

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.10.2017

PRONOUNCED ON : 27.10.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1125 of 2001

1.Palanisamy Gounder
2.Muthusamy
3.Rangasamy
4.Shanthamani
5.Shanthi

...

Appellants

Vs.

Karuppa Gounder

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 26.02.2001 made in A.S.No.21 of 2000 on the file of the II Additional Subordinate Judge, Gobichettipalayam, reversing the judgment and decree dated 22.12.1999 made in O.S.No.236/1997 on the file of the District Munsif Court, Gobichettipalayam.

For Appellants

: Mr.R.T.Doraisamy

For Respondent

: No appearance

JUDGMENT

In this second appeal, the Judgment and decree dated 26.02.2001 made in A.S.No.21 of 2000 on the file of the II Additional Subordinate Judge, Gobichettipalayam, reversing the judgment and decree dated 22.12.1999 made in O.S.No.236/1997 on the file of the District Munsif Court, Gobichettipalayam, is under challenge.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for Permanent Injunction.

4. The plaintiff, the first defendant and one Ramasamy are brothers. The above said brothers effected partition of their properties by way of a partition deed dated 04.12.1968 and accordingly, the "A" schedule properties described in the partition deed were allotted to the first defendant and the "B" schedule properties were allotted to the plaintiff and the "C" schedule properties were allotted to Ramasamy. Accordingly, the first item of the plaintiff schedule properties were allotted to the plaintiff under the above said partition deed and been in

possession and enjoyment of the plaintiff and thus, in the Well situated in the first item of the suit properties in Survey No.230/5, the plaintiff is having 1/3 share and the first defendant is entitled to 2/3 share in the above said Well and accordingly, the plaintiff is drawing water from the above said common Well by installing a 5 HP Motor Pumpset and obtaining separate service connection as per the terms agreed to between the parties and out of three days, the plaintiff is entitled to draw water for one day and for the remaining two days, the first defendant is entitled to draw water from the Common Well. While so, some dispute arose between the plaintiff and the defendants in respect of the other lands and in this connection, the first defendant has laid the suit against the plaintiff in O.S.No.645 of 1996 and the same is pending and as the first defendant insisted the plaintiff not to contest the above suit, to which course, as the plaintiff was not acceptable, dissatisfied with plaintiff, the defendants attempted to interfere with the right of the plaintiff in drawing water from the common Well above mentioned on 26.09.1996 and on account of the same, the lands of the plaintiff were kept uncultivated and remained barren and resultantly, the coconut trees of the plaintiff had withered away without yielding any usufructs and thereby, the plaintiff had been put to loss amounting to Rs.25,000/- and on 20.06.1997 again when the

plaintiff made attempts to draw water from the common Well during his turn, the same had been interfered with by the defendants unlawfully and in this connection, police complaint had been lodged against the defendants and further, according to the plaintiff, the defendants are attempting to draw water from the common Well for irrigating the other lands that had been purchased by them in survey Nos.215 & 216, to which, the defendants are not entitled to and the common Well is intended to use only for the lands situated in the concerned survey number measuring an extent of 5 acres and 20 cents and beyond the said extent, the defendants are not entitled to utilise the water of the common Well for irrigating their other own lands and hence, according to the plaintiff, he has been necessitated to lay the suit for the reliefs of permanent injunction.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts and the division of the properties amongst the brothers as per the partition deed dated 04.12.1968 is admitted and in the suit common Well, the plaintiff is entitled to 1/3 share and the first defendant is entitled to 2/3 share and it is true that the plaintiff is entitled to draw water from the common Well during his turn i.e. one day out of three days and for the remaining two days, the

defendants are entitled to draw water from the common Well and the defendants, at no point of time, had interfered with the plaintiff's right to draw water from the common Well during his turn and it is false to state that the defendants prevented the plaintiff from drawing water from the common Well on 26.09.1996 and on subsequent days, on account of the dispute which arose between them and on account of the pendency of O.S.No.645 of 1996 and thereby, it is false to state that the plaintiff has suffered loss to the extent of Rs.25,000/- on account of his inability to cultivate his lands and other factors. According to the defendants, the water level in the common Well has gone down and despite the same, the plaintiff has not endeavoured to shift his motor pumpset suitably so as to draw water from the common Well during his turn and accordingly, the plaintiff was unable to cultivate his lands and therefore, the case of the plaintiff that on account of the acts of the defendants, he was unable to cultivate the lands etc., are false and made for the purpose of this case. It is false to state that the defendants are not entitled to draw water from the common Well for irrigating their lands that had been purchased by them. The defendants are entitled to irrigate the other lands purchased by them using the water from the common Well and the plaintiff is not entitled to injunct the same and by doing so, the

plaintiff would not put to loss and hardship and hence, the suit laid by the plaintiff, without any cause of action, is liable to be dismissed.

6. In support of the plaintiff's case, PW1 has been examined and Exs.A1 to 8 were marked. On the side of the defendants', DW1 was examined and no documentary proof has been adduced. Exs. C1 to 3 were also marked.

7. On a consideration of the oral and documentary evidence adduced and the submissions made, the trial Court was pleased to dismiss the suit laid by the plaintiff and on appeal by the plaintiff, the First Appellate Court was pleased to set aside the judgment and decree of the trial Court and accordingly, by allowing the appeal preferred by the plaintiff, decreed the suit as prayed for in favour of the plaintiff. Impugning the same, the defendants have preferred this second appeal.

8. At the time of the admission of the second appeal, the following substantial questions of law were formulated for consideration;

1. Whether the defendants are not entitled to take water

from the suit well in their turn to the lands purchased by them in the absence of specific bar to that effect in Ex.A1 partition deed.

2. whether the lower appellate Court is correct in granting injunction against the defendants when the defendants specifically stated in written statement that they have not prevented the plaintiff from taking water in his turn.

9. The subject matter of the suit is the common Well situated in survey No.230 /5. It is not in dispute that the plaintiff is entitled to 1/3 share in the above said common Well and the first defendant is entitled to the remaining 2/3 share in the above said Well. It is further not in dispute that as per the arrangement entered into between the parties, the plaintiff is entitled to draw water from the common Well for one day out of three days and for the remaining two days, the defendants are entitled to draw water from the common Well. In this connection, it is to be mentioned here that the plaintiff, the first defendant and one Ramasamy are brothers and they had effected partition of their properties by way of the partition deed dated 04.12.1968 and the copy of which has been marked as Ex.A1. It is therefore found that as per the recitals found in Ex.A1, it is seen as

above stated that the plaintiff and the defendants are entitled to shares in the common Well and entitled to draw water during their turns from the common Well.

10. Now, it is the case of the plaintiff that in respect of the certain other lands dispute arose between the parties resulting in the laying of the suit by the first defendant in O.S.No.645 of 1996 and the defendants compelled the plaintiff not to contest the above said suit and as the plaintiff had **refused to accede** to their demand, according to the plaintiff, on 26.09.1996, the defendants unlawfully interfered with his enjoyment of usage of the common Well by drawing water from the same during his turn, which made, the plaintiff unable to cultivate his lands and the acts of the defendants persisted continuously and thereby, the lands of the plaintiff had remained infertile and the coconut trees had withered away resulting in loss to the plaintiff quantified at Rs.25,000/- and as the defendants persisted in interfering with the right of the plaintiff to draw water from the common Well during his turn, according to the plaintiff, he has been necessitated to prefer police complaint against the defendants and further, according to the plaintiff, the defendants, without any authority, are attempting to draw water from the common Well to their

other lands purchased by them, to which course, they are not entitled to do and hence, according to the plaintiff, he has constrained to seek the reliefs of permanent injunction against the defendants.

11. As regards the share of the plaintiff in the common Well and his entitlement to draw water from the common Well during his turn, the defendants have not contested the case of the plaintiff and it has been specifically stated by the defendants in the written statement that they had not disturbed the right of the plaintiff in drawing water from the common Well during his turn. According to the defendants, it is only the plaintiff, who had not cultivated his lands on account of the water level going down in the Well, as he has not endeavoured to shift his motor pumpset suitably so as to enable him to draw water from the common Well, which resultantly disabled the plaintiff to cultivate his lands and therefore, the consequent loss suffered by the plaintiff cannot be in any manner attributed to the defendants and hence, according to the defendants, the plaintiff has falsely alleged that the defendants had interfered with his right to take water from the common Well and further according to the defendants, the plaintiff is not entitled to injunct them from taking water from the common Well during their turn for irrigating their other lands and the defendants are

entitled to irrigate the other lands from the common Well and hence, the plaintiff is not entitled to seek the said relief also and the suit is therefore liable to be dismissed.

12. Now, according to the plaintiff, on 26.09.1996, the defendants prevented him from taking water from the common Well. However, it is found that the present suit has come to be laid only during the year 1997. If really, the defendants had interfered with the plaintiff's right to draw water from the common Well during his turn in the year 1996 as alleged in the plaint, as rightly put forth, the plaintiff would have initiated necessary legal action against the defendants immediately. On the other hand, it is seen that the present suit itself has come to be laid nearly one year after the alleged incident. It is, further found that according to the plaintiff, he has preferred police complaint against the defendants for their unlawful acts in preventing him from drawing water from the common Well. In this connection, the copies of the police complaint levelled by his wife have been marked on the side of the plaintiff. It is thus found that the plaintiff as such has not lodged any complaint. The First Appellate Court, on the basis of the initiation of the above said complaints against the defendants, proceeded to hold that inasmuch as the defendants

unlawfully interfered with the plaintiff's right to draw water from the common Well, the above said complaints had been lodged and hence, granted the relief of injunction sought for by the plaintiff. However, as rightly put forth by the defendants' counsel, when it has not been established by the plaintiff as to what further action had been really taken by the police on the alleged complaints preferred by the plaintiff's wife, it is seen that merely on the filing of the complaint, it cannot be construed that the defendants had interfered with the plaintiff's right to enjoy the common Well during his turn, particularly when other than marking the copy of the complaint, no other material has been produced by the plaintiff to evidence that further course of action had been initiated with reference to the same. When it is the specific case of the defendants that they had not interfered with the plaintiff's right to draw water from the common Well at any point of time, it is seen that the plaintiff has to establish his alleged cause of action for laying the suit against the defendants with reference to the same. It is seen that the plaintiff himself has not chosen to enter the witness box for the reasons best known to him. Though it is found that he has attended the Court proceedings well, he has not chosen to enter the witness box and he has chosen to examine his son as PW1. Now, it is further seen that as per the admission of PW1, the suit

lands had been leased to the third party and therefore, it is found that the suit lands are not under the direct cultivation of the plaintiff. If really, the defendants had interfered with the plaintiff's right to use the common Well during his turn, as rightly contended, the lands having been leased to a third party, it is only the lessee, who would have suffered thereby and the lessee, in turn, would have taken steps to bring or initiate necessary legal action against the defendants. However, it is not the case of the plaintiff that the lessee has taken any action against the defendants for their alleged interference. When it is admitted that the plaintiff is not engaged in the direct cultivation of the lands in question from 1996 or 1997 onwards, the case of the plaintiff that the defendants attempted to interfere with his right to use the common Well as such cannot be readily accepted. The plaintiff has not endeavoured to examine the lessee in support of his case. That apart, no other independent witness has also been examined to substantiate his case. PW1 in his evidence has deposed that he is employed elsewhere and therefore, it is seen that he is not in the know of things as to what had happened on ground. In such view of the matter, it is found that PW1 would not have any direct knowledge as to the happenings, which had occurred in the suit lands. Though PW1 would claim that it is he, who had given information to the

advocate for preferring the suit, it is found that it is only the plaintiff, who has given the information for lodging the case. However, the plaintiff has not chosen to enter into the witness box. Be that as it may, it is found that when the plaintiff or PW1, as the case may be, is not directly engaged in the cultivation of the suit lands and admittedly leased to a third party, it is seen that their case that the defendants had interfered with their right to draw water from the common Well as such cannot be readily accepted.

13. In this case, the Commissioner appointed had inspected the suit Well in question and noted that the structure put up by the defendants is shown adjustable that they could draw water from the Well, even if water level goes down. On the other hand, as seen from the report of the Advocate commissioner, the Pump set arrangement set up by the plaintiff is not adjustable. In such view of the matter, it is found that even the foot valve is not touching the water surface and accordingly, it is seen that the plaintiff or the person, who had been inducted as lessee is unable to cultivate the lands in question by using the common Well. In such view of the matter, the contention that the plaintiff is unable to cultivate the lands on account of the alleged interference caused by the defendants as such cannot be accepted

straightaway. Further, as seen from the report of the commissioner, it is seen that the coconut trees lying in the lands of the plaintiff had not withered away completely and on the other hand, it is seen that barring one or two coconut trees, the other coconut trees are ripe with full of coconuts and in good condition and therefore, the plea of the plaintiff that due to alleged interference caused by the defendants, he is unable to cultivate the lands or enjoy the coconut trees as such cannot be accepted in any manner. That apart, according to the plaintiff, on account of the alleged interference put forth by the defendants, he had sustained loss, which according to the plaintiff, amounts to Rs.25,000/- and if really, the plaintiff had sustained, any such loss, as rightly argued, the plaintiff would have sought for necessary relief against the defendants with reference to the same. However, other than the relief of permanent injunction, the plaintiff has not sought for the appropriate reliefs against the defendants for the alleged loss said to have been sustained by him on account of the alleged interference said to have been caused by the defendants.

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14. In the light of the above position, when it has not been established by the plaintiff as such that the defendants had interfered with his right to draw water from the common Well during his turn and

when the alleged police complaints said to have been preferred by the plaintiff's wife with reference to the same are not shown to be put into any action legally and when it is the specific case of the defendants that they had not, at any point of time, interfered with the plaintiff's right to draw water from the common Well during his turn and when as seen from the realities on ground that only on account of the plaintiff's improper maintenance of the suit Well, he is unable to cultivate his lands and not for the other reasons as projected, the First Appellate Court had erred in holding that the plaintiff's case could be sustained merely on the lodging of the police complaint. The first appellate court has further held that the plaintiff but for the interference would not have kept his lands uncultivated, unmindful of the fact that when there is no material on the part of the plaintiff to hold that the defendants as such had caused any interference to his enjoyment of the Well in question, it is seen the first appellate court has, for unacceptable reasonings, which can be termed only as perverse, had dislodged the well considered reasonings and findings of the trial Court for non suiting the plaintiff. In such view of the matter, it is held that the determination of the first appellate court in holding that the plaintiff is entitled to obtain the relief of permanent injunction as claimed is not based on any evidence, particularly, when it is the

admitted case of the defendants that they have not prevented the plaintiff from taking water from the common Well in his turn. Hence, the second substantial question of law formulated for consideration in this second appeal is answered in favour of the defendants and against the plaintiff.

16. The second limb of the prayer sought for by the plaintiff in the case is that the defendants are attempting to take water from the common Well for irrigating their other lands purchased by them and the defendants are not entitled to do so and according to the plaintiff, only in respect of the lands situated in the survey number in which the well is located, the defendants are entitled to irrigate the lands and not other lands and hence, they should be enjoined from irrigating other lands by using the water of the common Well. Per contra, it is the defence of the defendants that there is no agreement between the parties that the defendants should not irrigate their other lands by using water of the common Well and further, it is also stated that the partition deed marked as Ex.A1 does not bar or prevent the defendants from irrigating the other lands and further, according to the defendants, when by drawing water from the common Well for irrigating the other lands, when it has not been established by the

plaintiff that he has been put to any loss and hardship, the plaintiff cannot be granted second limb of the prayer claimed in the suit.

17. In so far as the above relief sought for by the plaintiff, it is seen as rightly put forth by the defendants' counsel, there is no bar or embargo in Ex.A1 preventing the defendants from drawing water from the common Well for irrigating their other lands. Similarly, it is found that PW1 during the course of cross examination has admitted that there is no agreement between the parties preventing them from drawing water from the common Well for the purpose of irrigating their other lands. In such view of the matter, as rightly contended by the defendants, it is found that they are entitled to draw water from the common Well for irrigating the lands purchased by them. That apart, as rightly contended by the defendants' counsel, when even according to the plaintiff, he is irrigating the other lands situated in different survey numbers, other than the lands situated in the survey number, where the common Well is located as seen from the description of the first item of the suit properties, it is found that the parties had been drawing water from the common Well for irrigating the other lands belonging to them during their turn and in such view of the matter, the contention put forth by the plaintiff that the defendants

are not entitled to draw water from the common Well for irrigating the lands that had been purchased by them as such cannot be countenanced. In such view of the matter, in the light of the above position, as rightly argued by the counsel for the defendants, the authorities projected in this matter before the Courts below are found to be not applicable to the case at hand and in such view of the matter, it is found that the plaintiff is not entitled to obtain the second limb of the prayer i.e. the relief of permanent injunction restraining the defendants from drawing water from the common Well for irrigating their other lands. As rightly contended by the defendants' counsel, the first appellate court has not analysed the above issue in the correct perspective based on the materials placed on record and therefore, it is seen that the first appellate court has erred in holding that the defendants are not entitled to take water from the said well during their turn to the lands purchased by them in the absence of the specific bar to that effect in Ex.A1 or sans any agreement with reference to the same between the parties as admitted by PW1 and also when it is seen that the plaintiff himself is irrigating his other lands in different survey numbers by drawing water from the common Well. In such view of the matter, the first substantial question of law formulated for consideration in this second appeal is answered in

favour of the defendants and against the plaintiff.

In the light of the above discussions, the Judgment and decree dated 26.02.2001 made in A.S.No.21 of 2000 on the file of the II Additional Subordinate Judge, Gobichettipalayam are set aside and the judgment and decree dated 22.12.1999 made in O.S.No.236 of 1997 on the file of the District Munsif Court, Gobichettipalayam are confirmed. Resultantly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

27.10.2017

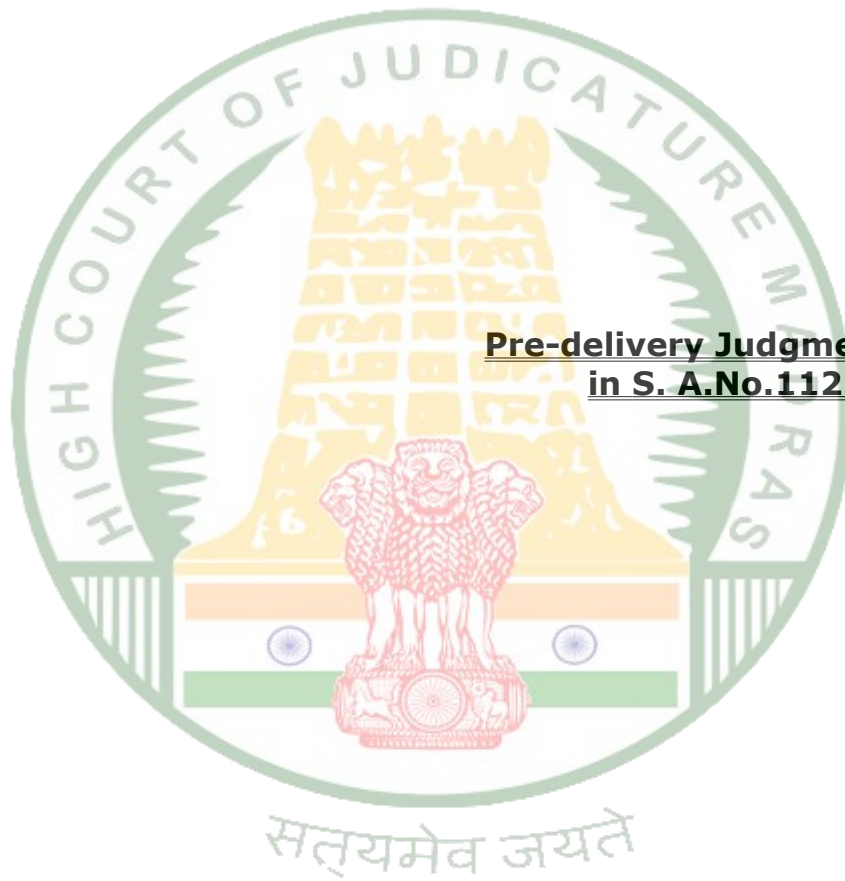
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To

1. The II Additional Subordinate Judge, Gobichettipalayam,
2. the District Munsif Court, Gobichettipalayam.

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T.RAVINDRAN,J.

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**Pre-delivery Judgment made
in S. A.No.1125 of 2001**

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