

SOMA-
SUNDARUM
CHETTY
v.
VADIVELU
PILLAI.

is enjoying it undisputedly, having constructed buildings, etc., thereon. He does not however give the date on which he took possession, or say anything about possession for more than twelve years as giving him a title apart from the alleged sale. The only issue framed as to title is "Whether the suit property belongs to plaintiff?" Reading this issue with the plaint it cannot be said that it raises the question of title based on twelve years' possession. In *Shiro Kumari Debi v. Govind Shau Tanti*(1) it was distinctly held that a declaration cannot be given on a title not stated either on the plaint or the issues. We agree with that decision and dismiss this appeal.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1908
September 8.

TIRUVENKATACHAR (PLAINTIFF), APPELLANT,

v.

DESIKACHAR (DEFENDANT), RESPONDENT.*

Easement Act, Act V of 1882, s. 4—Right to take water through another's land when sold by Government.

A right to take water through another person's land whenever Government should sell such water is a right of easement within section 4 of the Easement Act.

It will make no difference that water was not taken for several years because Government refused to sell or because there was no water in the source of irrigation.

SUIT for declaration of plaintiff's right to an artificial channel in defendant's land; for the restoration of a water-course and for an injunction and damages.

The plaintiff claimed a right of easement to carry water through the channel to his own lands whenever Government should sell water to him. The plaintiff's lands in respect of

(1) I. L. R., 2 Calc., 418.

* Second Appeal No. 951 of 1905, presented against the decree of G. F. T. Power, Esq., District Judge of Coimbatore, in Appeal Suit No 184 of 1903, presented against the decree of M. R. Ry. T. Sadasiva Aiyar, District Munsif of Coimbatore, in Original Suit No. 269 of 1902.

which he claimed the right were punja lands, to which Government was not bound to supply water. It was found from the evidence that for several years Government had refused to supply water. The defendant contended that there was no uninterrupted enjoyment, and no right by prescription was acquired by the occasional precarious user.

TIRUVEN-
KATACHAR
v.
DESIKACHAR-

The Munsif held that such a right to *carry water whenever the owner of the water should consent* cannot be the subject of an easement right, and dismissed the suit.

This was confirmed on appeal.

The plaintiff appealed to the High Court.

The Hon. The Advocate-General for appellant.

V. C. Seshachariyar for respondent.

JUDGMENT.—An easement is a right which the owner of land possesses, as such, for the beneficial enjoyment of the land, to do, and continue to do something, in or upon, or in respect of certain other land not his own (*vide* section 4 of Act V of 1882). In the present case it is found that the plaintiff had the right to take water to his own land through a channel on the defendant's land whenever the water was sold to him by Government. We think that this right amounts to an easement within the definition above given. We do not think the fact that Government is not bound to sell water to the plaintiff affects the question. It might be that for a series of year there was no supply in the irrigation source. It could not be contended that for that reason the plaintiff would lose his right to take water through the channel when water was available, supposing Government was then willing to sell it to him. Whether the plaintiff took no water through the channel because there was no water in the irrigation source or because Government refused to sell him water can make no difference. We therefore modify the decrees of the Courts below and grant the plaintiff the declaration and injunction prayed for. The defendant will also restore the channel to its original condition with a width of 5 feet, including the breadth of the south bank of the channel to a depth of $1\frac{1}{2}$ feet in six months from this date, failing which the plaintiff may do so, and recover the cost from the defendants. Each party will bear his own costs throughout.