



S.A(MD)No.129 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

Reserved on : 20.07.2023

Pronounced on : 26.09.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

S.A(MD)No.129 of 2023

and

C.M.P(MD)No.2754 of 2023

1.M.Sankarapandi
2.M.Kottaisamy
3.M.Arumugasamy

... Appellants/Plaintiffs

Vs.

Perumal Servai (Died)

Packkumani @ Packiyasamy (Died)

1.Lakshmi
2.Valliammal
3.Karuppasamy
4.Shanmugaiah
5.Samuthirakani
6.Lakshmi
7.Bathirakaliammal
8.Senthurkumaran
9.Gangatharan

...Respondents 1 to 9/LRs of the
deceased Defendants 1 & 2

10.Rasu

...10th Respondent/3rd Defendant

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PRAYER :-

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This Second Appeal is filed under Section 100 of the Civil Procedure Code, to allow this Second Appeal by setting aside the judgment and decree made in A.S.No.75 of 2015 dated 16.02.2023 on the file of the Sub Court, Sankarankovil, reversing the judgment and decree made in O.S.No.355 of 2013 dated 21.08.2015 on the file of the Additional District Munsif Court, Sankarankovil.

For Appellants : Mr.M.Thirunavukkarasu

For Respondents : Mr.F.X.Eugene

JUDGMENT

This Second Appeal is preferred against the judgment and decree dated 16.02.2023 passed in A.S.No.75 of 2015 on the file of the Sub Court, Sankarankovil, reversing the judgment and decree dated 21.08.2015 passed in O.S.No.355 of 2013 on the file of the Additional District Munsif Court, Sankarankovil.

2. The appellants are the plaintiffs in O.S.No.355 of 2013 on the file of the Additional District Munsif Court, Sankarankovil. They have filed the suit for declaration that the plaintiffs along with third defendant have half right



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over the Well in 2nd schedule property and consequential permanent injunction against the defendants 1 and 2.

3. During pendency of suit proceedings and appeal proceedings, the defendants 1 and 2 died and their legal representatives have been added.

4. For the sake of convenience, the parties are referred as plaintiffs and defendants as arrayed in O.S.No.355 of 2013 on the file of the Additional District Munsif Court, Sankarankovil.

5. It is the case of the plaintiffs that the suit properties consists two schedules and situated in S.No.147/1 and S.No.147/2. The suit properties originally belonged to one Sankarapandian. The southern lands of the suit properties belonged to one Shanmugam Servai, who is brother of Sankarapandian. During their life time, the said Sankarapandian and Shanmugam Servai dug a Well in S.No.147/2 and had been enjoying the same with half share each. They got Electricity Service Connection No.01600434 towards the Well in the name of Sankarapandian and installed pipe lines to



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irrigate the fields in their respective lands. After the death of Sankarapandian, his wife kaliasammal sold the suit properties to the father of the plaintiffs Maruthaiah konar. In the description of properties in sale deed, the suit 2nd schedule property, the half right of Well has been wrongly stated as situated in S.No.147/1 instead of S.No.147/2. There is no Well in S.No.147/1 at any point of time. While being so, the defendants 1 and 2 objected to take water from the Well. The plaintiffs and the 3rd defendant are brothers. The 3rd defendant married the daughter of 2nd defendant and the 3rd defendant acts with defendants 1 and 2. Hence, the plaintiffs filed the suit.

6. It is the case of the defendants that originally the suit properties belonged to their paternal grandfather namely Subbukonar. Thereafter, his sons Sankarapandian and Shanmugam Servai enjoyed the properties. Sankarapandian had no issues and he mortgaged the properties with his brother Shanmugam Servai for his expenses and handed over possession in lieu of interest with Shanmugam Servai and later, handed over enjoyment with him. Sankarapandian died in the year 1969 intestate leaving his wife Kaliasammal and father of the defendants Shanmugam Servai. The said



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Kaliammal is none other than the sister of Maruthaiah Konar, who is father of the plaintiffs and the third defendant. The first defendant and his brother maintained Kaliammal. Taking advantage of relationship and issueless, the plaintiffs forged sale deeds. The father of the defendants dug Well in the 2nd schedule property and obtained service connection in the name of his brother Sanarapandian only name lending to give respect as elder brother. The entire share of 2nd schedule property was absolutely handed over to father of the defendants namely Shanmugam Servai by Sankarapandian. The plaintiff have no right or title over the 2nd schedule property. Therefore, the suit is liable to be dismissed.

7. During trial, the plaintiffs examined 3rd plaintiff as P.W.1 and marked 15 exhibits as Ex.A.1 to Ex.A.15 and the defendants have examined the 1st defendant as D.W.1 and marked 8 exhibits as Ex.B.1 to Ex.B.8. Advocate/Commissioner's report and Sketch were marked as Ex.C.1 and Ex.C.2.



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8. After hearing both the learned Additional District Munsif, Sankarankovil decreed the suit in O.S.No.355 of 2013 by passing judgment and decree dated 21.08.2015. Aggrieved by the judgment and decree, the defendants preferred civil appeal in A.S.No.75 of 2015 before the Sub Court, Sankarankovil. The first Appellate Court after hearing both passed judgment dated 16.02.2023 allowing the appeal and set aside the judgment and decree passed in O.S.No.355 of 2013 and dismissed the suit.

9. Challenging the judgment and decree of the First Appellate Court, the plaintiffs have preferred this second appeal and the same has been admitted for file on 03.03.2023 on the following substantial questions of law:-

i) Whether the Lower Appellate Court is right in holding that the plaintiffs are not entitled to get the declaratory relief in respect of suit 2nd schedule Well in the absence of seeking the relief of declaration for the suit 1st scheduled property?

ii) Whether the Lower Appellate Court is right in dismissing the suit filed by the plaintiffs by holding that the plaintiffs failed to establish



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their right over the suit 2nd schedule Well by ignoring Ex.A.2 joint patta?

iii) Whether the plaintiffs are not entitled for the relief of declaration and permanent injunction in respect of suit 2nd schedule well when they filed Exs.A.1 to Exs.A.15 to prove their right?

10. The learned counsel for the appellants/plaintiffs has argued that the suit 1st schedule properties in S.No.147/1 originally belonged to Sankarapandian and it is also admitted by the defendants. The defendants have also admitted that the said Sankarapandian and his brother Shanmugam Servai had jointly enjoyed the Well situated in the 2nd schedule property in S.No.147/2. The plaintiffs father purchased the suit properties from Kalammal, wife of Sankarapandian by virtue of registered sale deed, which is marked as Ex.A.1. In the contents of sale deed, it is specifically mentioned about the half right over the Well situated in the suit property. But, the S.No. 147/2 was wrongly mentioned as S.No.147/1. Admittedly there is no Well situated in the S.No.147/1. The defendants have also not established that there is Well in S.No.147/1. The electricity service connection from Tamil Nadu



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Electricity Board was obtained in the name of Sankarapandian, which is also admitted by the defendants. As per the provisions of Section 3 and 8 of the Transfer of Property Act, even if the presence of any building or any superstructure is not mentioned in the schedule properties of the sale deed, the transferee did not lose the title over the building or superstructure just because it is not mentioned, unless and until the same is specifically stated to be excluded. In the present case, the right of Well has been clearly mentioned in the sale deed and the same has not been excluded. Because of wrong mentioning of S.No.147/1 instead of S.No.147/2, the plaintiffs do not lose their half right over the suit Well. The present sub division of original survey numbers have not been disputed by the defendants. The suit Well is situated in S.No.147/2. The plaintiffs' land is situated in S.No.147/1B and 147/2A. The defendants land is situated in S.No.147/2D, 147/2F, 147/2B and 147/2E. The Well in dispute is now situated in S.No.147/2C. The D.W.1 has also admitted in his cross examination that the suit Well is situated on the straight of northern side of S.No.147/2A and southern west of S.No.147/2B, eastern side of S.No.147/3 & F. It is also the specific case of the plaintiffs that there is pipeline put up from the suit Well towards the properties of the plaintiff's land. The commissioner's report Ex.C.1 also established the same. The



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defendants admitted that their father Shanmumgam Servai purchased property under Ex.A.8 and Ex.A.15 from Sankarapandian, contrary to the same they stated that they derived title over the suit 2nd schedule by way of succession as Sankarapandian and Kaliammal died without any issues and thereby the defendants inherited the property after the death of Sankarapandian. The plaintiffs have filed reply statement against the written statement of the defendants. The defendants have not objected the reply statement by filing any additional written statement. The Lower Appellate Court has not considered the facts and allowed the appeal. The Lower Appellate Court has allowed the appeal preferred by the defendant only on the grounds that there is no mentioning of Well in the Ex.A.1 sale deed stands in the name of the plaintiffs' father and Ex.A.6 settlement deed executed by the plaintiffs' father in favour of plaintiffs. Thus the judgment passed by the Lower Appellate Court has to be set aside. In support of his argument the learned counsel for the plaintiffs have relied on the following citations:

1) (2009) 1 Supreme Court Cases 354 (Laxmanan /v/ Thekkayil Padmini & Others), wherein it is held in paragraph No.29 as follows:

*“29.Pleadings as we understand
under the Code of Civil Procedure (for*



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short 'the Code') and as is defined under the provisions of Rule 1 Order 6 of the Code consist only of a plaint and a written statement. The respondent-plaintiff could have filed a replication in respect to the plea raised in the written statement, which if allowed by the court would have become the part of the pleadings, but mere non-filing of a replication does not and could not mean that there has been admission of the facts pleaded in the written statement. The specific objection in the form of denial was raised in the affidavits filed in respect of the injunction applications, which were accepted on record by the trial court and moreover the acceptance on record of the said affidavit was neither challenged nor questioned by the present appellant."

2) **1997-3 Law Weekly 644 (K.Jayalakshmi Ammal /v/ S.M.Balasundram and Anr.)**, wherein it is held in paragraph No.12 as follows:

"12.The argument that the right of way has not been mentioned in Ex.A.4 also



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may not be of much importance. If the right could be recognized as an easement by transfer of immovable property, all the rights of the transferer are also transferred. That is clear from Section 8 of Transfer of Property Act.”

3) AIR 2009 Kerala 78 (V.P.Fakrudheen Haji /v/ State Bank of India & Anr.), wherein it is held in paragraph No.12 as follows:

“12.Even if the existence of a house is not mentioned in Ext.A1, it cannot be said that the plaintiffs has no title to the house in the plaint schedule property. As per S.3 of the Transfer of Property Act, the expression “attached to the earth” means rooted in the earth, as in the case of trees and shrubs; imbedded in the earth as in the case of walls or buildings; or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.....”.

11. Per contra, the learned counsel for the respondents/defendants has contended that the 2nd schedule suit property is half right of Well in S.No.



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147/2C. The plaintiffs have not sought any relief of declaration. The plaintiffs claimed title over the suit properties by virtue of settlement deed Ex.A.6, wherein there is no mentioning of the 2nd schedule suit property in the description of property under Ex.A.6. The first Appellate Court has correctly held in the judgment that in Ex.A.1 sale deed, the description of properties were mentioned with four boundaries and the Well in S.No.147/2 has not been mentioned and therefore, the plaintiffs have to establish the Well is situated in S.No.147/1, but the plaintiffs failed to do so. The plaintiffs have not adduced any oral and documentary evidence to substantiate his case. As per Section 59 of the Indian Evidence Act all facts, except the contents of documents, may be proved by oral evidence. As per Sections 91 and 92 of the Indian Evidence Act, when there is exclusive documents, contrary to that contents of documents, no oral evidence could be taken into consideration. Even for the sake of argument, the case of the plaintiff that the survey number was wrongly stated as S.No.147/1 instead of S.No.147/2, the 1st schedule property is measuring 3 Acre 72 cents in S.No.147/1 and the land in S.No. 147/2 is measuring 4 acre 11 cents. In Ex.A.1 document, while describing the Well, it is clearly mentioned that the Well situated in S.No.147/1 measuring 3 acres 72 cents not mentioned as 4 acre 11 cents. Further as per provision of

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section 91 and 92 of evidence Act, the contents of the registered documents could be admitted. The plaintiffs claim right through Ex.A.6 settlement deed executed by their father. There is no Well mentioned in the schedule of property therein. The documents in written form would only speak. Ex.A.1 did not convey any right in the 2nd schedule property. So, the plaintiffs have failed to prove their half share right over Well in the 2nd schedule property. No independent witness was examined. There is no question of law arisen in this Second Appeal. The first Appellate Court has correctly appreciated the evidence and correctly passed the judgment by setting aside the judgment and decree of the Trial Court. Therefore, this Second Appeal may be dismissed. In support of his argument, the learned counsel for the respondents/defendants has relied on the following citations.

1) Judgment dated 30.09.2021 passed by the **Hon'ble Supreme Court in Civil Appeal No.1491 of 2007 (Placido Francisco Pinto (D) by LRs & Anr.) Vs. (Jose Francisco Pinto & Anr.)**, wherein it is held in paragraph No. 28 as follows:

“28. It is beyond dispute that a sale deed is required to be registered i.e., a document required by law to be reduced to



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the form of a document. Therefore, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding or subtracting from its terms.”

2) Judgment dated 02.05.2006 passed by the **Hon’ble Supreme Court in Civil Appeal No.2413 of 2006 (Anil Rishi Vs. Gurbaksh Singh)**, wherein it is held as follows:

“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

12. Heard the arguments of both and perused the material records of the case.

13.Originally the properties in S.No.147/1 and 147/2 were belonged to Subbukonar and after his demise their sons Sankarapandian and Shanmugam Servai orally partitioned and enjoyed the same without any dispute. The father of the plaintiffs purchased lands of Sankarapandian. The father of the defendants 1 and 2 purchased lands of Shanmugam Servai. The

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main dispute between the parties is in respect of 2nd schedule property i.e., Well in S.No.147/2. There is no dispute that the properties in S.No.147/2 was originally belonged to Sankarapandian and Shanmugam Servai and both dug a Well and obtained electricity service connection in the name of Sankarapandian for electric motor installed for that Well. It is the case of the plaintiffs that their father purchased lands in S.No.147/1 and half share in Well in S.No.147/2 from one Kalimammal, wife of the Sankarapandian. Now the survey numbers were subdivided under UDR. The plaintiffs' land is situated in S.No.147/1B and 147/2A. The defendants land is situated in S.No. 147/2D,147/2F, 147/2B and 147/2E. The Well in dispute is now situated in S.No.147/2C.

14. The plaintiffs purchased half share in the Well in S.No.147/2 from Kaliasammal. It is the specific case of the plaintiffs that there was no Well in S.No.147/1 and in the description of property mentioned in Ex.A.1, the survey number was wrongly stated as S.No.147/1 instead of S.No.147/2. The defendants contend that the land in S.No.147/1 is measuring 3 acre 72 cents and the land in S.No.147/2 is measuring 4 acre 11 cents and in Ex.A.1 it is



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clearly stated that the measurement of land in S.No.147/1 as 3 acre 72 cents and not as 4 acre 11 cents and so, the plaintiffs' plea that the survey number was wrongly mentioned is not correct. Both parties have claimed title over lands from two brothers Sankarapandian and Shanmugam Servai. Sankaranapdian and Shanmugam Servai dug a Well in S.No.147/2 and enjoyed the same with half share. On perusal of Ex.B.1, which is mortgage deed executed by Sankarapandian in favour of Shanmugam servai, wherein the description of property of 2nd schedule is mentioned as half share of Well situate in S.No.147/2 and patta number is 315. Therefore, it is clear that Sankarapandian had half share in the Well. Admittedly, the electricity service connection was obtained in the name of Sankarapandian and still continues in his name as disclosed from Ex.B.3, marked through the defendants. the FMB sketch for S.No.147 is marked as Ex.A.3. On perusal of the same, no Well is marked in S.No.147/1, a Well is noted in S.No.147/2C. As per the commissioner's report and sketch, there is no Well seen in S.No.147/1 and Well is mentioned in S.No.147/2 and there is pipe lines installed in earth and electric motor from the Well in dispute to the lands of the plaintiffs. The defendants contended that the Ex.A.3 could not be taken into consideration to prove the Well. As per Ex.C.1 and Ex.C.3, the commissioner stated in his



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report that there is no Well situated in S.No.147/1 and the Well is situated in S.No.147/2 and the plaintiffs used to irrigate his lands from the said Well.

Already stated above, the defendants have taken two stand for claiming title over properties that they purchased lands from Sankarapandian at one stage and at another stage they stated that they derived titled through legal heirship as Sankarapandian and Kaliasammal died without any children and intestate. There is no specific document produced by the defendants to show that they purchased land in S.No.147/2 with absolute right of Well in S.No.147/2C. But, the plaintiffs produced document for purchase of suit properties with half right over Well. There is no dispute that the 1st schedule property is absolute property of plaintiffs. Hence, there is no necessity to seek declaratory relief for the 1st schedule property. The first Appellate Court has failed to consider the commissioner's report and sketch which clearly show that there is no Well in S.No.147/1. Through Ex.A.1, half share over Well was conveyed, but survey number was wrongly mentioned as stated by the plaintiffs. Hence, all the substantial questions of law are answered in favour of the appellants. This Court holds that the case of the plaintiffs is proved by them as correctly decided by the Trial Court. Thus, this Second Appeal succeeds.



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15. In the result, the Second Appeal is allowed by setting aside the judgment and decree dated 16.02.2023 passed in A.S.No.75 of 2015 on the file of the Sub Court, Sankarankovil reversing the judgment and decree dated 21.08.2015 passed in O.S.No.355 of 2013 on the file of the Additional District Munsif Court, Sankarankovil. The judgment and decree passed in O.S.No.355 of 2013 on the file of the Additional District Munsif Court, Sankarankovil are restored. No costs. Consequently, connected Miscellaneous Petition is closed.

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NCC : Yes / No
Internet : Yes / No
Index : Yes / No
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To

- 1.The Sub Court,
Sankarankovil.
- 2.The Additional District Munsif Court,
Sankarankovil.
- 3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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Pre-Delivery Judgment made in
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and
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