

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.01.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1476 of 1994
and
CMP.No.18348 of 1994

Murugesan

... Appellant/Plaintiff

Vs.

1.Perumal Goundar (died)
2.Govinda Gounder
3.Kothanda Gounder
4.Ammani Ammal

(RR2 to 4 brought on record as LRs of the deceased 1st respondent vide order dated 9/3/2001 in CMP Nos.18491 to 18493 of 1995 by PSDJ)

... Respondents/Defendant and
Lrs- of the deceased defendant

Prayer:

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree of the Subordinate Judge's Court, Tiruvannamalai, dated 26.08.1994 and made in A.S.No.25 of 1994 modifying the judgment and decree of the District Munsif of Tiruvannamalai, dated 13.08.1993 and made in O.S.No.927 of 1979.

For Appellant : Mr.S.Vediappan
for M/s.R.Karthikeyan

For Respondents: R1 - Died (Steps taken)
R2 - Died B/o.18.6.13
Steps Due
R4 - Given Up
Vide Order dated 08.04.2010
R3 - No Appearance

J U D G M E N T

The plaintiff who lost the case in both the Courts below has filed the second appeal before this Court.

2.The case of the plaintiff is as follows: The plaintiff is the son of one Govindasamy Gounder through his first wife. After the death of the plaintiff's mother, the said Govindasamy Gounder subsequently married one Karupayee, with whom he gave birth to two male and one female child and all are residing in one roof and they are of the Hindu joint family and all of them are entitled to the properties left by the said Govindasamy Gounder.

3.The plaintiff's father had purchased $2/3^{\text{rd}}$ share in the well that is situated in S.No.105/2 from its previous owner Govindasamy Reddiar under a registered Sale Deed dated 15.06.1954. The said well is situated in S.No.105/2 and it is intended to irrigate 54 cents in S.No.105/1, 1.35 acres in S.No.105/2 and 5.38 acres in 105/3. Only the above said survey nos. are covered under the Ayacut of the well in S.No.105/2. Remaining $1/3$ share of the well in S.No.105/2 was purchased by one Korakka Gounder along with 1.35 acres in S.No.105/2. Korakka Gounder purchased the property in S.No.94/4b to an extent of 3.58 acres from Surutayya Gounder under Sale Deed dated 29.01.1944. The said Korakka Gounder enjoyed the above said lands in S.No.105/2 and S.No.94/4b.

4.The said properties owned by Korakka Gounder was subsequently purchased by the defendant and after purchase, there is no prescriptive title for taking water from the well in S.No.105/2 to S.No.94/4b. Hence, the defendant taking water from the said well and irrigating S.No.94/4b is illegal. Hence, the appellant/ plaintiff filed suit for declaration and permanent injunction declaring that the plaintiff is entitled to take water to S.Nos.105/1 and 105/3 from the well in S.No.105/2 and permanent injunction restraining the defendant, his men, agents and servants from in any manner interfering with the plaintiff's taking water from the well in S.No.105/2 to S.Nos.105/1 and 105/3 of Agram village hamlet of Radhapuram and permanent injunction against the defendant, his men, agents and servants from in any manner taking water from the well in S.No.105/2 to S.No.94/4b of Agram village hamlet of Radhapuram and costs.

5.The case of the defendant is as follows: There is no dispute regarding the fact that the well is situated in S.No.105/2. The land in S.No.94/4b along with the land in S.No.105/2 originally belonged to one family and S.No.94/4b had been within the Ayacut of the suit well all along. Infact, one Korakka Gounder, the original owner had been cultivating in S.No.94/4b all along taking water from the well in S.No.105/2 and S.No.94/4b was purchased by Korakka Gounder from one Surutayya Gounder vide document dated 29.01.1944. Thereafter the said Gorakka Gounder also purchased the disputed well land

in S.No.105/2. Subsequently, the defendant purchased both the lands in the year 1946 through Sale deed dated 06.03.1946.

6.From the date of purchase i.e., 1946 onwards, the defendant enjoyed the suit property and he is cultivating the lands by taking water from the well in S.No.105/2. Therefore, the defendant all along had been cultivating only by taking water from the well in S.No.105/2 and irrigating the said water to S.No.94/4b. The said S.No.94/4b is well within the Ayacut of the said well. Infact, the defendant as well as his predecessor in title had been taking water to S.No.94/4b all along from the well in S.No.105/2. However, the plaintiff purchased the property only in the year 1954 and till filing of the suit in the year 1979, there is no disturbance between the plaintiff and the defendant. However, for the reasons best known to the plaintiff, he has filed the present suit with a new plea in the year 1979.

7.The defendant also averred in his written statement, that the defendant's vendor namely, Korakka Gounder was entitled to $\frac{1}{2}$ right in the well by registered sale deed dated 29.01.1944. The said Korakka Gounder conveyed his rights through sale deed dated 06.03.1946 to the defendant. Totally, the defendant enjoyed 5 acres. However, the plaintiff is taking water from the suit lands and enjoying more than 6 acres.

8.After elaborate trial and considering the pleadings as well as the depositions of either side, the Trial Court dismissed the suit. Aggrieved by the said dismissal, the appellant filed first appeal before the lower Appellate Court. The lower Appellate Court modified the lower court order by granting declaration that the appellant is entitled to take water from S.No.105/2 and irrigate the said lands in S.Nos.105/1 and 105/3 and granted injunction, however rejected the second prayer seeking permanent injunction against the defendant, his men, agents and servants from in any manner taking water from the well in S.No.105/2 to S.No.94/4b. Aggrieved over the said judgment, the present second appeal is filed.

9.The substantial questions of law that were framed at the time of admission of the second appeal are as follows:

"1) Whether the lower appellate court is correct in law in coming to the conclusion that the respondent/ defendant can take water from the suit well in S.No.105/2 to the land in S.No.94/4B, which is not covered by the ayacut of the well in view of the decisions reported in 1970 (i) MLJ page 376?

2) Whether the lower appellate court was right in holding that the respondent has prescribed his right for taking water from the suit well by way of easement when he has specifically asked his right under a deed?

3) Whether the lower appellate court was not correct in taking into consideration the various admissions made by the respondent/defendant and his witness and hence the onus is on him to prove the case regarding easement."

10. Heard the learned counsel appearing for the appellant. There is no representation on behalf of the respondents.

11. The learned counsel appearing for the appellant submitted that the judgment and decree passed by the courts below are not sustainable.

12. The suit property was purchased from one Govindasamy Reddiar. With regard to the first question of law whether the lower appellate court is correct in law in coming to the conclusion that the respondent/defendant can take water from the suit well in S.No.105/2 to the land in S.No.94/4b, which is not covered by the Ayacut of the well as well as the decision reported in 1970 (1) MLJ 376, in the above said decision, this Court has held that the arrangement was merely a division of the water in the well in the abstract with right to use the water in any manner they liked to irrigate any lands they liked. However, they are not entitled to extend the Ayacut land which was subsequently purchased. In the present case on hand, the defendant purchased the property in the year 1946. On a perusal of the above Sale Deed which was marked as Ex.B2, one Korakka Gounder sold the property to the defendant including S.No.94/4b to an extent of 3.58 acres and S.No.105/2, where the disputed well is situated. Both the properties were purchased by the defendant in the year 1946. However, the plaintiff purchased the property in the year 1954, through Sale Deed dated 15.06.1954 which was marked as Ex.A1. On a perusal of Ex.A1, it is known that the plaintiff's father Govindasamy Gounder purchased the said property from one Govindasamy Reddiar. The said Govindasamy Reddiar purchased the same from one Dhanabakiam Ammal. However, on perusal of Ex.B2 as well as Ex.A1 both the parties have right to 50% share of water to irrigate the respective lands. The defendant purchased the property prior to the plaintiff in the year 1946 itself and he is enjoying the property. Thereafter, though the plaintiff purchased the property in the year 1954, however, he did not raise any questions till 1979, when the suit was filed and there is no

pleadings as to how the defendant is not entitled from irrigating water from the said well. In view of the above, the decision rendered by this Court is not applicable to the present case on hand and the defendant is entitled to take water from the disputed well and irrigate the land in S.No.94/4b, which was purchased in the year 1946. The issue is answered accordingly.

13. In respect of the other issues relates to whether the respondent has prescribed his right for taking water from the suit well by way of easement, whether he has specifically asked his right under the sale deed and the lower court discussed the various admissions made by the respondent/ defendant, on a perusal of the lower Appellate Court judgment, it is known that the plaintiff purchased the property in the year 1954. However, the respondent purchased the property on 06.03.1946 and the total extent of land including S.No.94/4b and S.No.105/2 is within 5 acres. The plaintiff purchased the property in the year 1954 in S.Nos.105/1 and 105/3 and 105/2 totally more than six acres. Both the parties are entitled to take water from S.No.105/2 with 50% of the share and Ayacut land is also equal and one and the same. Accordingly, the defendant enjoyed the well right from the year 1946 and he is irrigating the land in S.No.94/4b with the well water right from the year 1946, prior to the plaintiff purchasing the property. Hence, the defendant is entitled to take water from the well situated in S.No.105/2. Accordingly, the issues are answered in favour of the defendant.

14. In view of the above discussions, the appellant is not entitled to succeed and the findings of First Appellate Court does not deserve any infirmity. The second appeal fails and the same is dismissed. The judgment and decree of the Subordinate Judge's Court, Tiruvannamalai, dated 26.08.1994 and made in A.S.No.25 of 1994 modifying the judgment and decree of the District Munsif Court, Tiruvannamalai, dated 13.08.1993 and made in O.S.No.927 of 1979 is confirmed. No costs. Consequently, CMP No.18348 of 1994 and CMP 564/10 are closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge,
Tiruvannamalai.

2. The District Munsif,
Tiruvannamalai.

Copy To
The Record Keeper,
VR Section,
High Court,
Madras

+1cc to M/s.R.Karthikeyan, Advocate, S.R.No.713

S.A.No.1476 of 1994

VGII(CO)
CS/05/02/18



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