



S.A.No.150 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.03.2023

CORAM

THE HONOURABLE MR. **JUSTICE G.K.ILANTHIRAIYAN**

S.A.No.150 of 2023

Gouthaman

...Appellant

Vs.

1.Alagesan
2.Elamselvi
3.Gopinath

...Respondents

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 01.09.2022 made in AS.No.16 of 2019 on the file of the Subordinate Judge, Pollachi confirming the judgment and decree dated 01.11.2018 made in OS.No.521 of 2012 on the file of the District Munsif, Pollachi.

For Appellant : Mr.N.Krishnakumar

JUDGMENT

This second appeal is directed as against the judgment and decree dated 01.09.2022 made in AS.No.16 of 2019 on the file of the Subordinate Judge, Pollachi confirming the judgment and decree dated 01.11.2018 made in OS.No.521 of 2012 on the file of the District Munsif, Pollachi, thereby dismissed the suit for permanent injunction.



S.A.No.150 of 2023

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

3. The plaintiff is the appellant and the respondents are the defendants. The case of the plaintiff in brief is as follows :-

3.1. The plaintiff and the first defendant are brothers and the second and third defendants are the wife and son of the first defendant. The suit property absolutely belongs to him by the registered sale deed dated 04.07.1985 and he is in possession and enjoyment of the suit property. His father died on 20.11.2006 and his mother died on 27.12.2009. His father owned certain properties and it was in the joint possession and enjoyment of the plaintiff and the first defendant along with the other brother one, Bharathi. During his lifetime, on 03.02.1995, he had executed Will with regards to his properties. As per the Will, after his lifetime, his wife was given right of enjoyment without making any alienation or encumbrance, After her lifetime, 'A' schedule property of the Will was allotted to the share of the third defendant subject to the interest of the first and second defendants, 'B' schedule property of the Will was allotted to the son of the plaintiff subject to the life interest of the plaintiff and his wife. 'C' schedule property of the Will was allotted to the share of the son of another son,



S.A.No.150 of 2023

Bharathi subject to the life interest of the said Bharathi. After demise of their father and mother, they are in possession and enjoyment of the respective properties allotted in their favour as per the Will. As far as the suit property is concerned, it is a self acquired property of the plaintiff and it is no way related to the other properties which were bequeathed in favour of the plaintiff and the defendants. The entire property covered under the Will comprised in SF.No.185/1.

3.2 As far as the suit property, it is comprised in SF.Nos.179 and 180 and the properties covered under the Will have two wells and one borewell. One well attached with service connection No.378 and the borewell situated adjacent to this well and another well attached with service connection No.61 has been allotted to the share of the defendants. The well with service connection No.379, though it has been mentioned as allotted in favour of the said Bharathi, a common right has been given to the plaintiff, first defendant and the said Bharathi to take water and to maintain the motor pumpset and to pay the electricity charges. Accordingly, the common well in which the plaintiff is taking water for three days, the first defendant is taking water for three days and the said Bharathi is taking water for seven days in turn. While being so, the first defendant made attempt to trespass



S.A.No.150 of 2023

into the suit property claiming cart track right and also claiming right to take water through pipelines through the suit property. Hence, the suit.

4. Resisting the same, the respondents filed their written statement and stated that the first defendant's father executed a Will on 03.02.1995 with regards to the devolution of his properties. The plaintiff as well as the first defendant had purchased their properties on the same date apart from the properties which were bequeathed through Will dated 03.02.1995. On the western side of the suit property, a cart track runs from north to south and the plaintiff and the first defendant had purchased the said cart track runs from north to south. The plaintiff and the first defendant had purchased the cart track also when they purchased their properties. The plaintiff had purchased property comprised in SF.No.179/1C. The first defendant's brother Bharathi had purchased the property comprised in SF.No.179 and the first defendant had purchased the property comprised in SF.No.180. There are two wells situated in the property belongs to the plaintiff's father and there is a motor pumpset and electricity service connection in the well situated on the north and the service connection for the said well is No.379. Likewise, there were two electricity service connection bearing Nos.61 and 378 in the well situated at south along with



the motor pumpset. On the date of the execution of the Will, the plaintiff, the first defendant and their brother Bharathi entered into an agreement with regard to the right on the cart track and accordingly, all the four of them were given right to use the cart track situated on the northern boundary of the survey No.179/1 and to reach their property through the cart track situated in survey No.185. Therefore, the first defendant could irrigate his lands situated at survey No.180 only through the well situated in SF.No.185/1 and he has no other source of separate well for irrigating his land.

5. On the basis of the pleadings on both sides, the trial court framed the following issues:

- a) *Whether the suit is bad for non-joinder as alleged?*
- b) *Whether the plaintiff is entitled for the relief of permanent injunction to restrain the defendants from trespassing into the suit property as prayed for?*
- c) *Whether the plaintiff is entitled for the relief of permanent injunction to restrain the defendants from taking water from the wells and bore wells situated in SF.No.185/1 as prayed for?*
- d) *What other relief plaintiff is entitled for?*



S.A.No.150 of 2023

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In support of the plaintiff's case, P.W.1 was examined and nine documents were marked as Ex.A.1 to Ex.A.9. On the side of the defendants, D.W.1 was examined and Ex.B.1 to Ex.B.10 were marked. 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. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal suit in AS.No.16 of 2019 before the Subordinate Judge, Pollachi. The first appellate Court on appreciating the materials placed on records, dismissed the appeal by confirming the judgment and decree passed by the trial Court. Challenging the same, the plaintiff has come forward with the present second appeal with the following substantial questions of law:

a) Whether the courts below are justified in dismissing the suit holding that the respondents have the right over the cart track and to take water through the underground pipeline on the basis of recitals in the Will (Ex.A3) executed by the party's father more particularly when those recitals are redundant as the property does not belong to the testator himself, but the property belongs to the appellant, having purchased the same vide sale



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S.A.No.150 of 2023

deed dated 04.07.1985 (Ex.A1)?

b) Whether the courts below are right in dismissing the suit for bare injunction when the appellant had proved his ownership and possession with an absolute right to restrict the respondents from taking water through the underground pipeline and also interfering with his right over the cart-track?

7. The learned counsel appearing for the appellant would submit that only on the basis of the commissioner's report, both the courts below dismissed the suit. Admittedly, the suit property comprised in survey No.179/1C purchased by the plaintiff and it is a self acquired property. Whereas his father executed Will and created right over the well situated in SF.No.185/1. Therefore, his father had no right or title over the suit property to execute the Will which was marked as Ex.A3. The appellant also had mutated the revenue records as per Ex.A6. In fact, the first respondent also had mutated his property in his name and it would show that their possession and enjoyment of the said property are not interdependent but only independent. The plaintiff filed suit for bare injunction and as such, one of the brothers Bharathi need not be a necessary and proper party to the suit. The recitals of the Will revealed that in entirety stand in proof of the



S.A.No.150 of 2023

futuristic view of the testator and his intention to keep the unity between all his three sons and their male descendants who are the ultimate owners amounts to special pleadings and is not based on any evidence.

8. Heard, the learned counsel appearing for the appellant.

9. On perusal of records, revealed that the appellant filed suit for permanent injunction restraining the respondents from trespassing into the suit property by way of claiming any cart track right, pipeline right and restraining them from taking water from wells and borewell situated at SF.No.185/1 situated at Pethanaickenur Village to the separate property of the first defendant comprised in SF.Nos.180 and 179 of the same village. The property comprised in SF.No.179/1 admeasuring 5.12 acres situated at Pethanaickanur Village. It is purchased by the appellant by the registered sale deed dated 04.07.1985. The plaintiff, the first defendant and one, Bharathi were sons of Thirumalaisami Naicker and their mother i.e. one, Velumani. The defendants 2 and 3 are wife and son of the first defendant. The father also purchased the property and he had executed Will dated 03.02.1995 bequeathing his properties to his grand son and vested interest with his wife, sons and daughter in laws, which was marked as Ex.A3. After



S.A.No.150 of 2023

execution of the Will, he died on 27.12.2009. The suit property was purchased by the plaintiff and the property comprised in SF.Nos.179 and 180 was purchased by the first defendant by the registered sale deed dated 04.07.1985. The specific stand of the plaintiff is that the suit property is a self acquired property and as such, his brothers are no way connected to the properties acquired through the Will executed by their father. Further, the appellant contended that the first defendant was given right to take water from the well comprised in SF.No.185/1 to his own land comprised in SF.No.190. The said well is not sufficient to irrigate the land comprised in SF.No.181/1 and the well having service connection No.379 is common well and the first defendant has no right to take water from the said common well to irrigate his self acquired land.

10. On perusal of Ex.B1, it is a pathway agreement between the plaintiff and the first respondent and another. It was executed on the strength of the Will which was marked as Ex.A3 dated 03.02.1995. It was also admitted by the appellant during his cross examination. Ex.B1 plan was annexed and indicates that the existence of cart track previously. The newly formed cart track also shown in the said plan. Admittedly, the newly created cart track on the western side of the plaintiff and the first defendant



S.A.No.150 of 2023

land is running north to south. On perusal of Ex.B1 to Ex.B7, there is already cart track in existence of east west and north south cart track.

Further, the appellant claims right over the property which acquired from his father through Ex.A3 Will. As per the recitals in the Will, there is already a pipeline in existence through the lands of the appellant and another brother Bharathi to the land of the first defendant. A common well is situated in the land comprised in SF.No.185/1 and pipeline is formed through the appellant's land in SF.No.185/1 which was acquired through Ex.A3. Further, the property purchased by the appellant comprised in SF.No.179/1C and through the first defendant brother Bharathi's land comprised in SF.No.179 and reaches the property belong to the first defendant comprised in SF.No.180.

11. Therefore, common well is situated in one of the brother Bharathi's land and as per the Will, well belongs to the said Bharathi and right of taking water for seven days was also assigned in his favour. The plaintiff and the first defendant were allotted only three days. Therefore, the intention of the testator to grant equal right to his sons and when already pipeline in existence and cart track also in existence.



S.A.No.150 of 2023

12. Therefore, this Court does not find any valid reason to interfere with the findings rendered by the Courts below as such the Courts below have analyzed the evidences both the documentary and oral in detail, adduced by the parties and by giving cogent reasons, concluded rightly and dismissed the suit filed by the plaintiff. Accordingly, this Court is of the considered opinion that no substantial questions of law involved in this appeal.

13. Accordingly, the judgment and decree dated 01.09.2022 made in AS.No.16 of 2019 on the file of the Subordinate Judge, Pollachi confirming the judgment and decree dated 01.11.2018 made in OS.No.521 of 2012 on the file of the District Munsif, Pollachi is confirmed and the second Appeal is dismissed. There shall be no order as to costs.

01.03.2023

Index : Yes/No
Internet : Yes/No
Speaking order/Non-speaking order
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G.K.ILANTHIRAIYAN, J.

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To



S.A.No.150 of 2023

- 1.The Subordinate Judge,
Pollachi
- 2.The District Munsif,
Pollachi
3. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

S.A.No.150 of 2023

01.03.2023