

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1545 of 2000

1.Subramani
2.Vediammal

.. Appellants/Appellants/Defendants

-Vs-

1. Govindan
2. Mangaiammal

.. Respondents/Respondents/Plaintiffs

Prayer:

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree of the court of the I Additional District Judge, Krishnagiri in A.S.No.54 of 1999 dated 31.07.2000 in confirming the judgment and decree of the court of the District Munsif, Krishnagiri in O.S.No.236 of 1991 dated 02.03.1999.

For Appellants : Mr.V.Raghavachari

For Respondents: Mr.J.Hariharan
for Mr.V.Nicholas

J U D G M E N T

The second appeal is filed against the judgment and decree dated 31.07.2000 passed in A.S.No.54 of 1999 on the file of the learned I Additional District Judge, Krishnagiri, confirming the judgment and decree dated 02.03.1999, passed in O.S.No.236 of 1991 on the file of the learned District Munsif, Krishnagiri.

2. The parties are referred to as per their rankings in the trial court. The respondents/plaintiffs filed a suit for declaration, to declare the plaintiffs right in the suit 'A' Schedule property and to grant perpetual injunction restraining the defendants from taking water from the well situated in S.No.159/12 to the lands described in the 'B' Schedule property.

3. The 'A' Schedule property belongs to plaintiffs and they are in exclusive possession. The first defendant has four brothers. They divided their ancestral family properties into three shares and the well in S.No.159/12 was kept for common purpose. The lands in S.Nos.159, 160 and 161 are irrigated from

the well situated in S.No.159/2012. The first plaintiff and his brothers divided their properties 25 years back. By virtue of partition each of the brothers had 1/15th share in the said well. Accordingly, the first plaintiff is entitled for 1/15th share in the suit 'A' Schedule property. Thereafter, on 29.05.1971, the first plaintiff's brother Krishnan sold his share of 24 cents situated in S.No.160/2D, together with his 1/15th share in the well, under a registered sale deed to the second plaintiff.

4. Accordingly, the first plaintiff and the second plaintiff enjoyed the respective shares in the well. The land purchased by the second plaintiff is sub divided into 160/2k and UDR patta was also granted in favour of the second plaintiff. The plaintiffs were in peaceful possession and enjoyment of the land and irrigating them from the well situated in S.No.159/12 in which the first plaintiff have 1/15th share and the second plaintiff have 2/15th share.

5. The defendants purchased the land in S.Nos.161/3, 161/4 and 161/5 as described in the 'B' Schedule. These lands were never irrigated from the well described in the Suit 'A' Schedule property. On 26.04.1991 the defendants with their men attempted to take water from the well situated in S.No.159/12 to irrigate his land described in the 'B' Schedule property, which was prevented by the plaintiffs. The defendants are denying the title of the plaintiffs. Therefore, the plaintiffs are entitled for declaration and perpetual injunction as sought in the plaint.

6. The sum and substance of the written statement filed by the first defendant is as follows:-

(i) The first defendant denied the right of the plaintiffs with regard to the 'A' Schedule property and they are in a absolute possession of the same. He admitted the relationship of the first plaintiff and his brothers and their partition. The first defendant further, admitted that the first plaintiff has four brothers and they had ancestral properties got through their father Kullappan who had two brothers, divided their lands into three shares and they kept the well in S.No.159/12 as common.

(ii) The first defendant also admitted the 1/15th share of the first plaintiff. However, he denied the second plaintiff's 1/15th share purchased from Krishnan for irrigating the lands in S.No.159/12, claiming 2/15th share. In fact the first defendant purchased 1/15th share in the well from the first plaintiff's brother Krishnan and Dharmalingam son of Karuthan, through the register sale deed dated 09.03.1981. After the purchase, he has been irrigating his lands from the above said well.

(iii) Subsequently, the first defendant purchased another property through the sale deed dated 11.09.1970 for valid sale consideration. After the said purchase he has installed an oil engine in the suit well situated in S.No.159/12. Since, then

onwards he was drawing the water from the well and irrigating 'B' Schedule property with the knowledge of plaintiffs. He has also perfected his title by adverse possession acquired by way of Easement.

(iv) The defendants are enjoying their lands in 'B' Schedule property by irrigating water from the well situated in 'A' Schedule property in which they have common shares. Therefore, the plaintiffs are not entitled for any relief in the suit.

7. Based on the documents and the pleadings, the learned District Munsif, Krishnagiri and the lower Appellate Court framed the issues. After perusal of the oral and the documentary evidence the learned District Munsif decreed the suit in favour of the plaintiffs and the same was confirmed by the lower Appellate Court. As against the concurrent findings, the appellants/defendants have filed the second appeal.

8. At the time of admission of the second appeal, this court has framed the following substantial questions of law:-

"1. Whether the Courts below are right in decreeing the suit and in granting an injunction against the vendee of the co-owner?

2. Whether the order of the Courts below are not against the judgment of the Madras High Court in 1999 II MLJ 648?

3. Whether the Courts below are right in not applying the principle under Section 8 and 19 of the Easement Act and Section 6 of the Transfer of Property Act and should it not have held that the lands cannot be divorced of the source of irrigation?"

9. Learned counsel appearing for the appellant admitted that the first plaintiff and his brothers divided their ancestral property into three shares and also admitted that one well is situated in S.No.159/12. However, there is only one well available in the 'A' Schedule property. Through that well all the three S.Nos are irrigated. Though the defendants purchased the property in S.No.161 from one Palani Gounder, through Ex.B2, the said Palani Gounder purchased the property from one of the brothers of the first plaintiff through Ex.A.26. Even on perusal of Ex.A.26, it is clear that the defendants vendor acquired the

right of 1/15th share of irrigating rights in S.No.161, through Ex.A.26. The vendor of the defendants acquired the right and the sale is extended to the defendants. Accordingly, the defendants are enjoying the irrigating rights from the well situated in S.No.159/12.

10. Immediately after purchase, the defendants installed the oil engine in the above said well and were drawing water from the said well, to cultivate the lands belonging to the defendants. In order to defeat the rights of the defendants, the plaintiffs filed a vexatious suit before the lower court. Without considering Ex.A26 and Ex.B2, the lower Court as well as the lower Appellate Court arrived at a perverse finding and held in favour of the plaintiffs.

11. The learned counsel in support of her contentions relied upon the unreported decision, of this court in Second Appeal No.1327/2002 (Radhamani Ammal Vs. Ramu Udayar and others.), the relevant portion of which reads as follows:

"15. In the light of the above position, when it is found that the defendants 1 and 2 have admittedly equal share in the A schedule Well and found to be entitled to equal share in the electric motor pumpset and also the service connection, described in the A schedule properties, it is seen that as regards the A schedule properties are concerned, both the plaintiff and the defendants 1 and 2 are only co-owners. Similarly, as far as the B schedule properties are concerned, in the total extent of the survey numbers mentioned thereunder, it is seen that admittedly, the defendants are also co-owners of the same and in such view of the matter, as rightly putforth by the defendants' counsel, when in respect of both the A and B schedule properties, the defendants are the co-owners, the present suit laid by the plaintiff for permanent injunction against the co-owners is not maintainable, particularly, when the plaintiff seeks the relief above stated, on the basis of the settlement deed Ex.A1, executed by her husband, Govindha Udaiyar. In this connection, it is argued by the defendants' counsel that when the plaintiff schedule properties A and B are belonging to both the plaintiff and the defendants as co-owners, it is contended that the plaintiff's husband Govindha Udaiyar would not be, as per law, entitled to settle the properties in favour of his children, by way of Ex.A1, as the law governing the parties does not permit him to effect the settlement deed of the undivided share, in favour of the strangers or other co-parceners, unless the

same had been given consent by the other co-parceners. In this connection, the defendants' counsel placed reliance upon the decision of the Apex Court in AIR 1987 SC 1775 (Thamma Venkata Subbamma (Dead) by Lr Vs. Thamma Rattamma and Ors.) In the above said decision, the above position of law is stated as follows:

Issues: Whether a gift by a coparcener of his undivided coparcenary interest to another coparcener was void? Holding: According to the Mitakshara law, no coparcener can dispose of his undivided interest in coparcenary property by gift. There was no estoppel or other kind of personal bar which preclude the donor from asserting his right to recover the transferred property. The legislature did not provide for any gift by a coparcenary of his undivided interest in the coparcenary property either to a stranger or to another coparcener. Therefore, the personal law of the Hindus, governed by Mitakshara school of Hindu law, a coparcener could not make a gift of interest. Under the proviso to Section 6 of the Hindu Succession Act, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through female relative then the interest of the deceased in the Mitaksara coparcenary property shall devolve by testamentary or intestate succession. The devolution of interest in coparcenary property by survivorship had been altered to testamentary or intestate succession. Therefore, a coparcener can make gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of all other coparceners. Such a gift would be quite legal and valid. Hence appeal is dismissed."

12. The learned counsel appearing for the respondents/plaintiffs would submit that there is no dispute with regard to the partition in respect of the first plaintiff's brothers with regard to the ancestral properties. The ancestral properties are divided into three shares between the first plaintiff's brothers. The second plaintiff after the partition in favour of the first plaintiff, she purchased the property from one of the first plaintiff's brothers.

13. Admittedly, there is a well available in S.No.159/12. Through that well these brothers were irrigating water for time immemorial. However, some of the brothers of the first plaintiff sold the properties to third parties. Even then they have not conveyed the enjoyment of their shares in the well situated in S.No.159/12 to any third parties. The first defendant claims the right under Ex.A.26 where the vendor of the defendants purchased the property from the plaintiff's brothers. Even on perusal of Ex.A.26 it clearly shows that the first plaintiff's brother conveyed only S.No.161 and not S.No.159/12.

14. When the S.No.159/12 is not conveyed, claiming right through Ex.A.26 will not arise, since what is available is not conveyed through Ex.A.26. The first defendant purchased the property through Ex.B2, and right is not available to him to irrigate the water from the S.No.159/12. Accordingly, the lower Court as well as the lower Appellate Court arrived at a fair conclusion that the defendants have no right to irrigate the lands from the water in the well in S.No.159/12 and granted the decree in favour of the plaintiffs. The concurrent findings need not be interfered in the second appeal, since, there is no question of law available in favour of the defendants/appellants.

15. The respondents/plaintiffs filed a suit for declaration in respect of 'A' Schedule property and consequential injunction restraining the defendants from taking water from well situated in S.No.159/12 which is described as 'B' Schedule property. On perusal of the schedule, S.Nos.160/2D and 160/2k are described in the 'A' Schedule property. Since, through partition and sale deed the first plaintiff and the second plaintiff possess the title in respect of S.Nos.160/2D and 160/2k, the 'B' Schedule property is described as well in S.No.159/12.

16. In order to prove their case the respondents/plaintiffs marked the sale deed as Ex.A2. The first plaintiff acquired the right in respect of 'B' Schedule property through oral partition. The second plaintiff purchased the property in respect of drawing water in the 'B' Schedule property from one of the legal heirs of the first plaintiff and it was not disputed by the defendants. In respect of acquisition of rights for drawing water through the partition, the sale deed as well as the revenue records were also transferred in the name of the first plaintiff and the second plaintiff. The said documents are marked as Ex.A1, Ex.A2, Ex.A3 and Ex.A4, and the plaintiffs also filed a revenue records to show that the plaintiffs are exclusive in possession and enjoyment of the 'A' and 'B' Schedule properties.

17. The case of the defendants is that under Ex.B2, the

defendants claimed 1/15th share in the disputed well. On perusal of Ex.A.26 the vendor of the defendants namely the Palani Gounder, purchased 10 cents in S.No.161 and 1/10th share in the same Survey Number and the said sale deed did not disclose that Vaguthan @ Chinnaian had conveyed 1/15th share in S.No.159/12. Therefore, the said Palani gounder had no right to convey 1/15th share in S.No.159/12 under Ex.B.2. He conveyed only 1/10th share in S.No.161. Admittedly, the well is not situated in S.No.161.

18. Apart from the above the first defendant has purchased 1/15th share under Ex.B3 from Krishnan and Darmalingam, who is

none other than the brothers of the first plaintiff. The sale deed was executed on 09.03.1981. But, however the said Krishnan has already conveyed his 1/15th share under Ex.A2 dated 29.05.1971 to the second plaintiff, prior to the first defendant's purchase. The said Darmalingam had only 1/60th share in his father's 1/15th share. Therefore, the said Krishnan and Darmalingam jointly conveyed 1/15th share to the first defendant is not valid and they have no such right.

19. Admittedly, even as per the first defendant statement, 'B' Schedule property belong to the defendants. On perusal of the Commissioners report filed in the Lower Court, an oil engine is set up by the defendants and there was a channel from the disputed well leading to the lands of the defendants. In view of the Commissioner's report the learned counsel appearing for the appellant would submit that even in the absence of title in favour of the defendants, the defendants are enjoying the rights by acquiring the adverse possession. Therefore, the plaintiffs are not entitled for permanent injunction, restraining the defendants from taking water from the well. Even on perusal of the decision cited by the learned counsel appearing for the appellants, the dispute is in respect of co-owners with regard to the electric pump sets installed in 'A' Schedule property.

20. With regard to the second question of law, on perusal of the decision of this Court rendered in the case of Arunachala Naicker and others Vs. Janakirama Naicker, dated 26.03.1999 reported in (1999)2 MLJ 648. Particularly the relevant portion in Para 13 reads as follows:

"In my view, the right in the well cannot be treated as a distinct item of property divorced from the lands for which it was to serve as the source of irrigation. So what was conveyed by Vinayagamurthy to the respondent under Ex.A-2 could take in only the share in the well that the land covered by the sale deed could take. As has been pointed out by the Supreme Court in the same judgment in these days of scarcity when every effort is being made at all levels to increase the agricultural production to feed the country's

teeming millions, it would not be desirable to allow the defendants to create any hurdle in the irrigation of the plaintiff's plots through the Government channel from their exclusive well. "The instant case is one such where the respondent attempted to deprive the fourth appellant from exercising his rights in the suit well by relying on the sale deed from Vinayagamurthy conveying the entirety of his share in the suit well".

21. On perusal of the above decision, the decision may not be applicable to the present case on hand. In the present case on hand admittedly, defendants purchased 10 cents in S.No.161 and 1/10th share in the same Survey Number and the sale deed did not disclose that Vaguthan @ Chinnaian had conveyed the share in S.No.159/12. However, the well is situated in S.No.159/12. In the absence of any share in the well situated in the Survey No. the defendants are not entitled to enjoy the irrigation rights.

22. The present case on hand is that the defendant is claiming irrigation right in the 'B' schedule property based on the adverse possession and the sale deed is marked as Ex.B2. Even on perusal of Ex.B2, the S.No.159/12 is not mentioned, they mentioned only S.No.161, Infact the well is situated only in S.No.159/12. The plaintiffs did not establish their case with regard to the adverse possession and their title in S.No.159/12.

23. In the absence of any material this Court is not able to grant the relief in favour of the appellants/defendants. In view of above the substantial question of law are answered against the appellants and the second appeal fails. Accordingly the Second Appeal is dismissed.

24. In the result, the second appeal is dismissed. The Judgment and decree dated 31.07.2000 made in A.S.No.54 of 1999 by the learned I Additional District Judge, Krishnagiri, confirming the Judgment and decree dated 02.03.1999 made in O.S.No.236 of 1991 by the learned District Munsif, Krishnagiri, is confirmed. The parties are directed to bear their own costs.

-s/d-

Assistant Registrar(CS-IV)

True Copy

Sub-Assistant Registrar

To

1.The I Additional District Judge, Krishnagiri.

2.The District Munsif, Krishnagiri.

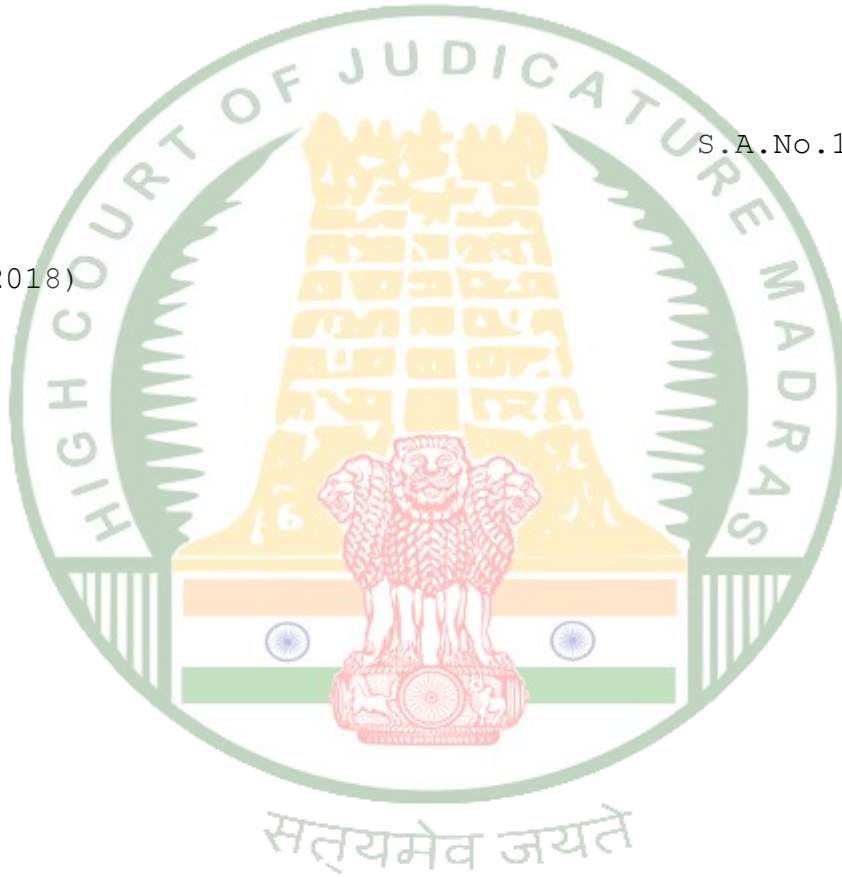
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