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IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.692 of 2009

Kathavarayan

... Appellant/2nd Defendant

Vs

1. Mr.E.Viswanathan ... 1st Respondent/Plaintiff
2. Mr.Nainamalai Udaya
3. Mr.Chandrasekaran ... 2nd & 3rd Respondents/Defendants 1 & 3

Prayer :- Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 24.09.2008 pass in A.S.No.86 of 2007 on the file of the Additional Subordinate Court, Salem confirming the judgment and decree dated 0512.2006 passed in O.S.No.303 of 2001 on the file of the Principal District Munsif, Salem.

For Appellant : Mr.P.Jagadeesan

For Respondents: Mr.T.M.Hariharan - R1
No appearance - R2 & R3

JUDGMENT

Aggrieved over the concurrent finding of the Courts below decreeing the suit filed for permanent injunction and mandatory injunction, the second appeal has been filed.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The brief facts of the plaintiff case is as follows :

The suit property and the other properties are purchased by the grandfather of the plaintiff Periyathambi Udayar on

22.08.1933. Thereafter, Periyathambi Udayar partitioned the properties between his two sons Erusappan and Kuppannan. After the death of the said Erusapan, the father of the plaintiff, the legal heirs of Erusappan had partitioned the properties left by Erusappan by way of a Compromise Final Decree in I.A.No.1065 of 1990 in O.S.No.574 of 1990 on the file of the Additional Subordinate Judge, Salem on 01.11.1990. In the said partition, the suit property and other properties were allotted to the plaintiff and the plaintiff is entitled to 1/28th share in the suit property. The well in Town Survey No.40, Ward 'A' Block 20 of Salem is a portion of the property allotted to the plaintiff in the said partition and the plaintiff has got 1/28th share in the well and in the vacant land around the well. The first defendant is the son of Chidambara Udayar and the fourth defendant Lakshmi Ammal is the daughter-in-law of Chidambara Udayar, whose husband is Siddha Udayar and the first and fourth defendants belong to the same branch and the first and fourth defendants are having 1/8th share in the well and the vacant area around the said well in T.S.No.40. The second and third defendants belong to one branch and they are having 5/16 shares in the said well and the vacant area around the well. The plaintiff and the defendants are having common right in the suit property. There was a dispute with regard to the said pathway between the plaintiff and his family members on one hand and the defendants and others on the other hand. Therefore, the plaintiff had filed a suit in O.S.No.1225 of 1996 on the file of the District Munsif, Salem for permanent injunction. The above suit was decreed on 10.11.1993. Now, with a view to cause further trouble, the defendants have joined together and attempted to close the common well. The same was thwarted. After several mediations, the defendants agreed that they would not proceed further and the matter can be settled between the parties. Contrary to the assurances, the defendants had again attempted to close down the suit well on 10.04.2001. Hence, the suit for declaration and for permanent injunction restraining the defendants from closing the well or to complete the road in respect of 'A' schedule property and for directing the defendants to restore the 'B' schedule property to its original condition.

4. The brief facts in the written statement filed by the second defendant and adopted the first and third defendants :

It is the contention of the defendants that the grandfather of the plaintiff had purchased 1/28th share in the well alone and not in the vacant land. The plaintiff has already constructed a house leaving the said land of 15 cents. The area of the well and vacant land is around 1742 sq.ft. and the plaintiff's share will be only 62 sq.ft. Further, it is their contention that the well is not in use for the past 15 years either by the plaintiff

or by the defendants. The plaintiff has got his own well and water connection in his house. Due to non use of more than 15 years, the plaintiff is estopped from making any claim in respect of the well portion. The allegation that the defendant had made an attempt to close the well is also denied.

5. In the additional written statement, it is the contention of the defendants that the property conveyed in the sale deed dated 22.08.1933 was only the right to draw water and it is only a easementary right. The other sharers have no property on the portion of the land where the well was available. Further, the plaintiff and his predecessors by their own conduct have impliedly released their right to draw water from the well.

6. The trial Court framed the following issues for determination in the suit :

1. Whether the plaintiff is entitled for permanent injunction and mandatory injunction as prayed for?
2. Whether the description of the suit property is correct?
3. To what relief the plaintiff is entitled?

7. On the side of the plaintiff, P.W.1 was examined and Ex.A.1 to Ex.A.12 were marked. On the side of the defendants D.W.1 was examined and Ex.B1 to B.7 were marked.

8. The trial Court after appreciation of the entire evidence decreed the suit. The first appellate Court also confirmed the decree and judgment of the trial Court. As against which the present second appeal has been filed.

9. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents at the time of admitting this Second Appeal.

9. The following substantial questions of law have been raised in this Second Appeal :

1. Whether the lower Courts are right in granting a decree as prayed for by the plaintiff in respect of the property in T.S.No.40, especially when

the plaintiff's grand father has not purchased any portion of land in T.S.No.40 under Ex.A.1, except the 1/28th share in the well situated in T.S.No.40?

2. Even assuming without admitting that the plaintiff has right over any portion in T.S.No.40, whether the suit for permanent and mandatory injunction is maintainable, as against the defendants who are co-owners of the suit property as admitted by the plaintiff?

3. In view of the fact that the plaintiff's predecessor in title was given only an easementary right of pathway, whether the present suit claiming ownership is maintainable in law?

4. Whether the lower Courts right in granting the decree as prayed for by the plaintiff, especially when the entire land in and around T.S.No.40 were divided into house sites and the irrigation well has become useless and closed?

5. Whether or not the right of the plaintiff, if any, has got extinguished because of the non user of the well in T.S.No.40 for several years and in the entire 15 cents of agricultural land purchased by his grandfather under Ex.A.1 buildings were constructed by erecting a compound wall?

10. The learned counsel appearing for the appellants submit that the Courts below have not appreciated the entire facts and erroneously decreed the suit. In fact as per Ex.B.5, the plaintiff has a right to draw water in the well and not in the other areas of the land. Even under Ex.A.1, the right has been given

only to draw water and not in respect of the vacant land surrounding the well. The learned counsel appearing for the appellants has also placed reliance on Ex.B.3, Ex.B.4 and Ex.B.7 documents to show that in the entire area, the plaintiff is not entitled and utmost they are entitled to only 62 sq.ft. Hence, submitted that the Courts below have not properly appreciated the evidence and decreed the suit.

11. Whereas, the learned counsel appearing for the respondents submitted that Ex.A.1, A5 and 'A' register extract clearly show that not only in the well, but also in the entire vacant area the plaintiffs have right. The Courts below rightly assessed the documents and factually found that the plaintiffs

are co-owners in the suit property and granted the relief. It is his further contention that in the earlier suit filed in O.S.No.1225 of 1986 has been decreed against the defendants. Now they cannot contend that the plaintiffs have no right in the suit property. Hence, prayed for dismissal of the appeal.

12. The suit has been filed by the plaintiff as a co-owner in the suit property for restraining the defendants from closing down the well and also putting up a road in respect of the 'A' schedule property and restore the 'B' schedule property. It is not disputed by the both sides that the suit property has been originally purchased under Ex.A.1. The suit property is common for all the sharers. This aspect is also not in dispute. It is also not in dispute that the plaintiff has already filed a suit for permanent injunction against the defendants in respect of the suit properties. The decree passed in the above suit has also been filed as Ex.A.6. The above suit was filed restraining the defendants not to prevent the plaintiff to use common path way and also for declaration to declare the pathway as a common pathway. The above suit was decreed exparte. This fact has also not been disputed. Whereas the defendants only contention is that the plaintiff in the previous suit has sought permission to withdraw the suit. However, he did not withdraw the suit. Except that, the previous decree and judgment has not been challenged by the defendants. Therefore, the same is binding on the defendants.

13. It is further to be noted that Ex.A.1 is the sale deed in respect of purchase of the suit property. Ex.A.1, when carefully seen, 1/4th share has been purchased in the suit property, including the well and surrounding area. Ex.B.5 relied upon by the defendants, when carefully seen, one Chellamal has executed the sale deed in favour of Periammal, wherein also it has been mentioned that 1/4th share not only in respect of the well but also of the vacant land surrounding the well. The partition in favour of the plaintiff has also not been seriously disputed by the defendants, though except general denial in the written statement. Ex.A.4 has been filed to prove the partition. It is not the case of the defendants that the plaintiff has no share in the well. Their contention is that the extent surrounding the well is 1742 sq.ft. in which the plaintiff is entitled to 62 sq.ft. only. Ex.A.9 Town Survey Register extract clearly indicate the area where the well situated is an extent of 13955 sq.ft. and the well is situated in the above area. Therefore, the contention of the defendants that only 62 sq.ft. was entitled to the plaintiff cannot be countenanced, in view of the sale deeds Ex.A.1, Ex.B.5 and Town Survey Register Extract Ex.A.9. At any event, the plaintiff is

a co-owner of the well. As long as his right is very much available, the defendants cannot contend that his right has been extinguished.

14. Admittedly, a previous suit has already been filed and the same has been decreed against the defendants. Ex.A.2 agreement, when carefully seen, the same indicate that the defendant has agreed to pay Rs.1000/- per sq.ft. and the same has been admitted in the above document. Though release deed was executed, there was no consideration received by them. Having admitted that the plaintiff has specific share and Ex.B.1 and Ex.A.5 also clearly show that the plaintiff has a share in the area surrounding the well in the survey number 40, now the defendants cannot contend that plaintiff does not have any right in the area surrounding the well. The Courts below have rightly appreciated the entire evidence and this Court do not find any error or infirmity in the finding of the Courts below and the substantial questions of law raised by the appellants are answered against them.

15. Accordingly, the Second Appeal is dismissed and the judgment and decree of the Courts below are confirmed. No cost.

Sd/-
Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

vrc

To

1. The Additional Subordinate Judge,
Salem.

2. The Principal District Munsif,
Salem.

+1cc to Mr.P.Jagadeesan, Advocate SR.No.36727

Second Appeal No.692 of 2009

KS (CO)
GMY (23/05/2019)