

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.03.2018
PRONOUNCED ON : 06.04.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1420 of 2003

1. Songappa Gounder
2. Arunachalam

..Appellants/Defendants 1&2

Vs.

1. T.P.Arumugham

..1st Respondent/Plaintiff

2. Tamil Nadu Electricity Board,
represented by the Executive Engineer,
Periyar Electricity Distribution Circle,
Erode South Division Unit,
Gandhiji Road, Erode.

3. Tamil Nadu Electricity Board,
represented by its Asst. Executive Engineer,
Elumathur, Erode Taluk.

4. Tamil Nadu Electricity Board,
represented by Junior Engineer,
Ellakadai, Elumathur, PO.,
Erode Taluk.

..Respondents 2to4/Defendants 3to5

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 20.03.2003 made in A.S.No.22 of 2002 on the file of the First Additional Sub Court Erode, reversing the judgment and decree dated 14.12.2001 made in O.S. No.81 of 1998 on the file of the District Munsif Cum Judicial Magistrate, Kodumudi.

For Appellants : Mr. N.Manokaran

For R1 : Mr.V.P.Senguttuvel

For R2 to R4 : V.Viswanathan,
Senior Counsel for TNEB

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 20.03.2003, passed in A.S.No.22 of 2002, on the file of the First Additional Subordinate Court, Erode, reversing the judgment and decree dated 14.12.2001, passed in O.S. No.81 of 1998 on the file of the District Munsif Cum Judicial Magistrate Court, Kodumudi.

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

3. Suit for permanent injunction and mandatory injunction.

4. The case of the plaintiff, in brief, is that the first defendant is the elder brother of the plaintiff and the second defendant is the son in law of the first defendant and the plaintiff and the defendants 1 and 2 effected partition of their properties by way of a deed of partition dated 15.05.1985 and accordingly, the sharers had been enjoying their respective shares and there is one well situated in R.S.No.331/10, Kangan village, Erode. It is the suit well in which there is one 5 H.P.electric motor and pumpset installed with service connection No.289 which was obtained in the name of the plaintiff in the year 1984. Under the above said partition deed, the plaintiff and the first defendant were allotted half share in the suit well and the second defendant was not allotted any share. Accordingly, the plaintiff and the first defendant had been bailing water from the suit well through turn system of three days out of every six days and irrigating their respective lands. While so, inasmuch as the first defendant unlawfully objected to the plaintiff using the motor room which happened to be located in the share of the first defendant, misunderstanding arose between the parties and the first defendant filed a suit in O.S. No.449/96 against the plaintiff for the reliefs of declaration and permanent injunction as regards his half share in the suit electric motor and pumpset and his right to bail water as per his turn and during the pendency of the suit, a panchayat was held between the parties and accordingly, the plaintiff along with his son agreed to convey half share in the suit electric motor and pumpset in favour of the first defendant and accordingly, conveyed the same under the registered sale deed dated 29.4.1997 and it was agreed that the plaintiff and his son may apply for a separate service connection for installing a motor connection in the suit well for bailing water as per the partition and it is agreed that the suit in O.S.No.449 of 1996 should be withdrawn by the first defendant. However, as the plaintiff was informed that obtaining separate service connection may take time, the plaintiff installed 6 H.P. oil engine and pumpset in the suit well and bailing water for irrigating his lands and during power cut seasons, the defendant was unable to irrigate his lands and accordingly, picked up quarrel with the plaintiff and again a panchayat was held between the parties and it was agreed in the said panchayat that the parties should revert back to their original position viz, the sale deed dated 29.4.1997 should be cancelled and that each party should bail out water according to their turns from the common well using the motor pumpset and service connection and as the cancellation of the sale deed dated 29.04.1997 would incur heavy expenses and as the first defendant had not withdrawn the suit in O.S. No.449 of 1996, accordingly, it was agreed that the first defendant should give evidence in the said

suit as regards his entitlement of half share in the suit well electric motor and pumpset and obtain the decree and thereby, each party would be declared to be entitled to half share in the suit property and accordingly, the first defendant tendered evidence in the said suit admitting the half share of the plaintiff in the suit property and since then, the parties had been irrigating their respective lands from bailing out water from the suit well during their turns and the defendants 1 and 2 unlawfully laid another underground pipeline for irrigating their lands and also attempted to prevent the plaintiff from bailing out water from the suit well and also installed submersible electric motor and pumpset in the suit well with a view to prevent the plaintiff from bailing out water and left with no other alternative, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants 1 and 2, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts. It is true that the plaintiff and the first defendant become entitled to equal half share in the suit well as well as the service connection, motor pumpset etc., by way of a registered partition deed dated 15.05.1985. It is false to state that the parties had been bailing water from the suit well as per the turn system of three days out of every six days. It is true that the defendant filed a suit in O.S. No.449/96 for declaration and permanent injunction etc., but not in the circumstances put forth in the plaint and it is false to state that during the pendency of the said suit, a panchayat was held between the parties, whereunder, the plaintiff had conveyed his half share in the electric motor pumpset to the defendants by way of a registered sale deed dated 29.04.1997 and that the first defendant had agreed to withdraw the suit in O.S. No.449/96. Inasmuch as the plaintiff attempted to disturb the defendants' right to use the suit well, service connection in the motor pumpset, the suit in O.S.No.449/96 has come to be preferred and accordingly, during the pendency of the said suit, the plaintiff sold his half share to the defendants by way of a sale deed dated 29.04.1997 and since then, the plaintiff has no right, title or interest over the suit property and the first defendant became the absolute owner of the same. The plaintiff has got a separate well in the south east of the suit well and the defendants thereafter installed a 5 H.P. submersible motor in the suit well as the plaintiff has no right in the suit well after the sale deed dated 29.4.1997. He has also not chosen to contest the suit in O.S. No.449/96 by filing a written statement and accordingly, the plaintiff was set ex-parte in the said suit and as the first defendant had not carried out amendment in the said suit after purchasing the plaintiff's half share in the suit property as aforestated, chose to depose in the said suit based on the plaint averments and accordingly the decree has come to be passed in the said suit and taking advantage of the same the plaintiff with mala fide intention has come forward with the suit as if he has got half share in the

suit property. The suit as framed is not maintainable and without any cause of action and hence liable to be dismissed.

6. The case of the defendants 3 to 5 is that the service connection S.C.No.289 in suit well stands in the name of the plaintiff and the plaintiff and the first defendant are the common owners of the abovesaid service connection. However, the parties had not taken steps to mutate the records with reference to the same and as far as the defendants are concerned, they are unnecessary parties to the suit and hence, the suit is liable to be dismissed.

7. In support of the plaintiff's case PW1 was examined Exs.A1 to A8 were marked. On the side of the defendants DWS1 and 2 were examined, Exs.B1 to B3 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the suit laid by the plaintiff. On appeal, the first appellate Court, on an appreciation of the materials placed on record, was pleased to set-aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Challenging the same, the present second appeal has come to be laid.

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

1. Whether the first appellate Court is right in accepting the plea of panchayat as claimed by the plaintiff in the absence of any oral and documentary evidence to prove the factum of panchayat in conformity with sections 101 to 103 of Indian Evidence Act?
2. Whether the first appellate Court is right in rejecting the right of the appellants conferred under Ex.B1 when the parties to the said document is debarred from giving evidence as per sections 91 and 92 of Evidence Act?
3. Whether the evidence of PW1 in OS No.449/96 marked as Ex.A5 can be construed as admission under Sections 17 and 21 of the Evidence Act especially when the exparte evidence adduced PW1 in O.S. No.449 of 1996 was based on the pleadings in that suit?

4. Whether there was proper casting of burden of proof by the lower appellate Court and whether the first appellate Court has properly appreciated and applied the principles of Estoppel in the facts of the present case?

10. The plaintiff and the first defendant are brothers. The second defendant is the son in law of the first defendant. By way of a partition deed dated 15.05.1985, it is seen that the plaintiff and the first defendant each have common half share in the suit property i.e., the suit well, service connection and the motor and pumpset installed therein. In this connection, on account of the misunderstanding between the parties, the suit in O.S. No.449/96 has come to be laid against the plaintiff by the first defendant as regards his right in the suit property. During the pendency of the said suit, it is found that the plaintiff has alienated his half share in the suit property to the first defendant by way of a registered sale deed 29.04.1997. Thus, it is found that pursuant to the above said sale deed, it is only the first defendant, who has absolute title to the suit property in entirety. However, it is stated by the plaintiff that pursuant to the panchayat held between the parties concerned, during the pendency of the suit in O.S. No.449/96, the plaintiff had agreed to convey his half share in the suit property to the defendants and the defendants had agreed to withdraw the said suit. Further, according to the plaintiff, he has been granted permission to install a separate motor pumpset in the suit well and service connection for the purpose of bailing out water to irrigate his lands and it is the case of the plaintiff that as the said process is a time consuming one and hence, according to the plaintiff, in the meanwhile, he had installed 6 H.P.oil engine and pumpset in the suit well and bailing out water for irrigating his lands. As rightly contended by the defendants and as rightly determined by the trial Court, when the plaintiff is found to have conveyed his half share in the suit property by way of a sale deed dated 29.04.1997, it does not stand to reason as to how, thereafter, the plaintiff could exercise his right in the suit well by way of installing oil engine to draw water for the purpose of irrigation. Further, the panchayat, as pleaded by the plaintiff, is not convincing as no acceptable materials are placed to sustain the same. If really, such a panchayat had been made out and the first defendant, despite the execution of the sale deed dated 29.04.1997 by the plaintiff, had permitted the plaintiff to install the oil engine, definitely there should have been materials to buttress the same. Particularly, when the defendants 1 and 2 have denied the alleged panchayat projected by the plaintiff, the case of the plaintiff that even after the sale deed dated 29.04.1997, he has been exercising right of ownership in respect of the suit property as such cannot be accepted in any manner. Though it is claimed by the plaintiff that the defendant had agreed to withdraw the said suit, the fact remains that the said suit has not been

withdrawn. It is found that inasmuch as the plaintiff had conveyed his half share in the suit property to the first defendant by way of a sale deed dated 29.04.1997, it is found that the plaintiff did not choose to contest the said suit and remained ex-parte.

11. Further, according to the plaintiff, as the defendants experienced difficulties in bailing out water during the power cut season, it is stated that a further panchayat was held between the parties and it was agreed in the said panchayat that the parties should revert back to their original position, thereby, it is the case of the plaintiff that he has been conferred with the half share right in the suit property and it is also the case of the plaintiff that the defendant should tender evidence in O.S. No.449/96 only as against the half share in the suit property with a view to admit the plaintiff's half share in the suit property. However, the said pleas projected by the plaintiff are resisted by the defendants. As rightly determined by the trial Court, when the plaintiff had already conveyed his half share right in the suit property to the defendants by way of the sale deed dated 29.04.1997, his case that without the cancellation of the same, the parties had agreed to revert back to their original position, as such, cannot be countenanced. A legal conveyance cannot be set aside or cancelled by convening a panchayat which is not a legal redressal. It is thus found that the case of the plaintiff that the sale deed dated 29.04.1997 has been agreed to be cancelled and not given effect to on the basis of the panchayat decision is found to be untenable, particularly, when there is no proof placed by the plaintiff that such a panchayat has been held between the parties. None of the parties who had been associated with the panchayat has been examined. If really, such an arrangement would have been arrived at, a muchilika would have been executed, but no such muchilika has been entered into or agreed to be recorded by the parties. Further, if the first defendant had agreed to recognise the plaintiff's half share and right in the suit property following the out come of the panchayat, nothing prevented the parties to apprise the decision of the panchayat to the Court where O.S. No.449/96 was pending and thereby invited the decision of the Court to pass the decree in terms of the arrangement arrived at by the parties by way of filing the compromise memo. On the other hand, the plaintiff has chosen not to contest O.S. No.449/96 and remained ex-parte. O.S.No.449/96 has come to be laid prior to the execution of the sale deed dated 29.04.1997. It is seen that the first defendant did not chose to amend the plaint even after assuming full right to the suit property pursuant to the sale deed dated 29.04.1997. Accordingly, it is found that the first defendant had tendered evidence only as per the pleas set out in the plaint in the suit and accordingly, his half share in the suit property had been declared in the suit. By way of the same, it cannot be held that the first defendant had agreed to confer or recognise the half share in the suit property to the

plaintiff as a corollary to the decision of the panchayat. As rightly contended by the defendants, the plaintiff taking advantage of the abovesaid ex-parte decree is scheming to grab the share in the suit property, by way of projecting the panchayat said to have been conveyed between the parties. It is found that the materials placed on record would go to show that even prior to the alleged second panchayat stated to be convened in the month of July 1997, the first defendant purchased the submersible motor by way of Ex.B3 and installed in the suit well. It is thus found that the first defendant had started exercising full ownership over the suit property by way of installing the submersible motor in the suit well and accordingly, as rightly determined by the trial Court, if really the second panchayat had been convened, there would have been some understanding in respect of the expenses incurred by the first defendant for the purchase of the submersible motor effected in the suit well. This fact would only go to show that the panchayat plea projected is not true and the plaintiff planning to usurp some right in the suit property and accordingly, is found to have come forward with the present suit by projecting two panchayats and however, without any materials to sustain the same.

12. As rightly found by the trial Court, there is no material placed by the plaintiff to uphold the alleged convening of the panchayat between the parties in respect of the suit property, particularly, after the purchase of the plaintiff's half share right in the suit property by the first defendant by way of the sale deed dated 29.4.1997 and in such view of the matter, when the said right conveyed to the first defendant by the plaintiff had not been lost by the first defendant in the manner known to law, further, when it is seen that the ex-parte decree rendered in O.S.No.449/96 is passed based upon the plaintiff's averments and the pleadings tendered in the matter and merely because the first defendant has not projected the acquisition of the right in the suit property by way of sale deed dated 29.4.1997 in the said suit, that by itself would not lead to the conclusion that the plaintiff has retained his half share right in the suit without the cancellation of the sale deed dated 29.4.1997 in the manner known to law.

13. Materials placed on record would go to show that the plaintiff has not legally regained the right conveyed to the first defendant by him in the suit property by way of the sale deed dated 29.04.1997 and on the other hand, the materials placed on record would go to show that it is only the first defendant who has been exercising absolute right in the suit property pursuant to the sale deed dated 29.04.1997 and in such view of the matter, it is found that the suit laid by the plaintiff on the footing that he is still owning half share right in the same is found to be of no substance, particularly, when there is no material at all justifying the abovesaid claim of the plaintiff.

14. In the light of the abovesaid reasoning, the first appellate Court is found to have erred in accepting the plea of the panchayat projected by the plaintiff sans any oral and documentary evidence pointing to the same as per law and also forgetting that the plaintiff is debarred to tender evidence contrary to the recitals found in the sale deed dated 29.04.1997 as per sections 91 and 92 of the Indian Evidence Act and the evidence of the first defendant in O.S.No.449/96 should only be construed as confined to the pleadings set out in the said plaint and not to be determined as if he had accepted the plaintiff's half share right in the suit property and thus it is found that the first appellate Court without proper appreciation of the materials placed on record based on illogical reasonings and conclusions, erroneously set aside the well considered judgment of the trial Court of rejecting the plaintiff's case. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendants.

15. For the reasons aforesaid the judgment and decree of the First Additional Subordinate Court, Erode, dated 20.03.2003, passed in A.S.No.22 of 2002, are set aside and the judgment and decree dated 14.12.2001, passed in O.S. No.81 of 1998 on the file of the District Munsif Cum Judicial Magistrate Court, Kodumudi are confirmed. Accordingly the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CS-viii)

//True Copy//

Sub Assistant Registrar

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To

1. The First Additional Sub Court, Erode.
 2. The District Munsif Cum Judicial Magistrate,
Kodumudi.
- + 1 cc to Mr.N.Manokaran, Advocate Sr.25768
+ 1 cc to Mr.V.P. Sengottuvel, Advocate Sr.26067
+ 1 cc to Mr.V. Viswanathan, Advocate Sr.25577

S. A.No.1420 of 2003

TM(CO)
EU(08/05/2018)