

(2003) 12 MAD CK 0132

In the Madras High Court

Case No : Second Appeal No. 732 of 1990

Lakshmana Konar and Another

APPELLANT

Vs

Namalwar Konar (deceased by LRs) and Others

RESPONDENT

Date of Decision : 24-12-2003

Acts Referred:

Specific Relief Act, 1963 — Section 38, 39

Citation : AIR 2004 Mad 264 : (2004) 2 MLJ 283

Hon'ble Judges : V. Kanagaraj, J

Bench : Single Bench

Advocate : C. Hanumantha Rao, for the Appellant; R. Senthur Pandian, for No. 4, for the Respondent

Final Decision : Dismissed

Judgement

V. Kanagaraj, J.—This Second appeal is preferred against the judgment and decree dated 7-2-1990 made in A.S. No. 95 of 1987 by the Court of Subordinate Judge, Tuticorin, thereby setting aside the judgment and decree dated 23-3-1987 made in O.S. No. 234 of 1983 by the Court of District Munsif, Srivaikundam.

2. Tracing the history of the above second appeal coming to be preferred, it comes to be known that the first respondent herein has filed the suit for permanent and mandatory injunction, on averments such as that the plaintiff schedule well belongs to him and the defendants, wherein the plaintiff is entitled to 11/48 shares, the first defendant is entitled to 2/48 shares, defendants 2 and 3 together are entitled to 5/48 shares, the 4th defendant is entitled 18/48 shares and the 5th defendant is entitled to 12/48 shares; that there were several prior litigations viz., O.S. Nos. 223/73, 254/74 and 20/75 between the parties with respect to the-drawing of water from the well and now the parties are baling out water according to their whims and fancies; that during 1974-75, defendants 1 and 4 dug out a portion of the well on its north measuring 6 ft. x 51/4 x 31/4 feet and kept the rubbish nearby. Since upto 1978 there was no scarcity of water, there was no problem; that in 1979, due to scarcity of water, the plaintiff and the

5th defendant on the south of the well put up an electric motor and pump set and defendants 1 and 4 on the north of the well put up another pump set; that since water percolated in the well into the pit dug up by first defendant, defendants 2, 3 and 4 could not use the well water; that because of the skirmishes, there were criminal proceedings between the parties, that the first defendant had further dug up the pit by 1 and 1/4th ft. further deep, and hence, the plaintiff sent a notice to the first defendant, to which the first defendant sent a reply; that therefore, the 1st defendant alone has to remove the rubbish; that the 5th defendant being a cognate, he has been added as a party to the suit.

3. On the contrary, the first defendant in his written statement would state that in the prior litigations, the share of the parties have not been declared and they were baling out water according to their wishes are not correct; that defendants 1 and 4 did not dig the well and it is not true that the rubbish have been piled up anywhere; that this defendant denies the other allegations and the contents of his reply are true; that the parties are entitled to the respective shares and the plaintiff cannot dig the well according to his wishes and he is not entitled to the reliefs as prayed for.

4. The second defendant, in his written statement, would state that it is not true to say that the plaintiff is entitled to 11/4 shares out of 56 shares; that the 1st defendant is entitled to 6/56 shares; that defendants 2 and 3 jointly have 5/48 shares, but each of them is entitled to 5/56 shares; that father of second defendant had 5/56 shares which this defendant has inherited; that the 4th defendant was entitled to 26/56 shares and out of which, 8 shares with 1/3rd share in the pump set has been sold by the 4th defendant to the 3rd defendant; that thereafter, he got 5 shares from the second defendant and the 5th defendant had got 16/66 shares; that one Adinarayanan, brother of the plaintiff, is entitled to 31/2 out of 56 shares; that the suit without impleading Adinarayan is bad; that this defendant was not a party to the prior litigations and that the plaintiff is not entitled to any relief as against this defendant; that the 5th defendant has filed a separate written statement sailing with the plaintiff.

5-6. On such pleadings by parties, the lower Court having framed the following for determination of the questions involved in the suit, viz., (i) Whether the first defendant had deepened the well and placed the rubbish near the well? If so, whether the plaintiff has a right to ask the defendant to remove the same? (ii) To what relief the plaintiff is entitled?, has allowed the parties to record their evidence and the plaintiff, on his side, would only examine himself as the sole witness as P.W. 1 for oral evidence and would mark 9 documents as Exs. A. 1 to A.4 in support of his case, for documentary evidence. On the part of the defendants, in all, one witness is examined as D.W.1 for oral evidence and no document is marked. Exs. C.1 and C.2 are marked as Court documents.

7. Learned District Munsif, Srivaikundam, having traced the facts and circumstances of the case as pleaded by parties, having framed the issues brought forth above and having appreciated the same in evidence, issue wise,

had ultimately dismissed the suit, without costs. Aggrieved by the said judgment, the plaintiff has preferred an appeal in A.S. No. 95 of 1987 before the Court of Subordinate Judge, Tuticorin, and the said Court also tracing the facts as pleaded before the trial Court and framing the points as below, (i) whether the plaintiff is entitled to the relief of permanent injunction as prayed for in the suit? and (ii) Whether the plaintiff is entitled to the relief of mandatory injunction? and appreciating the oral and documentary evidence placed on record, would find that the plaintiff is entitled to the relief as prayed for, thereby setting aside the judgment of the lower Court dated 23-3-1987 and granted two months time to remove the rubbish.

8. It is only against the judgment delivered by the first appellate Court, the 1st and 4th defendants in the suit, who are the 1st and 4th respondents before the first appellate Court, have come forward to prefer the above second appeal on certain grounds as brought forth in the grounds of second appeal and on the following substantial questions of law :--

(i) is not the plaintiff/1st respondent estopped from depending the well on the southern side of the well since the spring is on the southern side of the well and water flows from the southern side to the northern side and the appellants have been enjoying such right for over 14 years?

(ii) Are not the appellants who have 3/56 share in the well entitled to draw more water from the well by having pit lower than that of the plaintiff/first respondent?

9. During arguments, learned counsel appearing on behalf of the appellants would not only reiterate the grounds of appeal as raised in the second appeal, viz., that the lower Court has erred in holding that the ground level of northern side of the suit well is not even; that it further failed to note that the appellants have 30/56th shares and entitled to draw more water and the plaintiff has only 9/56 shares in the well; that the plaintiff admitted that the appellants deepened the northern side of the well in 1969 and the plaintiff did the same in 1974; that the lower Court further failed to note that the plaintiff has not allowed the appellants to deepen the well in the year 1969, and therefore, he is estopped now from changing the state of affair, but also would cite the following judgments :--

(i) AIR 1969 Goa 90 (Jose v. Julia)

(ii) Prabhoo Vs. Doodh Nath and Others,

So far as the first judgment cited above is concerned, it is held therein :

"A co-owner, in possession of the joint property, has no right to change the user of that property without the consent of the other co-owners. If he does so by starting digging operations with a view to erect a house on joint property and the aggrieved co-owner comes to the Court with due promptness for restraining, him from raising a building, the Court can very legitimately decree prohibitory injunction. If in the meantime any structure has been raised a decree for

mandatory injunction can also be granted."

So far as the second judgment cited above is concerned, it is held therein :

"One co-owner has not in law any right to appropriate land to himself out of joint and against the consent of his co-owners. High-handed action by one co-owner cannot be encouraged by Courts of law. Unless some special equity is shown in favour of the defendant in a suit for demolition of constructions, which are in the process of being made by him without the consent of the co-owners a decree for demolition should not be refused especially when the co-owners have come to Court at the earliest."

10. On the other hand, on the part of the learned counsel appearing on behalf of the fourth respondent, it would be argued only to the effect of the factual case put up in the pleadings, further sailing along with the judgment of the lower appellate Court ultimately ending up justifying the decision arrived at by the lower appellate Judge. The learned counsel would lay emphasis that to the extent of the plaintiff deepening the well, he is also entitled to do the same as a co-owner and it is the Commissioner's report, which has made everything clear, based on which a valid decision has been arrived at by the appellate judge.

11. A careful perusal of the judgment passed by the trial Court would reveal that the said Court, in consideration of the oral evidence adduced on the part of the plaintiff as the sole witness as P.W.1 and on the part of the defendant, on examination of the first defendant as the sole witness on their side and in consideration of the documents marked as Exs. A. 1 to A.9 most of them being either the legal notices or the replies or the Court documents with no document marked on the side of the defendant, but in consideration of Exs.C.1 and C.2, which were marked on the part of the Court and remarking that whatever be the rights of parties, there cannot be a second opinion that the stones heaped inside the well must be removed and it is incumbent on the part of the plaintiff and defendants 1 to 5 to clear them from out of the well sharing the expenses equally and it is not proper on the part of the plaintiff to come forward to say that it is the first defendant alone, who has to remove the heaped stones, and therefore, the plaintiff is not entitled to the mandatory injunction, has dismissed the suit ultimately, but without costs.

12. On the contrary, the appellate Court would make note of the facts that during 1969-70 the well was sunk, which is an admitted fact on both sides and that the first defendant deepened the well only during 1970-71, and hence, the stones heaped should have been done only by the first defendant at the time that he deepened the well on the northern side as it is shown, that the earthen side stones having been excavated from there ought to have been heaped on the southern side as clearly shown by Ex.C.1 Commissioner's report, and, therefore, would decide that the plaintiff in asking for a mandatory injunction seeking direction to the first defendant to remove the earthen stones heaped inside the well is fully justified, and hence, would not only allow the appeal preferred by the

plaintiff, but also would direct the first defendant to remove the mud and stones heaped inside the well further giving a time of two months for the first defendant to carry out the same.

13. There is justification in the reasoning of the first appellate Court for having arrived at such a conclusion, since it is a case that comes to be proved that the first defendant in the suit is responsible for heaping the mud and stones inside the well when he deepened the same for his benefits during 1970-71 and it is he who is responsible to remove them also without causing obstruction to the flow of water, thereby hindering the possibilities of the co-owners, and therefore, it is only proper to have issued a mandatory injunction requiring the first defendant to remove the debris heaped in-side the well, and therefore, this Court is not able to find any valid or tangible reason to cause its interference into the well considered and merited judgment passed by the lower appellate Court. The cases cited above are also not supporting the case of the appellants in the facts and circumstances of the case in hand.

14. The questions of law framed in this second appeal in the name of substantial questions of law being not in the form of substantial questions of law, but only resiling on facts, and therefore, this Court is not able to adhere to those questions framed, but only on facts and circumstances and the position of law on the subject and in such event, the above conclusions could only be arrived at.

In result.

(i) the above second appeal does not merit acceptance and the same is dismissed as such;

(ii) the judgment and decree dated 7-2-1990 made in A.S. No. 95 of 1987 by the Court of Subordinate Judge, Tuticorin. thereby setting aside the judgment and decree dated 23-3-1987 made in O.S. No. 234 of 1983 by the Court of District Munsif, Srivaikundam, is hereby confirmed;

(iii) however, in the circumstances of the case, there shall be no order as to costs.