

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.08.2020

PRONOUNCED ON : 18.08.2020

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1167 of 2009 and
M.P.No.1 of 2009
(Heard through video conferencing)

Pandurangan
Son of Mannankatti,
Pethanaickenpalayam Village,
Ulundurpet Taluk ...Appellant/Appellant/Plaintiff

Vs

1.Sampath
Son of Pandurangan

2.Munian,
Son of Pandurangan

Both residing at
Pethanaickenpalayam Village,
Ulundurpet Taluk. ... Respondents/Respondents/Defendants

Prayer:- This Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree of the Principal District Judge's Court at Villupuram dated 19.06.2009 in A.S.No.14 of 2009, confirming the judgment and decree of the Principal District Munsif Court at Ulundurpet dated 29.06.2007 in O.S.No.268 of 2006.

For Appellant :Mr.Venkatasubban for
Mr.Sarvabhauman Associates

For R.1 :No Appearance

For .2 :Mr.R.Rajarajan

JUDGMENT

This second appeal is filed against the concurrent finding of the Courts below in respect of sharing water from the common Well to irrigate land which was not part of the erstwhile common land.

2.The plaintiff who is the appellant herein, aggrieved by the act of the defendant drawing water from the common Well to irrigate the 'D' schedule property, has approached the trial Court for permanent injunction against the defendant from taking water from the Well in 'A' schedule property to irrigate the D schedule property.

3.The case of the plaintiff is that, the plaintiff and the defendants are the owners of A,B and C schedule of properties. In the year 2000, they exchanged the properties allotting A and B schedule property to the plaintiff and C schedule property to the defendants. The Well in the 'A' schedule property is the source of water for irrigation of 'B' and 'C' schedule properties and it has to be used in common by both parties for irrigation of those properties alone. Contrary to this understanding, the defendants who encroached 'D' schedule properties which belong to the Ayyanar koil maniyam and lake prombokku, trying to use the common Well water to irrigate the D schedule land. The exploitation of the water source from the common Well by the defendants to irrigate the lands other than 'B' schedule property is detrimental to the interest and right of the plaintiff.

4.The defendants contested the claim of the plaintiff on the ground that, they have every right to use the water source from the Well in A schedule property. The plaintiff have only 1/3rd share in the Well. Prayer for an injunction restraining co-owner from enjoying the common Well is not maintainable.

5.From the evidence, the Courts below have traced the title and rights of the respective parties as below:-

The suit subject property is of 2.40 acres extend land originally owned by Kuppa Padaiyatchi. It was divided equally among his two sons Kootha Padaiyatchi and Mannagatti Padaiyachi. The 1.20 acres of land with Well went to Kootha Padaiyatchi. It was later divided into 60 cents each between his sons Pandurangan(I) and Kathirvel. The remaining 1.20 acres of land inherited by one Pandurangan(II), son of Mannagatti Padaiyachi, who is the father of the defendants. Kathirvel sold his 60 cents to his brother Pandurangan(I) who thereby became the owner of 1.20 acres. Through an exchange deed dated 12/12/2000 (Ex A-2), the plaintiff got possession of A and B schedule properties, the

defendants got 'C' schedule property. It is admitted by both parties that the Well in 'A' schedule is the source for the land in 'B' and 'C' schedule properties. In the cross examination, the first defendant admitted that he and the plaintiff hold $\frac{1}{2}$ share each in the Well.

6.The trial Court concluded that, the plaintiff failed to prove drawing of water from Well in A schedule property to irrigate 'D' schedule land. The plaintiff ought to have taken measures to prove this by taking Advocate Commissioner to note the physical features. Having failed to prove the fact alleged, the plaintiff is not entitled to the relief sought in the plaint.

7.The first appellate Court on reappriciation of evidence, held that, the plaintiff has not proved his share in the Well. The Well in 'A' schedule property was given to the defendants through the exchange deed. In the exchange deed, the plaintiff is not conferred with any right in the Well. No restriction imposed on the defendants for enjoyment of the Well. In the absence of restriction on the use of the Well, no injunction can be granted as prayed.

8.The learned counsel for the appellant would submit that though the exchange deed Ex A-2 does not specifically mention about the Well in 'A' schedule property and its usage by the parties, it is an admitted fact that the plaintiff is a co-sharer in the Well. The trial Court dismissed the suit for injunction holding that the plaintiff failed to prove the drawing of water from 'A' schedule property to irrigate 'D' schedule property. Whereas, the first appellate Court dismissed the appeal for a different reason, that the recital in the exchange deed does not mention about the right of the plaintiff in the subject Well or any restriction on the defendants in the manner of using the water in the Well. Both reasons for depriving the plaintiff from the relief sough, is not in accordance with law.

9.The learned counsel appearing for the appellant relying upon the following judgements, would submit that, the right in the Well is inseparable connected with the ownership of the land. The right to irrigate the land is coextensive with the right to the water in the Well. Permitting the defendants to use the water for irrigating the land un connected to the Well, will leave the plaintiff with insufficient of water.

(i) In Sivarama Pilai -vs- Marichami Pillai (AIR 1971 Mad 230), in paragraph Nos.9,25, this Court has held as follows:-

"9.This decision is clear authority for the postition that the Well is inseparably connected with the ownership of the lands and that the rights in the well cannot be dissociated from the lands. In other words, the rights to the water in the well are co-extensive with the rights of the particular party to irrigate the lands, Sathyanarayana Rao, J., followed the Bench decision in AIR 1929 Mad 25, as well as the unreported decision of Chandrasekhara Aiyar, J. There are two unreported decisions of Chandrasekhara Aiyar,J., one in Ammanna v. Ramanna, (1946) I Mad LJ 24, (SN), and the other in Second Appeal No.1640 of 1943 (Mad), I sent for and perused the original judgment in both the second appeals; Chandrasekhara Aiyar, J., has followed and applied the principle laid down in AIR 1929 Mad 25. In both the cases, Chandrasekhara Aiyar J., has held that the ownership of the parties in the Well is Inseparably connected with the lands which they were previously owning as co-owners and it would not be open to one of the co-sharers to take the water to irrigate some other lands.

.....
25.It is unnecessary to deal with the aspect further because I am of the view that Independently of any question of damage, the plaintiff will be entitled to an injunction restraining the defendants from taking water for irrigating other lands. It is necessary to observe that this limit or fetter on the defendant with regard to the use of the water from the Well equally applies to the plaintiff who too cannot take water for irrigating the lands newly acquired by him."

(ii)In Ponnusamy Gounder -vs- Balakrishna Gounder (1999 LW 944), in paragraph No.9, this Court has held as follows:-

"9.On a consideration of the principles laid down in the above decisions the

following propositions appear to be evident:

(1) In between the co-owners of a piece of land irrigated by a well is implicit that the well is kept in common only for the purpose of irrigating the lands which are allotted to the respective branches and to serve that purpose only leaving out of account the other incidental at purposes like bathing, washing clothes, taking water for cattle, etc.;

(2) The scheme of arrangement cannot admit of any notion by which the parties will be deemed to be entitled to the particular quantity of water (so many gallons) treating that alone as a distinct item of property, divorced from the lands, which they can take to any land owned by them apart from the land for which the well is intended;

(3) The ownership of water in the well is not independent to the ownership of the land. Hence the use of the water for lands other than that for which the well is intended is not permissible."

(iii) In Kasi Naidu-vs- Govindarajan and 4 others (2000 (1) LW 470), in paragraph No.12, this Court has held as follows:-

"12. The courts below have not at all appreciated this legal position. The lower appellate court also has relied on certain decisions which are not relevant to the issue in question. Those decisions are not the answer to the issue raised by the plaintiff. The plaintiff's right in the suit well is not denied by the defendants and so the infraction of the joint right of ownership by the defendants by using the same for the lands not connected with the suit well is liable to be prohibited by granting a decree for permanent injunction."

10. In the case on hand, the facts are little different. The right in the Well situated in the 'A' schedule property itself not been proved by the plaintiff. The title deeds of the plaintiff does not speak about his right in the Well. Nevertheless, the defendants admit 1/3 share in the Well. He also admit that water from 'A' schedule Well is used to irrigate the 'B' schedule property of the plaintiff. Since the exchange deed does not say anything about the Well, the right of the defendants using the water from the Well to irrigate their land whether in the 'C' schedule or in the 'D' schedule cannot be a concern for the plaintiff.

11. The point in favour of the plaintiff is the admission of the defendants that the plaintiff having share in the Well and the plaintiff has put up his own side bore to draw water through oil engine. This right is not denied or deprived by the defendants.

12. The learned counsel for the appellant would submit that, the observation of the first appellate Court that the plaintiff has no right in the Well is un called. It is not even the case of the defendants. In the written statement, the defendants themselves have admitted that the plaintiff have 1/3rd share in the Well. While so, now taking advantage of the observation by the first appellate Court, the plaintiff right to draw water from the 'A' schedule property is interfered.

13. This Court finds that neither the trial Court nor the appellate Court erred in dismissing the suit. The prayer sought by the plaintiff is un sustainable since, he had no document to show that he have share in the the Well and he along with the defendants enjoy it as a common Well. Particularly, the exchange deed is silent about this Well.

14. The defendants have spent for 'side bore' and irrigating the land in their possession from the water drawn from the Well situated in the 'A' schedule property. Like wise, the plaintiff also drawing water from the same Well through a 'side bore'. Each of them have separate side bore and there shall be no reason to fear of exploiting the water source of one party by other party. The defendants have conceded the right of the plaintiff in the Well. One cannot restrain the other from utilizing the water which they draw from different source. Therefore, the dismissal of the suit by the Courts below is confirmed.

15.The parties have separate side bore and separate oil engines to draw water from the Well in question. Therefore it is directed, the plaintiff and defendants can draw water on odd-even days respectively, to avoid any apprehension of over exploitation of the limited resource and to ensure the even distribution of the water yield.

16.With the above direction, the Second Appeal is dismissed thereby confirming the judgments and decrees passed by the Courts below. No order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-VIII)

//True copy//

Sub Assistant Registrar

jbm

To

1.The Principal District Judge's,
Villupura.m

2.The Principal District Munsif,
Ulundurpet.

Copy To
The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.Sarvabhauman Associates, Advocate SR.No.27228

S.A.No.1167 of 2009

PA (CO)
GMY (09/11/2020)

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