

(1999) 03 MAD CK 0069
In the Madras High Court

Arunachala Naicker and Others

APPELLANT

Vs

Janakirama Naicker

RESPONDENT

Date of Decision : 26-03-1999

Acts Referred:

Easements Act, 1882 — Section 8
Registration Act, 1908 — Section 47

Citation : (1999) 2 MLJ 648

Hon'ble Judges : K. Sampath, J

Bench : Division Bench

Judgement

K. Sampath, J.—The defendants in O.S. No. 211 of 1982 on the file of the District Munsif, Polur, are the appellants in the second appeal. The respondent filed the suit for declaration and permanent injunction in respect of several items of properties, We are only concerned with S. No. 210/ 1-A and S. No. 210/3-A in Arunagirimangalam village, Kalasapakkam Sub District in North Arcot District.

2. The case of the respondent was that he purchased the several items in the suit from their owners Vinayagamurthy and Santhanam under Ex.A-1 dated 2.8.1980 and Ex.A-2 dated 16.9.1980. The purchase by him included 3/4th right in the well in S. No. 210/1-A. He had originally owned 1/4th share in the well and after the purchase by him now he became entitled to the entirety of the well in S. No. 210/1 -A and notwithstanding the fact that the appellants knew about his purchase, they colluded with Vinayagamurthy, one of the vendors of the respondent, and created an antedated document and on the strength of that document, they attempted to interfere with the respondent's possession and enjoyment and the suit was therefore necessitated for the reliefs already mentioned.

3. The appellants resisted the suit contending inter alia that the fourth appellant became entitled to the right in the share in the suit well in S. No. 210/ 1-A and by virtue of his purchase from Vinayagamurthy under Ex.B-1 dated 17.6.1980, that it was not an antedated document and the respondent was not entitled to

any relief.

4. The learned District Munsif framed the necessary issues and on the pleadings and on the oral and documentary evidence, accepted the case of the respondent that he became absolutely entitled to the suit well by virtue of his purchase and by virtue of his prior title, that the sale deed Ex.B-1 was antedated and that the respondent was entitled to the reliefs prayed for. This decision of the trial Court was confirmed in A.S. No. 16 of 1986 filed by the appellants, by the learned Subordinate Judge, Tiruvannamalai, on 5.2.1987. Aggrieved, the present second appeal has been filed.

5. At the time of admission the following substantial questions of law were raised for decision in the second appeal:

(1) Whether the court below ought not to have held that Ex.B-1 which is a sale deed dated 17.6.1980 in favour of the appellants, will prevail over Exs.A-1 and A-2 and dated 2.8.1980 and 16.9.1980 respectively, although it was registered on 4.10.1980 by virtue of Section 47 of Indian Registration Act?

(2) Whether the courts below have not failed to interpret correctly and properly that Ex.B-1 would include the right of irrigation from the suit well in S. No. 210/1-A as per provisions of Section 8 of Easements Act read with Section 19 thereon and the right of irrigation passes as easement of necessity or by implication under law?

(3) Whether the courts below have not erred in holding that the respondent is entitled to injunction as against appellants herein, even in the absence of proof of any damage or hardship or inconvenience suffered by him in the light of the decision of the Supreme Court in Ayyaswami Gounder and Others Vs. Munnuswamy Gounder and Others, .

(4) Whether the conclusion and finding of the courts below that Ex.B-1 is an antedated document is not perverse and suffers from grave irregularity and illegality that there is no evidence on records to justify such findings?

6. So far as substantial questions 1 and 4 are concerned, the courts below have as a question of fact on the materials available, held that Ex.B-1 is an antedated document and it is not possible to interfere and take a different view. Therefore, questions 1 and 4 are answered against the appellants.

7. However, with regard to the rights in the well arguments have been advanced as to whether under the sale deed in favour of the plaintiff, the entire 3/8th right in the well purported to have been sold would pass to the plaintiff/respondent notwithstanding that the entire extent in the said survey number had not been sold. Out of 96 cents in S. No. 210/3-A the respondent purchased 50 cents from Vinayagamurthy and there was still left an extent of 45 cents, though the parties claimed that an extent of 52 cents was still available. However having regard to the fact that the survey number had an extent of only 96 cents, it has to be held that if at all the fourth appellant would get title and interest only to an extent of

46 cents. The well right, in my view, would have been only in proportion to the extents. It does not appear from the records that in respect of any other property the suit well was the source of irrigation. It would be relevant to refer to Ex.A-3 which is the partition deed between Santhana Naicker and Vinayagamurthy in the year 1966. Under this partition deed "A" schedule property was allotted to Santhana Naicker. The first item in the "A" schedule is S. No. 210/2-1 acre 6 cents. The second item is S. No. 21071-A and in this well excluding the 1/4th share of Janakirama Naicker (the respondent herein), the balance of 3/4th share had to be taken in moiety by Santhana Naicker and Vinayagamurthy. Under Ex.B-3 "B" schedule property has been allotted to Vinayagamurthy. The first item in "B" schedule is 210/3-A - 96 cents and the second time is the one half share in the 3/4th share in the well in 210/1-A, that is to say that in the well the respondent/plaintiff had a one fourth share already and Santhana Naicker and Vinayagamurthy had each a 3/8th share. From a reading of the said partition deed Ex.A-3 it is seen that the well which is the suit well, is meant for irrigating the properties in S. No. 210/ 2 allotted to Santhanam and the property in S. No. 210/3-A, that is to say that so far as Vinayagamurthy was concerned, his property of 96 cents in 210/3-A had a right of irrigation from the well in 210/1 -A and the share in the well was 3/8th. Therefore, the 3/8th share in the well in 210/a-A was meant for irrigation of 96 cents in 210/3-A. We have already noticed that out of 96 cents the respondent had purchased only 50 cents and Vinayagamurthy purported to sell his entire share of 3/8th in the well to the respondent, in which case the balance of 46 cents sold to the fourth appellant would be left high and dry without any source of irrigation. It is also not shown by the learned Counsel for the respondent that there is any other source of irrigation for the 96 cents allotted to Vinayagamurthy. In these circumstances, it has to be seen whether the appellants could claim a right of irrigation in the suit well notwithstanding the fact that the entirety of the 3/8th share of Vinayagamurthy had been purported to have been sold to the respondent.

8. Mr. V. Raghavachari, learned Counsel for the appellants, submitted that by virtue of the provisions of Section 8 and Section 19 of the Easements Act the appellants would be entitled to have a right of easement to take water from the suit well to the property purchased by the fourth appellant from Vinayagamurthy. The learned Counsel submitted that the right in the well cannot be divorced from the right in the land. The learned Counsel also relied on the judgment of the Supreme Court in Ayyaswami Gounder and Others Vs. Munnuswamy Gounder and Others, .

9. Mr. D.Rajendran, learned Counsel for the respondent, submitted that the partition deed Ex.A-3 does not mention that the suit well is meant for irrigation of the property purchased by the fourth appellant from Vinayagamurthy and when once the entire right and title of Vinayagamurthy in the suit well have been sold away to the respondent, nothing remained for the fourth appellant to take in the well. According to the learned Counsel, this is particularly so in view of the

concurrent finding of the courts below that the sale deed in favour of the fourth appellant had been antedated. It would be worthwhile to refer to the decision of the Supreme Court relied on by the learned Counsel for the appellants in that case, the problem arose as follows:

The parties were descendants from a common ancestor and they owned joint properties. A partition took place between the parties whereunder Survey Nos. 95 and 96 fell to the share of the plaintiffs and 15 cents of land in Plot No. 96/5 in which the common well was situate and the channel running from that common well were, however, kept joint for the common enjoyment of the parties. Water from common well situate in plot was not sufficient enough to irrigate the lands of both the parties got by them in the said partition. The plaintiffs, therefore, were irrigating their lands from their exclusive well in Survey No. 103/2 purchased by the father of the plaintiffs and they were irrigating their land obtained in partition through the common channel from their own well in Survey No. 103/2 by connecting the common channel in the common land in Survey No. 96/5 by means of a small channel to take water to their lands in Survey Nos. 96/3, 96/1, 95 and 92. The defendants objected to the use of the common land in Survey No. 96/5 and the common channel running in Survey No. 96/5 for taking water from their exclusive well in Survey No. 103/2. There was no other source of irrigation for the plaintiffs. Hence, the plaintiffs filed the suit for declaration of their right to take water from their exclusive well situate in a plot of land exclusively belonging to them, through a portion of a channel to their plots at survey Nos. 95 and 96 lying to land of the parties and for a consequential relief of permanent injunction restraining the defendants/respondents from interfering with the enjoyment of their right to take water from the well through the aforesaid channel. The defendants admitted the plaintiffs' right to enjoy the common well, the common land and the common channel in Survey No. 96/5. They, however, pleaded that the plaintiffs were not entitled to use the common property for taking water from their exclusive well to their family lands. They, however, did not plead or prove any damage, injury or hardship suffered by the defendants to show that they were in any way prejudiced by plaintiffs forming a small channel in the common land to take water from their exclusive well to their family lands north of the suit property.

The Supreme Court held that,

in the absence of any specific pleading regarding prejudice or detriment to the defendants/respondents the plaintiffs had every right to use the common land and the common channel. The plaintiff/appellants were claiming their right on the basis of admitted co-ownership right which includes unrestricted user, unlimited in point of disposition, and it could not be said that the plaintiff's right to the water was not acquired by any grant from the defendants/respondents or from any other sale deed. The right of co-ownership presupposes a bundle of rights. The only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-

owner to a detriment. Further, the plaintiffs claimed easementary right only as an alternative ground but the main ground on which they based their claim was on the right of co-ownership, therefore illustration (c) to Section 8 would not be applicable as it applies where a co-owner seeks to impose an easementary right on the land or any part thereof.

10. The courts below have also observed that the fourth appellant had not chosen to elect his relief whether he wanted title in that suit well or only easementary right and therefore the fourth appellant could not claim either of the rights. The first right in view of his sale deed being found to be antedated and the second right in view of his not having elected, he could not claim either of the rights. It is stated by the Supreme Court in paragraph 12 as follows:

It was further contended that the Illustration (c) to Section 8 of the Indian Easements Act relied upon by the High Court had no application to the facts of the present case inasmuch as the plaintiffs' case mainly hinges upon their right as co-owners and not on the basis of prescription by easementary right. Illustration (c) to Section 8 of the Indian Easements Act applies where a co-owner seeks to impose an easementary right on the land or any part thereof. In the instant case, however, the plaintiffs claim easementary right only as an alternative ground but the main ground on which they based their claim is on the right of co-ownership.

The Supreme Court appears to have winked at this non-election by the party.

11. This is a clear case where it has to be held that what the respondent purchased from Vinayagamurthy was only the proportionate share relating to the 50 cents purchased by him out of 96 cents, that is to say, his sale deed could convey right in the suit well only to $50/96 \times 3/8 : 25/128$ share and the balance would go with the remaining 46 cents, that will be $23/128$, if it is viewed from this angle what the courts below have done appears to be clearly erroneous. The respondent cannot insist on his pound of flesh. He cannot deprive the fourth appellant of his right to irrigate his 46 cents from the suit well.

12. It would be worthwhile to refer to the observations made by this Court in *Sivarama Pillai v. Marichami Pillai* AIR 1970 Mad. 230 : (1970) 1 M.L.J. 370. it is follows:

In the nature of things, a well cannot be divided by metes and bounds and persons who own joint rights in a well (to the right of the water in the well) can enjoy that right either jointly or separately only by resort to a workable arrangement safeguarding and securing the right to irrigate the lands allotted to the respective branches.... It is implicit in such arrangements that the common source of irrigation, the well, is kept in common for the only purpose of irrigation the lands which are allotted to the respective Branches and to serve that purpose only, leaving out of account the other incidental purposes like bathing, washing clothes, taking water for cattle, etc. The Scheme of the arrangement cannot admit of any notion of the parties being entitled to the particular quantity of

water (so many gallons) treating that alone as a distinct item of property divorced from the lands. The well is set apart as common property for the most beneficial and profitable enjoyment of the land and it does not matter what label the parties give to their rights in the well, whether it is a right to a particular share in the well or whether a right to take water by turns. But what is crucial is that in the case of lands, valuable right is the source of irrigation.

This case was referred to and distinguished on facts by the Supreme Court.

13. In my view, the right in the well cannot be treated as a distinct item of property divorced from the lands for which it was to serve as the source of irrigation. So what was conveyed by Vinayagamurthy to the respondent under Ex.A-2 could take in only the share in the well that the land covered by the sale deed could take. As has been pointed out by the Supreme Court in the same judgment" in these days of scarcity when every effort is being made at all levels to increase the agricultural production to feed the country's teeming millions, it would not be desirable to allow the defendants to create any hurdle in the irrigation of the plaintiff's plots through the Government channel from their exclusive well. "The instant case is one such where the respondent attempted to deprive the fourth appellant from exercising his rights in the suit well by relying on the sale deed from Vinayagamurthy conveying the entirety of his share in the suit well.

14. Having regard to what is stated above, the inescapable conclusion is that the fourth appellant would be entitled to have the proportionate share in the suit well or in other words, the respondent would be entitled to a declaration in respect of 25/128 share in the suit well. The alternative prayer based on easement of necessity need not be prevented in view of the finding that the respondent is entitled to have a proportionate share in the suit well. No proof of damage or hardship or inconvenience suffered by the respondents.

15. Consequently, it is held that it is not necessary to answer question No. 2 and so far as question No. 3 is concerned the respondent would be entitled to a declaration and injunction in respect of the suit well only to the extent of 25/128th share in other respects the decree of the trial court as confirmed by the lower appellate court is confirmed. There will be no order as to costs.