

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 09.01.2017****PRONOUNCED ON : 27.01.2017****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.24 of 2011****and****M.P.No.1 of 2011**

1.A.Govindasamy (deceased)

2.Nataraj

3.G.Palaniammal

4.A.Punith latha

5.G.Sasikala

6.G.Hariharan

...

Appellants

(Appellants 3 to 6 brought on records
as LR's of the deceased 1st appellant vide
order of Court dated 28.11.2016
made in CMP.No.19087/16 in
S.A.No.24 of 2011)

Vs.

Viswanathan

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the decree and judgment dated 01.07.2010 made in A.S.No.16 of 2009 on the file of the Subordinate Judge, Dharapuram in reversing the decree and judgment dated 07.01.2009 made in O.S.No.425 of 2004 on the file of the District Munsif Court, Dharapuram.

For Appellants

: Mr.T.V.Ramanujam,
Senior Advocate
For Mr.Jothimanian

For Respondent

: Mr.S.Saravanan

JUDGMENT

Challenge in this second appeal is made by the defendants against the judgment and decree dated 01.07.2010 made in A.S.No.16 of 2009 on the file the Sub Court, Dharapuram, reversing the judgment and decree dated 07.01.2009 made in O.S.No.425 of 2004 on the file of the District Munsif Court, Dharapuram.

2. The suit has been laid by the plaintiff for declaration and permanent injunction.

3. The second appeal is admitted and the following substantial question of law is formulated for consideration in this second appeal.

" Whether the judgment and decree of the First Appellate Court are based upon the perverse findings and misdirected against the evidence on record?

4. It is not in dispute that the total extent in survey No.93 originally belonged to Arumugha Gounder, the father of the defendants. It is also not in dispute that Krishnasamy Gounder had purchased 0.10 cents in Survey No.93 from Arumugha Gounder under

Ex.A1. Further, it is also not in dispute that the plaintiff's father had purchased 0.05 cents from Krishnasamy Gounder for the purpose of putting up a Well in the above said suit survey number under Ex.A2. Now, according to the plaintiff's case, pursuant to Ex.A2, his father had dug up a Well in the suit property and also, obtained service connection in the year 1987 and accordingly, irrigating his land through "AB" pipe line fixed beneath the ground level and in this scenario, the defendants, without any authority, had interfered with his possession, therefore, he had been forced to institute the suit for claiming the appropriate reliefs.

5. According to the defendants, it is false to state that the plaintiff is claiming the relief to the Well dug up in the property purchased by his father under Ex.A2 and on the other hand, according to the defendants, the plaintiff has falsely laid a claim upon the Well situated in the property of the defendants and therefore, it is stated that the plaintiff is not entitled to seek the reliefs sought for.

6. In the light of the respective case of the parties as aforesaid, it could be seen that it is for the plaintiff to establish that he seeks the reliefs in the present suit with reference to the Well put up in the property purchased by his father under Ex.A2. As seen above, as

regards the purchase of the property i.e. 0.05 cents from Krishnasamy Gounder in Survey No.93 under Ex.A2, there is no dispute. Now, in so far as the dispute between the parties concerned centres around in which well the plaintiff is seeking the reliefs in the suit, it could be seen that the Commissioner has been ordered to inspect the properties of the respective parties and submit report and plan. Accordingly, it could be seen that in this case, lastly, the commissioner, with the help of Taluk Surveyor, has inspected the property of the parties concerned and submitted his report and plan, which have been marked as Exs.C5 & C6 which clinch the issues pending between the parties in this matter.

7. In the report, the commissioner has pointed out that he had divided the properties of the parties concerned in three segments and the southern most portion consisting of 0.05 cents has been shown in green colour. Therefore, it could be seen that considering the case of the parties, the green colour portion shown by the commissioner belongs to Krishnasamy Gounder. Further, according to the report of the commissioner, 0.05 cents situated to the northern side of the above said green colour portion, shown in yellow colour belongs to the plaintiff and the extent of 0.21 cents situated to the northern side of the said extent (Yellow colour portion) shown in Rose colour

belongs to the defendants. Therefore, it could be seen that the yellow colour portion is the property purchased by the plaintiff's father from Krishnasamy Gounder under Ex.A2. Now, according to the surveyor's report, it is found that in the yellow colour portion, there is one Well and also, two Coconut trees and also pipe line pressure and the service connection fitted in the above said Well bears SC.No.86. Further, according to the surveyor's report, it could be seen that there are two wells situated in the rose colour portion belonging to the defendants and there are two service connection respectively in the above said two Wells with SC Nos.85 and 92 and both service connections are in operation and there are coconut trees in the said portion. Therefore, it could be seen that as per the above said surveyor report/Commissioner report, it is found that there is one Well in the portion of the plaintiff bearing SC No.86 and there are two Wells in the portion belonging to the defendants bearing two service connection numbers viz., SC Nos.85 and 92. As far as the above report of the advocate commissioner is concerned, no objection seems to have been filed by the parties. Therefore, it could be seen that the service connection in the Well situated in the plaintiff's property is only SC No.86. However, the plaintiff has come forward with the suit claiming the relief for service connection No.92, which is admittedly fitted in the Well situated in the property belonging to the

defendants. It has not been explained by the plaintiff in the plaint as to how he had come to obtain service connection No.92 in the Well located in the property belonging to the defendants. No doubt, some evidence had been adduced on behalf of the defendants through DWs 1 & 2 that at the request of the plaintiff's father, service connection No.92 had been allowed to be obtained by the plaintiff's father in the Well situated in the property of the defendants. Based upon the above admission, it is found that the first appellate court has accepted the plaintiff's case and accordingly, granted the decree in favour of the plaintiff. However, even the first appellate court has observed that the above admission of the defendants by itself would not be adequate to uphold the plaintiff's case. Still the first appellate court has agreed with the plaintiff's case, on the premise that the commissioner's report and plan marked as Exs.C5 & 6 do not project the actual position of the physical features obtaining in the locality and in such view of the matter, it has accepted the plaintiff's case, however, strangely as contended by the defendants' counsel, directed that the commissioner's report and plan marked as Exs.C1 to C6 should form part and parcel of the decree passed by it in favour of the plaintiff.

8. As per Ex.A2, it is found that the property purchased by the

plaintiff's father is situated just North of the property retained by Krishnasamy Gounder. It is not the case of the plaintiff in the plaint that his father or the plaintiff as such had been using the Well situated or located in the property of the defendants and that with the permission of the defendants or their father had obtained service connection in their own name and thereby, drawing water from the said Well for irrigating their lands through "AB" line. On the other hand, it is the specific case of the plaintiff's that only in the property purchased by the plaintiff's father under Ex.A2, a Well was dug up and in the said Well i.e. the Well situated in the property purchased under Ex.A2, the service connection No.92 was obtained and thereby, they are irrigating their lands through the AB pipe line imbedded underneath the ground. However, when it is found and also not disputed that the service connection in the well located in the property of the plaintiff bears only SC No.86, it does not stand to reason as to how the plaintiff could lay a claim over the service connection No.92 admittedly fitted in the Well located in the property belonging to the defendants. In the absence of any pleadings that the plaintiff and his predecessor in title had also been utilizing the Well situated in the property of the defendants by obtaining service in their name and further, in the absence of any proof in support of their case as regards the above case, it could be seen that the plaintiff

cannot be allowed to succeed merely on the stray admission of the defendants through the mouth of DWs.1 & 2. No doubt as adverted to earlier, DWs 1 & 2 have tendered evidence that the plaintiff's father had obtained service connection No.92 as regards the Well situated at the northern extent of their property. However, when the plaintiff has not established his case that the Well located in the defendants' property had been utilized by the plaintiff and his predecessor in title on some arrangement and also, by obtaining service connection in their own name either through pleadings or by acceptable proof and when the ground position discloses that the Well and the service connection over which the plaintiff's lay a claim, are found to be the property belonging to the defendants, as rightly put forth by the defendants counsel, the plaintiff in the guise of the present suit, by giving a wrong description of the suit property and thereby, laying a false claim over the Well and service connection belonging to the defendants. Further, it has also not been established by the plaintiff, as to on what basis, his father had obtained service connection No.92 in his name, particularly with reference to the Well admittedly situated in the property belonging to the defendants. The only document i.e. marked on the side of the plaintiff is Ex.A5, which is a EB receipt bearing service connection No.92. However, the service connection No.92 has not been

established to have been obtained by the plaintiff's father legally as regards the Well located in the defendants' property. It could be seen that the first appellate Court has misconstrued the evidence adduced by the parties, in a wrong manner and also without any basis, disbelieved the commissioner's report and plan, particularly, marked as Exs.C5 & 6 and thereby, proceeded to uphold the plaintiff's claim without any basis. Merely because, the plaintiff's father had purchased the property comprised under Ex.A2 for the purpose of digging a Well, it cannot be held that he is entitled to make use of the Well situated in the defendants' property and obtain service connection in his name for the said Well and thereby, draw water from the said Well without express permission or sanction from the defendants. Therefore, it could be seen that the plaintiff, by way of this suit, is laying a claim over the property, particularly, the Well and service connection belonging to the defendants and in such view of the matter, the reasonings of the first appellate court for upholding the plaintiff's case cannot be legally countenanced to any manner. It has to be therefore held that the first appellate court has proceeded with the matter on the wrong premise of the evidence on record and accordingly, based upon erroneous and perverse findings dislodged the well considered findings of the trial Court and accordingly, erred in upholding the plaintiff's case. Therefore, the

substantial question of law formulated in this appeal is answered against the plaintiff and in favour of the defendants.

In conclusion, the judgment and decree dated 01.07.2010 made in A.S.No.16 of 2009 on the file the Sub Court, Dharapuram, are set aside and the judgment and decree dated 07.01.2009 made in O.S.No.425 of 2004 on the file of the District Munsif Court, Dharapuram, are confirmed and accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

27.01.2017

Index : Yes/No
Internet: Yes/No
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To

1. The Sub Court, Dharapuram.
2. The District Munsif Court, Dharapuram.

T.RAVINDRAN,J.

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Pre-delivery Judgment in
S. A.No.24 of 2011
and
M.P.No.1 of 2011

27.01.2017