

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.01.2018

PRONOUNCED ON : 30.01.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1562 of 2003

1. O.K.Ponnusamy
2. Maragatham .. Appellants

Vs.

1. Minor Arulkumar
2. Minor Gowrisankar
Minor are represented by
their next friend / mother
Kuttaiammal
3. Karuppana Gounder .. Respondents

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 21.11.2001 made in A.S.No.25 of 2001 on the file of the Sub Court, Bhavani, confirming the Judgment and Decree dated 06.11.2000 made in O.S.No.767 of 1991 on the file of the Principal District Munsif Court, Bhavani.

For the Appellants : Mr.N.Manokaran

For the Respondents : Mr.P.Parthi Kannan
for Mr.S.Kaithamalai Kumaran

JUDGMENT

This second appeal is directed against the Judgement and Decree dated 21.11.2001 passed in A.S.No.25 of 2001 on the file of the Sub Court, Bhavani, confirming the Judgment and Decree dated 06.11.2000 passed in O.S.No.767 of 1991 on the file of the Principal District Munsif Court Bhavani.

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

3. Suit for Permanent injunction.

4. The plaintiffs are the owners of the suit property by way of two sale deeds dated 07.02.1990 and 08.02.1990 executed by one Sengoda Gounder in their favour and the plaintiffs had been in possession and enjoyment of the same since then and originally the suit property and other properties belonged to three brothers viz., Kuppanna Gounder, Sengoda Gounder and Kalianna Gounder and they have partitioned their properties by way of a partition deed dated 22.09.1938 and the suit property fell to the share of Sengoda gounder and the plaintiffs have purchased the same from Sengoda Gounder by way of the above mentioned two sale deeds and the defendants are the legal representatives of Kalianna Gounder, who is the brother of Sengoda Gounder and have nothing to do with the suit property and they have got shares to the east and north of the suit property. There is a well situated in the suit property, which belongs to the plaintiffs absolutely and the defendants had been allotted only a right to take water from the Well as per the partition deed dated 22.09.1938 and however, they had not taken water, after the purchase made by the plaintiffs and they had abandoned the right to take water from the Well situated in the suit property since they had got another Well in the same survey field. Due to misunderstanding which had arisen between the parties, the defendants are proclaiming that they would form a pathway in the suit property so as to take water from the Well by trespassing into the same, to which course, the defendants are not entitled to and hence, the necessity for the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts. After denying the plaint averments, according to the defendants, they had denied the entitlement of the suit property as put forth by the plaintiffs by virtue of the sale deeds dated 07.02.1990 and 08.02.1990 and they have admitted the partition deed dated 22.09.1938 effected amongst the three brothers as stated in the plaint and they have also admitted that the said partition deed provides only for taking of water from the Well by the defendants and their predecessor in interest and according to them, it is false to state that the defendants had stopped taking water from the Well pursuant to the purchase of the suit property by the plaintiffs and it is false to state that the defendants have got another Well for irrigating their lands and had abandoned their right in the suit Well as put forth in the plaint. Inasmuch as the defendants are entitled to take water from the suit Well, according to them, they are entitled to have access to the suit Well and accordingly, the plaintiffs are not entitled to obstruct the defendants from using the mamool pathway for reaching the Well to enable them to take water from the Well and when it has been admitted that the suit Well is common to the plaintiffs and the defendants and the parties

being co-owners, the plaintiffs are not entitled to obtain the relief of permanent injunction as against the defendants and hence, the suit is liable to be dismissed.

6. In support of the plaintiffs' case, PWS-1 to 3 were examined and Exs.A1 to A8 were marked. On the side of the defendants, DWs-1 to DW3 were examined and Exs.B1 & 2 were marked. Exs.C1 and C2 were also marked.

7. On a consideration of the oral and documentary evidence placed on record and the submissions made by the respective parties, the trial Court was pleased to dismiss the suit laid by the plaintiffs. On appeal, the First Appellate Court, on an appreciation of the materials placed, was pleased to set aside the judgement and decree of the trial Court and by way of allowing the appeal preferred by the plaintiffs, decreed the suit as prayed for. Aggrieved over the same, the present second appeal has come to be laid by the defendants.

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

1. Whether the findings of the lower Appellate Court is correct in law in granting decree to the plaintiff especially when the defendants 1 and 2 are conferred with the right to take water from the common well under Ex.B1 dated 22.09.1938?

2. Whether the lower Appellate Court has properly appreciated and applied the principles to find out whether the plaintiffs are entitled to prevent the 1 and 2 defendants claim of Easement of necessity and prescription in view of the fact and circumstances of the present case?

9. From the materials placed, it is found that Kuppanna Gounder, Sengoda Gounder and Kalianna Gounder are brothers and that, they had divided the properties belonging to them by way of the partition deed dated 22.09.1938, which document has come to be marked as Ex.A2/B1. On a perusal of Ex.A2/B1, it is found that Sengoda Gounder had been allotted the suit property. It is the case of the plaintiffs that they had purchased the suit property from Sengoda Gounder by way of two Sale deeds dated 07.02.1990 and 08.02.1990, which documents have been marked as Exs.A1 and A5 respectively. The plaintiffs' claim of purchase of the suit property by way of Exs.A1 & A5 from Sengoda Gounder has not been

disputed, as such, by the defendants. It is further seen that the defendants are the legal representatives of Kalianna Gounder.

10. The defendants have not disputed the partition deed marked as Ex.A2/B1. On a perusal of Ex.A2/B1, it is found that the suit property, particularly, the suit Well, which is in dispute, had been exclusively allotted to the share of Sengoda Gounder. As seen from the recitals described in Ex.A2/A3, the "B" schedule properties described therein had been allotted to Sengoda Gounder. Further, Kuppanna Gounder, the other brother had been 1/4th share in the Well situated in the same Survey Number i.e. 119 as found from the recitals contained in Exs.A2/B1. In addition to that, it is noted that Kalianna Gounder has not been allotted any Well towards his share and accordingly, it is found that Kalianna Gounder has been granted permission only to take water from the Well allotted to Sengoda Gounder under the said partition deed. When the defendants are admitting the partition deed as above stated effected amongst three 3 brothers, when as per the said partition deed, Sengoda Gounder had been allotted exclusive right over the Well in dispute and when Kalianna Gounder had not been allotted any such exclusive right in the said Well and on the other hand, had been permitted only to take water from the said Well, as rightly put forth by the plaintiffs' counsel and the defendants cannot be allowed to lay any claim of title to the suit property, particularly, the Well in dispute.

11. Now, according to the plaintiffs, following the dispute between the parties, the defendants are trying to form a new pathway in the property belongs to the plaintiffs i.e. the suit property for the purpose of taking water in the Well. In this connection, as rightly found by the First Appellate Court, the Advocate Commissioner on inspection of the suit property concerned and also, the adjacent properties of the parties noted that no feature is available on ground to point out that the defendants had been drawing water from the suit Well to their lands. Now, according to the plaintiffs, since their purchase of the suit property from Sengoda Gounder, the defendants had not taken water from the suit Well and had abandoned the same. Accordingly, it is noted that inasmuch as the defendants had stopped taking water from the suit Well, the Commissioner, on inspection of the properties concerned, had not observed any features pointing to the usage of the suit Well by the defendants for the purpose of irrigating their lands. If the defendants had continuously used the suit Well, as rightly argued and also, as rightly found by the First Appellate Court, features pointing to the same would have been available on ground at the time of inspection of the Advocate Commissioner and on the other hand, it is found that no such features were available on ground and accordingly, the defendants had also not endeavoured to point

out the same to the Advocate Commissioner and in such view of the matter, the defendants by laying a claim of right to the suit Well or the suit property as such cannot be allowed to interfere with the possession and enjoyment of the plaintiffs in respect of the suit property by creating a new pathway as apprehended by the plaintiffs. In this connection, it is to be noted that DW1 has not claimed any right over the suit Well during the course of his evidence and this would only go to indicate that he is also aware of the true position of the nature of the right granted to the defendants by way of the partition deed marked as Exs.A2/B1. Further, it is also seen that as per the evidence DW1, they have been cultivating their lands through LBP channel and in such view of the matter, when admittedly, as per the partition deed Ex.A2/B1, the defendants and their predecessor in interest i.e. Kalianna Gounder had not been allotted the suit property, particularly, the suit Well and in fact, no Well had been allotted to the share of Kalianna Gounder under the said partition deed and he had been granted only right to take water from the suit Well and when features available on ground point out that the said right had not been used by the defendants over a long period of time as above discussed, the defendants cannot be allowed to misuse the limited right granted to them under Ex.A2/B1, so as to lay a new pathway in the property belonging to the plaintiffs and accordingly, it is found that the First Appellate Court had rightly accepted the plaintiffs case and allowed the appeal preferred them.

12. The Counsel for the defendants contended that when the defendants are disputing the title of the plaintiffs in respect of the suit property, the plaintiffs having failed to seek the relief of declaration and as they had laid the suit only for the relief of permanent injunction, on that ground alone, according to her, the suit should fail. However, when it is found that the defendants have not disputed the partition deed Ex.A2/B1 and when under the said deed, the defendants and their predecessor in interest had not been granted any right in the Well and on the other hand, when it is seen that Sengoda Gounder had been granted exclusive sole right in the suit Well and Kalianna Gounder had been granted only the right to take water from the suit Well, it is found that the defendants are well aware of the title of the plaintiffs in the suit Well by way of the purchase of the suit property from Sengoda Gounder and in such view of the matter, there is no need on the part of the plaintiffs as such to seek the relief of declaration in respect of the suit property, particularly, when it is seen that the defendants had not projected any valid material, as such, to lay a claim of right over the suit property, particularly, the suit Well and in such view of the matter, on the above contentions put forth by the defendants' counsel, the plaintiffs' suit cannot be rejected.

13. In the light of the above discussions, even though the defendants have been conferred the right to take water from the suit Well by way of Ex.A2/B1, on that footing the defendants cannot be allowed to disturb the plaintiffs' possession and enjoyment of the suit property by forming a new pathway as apprehended by the plaintiffs. In such view of the matter, it is found that the First Appellate Court is perfect in order and also correct in law in granting the decree as prayed for. It is further found that the First Appellate Court has properly appreciated the materials placed on record in the right perspective, both factual as well as legal aspects and held that the defendants had failed to establish that they had been drawing water from the suit Well in question and further, found rightly that the defendants are irrigating their lands through LBP channel as above pointed out and in such view of the matter, when the defendants have failed to establish that they have right over the suit Well by way of easement of necessity and prescription and further, with reference to the same, no acceptable and reliable material has been placed by the defendants to buttress their said case, it is found that the First Appellate Court had not committed any error in upholding the plaintiffs' case. The substantial questions of law formulated in this second appeal are accordingly answered in favour of the plaintiffs and against the defendants.

14. At the end, the second appeal fails and is, accordingly, dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

adl/sms

To

1. The Sub Court, Bhavani,
2. The Principal District Munsif Court, Bhavani.

+1cc to Mr.N.MANOKARAN, Advocate, S.R.No. 6850

Pre-Delivery Judgment made in
S.A.No.1562 of 2003

RR (CO)
TR(15/05/2018)