

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1463 of 1999

1.Chinnasamy Gounder
2.C.Kandasamy
3.C.Poornam Ramasamy
4.V.N.Ramasamy

..Appellants/Plaintiffs
Vs.

1.Lakshmiammal
2.Somasundaram
3.Mariappan Gounder (deceased)
4.Nallasamy
5.Sadayappan
6.Sadayappan Gounder
7.Ramasamy
8.Uthami

...Respondents/Respondents

(R4 is recorded as LR of the deceased
R3 vide order of court dt.20.02.2018
made in S.A.No.1463/1999)
(Respondents 5 to 8 given up as
unnecessary parties)

PRAYER: The Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 06.04.1999 made in A.S.No.127/97 on the file of the I Additional District Judge-cum-Chief Judicial Magistrate, Erode modifying the Judgment and decree dated 09.04.1997 made in O.S.No.1266/96 on the file of the I Additional District Munsif, Erode in so far as it against the Appellants.

For Appellant : Mr.D.Sivakumar for
Appellant 1

Mr.L.Mouli for Appellants 2 to 4

For Respondents: Mr.S.Mukunth

for M/s.Sarvabhauan Associates

For R1 to R4

R5 to R8 given up

J U D G M E N T

The plaintiffs are the appellants herein. Though they have succeeded before the Trial Court, lost their case before the First Appellate Court. Aggrieved by the decision of the First Appellate Court, the plaintiffs have filed the present second appeal. The plaintiffs are the appellants herein and the defendants are the respondents herein.

2.The sum and substance of the plaint averments are as follows:

The plaintiffs have stated that the first plaintiff is the father of the second plaintiff, third plaintiff is the husband of the fourth plaintiff, the first defendant is the mother of the second defendant, the third defendant is the father of the fourth defendant. The seventh defendant is the father of the third plaintiff; that old S.F.No.201-A of Kollankoil Village, Erode Taluk is located South of Old S.F.No.201-B (New Survey No.1051-2), that both the survey fields originally belonged to common owners and after division among themselves it changed hands.

3.At present the plaintiffs and the defendants are the owners of these two fields with two others; that the partition of these two fields took place several decades ago; that there was a resurvey of the entire village and in the resurvey the plots that were allotted to each sharer was given a separate and distinctive resurvey numbers; that the said resurvey was conducted after observing all the formalities and come into force about 23 years back; that the plaintiffs and defendants are in possession and enjoyment of their respective shares; that originally there was a well in the southern part of old S.F.No.201-B and located adjoining the share of one Chinnappa Goundar in R.S.No.1051/5; that this well became dry and fell into disuse for more than 50 years ago and became dilapidated.

4.The plaintiffs filed a plan along with plaint; that this ruined well is shown as DW in R.S.No.1051-5; in the plaint plan; that after this well fell into disuse, the vendors of the defendants 1 to 4 dug a separate well at the north eastern corner of their share; that similarly the plaintiffs, their vendors and other sharers of old S.F.No.201-B dug a separate well at the north western part of old S.F.No.201-B corresponding to R.S.No.1051/2; that the sharers of this well have installed a 5 H.P. Electric motor under S.C.No.46 and take water during their respective turns; that there is no dispute regarding the rights of the plaintiffs to take water from this well or to use the electric motor and pump sets and to take along the water course in Old S.F.No.201-B corresponding to R.S.No.1051-14 under a sale deed dated 29.11.1983 from one Chinnammal and others.

5.The 2nd plaintiff purchased specific 38 cents in old S.F.No.198 corresponding to R.S.No.1052/11 and specific 12 cents of land in Old S.F.No.198 corresponding to R.S.No.1052-9B under a sale deed dated 30.08.96 from one Chinnappa Goundar and his son Kandaswamy; that the plaintiffs 1 and 2 were allotted specific 13 cents and another plot of specific 57 cents in old S.F.No.201-A corresponding to R.S.No.1051/13 under a partition deed dated 15.07.71; that under the said partition deed the

plaintiffs 1 and 2 were allotted specific plot of 91/2 cents in old S.F.No.198 corresponding to R.S.No.1052-7; that they were also allotted specific 6 cents of land and another 21½ cents of land in old S.F.No.201/B, that the originals of the sale deeds dated 29.11.83 and 30.08.86; that the 3rd plaintiff was allotted a specific plot 41 cents in old S.F.No.201/A a specific plots of 30 cents in old S.F.No.198 and another specific plot of 3 ½ cents in old S.F.No.198 a specific 6 cents and another specific plot of 20 cents in old S.F.No.201/B.

6. Under the partition deed dated 15.07.71 referred to above; that the 4th plaintiff and her father-in-law Nallasamy Gounder the 7th defendant jointly purchased specific 14 cents in old S.F.No.198 corresponding to R.S.No.1052/10 under a sale deed dated 5.9.88 from one Palaniswamy Gounder and others; since the 7th defendant is sick and unable to move away and to join the plaintiffs in filing the suit, he is impleaded as a defendant; that the first defendant had purchased on 10.9.70 a specific plot of 83 cents in old S.F.No.201-A and another specific plot of 61 cents in old S.F.No.198 with their separate well in Old S.F.No.201/A and a share in the dilapidated well in old S.F.No.201-B and shown as D.W.1051/2 in the plaint plan from one Ramaswamy Gounder and his son Paramasivam; that the defendants 1 and 2 are jointly enjoying the plots of land purchased by the 1st defendant.

7. The 3rd defendant purchased a specific plot of 11 cents in Old S.F.No.201-A and specific plot of 4 cents in O.S.F.No.198 and another plot specific 2 cents in old S.F.No.198 with 1/12th share in the separate well in old S.F.No.201-A and dilapidated well which is not completely closed; that the defendants 3 and 4 jointly enjoyed the specific plots purchased by the 3rd defendant; that the defendants 5 and 6 are entitled to a plot in R.S.No.1051/3 and 5 cents in R.S.No.1051/15; that all the plaintiffs and defendants are in possession and enjoyment of their respective shares which are shown distinctively in the plaint plan; that there is also no dispute regarding the shares of the plaintiffs 1 to 4 and that of the defendants 5 and 6 and third parties Kuttiappa Gounder vagaiyara and Chinnappa Gounder in the well located at the north western corner of old S.F.No.201/B and shown as W in the plaint plan; that the plaintiffs are entitled to take water from the well shown and 'W' in the plan to their respective plots in old S.F.No.198, 201/B; that corresponding to their respective R.S.; that there is 'W' a water course leading from the well marked W towards south to irrigate the lands of the plaintiffs and other shares therein.

8. The defendants 1 to 4 know the well marked as 'W'; that the water course of this well run towards south and turns towards east at the north western corner of the share of

plaintiffs 1 and 2 and again turns towards south in between the shares of plaintiffs 1 and 2 and Chinnappa Gounder and proceeds upto the southern and in between the share of the defendants 1 to 4 and also in between the shares of the plaintiffs 2 and 3; that the total width of this water course is about 4 feet 6 inch; that the western ridge of this water course is about two feet wide; that the inner part of the water course is about 1½ feet; that the eastern ridge of the water course is about 1 foot wide; that this water course is distinctively shown in the plaint plan in blue colour; that the western ridge of the water course is also used as passage to taken men and cattle to the respective shares of the plaintiffs and defendants; that this passage is shown in black colour in the plaint plan.

9.The plaintiffs and the 7th defendant and their predecessors in title have been and are using this water course and the passage for more than 50 years in their own right, openly, continuously and without any obstructions from any source including the defendants 1 to 6 and their predecessors in title that they are in enjoyment of the suit water course and passage by lost grant and also as a easement of necessity; that there is no other water course to take water from the well marked as in the plaint plan and to irrigate the various plots of the plaintiffs and the 7th defendant in R.S.No.1051 and 1052, that there is also no other passage to take man and cattle from the plots of the plaintiffs and 7th defendant to the well marked as 'W' in the plan; that further there is an underground pipeline as mentioned in the plaint plan which is laid by the plaintiffs and defendants for taking seepage water from Valliampalayam orrnatham upto the obliterated portion of water course and the seepage water is taking for irrigation through the suit water course, to their respective fields.

10.The lands of the plaintiffs and the defendants were also included in L.B.P. Canal Ayacut; that the plaintiffs and defendants 1 to 4 had been taking LBP water to their lands from a water course located on the middle part of old S.F.No.201/4 through one Malaiyappagounder's land; that the defendants 5 and 6 did not use the L.B.P. Canal water since the water in the well W itself is more than sufficient, that during the 1st week of October, 1996 the defendants 1 to 4 laid an underground pipeline in the Panchayat Road located west of the well 'W' to take water from the L.B.P. Koppur and to connect is with suit water course with a view to take the L.B.P. Canal water to their respective shares along the suit water course; that the plaintiffs prevented the defendants 1 to 4 from connection the pipeline with suit water course since it would affect their rights to take water to their respective shares from the well marked W in the plaint plan during their respective turns and especially during the period when the L.B.P. Water is let in for irrigation; that the defendants 1 to 4 have no right to use

the suit water course either to take well water or to take L.B.P. Canal water.

11. Since the defendants 1 to 4 did not succeed in their attempt they wanted to cause loss and damage to the plaintiffs and the 7th defendant; that with the object of carrying out their object the defendants 2 and 4 obliterated the suit water course and the passage that runs in their share in O.S.F.201/4 in spite of protest by the 2nd plaintiff at that time; that the defendants 2 and 4 completely destroyed the suit water course and the passage on 29.10.1996 that the destroyed portion of the suit water course is shown as red colour in the plan; that the destroyed portion of the suit pathway is shown as pink colour.

12. The 2nd plaintiff lodged a complaint at Arachaloor Police station on 29.10.1996 and it was registered on 01.11.1996 under a receipt No.121/96; the Police department but so far no concrete step is taken; that the defendants 5 and 6 are actively assisting the defendants 1 to 4 in their illegal activities; that the defendants 1 to 6 command men and money; that there are standing crops of turmeric coconut palms and solem in the lands of the plaintiffs and the 7th defendant; that the plaintiffs have raised the turmeric spending huge amounts and reared it for about 5 months when the water course is destroyed by the defendants 1 to 4 that after such destruction of the water course, the plaintiffs and the 7th defendant are unable to irrigate their plots and all crops are now dry and withered away.

13. The defendants 1 to 6 have colluded together and causing such loss and damages; that the plaintiffs have suffered a loss of more than 25 thousand rupees in this regard but restricted their claim for damages for Rs.25,000/- that the plaintiffs lay this suit for declaration of their right to use the suit water course to the water from the well marked 'W' during their respective turns and for consequential injunction in this regard, that they also lay this suit for declaration of their right to use the suit passage and for consequential injunction in this regard and for damage for loss cause to them by the destructive activities of the defendants 1 to 6; that the suit water course and the passage have to be restored to the original position.

14. The sum and substance of written statement filed by the 4th defendant and adopted by the defendants 1 to 3 are as follows:

The defendants have admitted the existence of the property and ownership of the same as described in the plaint. The only point disputed by the defendants was the cause of action alleged to have been taken place on 29.10.1996. They denied that they

have destroyed the water course and path way as they were not in existence. They protested the same against the plaintiffs for their claim of a pathway and a water course through these defendants filed under easement of necessity and easement of grant. The field has been shown as fed by the northern well was originally fed by southern well and the field was irrigated only by the well situated on the south of the field.

15.The sum and substance of written statement filed by the 6th defendant are as follows:

The defendant stated that all the averments in the plaint is true and further that he had no objection in granting the decree as prayed for by the plaintiffs.

16.After elaborate trial, the Trial Court granted decree in favour of the plaintiff and declared the rights of the plaintiffs and the 7th defendant to take water from the well shown as 'W' in the plaint plan through the suit water course to irrigate their respective shares in R.S.No.1051 and 1052 and granted mandatory injunction in favour of them and awarded Rs.10,000/- towards damage in favour of the plaintiffs.

17.Aggrieved by the same, the defendants preferred an appeal before the First Appellate Court. The First Appellate Court after perusing the materials modified the judgment and decree dated 09.04.1997 and declared that the entire suit water course is common for plaintiffs as well as the defendants and both of them are entitled to use the said water course and set aside the damage awarded by the Trial Court in favour of the plaintiffs. As against the same, the plaintiffs have filed the second appeal before this Court.

18.At the time of admission of the second appeal, this Court framed the following substantial questions of law:

(i) When the physical features of the suit property indicate the existence and user for along length of time, then, whether a decree ought to have been granted in favour of the appellants herein declaring their rights on the basis of presumption of lost grant?

(ii) When the defendants have not claimed any right in the suit property, whether a decree can be granted in their favour granting them rights in common? And

(iii) When arguments have been addressed under Or.41 R.22 CPC against a trial Court finding which is not being capable of being valued for the purpose of filing a cross appeal, then whether the judgment of the lower appellate Court is vitiated in that it has held the plaintiffs cannot be entitled to any right in the absence of any separate cross objection being filed?

19.The Learned Counsel appearing for the appellants would submit that though the Trial Court after framing issues and considering the entire materials has drawn inference in favour of the plaintiffs i.e. the plaintiffs are entitled to enjoy and draw water from the well situated in S.Nos.1051 and 1052 as a lost grant and consequently granted injunction and awarded damages, the First Appellate Court without considering any materials and without any counter claim, set aside the well considered Judgment and Decree of the Lower Court and granted relief to the defendants that they are also entitled to enjoy the water course along with the plaintiffs is not sustainable.

20.The learned counsel further submitted that the First Appellate Court had committed grave error by granting relief in favour of the defendants without any counter claim. Hence, this court necessarily has to interfere with the Judgment and decree of the First Appellate Court.

21.The learned counsel appearing for the respondents would submit that the Trial Court as well as the First Appellate Court arrived at a finding that the plaintiffs did not establish their case through material evidence and only considering the Commissioner report and physical features of the property in the respective Survey Nos. 1051 and 1052 granted relief as lost grant in favour of the plaintiffs. Even the Trial Court did not grant any exclusive rights in favour of the plaintiffs. However, the Trial Court had drawn inference in favour of the plaintiffs. The plaintiffs had presumed that they can enjoy the water course as lost grant. The First Appellate Court also confirmed the entitlement of enjoying the water course along with the defendants.

22.The learned counsel for the respondents further submitted that the water course in both ways belonging to the Government and that no one can have exclusive right to enjoy the property at the relevant point of time, as the L.B.P canal water was flowing through the water course and the same was enjoyed by the plaintiffs as well as the defendants. After considering the

entire materials, the First Appellate Court granted relief in favour of the plaintiffs as well as the defendants, which is a well considered Judgment and decree which do not warrant any interference by this Court in the second appeal and prays for dismissal of the second appeal.

23. On a perusal of the materials as well as the findings of the Trial Court and First Appellate Court, it is seen that the plaintiffs have not produced any documents to show that they have exclusive rights to enjoy the water course. Even though some defendants are entitled to draw water from the well situated in Survey Nos. 1051 and 1052 along with the plaintiffs, the plaintiffs denied the enjoyment of the water course only in respect of defendants 1 to 4, other defendants were allowed to enjoy the water course along with the plaintiffs.

24. The plaintiffs have admitted that they do not have any exclusive right to use the water course and they have not marked any documents to show that they have title over the water course.

25. After considering the entire issues, the First Appellate Court granted the relief to the appellants as well as the respondents that both of them have equal rights to use the water course for the purpose of irrigation, since the said water course is common for plaintiffs as well as defendants.

26. On a perusal of the plaint averments and written statements, the appellants as well as the respondents did not claim any exclusive right in the suit water course and they merely wanted the right of enjoyment in the water course. Accordingly, the First Appellate Court granted relief in favour of the plaintiffs as well as the defendants. Hence, I do not find any error or infirmity in the Judgment and Decree passed by the First Appellate Court. Accordingly, the substantial questions of law are answered against the appellants.

27. In the result, the second appeal is dismissed. The Judgment and Decree dated 06.04.1999 made in A.S.No.127 of 1997 on the file of the I Additional District Judge-cum-Chief Judicial Magistrate, Erode, is confirmed. No costs.

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To.

1.I Additional District Judge-cum
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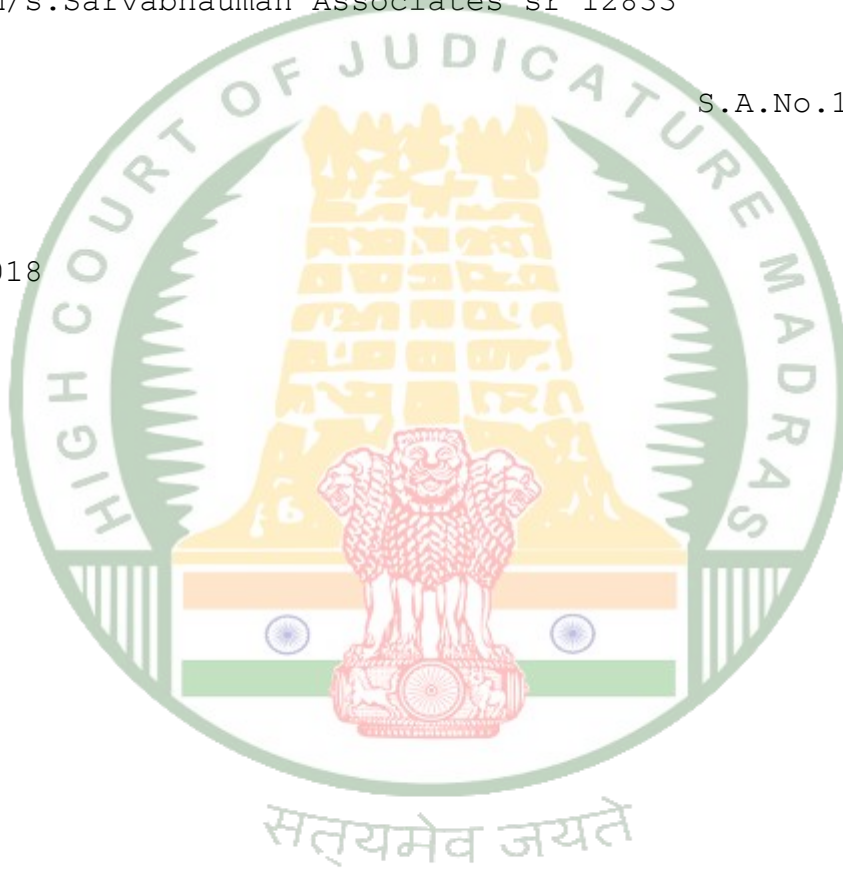
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