

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment 24.10.2019	Date of Pronouncing Judgment 01.11.2019
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CORAM

THE HONOURABLE MR. JUSTICE P.RAJAMANICKAM

S.A.No.1632 of 1999

AND

CMP.No.17545 of 1999

1.Kolandaisamy Gounder (died)

2. Thangaraju

3. Deivasigamani ...Appellants/Defendants

(1st appellant died. Appellants 2 and 3 are recorded as LR's of the deceased 1st appellant & R3 died. RR2 & 4 are recorded as LR's of the deceased R3 vide order of court dated 23.09.2019 as per memo dated 23.09.2019)

Vs.

1. Ramasamy Gounder (deceased)

2. M. Shanmugam

3. Kuppammal (died)

4. Samiathal

..Respondents/Plaintiffs

(RR3 and 4 brought on records as LR's of the deceased R1 vide order of court dated 09.01.2015 made in CMP.No.1521 of 2008)

Prayer:- Second Appeal filed under Section 100 of the Civil Procedure Code, 1908 against the Judgment and Decree dated 14.01.1999 made in A.S.No.96 of 1998 on the file of the II Additional District Judge, Erode, modifying the Judgment and Decree dated 25.03.1998 made in O.S.No.11 of 1997 on the file of the District Munsif Court, Erode.

For Appellants

: Mr.A.R. Nixon

For Respondents 2 and 4

: Set exparte

JUDGMENT

This second appeal has been filed by the defendants against the judgment and decree passed by the II Additional District Judge, Erode, in A.S.No.96 of 1998 dated 14.01.1999 modifying the judgment and decree passed by the Principal District Munsif, Erode in O.S.No.11 of 1997 dated 25.03.1998.

2. The respondents 1 and 2 herein had filed a suit in O.S.No.11 of 1997 on the file of the Principal District Munsif, Erode to declare that the plaintiffs are entitled to make use of the 6 cents of land ('A' schedule property) along with defendants to reach their properties and for permanent injunction to restrain the defendants, their men, etc, from interfering with their peaceful possession and enjoyment of the suit 'A' schedule property and also for permanent injunction to restrain the defendants, their men, etc., from preventing them from pumping out water from the well through 5 H.P electric motor and pumpset ('B' schedule property) on their half share. The learned Principal District Munsif by the judgment dated 25.03.1998 decreed the suit partly by granting permanent injunction restraining the defendants, their men etc., from preventing the plaintiffs from pumping out water from the well through 5 H.P electric motor and pumpset ('B' schedule property) on their half share. However, he dismissed the suit with regard to the relief of the declaration and permanent injunction with regard to the 'A' schedule property. He further ordered that Exs.C1 and C2 shall form part of the decree. He directed the parties to bear their respective costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.96 of 1998 on the file of the II Additional District Judge, Erode. The learned II Additional District Judge, Erode, by the judgment dated 14.01.1999 had allowed the appeal partly and modified the judgment and decree of the trial court and declared that the suit well, motor room and electricity connection are commonly belong to both plaintiffs and the defendants and also declared that the plaintiffs are entitled to use the suit 'A' schedule property for going to motor room and restrained the defendants by means of permanent injunction from preventing the plaintiffs for going to the said motor room. In other aspects, he dismissed the plaintiffs' suit. He also directed that Exs.C1 and C2 shall form part of the decree. Feeling aggrieved, the defendants have filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the trial court.

4. The averments made in the plaint are in brief as follows:

The first plaintiff and the first defendant are brothers. The second plaintiff is the son of the first plaintiff and the defendants 2 and 3 are the sons of the first defendant. The suit

property was jointly purchased by the first plaintiff and the first defendant through a registered sale deed dated 18.07.1962. The extent of land purchased was 1.84 acres. After purchase, the first plaintiff and the first defendant dug a well and installed a 5 H.P electric motor. The service connection No. for the electricity service is 367. In the year 1981, the first plaintiff and the first defendant and their other two brothers partitioned their joint family properties including the suit properties. In the said partition deed, 'A' schedule property was allotted to the share of the first plaintiff and 'D' schedule property was allotted to the share of the first defendant. In that partition deed itself, the first plaintiff and the first defendant were provided half right each in the well and the electric motor pumpset and the vacant site of six cents situated around the well. While so, there was a wordy quarrel between the plaintiffs and the defendants leading to enmity and now the defendants are preventing the plaintiffs from making use of the said 6 cents of vacant common land situated around the well and also attempting to obstruct the plaintiffs from pumping out water from the well. Hence the plaintiffs were constrained to file the above suit for declaration and permanent injunction.

5. The averments made in the written statement filed by the first defendant and adopted by the defendants 2 and 3 are in brief as follows:

It is admitted that the first plaintiff and the first defendant had jointly purchased a specific extent of land of 1.84 acres comprising 2/3 share in old S.F. No.61/B of a total extent of 2.76 acres in Nasiyanoor village on 18.07.1962. Though in the said sale deed, it is stated that 1.84 acres; in the last re-survey, it was found that the first plaintiff and the first defendant were in possession and enjoyment of 0.72.0 hectare only which is equal to 1.78 acres and that there was a shortage of 6 cents. The total extent of 0.72.0 hectare was divided into two plots and designated as R.S.No.328/2 and 328/3 with an extent of 0.37.0 hectare and 0.35.0 hectare respectively. Therefore, only the available extent of 0.72.0 hectare was divided between the first plaintiff and first defendant under the partition deed dated 28.10.1981. Under the said partition, the available extent of 0.72.0 hectare was divided equally and the northern portion was allotted to the first defendant and the southern portion was allotted to the first plaintiff. There was no common plot of 6 cents as alleged in the plaint. The common well falls within northern portion and the partition deed does not provide for any pathway from the southern portion. The first defendant installed a 5 H.P. electric motor and pumpset in the well by obtaining service connection and was pumping water to his portion through the electric motor pumpset. The first plaintiff having an half share

in the well without any means of access, requested the first defendant to allow to take water to his share from the common well with the same electric motor and pumpset. The first defendant agreed for the same and allowed the first plaintiff to take water through the same pumpset. The plaintiffs were using the motor and pumpset as per the permission / licence granted by the defendants. Since the motor and the pumpset belongs to the defendants, the plaintiffs are not having any right over the same. The defendants are having every right to revoke the said permission/licence at any time. However, the defendants never prevented the plaintiffs from having access to the well or making use of the electric motor and pumpset. There is no cause of action for filing the suit. Therefore, the defendants prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the second plaintiff examined himself as PW1 and they also examined one more witness as PW2. They had marked Exs.A1 to A5 as exhibits. On the side of the defendants, the second defendant was examined as DW1 and they marked one document as Ex.B1. The Advocate Commissioner's report and plan were marked as Exs.C1 and C2 respectively.

7. The learned District Munsif after considering the materials placed before him, found that even though in Ex.A1 sale deed, it is stated that 1.84 acres were purchased by the first plaintiff and the first defendant, during re-survey proceedings, it was found that they were in possession and enjoyment of only 0.72.0 hectare which is equivalent to 1.78 acres and there is a shortage of 6 cents. He further found that under Ex.A2 partition deed, the first plaintiff and the first defendant had equally partitioned the aforesaid 1.78 acres and each got 0.36.0 hectares which is equivalent to 89 cents and no common vacant land of 6 cents was kept as alleged in the plaint. He further found that half share was given in well, electric motor pumpset and electric service connection for the first plaintiff and the same extent was given for the first defendant under Ex.A2 partition deed. Accordingly, he decreed the suit as prayed for regarding the relief of permanent injunction with respect to the suit 'B' schedule property alone. However, he dismissed the suit with regard to the relief of declaration and permanent injunction in respect of suit 'A' schedule property. He ordered that Exs.C1 and C2 (Commissioner's report and plan) shall form part of the decree.

8. Aggrieved by the trial court's judgment and decree, the plaintiffs had filed an appeal in A.S.No.96 of 1998 on the file of the II Additional District Judge Erode. The learned II Additional District Judge, Erode, had partly allowed the said appeal and modified the judgment and decree of the trial court and declared that the suit well, motor room and electricity

connection are commonly belonged to both plaintiffs and the defendants and also declared that the plaintiffs are entitled to use the suit 'A' schedule property for going to motor room and restrained the defendants by means of permanent injunction from preventing the plaintiffs for going to the said motor room. In other aspects, he dismissed the plaintiffs' suit. He also directed that Exs.C1 and C2 shall form part of the decree.

9. Aggrieved by the first appellate court's judgment and decree, the defendants have filed the present second appeal. This court at the time of admitting the second appeal has formulated the following substantial question of law:

" Whether the lower appellate court erred in granting the relief when there is no plea or proof of easement right by necessity or by grant? "

10. During pendency of the second appeal, the first respondent died and hence his LRs were impleaded as respondents 3 and 4. Subsequently, it was reported that the third respondent also dead and her LRs are already on record as respondents 2 and 4. Eventhough notice was served on respondents 2 and 4 and their names also printed in the cause-list, they have not appeared either in person or through counsel and they were called absent and set exparte.

11. After hearing the arguments of the learned counsel for the appellants and perusing the records, the judgment is being passed in this second appeal.

12. Substantial question of law:

The learned counsel for the appellants/defendants has submitted that the first appellate court erred in reversing the well considered judgment and decree of the trial court. He further submitted that in Ex.B2 partition deed, no easementary right was granted to the plaintiffs for using suit 'A' schedule property, but the first appellate court has granted the relief declaring that the plaintiffs are entitled to use the suit 'A' schedule property for going to motor room. He further submitted that since the common well is situated just adjacent to the plaintiffs' land on the northern side, the plaintiffs need not use the suit 'A' schedule property for going to the motor room. He further submitted that the first appellate court in paragraph No.21 of its judgment had observed that since the plaintiffs are entitled to go to motor room for operating the motor the land up to the said motor room shall belong to both the parties and the said finding is against the evidence and therefore, he prayed to set aside the said finding and also set aside the judgment and decree of the first appellate court and restore the judgment and decree passed by the trial court.

13. It is an admitted fact that the first plaintiff and the first defendant are brothers and they purchased the properties situated in S.Nos.328/2 and 328/3 admeasuring 1.84 acres under Ex.A1 sale deed dated 18.07.1962. It is also an admitted fact that subsequently on 28.10.1981, the first plaintiff and the first defendant along with their two other brothers had partitioned their joint family properties and the properties which were purchased by them under Ex.A1. A registration copy of the said partition deed has been filed and marked as Ex.A2. A perusal of Ex.A2 would show that in the said partition, the properties which were purchased under Ex.A1 were divided into two equal shares and allotted to the first plaintiff and the first defendant equally. It is also an admitted fact that during re-survey, it was found that the first plaintiff and the first defendant were in possession of only 1.78 acres and the said extent of 1.78 acres were divided into two equal shares and the first plaintiff and the first defendant were allotted each 89 cents (36 ares) under Ex.A2.

14. Though the plaintiffs have claimed that under Ex.A2 partition deed, 6 cents of land was kept for common purpose around the common well, no such recital found in Ex. A2. The said fact also has been admitted by PW1 in his evidence. Both the courts below also concurrently found that no such land was kept for common purpose as alleged in the plaint. As against the said findings, the plaintiffs have not filed any appeal or cross objection. So, the findings of the first appellate court that no such 6 cents of land were kept common has become final.

15. It is an admitted fact that under Ex.A2 partition deed half share was given in well and electric motor pumpset to the first plaintiff and the remaining half share was allotted to the first defendant. The motor room is situated on the north of the common well. So, unless the plaintiffs are permitted to go through the vacant land which is situated around the well (suit 'A' schedule property), they cannot enjoy the electric motor pumpset. Taking into consideration of the aforesaid facts, the first appellate court had modified the judgment and decree passed by the trial court and declared that the well, motor room and electric service connection belong to the plaintiffs and defendants commonly and for going to the said motor room, the plaintiffs are entitled to use the suit 'A' schedule property and when the plaintiffs are going through the said 'A' schedule property, for going to the motor room, the defendants should not prevent them and accordingly, granted permanent injunction. This court does not find any infirmity in the judgment and decree of the first appellate court. Accordingly, the substantial question of law is answered against the appellants.

16. In the result, the second appeal is dismissed and consequently, connected miscellaneous petition is closed. The judgment and decree passed by the first appellate court are

confirmed. Considering the facts and circumstances of the case,
the parties are directed to bear their respective costs.

Sd/-

Assistant Registrar (CS-V)

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Sub Assistant Registrar

gv

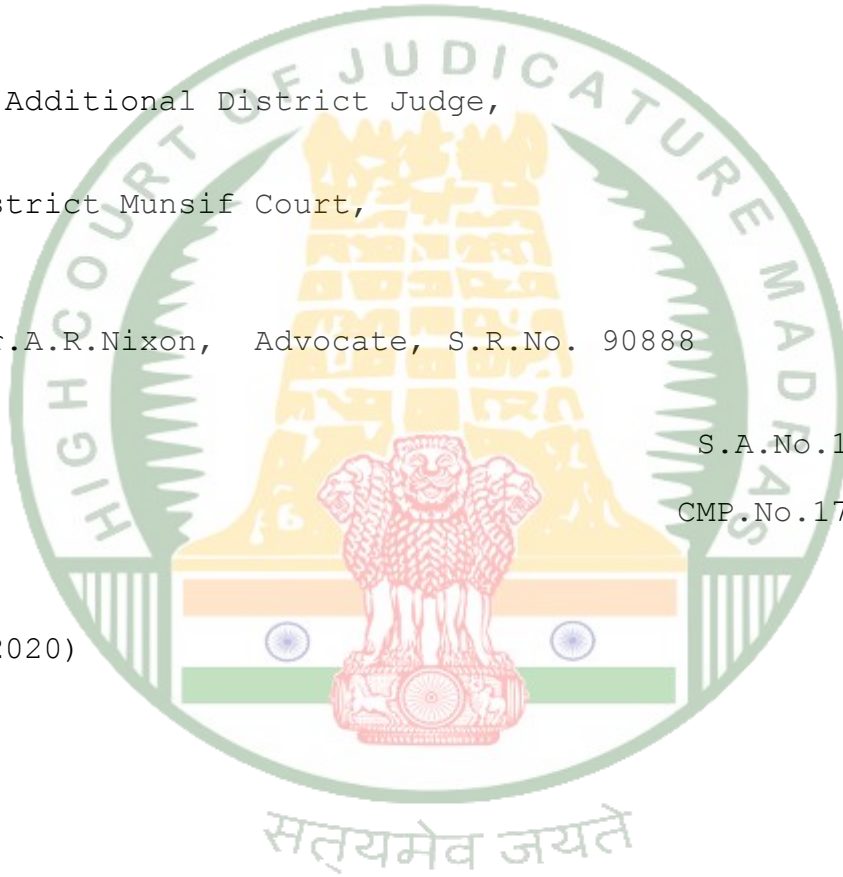
To

1. The II Additional District Judge,
Erode.
2. The District Munsif Court,
Erode.

+1cc to Mr.A.R.Nixon, Advocate, S.R.No. 90888

S.A.No.1632 of 1999
AND
CMP.No.17545 of 1999

GP (CO)
GN(24/11/2020)



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