



S.A.No.1619 of 2001

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.07.2024

Pronounced on : 30.09.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

S.A.No.1619 of 2001

- 1.Oorudaiyan (Died)
- 2.Palaniyandi
- 3.Kadirvel
- 4.Chitravalli
- 5.Palanisamy
- 6.Rajalakshmi
- 7.Dhanam

... Appellants/Appellants/
Plaintiffs

Vs.

- 1.Palanisamy
- 2.Subbammal
- 3.Pitchaiyammal

... Respondents/Respondents
Defendants

(Appellants 4 to 7 and 3rd respondent are brought on record as LRs of the deceased 1st Appellant vide Court order dated 30.01.2023 made in C.M.P(MD)No.9500 of 2021 in S.A.No.1619 of 2001).

PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 27.07.2001 made in A.S.No.1 of 2001 on the file of the Subordinate Court, Kulithalai, confirming the judgment and decree dated 24.03.2000 made in O.S.No.472 of 1994 on the file of the District Munsif Court, Kulithalai.



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For Appellants : Mr.K.Govindarajan
for M/s.Sarvabhauman Associates
For R1 & R2 : Mr.V.Ramamoorthy
For R3 : No Appearance

JUDGMENT

This Second Appeal is preferred against the judgment and decree, dated 27.07.2001 made in A.S.No.1 of 2001 on the file of the Subordinate Judge, Kulithalai, confirming the judgment and decree dated 24.03.2000 passed in O.S.No.472 of 1994 on the file of District Munsif Court, Kulithalai.

2. The appellants are the plaintiffs and the respondents are the defendants in O.S.No.472 of 1994 on the file of the District Munsif Court, Kulithalai. The appellants/plaintiffs filed the suit for declaration that the plaintiffs are the absolute owners of the suit property and for permanent injunction in respect of the suit property.

3. For the sake of convenience, the parties are referred as plaintiffs and defendants as arrayed in O.S.No.472 of 1994 on the file of the District



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Munsif Court, Kulithalai.

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4. Case of the plaintiff:

The suit property measuring 1 acre 40 cents with a Well in S.F.No.580/2B1A, Vaiganallure village, Kulithalai taluk originally belonged to one Thangaraju Pillai and his brother Manickam and others. The plaintiffs purchased the suit property measuring 1 acre 40 cents with Well from the said owners by way of two registered sale deeds dated 05.05.1986 and 18.12.1989. They have been enjoying the suit property from the date of purchase. The Well in the suit property is a 'Mattakinaru'. The 1st defendant is the son of 2nd defendant. The 2nd defendant purchased some other property in S.F.No.583/1 with half right in Well from the said Thangaraju Pillai and Manickam. The plaintiffs are depending on the Well in the suit property for irrigation. The defendants without any right over the Well attempted to obstruct the plaintiffs from deepening the Well and said that they had right over the Well and also denied the title of the plaintiffs over the suit property. Hence, the plaintiffs filed the suit for declaration and permanent injunction.



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5. Case of Defendants:

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It is true that the suit property originally belonged to Thangaraju Pillai and Manickam. The 1st defendant is the son of 2nd defendant. The plaintiffs and the 2nd defendant purchased the properties from the said Thangaraju vagairah. The averment that the plaintiffs purchased the suit property with full right over Well is not correct. The 2nd defendant purchased the property measuring 2 acres 40 cents and half right over Well from the said Thangaraju Pillai and Manickam through a registered sale deed dated 13.06.1974 and the defendants have been enjoying their property from the date of purchase without any hindrance. As there was a dispute between the 2nd defendant and Manickam, a suit in O.S.No.333 of 1984 was filed by one Maruthayee at the instance of Manickam as if the 2nd defendant's property was in S.No.583/1 and not in S.No.580/2. In that suit, an advocate/commissioner was appointed, who inspected the land along with the surveyor and filed a report mentioning that the property with right on Well purchased by the 2nd defendant was in S.No.580/2A and 580/2B and the 2nd defendant had been enjoying the same. The said suit was ended in favour of the 2nd defendant. Thereafter, the said Thangaraju and Manickam again sold the suit property and Well in S.No.580/2 to the plaintiffs on 18.12.1989. But, the



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2nd defendant purchased the property with half right over Well in S.Nos. 580/2A and 580/2B on 13.06.1974 and from that date he has been enjoying the same. The averments of the plaintiffs are denied as false. Hence, the suit is liable to be dismissed.

6. The 2nd defendant filed a suit in O.S.No.252 of 1995 seeking permanent injunction against TNEB officials and the plaintiffs.

7. Both suits in O.S.Nos.472 of 1994 and 252 of 1995 were taken up for trial jointly by the trial Court and evidences were adduced in O.S.No.472 of 1994.

8. During trial, on the plaintiffs' side two witnesses were examined as P.W.1 and P.W.2 and marked 7 exhibits as Ex.A.1 to Ex.A.7. On the defendants' side three witnesses were examined as D.W.1 to D.W.3 and Ex.B.1 to Ex.B.8 were marked and Ex.C.1 to Ex.C.6 were also marked.

9. After hearing both sides, the learned District Munsif, Kulithalai held that there is no dispute regarding the title of the plaintiffs over the suit



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property, but both the plaintiffs and the defendants have half right each on the Well and hence, dismissed both suits by passing common judgment and decree dated 24.03.2000.

10. Aggrieved by the judgment and decree in O.S.No.472 of 1994, the plaintiffs preferred the Civil Appeal in A.S.No.1 of 2001 before the Subordinate Court, Kulithalai. The first Appellate Court after hearing both, passed the judgment and decree, dated 27.07.2001 dismissing the appeal and confirmed the judgment and decree passed in O.S.No.472 of 1994.

11. Challenging the judgment and decree of the First Appellate Court, the plaintiffs have preferred this Second Appeal and the same has been admitted on 10.12.2001 by framing the following substantial question of law:-

"Whether the lower Appellate Court is correct in taking into consideration Commissioner's Report and plaint filed in a suit to which the appellants are not parties and without examining the Advocate Commissioner who had filed that report."



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12. Heard both sides and perused the records in this Second Appeal.

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13. The learned counsel for the appellants/plaintiffs has submitted that the suit property and Well are situated in S.F.Nos.580/2A and 580/2B. The previous owner of the property in a larger extent is same parties. The plaintiffs purchased the suit property under Ex.A.1 and Ex.A.2 dated 05.05.1986 and 18.12.1989. The 2nd defendant purchased the property in S.F.No.583/1 under Ex.B.1 dated 13.06.1974. The properties mentioned in Ex.A.1, Ex.A.2 and Ex.B.1 are entirely different and the boundaries of both properties are also different. Though the trial Court held that the plaintiffs are entitled to 1/2 share in the Well, the suit has to be decreed in respect of half share. The Court would not refuse to grant relief though specifically not claimed, if such relief is required by very nature of the case and of course not inconsistent with relief specifically claimed. Even the Court can mould reliefs according to proved facts. In this case, the plaintiffs proved that the suit property belonged to them as there is no dispute. The trial Court held that the plaintiffs have half right over the suit Well. The trial Court has unnecessarily relied on the commissioner's report filed in an earlier suit in O.S.No.333 of 1984, in which, the plaintiffs are not parties. Moreover, the



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said advocate/commissioner was not at all examined. So, the trial Court has to grant relief in respect of half share, but failed to do so and dismissed the suit in toto. The first Appellate Court also failed to look into the erroneous findings of the trial Court based on earlier commissioner's report. Therefore, the Courts below erred in dismissing the suit filed by the appellants/plaintiffs relying on the advocate/commissioner's report filed in an earlier suit in O.S.No.333 of 1984. The Courts below have not considered the entire evidences and therefore, the Second Appeal may be allowed. Further, the 2nd defendant filed a suit against the plaintiffs in respect of the same subject matter and that suit was dismissed. The 2nd defendant has not preferred any appeal against the dismissal of her suit and it operates as *res judicata*.

14. In support of his argument, the learned counsel for the appellants/plaintiffs relied on the following citations:

(1) 2002 (1) CTC 472 (Angammal and 2 Ors. /v/ Komara Gounder and 2 Ors.), wherein it is held in paragraph Nos.9 and 10 as follows:-

“.....The Full Bench of the Lahore High Court in Meher Chand /v/ Milkhi Ram, AIR 1932 Lah 401 (FB) held that it is the duty of the Court



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to mould the relief to be granted to the parties according to the facts proved which, however, should not be inconsistent with the pleadings.

Also relevant to mention in this context the ruling of the Supreme Court in Kedar Lal /v/ Harilal, AIR 1952 SC 47, where it is held that the court would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side however clumsily or inartistically the plaint may be worded and that in any event, it is always open to a court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs.

In the light of the settled legal position, this Court has no hesitation to grant a decree in favour of the appellants/plaintiffs for declaration and for permanent injunction with reference to an extent of 3.48 acres comprised in Survey No. 299/8 in Lathuvadi village, in Namakkal Taluk in Salem District."



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(2) 1989 TLNJ 319 (S.A.Krishnan /v/ Fathima Bi), wherein the

relevant portion as follows:-

“.....Even though a larger relief has been asked for, if on the facts which have emerged in the course of evidence the plaintiff could be accorded a lesser relief, certainly that should not be denied to the plaintiff.”

(3) (2001) 1 MLJ 238 (Alwar Chettiar /v/ Natarajan Pillai),

wherein it is held in paragraph Nos.8 and 12 as follows:

"8. In the four appeals, there is common issue, namely, whether the suit lane is a public lane. When the appeals are pending in this court, Jayalakshmi Ammal died. She is the sole respondent in the appeal in A.S.No.1370 of 1988 and the legal representatives were not brought on record in time and the above appeal abated.

12. In the present case, the trial court had decided all the three suits on the merits including the decision on the common issue. The result of the abatement of appeal in A.S.No.1370 of 1988 was that the decision of trial court was confirmed with respect to the common issue by the High Court. In consequence, the decision on



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the common issue became res judicata insofar as these appeals are concerned and Sec.11 of the Civil Procedure Code would bar the hearing of the common issue over gain. In view of the decision on the common issue has become res judicata these appeals must fail.

(4) 2007 (1) CTC 611 (Palanisamy Gounder /v/ N.Palanisamy and three others), wherein it is held in paragraph No.19 as follows:

“19. It is to be noted here that Order 26 Rule 9, CPC empowers appointment of a Commissioner for local investigation, even if the prayer for such appointment has not come from the parties and in such a case, the Court itself can appoint a Commissioner. The Commissioner, so appointed, has to do local investigation at any early stage of litigation when the controversy is as to identification, location or measurement of the land and premises of object and his report would serve the Court merely for the appraisal of the situation and for a better understanding of the evidence of parties, and it can never be a basis of a judgment.”



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15. Per contra, the learned counsel for the respondents/defendants contended that the dispute is only regarding to Well situated in the suit property. The 2nd defendant and the plaintiffs purchased the property from the same owner. The 2nd defendant purchased 2 acres 40 cents and half right over Well in the year 1974 itself. In the sale deed executed in favour of the defendants, it is clearly mentioned about the half right of Well and the pathway reached to the Well. After purchase, the defendants also dug another Well in their exclusive property. There was an earlier suit in O.S.No. 333 of 1984 between the 2nd defendant and the mother of the previous owner and in that case, advocate/commissioner was appointed, who inspected the suit property and Well and filed a report about the Well and enjoyment of the defendants from the Well. The plaintiffs also admitted that two Wells are there and one Well is in the middle of the property of the defendants and another Well is in the suit property. The commissioner report filed in O.S.No.333 of 1984 has been marked as Ex.B.3. The trial Court and first Appellate Court have come to conclusion that the defendants have half right over the suit Well, not only based on the commissioner's report but also documentary evidence namely the sale deed Ex.B.1. One of the original owners i.e., Manickam was examined as D.W.2, who deposed that they had



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sold their property with half right on Well to the 2nd defendant.

The defendants never objected the title of the plaintiffs on the suit property and also their half right of Well. So, the trial Court correctly dismissed the suit on the ground that injunction cannot be granted against co-owner of the Well. Therefore, the plaintiffs have no valid grounds in this Second Appeal. The factual findings of the trial Court as well as the first Appellate Court are based on the evidence on record. Concurrent findings could not be set aside unless the question of law decided favouring the appellant in the Second Appeal. The question of law could not be decided in favour of the appellant as the suit was factually decided by the Courts below. Therefore, the learned counsel prayed to dismiss the Second Appeal.

16. Heard the arguments of both sides and perused the material records of the case. Originally, the suit property with a larger extent measuring 3 acres 90 cents belonged to Thangaraju, his brother Manickam and others. On perusal of records and evidences adduced by both, it is clear that the 2nd defendant purchased 2 acres 40 cents in the year 1974 itself under Ex.B.1 = Ex.A.3 and the plaintiffs purchased 1 acre 40 cents from the said Thangaraju and Manickam under Ex.A.1 and Ex.A.2. In rest of 10 cents, the



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house of Thangaraju and Manickam is situated. There is no dispute in the above facts.

17. It is the case of the plaintiffs that they have purchased 1 acre 40 cents with full right of Well situated in the suit property from the previous owners. The defendants vehemently contended that the 2nd defendant purchased 2 acres 40 cents with half right over the Well situated in the suit property from previous owners in the year 1974 and they have been enjoying the half right of Well from the date of purchase. There is no dispute regarding the title of the plaintiffs over the suit property. The only dispute is regarding right of using of Well situated in the suit property.

18. It is further admitted by both sides that on earlier occasion, there was a dispute between the 2nd defendant and the mother of the previous owners. The defendants claim title over the well from the year 1974 under Ex.B.1. In Ex.B.1, it is mentioned that the property situated in S.F.No.583/1. In Ex.A.1 and Ex.A.2, it is mentioned that the property situated in S.F.No. 580/2. The defendants contended that as there was a dispute arose between the 2nd defendant and the mother of the previous owners namely



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Marudhayee, a suit in O.S.No.333 of 1984 was filed and in that suit, an advocate/commissioner was appointed, who inspected along with surveyor and filed a report and it has revealed that the 2nd defendant's property was situated in S.F.No.580/2A and 580/2B and not in S.F.No.583 and there was a pathway to the suit Well along the property of defendants. The said commissioner's report is marked as Ex.B.3. It is not the case of the plaintiffs that their previous owners had owned properties in S.F.No.583/1. It is also an admitted fact that there are two Wells in the properties. One is the suit property and another Well is situated in the middle of the exclusive portion of the land of the 2nd defendant.

19. On perusal of the judgments of the trial Court as well as the first Appellate Court, the Courts below appreciated the Ex.B.3 - Commissioner's Report conjoined with Ex.B.1 - Sale Deed, wherein it was mentioned that the property along with right of pathway and Well was sold. The plaintiffs also admitted that there is a Well situated in the middle of the defendants' property. If it is to reach the Well situated in the middle portion of the property of the defendants, there is no need to provide separate pathway. Whereas only to reach the suit Well a pathway is necessarily to be provided.



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Hence, the Courts below correctly held that in Ex.B.1 - sale deed, the provision of pathway was meant only to the suit Well and the defendants also purchased half right in the suit Well.

20. Indeed in **2007 (1) CTC 611** the brother Judge of this Court held that the Commissioner's Report can be used only as a guiding factor in the process of decision making and can never be used as the basis of decision making. But, in this case, the trial Court has not taken a decision solely based on Ex.B.3 - Commissioner's Report. Based upon the sale deed Ex.B.1 conjoined with Ex.B.3 Commissioner's Report and oral evidences adduced by both parties, the Courts below held that the defendants have half right over the suit Well. The specific evidence of D.W.2 - Manickam, who is the previous owner of the property clearly deposed that they sold the property to the 2nd defendant including the half right over Well and pathway right. This was not challenged by the plaintiffs. The argument that the advocate commissioner who filed Ex.B.3 was not examined is not a valid ground. The commissioner report was filed in the case between the 2nd defendant and the mother of the previous owner. The previous owner Manickam whose mother, a party to the previous suit was examined as DW2 and he



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categorically admitted selling half share in the Well to the defendants in the year 1974 itself. There was no objection filed against that commissioner's report. Admittedly, the commissioner's report was marked as Ex.B.3, there was also no objection raised by the plaintiffs while marking. It is also the case of the defendant that the said advocate/commissioner is no more. The plaintiffs have not denied it. So, the argument that in the absence of examination of advocate/commissioner, the Ex.B.3 - Commissioner's Report could not be held basis is untenable.

21. Of course, the **Full Bench of Lahore High Court in Meher Chand /v/ Milkhi Ram case (AIR 1932 lah 401(FB))** held that it is the duty of the Court to mould the relief to be granted to the parties according to the facts proved which, however, should not be inconsistent with the pleadings. In the case reported in **2002 (1) CTC 472** there was a dispute between the parties regarding title over 3.58 acres, that case was dismissed on the ground that the plaintiff therein did not come to Court with clean hands in respect of 10 cents out of 3.58 acres and so dismissed the suit. On appeal, this Court granted a decree in respect of 3.48 acres. But, the case on hand is entirely different. There is no dispute regarding the title of the plaintiffs over the suit



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property by the defendants. The dispute is only with regard to the Well.

The plaintiffs claimed full right. The defendants claimed half right.

The defendants have established their case by producing acceptable evidences under Ex.B.1, Ex.B.3 and also through the evidence of D.W.2 - Manickam, the erstwhile owner. The plaintiffs have not established their full right over the suit Well. Hence, there is no need to grant decree for half right of the plaintiffs as the defendants did not deny their half right.

Moreover, the **Hon'ble Supreme Court** in the case of **Kedar Lal /v/ Harilal** reported in **AIR 1952 SC 47** held that the Court would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side however clumsily or inartistically the plaint may be worded that in any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs. Hence, it is clear that while granting lesser relief, the other side should not be prejudiced. In this case, the plaintiffs and the second defendant are co-owners in respect of the suit Well. Hence, as rightly held by the Courts below injunction could not be granted against the co-owner.



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22. Yet another contention raised by the plaintiffs that the defendants filed a suit in O.S.No.252 of 1995 against the plaintiffs and the said suit was dismissed by the trial Court by way of passing a common judgment. The defendants did not prefer any appeal and hence, the decision on the common issue is *res judicata* by relying on **(2001) 1 MLJ 238**. In that case the dispute was regarding a lane. But, in this case, the dispute in respect of Well on which both parties claim half right. The defendants filed suit in O.S.No.252 of 1995 against TNEB and the plaintiffs restraining the TNEB officials from giving service connection. As per provision of the Indian Electricity Act, TNEB officials cannot be prevented from giving a connection to the owner/co-owner of the property. So, the dismissal of the suit in O.S.No.252 of 1995 will not operate as *res judicata*. Moreover, the defendants established their half right over the suit Well by adducing acceptable oral and documentary evidences. The citations relied on by the plaintiffs are not applicable to the facts of the case. Courts below found concurrent findings based on factual findings which need not be interfered by this Court by way of this Second Appeal. Hence, the question of law framed in this Second Appeal is answered against the appellants. Thus, this Second Appeal fails.



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23. In the result, the Second Appeal is dismissed. The judgment and decree dated 27.07.2001 made in A.S.No.1 of 2001 on the file of the Subordinate Judge, Kulithalai, confirming the judgment and decree dated 24.03.2000 passed in O.S.No.472 of 1994 on the file of the District Munsif Court, Kulithalai is confirmed. No costs.

30.09.2024

NCC : Yes / No
Internet : Yes / No
Index : Yes / No
VSD

To

- 1.The Subordinate Court,
Kulithalai.
- 2.The District Munsif Court,
Kulithalai.
- 3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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P.VADAMALAI, J.

VSD

**Pre-Delivery Judgment made in
S.A.No.1619 of 2001**

30.09.2024