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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :11 .04.2019

PRONOUNCED ON: 03.06.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1494 of 2007

and

M.P.No.2 of 2007

K.V.Sampathkumar ... Appellant/Defendant

Vs.

R.Varadharaja ... Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 22.06.2004 passed in A.S.No.74 of 2002 on the file of the Subordinate Judge, Kancheepuram, reversing the judgment and decree dated 31.03.2002 passed in O.S.No.1144 of 1993 on the file of the Additional District Munsif, Kancheepuram.

For Appellant : Mr.Christ Doss

For Respondent: M/s.M.Abbirami
for M/s.J.Ramakrishnan

J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 22.06.2004 passed in A.S.No.74 of 2002 on the file of the subordinate Court, Kancheepuram reversing the judgment and decree dated 31.03.2002 passed in O.S.No.1144 of 1993 on the file of the Additional District Munsif Court, Kancheepuram.

2.Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.



3. For the sake of convenience, the parties are referred to as per the rankings in the trial court.

4. The second appeal has been admitted on the following substantial question of law.

Whether the judgment and decree of the First Appellate Court is legally sustainable in view of the fact that the First Appellate Court failed to take into account the document rather than the evidence of parties in view of Sections 91 and 92 of the Evidence Act?

5. Suffice to state that the suit has been laid by the plaintiff for the reliefs of declaration and permanent injunction.

6. The suit property is described as the common well 'W' in between the house portions Nos. 44A and 44 B. According to the plaintiff, he has the half share in the suit well and accordingly sought for the appropriate reliefs with reference to the same.

7. The plaintiff bases his claim to the suit well, on the footing that originally the property belonging to the plaintiff and his forefathers was lying in the area bearing door No. 44 A, the house property provided with a well and according to the plaintiff, with reference to the house portion now bearing door No. 44 B, the same originally formed part of a single house bearing door No. 44 A and subsequently the same had been divided into two portions and further it is stated that the western portion is bearing door No. 44 B and the defendant is the present owner of the western portion and according to the plaintiff, the well belongs to both the portions and accordingly used in common by the owners of the two portions and drawing water by having separate pulleys without any obstruction and inasmuch as the defendant attempted to deprive the plaintiff of the use of the well described in the plaint schedule, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

8. According to the defendant, the suit well lies in the property belonging to him bearing door No. 44/B and contended that his predecessors in interest had been in the possession and enjoyment of the same and further contended that the property inclusive of the well was purchased in the Court auction and accordingly the well in dispute has been in the possession and enjoyment of the defendant and his predecessors in interest continuously and not treated as the common property and accordingly put forth that the plaintiff is not entitled to seek and obtain the reliefs as prayed for.



9. Based on the oral and documentary evidence adduced by the respective parties, and the submissions made, the trial court was pleased to dismiss the plaintiff's suit and the appellate court, set aside the judgment and decree of the trial court and granted the reliefs in favour of the plaintiff as prayed for. Impugning the same, the present second appeal has been preferred.

10. From the materials placed on record, it is found that the property belonging to the plaintiff and the defendant was originally bearing only door No.44 A, subsequently, it is found that the property had come to be divided and the separate house portions had been given the door Nos.44A and 44 B. It is seen that the property comprising and bearing door No.44B had been sold in court auction and the same had been acquired in court auction by the defendants' predecessors in interest and now the defendant is enjoying the said property. The property comprising door No.44/A is in the possession and enjoyment of the plaintiff. As regards the abovesaid possession and enjoyment of the portions comprising door Nos.44A and 44B, there is no dispute between the parties as such. The only dispute is as regards the well. According to the plaintiff, the well is common to both the parties, as it is stated that inasmuch as both the properties were a single unit at the earliest point of time, the well lying in the property was used in common. It is the further case of the plaintiff that when the portions got divided, the well continued to remain in the common usage of both the owners and accordingly, it is put forth that altogether, the well has been used in common by the two owners. As could be seen from the documents projected by the plaintiff marked as Ex.A1, it is found that the property when it was a single unit had been allotted to the plaintiff's father and his brother by way of a Koor chit during the year 1914 and subsequently by way of Ex.A1, deed of relinquishment, the plaintiff's paternal uncle had relinquished his share in favour of the plaintiff's father. In the abovesaid document dated 22.08.1939, the property is described as including the well and the door number is shown only as 44 A. Therefore, it is evident that the properties now belonging to the plaintiff as well as the defendant was a single unit at one point of time bearing only door No.44 A, accordingly, it is found that only one well was fitted in the property and enjoyed in common by the owners thereof. Subsequently, it is seen from the available materials, the single portion got divided into two units and accordingly the western portion is shown to be comprising door No.44 B and the other portion is shown to be comprising door No.44A, however, it is the specific case of the plaintiff that the well continued to remain in the common usage of two portions and



accordingly it is stated that the separate pulleys are fitted in the well for the purpose of drawing water from the respective units.

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11. The defendant has filed certain documents on his part, however the defendant is unable to adduce any evidence, with reference to the contents of the abovesaid documents and as to how his predecessors in interest had acquired title to the property and the defendant is also unable to express on what mode, his predecessors in interest had been enjoying the property prior to his acquisition of the right to the property he now owns. As rightly found by the first appellate court, considering the evidence adduced by the defendant as D.W.1, it is found that the defendant had admitted that the two door numbers namely 44A and 44B at one point of time, formed a single unit and thereafter got divided with two distinct door numbers and accordingly the well in the property when it was a single unit, had been in the possession and enjoyment of the separate owners after the properties had got divided. In this connection, the defendants, during the course of cross examination has admitted that there is a door way superstructure in the wall lying between the two houses on the eastern side and pleaded ignorance as to whether through the said door way superstructure the water is drawn from the well and admitted that in the documents of title projected by him, there is no specific reference that the well described therein exclusively belongs to the property comprising door No.44 B and would admit that the door No.44B also has the right in the well and further admitted that in the relinquishment deed, the well right has been provided for the door No.44/A and accordingly considering the abovesaid admission on the part of the defendant plus the recitals contained in Ex.A1 deed of relinquishment and as determined by the first appellate court, only a single well had been provided in the property when it was a joint unit and accordingly when the property got divided as two portions, the owners of the two portions continued to enjoy the well in common. Furthermore, the defendant has admitted that the well is lying in between two properties belonging to the parties as shown in Ex.A3 plan, furthermore, the defendant has also admitted that both the door numbers 44A and 44 B remained as single unit and got separated later as different units and the same could also be gathered from the documents projected by the defendants as determined by the first appellate court. In such view of the matter, as found by the first appellate court, the defendant had admitted the door lying structure in the wall lying between the two portions and accordingly the defendant further admitted that the plaintiff has presented a petition for restoring the pulley put up in the well and the said petition



had been entertained and according to the defendants, they had presented an appeal with reference to the same and further admitted that in none of the documents projected by him, the well is stated to be exclusively attached to door No.44B. In such view of the matter, as rightly held by the first appellate court, considering the documents projected by the parties in toto particularly, Ex.A1 when the property comprised in door No.44A and 44 B was a single unit, the same was having only door No.44A, fitted with the well and accordingly when the same had got subsequently divided, the well portion continued to be in the usage of the two portions in common and accordingly, structures are available in the wall lying between the two portions for enabling the parties to draw water from the well through the respective pulleys attached to the well.

12. Even though the defendants had produced the earlier deeds pertaining to the property, however, other than marking the same, the defendant had not adduced any evidence as to how he claims exclusive title to the well in dispute. When from the materials available on record both the units belonged to the common ancestors of the rival parties at one point of time and formed a single portion with only one well, in such view of the matter, the determination of the trial court that the plaintiff's portion comprising door No.44A should have been fitted with the separate well from the inception, as such, cannot be accepted. When there is no pleadings with reference to the same either on the part of the plaintiff or on the part of the defendant, when the materials as above discussed, go to disclose that the two units were having only one well, in such view of the matter, the abovesaid approach of the trial court for sustaining the above version, as such, cannot be accepted.

13. The trial court seems to have accepted the defence mainly on the basis of the Commissioner's report and plan. No doubt, in the Commissioner's report and plan, the well is shown to be as lying in the property comprising door No.44B. However, considering the Commissioner's report and plan in toto, it is found that the well is just lying adjacent to the wall between the two properties and the Commissioner has also reported that he had noted a small mouth made up of a cement work protruding into the wall of the room and further reported that the plaintiff had informed that the water from the well used to be drawn through the pulley and taken into his property through the abovesaid mouth and accordingly it is found that inasmuch as the well had been used in common by both the parties, the abovesaid mouth like structure is available in the property belonging to the plaintiff. Though at the time of the inspection of the properties by the Commissioner, the abovesaid mouth has been



found closed, on that score alone, it could not be inferred that the plaintiff would not have drawn the water from the well through the abovesaid opening. Inasmuch as the well had been used in common by both the owners, such a mouth like structure is fitted in the wall of the plaintiff's property and considering the lie of the well, it is evident that the same had been in the usage of the owners of the separate portions as put forth by the plaintiff and in such view of the matter, it is found that the Commissioner's report and plan, do not affect the case of the plaintiff as determined by the trial court and on the other hand only advance the case of the plaintiff probablising that the plaintiff had been drawing the water from the well by using a separate pulley. Merely on the fact that the Advocate Commissioner had not noted the separate pulley in the well, the same would not dis-entitle the plaintiff to seek the reliefs prayed for. When according to the plaintiff, the defendant with a view to deprive the usage of well had destroyed the pulley portion and on the other hand, when from the photographs marked as Exs.A4 and A5, it is found that the plaintiff had been using the well through the door way fitted in his property, in all, particularly considering the admission of the defendant that the two units were originally bearing door No.44 A with only one well, in such view of the matter, when the defendant has failed to establish his exclusive right to the well and on the other hand, when the plaintiff' has established that the well fitted in the property from the inception had been in the usage of the two portions in common, in the preponderance of probabilities, accordingly the first appellate court, is found to be right in accepting the plaintiff's case and granting the reliefs in favour of the plaintiff's as prayed for.

14.The determination of the issues involved between the parties as regards the well by the first appellate court centering on the factual matrix and when the first appellate court has given proper reasonings and conclusions with reference to the same and when the abvoesaid reasonings and conclusions are not shown to be suffering from any perversity or shown to be illogical and irrational, in such view of the matter, I do not find any valid reason to interfere with the determination of the first appellate court upholding the plaintiff's case. In such view of the matter, in my considered opinion, no substantial question of law is involved in the second appeal. Be that as it may, the substantial question of law formulated in the second appeal is accordingly answered in favour of the plaintiff and against the defendant.



15. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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Assistant Registrar (CS-VIII)

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Sub Assistant Registrar

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To

1. The Subordinate Judge,
Sub Court,
Kancheepuram,

2. The Additional District Munsif,
Additional District Munsif Court,
Kancheepuram.

Copy to

The Section Officer,
VR Section, High Court,
Chennai.

S.A.No.1494 of 2007
and
M.P.No.2 of 2007

VG I (CO)
GMY (01/10/2019)