

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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SECOND APPEAL No.268 of 2011

JUDGMENT:

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The unsuccessful 2nd plaintiff had filed this appeal under Section 100 of the Code of Civil Procedure, 1908 assailing the decree and judgment dated 16.09.2010 of the learned Additional District Judge, Vizianagaram in AS.No.54 of 2005 whereby the learned Additional District Judge, while allowing the said appeal of the defendants, had set aside the decree and judgment dated 07.03.2005 of the learned Additional Junior Civil Judge, Vizianagaram in OS.No.266 of 2001 and had dismissed the said suit of the plaintiffs filed for a declaration that the plaintiffs are equally entitled along with the defendants to draw water from the schedule mentioned two Wells to their respective lands and for consequential perpetual injunction restraining the defendants from interfering with their right to draw water from the plaint schedule mentioned two Wells to their respective lands and for costs of the suit.

2. I have heard the submissions of the learned counsel for the appellant/2nd plaintiff, who is the daughter of the deceased 1st plaintiff, and the learned counsel for the contesting respondents. I have perused the material record.

3. The learned counsel for the appellant/2nd plaintiff would contend that the following substantial questions of law are involved in this second appeal.:

1) Whether the learned lower appellate Court was justified in dispelling the finding of the learned trial Court, which is based on oral evidence and Commissioner's report that the suit schedule wells are aged 50 years and they were in existence during the partition, merely on the ground that there is no mention about the Wells in Ex.A1, and does it not amount to mis-appreciation of

evidence by the Lower appellate Court?

2) Whether the learned lower appellate Court was justified in differing from the findings of the learned trial Court on the sole ground that the suit wells are not referred to in the document and does it not amount wrong appreciation of the material evidence like the Commissioner's report, by the lower appellate Court?

3) Whether the lower appellate Court is justified in reversing the well considered judgment and decree and giving its findings without reference to the documents which is apparent error on the face of the record?

4) Whether the lower appellate Court was justified in reversing the well considered judgment and decree by observing that the appellant has not perfected her right, in the light of the observations of the trial Court that the wells are aged 50 years and easementary right for the appellant coming into picture?

[Reproduced verbatim]

4. On the other hand, the learned counsel for the contesting respondents had argued that no such substantial questions of law or any other questions are involved in this appeal and that the second appeal is liable to be dismissed at the admission stage.

5. Now, this Court has to examine as to whether or not any substantial questions of law are involved in this second appeal and whether the appeal deserves admission for disposal on merits or is liable to be dismissed at the stage of the admission.

6. The basic facts and the case of the plaintiffs, in brief, may be summed up as under:

6.1 The plaintiffs who are the mother and the daughter had brought the suit for declaration that they have equal right along with the defendants to draw water from the schedule mentioned two Wells to their respective lands and for a perpetual injunction to restrain the defendants from interfering with such right of the plaintiffs. It is not in dispute that the husband of the 1st plaintiff-Somulu, the defendants 2 and 3 and the father of the 1st defendant are brothers and that they had lived jointly and

together enjoyed the properties of the family. According to the plaintiffs, Somulu had purchased the entire land covered by exhibit A1, the registration extract of sale deed dated 28.11.1955. However, it is also admitted that during the life time of Somulu, the property that was purchased under exhibit A1 was partitioned among the four brothers including Somulu. The suit schedule Wells are admittedly in the lands of D1 and D2 i.e., the son of the one of the brothers of Somulu and another brother of Somulu. The plaintiffs are now claiming a right to draw water from the said Wells in the lands of D1 and D2, i.e., the lands which fell to the shares of the brothers of Somulu in a partition. Therefore, the onus of proof as well as the legal burden is on the plaintiffs including the second plaintiff/appellant herein. The plaintiffs in support of their claim rely upon the fact that the Wells were in existence since a long time i.e., even by the date of the partition among Somulu and his brothers and that during the life time of Somulu waters were being drawn from the said two Wells to the lands which fell to the share of Somulu and that earlier the husband of the 2nd plaintiff/appellant had filed a suit in OS.No.200 of 1994 for perpetual injunction and that in that suit a Commissioner was appointed and that the said Commissioner had noted in his report that the Wells are of 50 years old and that, therefore, the said fact would establish that the Wells are in existence even by the date of the partition amongst the brothers of Somulu including him and that the contention of the defendants that they have dug up the Wells in their respective lands in S.Nos.83/15 and 83/25 and that they are alone entitled to draw water from the respective Wells is incorrect.

6.2 On the other hand, the defendants deny the claim of the plaintiffs to draw waters from the Wells admittedly situated in the lands of the defendants 1 and 2.

7. In this background of the facts and contentions, the 2nd plaintiff, her husband and supporting witnesses were examined as PWs1 to 4 and

the defendants 1 and 2 and their supporting witness were examined as DWs.1 to 3. Exhibits A1 and A2 were marked on the side of the plaintiffs and exhibits B1 to B3 were marked on the side of the defendants.

8. Apart from the rough sketch, the only document filed on behalf of the plaintiffs is exhibit A1, the registration extract of the sale deed under which the entire land was originally purchased in the name of Somulu. It is not in dispute that the said land was partitioned amongst Somulu and his brothers and that the lands in which the subject Wells are situated fell to the shares of the defendants 1 and 2. In the said sale deed admittedly there is no recital to show that by the date of the said purchase under the said document the Wells were in existence in the lands. Coming to the partition among the brothers, even that partition was not reduced into writing. Therefore, there is no document evidencing the existence of Wells as on the date of the purchase under exhibit A1 and as on the date of the partition amongst Somulu and his brothers. Then what remains is the evidence of PWs1 to 4. The 2nd plaintiff is PW1 and her husband is PW2. The evidence brought on record would show that they were all not present when the admitted partition took place between Somulu and his brothers. Therefore, even the oral evidence about the existence of the Wells and the right to draw waters from the Wells is of no avail to the plaintiffs. Coming to the contentions based on the Commissioner's report to the effect that the Commissioner who was appointed in the former suit had noted that the Wells are 50 years old, what is worthy to note is that the Commissioner's report was not exhibited. Though such a Commissioner's report was not exhibited, the trial Court had made observations as if there was an observation in the Commissioner's report that the Wells were in existence since 50 years prior to the visit of the said Commissioner. Thus a careful analysis of the facts and the examination of the evidence brought on record in juxtaposition with the

pleadings would show that the plaintiffs could not discharge the onus and also the legal burden for seeking a declaration in regard to the right of drawing waters from the Wells admittedly situated in the lands of the defendants 1 and 2. The Court below had accurately considered the facts and appreciated the evidence in the right perspective and had come to a right conclusion and against the plaintiffs, in the well considered view of this Court. Further, a reading of the questions raised as substantial questions would show that the said questions are a blend of facts and are not even pure questions of law. Thus, the questions raised are not substantial questions and there is no substance in the contentions advanced on behalf of the appellant/2nd plaintiff.

9. Viewed thus, this Court finds that the substantial questions sought to be raised are not involved and that the decree and judgment of the Court of first appeal by which the decree and judgment of the trial Court were reversed, is a well considered judgment and having regard to the reasons supra, this court finds no infirmity calling for interference.

10. In the result, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs.

Miscellaneous petitions, pending if any, in this second appeal shall stand closed.

M. SEETHARAMA MURTI, J

08th July,, 2015
Vjl