then, passing through and the channel is situated on the upper portion of Survey Nos. 262 & 264 and that the

channel is situated on the Southern side from Northern side.

27. The Trial Court in his Judgment in Para 15 has observed that "as seen from the evidence of witnesses, the Mamool channel is a common one in all places and from the Mamool channel for other places, the water will pass through, etc."

28. At this juncture, this Court pertinently points out that a perusal of Ex. A.1-Sale Deed, dated 13.1.1982, in favour of the Respondent/Plaintiff, executed by one Ramachandra Chettiar shows that through Mamool water irrigation will be done for the purpose of cultivation. Ex. B.2 is the Sale Deed dated 2.6.1974, to and in favour of the 1st Appellant/1st Defendant, to and in favour of the 1 & 2 Appellants/Defendants executed by Athinarayana Chettiar. A glance of Ex. B.2-Sale Deed, dated 2.6.1974, clearly indicates that there is no reference in the said document as to how the cultivation will be done either through the channel water or otherwise. The Advocate Commissioner in his Report-Ex. C.1 has categorically stated that he has noted down the physical features of the suit property on 7.2.1984 and that there is a road by name Arumpattu Road which runs towards East and the said road has been marked in the plan as Road and further on that side of the road, there are channels running towards East and the Southern side of the Road at point X a channel is seen towards South and this channel is shown as X A D C B and ends in the Respondents/Plaintiffs land. Further, on the Eastern side to this channel, there is a land which belongs to the Appellants/Defendants and on the Southern side to this land, the Respondent/Plaintiffs land is seen, etc.

29. The Advocate Commissioner in his Ex. C.1 Report has stated that there is a road by name Arumpattu Road which runs towards East and the same is marked in the Plan as "Road" and on either side of this Road, there are channels running towards East and on Southern side of this Road at point X, a channel is seen towards South and this channel is shown as X A D C B and ends in the Plaintiffs land. Further, the learned Commissioner has also stated in Ex. C.1-Report that "on Eastern side to this channel, there is land which belongs to the Defendants. On the Southern side to this land, the Plaintiffs land is seen, etc."

30. Indeed, in Ex. C.1-Commissioner's Report, there is a reference as to the existence of a well in the Defendant's land and that he has seen the channel X A D C B and A X measures 3" A D measures 24"5 D C measures 8.5" C B measures 292" and the width of the channel is 2"8" and the position of the channel D C is seen damaged recently.

31. It is significant for this Court to pinpoint that the Advocate Commissioner in his report has stated that the case of the Plaintiff is seen that his land is a wet land and that land is irrigated from the tank water. From the tank water is flows the X. From the X water flows to Southern side along with A D C B and the Plaintiffs land and the Appellants/Defendants have damaged the D to C and thus prevent the flow of water.

32. The Advocate Commissioner also in his report has gone to the extent stating that the Defendant says that the channel X A D C B runs in his land and that this

channel is not in existence for a long period as alleged in the Plaint and further, the Respondent/Plaintiffs land has to be irrigated by a channel which is situated on the Eastern side of the Defendant's land. This channel is very small one. But, the Plaintiff says that the land cannot be irrigated in this way because the land level on the Western side is situated higher than the land of this channel. So, irrigation is impossible from the Eastern channel.

33. The learned Counsel for the Respondent/Plaintiff cites the decision of this Court in *The State of Tamil Nadu, rep. by the The State of Tamil Nadu Vs. V.A. Abdul Karim and Others*, wherein it is held that "the State Government has power to regulate and distribute water for effective irrigation of agricultural lands, etc.

34. He also seeks in aid of the decision *Kadarbhai Mahomedbhai and Another Vs. Haribhai Ranchhodbhai Desai and Another*, wherein it is held thus:

Though it was open to the Defendant to use his property in any manner he liked, his right was subject to the liability of the natural easement u/s 7, Illus. (h), Easements Act which existed for the last several years. He could not therefore use his land in a manner which would cause damage to the land of the Plaintiff. But taking into consideration the law of average, it can safely be said that the water channel in its present position does not pose a serious threat to the Plaintiffs land at all. The Plaintiff cannot come to the Court and request that the water channel should be restored in its original position so as not to impede the flow of stream in its natural course even with regard to flood water. The Court while granting appropriate relief has to take into consideration the imminent danger and not distant future danger. The Plaintiff was therefore not entitled to any mandatory injunction. The decree for permanent injunction passed by the Trial Judge was correct and it was not necessary for the Appellate Court to qualify his final order with regard to the danger of flood water which was not imminent, 1885 (28) Ch D 688, Rel. on; *Rasiklal Manilal Bhatt and Others Vs. Savailal Hargovindas Sur, & Bauribandhu Patra and Another Vs. Sagar Malla, & Gopalakrishna Panicker Vs. Thirunakkara Devaswom*, Distinguished.

35. It is to be borne in mind that the absolute and important right of the State Government is to regulate and distribute the supply of water for irrigation to one and all whose lands form and part of the ayacut under an irrigational source. It cannot be undermined by the Appellants/Defendants and the same cannot be whittled down by them. The material resources of the community are to be distributed in a best possible manner to sub-serve the common good and that is the Concept of Law and Justice in the considered opinion of this Court. Section 2 of the Indian Easement Act, 1882, enjoins that nothing in the Act shall be deemed to affect any law not expressly repeal or to derogate from any right of the Government to regulate the collection, retention and distribution of the water of the rivers and streams flowing in natural channels and of natural lakes and ponds or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation. The

Government has every right to regulate the water available to the ryots in a certain locality.

36. It is to be noted that an Advocate Commissioner can be appointed even before the filing of the Written Statement. As a matter of fact, the object of local inspection/investigation is not to collect evidence. But, to obtain evidence. Furthermore, to ascertain the spot situation and to elucidate the matter in dispute, an Advocate Commissioner can be appointed by a Court of Law. Their report of Advocate Commissioner is legal evidence and therefore, it is not at all necessary to the Commissioner for proving the report.

37. In the case before us, it is the evidence of DW 1 that to his land, the Government channel is passing through from the Northern side and further, he has deposed that the said channel is ending with his land. On the side of the land of the Defendant and also, the channel from Northern side to the Southern side through the Defendant's land, the channel is passing through on the Western side and as such, the First Appellate Court has come to a definite conclusion that in AB channel, the Appellants/Defendants have no right to destroy the "DC portion".

38. Even the evidence of DW 2 proceeds to the effect that the land of the Respondent/Plaintiff is situated on the Southern side of the Defendant's land and the Government Channel is proceeding from the Southern side and passing through the Northern side. DW 3 has also in his evidence has deposed that the detailed channel is passing from the Northern side to the Southern side. Therefore, it is crystal clear that the Suit channel is a Government channel and the Appellants/Defendants have no right to destroy the same as opined by the First Appellate Court in his Judgment in Para 15. The suit land is also the Nanja land and the Arumpattu lake water from, X place from Northern side, it is getting separated on the Southern side and it is proceeding to the land of the Respondent/Plaintiff through AB channel, as seen from Ex. C.2-Commissioner's Plan. From all these, it is quite evident that the suit channel is a mamool channel and in the said channel, the portion DC has been destroyed by the Appellants/Defendants. Even in Ex. A.1-Sale Deed, at the end of the schedule describing the property particulars, it is clearly specified that for the suit land, irrigation can be done through the mamool water. On a conspectus of entire facts and circumstances of the case and on taking note of entire gamut of oral and documentary evidence adduced by the witnesses on either side and also, in the light of the detailed qualitative and quantitative discussion mentioned supra, this Court comes to an inevitable conclusion that for the suit property through AB channel, as mentioned in Commissioner's Report, the Arumpattu Lake water is passing through and inasmuch as the Appellants/Defendants have destroyed the DC portion in the channel, the water is not passing through the land of the Respondent/Plaintiff and the case of the Respondent/Plaintiff in this regard, is found to be an acceptable one in the considered opinion of this Court. Viewed in that perspective, it is held that both the Trial Court as well as the First Appellate

Court have looked into the oral and documentary evidence (available on record) by appreciating the same and taken note of the attendant circumstances of the case in a threadbare fashion and has come to a correct conclusion while granting the relief of permanent as well as the mandatory injunction which in the considered opinion of this Court does not require any interference. Accordingly, it is held by this Court that a Decree can be passed by a Court in favour of the Respondent/Plaintiff based on Ex. C.1-Advocate Commissioner's Report and C.2-Plan, which can be relied upon for elucidating/resolving the controversies in dispute between the parties; the Report of Advocate Commissioner is legal evidence and it is not necessary to prove his report and even in the absence of revenue records Ex. C.1-Commissioner's Report and Ex. C.2-Plan can be relied upon by the Trial Court as well as the First Appellate Court and also that there is no need to draw an adverse inference against the Plaintiff (Deceased) and further that, the Respondents/Plaintiffs cannot be non-suited for not producing the revenue records so as to prove the existence of a detailed channel and thus, the substantial questions of law 1 to 3 are answered against the Appellants/Defendants. Resultantly, the Second Appeal fails.

In the result, the Second Appeal is dismissed leaving the parties to bear their own costs. Consequently, the Judgment and Decree of the Learned Principal District Judge, Villupuram in A.S. No. 127 of 1994, dated 10.4.1996 as well the Judgment and Decree of the District Munsif, Thirukoyilur in O.S. No. 34 of 1987, dated 15.2.1994, are confirmed by this Court for the reasons assigned in this Appeal.