

(2001) 01 AP CK 0011
In the Andhra Pradesh High Court
Case No : SA No. 587 of 1989

Gurubilli Sreeramulu and others

APPELLANT

Vs

Joga Verrodu and others

RESPONDENT

Date of Decision : 24-01-2001

Acts Referred:

Easements Act, 1882 — Section 13, 15, 17
Transfer of Property Act, 1882 — Section 54

Citation : (2001) 3 ALD 367 : (2001) 3 ALT 439 : (2001) 1 APLJ 333 : (2002) 3 CivCC 557

Hon'ble Judges : Vaman Rao, J

Bench : Single Bench

Advocate : Mr. P. Rajagopala Rao, for the Appellant; Ms. Aparna, for Mr. T. Niranjan Reddy, for the Respondent

Judgement

1. This second appeal is directed against the judgment dated 16-3-1989 in AS No.193 of 1984 under which the judgment and decree dated 24-11-1981 in OS No.247 of 1980 on the file of the Principal District Munsif Court, Yellamanchali decreeing the suit of the plaintiff was set aside and the suit was dismissed.

2. The parties will be referred to as they were arrayed in the trial Court.

3. The plaintiffs (appellants) filed OS No.247 of 1980 for declaration that the defendants have no right to take water to their lands from the well. The plaintiffs have been the owner of a plot of land measuring Ac.3.70 cents in survey No.288 of Rambilli village. During their minority, their maternal uncle as their guardian sold the eastern portion measuring Ac.2.10 cents out of the said land of Ac.3.70 cents in favour of Jalli Atchanna under a registered sale deed dated 30-4-1943. There is a well in the western portion of Ac.1.60 cents retained by the plaintiffs which was dug and constructed long back. According to the plaintiffs, they along have been using the said well for irrigating Ac.1.60 cents of land. Their plea is that the purchasers of the eastern land Ac.2.10 cents have no right to use the water and they never enjoyed any such right. It is pleaded by the plaintiffs that

taking advantage of the innocence of the plaintiffs, the defendants started claiming right of drawing water from that well and proclaimed such a right. Upon which the plaintiffs got issued a registered notice to which the defendants gave false reply.

4. The defendants in the written statement denied these allegations. They took a plea that the entire extent of Ac.3.70 cents of land is a single block and from times immemorial the entire land is being cultivated from the water from the said well, which is an ancient well situated in the western portion of the land. It is stated that the water is being used by the means of "Bodelu" or sub-channels and irrigated crops like chillies, tobacco, sweet potato in the entire land including Ac.2.10 cents purchased by the defendants. The defendants' predecessor-in-title as well as the defendants have been enjoying the said water continuously and uninterruptedly to an extent of their 4/7th share in the well. The defendants and predecessors in title have been raising the crops with the water from the said well. It is stated that the defendants' predecessor-in-title Jalli Atchanna had acquired 4/7th share in the suit well and in its waters not only as a right (presumably on the basis of sale deed) but also as an easement of necessity and at any rate acquired the said rights by prescription by enjoying the same over the statutory period and that they perfected their right to draw water from the well by continuous use since 1943. It is denied that the plaintiffs had exclusive right over the suit well or to its water and they had only 3/7th share in it.

5. On these pleadings, appropriate issues have been framed in the trial Court. On behalf of the plaintiffs, PWs.1 to 3 have been examined and Exs.A1 to A3 have been marked. On behalf of the defendants, DWs.1 to 4 have been-examined and Exs.B 1 and B2 have been marked.

6. On this evidence, the trial Court held that the defendants had not acquired any right to the suit well or any right to draw water from the said well and accordingly granted declaration in favour of the plaintiff that the defendants are not entitled to any such right and decreed the suit.

7. Aggrieved by this judgment, the defendants preferred an appeal before the HI Additional District Judge, Visakhapatnam who held that the defendants had acquired right to draw water from the said well and accordingly allowed the appeal and dismissed the suit.

8. In this second appeal, the findings of the learned District Judge are challenged by the appellants - plaintiffs on various grounds. It is contended by the learned Counsel for the appellants, Sri Rajagopala Rao, that the learned Additional District Judge failed to consider the fact that the trial Court rightly dismissed the plea of the defendants that they acquired rights to draw water from the well by way of easement of necessity or by prescription. The other contention raised is that the learned Additional District Judge committed an error of law in construing the sale deed and holding that the right to water from the well has been conveyed on the basis of a general recital that all rights including irrigation rights

have been conveyed.

9. However, the learned Counsel for the respondents, Mrs. Aparna contended that the findings and the judgment of the first appellate Court can be supported on all these three grounds, namely, there is a proper conveyance of right to draw water from the well and that at any rate, the defendants have made out a case of easement of necessity or acquisition of rights by prescription. It may be mentioned that the learned District Munsif rejected all these three pleas including the plea based on easement of necessity or acquisition of right by prescription. The first appellate Court, however, has allowed the appeal on his finding that the conveyance deeds under Exs.B1 and B2 read with Ex.A1 established conveyance of rights to well water. He did not go into the question of easement of necessity or acquisition of easementary right derived by prescription.

10. The first contention of the learned Counsel for the appellant, Sri Rajagopala Rao, is that the learned Additional District Judge committed a grave error of law by misreading the documents of title under which the defendants claim to have acquired the right to use water from the well situated in plaintiffs' part of the land.

11. Before going into this question, it may be appropriate to refer to the observations made by the learned III Additional District Judge that the trial Court committed an error in placing burden of proof on the plaintiff. It is stated that as the plaintiff has come to the Court with the relief of declaration that the defendants are not entitled to any right to the well, the burden lies on the plaintiffs to establish it and that the trial Court has committed an error in placing the burden on the defendants. There does not seem to be any error on this aspect. It is pertinent to mention here that the ordinary rule is that the burden lies upon the person who makes a positive assertion. It is the defendants who have asserted a positive case that they have acquired a right to the well under the sale deeds or otherwise. The plaintiff sought a declaration that the defendants are not entitled for any rights in the well. Under the circumstances, there does not seem to be any error in framing the issue or assigning the burden of proof. As observed by the learned III Addl. District Judge, inasmuch as both the parties had the opportunity to adduce the evidence and having in fact adduced evidence, this question of burden of proof does not assume significance.

12. The learned first Additional District Judge relied on a certain recital in the sale deed Ex.A1 under which the predecessors-in-interest of the defendants had purchased Ac.2-10 cents of land out of Ac.3-70 cents held by the plaintiffs. Ex.A1 is a registration extract of sale deed under which the predecessor in title Jalli Atchanna purchased Ac.2-10 cents from the plaintiffs during their minority through their guardian Jalli Latchanna. The recital in Ex.A1 which was considered crucial by the learned Additional District Judge is to the effect that the vendor purported to have conveyed title to the lands sold along with the well, trees and irrigation sources. It is pertinent to mention here that the total extent of land said to have been purchased by the defendants under Exs.B1 and B2 is not the

entire extent conveyed to the purchasers under Ex.A1. Under Ex.A1, Ac.2-10 cents of land has been conveyed to the predecessor-in-interest of the defendants. Under Ex.B1, one acre of land has been conveyed. Under Ex.B2, Ac.0-60 cents of land have been conveyed. It would appear that Jalli Atchanna had not conveyed the entire Ac.2-10 cents which he acquired under Ex.A1 but he conveyed only Ac. 1-60 cents and obviously retained the balance of Ac.0-50 cents. Similar recital as to the purported conveyance of the right to the well in Ex.B1 also is to the effect that the vendor conveys the land along with the well, trees and ordinary pathways. In Ex.B2, there is an identical recital as in Ex.A1 to the effect that the land sold has been conveyed along with well, trees and irrigation sources. It is significant to note that Ex.B1 does not mention irrigation source and that it mentions right to ordinary pathways, which is not mentioned in Ex.A1 and Ex.B2.

13. The contention of the learned Counsel for the appellant is that the learned Additional District Judge rightly held on the basis of this recital that the sales under Exs.B1 and B2 were, along with right to draw water from the well retained in the portion of the plaintiffs after the sale of Ac.2-10 cents under Ex.A1.

14. The learned District Munsif on the other hand gave very specific reasons for holding that these recitals do not evidence conveyance of any rights in the well. I am inclined to agree with the construction of the document as adopted by the learned District Munsif.

15. Firstly, it is admitted that there is no other irrigation source to irrigate the suit land i.e., lands covered by Exs. B1 and B2 except according to the defendants, the well retained by the plaintiffs in their western portion of the land after the sale of a part of land under Ex.A1 Ex.B1 does not mention about the conveyance along with the irrigation source. But, it mentions conveyance along with right to ordinary path ways. There is no whisper the that there are any pathways and right of which is necessary for the defendants to reach their lands conveyed to them under Exs.B1 and B2. The omission to mention irrigation sources in Ex.B1, omission to mention path ways in Exs. A1 and B2 would indicate that these recitals are formal and routine in nature. It shows that these recitals have not been made in a serious manner. If it were not so, the discrepancies pointed out above would not have arisen. As rightly pointed out by the leaned District Munsif, the recitals in question would go to show that the land in question has been conveyed i.e., one acre under Ex.B1 and Ac.0-60 cents under Ex.B2 along with the well, trees and irrigation sources or ordinary pathways as the case may be. These resources of well, trees and irrigation sources or pathways are supposed to be lying in the land conveyed. Admittedly, there is no well in the land conveyed under Ex.B1 or Ex.B2. There is no material to show that any trees were existing in those pieces of land. Admittedly, there is no other irrigation source. There is no whisper about the existence of any pathways. This would not have been certainly the way to incorporate a recital for conveyance of right to water in the, well situated in the portion of the land

retained by the plaintiff after the conveyance of Ac.2-10 cents under Exs.A1. If the right to draw water from the well situated in the plaintiffs land was sought to be conveyed either under Exs.A1, B1 or B2 far more specific and clear recitals would have been incorporated. It is pertinent to mention here that the defendants have come forth with a claim of 4/7th share in the water from the plaintiffs' portion of the land. This was obviously worked out as proportion of the land conveyed by the plaintiffs under Exs. B1 and B2 to the land retained by them. The sale deeds themselves do not mention the extent of the rights to draw the water in the well conveyed under Exs.B1, B2 or A1. It is difficult to conceive how the right to draw water from the well in the land of the plaintiffs could be worked out if it is assumed that the plaintiffs have conveyed right to draw water from the well lying in the land retained by them. Obviously, the plaintiffs would also be entitled to draw water from the well. If a right to convey water from the well was intended, normally, there would have been some recital as to the mode of drawing water. There would have been an arrangement to equitably share the water when the water in the well was not sufficient to irrigate the entire extent of land of Ac.3-70 cents. Admittedly, the well is situated in the western part of the land retained by the plaintiffs. If the right to convey water from the well for irrigation of the lands purchased by the defendants was intended to be conveyed, there would have been an indication as to what would be the mode of carrying water from the well to the portions of the land of the defendants. It could not have been left to the will of the defendants to dig a channel from any where in the land of the plaintiff to take water from that part. There would have been some understanding as to from which corner, as to by which mode the water will be carried like open, channel or pipe line. Absence of any attention to these details and absolute omission to mention in conveyance of right to draw water from the well situated in the plaintiffs part of the land would lead to an irresistible inference that there was no conveyance intended in respect of rights to draw water from the well in the plaintiffs portion. The recitals relied upon by the defendants indicated above, as observed by the learned District Munsif appear to be routine and formal recitals generally incorporated in the sale deeds by the document writers.

16. In view of this discussion, I have no hesitation in holding that the first Additional District Judge completely misconstrued Exs.A1, B1 and B2 in holding that there was conveyance of right to draw water for irrigating the defendants portion of the land from the well situated in the plaintiffs portion. This misreading and misconstruction of the document amounts to a serious error of law which invites intervention in the second appeal.

17. As stated above, the learned First Additional District Judge did not record any finding as to whether the defendants have made out any right to draw water from the well in question as an easement of necessity or as on the basis of acquisition of right of easement to draw water by prescription.

18. However, the learned Counsel for the respondents, Ms. Aparna, contends that

the judgment of the first appellate Court can be supported on these grounds also. Section 13 of the Indian Easement Act, 1882 deals with Easement of Necessity and quasi-easements.

19. Obviously, the defendants seek to rely on clause (a) of the said section. Section 13 of the Indian Easement Act, 1882 is extracted below for ready reference:

"13. Easements of necessity and quasi-easements :--Where one person transfers or bequeaths immovable property to another-

(a) If an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) If such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) If an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) If such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,--

(e) If an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement; or

(f) If such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless the different intention is expressed or necessarily implied, be entitled to such easement.

The easement mentioned in this section, clauses (a), (c) and (e), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee."

20. It is difficult to conceive how any claim of the defendants could be based on Section 13 of the Easements Act. Clause (a) contemplates that if an easement in other immovable properties of the transferor is necessary for enjoying the subject of the transfer or bequest, the transferee, or legatee shall be entitled to such easement. The contention of the learned Counsel for the respondents is

that as the whole land of Ac.3.20 cents originally held by the plaintiffs was irrigated through well water and when the plaintiff sold Ac.2-10 cents of that land, drawing of water from the well situated in the portion retained by the plaintiff would be necessary for enjoying the land transferred i.e., Ac.2-10 cents in favour of the defendants.

21. Firstly, there is no indication to show that the entire extent of Ac.3-70 cents was regularly under irrigation from the water drawn from the well. Admittedly, the land in question is a dry land not having any assured source of irrigation. If the vendor has a well in his dry land and if he sells a part of that land, the purchaser is not prevented from enjoying that land by cultivating dry crops in that land. It may be mentioned here that in this country, even after construction of scores of huge dams and projects, the irrigated area forms a small part of 20 to 25% of the entire land under cultivation. The major extent of land is under cultivation as a rain fed land. The question of land not being able to be enjoyed simply because water from the well was not available does not arise. The question of the defendants being unable to enjoy the land transferred to them by the plaintiff transferor, therefore, does not arise. Thus, there is no basis for any claim by the defendants on the basis of easement of necessity.

22. As to the acquisition of easementary right to draw water from the plaintiffs well by the defendants by prescription, it may be pointed out that there is scarcely any evidence that the defendants have been enjoying the water from the well situated in the plaintiffs land for more than 20 years till two years prior to the institution of the suit as contemplated u/s 15 of the Indian Easement Act. The evidence adduced on behalf of the defendants at the most is indicative of the water having been drawn from the plaintiffs well sporadically for a few years here and there. The requirement of Section 15 as to continuous use for the statutory period has not been satisfied at all.

23. It appears, the defendants were claiming acquisition of easementary right to draw water from the plaintiffs well by prescription u/s 17 of the Act. Section 17 of the Act is extracted below:

"17. Rights which cannot be acquired by prescription :--Easements acquired u/s 15 are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired-

(a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability, would be imposed;

(b) a right to the free passage of light or air to an open space of ground;

(c) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise;

(d) a right to underground water not passing in a defined channel."

24. The water in a well is certainly underground water. A claim of acquisition of easementary right in respect of underground water by prescription is not contemplated u/s 17 of the Easementary Act, 1882 unless it is shown that the underground water was passing in a defined channel. Clause (d) of Section 17 of the Act prohibits acquisition of any rights to underground water by prescription, which is not passing in a defined channel.

25. In the case of *Het Singh and Others Vs. Anar Singh and Others*, the Allahabad High Court held that u/s 17(d) of the Indian Easements Act, 1882, a right to underground water not passing through a defined channel cannot be acquired by prescription u/s 15.

26. In this case, there is no basis for the claim of the defendants in this regard.

27. The claim of acquisition of easementary right to draw surface water is governed by clause (c) of Section 17 of the Act, which contemplates that such a right cannot be acquired in respect of surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise. There is no plea on behalf of the defendants as to how the water from the well situated in the plaintiffs land was lifted, how, it was collected and how it was made to flow in a permanent stream to the land of the defendants. Thus, there is no basis for holding that the defendants have acquired any right to draw water from the well situated in the land retained by the plaintiffs after conveyance of part of the land under Ex.A1. Thus, the findings of the learned III Addl. District Judge suffer from serious error of law which calls for interference in the second appeal.

28. In the result, the second appeal is allowed. The suit of the plaintiffs stands decreed in terms of the judgment passed by the learned Principal District Munsif. However, the parties shall bear their own costs.