

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH**

SECOND APPEAL No.431 of 2000

Between:

Bala Narasimhulu and another

.....Appellants

and

Tholeti Narayana Reddy and another

.....Respondents

Date of Judgment pronounced on : 05-06-2018

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers
May be allowed to see the judgments? : Yes/No
2. Whether the copies of judgment may be marked
to Law Reporters/Journals: : Yes/No
3. Whether The Lordship wishes to see the fair copy
Of the Judgment? : Yes/No

*** HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**

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> HEAD NOTE:

! Counsel for the Appellants : Sri O Manohar Reddy

^ Counsel for the respondents : Sri CV Mohan Reddy

? Cases referred

1. 1961 (1) Andhra Weekly Reporter 383
2. 1999 (6) ALD 463



HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**SECOND APPEAL No.431 of 2000****JUDGMENT:**

The appellants to the second appeal are defendant Nos.1 & 2 in O.S.No.18 of 1985 on the file of Principal District Munsif, Kadiri, Anantapur District. The second appeal respondent Nos.1 & 2 are the plaintiffs therein which is a suit for permanent injunction to restrain the defendants and their men from preventing the plaintiffs making use of the water in sunnapugadda bavi situated in S.No.1422/1, to their lands in S.No.1424/2 including for installation of oil engine for the said well.

2. The suit was contested by defendants and the trial Court ultimately on 11.02.1992 dismissed the suit with costs and the plaintiffs preferred AS.No.8 of 1993 and the learned Senior Civil Judge, Kadiri, by his reversal judgment dated 05.02.2000 set aside the trial Court's dismissal decree and judgment and allowed the appeal by decreeing the suit claim. It is impugning the same, the defendants preferred the present second appeal.

3. This Court though admitted the second appeal on 23.06.2000 by mentioning appeal grounds 2 to 5 involves substantial questions of law without formulating any substantial questions of law this Court on 27.03.2018 from the hearing and from involvement of substantial questions of law formulated the substantial questions of law as following:

- 1) Whether the suit for bare injunction without relief of declaration regarding the usage of the channel for taking water to the fields of the plaintiffs is unsustainable and if so, the reversal judgment of the lower appellate Court in

decreeing the plaintiffs' suit and setting aside the dismissal judgment of the trial Court is outcome of any ill-appreciation of facts and law and unsustainable?

- 2) Whether the finding based on the earlier suit finding is sustainable to consider the same operates as estoppel or obiter or otherwise relevant to bind against the defendants/appellants to the second appeal?

4. The suit claim of the plaintiffs for permanent injunction in the claim based on easement is that the Hindu Joint family consisting of Tholeti Subbanna and Tholeti Narappa the brothers inherited by survivorship the property situated in S.Nos.1424/2, 1424/3 & 1422/1 and out of which there is well situated in S.No.1422/1, which is also known as Sunnapu Gadda bavi (the suit well) for irrigation of their lands in the other 2 survey numbers supra and in the partition between the two brothers supra of their joint family coparcenary property supra among others S.Nos.1424/3 and 1422/1 except the well kept joint for the common use fell to the share of Subbanna and S.No.1424/2 fell to the share of the Narappa with joint right to use the well to irrigate the lands and accordingly while they were irrigating from the well water source the respective lands supra, Subbanna died and his son Narsappa (father of defendant Nos.1 & 2) succeeded/inherited the properties of Subbanna and Narappa died and his son Muniappa succeeded/inherited the properties of him and while they were later irrigating the lands with the well water, Narasappa S/o Subbanna died and the defendants who are his sons succeeded/inherited and from death of Muniappa S/o Narappa the plaintiffs who are the sons of Muniappa succeeded/inherited the

properties and were cultivating the same with the well water jointly and earlier the defendants herein filed O.S.No.4 of 1977 on the file of District Munsif, Kadiri, against the plaintiffs herein for permanent injunction restraining the plaintiffs herein from enjoying the sunnapuralla gadda bavi situated in S.No.1422/1 supra and the suit was dismissed and appeal preferred in A.S.No.35/1980 ended in dismissal, still the defendants herein the unsuccessful plaintiffs in O.S.No.4/1977 and A.S.No.35/1980 having no respect for law are interfering with the present plaintiffs enjoyment of the well and it is joint right including to use water of the oil engine which made to file the suit.

5. The contest by the 2nd defendant, adopted his written statement by 1st defendant, in opposing the suit claim including of maintainability that too for bare injunction without relief of declaration, while in disputing about the respective partition, relationship and existence of the well in S.No.1422/1, while saying the report of the commissioner and plan belies the case of the plaintiffs herein and in earlier suit O.S.No.4/1977 alleged right claimed by the present plaintiffs to install motor and pump sets to the well was not in issue and the plaintiffs want to make unauthorized construction in the defendants property in S.No.1422/1 under that guise and there is no channel through which plaintiffs can draw water to their land in S.No.1424/2 and they have no right or entitlement to draw water from the well in S.No.1422/1 which property belongs to the defendants and in their possession and enjoyment for which they are paying taxes even and plaintiffs not made even use of the suit well to irrigate any of their said lands for past many years, thereby the right if any is

extinguished and plaintiffs are not entitled to suit reliefs and suit is liable to be dismissed.

6. The trial Court framed two issues of which one mainly is as to entitlement or not of permanent injunction relief sought by plaintiffs.

7. In the course of trial, the 2nd plaintiff T.Narayanareddy examined as PW.1 and placed reliance on Exs.A1 to A3 viz., judgment in O.S.No.4/1977 and judgment in AS.No.35/1980 and judgment in CMA.No.3/1977; and on behalf of defendants, 2nd defendant came to the witness box as DW.1 and cause examined DW.2-MV.Raghavaiah and placed reliance upon Exs.B1 to B6 and Ex.X1 is the entry for survey No.1422/1 in resurvey and resettlement register among Exs.B1 to B6, B1 is CC of 10-1 account, B2 is copy of resurvey and resettlement register, Exs.B3 & B4 land revenue receipts, B5-CC of loan account and B6 is CC of adangal. The trial Court with reference to said evidence and said contest with reference to the pleadings observed while dismissing the suit that plaintiffs did not examine any person nor filed record showing they are irrigating their land in S.No.1424/2 with the aid of the suit well in S.No.1422/1 and Ex.B6-CC of adangal revealed groundnut crop of S.No.1424/2 and mentioned source of rainfall (varshadaram) and were observed in earlier suit in O.S.No.4/1977 covered by Ex.A1 judgment there that plaintiffs are at liberty to file suit for declaration to get the issue settled if advised and the plaintiffs sought amendment of the plaint Para 3(a) and defendants did not file any additional written statement by saying original written statement averments are sufficient to make the suit claim and to defend against even amendment relates back to date of

plaint whereunder the division was pleaded between Tholeti Subbanna and Narappa, whereas in judgment of OS.No.4/1977 no such division was pleaded between them which shows an improved version. One K.Vengamuni advocate appointed as commissioner on the application of the defendants in the suit in I.A.No.142/1985 and filed his report with plan and there are no objections filed to it by either side which form part of the record though not exhibited, and the commissioner report and plan shows bari and channel (kaluva) are situated in S.No.1424/2 adjacent to the suit well in S.No.1422/1 and there were no bailing operators fitted to the well and the channel is situated only for a little distance. The burden is on the plaintiff to prove his title prima facie even for permanent injunction relief as held in 1985 (1) ALT 6 of not only title but also prior possession required to be proved for entitlement of permanent injunction including in suit for bare injunction are necessary to go into the title instantly and prima facie entries in Ex.B6 shows as rainfed which is a certified copy of a public document of drawing presumption of entries properly made that could not be rebutted by the plaintiffs and thereby plaintiffs failed to make out prima facie title and possession to the suit well.

8. The lower appellate Court in the appeal of the plaintiffs supra vide judgment dated 05.02.2000 in AS.No.8 of 1993 reversed the trial Court's dismissal decree and judgment and allowed the appeal by decreeing the suit claim having formulated the points for consideration as to whether the plaintiffs are entitled to injunction as prayed for that admittedly there was a prior litigation between the parties covered by OS.No.4/1977 and AS.No.35/1980 and the plaintiffs herein were defendants in OS.No.4/1977 and

respondents in AS.No.35/1980 and the suit well was subject matter in that suit also for bare injunction and the contest of the defendants in the present suit is contradictory to the pleadings in the earlier suit OS.No.4/1977 and trial Court mainly relied upon Ex.B6 entry of land in S.No.1424/2 of the plaintiffs is rainfed and from commissioner's report, in holding suit wont lie without relief of declaration erroneously by not considering the scope and binding nature of the observations in Exs.A1 & A2 in OS.No.4/1977 and AS.No.35/1980 that was directly in issue in relation to suit well with finality to operate as estoppel the defendants herein were the unsuccessful plaintiffs in OS.No.4/1977 supra that too when plaintiffs had right or not over the property is not in issue but for their land is in the ayakattu of the suit well and for injunction suit usage of water from the well is enough and for that the finding in Exs.A1 & A2 earlier suit and appeal judgments are sufficient where it was observed the plaintiffs herein were irrigating their lands with the water of the suit well and it is for the defendants herein to plead and prove non-usage of the well to irrigate the land of the plaintiffs herein for which they did not adduce any evidence and Ex.B6 entry alone is no way sufficient much less of the commissioner's report.

9. It is the same impugned in the present second appeal with the contentions in the grounds that the reversal decree and judgment of the lower appellate Court by sitting against the reasoned dismissal decree and judgment of the trial Court of the plaintiffs suit for injunction is unsustainable for no positive proof regarding use of the well by drawing water from the well to the land of the plaintiffs and the observations in the earlier suit in

OS.No.4/1977 even relevant no way suffice apart from suit for bare injunction wont lie without declaratory relief that too when the right to draw water is denied by the defendants herein and the findings of the lower appellate Court in its reversal judgment of the earlier decree and judgment operates as estoppel is untenable without plaintiffs entitlement is established and lower appellate Court was not right in throwing burden on the defendants to establish the case of the plaintiffs to the claim of drawing water from the well in question.

10. It is therefrom the above substantial questions of law were formulated in deciding the second appeal.

11. In fact the decree and judgment in OS.No.4/1977 covered by Ex.A1 and AS.No.35/1980 against it covered by Ex.A2 where the defendants herein as plaintiffs/appellants therein went unsuccessful in their claim to prevent the plaintiffs herein to draw water from the well including from any observation of remedy of those plaintiffs/defendants herein if at all is to maintain a suit for declaration and no such suit even filed. The trial Court is not right in saying for prima facie case plaintiffs have to establish their possession and here it is not a suit for injunction based on possession to have such an observation to make. It is in fact an easement of necessity covered by the Indian Easements Act from undisputedly the properties belong to joint family including the property where the well situate in S.No.1422/1 and the suit claim of the plaintiffs is the well kept joint and in the partition excluding the well the land in S.No.1422/1 allotted to the share of the ancestors of the defendants herein and with land in S.No.1424/3 whereas the plaintiffs ancestor was allotted the land in

S.No.1424/2 and the well kept joint for their cultivation of the lands. Once it is not the case of there is any alternative water source and the property originally joint family property and in the division the well shown kept joint and even otherwise even fell to the share of any one among the coparceners, there exists easement of necessity and it could be even qualified and not absolute for the reason drawing of well water is only for the crops whenever necessity arises and may be apparent and not a continuous one and not dependent purely of continuous usage to claim easement of necessity right as per the settled expression of this Court in **Pedda Sethammappa and Ors. v. Pedda Appaiah**¹, it was held that the effect of Section 13 of the Easement Act is that in cases of partition, if an easement is one of necessity, a person to whose share certain property falls is entitled to the easement. Leave it apart the earlier suit by Ex.A1 judgment in OS.No.4/1977 where the defendants herein went unsuccessful in preventing the plaintiffs herein from using the well water the suit for bare injunction, the dismissal of the suit claim with observations of remedy of declaratory relief is left open for no such declaration suit is filed by the defendants pursuant to it subsequently having even went unsuccessful in AS.No.35/1980 covered by Ex.A2. Leave about Ex.A3 is temporary injunction order culminated in CMA that order in favour of plaintiffs herein otherwise. Once such is the case and the relationship since not in dispute of the property originally belong to joint family property of both branches, outcome of common ancestor and the defendants in their written statement no way disputed the same but for saying the well water is not in use

¹ 1961 (1) Andhra Weekly Reporter 383

and even from the commissioner's report in saying there are no operators for bailing of water from the well, though channel of a short area situated for drawing well water from S.No.1422/1 to the land of the plaintiffs in S.No.1424/2 that is not the only evidence to be placed reliance including whatever mentioned in Ex.B6 of the land in S.No.1424/2 of the plaintiffs is in the revenue records designated as rainfed for not in irrigable water provided by the State with irrigation source but for the well water to draw whenever necessity arises. Thereby the trial Court went wrong in placing reliance as rightly concluded by the lower appellate Court to that extent. Leave about the trial Court even rightly observed of plaintiffs are not claiming any right over S.No.1422/1 having been saying the land fell to the share of the ancestors of defendants, but for the well therein kept joint in that claim of right over well water to draw to the cultivation of the land of the plaintiffs in S.No.1424/2.

12. Even the trial Court placed reliance on Ex.B6 and the entry as true that no way takes away the easement of necessity to exercise discretionary right whenever the necessity arises to draw water from the well by bailing or otherwise. Leave about the fact that the fixation of any motor to draw the water from the well is not the issue in earlier suit OS.No.4/1977 covered by Ex.A1 judgment that itself will not prevent to the qualified exercise of easement of necessity to draw water from the well situated in S.No.1422/1 to the cultivation of the land of the plaintiffs situated in S.No.1424/2 if at all to bail water by fixing any apparatus or by fixing a motor as the case may be for not the case of the defendants of by allowing the plaintiffs are continuously using the water source from which

there is inability to the defendants lands cultivation with that well water and it requires to be used whenever there is necessity and to the extent necessary and equitable without impairing the utility of drawing of water from the well by the defendants to the land in S.No.1422/1 and 1424/3. Had it been the case, the finding could be otherwise for no one can draw water exclusively to prevent the others use in proportion to the respective extents under cultivation from S.No.1424/2, 1424/3 and 1422/1. The lower appellate Court did not discuss in detail as a final fact finding Court in reversing the trial Court's judgment and decree of dismissal of the suit claim, the suit for bare injunction is sustainable as also observed by trial Court by referring to the judgment of this Court in 1985 (1) ALT 6 for always not the necessity to drive from whenever defendants dispute the plaintiffs entitlement to the relief of injunction, to seek for declaratory relief from such mere denial. The lower appellate Court's reasoned reversal judgment otherwise is sustainable and no way requires to interfere in answering the second appeal substantial questions of law thereby in holding suit for bare injunction is maintainable without relief of declaration regarding usage of the well water to the field of plaintiffs and the lower appellate Court was right in reversing the dismissal decree and judgment in this regard for nothing outcome of ill-appreciation of facts and law to hold the same as unsustainable, leave apart the earlier findings in OS.No.4/1977 & AS.No.35/1980 covered by Exs.A1 & A2 no way operates as estoppel, but as obiter and to bind including with reference to Section 13 of the Indian Evidence Act

and to the expression of the Apex Court in **Tirumala Tirupathi Devasthanam Vs. K. Subbarayudu**².

13. Accordingly and in the result, the second appeal is dismissed confirming the lower appellate Court's reversal decree and judgment.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 05.06.2018

Note: L.R. Copy to be marked

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² 1999 (6) ALD 463