

(1942) 03 PRI CK 0002

In the Privy Council

Case No : Privy Council Appeal No. 37 of 1940

Kuppaimetu Guruvappa Naicker

APPELLANT

Vs

M. Mounaguruswami Naicker

RESPONDENT

Date of Decision : 30-03-1942

Acts Referred:

Citation : (1942) AIR(PC) 37

Hon'ble Judges : Madhvan Nair, George Rankin, Lord Thankerton, JJ.

Advocate : Dold, Douglas Grant, White, Lambert, E. Wort, Sir Alfred, C.S. Rewcastle, J.M. Pringle, R.F. Roxburgh, for the Appearing Parties.

Judgement

Lord Thankerton

This is an appeal from an order of the High Court of Madras, dated 21st September 1938, by which an order of the District Judge of Madura, dated 17th July 1936, dismissing an application for execution, was reversed. The decree, the execution of which was applied for, was made on 22nd August 1911, by the District Judge of Madura on a compromise in original Suit No. 81 of 1909, in which the present respondent was plaintiff, and the present appellant was defendant. While the respondent, in his application for execution, asked for the arrest of the judgment debtor and other remedies provided under O. 21, R.32.Civil PC, he has stated, as recorded by both Courts below, that he was alone interested to have his rights under the compromise decree ascertained, and the dispute has been confined to this question. Their Lordships, accordingly, declined to allow the appellant to maintain before them for the first time that, even assuming that the proper construction were as claimed by the respondent and as decided by the High Court, he had committed no breach of the injunction contained in the decree. In his case before this Board, the appellant states that, though the proceedings purported to be for execution of the decree, "the object and sole result of the said proceedings were to obtain from the Courts a decision on the true construction of the said decree and that is the sole matter for adjudication in this appeal."

The appellant and respondent are interested as tenants-in-common in village Andipatti in the Palni Taluk of Madura District. Their rights primarily depend on a decree dated 20th October 1876, which was made in terms of the compromise of a partition suit between their respective predecessors, under which, inter alia, the respondent's predecessor (the defendant) got two-thirds, and the appellant's predecessor (the plaintiff) got one-third, of the nanja and punja lands of the village of Andipatti, it being further provided by the decree "(3) that the cost of repairing the tanks in the said village of Andipatti, known as Periakulam, Rajakulam and Ammakulam and also of the Channel Puduvaikal and dam Nagam Valasu shall be borne by the plaintiff and the defendant in the proportion of one-third and two-thirds respectively and they shall appropriate the water of the said tanks and channels in the same proportion and also enjoy the poramboke and water-spread lands and the fishery of the said village in the same proportion." On 30th October 1908, the respondent instituted a suit against the appellant in the Court of the District Munsif of Dindigul, which was transferred to the Court of the District Judge of Madura and numbered O. S. No. 81 of 1909. The immediate cause of complaint was the alleged use by the present appellant of the water of channel B, shown on the plan filed with the plaint, for irrigation of about 14 kulis of his punja land, marked C on the plan, and a permanent injunction against such use was asked for and also against obstruction of the water flowing as mamul to the old nanjas through the channel B. The appellant filed a written statement in answer on 15th February 1909, but the suit was compromised by an agreement dated 7th July 1911, and, in terms thereof, the decree, which is under consideration, was made, on the application of both parties, on 22nd August 1911, by the District Judge of Madura, and it is as follows :

"This case coming on for hearing this day . and it appearing that the parties have agreed to compromise the matter of the suit and that they have put into Court a deed of compromise, praying that this Court will pass a decree in accordance with the terms thereof, this Court, in pursuance of the said deed of compromise, doth order and decree as follows : "The defendant shall irrigate only the 14 kulis of land marked C in the plan filed along with the plaint, with the water from the channel marked B in the said plan. In other respects, the defendant should not, in future, convert the punja lands belonging to him in Andipatti village, as nanja lands, and irrigate them with the water".

The above is translated from the original Tamil, and the parties were agreed that, as pointed out by the High Court, the definite article before the word "water" at the close should be disregarded, as there is no corresponding word for it in the Tamil language. The description of property and the plan attached to the plaint were subjoined to the decree. On 13th November 1935, the respondent made the present application for execution to which reference has already been made. The alleged breach of the decree was that the appellant "for the first time after the said decree, had newly brought under nanja cultivation in addition to the said extent of 14 kulis, an extent of about 5 kulis which were punja and situate

adjacent to and around the plot marked C in the plan in or about the last two months, despite the protest of the plaintiff and his men, and is attempting to extend the nanja cultivation in the plots marked blue around the land marked C in the plan." The appellant, in his counter affidavit, stated that the 5 kulis only received water channel B by percolation and drainage from the 14 kulis, and were extensively watered by a well sunk in the 5 kulis, and maintained that the decree only prevented the direct taking of water from channel B to any new land, and that the decree did not prevent the appellant taking water from another channel marked A on the plan to the 5 kulis. On 12th December 1938, the respondent filed another execution petition to prevent the alleged use by the appellant of water from channel A for nanja cultivation of his punja lands, and the proceedings in that petition have been stayed pending the decision of this appeal. On the question of the proper construction of the compromise decree of 22nd August 1911, the learned District Judge held that the decree related only to use of water from channel B, and that, as it was not even alleged in the petition or the affidavit in its support that the appellant used the B channel water for his five kulis, the petition failed and should be dismissed. On appeal, the learned Judges of the High Court e differed from the District Judge and held that, on a proper construction of the decree the present appellant is prohibited from making use of the water not only of channel B but also of the other existing sources of irrigation in the village for any extra land which he might have converted or may hereafter convert from punja into nanja, and they so declared by their decree, from which this appeal has been taken.

The appellant maintained that the construction of the compromise decree adopted by the District Judge was the proper construction, but, if that view were too narrow, the proper construction was to confine the operation of the decree to water flowing in channels A and B. It may be explained that water in channel A flows towards the north and into the Rayakulam tank, passing on the way the 14 kulis marked C, which lie near to channel A on its east side. Channel B takes off from channel A at an earlier point and turns eastward along the southern edge of the 14 kulis. The punja lands of the appellant in suit in the execution petitions lie round about the 14 kulis marked C, on the west, north and east sides of the 14 kulis, and adjoin channel A on its east side for a certain distance, with a small portion of them on the other side-the western side-of channel A.

Their Lordships do not find any serious ambiguity in the language of the decree under construction. In their opinion, there can be no doubt that the 14 kulis referred to in the first sentence formed part of the punja lands belonging to the defendant in the Andipatti village. The opening words of the second sentence, taken along with the description of property and plan attached to the plaint which were g subjoined to the decree, sufficiently identify the 14 kulis as such, without recourse either to the pleadings or the compromise agreement, which would equally place the matter beyond doubt. Secondly, in their Lordships' opinion, the words used in the prohibition in the second sentence in their natural meaning, refer to all the punja lands belonging to the defendant in Andipatti

village other than the 14 kulis, and-the definite article being ignored-the language used does not limit "water" to water from channel B. Counsel for the appellant argued that such a wide construction, in view of its effect on large areas of punja land belonging to the appellant which were in no sense dependent on either channel A or channel B, would be so unreasonable a construction, under the circumstances, that it could not have been in the contemplation of the parties. The answer to this contention is that the appellant has not attempted to provide in evidence the material facts upon which alone such a contention could be maintained, and that, so far as the circumstances are before the Court, they tend to a contrary conclusion. In the first place, in the plaint of 30th October 1909, the irrigation of the 14 kulis was asserted to be in breach of the decree of 1876, which admittedly settled the parties' water rights and applied to the whole lands in the village; this challenge was accepted in the written statement and the parties were at issue as to their rights under that decree. Secondly, the operative part of the compromise agreement is in the following terms :

"Both of us have compromised to the effect that, as regards the land of kulis 14, mentioned in para. 1 of the above Sch. 1 which form part of the punjas belonging to the second individual in Andipatti village, the aforesaid Rettayambadi mitta, the second Individual Guruvappa Naicker, shall irrigate it with the water of the channel surrounding a Rayakulam, that the first individual, Mounaguruswami Naicker, shall withdraw the aforesaid suit, O. S. No. 81 of 1909, which he has filed for restraining the defendant from doing so, that the aforesaid Guruvappa Naicker shall not hereafter convert into nanja the remaining punja land belonging to the said second individual Guruvappa Naicker other than 14 kulis of land mentioned in para. 1 of the above Sch. 1."

There can be no doubt that the prohibition is intended to apply to all the appellant's punja lands in the village, except the 14 kulis; it will be noticed that water is not mentioned in the prohibition. Thirdly, it may be added that the plan filed with the plaint, along with the survey plan, Ex. E, prepared under the direction of the Court in course of these proceedings, which shows all the punja lands in the village belonging to the appellant, does not appear to provide a sufficient basis for any such contention by the appellant. The appellant has failed to satisfy their Lordships that the High Court have adopted a wrong construction of the compromise decree-a construction which does not involve interference with the use of rain water or wells by the appellant-and the appeal fails. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.