

Ayyaswami Gounder and Others

Vs

Munnuswamy Gounder and Others

Civil Appeal No. 2118 of 1978

A. P. Sen, R. B. Misra JJ )

25.09.1984

JUDGMENT

R. B. MISRA, J. -

1. The present appeal of the plaintiffs-appellants by special leave is directed against the judgment of the High Court dated April 7, 1978 reversing the judgment and decree of the two courts below and dismissing the suit.
2. The appellants filed a suit for declaration of their right to take water from their exclusive well marked W-1 in the site plan attached with the plaint and situated in a plot of land exclusively belonging to them, through a portion of a channel to their plots at survey Nos. 95 and 96 lying to the north of the common well W-2 in the joint land of the parties and for a consequential relief of permanent injunction restraining the defendants-respondents from interfering with the enjoyment of the plaintiff's right to take water from W-1 through the aforesaid channel.
3. The parties are descendants from a common ancestor and they owned joint properties. A partition took place between the parties in or about 1927 whereunder survey Nos. 95 and 96 fell to the share of the plaintiffs and 15 cents of land in plot No. 96/5 in which the common well W-2 is situate and the channel running from that common well were, however, kept joint for the common enjoyment of the parties. Water from well W-2 situate in plot No. 96/5 was not sufficient enough to irrigate the lands of both the parties got by them in the said partition. The plaintiffs, therefore, were irrigating their lands from the well in survey No. 103/2 purchased by the father of the plaintiffs in 1928 in the name of plaintiffs' mother under Ex. A-1 and they were irrigating their land obtained in partition through the common channel from their own well in survey No. 103/2 by connecting the common channel in the common land in survey No. 96/5 by means of a small channel to take water to their lands in survey Nos. 96/3, 96/1, 95 and 92. The defendants objected to the use of the common land in survey No. 96/5 and the common channel running in survey No. 96/5 for taking water from their exclusive well in survey No. 103/2. Hence the plaintiffs were obliged to file the suit mentioned above.
4. The defendants admitted the plaintiffs' right to enjoy the common well, the common land and the common channel in survey No. 96/5. They, however, pleaded that the plaintiffs were not entitled to use the common property for taking water from their exclusive well in survey No. 103/2 to their family lands north of the common well. They also disputed the existence of the channel from 1928 as pleaded by the plaintiffs and further contended that the plaintiffs could not acquire any easementary rights over the common land to take water from their exclusive well. They, however, did not plead or prove any damage, injury or hardship suffered by the defendants to show that they

were in any way prejudiced by plaintiffs forming a small channel in the common land to take water from their exclusive well to their family lands north of the suit property.

5. The trial court by its judgment dated June 16, 1973 found that the plaintiffs being co-owners of the common property were entitled to use the property in the way most advantageous to them and the defendants having nor pleaded or proved any damage or loss to the common property cannot obstruct the plaintiffs from taking water to their exclusive well through the common channel. It will be relevant at this stage to quote the observations of the trial court :

Except asserting that it will affect him, DW 1 is not able to specify in what way the act of the plaintiffs caused damage or inconvenience to him in exercising his right in taking water through the common channel. All that he would say is that the plaintiffs should not have a channel AB on the common place of land.

6. The trial court, however, did not record any finding on the prescriptive right of easement pleaded by the plaintiffs, in view of its finding that the plaintiffs being co-owners can use the common land to form a channel.

On appeal by the defendants the first Appellate Court by its judgment dated July 16, 1974 substantially concurred with all the findings of the trial court. But to avoid any complaint or prejudice which the defendants may complain of, though nothing was pleaded or proved, the learned Judge thought it fit to modify the decree of the trial court by fixing terms for the plaintiffs' use of the channel. With this little modification the first Appellate Court confirmed the decree of the trial court.

7. The defendants feeling aggrieved took up the matter in second appeal and the High Court by its judgment dated June 12, 1978 reversed the judgments and decrees of the two courts below and dismissed the suit holding that the plaintiffs did not acquire any right either by grant or by prescription by way of easement. The High Court, however, found that the plaintiffs by taking water from their exclusive well through the common channel would be throwing additional burden on the common channel and common land which was not and could not have been intended by the parties at the time of the partition when they kept their well W-2 and the lands situated around it and the common channel for the common enjoyment of the parties.

8. The plaintiffs-appellants have now approached this Court and reiterated the same arguments as advanced by them in the two courts below.

9. The learned counsel for the appellants strenuously contended that in the absence of any specific plea regarding prejudice to the defendants by the use of the common land and the common channel the High Court was not justified in recording a finding that additional burden to the prejudice of the defendants would be put on the common land and the common channel and that this could never have been intended by the parties at the time of there partition.

10. We find considerable force in this contention. In the absence of any specific pleading regarding prejudice or detrimental to the defendants-respondents the plaintiffs have every right to use the common land and the common channel. The plaintiffs-appellants were claiming their right on the basis of admitted co-ownership rights which includes unrestricted user, unlimited in point or disposition, and the High Court was not justified in holding that the plaintiffs' right to take water was not acquired by any grant from the defendants-respondents or from any other sale deed. The

right of co-ownership presupposes a bundle of rights which has been lost sight of by the High Court.

11. The only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment.

12. It was further contended that the Illustration © to Section 8 of the Indian Easements Act relied upon by the High Court had no application to the facts of the present case inasmuch as the plaintiffs' case mainly hinges upon their right as co-owners and not on the basis of prescription by easementary right. Illustration © to Section 8 of the Indian Easements Act applies where a co-owner seeks to impose an easementary right on the land or any part thereof. In the instant case, however, the plaintiffs claim easementary right only as an alternative ground but the main ground on which they based their claim is on the right of co-ownership.

13. The plaintiffs cited the case of Subbiah Goundan v. Ramaswamy Goundan (AIR 1973 Mad 42 : 85 Mad LW 659) before the High Court. In a similar situation it observed :

In the instant case, the defendants make use of the common channel for taking water from their exclusive well in S.No. 24 only during their turn of enjoyment of the common well. Such use of the common channel, by no stretch of reason can be said to interfere with the right of the plaintiff in any way. Nor can it be said that the said user of the channel by the defendants would in any way damage or weaken the channel. Unless the plaintiff proves that such use by the defendants in any way interfere with his rights or that the common channel is being or is likely to be damaged or injured or weakened he cannot prevent the defendants from making use of the channel during their turn of enjoyment of the common well by taking water from exclusive well also, which is most advantageous and beneficial from their point of view.

If the learned Single Judge did not agree with that decision he should have referred the matter to a larger Bench and the judicial propriety or decorum did not warrant holding contrary to the decision of the same High Court by him.

14. The defendants indeed are adopting a 'dog in the manager' policy. Although they do not stand to be prejudiced or put to any detriment on their own pleadings, they seek to prevent the plaintiffs from irrigating their lands through the common channel from their exclusive well. There is no other source of irrigation for the plaintiffs.

15. Counsel for the defendants-respondents on the other hand contended that the well W-1 was built after partition by the plaintiffs on their exclusive land and, therefore, no additional burden could be put by the plaintiffs on the common channel and if the plaintiffs acquired new land then they cannot have any right to irrigate from the common well or channel. It was also contended that no proof of damage or prejudice was necessary. In support of their contention they relied upon the decision of the Madras High Court in Sivarama Pillai v. Marichami Pillai (AIR 1971 Mad 230 : (1970) 1 Mad LJ 376). In that case it was a common ground that as an integral part of the partition arrangement, both the branches would have equal right to take water from the well and that right should be worked out by the plaintiff taking water from the well for three days and the defendants in the next three days thereafter. That case was decided on the basis of the terms of agreement at the time of partition. It is in the setting of the facts of that case that the High Court observed :

In the nature of things, a well cannot be divided by metes and bounds and persons who own joint rights in a well (to the right of the water in the well) can enjoy that right either jointly or separately only by resort to a workable arrangement safeguarding and securing the right to irrigate the lands allotted to the respective branches.

It is implicit in such arrangements that the common source of irrigation, the well, is kept in common for the only purpose of irrigating the lands which are allotted to the respective branches and to serve that purpose only, leaving out of account the other incidental purposes like bathing, washing clothes, taking water for cattle, etc. The scheme of the arrangement cannot admit of any notion of the parties being entitled to the particular quantity of water (so many gallons) treating that alone as a distinct item of property divorced from the lands. The well is set apart as common property for the most beneficial and profitable enjoyment of the land and it does not matter what label the parties give to their rights in the well, whether it is a right to a particular share in the well or whether a right to take water by turns. But what is crucial is that in the case of lands, valuable right is the source of irrigation.

This case is distinguishable on facts inasmuch as in that case at the time of partition the well was kept joint and arrangements had been entered into about the mode of use of the well fixing the duration. If the parties had entered into a contract then they would be governed by the terms of the contract but in the case in hand there was no such stipulation about the manner or mode of enjoyment of the common well and the common channel.

16. There is yet another reason why we would be reluctant to encourage the defendants to stop the plaintiffs from irrigating their fields from their own exclusive well through the common channel. In these days of scarcity when every effort is being made at all levels to increase the agricultural production to feed the country's teeming million it would not be desirable to allow the defendants to create any hurdle in the irrigation of the plaintiffs' plots through the common channel from their exclusive well. Thus, neither the law nor expediency warrants a conclusion as desired by the defendants.

17. For the foregoing discussion the appeal must succeed. It is accordingly allowed and the judgment and decree of the High Court is set aside and the one passed by the first Appellate Court is restored in order to avoid any likely prejudice to the defendants-respondents. In the circumstances of the case the parties shall bear their own costs.

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