

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**906 SECOND APPEAL NO. 347 OF 2015
WITH
CA/8388/2015
IN
SA/347/2015**

**ANIL PRABHAKAR UDAWANT
AND ORS.**

VERSUS

**VINAYAK RANGNATH UDAWANT
AND ORS.**

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Mr. N.S.Jaju, Advocate for Appellants.
Mr. V.M.Maney h/f Mr. Milind Patil,
Advocate for R – 2.

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CORAM : T.V.NALAWADE, J.

DATE : 28th JUNE, 2016

ORDER :-

. The Appeal is filed to challenge the Judgment and decree of R.C.S. No. 393/2005 [old R.C.S.No. 242/2002] which was pending in the Court of the Civil Judge [Jr.Division], Rahata, District Ahmednagar and also the

Judgment and decree of R.C.A. No. 12/2008 which was pending in the Court of the District Judge – 1, Kopargaon, District Ahmednagar. The Suit filed by the present respondent Vinayak for relief of declaration and injunction is decided in his favour. Heard both sides.

2. Plaintiff Vinayak, defendant No. 1 Mohan, Baburao and one Sakhahari are the sons of one Dagdabai. Dagdabai was owner of land G.No. 325 to the extent of 5 H. 24 R. situated at village Loni [Bk.], Tahsil Rahata, District Ahmednagar. During life time of Dagdabai, she distributed most of the portion amongst her 4 sons and she kept some portion with her. After the death of Dagdabai, the said portion was also partitioned amongst these 4 sons of Dagdabai.

3. It is the case of plaintiff that there were 2 wells in the land owned by Dagdabai. It is contended that one well is situated in the portion given to Mohan and other well is situated in the portion given to Baburao. It is contended that as there were only 2 wells, all the 4 brothers had equal share in these 2 wells. It is contended that defendant Mohan and Sakhahari were taking water from the well situated in the

portion of Mohan. It is contended that plaintiff and Baburao were taking water from the well situated in the portion allotted to Baburao.

4. It is the case of plaintiff that he has installed motor on the well situated in the portion of Baburao and he has been taking water from that well right from beginning. It is contended that due to the aforesaid circumstances, he is entitled to get $\frac{1}{2}$ share of water and he is owner of $\frac{1}{2}$ share in the well. It is contended that on 19/10/2004, defendant Nos. 2 to 4, the members of family of Baburao, obstructed the plaintiff from taking water and so the cause of action took place for the Suit. Declaration was claimed that the plaintiff is the owner of $\frac{1}{2}$ share in the well situated in the portion of Baburao and injunction was claimed to prevent mainly defendant Nos. 2 to 4 from interfering in the right of plaintiff to take the water.

5. The Suit was contested mainly by defendant No. 2 by filing Written Statement. However, the Written Statement was filed for defendant Nos. 2 to 4, who include Baburao, the brother of plaintiff. The relationship is not disputed. Some contentions are made that Baburao has sold

his property to defendant Nos. 2 and 3, who are son and daughter-in-law of Baburao under sale deed and so they are the owners of the portion which was allotted to Baburao in the partition.

6. Defendant Nos. 2 to 4 have denied that there were 2 wells in the land G.No. 325. They have contended that there was only one well in this land and after partition, the 4 brothers started taking water from this well and that well is situated in the portion allotted to the share of Mohan. It is the case of defendant Nos. 2 to 4 that their predecessor Baburao had taken well in the portion allotted to him in the year 1977. It is contended that as there was sufficient water in this well and as plaintiff requested Baburao to allow him to take water, initially for the period of 5 years by using the motor installed by Baburao, plaintiff took water from this well. It is contended that in the year 1986, plaintiff took electricity connection for installing his motor on this well after taking permission of defendant No. 1 Prabhakar, son of Baburao. It is contended that at that time defendant No. 2 was minor and as defendant No. 4 was addicted to liquor, he gave such permission. It is contended that though plaintiff is taking water from this well, he has no right to take water

and he was taking water due to the permission given to him by the defendants.

7. It appears that the portion of Sakhahari was sold to defendant Nos. 5 and 6 and they have taken new well in the portion purchased by them. They have taken one bore well also. It is the case of defendant Nos. 2 to 4 that only to harass them, plaintiff has filed false Suit. It is their case that they have grape garden and if water is allowed to be given to the plaintiff, that garden will be virtually destroyed due to scarcity of water.

8. Issues were framed on the basis of aforesaid pleadings. Both the Courts below have held that plaintiff has $\frac{1}{2}$ share in the disputed well. Learned counsel for the appellants submitted that as the well is situated in the portion which had come to the share of Baburao, plaintiff can not claim that he has right to take water from that well. Learned counsel submitted that the well was subsequently taken by Baburao and the entry is made in the name of defendant No. 2 and for that reason also no relief could have been given to the plaintiff.

9. This Court has carefully gone through the pleadings and the evidence given by both sides. Following circumstances are mentioned in the Judgment delivered by the 2 Courts.

- [i] It is not disputed that the original owner Dagdabai had distributed the land amongst her 4 sons. Copy of the mutation, under which the land was distributed, is at Exh. 71. This document shows that 2 Acres 30 R. portion was given to Baburao and Mohan each. 2 Acres 29 gunthas portion was given to Sakahari and Vinayak each. Thus, 1 R. portion was given more to Baburao and Mohan each.
- [ii] In the mutation made, there is no mention of the allotment of well to anybody or to show that there was any well in existence. At the relevant time the entry of well was not there in 7/12 extract.
- [iii] It is not disputed by defendant Nos. 2 to 4 that all the 4 brothers had equal right to take water from the well which was owned by Dagdabai. The defendants have contended that there was only one well and all the brothers were taking water from that well, though the well was situated in the portion allotted to Mohan.

This admission can be used against defendant Nos. 2 to 4 and it shows that though particular portion was allotted to one son, the ownership of the well situated in that portion was not given to him.

[iv] Defendant Nos. 2 to 4 have admitted that at least from the year 1977, plaintiff was taking water from the well situated in the portion allotted to Baburao. In that year also, there was no entry of well in the 7/12 extract in the portion owned by Baburao.

[v] Exh. 44, 7/12 extract of G.No. 325, shows that first time entry of well was made in the name of Chandrabhan, purchaser from Sakahari, on 11/05/1996. Defendant Nos. 2 to 4 are not disputing that Chandrabhan had taken new well in his portion. This is the third well which was present on the date of Suit in G.No. 325.

[vi] Exh. 75, copy of mutation, shows that on 08/05/2004 after starting of the dispute, application was made by defendant No. 2, successor of Baburao, for making entry of well and then the well was entered in the 7/12 extract and it was shown that it was owned by defendant No. 2.

[vii] The oral evidence given by the parties show that

the share of Mohan is situated on northern side and adjacent to his share, there was the share of Sakhahari, now of defendant No. 6. The evidence of employee of Electricity Company shows that on the well situated in the portion of Mohan, there are 2 connections of electricity and this circumstance supports the case of the plaintiff. Further, Sakhahari is examined as witness by the plaintiff to prove this contention. Similarly, the property of plaintiff is situated adjacent to the share allotted to Baburao and on the suit well, admittedly, there are 2 motors fixed and one motor belongs to the plaintiff. The employee of electricity company has also given evidence on this point. This circumstance creates probability that 2 brothers were allowed to use water from the well situated in the portion of Mohan and 2 brothers are allowed to use water from the well situated in the portion of Baburao.

[viii] There is specific admission that at least from the year 1977, immediately after the partition of the land amongst the sons of Dagdabai, the plaintiff started using water of the suit well and he had taken electricity connection long back, in the year 1986 to install motor on this well. The 7/12 extract shows that the plaintiff was taking crops like sugarcane by using this water. Ordinarily, nobody will allow a person who is not owner to

take water from the well for so many years and he would not allow such person to take electricity connection and install motor on the well.

10. Civil matters are required to be decided on preponderance of probability and aforesaid circumstances are sufficient to create probability in favour of the plaintiff that the suit well was to be used by 2 sons of Dagdabai viz. Baburao and the plaintiff. On preponderance of probability, ownership of $\frac{1}{2}$ share in the well is proved by the plaintiff. In view of these circumstances, there was no alternative before the Courts below than to give the decree in favour of the plaintiff.

11. Learned counsel for the appellants argued on one circumstance like the recitals of sale deed executed by Baburao in favour of his successors, defendant Nos. 2 to 4. In one sale deed, Baburao had mentioned that he is owner of one well and along with that land he was transferring his ownership in the well to his successors, defendant Nos. 2 to 4. These circumstances can not be used against the plaintiff in view of the aforesaid circumstances.

12. The aforesaid discussion shows that no substantial question of law as such is involved in the matter.

13. In the result, Second Appeal stands dismissed. In view of disposal of Second Appeal, C.A. No. 8388 of 2015 does not survive and stands disposed of.

[T.V.NALAWADE, J.]