

(1945) 03 MAD CK 0027
In the Madras High Court

Lingappa Goundan and Others	Vs	APPELLANT
Ramaswami Goundan and Others		RESPONDENT

Date of Decision : 28-03-1945

Acts Referred:

Citation : AIR 1945 Mad 244 : (1945) 58 LW 293 : (1945) 1 MLJ 347

Hon'ble Judges : Somayya, J; Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—The well shown in the plaint plan was reserved in common between three brothers who divided the rest of their common

properties. The properties allotted to each brother was mentioned in a separate schedule and in each schedule we find the following:

The above lands inclusive of trees, etc., together with the right to a third share in the well in S. No. 574.

2. Till the events that gave rise to this suit, there were two picottas on the eastern side of the well and all the co-sharers have been using those

picottas or baling-stands for baling out water from the well. The plaintiff's case is that he found some trouble in baling out water at the then existing

baling-stands and therefore wanted to construct a baling-stand at the point AB on the southern portion of the common well. The land situated to

the south and west of the common well belongs wholly to the plaintiff, and the point AB at which he wanted to erect a common baling-stand is on

the southern side of the well. The defendants raised two defences, one is C that being a common well the plaintiff has no right to put up a baling-

stand at the point AB. The other is that if the plaintiff is allowed to do so, there will not be enough water for being baled out at all the baling-stands,

the two existing ones and the third new one. The trial Court held that if the plaintiff was allowed to erect a baling-stand at the point AB it would

interfere with the common right reserved under the partition document and that therefore the plaintiff has no right to erect a baling-stand at the point

AB. The suit was accordingly dismissed. On appeal, the Subordinate Judge has disposed of it in a very summary manner. He says that the suit

should not have been dismissed and that arrangements should be made for a partition of the right as owing to ill-feelings between the parties the

existing state of things would not be proper. The Subordinate Judge was of opinion that some arrangements by way of turns should have been

directed to be made as regards the enjoyment of the water right. Instead of deciding the turns in which the plaintiff and the defendants should enjoy

the water right, the Subordinate Judge gave a decree allowing the plaintiff to put up a new picotta subject to the condition that in execution the

turns should be fixed by having a Commissioner appointed. This is hardly a satisfactory solution of the trouble. The Subordinate Judge ought to

have enquired into the best method of enjoyment by the parties and what exactly the turns were, whether it is one day to each of the three sharers

as the defendant deposed in the witness box or a few hours in the morning to one and a few hours later and so on to others on each day, whether

during the paddy season a special provision ought not to be made allowing each sharer to take water for a few hours every day and what exactly is

the method of enjoyment in the non-paddy season. These are all questions which ought to be decided in the suit itself.

3. Mr. Viswanatha Ayyar, the learned advocate for the appellant, has raised another question that the well being a common well the plaintiff is not

entitled to ask the Court to interfere with the present method of enjoying the common property and that a Court of law when appealed to is not

entitled to alter the present method of enjoyment even if the Court came to the conclusion that the existing mode of enjoyment is bound to lead to

friction and that a better and more convenient method of enjoyment is feasible without any detriment to the defendants.. If this is so, the plaintiff

cannot get any relief even if the Court finds that a better method of enjoyment can and ought to be substituted in the interests of all parties

concerned. Mr. Viswanatha Ayyar brought to my notice a decision of this Court in *amindar of Bethavole v. Satyanarayana Rao Bahadur*. There,

there was a vagu or jungle stream which the plaintiff alleged ran through his exclusive property. He put up a dam diverting the water of that stream into his own tank and the defendants removed the bund. Action was then brought for restraining the defendant from interfering with the plaintiff's putting up a bund at the place he wanted to build it. Both the Co%ts found that the jungle stream ran through what was the boundary line between the two estates and that therefore it was the common property of both. In fact the High Court observe"H that if 4he stream ran through common property the plaintiff had no case whatever. That was not a case where the plaintiff proceeded upon the footing that the stream was a joint stream and asked for some kind of enjoyment which would be consistent with the defendant's rights in the jungle stream. That being so, the decision that the plaintiff had no right to interfere with the existing state of things is not of very great help in this case. Then, a decision of the Lahore High Court in Jang v. Dogar¹ is relied upon. But that was with reference to a right of a person to change the course of the channel along which the plaintiff was taking water to his own land from a well, which was kept common to all the parties. The land in between was the defendant's land and in effect it was a case of an easement by grant that being implied from the fact that the parties agreed to take water from the joint well to their lands, which could not be done unless there was an implied covenant of easement to take the water through the defendant's land which stood between the well and the plaintiff's, land. In such a case, it was held that the defendant had no right to alter the course of the channel which, according to the learned Judge, evidently was the course prescribed as the one best suited to the circumstances of the case when the partition was entered into by the parties. These cases have, in my opinion, no bearing on the question whether the Court can give relief to the plaintiff in a case like this where he comes to Court alleging that the existing mode of enjoyments not working properly and asks for a better and more convenient method of enjoyment." If the property was partible, it is undoubtedly the right of one co-owner to ask for a partition of the property. It may be that even in such a case of a partible property, if by consent of parties each co-owner is in possession of separate parts of the property without asking for a partition, one co-owner is not entitled to disturb the peaceful enjoyment by the other co-sharer of the part of the property which the other is in

possession of. But in such cases the obvious right of the dissatisfied party is to ask for partition and not to interfere with the enjoyment of the other co-sharer of a portion of the common property. In a case where a partition is not feasible or possible as in this case, the Courts have undoubtedly the right to prescribe the method in which the common well can be enjoyed by the parties. Here a right in the well is given to each sharer. It is not even a case where the well in its entirety is kept common, but we need not dwell on this distinction. We will take it that the well was kept common for all co-sharers. If so, since in the nature of things the well cannot be cut up into three parts and one portion given to each sharer, the best method of providing for the rights of all parties is to fix the turns during which each sharer can bale out water from the well. Till now, during the twenty years that elapsed between the date of the partition and the date of the suit, there have been no doubt two baling stands on the eastern side of the well, but that does not mean that for all the future, the parties are confined to these two baling-stands. The plaintiff is attempting to construct a baling-stand on the southern side of the well. The property situated next south of the well is admittedly the plaintiff's exclusive property and therefore the bullocks will go up and down on a land which is exclusively that of the plaintiff. The plaintiff will not be encroaching on any land which belongs to the defendants. There is, therefore, no reason why the plaintiff should not be allowed to put up a baling-stand at the point AB, provided he is not allowed to use it except in accordance with the turns which are fixed by the Court. Having regard to the fact that the plaintiff is an one-sixth sharer and the defendants are entitled to the other five-sixth, the direction given by the lower appellate Court that the turn should be fixed in execution is wholly unsatisfactory. The evidence about the turns during which each should enjoy during the paddy and non-paddy season have not been fully investigated; as the record stands at present, there is only the evidence of the plaintiff and the first defendant. The other defendants have not given any evidence. According to the plaintiff each is to bale out water every day; according to the defendant, one party is to bale out water during the whole of one day and the other sharers are to be given the right of baling out on the other days. Then seeing that there is not enough water for more than a day's baling, I am sure that in the state of feelings that exists between the parties, there will be no water left at the end of any

particular day. But that is a matter which the lower Courts have to investigate. I hold that the Court has a right to prescribe turns. The right which the lower appellate Court has upheld in the plaintiff, namely, the right of erecting a baling-stand at the point AB is confirmed and the defendants are restrained from interfering with the right of so putting Up a baling-stand. The lower appellate Court will take evidence on the question as to the turns in which this right should be enjoyed during the paddy season and non paddy season and then incorporate the result of its inquiry in the decree. Before beginning the enquiry, the parties will be required to put in statements of their (case as to the exact turns in which the right is to be enjoyed. This will be necessary in order to prevent the parties from improving or altering their cases from time to time., But the Court is not confined to accept the suggestions of any party. The decree of the lower appellate Court is reversed and the appeal remanded to that Court for disposal according to law in the light of the above observations. Costs will abide and be provided for in the revised decree of the appellate Court.