
(2011) 10 MAD CK 0160

In the Madras High Court

Case No : Second Appeal No. 1842 of 1997

Bagavathiappa Gounder @ Bavuthiyappa Gounder	APPELLANT
Vs	
Karuppaiyan, Pappathi @ Kaliyammal and Periyasamy	RESPONDENT

Date of Decision : 13-10-2011

Acts Referred:

Citation : (2011) 10 MAD CK 0160

Hon'ble Judges : V. Periyakaruppiah, J

Bench : Single Bench

**Advocate : V. Meenakshi Sundaram for Mr. M. Vallinayagam, for the Appellant;
Anand Chandrasekar, for the Respondent**

Final Decision : Allowed

Judgement

Honourable Mr. Justice V. Periyakaruppiah

1. This Second appeal has been filed by the plaintiff, who lost the suit before the trial Court and in the appeal, his claim was also negated by the 1st appellate Court.
2. The plaintiff filed the suit before the trial Court for the reliefs of permanent injunction and for damages and costs in respect of the suit property viz., one well and the right to bale water from the said well located in the western half of S.No.817 for an extent of 9.13 1/2 cents with vaikkal, thotti and thulai etc and also using the 5 H.P. Oil Engine Motor, cement pipe line exclusively belonging to him and also to enjoy the velan trees and other trees along with right of walking and other easmentary rights in the said property at Thennilai East village, Karur Taluk and District.
3. The basis of claim made by the plaintiff was that there was a dispute in between the plaintiff and one Marayee ammal and others in respect of the suit property and therefore, the plaintiff filed the suit against the said Marayee ammal and others in O.S.No.908 of 1977 on the file of the District Munsif Court, Karur for permanent injunction and other reliefs. Ultimately, the said suit was

compromised among the parties and a compromise decree was passed on 18.12.1979 in terms of the compromise had by the parties on 17.12.1979. In the said agreement, it was specifically agreed that the plaintiff was entitled to take water from the well situated in S.F.No.817 measuring 18.27 acres. It was also agreed in between the parties that the eastern half of 9.13 1/2 cents sold by the vendors to the plaintiff's father Rangasamy through the sale deed dated 06.09.1927, was also with the right to get water from the well situated in its western half. It is also further claimed by the plaintiff that the defendants were inimical towards the plaintiff and therefore, the compromise reached in between them in the earlier suit and the right given to the plaintiff's father and after the life time of the father to the plaintiff and the defendant was preventing the plaintiff to enjoy the same and therefore the plaintiff sustained damages too. The plaintiff also claimed the rights over the trees standing in the western half and therefore he had requested the Court to pass an order of permanent injunction against the defendants in any manner interfering with the plaintiff's peaceful possession and enjoyment of his rights in the plaint schedule property and also to direct the defendants to pay Rs.2,400/-being the plaintiff's half share of the value of the trees cut by them and also for costs.

4. The suit was resisted by the 1st defendant by denying the right conferred under the sale deed dated 06.09.1927 and also the trees standing in the property. The 1st defendant had also contended that the plaintiff had no right in the soil as well as over the trees standing on the western half of the land in s.No.817 and there was no ownership nor any joint ownership for the plaintiff as told by the plaintiff. The 1st defendant has also denied the damages claimed against him, by the plaintiff, much less to the value of Rs.2,400/-. The 1st defendant had also contended that the plaintiff had vexatiously filed the suit even though there was another decree in respect of his half right in the well and the present suit should have been filed to disturb the defendants, due to the enmity had by the plaintiff against the defendants.

5. The trial Court had framed necessary issues, tried the suit and dismissed the claim of the plaintiff with cost.

6. Aggrieved by the judgment and decree passed by the trial Court, the plaintiff preferred an appeal and the 1st appellate Court had confirmed the judgment and decree passed by the trial Court and hence, the second appeal has been brought forth before this Court.

7. At the time of admission, the following substantial questions of law were formulated by this Court:

1. Whether the trial Court is proper in holding that the plaintiff has got only the right to take water when Ex.A1 to A3 confers ownership to both the plaintiff and the defendants?

2. Whether the appellate Court is proper in confirming the trial Court's decree and judgment after differing with its finding and observing that the onwership of

the well is common to both the plaintiff and defendants?

8. Heard Mr. V. Meenakshi Sundaram for Mr. M. Vallinayagam, learned counsel appearing for the appellant and Mr. Anand Chandrasekar, learned counsel appearing for the respondents.

9. The learned counsel appearing for the appellant would submit in his argument that both the Courts below have erred in dismissing the suit filed by the plaintiff/appellant, even after coming to a conclusion that the plaintiff is entitled to the relief in respect of the right to take water from the well situated on the western half of the property in S.No.817 through the "hole" either by laying underground pipeline or by taking the water through the hose pipe line.

10. He would further submit in his argument that the trial Court had also found that the documents produced by the plaintiff in Exs.A1,A2 and A3 are binding on the parties and the compromise decree already passed in between the parties would be operating and the plaintiff is entitled to take water from the well situated at the western half measuring about 9.13 1/2 cents out of the total property. He would also submit that however both the Courts below have found that the plaintiff is not entitled to the trees standing on the western half and when the part of the claim of the plaintiff have been found in favour of the plaintiff, the suit filed by the plaintiff ought not to have been dismissed in its entirety by the trial Court and the 1st appellate Court should not have also agreed the same, which is against the proved claim of the plaintiff. He would also submit in his argument that the lower Courts ought to have found the entitlement of the plaintiff and it is the duty of the Courts to mould the relief to be granted to the parties according to the facts proved which, however, should not be inconsistent with the pleading. He would also insist in his argument that whenever a larger relief has been asked for by the plaintiff and the Courts found that the plaintiff is entitled to a lesser relief, it ought to have been granted to that extent. He would further submit that the trial Court as well as the 1st appellate Court, having found that the plaintiff is entitled to half right in the well and to draw water from the well through thulai (hole i.e. to take water through underground pipeline or through hose pipe line above the ground level), ought to have decreed the suit to that extent.

11. He would cite a judgment of this Court reported in 1958 (II) MLJ 189 between Kesavalu Naidu Vs. Doraisami Naidu (died) and others, in support of his argument. He would also draw the attention of this Court to a judgment of the Hon"ble Apex Court reported in Rajendra Tiwary Vs. Basudeo Prasad and Another, , for the same principle. He would therefore, requested the Court to allow the appeal, by passing a decree in favour of the plaintiff, in respect of the right to take water by exercising his half right in the well situated in the suit property.

12. The learned counsel appearing for the respondents would submit in his argument that no doubt, the lower Courts have denied the right of the plaintiff in

taking water from the well situated in the suit property. But, at the same time, the plaintiff had no right over the trees standing on the western half of the properties as well as to use the land for taking his cart and other things. He would further submit that the only right recommended by the Courts below was to get water by exercising his half right in the well situated in the suit property. He would also bring it to the notice of the Court that this Court has earlier passed an order on 25.08.2003 at the time of admission in C.M.P.No.18629 of 1997, an injunction application, permitting the plaintiff to use the water from the well situated in the suit property, by exercising his half right. He would also submit that the plaintiff is not entitled to any other rights except that right and if for any reasons, the plaintiff is entitled for the said relief, to such an extent, suitable orders may be passed.

13. Considering the submissions made by both sides, I could see that the Courts below have concurrently rejected the claim of the plaintiff over the trees standing in the suit property as well as the right to take cart and other vehicles in the suit property, since the plaintiff has no such easementary right. However, both the Courts below have found that the plaintiff is entitled to take water from the well situated in the suit property by exercising his half right obtained by him from his father as referred in the sale deed dated 06.09.1927. The said right was recognised in a subsequent suit filed by the suit in O.S.No.908 of 1977, in which a compromise decree has been passed. No doubt, the plaintiff is entitled to such a right and therefore, the Courts below have also recognised the said right.

14. Now, the only point to be seen is, when the Courts below have found that the plaintiff is entitled to such right, could it not possible to pass a decree to that extent when the total reliefs were not grantable by the said Courts. Of course, the plaintiff cannot have any right over the trees in the suit property as well as other rights since both the Courts below have concurrently come to a conclusion that he is not entitled to. Similarly, the Courts below have concurrently found that the right to bale out water from the well in the suit property is available to the plaintiff. The judgment of this Court cited by the learned counsel appearing for the appellant reported in 1958 (II) MLJ 189 between Kesavalu Naidu Vs. Doraisami Naidu (died) and others, would lay down as follows:

Where a plaintiff claims more than what he is entitled to, the Court should not dismiss the suit, but give the plaintiff only such relief as he is entitled to. The fact that the plaintiff asked for a relief larger than the facts attested by him would warrant is no ground for refusing him the lesser relief to which, on the facts found, he is entitled. The Court should not refuse to grant a relief not specifically claimed in the plaint, if such relief is obviously required by the nature of the case and is not inconsistent with the relief specifically claimed and raised by the pleadings. The mere fact of absence of a formal issue is immaterial when the defendant has not been taken by surprise. Pleadings in the mufsil are to be construed liberally and not strictly.

In the judgment of the Hon'ble Apex Court reported in Rajendra Tiwary Vs.

Basudeo Prasad and Another, , it has been categorically laid down the same principle, which are extracted as follows:

Where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief. Order VII, Rule 7 permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted.

The aforesaid principles laid down by this Court as well as the Apex Court would cast a duty upon the Court to find out the rights of the parties pleaded in a suit and even the right of the plaintiff is found to be lesser, it has to mould the relief accordingly on the facts proved and to grant the same.

15. No doubt, it is true that the plaintiff has proved that he is entitled to get water from the well situated in the suit property and to transmit the water through thulai i.e. underground pipe line or the hose pipe line, to the eastern half of the suit property.

16. The learned counsel appearing for the respondents has not seriously disputed the same. Having found that the plaintiff is entitled to a lesser remedy out of the total reliefs sought for, both the Courts below, ought to have granted a decree in favour of the plaintiff to that extent. But, the trial Court, miserably failed to appreciate the plea of the plaintiff, but dismissed the suit instead of decreeing the suit partly towards the said right of taking water. Similarly, the 1st appellate Court has also miserably failed to appreciate the said plea and to allow the appeal to that extent. But, it has categorically dismissed the appeal. The said principles of law, to grant a lesser relief, when the plaintiff has proved such portion alone and not found entitled to other reliefs, the Court ought to have recognised proof of such pleas towards such lesser relief and to grant such a decree. Therefore, it has become necessary for this Court to pass an order setting aside the judgments and decrees of both the Courts below to that extent for granting of lesser decree of permanent injunction not to interfere with the right of the plaintiff to bale out the water from the well situated in the suit property, where the plaintiff has got half right and from installing diesel motor engine for that purpose and to transmit the water either through underground water pipe line or through the hose pipe line to his property lying on the eastern side of the suit property and the access of the plaintiff to exercise such right of get this water.

V.Periyakaruppiah, J.

17. The second appeal is allowed partly to that extent and decree has been passed to that extent. No order as to costs.