

(1995) 08 KAR CK 0031

In the Karnataka High Court

Case No : Regular Second Appeal No. 269 of 1985

Neelamanavar Nagamma

APPELLANT

Vs

Neelagallu Veeranna (Dead) by L.Rs. and Others

RESPONDENT

Date of Decision : 22-08-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, 100

Citation : (1996) 2 KarLJ 654

Hon'ble Judges : Harinath Tilhari, J

Judgement

This is plaintiffs second appeal arising out of judgment and decree dated 28-11-1984 delivered by Civil Judge, Hospet, in Regular Appeal 6 of 1978, whereby, the learned Civil Judge has, allowed the defendants' Appeal No. 6 of 1978 after having reversed the judgment and decree dated 3-8-1974 delivered by the Principal Munsiff, Hospet, in O.S. No. 319 of 1965 and thus, the lower Appellate Court dismissed the claim of the present appellant-plaintiff in the regular suit for declaration, injunction and rectification of the documents. According to the plaintiff's case originally the defendant 1 in the appeal and husband of defendant 2 were brothers and they have been related to each other as mentioned in the plaint. According to the plaintiffs case, Survey No. 24 originally belonged to the ancestors of defendants 1 to 9 and it has been subdivided into various portions as mentioned in the sketch to Schedule A to the plaint. According to the plaintiff's case in a portion of Survey No. 24-F and I, there was a well and there were two water courses coming North to East. According to plaintiffs case, the right to take water from well in question situate in Survey No. 24-I were shared among co-owners in definite shares. The plaintiff's case is that the defendants 6 to 8 owned Survey No. 24-D and E. The defendants 6 to 8 was originally owned Survey No. 24-D and E. They mortgaged Survey No. 24-D to defendant 10, i.e., husband of the plaintiff. The plaintiff's case is that defendants 6 to 8 had 1/6th share in the well and in the right to take water from the well. The plaintiff's case is that defendants 6 to 8 sold the Survey No. 24-D to one Gangamma and Survey No. 24-E to defendant 11-Bheemappa.

Both sale deeds are dated 5-12-1955 (which are Exhibits P-13 and P-14). According to the plaintiff's case, defendants 6 to 8 also transferred by sale their share in the well or to take water in the well to Gangamma and defendant 1-Bheemappa and they really sold their shares as 1/12 but by mistake it was mentioned as 1/6. They have really sold 1/12 share to each of the Vendees, i.e., 1/2 of 1/6 share in the right to take water from the well. Their share according to plaintiff's case were along with the land sold to Gangamma and Bheemappa as the immovable property stated therein Survey No. 24-D and Survey No. 24-E and the right to take water to the vendee under two sale deeds to the extent of 1/2 of 1/6 share each individually. In other words, each of the said vendee has been given 1/12 share each. The plaintiff has asserted in the plaint that the share in the right to take water that was sold to Gangamma was in respect of and from well known as Jodhu Kapali Bhavi situate in Survey No. 24-I and F but by mistake, in the sale deed, it has been wrongly mentioned as Jodhu Kapali Well in Survey No. 23-A. The plaintiff further alleged that Gangamma in turn vide sale deed dated 20th May, 1958 conveyed and transferred by sale both land, i.e., Survey No. 24-D and right to irrigate and take water from the well, in dispute situated in Survey No. 24-I and F. But because of wrong descriptions in the sale deed dated 5-12-1955, the well has been described by them as on (wrong) number 23-A and not 24-I and F. The plaintiff's claim that the plaintiff had been in possession and enjoyment of the suit schedule property and enjoying the usufructs thereof. According to the plaintiff that the land in Survey No. 24-D was irrigated with the water of the well which did run from the well having recourse and passage through 24-L and 24-G and finally entered the plaintiffs plot. The plaintiff also stated that some suit was filed against the defendants 1 to 8 when they created some obstructions and that suit was numbered as 229/61 in the Court of Munsiff, Bellary and that suit sought the decree for injunction against defendants 1 to 11 and that suit was decreed by the Munsiff Court. The plaintiffs case is that soon thereafter the execution of the decree in O.S. No. 229/61, that plaintiff sought to take water to her land through the land of first defendant in October, 1964. There did develop misunderstanding between defendant 1 and plaintiff's husband and thereafter the defendants 2 and 8 were set up by the defendant 1, and they began to obstruct in the plaintiff's exercise of right to take water and all efforts to settle the matter failed. That the plaintiff had to file the present suit. The plaintiff-appellant's case is that her predecessor in interest have been exercising the right of taking water of from the well in dispute to Plot No. 24-D described in the plaint for a long time and their predecessor as well the plaintiff-appellant did acquire the right to easement by prescription and none of the defendants had any right to prevent the plaintiff from taking the water from suit well. The plaintiff has also claimed relief of declaration that the plaintiff has a right to draw the water from the well situated in Survey No. 24-I and F of Dharmasagara to her land 24-D along with the Western boundary of 24-G and Southern boundary of 24-A/3 to reach the land in Survey No. 24-D. The plaintiff claimed relief of permanent injunction against the defendant from interfering with the enjoyment of plaintiff's rights. By amendment of the plaint, the plaintiff

sought for relief of rectification of the sale deed dated 20-5-1958 which had been executed in favour of the plaintiff-appellant by substituting figure 1/12" for 1/6" and by substituting Survey No. 24-I and F for Survey No. 23-A of village Dharmasagar and to take water from the well located therein to her land. The defendant 1 filed a written statement and denied the plaintiffs case. The plaintiff pleaded that Survey No. 24 belonged six persons and they acquired 1/6th share each to use the water of the well. The principal defence of the defendant had been to the effect that the plaintiff's case is false and that under the transfer deed, no right to take water from the well had been sold or given to the plaintiff or plaintiff-appellants Vendor nor any right with respect to water had been sold by defendants 6 to 8 in favour of Gangamma. While selling those lands, Veerabhadrapa-defendant 6 has given his entire 1/6th share in the right to take water to defendant 11-Bheemappa who has purchased Survey No. 20-E and according to defendant 1, no right or interest to take water had been given to Gangamma or Basavareddy who were purchasers of Survey Nos. 24-D and 24-J respectively and as such, Gangamma had no right whatsoever under the documents for use of water in the lands purchased by him and as such, she could not transfer the right which never existed over the water, in favour of the plaintiff. The defendants further alleged that as such the plaintiff-appellant did not acquire or get any right from Vendor Gangamma under sale deed dated 20th May, 1958 in respect of matter of taking water from the well in the suit. The defendants in para 6 of written statement have submitted that the plaintiff has wrongly set-up a story of misdescription of the well by showing wrong Survey No. 23-A for ulterior motives. They also alleged no water was taken by the plaintiff through any water course muchless through the water course marked in the plaint and sketch. The defendant-respondent denied any knowledge of any decision in Suit No. 229/61 and they asserted that he was not a party in such suit, i.e., O.S. No. 229/61 and so the decision given therein is not binding on him. The defendant stated that the plaintiff had no right to the water course nor has she been enjoying the same as such and so according to defendant 1, the plaintiff had no right to claim relief of injunction. The claim for damages was asserted to be not maintainable. As regards defendants 2 and 3, they did not file any written statement. The suit proceeded ex "parte against them. The defendant 4 adopted the pleas taken by defendant 1 in her written statement. The defendants 5 to 8 did not contest the suit and did not file statement and suit proceeded ex parte against them. The defendant 11 also did not file any written statement. The defendant 10 had filed a written statement supporting the case of the plaintiff and defendant 9 adopted the written statement filed by defendant 10. The Trial Court on the basis of the pleadings of the parties framed the following 8 issues:

(1) Does plaintiff prove that she has 1/12th of the right to take water from the well in Survey No. 24-I and F through her vendor?

(2) Whether the mention of Survey No. 23-A in the sale deed in favour of plaintiff is a mistake?

(3) Does plaintiff prove obstruction by defendants 1 to 3 in her right to take water?

(4) Does plaintiff prove that she has acquired a right to take water from the well as an easement of necessity along the course alleged.

(5) Does she prove that she has enjoyed the right to take water from the said well for 20 years peacefully and without interruption along the alleged course?

(6) Is plaintiff entitled to declaration and injunction sought?

(7) Is she entitled to damages and if so to what amount?

(8) What decree or order?

2. These eight issues were framed on 14th June, 1966, i.e., more than 20 years ago. By judgment and decree dated 31-1-1967, the Trial Court dismissed the suit of the plaintiff but no costs and having felt aggrieved by the judgment and decree dated 31-1-1967, the defendant preferred Regular Appeal No. 15 of 1967 before the Court of the Civil Judge, Bellary and by judgment and decree dated 13-3-1973, the learned Civil Judge acting as the Appellate Court, set aside the Trial Court's decree and remanded the case for decision afresh with a direction to frame issues as per the memo filed by both the parties and in pursuance of that direction, the Trial Court on 13-12-1973 framed the following issues:

(1) Whether the right to take the water from the suit well situated in Survey No. 24 (I and F) has been exclusively given to defendant 11?

(2) If so, whether the plaintiff has the right to take water from the said well along the route shown in plaint plan?

(3) Whether defendant 1 is not entitled to contend that the plaintiff has no right to take water from the well?

(4) Whether the plaintiff is not entitled to take water as quasi easement?

(5) Whether the plaintiff is entitled to rectification of her sale deed?

(6) What relief?

3. The Trial Court after having recorded the findings decreed the plaintiffs suit for declaration, injunction and rectification. Vide, judgment and decree dated 3-8-1974 the Trial Court held as under:

(1) That the right to take water from the suit well situated in Survey No. 24-I and F, has not been exclusively given to defendant 11;

(2) That the plaintiff has right to take water from the suit well alongwith the route as mentioned in the plaint plan;

(3) The defendant is not entitled to contend that the plaintiff has no right to take water from the well;

(4) That the plaintiff is entitled to take water as quasi easement; and (5) The plaintiff is entitled to rectification of her sale deed.

4. The Trial Court rejected the reliefs or claim for damages. Having felt aggrieved by the judgment and decree dated 3rd August, 1974, the heirs of defendant 1 preferred a Regular First Appeal No. 6 of 1978. I am informed that earlier different number was given but on transfer, it had been numbered as Regular Appeal No. 6 of 1978. The learned lower Appellate Court, (Civil Judge, Hospet, S.S. Murgod) allowed the defendants' appeal and set aside the judgment and decree of the Trial Court in the above suit and dismissed the plaintiff's claim made in the suit. The lower Appellate Court directed the parties of the suit to bear their respective costs of two Courts. The lower Appellate Court held as under:

That the documents filed show that the right to take water was conferred from the well situated in Survey No. 23-A and not in Survey No. 24-F and I and that it has not been shown what exact right was given to her in the suit well and when specific situation of the well has been shown as in Survey No. 23-A, it cannot be said that any right has been given to draw water from the suit well situate in Survey No. 24-F and I. The Court further held that the plaintiff has failed to establish that water was being taken at any time to land in Survey No. 24-D even prior to the purchase by the plaintiff either Gangamma or by any of the person who was cultivating this land Survey No. 24 and the plaintiff has failed to establish any quasi easement. Actually the mistake in the description of the documents has not been established. It further held that the executant of the documents are not the parties to suit. So no relief or rectification can be granted. With the above findings, the lower Appellate Court allowed the defendants' appeal and dismissed the plaintiffs' claim in the suit as well as set aside the findings of the Trial Court. Having felt aggrieved by the judgment and decree of the lower Appellate Court dated 28-11-1984, the plaintiff has come up in second appeal under Section 100, C.P.C. before this Court.

5. I have heard Sri K.S. Savanur, learned Counsel for the appellant assisted by Sharath Kumar, Advocate of this Court for the appellant and on behalf of respondents, I have heard Sri Suresh S. Joshi assisted by Miss Amrutha M.V., an Advocate of this Court.

6. On behalf of the appellant, Sri K.S. Savanur, learned Counsel for the appellant submitted that the lower Appellate Court committed substantial error of law in taking the view that right to take water from the well in the suit had not been conveyed or transferred under the deed in respect of Survey No. 24-D from the well in dispute situated at Survey No. 24-I and F and that the plaintiff has not been able to establish any right to take water from the well in the suit either by easement of necessity or otherwise. Sri K.S. Savanur submitted that findings in this regard are based on misinterpretation of the deed of transfer as well as the findings suffers from error of law of substantial nature as the findings have been arrived at by the learned lower Appellate Court after having ignored the material

evidence on record namely the statement of oath made by D.W. 4 on record. He submitted the statement of D.W. 4 on record corroborates the plaintiff's evidence and this findings of fact has been arrived at after having ignored the material. The said findings are vitiated by error of law. Sri K.S. Savanur further submitted that perusal of Ex. P-9 alongwith Exs. P-13 and P-14 will clearly show that it was provided that under the deed while the vendor transferred the land in Survey No. 24-D, he also mentioned among the properties to be transferred, the share in right to take the water from the well. He submitted that thereunder 1/12th share in the right to take water had been transferred by Gangamma the vendor of the plaintiff-appellant. He further submitted that under the sale deed dated 5-12-1955, the defendants 6, 7 and 8 namely Veerabhadrapa, Thimmappa and Rayappa transferred the said property namely Survey No. 24-D measuring 4.25 acres as well as their right to take water to the extent of 1/6th share from the well. The learned Counsel for the appellant submitted that Survey No. 24 was one unit and it was divided in sub-divisions and that Survey No. 24-D and other survey numbers were used for irrigation purposes by taking the water from the well situated at Survey No. 24-I and F and really that right to take was transferred by these defendants 6 to 8 in favour of the predecessor in title of the plaintiff-appellant-Gangamma and it was a mistake or a erroneous mention in the description of the well as well as Survey No. 23-A. The learned Counsel for the appellant submitted that really this involves the question of interpretation of the title deed and here it is also a case of mistaken description firstly of the share that transfer was made of 1/12th share each to Bheemappa, Gangamma and both were given right to take water at 1/6th share and they were entitled to enjoy equally 1/6th share on the date of the execution of the sale deed by defendants 6 to 8-Veerabhadrapa, Thimmappa and Rayappa and as such, really 1/12th share in the matter of right to take water was transferred to defendant 12-Bheemappa and Gangamma by mistake in both the deeds it was mentioned as 1/6th and in both the sale deeds, a well has been shown to be situated in Survey No. 23-A. Really it referred to well situated in Survey No. 24-I and F. Sri Savanur, submitted that circumstances that existed at that time also establish the plaintiffs claim and submitted that the well which is situated in Survey No. 23-A was almost one as if was none. He submitted that at the time when the transfer was made either in favour of Gangamma by the defendants 6 to 8 or Gangamma to the plaintiff-appellant the well had no water in Survey No. 23-A and it was used for irrigation. It is certain that certain side walls were already fallen down and there were tamarind trees covering the mouth of the well and it was not being used for good long length of time earlier to the execution of the transfer deeds. So there could be no intention to transfer any such thing which was likely to negative the right mentioned in the deed, i.e., taking of the water and therefore, these circumstances also prove and establish that really reference of Survey No. 23-A was mistake and thereunder was conveyed the right to take water on Survey No. 24-D from the well not on Survey No. 23-A, but from the well in Survey No. 24-I and F. Really there was a mistaken description in the transfer deeds of 1955 in favour of Gangamma or Bheemappa and that was

followed or continued in deed dated 20-5-1958 executed by Gangamma in favour of the plaintiff. The mistake was in addition to the description of the share in the right to take water as in both the sale deeds, 1/6th right was transferred and both the sale deeds were executed on the same day with a right to take water with reference to or respect of the same well. So the intention of the vendors in this case was to transfer the share in right to take water from the well. But in both the sale deeds, right to take was mentioned as 1/6th right to take water that was given to vendee that being the first mistake and second being the description of the well. Sri K.S. Savanur, learned Counsel for the appellant placed great reliance on Sections 95 and 97 of Evidence Act for this purpose and in respect of his contention that circumstantial evidence could be lead into to explain and clarify the position. He further submitted that in the plaint, the plaintiff-appellant has clearly stated that Survey No. 23-A with reference to the well was wrongly mentioned in the deed for Survey No. 24-I and F and the defendant-respondent vehemently denied these allegations saying that the allegations were made only for the purpose of this case and they did not place their specific case to the effect if defendants really intended to refer to Survey No. 23-A which jointly belonged to the members namely predecessor-in-interest of the vendor of the plaintiff, i.e., defendants 6 to 8 as well as other defendants-respondents to the case. There is no question of transfer of any such right to take water from the well on Survey No. 23-A when that well was not on a proper condition for being used as such and was never used earlier. No person can transfer the right which does not possess or enjoy which cannot be enjoyed as well without some further rights being transferred or given. That no right under sale deeds has been given by defendants or vendors to cut and remove the tamarind trees existing on the mouth of the well on Survey No. 23 or to make the well workable by digging it. He further submitted that this Court may be pleased to frame an issue to that effect and that findings may be called from the Trial Court or appeal and case be remanded for fresh trial. In support of his contention based on Section 95 of Indian Evidence Act along with illustration thereto the learned Counsel for appellant placed reliance on the decision of the Assam High Court in the case of Santi Ranjan Das Gupta v Dasuram Mirzamal firm, AIR 1957 Assam 49. He submitted that, on the basis of the said decision, the Section 92 does not exclude the proof of fraud or actual mistake committed at the time of the execution of the document. Sri Savanur submitted that as there existed no facility of irrigation from the well at Survey No. 23-A and it was almost rotten and therebeing no water as such when the right to take water has been mentioned in the deed, it must be taken to refer to well at Survey No. 24-I and F as held by the Trial Court and the learned lower Appellate Court as such misconstrued the deed and ignored that evidence and so it committed error of law in allowing without any basis the defendant-respondents' first appeal and in setting aside the Trial Court decree. Sri Savanur submitted that evidence of D.W. 4 reveals that Survey No. 24-D used to be irrigated by the water from the well situate at Plot Survey No. 24-I and F which was known as Jodhu Kapali well and the plots of co-owners were being irrigated by this well and the well on Plot No.

23-A had not been in use, since his memory goes on. These witnesses also disclose that the well in dispute had been known as Jodhu Kapali well while dilapidated well in Survey No. 23-A was known as Halu Bhavi. He submitted that the well namely Jodhu Kapali was no other well than the well on Survey No. 24-I and F. He further submitted that the evidence of P.Ws. along with the evidence of D.Ws. and coupled with the fact that the two wells were known by name namely well situated at Survey No. 23-A as Halu Bhavi and the well on Survey No. 24-I and F as Jodhu Kapali well clearly establish the plaintiff's case as to right to get irrigation, right to get water from the well in dispute, i.e., Jodhu Kapali Well in Survey No. 24-I and F.

7. He further submitted that the decree passed by the Trial Court had not been challenged by other defendants except defendant 1. It had neither been challenged by the defendants 6 to 8 nor by defendant 11 nor any other defendants except defendant 1 and as such when the appeal had been allowed by the first Appellate Court, an anomaly had been created by therebeing to conflicting decrees and as such, the lower Appellate Court ought to have dismissed the appeal and on this very ground, the Appellate Court ought to have dismissed the defendant's appeal.

8. On behalf of respondents-Sri Suresh S. Joshi, learned Counsel for the respondents submitted that firstly that the decision in the present case is concluded by pure findings of fact to the effect that no right to take water had been conferred on the plaintiff-appellant under the deeds from the well in suit, i.e., the well situated on Survey Nos. 24-I and F. He submitted that the sale deeds on the basis of which the plaintiff claims title clearly show that if any right to take water had been transferred to the appellant or to his predecessor in title namely Smt. Gangamma that right had been transferred with reference to the well specifically described in the deed namely the well situated in Survey No. 23-A. The learned Counsel further submitted that the deed is very clear and there is no ambiguity and as such, if this Court accepts the contention of the learned Counsel for the appellant and takes that instead of well on Survey No. 23-A referred to therein, the reference is to the well on Survey No. 24-I and F then the Court would rather be re-writing transfer deed and it is not permissible in view of provisions of Section 92 of the Evidence Act and it would be acting beyond comes within the scope of the interpretation of the deed. The learned Counsel submitted that the learned lower Appellate Court did not commit any error of law or mistake in interpreting the deed in question. The learned Counsel for the respondents further submitted that as regards the question of title to Survey No. 23-A and the well therein, there is sufficient evidence to show that well in Survey No. 23-A did belong to the parties and invited my attention to the statements of D.W. 1 and D.W. 2 on record as well as D.W. 3 in this regard. Placing reliance of statement of these D.Ws., the learned Counsel submitted that when both Survey Nos. 23-A and 24 did belong to the plaintiff's Vendor's predecessor-in-title along with others and the land of these plots is established to belong jointly to the parties, i.e., the predecessor of the vendor of plaintiff as

well as other defendants jointly and when it is admitted position that there is well on Survey No. 24-I and F and also there has been well in Survey No. 23-A. Sections 95 and 97 and illustration thereto would not come to rescue the plaintiff-appellant. It may not be taken that there is mistake or ambiguity in reference to the well and the number of the survey number in which it is situate. The learned Counsel submitted that there is no question of any mistake description of the well from which the plaintiff or plaintiff predecessor are said to have taken the water and it cannot be said that the plaintiff-appellant or their predecessor were given right to take water in the suit well in Survey No. 24-I and F. The learned Counsel for the respondents submitted that even if some of the defendants did not appeal, but, in view of the provisions under Order 41, Rule 33 of the C.P.C., it has been within the competence or the jurisdiction of the lower Appellate Court to modify or reverse the decree on merits, therefore, Sri Joshi urged that in allowing the defendant's appeal, the lower Appellate Court did not commit any error of law or jurisdiction.

9. The learned Counsel for the respondents lastly submitted that it appears from the perusal of the lower Appellate Court judgment that no doubt the lower Appellate Court did not apply its mind or did not consider the evidence contained in the deposition of D.W. 4. But D.W. 4 is defendant 9 own witness of the plaintiff and his evidence should not have been relied and there is no error of substantial nature in ignoring that statement. Even if the Court otherwise thinks it ought to have been considered while recording the finding on the question involved that the lower Appellate Court ought to have considered and referred to this statement and then after allowing the appeal, the case may be remanded for decision by the lower Appellate Court.

10. The learned Counsel for the respondent further contended that the well in dispute is "Uramundina Jodhu Kapali Bhavi" and that well on Survey No. 23-A has been known as Jodhu Kapali Bhavi and so in this connection he referred to the statement of D.W. 1 and contended that Jodhu Kapali well has been referred with reference to well on Survey No. 23-A indicating the intention of the parties that right to take water from well on 23-A was transferred but not from the well in the suit, i.e., "Uramundina Jodhu Kapali Bhavi".

11. The learned Counsel for the respondents as mentioned earlier with reference to the statement of D.W. 1, tried to assert that two wells, i.e., well in suit which is Survey No. 24-I and F and the well existing on Survey No. 23 was named Jodhu Kapali with one difference that well on Survey No. 24-I and F was known as "Uramundina Jodhu Kapali Bhavi". I have considered the contentions made by learned Counsels for appellant and respondent and have applied my mind to the record. Before proceeding further I may mention that a request was made at one stage by the learned Counsel for the appellant and at the other by the learned Counsel for the respondents for remanding the whole case for decision of the entire matter in the appeal by the lower Appellate Court after considering the evidence of D.W. 4 and in the light of the evidence of D.W. 4 which had been

ignored by the lower Appellate Court and for a direction to the lower Appellate Court for record fresh findings. But as the material evidence is on record and this Court can itself record the finding after considering the evidence on record which has been ignored by lower Appellate Court along with other material on record and particularly when there has been remand at earlier stages for three decades, I do not think it proper to remand the matter to the Courts below, and particularly in view of the law laid down by the Lordships of the Supreme Court in the case of *Bechan Pandey and Others v Dulhin Janki Devi and Others*, AIR 1976 SC 866. It will be profitable to quote the following observations of their Lordships of the Supreme Court made in *Bechan Pandey*'s case referred to above and it reads:

"To remand the suit to the Trial Court would necessarily have the effect of keeping alive the strife between the parties and prolonging this long drawn litigation by another round of legal battle in the Trial Court and thereafter in appeal. It is time, in our opinion, that we draw the final curtain and put an end to this long meandering course of litigation between the parties".

The present appeal cannot be termed to be one concluded by pure and simple finding of fact as this appeal raise question of interpretation of title deeds as well as question to be investigated if findings on question of fact are vitiated by error of law as urged by appellant.

12. The interpretation of the deeds of title or documents which form the basis of the claim or defence in case or suit raise a question of law and if finding of fact has been arrived at by the Courts of fact on the basis of the misreading of the document of title, then beyond doubt it can be said that the findings would be vitiated by error of law and can be interfered with in second appeal. I may make it clear that it is not interpretation of every document (other than the document of title) that could be said to raise a question of law. Interpretation of documents of historical importance does not raise a question of law for consideration. It is only misinterpretation of documents of title that may raise question of law. The documents forming the basis of the claim in the suit or any defence may also involves raise of question of law.

See: *Nedunuri Kameswaramma v Sampati Subba Rao*, AIR 1963 SC 884;

Sir Chunilal V. Mehta and Sons Ltd. v Century Spinning and Manufacturing Company Limited, AIR 1962 SC 1314; *Bhusawal Borough Municipality v Amalgamated Electricity Company Limited*, AIR 1966 SC 1652;

Anayatullah and Others v Commissioner of Muslim Wakf of Jammu, (1991)1 (Supp.) SCC 396.

Whether there is misinterpretation or not that is another question that has got to be considered. That as regards the right, I have applied my mind to Exs. P-9, P-13 and P-14. The schedule to the property indicates the. property with the number and further indicates as in respect of this land, the vendor had right to

take water to the extent of 1/6th share from the well. Perusal thereof refers to well as Jodhu Kapali well situated in Survey No. 23-A. So this is as per the deed of Ex. P-14, dated 5-12-1955 executed by Veerabhadrapa and others namely defendants 6 to 8 in favour of Gangamma. So this right is also the property. The right to take water is also the property. So right to take water is the property has also been transferred with reference to the land which land itself had been transferred. But from what well that is a question to be determined. Whatever the right to take water from the well was transferred to Gangamma, that Gangamma transferred that right in favour of the plaintiff-appellant as per deed Ex. P-9 and therein also reference to the well which has been mentioned as Jodhu Kapali well in Survey No. 23-A. Prima facie on its face value, these two documents no doubt show that right to take water has been transferred in favour of transferee concerned with reference to Jodhu Kapali well mentioned as situated in Survey No. 23-A. The contention of the learned Counsel for the appellant has been that this reference to number or survey number is wrong, i.e., Survey No. 23-A which is mentioned in the deed. Real intention is to confer right and transfer to take water from the well located or situated at Plot No. 24-I and F.

13. In case of *Ramana Dayaram Shetty v International Airport Authority of India and Others*, AIR 1979 SC 1628, their Lordships laid down that with reference to principle of interpretation of documents as under:

"It is a well settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use. To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable".

14. What emerges from these observations and the dictum laid down, their Lordships of the Supreme Court with reference to the interpretation of documents is that efforts should be made to give an effect to the expression used. In the document, no word ordinarily is to be taken to be superfluous and as far as possible, the Courts should avoid such construction which would render the document meaningless or make what has been provided in the documents ineffective. Real efforts should be that as far as possible that the intention of the authors should be given effect to and if possible, unless it is very necessary, without changing the expression or without taking any word to be superfluous. The same principle has been laid down in express terms of their Lordships of the Privy Council in case of *Purnananthachi v T.S. Gopalaswami Odayar and Others*,

AIR 1936 PC 281. At page 282 of the report, their Lordships of the Privy Council had been pleased to observe that "It is, therefore, necessary to ascertain the intention of the parties. The cardinal rule of interpretation for deeds as well as for other instruments is to gather the intention from the words of the document, and for that purpose the language of the entire deed should be taken into consideration".

15. There are two materials sale deeds which need to be referred, i.e., Ex. P-9 and Ex. P-14. Ex. P-14 sale deed dated 5-12-1955 in favour of Gangamma reads as under:

"We three persons namely Veerabhadrappe S/o Mahadevappa (2) Thimappa and (3) Rayappa S/o Neelagallu Basappa have executed the sale deed of immovable property as follows:

.....

that we are in possession of unencumbered schedule property and we Veerabhadrappe, N. Thimappa and Rayappa have sold absolutely and have delivered the possession of the schedule property today. From today you and your heirs are the absolute owners of the property. We and our heirs have no right therein.

SCHEDULE

Of Bellary R.D. Hospet, SRD Hospet Taluka, Dharmasagar village-Government Dry Land bearing Survey No. 24-D measuring 4-25 acres assessed at Rs. 3-12-0 the entire number in respect of this land there is a right to take water of 1/6th share from well Kapali Bhavi situate in Survey No. 23"Ex. P-9 is title deed is registered (sale deed) dated 20-5-1958 executed by Gangamma in respect of the property referred to in Ex. P-14 (purchased by her) transferring the same to in favour of N. Nagamma (plaintiff-appellant). In it seller is mentioned as Gangamma through her General Power of Attorney holder D.N. Basavva. The material portion of the deed reads as under:

"(4) Smt. Gangamma of Dharmasagar has got from Neelagallu Veerabhadrappe, Neelagallu Thimappa, Neelagallu Ramayya of Dharmasagar village sale deed dated 5-12-1955 registered with.....and since then she has got absolute rights and upto this date she has not alienated the Schedule property which I am selling to you for consideration of rupees two thousand five hundred only and I have handed over possession of the same from today. You are owner of land with treasure-trove, etc., and enjoy the same The aforesaid Neelagallu Gangamma or her heirs have no rights in the schedule property.

SCHEDULE OF PROPERTY

District Bellary, Sub-Division Hospet, village Dharmasagar, Babu (Nature) Government Dry Land, Survey No. 24-D Acre cents 4-25-Assessment Rs. 3-As

12-P.O. To this land there is 1/12th share right to take water from the Jodhu Kapali Bhavi situate in Survey No. 23-A.

This property is of jurisdiction of Bellary District Board".

This is English translation of the document in Kannada as placed by the learned Counsel for the appellant. The property mentioned in the schedule is not only the land bearing Survey No. 24-D but also includes that in respect of two lands there is a right to take water 1/6th from the well Jodhu Kapali Bhavi situated in Survey No. 23-A. Similarly in Ex. P-9, the Vendor in Ex. P-9 in the deed first indicates how she had acquired the rights and makes reference to the sale deed dated 5-12-1955, Ex. P-14 and thereafter the deed reads as under as per the translation from Kannada to English that I have got absolute rights and upto this date I have not alienated the schedule property which I am selling it to you for a consideration of rupees two thousand and five hundred only (Rs. 2,500/-) and I have handed over today the possession of the same from today, you are the owner of the land with treasure-trove, etc., and enjoy the same and competent to alienate the same by gift, sale, etc.

16. The property given in the schedule not only includes the said Survey No. 24-D but also provides that there is 1/6th share in the right to take water from Jodhu Kapali well in Survey No. 23-A. Reading of these documents clearly shows that the property that has been transferred under this deed is along with the land in Survey No. 24-D, the right to take water from the well which has been mentioned as Jodhu Kapali well in Survey No. 23-A. The reading of these documents Exs. P-9 and P-14 clearly show that the vendor therein transferred along with the land the right to get the water for the purpose of irrigating Survey No. 24-D. They had enjoy to the extent of their share from the well Jodhu Kapali Bhavi. Now the question is which is the well referred in this document and whether that has been situate in Survey No. 23-A or its well in suit situate on Survey No. 24-I and F.

Section 95 of the Evidence Act reads as under:

"When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense".

17. He also relied upon illustration to Section 95. Illustration to Section 95 reads as under:

"A sells to B by deed "my house in Calcutta".

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah".

It appears from the perusal of Sections 95 and 97 of Evidence Act that in order

to keep the documents alive and not render invalid or render the intention expressed under the documents to be inoperative and ineffective the section permits that the evidence of circumstance may be given and be considered.

18. The evidence on record including the statement of witnesses which has been ignored by the lower Appellate Court shows that the well which is alleged to be Plot No. 23-A was known as Halu Bhavi. D.W. 4 has even stated that well in Survey No. 23-A was never called as Jodhu Kapali well or Jodhu Kapali bhavi. The statement of D.W. 4-Virupaxappa is to the effect that it is not true to say that said Halu Bhavi is called as Jodhu Kapali well. He has stated the suit well was known and called as "Uramundina Jodhu Kapali well or Jodhu Kapali bhavi". This evidence and other material evidence contained in the statement of D.W. 4 has been ignored. D.W. 2-Iranna S/o Thimmappa has also stated that I know Halu Bhavi in Survey No. 23. He stated that Halu Bhavi is in Irannangudi Patti. D.W. 3's statement also indicates that well in Survey No. 23-A was known as Halu Bhavi. So this comes out from the evidence of defendant witnesses including the evidence of D.W. 4 that the well situated on Survey No. 24-I and F is and has been known as Jodhu Kapali bhavi or Jodhu Kapali well or Uramundina Jodhu Kapali well and there is no dispute that the name of well which exist in Survey No. 23-A as well as according to the defendants' case is known as Halu Bhavi though defendant witnesses are at conflict. If well in Survey No. 23-A was known as Jodhu Kapali well or Jodhu Kapali Bhavi, this position that emerges the depositions of D.W. 4 and other D.Ws. coupled with the statement of P.Ws. 1, 3, 4, 5, 6, 7 and report of Commissioner reveal that there were two wells one on Survey No. 23-A, and the other, i.e., the well in suit and the well in suit i.e., the well situated in Survey No. 24-I and F has been known as Uramundina Jodhu Kapali Bhavi or Jodhu Kapali well. While the other well which is in Survey No. 23-A is known as Halu Bhavi. The Commissioner's report on record also appears to reveal that the well in dispute was known as Jodhu Kapali or Uramundina Jodhu Kapali well. The Commissioner's report also indicates that at the time of the visit of the Commissioner as per the Commissioner's report, it was pointed out to him that there were only one well namely Jodhu Kapali or Uramundina Jodhu Kapali and that has been shown to be situated in Survey No. 24-I and F. The other well which has been situated at Survey No. 23-A is not indicated or alleged before the Commissioner to be named as Jodhu Kapali well or Kapali Bhavi. This appears to be subsequent development that it was attempted to be made at a subsequent stage namely at the time the evidence was being recorded. So it goes to show that well at Survey No. 23-A was not known as Jodhu Kapali well nor was it known as Jodhu Kapali Bhavi and it has primarily been referred to by the witnesses also as Halu Bhavi. It transfer deeds, i.e., Exs. P-13, P-14 and P-9 the well that has been referred to from which the right to take water appears to have been transferred and given to the extent of share of defendants 6 to 8 to the transferees vide, these exhibits was given in the well that has been known as Jodhu Kapali Well or Jodhu Kapali Bhavi but not in the well known as Halu Bhavi. There is no doubt that number or the survey number in that connection is

referred as Survey No. 23-A. There is another circumstantial evidence appearing from deposition of D.W. 4 which really throws some light and indicates the circumstances prevailing at the time of execution and attestation of the sale deed in favour of plaintiff. D.W. 4-Virupaxappa has stated on oath that prior to the purchase of land by plaintiff, that land was being supplied with water and I got water from my three strips of land from the "Uramundina Jodukapali Well", i.e., suit well. Even the other occupants of the other strips of land got water for their respective strips from the very well. None of the occupants of our strips have taken water from the "Halu Bhavi". I have not seen that well under use. This statement of D.W. 4 reveals that well known as "Halu Bhavi" situated at Survey No. 23-A has not been in use for quite many years, almost for not less than 30 years or earlier. Because D.W. 4 says that he had never seen the water being taken from the well known as Halu Bhavi and that has not been in use nor it been seen to be used by him and none of the occupants have to take water from that well. This aspect of the matter has escaped the notice of the Courts below. Even D.W. 2 has also admitted that Halu Bhavi or Halu Bhavi well had not been in use and the water therefrom had not been taken for good many years, i.e., more than 10 to 15 years earlier to the date of his statement, which was recorded in January 1967. This really supports the case of the plaintiffs that well at Survey No. 23-A which is known as Halu Bhavi was not in working order and was not used for taking water and that there was no water in this well as has been deposed by him. This is also mentioned by the Commissioner-P.W. 1 that well in Survey No. 23 had no water. D.W. 3 whose statement also states that he had never seen the water in the well situate at Survey No. 23-A at any time and that on the mouth of the well at Survey No. 23-A there are tamarind trees. As per the statement of D.W. 4 there are tamarind trees in Survey No. 23-A and six Pattadars distribute their income. So tamarind trees on the mouth of the well belong to all Pattadars. The circumstances taken together along with the evidence of D.W. 4 that has not been considered by the lower Appellate Court along with the depositions of P.Ws. give support to the plaintiff's case that the Halu Bhavi situated at Survey No. 23-A was without water and was never being used and could not be used for taking the water because of the location of the trees on the mouth of the well. This fact along with the fact that no right as to the tamarind trees nor right to cut those trees had been given to the transferor under Exs. P-9, P-13 and P-14 and to make over the well fit to take out the water after digging it more coupled with the fact that the transferor could not give right or that right to cut trees to transferee except with written consent of other co-owners of trees and this has to be taken into account to determine if the right to take water could said to have been given with reference to the well situated at Survey No.. 23-A or with reference to the well known as Jodhu Kapali Bhavi situated at Survey No. 24-I and F. This no doubt show among the properties mentioned in the schedule and transferred to the transferees namely by defendants 6 to 8 to Gangamma and by Ex. P-9 by Gangamma to the plaintiff-appellant clearly suggests that right to take water was given from the well known as Jodhu Kapali Well or Uramundina Jodhu Kapali Well situated at Survey No. 24-

I and F and not from the well Halu Bhavi at Survey No. 23-A which Halu Bhavi had never been used for taking the water as per the evidence on record and it was never used for taking water by either Gangamma or defendants 6 to 8 or their predecessors. These circumstances or this circumstantial evidence coupled with the name of the well mentioned in Exs. P-9, P-13, P-14 as Jodhu Kapali Bhavi or Kapali Bhavi can be taken into consideration for the purpose of making description of the well with respect to the right to take water from that well referred in the deeds lead me to hold that there was mistake with reference to survey number and Survey No. 23-A had wrongly been referred for Survey No. 24-I and F. Here it is not a case of reappreciation of the evidence but it is a case in which in the light of the evidence that has been ignored from consideration by the lower Appellate Court along with the other evidence on record led by the parties and the contents of the deed, this Court is required to record finding in the light of evidence on record including the one of D.W. 4 which had been ignored by lower Appellate Court and as the finding on the point arrived by lower Appellate Court has been vitiated by the error of law to the effect that it has been arrived at after having ignored the material relevant evidence. There is further material piece of evidence in this regard which has been ignored by lower Appellate Court and it is that D.W. 2 who says "that his contention is not that the plaintiff had no right to take water in Survey No. 24-D from the suit well but really says that through his survey number the water cannot be taken" which means he admits plaintiffs right to take water from the well in dispute, i.e., well known as Jodhu Kapali well or Uramundina Jodhu Kapali well situate on Survey No. 24-I and F. This evidence has also not been taken into consideration. The finding of fact arrived at after non-consideration or ignoring of material piece of evidence always raises the question of law and can said to be vitiated by substantial error of law and it is open for this Court to interfere with such finding.

See: J.B. Sharma v State of Madhya Pradesh and Another, AIR 1988 SC 703;

Dilbagrai Punjabi v Sharad Chandra, AIR 1988 SC 1858;

Jagdish Singh v Natthu Singh, AIR 1992 SC 1604. These errors coupled with the question of interpretation of the deed made this Court to consider this question is to whether the appellant (plaintiff) had been conferred the right to take water from the well known as Jodhu Kapali well situated at Plot No. 24-I and F.

19. I am of the opinion that the lower Appellate Court's findings is incorrect and vitiated by substantial error of law. The deed Exs. P-9 and P-14 coupled with the circumstances indicated above reveals that right to take water had been conferred by the plaintiff-appellant to the extent of share mentioned from the well Jodhu Kapali Well or Jodhu Kapali Bhavi or Uramundina Jodhu Kapali Well situated in Survey No. 24-I and F and not 23-A. The circumstances referred to above emerges from the evidence led by the parties including from the statement of D.W. 4 whose evidence has not been considered by the lower Appellate Court. The well having been described as Jodhu Kapali Well or Jodhu Kapali Bhavi by its name as such. But the wrong number or the survey number

had been given in deed than that of actual plot or actual survey number on which the well referred in the deed exists. The above evidence relating to the circumstances in which description of the well did fit in the light of provisions of Section 95 of the Evidence Act had to be considered and finding has been arrived at. Because there appears some discrepancy in the complete description of the identity of the well, as Jodhu Kapali Well or Uramundina Jodhu Kapali Bhavi has been one which is situated on by Survey No. 24-I and F and the well that was never used and which could not be used and it was known as Halu Bhavi was located in Survey No. 23-A. These circumstantial evidences emerging from the evidence on record had been admissible under Sections 95 and 97 of the Evidence Act as is mentioned earlier. The above circumstantial evidence coupled with other evidence really indicates and shows and establishes that the right to take water had been given to the appellant from Jodhu Kapali Well situated in Survey No. 24-I and F and there was a mistake in giving its Survey No. as 23-A as Survey No. 23-A was something mistaken. That from the D.W. 4's evidence coupled with that of plaintiff's evidence it is clearly establishes that originally the defendants 6 to 8 took the water to irrigate their field, i.e., Survey No. 24-D and E from the well situate in Plot No. 24-I and F and the alleged well in Survey No. 23-A was never used and was not in useable condition and on the division of Plot No. 24, the right to take water to irrigate the field in Survey No. 24-D and E from the well situate at Survey No. 24-I and F accrued to defendants 6 to 8 by way of easement of necessity or quasi easement, as well and this right of quasi easement which accrued to the defendants 6 to 8 did pass on along with the transfer of land to 24-D by defendants 6 to 8 to Gangamma and by Gangamma to the present appellant-plaintiff, as the right related to the land and the rights which the transferor had acquired even by virtue of partition with his co-sharer even as an easement did pass on to the vendee under the deeds including the plaintiff-appellant. The finding on question of quasi easement has also been recorded without applying its mind and without taking into consideration the evidence of plaintiff's witnesses along with the evidence of D.W. 4 whose deposition had been ignored by the lower Appellate Court and as such the finding recorded by the lower Appellate Court has been vitiated by error of law.

20. The last point that has been urged on behalf of the appellant is that the decree of the Court below is vitiated by error of law on account of the fact that first appeal had been preferred by defendant 1 alone and by none of the defendants against the Trial Court decree which had been passed in favour of the present plaintiff-appellant and not having been appealed before the Appellate Court by other defendants. The decree passed by the Trial Court against others had become final and as such the lower Appellate Court should have dismissed the appeal instead of allowing it and that the decree of the lower Appellate Court should be set aside on this ground, does not require any consideration.

21. I, having thus considered, am of the opinion that the second appeal deserves to be allowed and the judgment and decree of the lower Appellate Court deserves to be set aside, as such is hereby allowed. The impugned judgment and

decree of the lower Appellate Court is hereby set aside and the decree of the Trial Court whereby the plaintiff-appellant's suit had been decreed, is hereby restored and the suit is decreed in terms of the decree passed by the Trial Court with costs throughout recoverable from the contesting defendants-respondent, i.e., from defendant-respondent 1 or her heirs and from defendant-respondent 4.