

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.647 OF 1994

Shri Hariba Arjuna Karande & Ors. ...Appellants

vs.

Shri Ramu Kondi Ghadge & Anr. ...Respondents

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Mr. Sushil Inamdar, i/b. K.B. Sonwalkar, for the Appellants.

Mr. A. Chikale, i/b. P.B. Shah, for the Respondents.

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CORAM : S.C. GUPTE, J.

DATED : 5 JUNE 2017

(JUDGEMENT) :

. Heard learned Counsel for the parties.

2. The Second Appeal arises from the judgment of the District Court, Satara, dated 28 February 1992, dismissing the appeal of the Appellants (Original Defendants) against the decree passed by the trial court in favour of the Respondents (Original Plaintiffs) in a suit for perpetual injunction. The Second Appeal was admitted on questions of law concerning the part ownership of, or alternatively, the right of easement by prescription to take water from, the suit well of the Appellants.

3. In order to appreciate the controversy involved in the appeal, it is necessary to state the following relevant facts :

The Defendants are owners of land being Gat No.1396. Plaintiff No.1 is the owner of Gat No.1390, 1391 and 1397. Plaintiff No.2 is seized and possessed of Gat No.1392. There is a well situated in the agricultural land, bearing Gat No. 1390, of village Naikbombwadi, Taluka Phaltan, District Satara ('suit well'). The water course of this well allegedly goes through Gat No.1396, the Defendants' land. The Defendants were obstructing the Plaintiffs' possession and peaceful enjoyment of the suit well. The Plaintiffs, in the premises, filed Civil Suit No.126 of 1983 in the Court of Civil Judge, Junior Division, Phaltan, for a perpetual injunction, restraining the Defendants from obstructing the Plaintiffs' peaceful possession and enjoyment of the suit well. The Defendants filed a counter-claim seeking a perpetual injunction, restraining the Plaintiffs from obstructing the Defendants' right to take water from the suit well. The Court decreed the suit and dismissed the Defendants' counter-claim. Being aggrieved, the Defendants filed First Appeal No.545 of 1987 in the Court of Additional District Judge at Satara. By the impugned judgment, the District Court dismissed the Appeal. Hence this Second Appeal.

4. The impugned orders of the Courts below are challenged on the following grounds :

- (a) The Defendants have one half share in the suit well, and as such part owners, have a right to take water from it.
- (b) The lower Courts have erred in holding that the Plaintiffs

have a right to take water from the suit well to their land, Gat No.1397, through the Defendants' land, Gat No.1396. It is submitted that the Plaintiffs have not acquired any right of easement by prescription to take water through the water channel prepared by the Defendants to Gat No.1397. Learned Counsel submits that the Plaintiffs were never taking water from the suit well to their land, Gat No.1397, through the Defendants' land prior to filing of the suit.

(c) It is submitted that the Courts below erred in dismissing the Defendants' counter-claim, seeking a declaration of their one half share in the suit well and a perpetual injunction, restraining the Plaintiffs from obstructing their right to receive water from the suit well.

(d) The lower Courts have erred in holding that since the Defendants' earlier suit, being Regular Civil Suit No.68 of 1983, was dismissed for default and no efforts were made for its restoration, the Defendants could not claim the same relief in their counter-claim. It is submitted that the claim in R.C.S. No.68 of 1983 was different from the counter-claim made in this suit and the provisions of Order VIII, Rule 6-A of CPC have been wrongly interpreted and applied by the courts below.

5. The trial court found that the suit well was within the Plaintiffs' land, namely, Gat No.1390, according to the revenue records; that the documentary evidence on record showed that the Plaintiffs purchased the well and were in use thereof; that there was no evidence to show that the Defendants were either the owners or in possession or use of the suit well; that there was a long gap between the date the

Defendants as tenants were enjoying one half share of water from a well in the adjacent plot, which corresponds to Gat No.1390; and that there was no documentary evidence that the Defendants enjoyed water from the present suit well. On this basis, the trial court decreed the suit and dismissed the counter-claim.

6. The lower appellate court dismissed the appeal holding that the certificate under Section 32 M of the BTAL Act does not specify that the Defendants had a right to fetch water from the suit well to the extent of one-half share; that on the other hand, the judgment and order in tenancy proceedings in favour of the Plaintiffs declared them as deemed purchasers of the land, which contained the suit well, the price of which was fixed in the order; that a prior suit filed by the Defendants, being R.C. Suit No.68 of 1983, claiming the same reliefs as in the present counter-claim, was dismissed for default and no steps were taken for restoration and thus the counter-claim was hit by Section 12 of the Code and that even otherwise, counter-claim put forth by amending the written statement could not be entertained under Rule 6-A (1) of Order 8.

7. The appreciation of the documentary and oral evidence by the courts below cannot be faulted on any question of law. The conclusions that there was evidence to support the Plaintiffs' case of purchase of the suit well along with the plot of land and that there was no evidence that the Defendants either partly owned the suit well or were actually making any use of it by drawing water from it, cannot be termed as either based on no evidence or vitiated by any error of law.

There is no relevant material disregarded or irrelevant or non-germane material considered to arrive at these conclusions.

8. Learned Counsel for the Appellants has not shown how reliefs in their earlier suit, namely, R.C. Suit No.68 of 1983, were different from the present counter-claim.

9. There is, accordingly, no merit in the Second Appeal. The Second Appeal is dismissed. No order as to costs.

(S.C. GUPTE, J.)