

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.12.2019

Date of Verdict : 20.12.2019

CORAM

THE HONOURABLE MR. JUSTICE G.K. ILANTHIRAIYAN

S. A. No. 577 of 2005

1. Ramaswamy Gounder (Died)
2. Thavamani
3. Annamalai
4. Rangaswamy Gounder
5. Nanjappan
6. Eswarmoorthy

...Appellants/Respondents/
defendants

-Vs-

1. Arumugam
2. Palaniappan

...Respondents/Appellants/
plaintiff

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 15.12.2004 in A. S. No. 40 of 2003 on the file of the Principal Subordinate Court, Gobichettipalayam, reversing the judgment against the order dated 26.08.2003 in O. S. No. 305 of 1999 on the file of the District Munsif Court, Gobichettipalayam.

For Appellants : Mr. R. Venkatesulu
for Ms. Usha Raman

For Respondents: Mr. A. Sundaravadhanan
for Mrs. P.T. Ramadevi

J U D G M E N T

This second appeal is directed as against the judgment and decree dated 15.12.2004, passed in A. S. No. 40 of 2003 on the file of the Principal Subordinate Court, Gobichettipalayam, reversing the judgment against the order dated 26.08.2003 in O. S. No. 305 of 1999 on the file of the District Munsif Court, Gobichettipalayam.

2. For the sake of convenience, the parties are referred to, as per their ranking in the trial Court.

3. The case of the plaintiffs in brief is as follows :-

3.1. The suit is filed for declaration and permanent injunction. The second, third, fifth and sixth defendants are the sons of first and fourth defendants. The plaintiffs are brothers born to one late Karuppana Gounder. The suit schedule property derived by them from their ancestors, after the demise of their father as per partition deed dated 09.11.1998 and they partitioned the suit property. Accordingly in the suit schedule property, agricultural land measuring 25 cents belongs to second plaintiff and the remaining property of 3 cents along with Oil Engine is common for both the plaintiffs. When their father was alive, the first to fourth defendants partitioned by orally in the year 1970-1971 that through the suit schedule property comprised in R.S.F. No. 3/5 (old R.S.F. No. 21B) from the common well, they are taking water to irrigate their land with three feet breadth. Except this water line, they have no right or title over the remaining property even according to their partition. In fact, the defendants filed a suit in O.S. No. 308 of 1987 and it is pending on the file of this Court in S.A.No. 342 of 1992. Further, the defendants partitioned their property on 31.03.1997 itself i.e., even before the partition among the plaintiffs dated 09.11.1998. As per the plaint plan, adjacent to the common water line, an extent of 6 cents land is situated. While pending suit in O.S. No. 308 of 1987, in the said land, the plaintiffs had set separate Oil Engine to draw water from the well. In the said property, measuring 6 cents, the defendants have no title or right over the same. When the plaintiffs are in enjoyment of the said property, the defendants are also claiming right over the said property and prevented the plaintiffs to enjoy the said land.

3.2. In fact, in the said property partition was effected between the defendants without the knowledge of the plaintiffs on 31.03.1997 and so, it cannot bind the plaintiffs at any point of time. Further it is stated in the revenue records that, they also mutated the name including the plaintiffs name in respect of the said property as joint patta. In this regard, an appeal is also pending. Therefore, the plaintiffs sought for declaration and permanent injunction in respect of the suit schedule property.

4. Resisting the same, the defendants filed a written statement and the case of the defendants in brief is that, in R.S.F.No. 21B measuring 80 cents, 1/3 share belongs to the

plaintiffs and 2/3 share belongs to one Murugana Gounder. The first and fourth defendants, by the sale deed dated 27.03.1970 purchased the property comprised in R.S.F. No. 21B to the total extent of 80 cents, i.e., 2/3 share from the said Murugana Gounder. In the said deed, the vendor clearly mentioned, 2/3 share in R.S.F. No. 21B. The father of the plaintiffs also mortgaged the property, i.e., 1/3 share that belongs to him, measuring 26.2/3 cents to one Ramana Gounder. Therefore, the plaintiffs are entitled to land measuring 26.2/3 cents in R.S.F. No.21B only, as per the mortgaged deed executed in favour of one Ramana Gounder. Thereafter, R.S.F. No. 21B was sub-divided as 3/4, 3/5, 3/6 and 3/12. Except the land comprised in R.S.F. No. 3/4, other subdivisions belong to share holders. Therefore the suit schedule property never belongs to the plaintiffs alone and in respect of the property, 2/3 share belongs to the first and fourth defendants and 1/3 share belongs to the plaintiffs. The property is situated near the common well. In fact, up to the year 1985, the water was drawn manually (cow-calf), thereafter every share holder fixed separate Oil Engine and were drawing water from the common well. The suit schedule property was used to tie up the bulls and cows while drawing the water from the well. Therefore, the plaintiffs never used the suit land independently. Even according to their sale deed in the common property, the plaintiffs have 1/3rd share, measuring 26.2/3 cents alone. Now the plaintiffs filed a suit for declaration for the property measuring 28 cents without any title or right over the entire property. In fact, in the said place of 6 cents common area, the defendants also constructed motor room and drawing water from the common well. For this property, the patta was issued wrongly in favour of Karuppana Gounder, namely the father of the plaintiffs. Thereafter, the defendants filed a proper application before revenue authorities and it was corrected and other share holders were included in the patta. In fact as against which, the plaintiffs also filed an appeal and the same was also dismissed. Therefore, the plaintiffs are not entitled to seek any relief as prayed for and sought for dismissal of the suit.

5. On the side of the plaintiffs, PW1 and PW2 were examined and Exs. A1 to A30 were marked. On the side of the defendants, first and second defendants were examined and Exs. B1 to B3 were marked. The Advocate Commissioner report and his plan were marked as Exs. C1 to C3. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court dismissed the suit filed by the plaintiffs. Aggrieved by the same, the plaintiffs filed Appeal Suit in A. S. No. 40 of 2003 before the Principal Subordinate Court, Gobichettipalayam and the same was allowed and set aside the

judgment and decree of the trial Court. Aggrieved by the same, the defendants filed this Second Appeal.

6. At the time of admission of the Second Appeal, the following substantial question of law was framed :-

" Whether the reliefs claimed, out of which the present Second Appeal has arisen, is hit by the principles of res judicata by the decision of this Court rendered in S. A. No. 342 of 1992 ?"

7. Heard Mr. R. Venkatesulu, learned counsel appearing for the appellants and Mr. A. Sundaravadhanan, learned counsel appearing for the respondents.

8. The learned counsel appearing for the defendants submitted that they have already filed a suit in O. S. No. 308 of 1987 before the District Munsif, Gobichettipalayam, for declaration, declaring their easement right to take water through the plaint annexed plan marked as ABC water channel from the common well and also for a permanent injunction as against father of the plaintiffs, in respect of the very same suit schedule property herein namely, the water channel marked as ABC, measuring 3 feet 33.33 feet length on the side of North to South and 215.33 feet length on the side of East to West comprised in R.S.F. No. 3/4 situated at Akkarai Kodiveri Village, Gobichettipalayam. The said suit was decreed in their favour and it went up to this Court in S. A. No. 342 of 1992 and this Court by judgment and decree dated 26.07.2002 dismissed the Second Appeal and confirmed the judgment and decree of the Courts below. Again for the very same property, now the plaintiffs filed the suit for declaration declaring that the suit schedule property absolutely belongs to the plaintiffs and also for permanent injunction as against the defendants. Therefore, the present suit is directly hit by the principles of res judicata. Considering the above submission, this Court formulated the substantial question of law, whether the suit filed by the plaintiffs is hit by the principles of res judicata or not.

9. The learned counsel appearing for the plaintiffs submitted that the suit filed by the defendants was claiming easement right over the suit schedule property and injunction, whereas, the plaintiffs filed suit for declaration in respect of the suit schedule property and injunction. Therefore the res judicata would not come against the suit filed by the plaintiffs. Further, he submitted that the present suit was filed in respect of the land comprised in R.S.F. No. 3/4 measuring 28 cents and the Oil Engine fixed by the plaintiffs

along with the water line from the common well comprised in R.S.F. No. 3/5 and car track etc., whereas, the defendants filed the suit only in respect of the land comprised in R.S.F. No. 3/4 and not for other reliefs.

10. This Court considered the rival submissions made by the learned counsel on either side. The point for consideration in this appeal is that the suit schedule property in the earlier suit filed by the defendants and the present suit filed by the plaintiffs are one and the same or not.

11. The first and fourth defendants purchased $\frac{2}{3}$ share of the property in the total extent of 80 cents, comprised in R.S.F. No. 21B. Subsequently it was sub-divided as $\frac{3}{4}$ to the extent of $53\frac{1}{3}$ cents, out of 80 cents from one Murugana Gounder by the sale deed dated 27.03.1970 marked as Ex. B1, and the remaining $\frac{1}{3}$ share was purchased by the plaintiffs measuring $26\frac{2}{3}$ cents. Thereafter, R.S.F. No. 21B was sub-divided as $\frac{3}{4}$, $\frac{3}{5}$, $\frac{3}{6}$ and $\frac{3}{12}$. The property of the plaintiffs is situated at $\frac{3}{4}$ along with common well and water line from the common well to the other property. In and around the common well, respective share holders installed Oil Engine for drawing water from the common well to their respective land for irrigation.

12. The defendants filed the suit claiming easement right over the property marked as ABC in the plaint annexed plan which is marked as Ex. A2 comprised in R.S.F. No. 3/4 measuring 3 feet 33.33 feet length on the North-South side and 215.33 feet length at the East-West side situated at Akkarai Kodiveri Village, Gobichettipalayam. The said suit was decreed in favour of the defendants and the plaintiffs filed Second Appeal before this Court. This Court while dismissing the Second Appeal in S. A. No. 342 of 1992 by judgment and decree dated 26.07.2002, held as follows:

" It is not in dispute that the vendors under Exhibits A1 to A5 who sold the property to the plaintiffs had a right in the well marked as "O" in the plaint plan, thereby the plaintiffs got $\frac{9}{10}$ share in the suit well. The defendants was having only $\frac{1}{10}$ share in the suit well. Learned counsel appearing for the appellant has submitted that the plaintiffs are entitled to irrigate through ABC channel only the land got by inheritance measuring 52 cents and the plaintiffs cannot use the said channel to irrigate the lands purchased under Exs. A1 to A5 which is marked

as Plot 2 in the Commissioner's plan. He has also submitted that since the well is situated near the said Plot 2, they can take water straight from the well and they need not use the ABC channel. The said submission cannot be accepted. The channel ABC is connecting the well. The plaintiffs' vendors and after purchase the plaintiffs have been allowed to draw water from the suit well. No evidence is available on record to show that the said ABC channel can be used only for irrigating ancestral properties of the defendants and the plaintiffs. No such restriction has been pointed out even before me. So the said channel has to be construed as it is available to take water from the well to the lands of the land owners, who are having right in the well. So, the plaintiffs are correct in claiming that they have been given the implied grant to take water from ABC channel to irrigate the lands purchased by them under Exs. A1 to A5. The lower Appellate Court is very correct in holding that the trial Court had committed error in holding that the plaintiffs are having right to take water through the said channel only to 52 cents and not to the lands purchased under Exs. A1 to A5."

13. This Court already categorically held that the defendants have right in the common well by 9/10 share and the plaintiffs have right in the common well by 1/10th share. The water channel marked as ABC in the annexed plan namely, Ex A2 is connecting the common well and the defendants are using the water channel from the date of their purchase.

14. After suffering the judgment and decree, the plaintiffs again filed the present suit. The trial Court after analyzing the oral and documentary evidences, rightly dismissed the suit, as the plaintiffs are not entitled for the relief sought for. The First Appellate Court reversed the findings of the trial Court on the basis of the partition deed between the plaintiffs dated 09.11.1998, where the plaintiffs are entitled for 3 cents each in the suit schedule property. Though the defendants filed written statement stating that 2/3 share in the suit schedule property belongs to them and 1/3 share belongs to the plaintiffs, they did not mark any documents to that effect. Therefore, the First Appellate Court without analyzing the other materials and evidences and without any reasonings reversed the

findings of the trial Court. The suit schedule property in the suit filed by the plaintiffs herein and the suit schedule property in the plaint filed by the defendants in O. S. No. 308 of 1987 are one and the same. Though the suit filed by the defendants is for claiming easement right, for the very same property, the plaintiffs cannot claim for declaration. Once, easement right of the said property was decreed in favour of the defendants, again the plaintiffs cannot seek for declaration for the very same property and it leads to res judicata. However, the plaintiffs are entitled for their share as per their father's purchase and it was reflected in the mortgage deed executed by their father in favour of one Ramana Gounder marked as Ex B2 dated 07.08.1941 only to the extent of 26.2/3 cents comprised in R.S.F. No. 3/4 situated at Akkarai Kodiveri Village, Gobichettipalayam. Already the easement right for drawing water from the common well comprised in R.S.F. No. 3/4 along with the water channel measuring 3 feet breath, 33.33 feet length on the North-South side and 215.33 length on the East-West side in R.S.F. No. 3/4 situated at Akkarai Kodiveri Village, Gobichettipalayam, granted in favour of the defendants. However, the plaintiffs are entitled for 1/10 share in the common well and the defendants are entitled for 9/10 share in the common well.

15. It is also made clear that all the plaintiffs are entitled to only 1/10 share in the common well and are entitled only to the extent of 26.2/3 cents in R.S.F. No. 3/4 situated at Akkarai Kodiveri Village, Gobichettipalayam.

16. In the light of the above discussion, the substantial question of law formulated in this appeal is accordingly answered in favour of the appellants / defendants and against the respondents / plaintiffs.

17. Accordingly, this Second Appeal is allowed and the Judgment and Decree, dated 15.12.2004 made in A. S. No. 40 of 2003 on the file of the Subordinate Court, Gobichettipalayam is set aside. With costs.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

vji

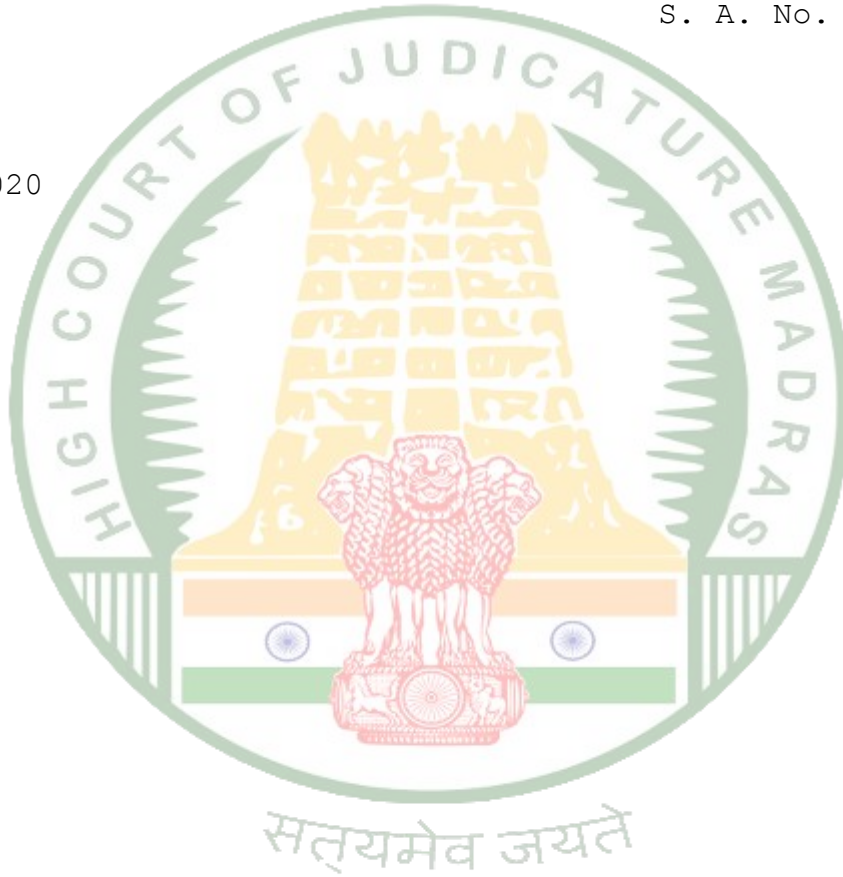
To

1. The Principal Subordinate Court,
Gobichettipalayam.
2. The District Munsif Court,
Gobichettipalayam.

+1 cc to M/s.Usha Raman Advocate sr106376

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