



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.08.2019

CORAM

WEB COPY

THE HONOURABLE MRS. JUSTICE R. THARANI

S.A. (MD)No.807 of 2009

1. Palammal [Died]

(Memo USR No.3309/14, Recorded as
A1-Died, A2 to A8 are the LRs of A1
vide Court order, dated 08.03.2019.)

2. K. Muniasamy

3. K. Thirumani

4. Palthangam

5. Kamaraj

6. Kasthuri

7. Rohini

8. K. Mookammal

.. Appellants/ Appellants
Defendants

Vs.

John Muniasamy

.. Respondent/Respondent
Plaintiff

Prayer : This Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 31.08.2009 passed in A.S.No.4 of 2007 on the file of the Sub Court, Tuticorin confirming the judgment and decree dated 28.09.2006 passed in O.S.No.28 of 2006 on the file of the District Munsif, Tuticorin.

For Appellants

: Mr.K.Sekar

For Respondent

: Mr.M.P.Senthil

J U D G M E N T

Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondent.

2.This appeal is filed against the judgment and decree dated 31.08.2009 passed in A.S.No.4 of 2007 on the file of the Sub Court, Tuticorin, confirming the judgment and decree in O.S.No.28 of 2006 on the file of the District Munsif, Tuticorin, dated 28.09.2006.

3.The appellants were the defendants and the respondent was the plaintiff in the suit.

4.The respondent herein filed a suit in O.S.No.28 of 2006 before the learned District Munsif, Tuticorin, for a prayer of

<https://hcservices.ecourts.gov.in/hcservices/>



declaration, declaring the $1/3^{\text{rd}}$ share of the property in the suit well and for injunction against the defendants not to disturb enjoying $1/3^{\text{rd}}$ share of the well. The trial Court decreed the suit. Against which, the defendants preferred an appeal before the Sub Court, Tuticorin in A.S.No.4 of 2007. The first Appellate Court dismissed the first appeal. Against which, the appellants preferred this Second Appeal.

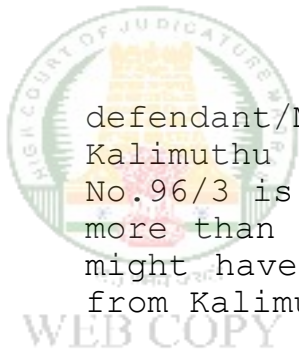
5.The brief substance of the plaint is as follows:

The first defendant is the sister of the plaintiff, the second and third defendants are the legal representatives of the first defendant. The plaintiff is the owner of Survey Nos.95 and 94 and the first defendant's husband Kalimuthu was the owner of Survey No.94, when the said Kalimuthu dug a well in the year 1973 the plaintiff borne all the expenses and after taking into account of the expenses, Kalimuthu agreed for the plaintiff to have $1/3^{\text{rd}}$ share in the Well as well as the Motor Room and Channel. On 17.12.1984, they entered into an agreement regarding share in the Well, Motor etc. Kalimuthu agreed to execute a registered deed also. In the agreement, instead of Survey No.94/2 puja land it is wrongly mentioned as 96/3, whereas Survey No.96/3 is a nanja land. The plaintiff was enjoying the $1/3^{\text{rd}}$ share in the Well, Motor etc., for the past 5 years even after the death of Kalimuthu, who died in the year 2000. When the property was divided between the defendants, the defendants refused the right of the plaintiff and sent a notice, dated 14.11.2005 and the plaintiff filed a suit for declaring the right over the $1/3^{\text{rd}}$ share of the Well and for an order of injunction restraining the defendants.

6.The brief substance of the written statement filed by the defendants is as follows:

It is wrong to state that the plaintiff spent any thing for digging of the well. It is wrong to state that the predecessor of the defendants agreed for giving $1/3^{\text{rd}}$ share in the Well, Motor, etc., to the plaintiff and he entered into an agreement, dated 17.12.1984. It is stated that Kalimuthu purchased Survey No.94 in the year 1973 and he dug a well from out of his own money and from the amount he got from selling the jewels of his wife/first defendant. The plaintiff was working as a teacher and was residing outside the village and on his request, the defendants' predecessor / Kalimuthu took the property of the plaintiff on lease and after his demise, the defendants took the same for lease from the plaintiff up to July 2005 and they gave Rs.3,000/- towards lease amount for the past 20 years. The defendants were using the well water from their property to irrigate the lease land of the plaintiff. The plaintiff never paid any amount towards electricity charges and E.B. connection is now transferred to the name of the second defendant. The defendants deepened the Well and they were maintaining the Well and the Well is situated in Survey No.94/2 which belong to the grand-father of the second defendant, even in

<https://hcservices.ecourts.gov.in/hcservices> 1983, first defendant / Palammal, eighth



defendant/Mookammal and second defendant / Muniasamy were majors, Kalimuthu never signed any agreement, dated 17.12.1984, survey No.96/3 is no way connected with the Well. The value of the Well is more than one lakh and the agreement is not valid. The documents might have been created by the plaintiff with a signature obtained from Kalimuthu in blank papers, during financial transactions.

7.On the basis of pleadings, the trial Court framed the following issues:-

(i)whether the plaintiff is entitled for a declaration, injunction regarding 1/3rd share in the suit well?

(ii)what are the other reliefs?

8.On the side of the plaintiff, five witnesses were examined as P.W.1 to P.W.5 and five documents were marked as Exs.A.1 to A.5. On the side of the defendants, one witness was examined as D.W.1 and six documents were marked as Exs.B.1 to B.6. Ex.C1 to C4 were also marked as Court documents. After hearing both sides and considering the oral and documentary evidence, the trial Court has decreed the suit. Against which, the defendants preferred an appeal.

9.In the grounds of first appeal, it is stated that Ex.A7, certificate given by the Village Administrative Officer is not acceptable and the certificate is to be issued only by the Tahsildar and there are contractions in the evidence of P.W.1 regarding Survey No.96/3 and Suvey No.94/2, there is no well in Survey No.96/3, Ex.A3 is not an acceptable document and the trial Court failed to consider that Kalimuthu undertook all the expenses and he pledged the jewels of his wife and Kalimuthu took the property for lease from the plaintiff and after the death of Kalimithu also the defendants took the property for lease from the plaintiff and they irrigated the plaintiff's land through the water from their own land. It is further stated that P.W.1 and 2 had accepted that the plaintiff did not have any well of his own, the trial Court failed to consider the E.B. receipts- Ex.B3 to B6. The well was dug in the year 1973, Ex.A3 was said to have been executed only on 17.12.1984. The second defendant / Muniasamy had not signed the documents though he was a major at that time and that Ex.A1 and A3 are created for the case.

10.On the basis of the grounds of appeal the first Appellate Court framed the following issues:-

(i).whether the appeal is to be allowed?

11.After hearing both sides the first Appellate Court dismissed the appeal. Against which, the appellants preferred this Second Appeal.



12. In the grounds of the Second Appeal, it is stated that both the Courts below failed to consider that the unregistered agreement/Ex.A3 is inadmissible in evidence. When the well is an immovable property, it has to be registered and hence, the case is hit under Section 17 of the Registration Act. The trial Court failed to frame issue regarding the admissibility of Ex.A1, both the Courts below failed to consider that the agreement, which is marked as Ex.A3 is only for Survey No.96/3 and not for Survey No.94/2. Both the Courts below failed to consider that Ex.A7, certificate issued by the V.A.O., is not reliable. Both the Courts below failed to consider the fact that the husband of the first appellant/Kalimuthu had constructed the well by spending his own income. The lower Court failed to consider that the property was taken for lease by Kalimuthu and after his demise by the defendants. Both the Courts below failed to consider that the plaintiff/respondent herein is a teacher, who is capable of manipulating documents in his favour in order to grab the well from the appellants' family. Both the Courts below failed to consider that even assuming it as a breach of contract, the remedy is only for damages and he could not claim right over the immovable property. The plaintiff never proved that he paid electricity charges. Both the Courts below failed to consider that the major son of Kalimuthu did not sign the document.

13. On the grounds of Second Appeal this Court framed the following substantial questions of law:-

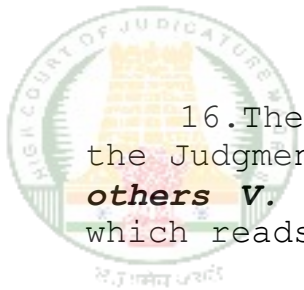
(i) whether both Courts are correct in relying upon the document under Ex.A3 wherein there is a transfer of immovable property as such the said document under Ex.A3 is hit by Section 17 of the Registration Act.?

(ii) Whether both Courts are correct in assuming that it is a breach of contract, the remedy is only under damages and not claiming right over the immovable property as the respondent is not the owner of the well?

Issue No.I.

14. On the side of the appellants, it is stated that both the Courts below are not correct in relying upon the document Ex.A3, wherein there was a transfer of immovable property and Ex.A3 is hit by Section 17 of the Registration Act.

15. On the side of the appellants, it is stated that Ex.A3 is an unregistered document and the property described in the plaintiff's 1/3rd share in the well water, motor, channel and the property is an immovable property and the agreement said to have been entered into by the second defendant's father is hit under Section 17 of the Registration Act.



16.The learned counsel appearing for the appellants relied upon the Judgment passed by this Court in **Muruga Mudaliar (Deceased) and others V. Subba Reddiar** reported in **A.I.R. (38) 1951 Madras 12**, which reads as follows:

14.It is true that the proviso to Section 49, Registration Act, inserted by Act XXI [21] of 1929 does not in terms apply to a suit for damages. But I fail to see any principle or policy which justifies the admission of an unregistered document as evidence of a contract in a suit for specific performance but at the same time requires its rejection as evidence of a contract in a suit for breach of that contract. I venture to think that the omission to provide for the reception of such a document in a suit for damages was due to the fact that such a provision was unnecessary as a suit for damages was not concerned in any manner with a right, title or interest to or in immovable property, that is to say, was not one affecting immovable property.

15.In view of the important and difficult question of law raised in this reference I wish to state my reasons in support of the conclusion I have reached in the case. Raghava Raod J. referred the following question to the Full Bench:

"Whether an agreement of lease in writing required to be registered but unregistered may be used as evidence of the agreement in a suit for damages for its breach?"

In his judgment on which the reference is based, the learned Judge made it clear that the document in question, though in form an agreement of lease, does create a present and immediate demise and operates from its very date.

34.In view of this decision of the Privy Council it seems to me unnecessary to refer to the other decisions of other Courts on which reliance was placed by Mr.Bhashyam, the learned counsel for the respondent, particularly as those decisions did not consider the decision in *M.E.Moola Sons, Ltd. V. Burjorjee*, 10 Rang. 242 : (A.I.R. (19) 1932 P.C. 118). Nor is not necessary to consider the scope and ambit of the new Section (S.27A) of the Specific Relief Act, which relates to specific performance of contracts to lease where there was part performance. The section was considered recently by a Bench in *Ranganatham Chetti V. Kanakaratnammah*, (1948) 2 M.L.J.189: (A.I.R (36) 1949. Mad. 225). The present suit is not one for specific performance and it is unnecessary to go into the question whether that section is exhaustive. Light is thrown on



this question by the decision of the Calcutta High Court in *Gokul Chandra V. Haji Mahomed Din*, I.L.R. (1938) 1 Cal. 563 : (A.I.R. (25) 1938 Cal. 136).

17.The learned counsel appearing for the appellants also relied upon the Judgments passed by this Court in ***District Collector, Chidambaram District V. John Nadra*** reported in ***A.I.R. 2007 Madras 228***, and in ***Mohammed Ibrahim V. Northern Circars Fibre Trading Co.***, reported in ***A.I.R. (31) 1944 Madras 492*** and also relied upon the judgments passed by the Hon'ble Supreme Court in ***Duncans Industries Ltd V. State of U.P.and others*** reported in ***2000 (1) SCC 633*** and in ***Shyam Narayan Prasad V. Krishna Prasad and others*** reported in ***2018 (7) SCC 646***.

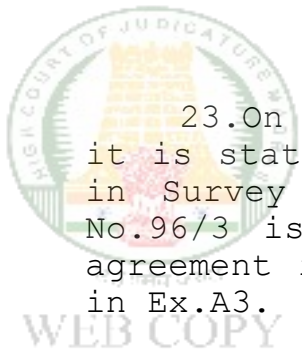
18.On the side of the appellants, it is stated that a right of an agriculturist to take water through Government sluices, is right relating to an immovable property and the period of limitation for enforcement of the right relating to sluices is 12 years under Article 65 and not three years under Article 137. A judgment of this Court reported in ***A.I.R. 2007 Madras 228*** is cited.

19.On the side of the appellants, it is further stated that even if a document is registered at a latter point of time it will be valid only from the date of registration. A judgment of the Hon'ble Supreme Court reported in ***2000 (1) SCC 633*** is cited.

20.On the side of the appellants, it is stated that no right can be claimed on the basis of an unregistered document. A judgment ***of the Hon'ble Supreme Court*** reported in ***2018 (7) SCC 646*** is cited.

21.On the side of the respondent, it is stated that the respondent is taking water from the well from the year 1975, the first defendant is the sister of the plaintiff. Plaintiff and his wife were working and they spent the entire amount for digging the well in the plaintiff's property. An agreement was entered into between the plaintiff and the husband of the first defendant. Though electricity connection was in the name of the husband of the first defendant, plaintiff was entitled to draw water as per the agreement. It is stated that the Village Administrative Officer has deposed that the pipeline is available and had also deposed regarding the usage of the well. The evidence of D.W.1 clearly shows the drawing of 1/3rd water by the plaintiff by the way of pipeline. It is admitted by the defendant/D.W.1 that Ex.A1 and A2 showed the amount for digging the well.

22.On the side of the appellants, it is stated that the respondent being a teacher lived out of the village and he leased out his property to the appellants and the appellants irrigated the land from the water derived from the well in their land.



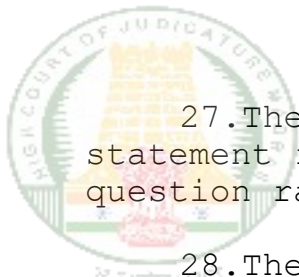
23. On the side of the appellants, it is stated that in Ex.A3, it is stated that Well is available only in Survey No.96/3 and not in Survey No.94/2. The case of the respondent is that survey No.96/3 is only a Nanja land but the property mentioned in the agreement is a punja land and that survey number is wrongly stated in Ex.A3.

24. From the evidence of P.W.1 and 2 it is clear that only survey number 94/2 is adjoining the property of the respondent. The defendants agreed that there is no well in survey No.96/3. In that circumstances, the survey number stated in Ex.A.3 should actually be mentioned as Survey No.94/2. The evidence of D.W.1 clearly reveals that the property has been irrigated only with the water derived from the well situated in Survey No.94/2. The evidence of P.W.2 reveals the same and Ex.C1 and C.2 also reveal that there was a channel available for irrigating the property of the respondent from the water derived from the well in Survey No.94/2. The defendants denied the signature of Kalimuthu in Ex.A3 stating that the signature of Kalimuthu was obtained in a blank paper. But the defendants never questioned the registration of the said document, in their pleadings. The appellants admit that the property of the respondent was irrigated from the water in the suit Well. But, the appellants failed to prove that there was a lease agreement between the parties. The appellants failed to prove that they paid Rs.3,000/- as lease amount to the respondent, whereas the respondent proved that he paid the amount for digging well by way of Ex.A1 and 2. The enjoyment of the water by the respondent from the suit well was accepted by the appellants, Kalimuthu as the Kartha of the family, is entitled to sign an agreement on behalf of the Joint Hindu Family. In the above circumstances, Ex.A3 is admissible and it is not hit under Section 17 of the Registration Act.

Issue No.II:

25. On the side of the appellants, it is stated that even if the agreement is acceptable, the remedy available to the respondent is only to file a suit for damages and he cannot claim right over a immovable property as the respondent is not the owner. The appellants have not raised this point in the pleadings. Ex.A3 allow the respondent to irrigate his land by using water from the well situated in the suit property. The respondent is not claiming any right over the properties, but he is claiming right over the water available in the well.

26. It is seen that Ex.A3, is an agreement, regarding the right over the well and motor etc., even if Ex.A3 is to be treated as an agreement of sale, no time limit is prescribed in Ex.A3. It is seen that the respondent is irrigating his land from the suit Well from the year 1974 to 2005 and the same was admitted by the appellants also. Admittedly the respondent is enjoying the water from the well for more than 20 years.



27. There is no pleadings as to this point in the written statement filed by the appellants. In the above circumstances, this question raised by the appellants is not acceptable.

28. These questions of law raised by the appellants are only the questions of facts and the questions raised by the appellants were not acceptable and there is nothing sufficient enough to interfere in the judgment and decree passed by the Courts below and hence, it is decided that the appeal is to be dismissed.

29. Accordingly, this Second Appeal is dismissed, confirming the judgment and decree dated 31.08.2009 passed in A.S.No.4 of 2007 on the file of the Sub Court, Tuticorin, wherein the judgment and decree dated 28.09.2006 passed in O.S.No.28 of 2006 on the file of the District Munsif, Tuticorin, is confirmed. No costs.

Sd/-

Assistant Registrar (Ad-I)

// True Copy //

Sub Assistant Registrar (CS)

Ls

To

1. The Sub Judge,
Tuticorin.

2. The District Munsif,
Tuticorin.

3. The V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.K. SEKAR, Advocate SR-83616.

+1 CC to M/s.M.P. SENTHIL, Advocate SR-83726.

Made in
S.A. (MD) No.807 of 2009
27.08.2019

CS (14.10.2019) 8P 7C