1962 *Present :* Herat, J.

M. NAGASAMY *et al.*, Appellants, *and* K. APPATHURAI *et al.*, Respondents

S. C. 5/1960—C. R. Mallakam, 15403

Servitude—Well—Right to draw water—Right to lead water—Necessary parties.

Where, in an action for a declaration of a right to draw water from a well and to lead that water from the well, the well and the water lifting apparatus in question and the land through which the water is to be led belong to several persons, all the owners of the servient tenements are necessary parties and must be joined.

APPEAL from a judgment of the Court of Requests, Mallakam.

H. W. Jayewardene, Q.C., with *H. D. Tambiah, N. R. M. Daluwatte* and *D. S. Wijewardene*, for the Defendants-Appellants.

C. Ranganathan, for the Plaintiffs-Respondents.

March 28, 1962. HERAT, J.—

The plaintiffs-respondents who are husband and wife sued the defendants-appellants for the following reliefs :

(*a*) For a declaration that they were entitled to a share in the well shown in plan marked X.

(*b*) For a declaration that they were entitled to a share in the ' Toorvai ' land which is the land immediately surrounding the well and used as an adjunct of that well.

(*c*) For a share of the water lifting machine which machine is fixed on the soil of the land to the North of the land on which the well stands and which is depicted as a black circle in the plan X.

(*d*) For a declaration that they were entitled to the five coconut trees standing on the ' Toorvai ' land.

(*e*) For a declaration that they were entitled to effect certain plantations on the ' Toorvai ' land, and for damages against the defendants for obstructing them in their rights.

The learned Judge who heard the case did not grant them the declaration as regards the five coconut trees or the right to plant on the ' Toorvai ' lands, but granted them the remaining reliefs.

Now, it appears from the evidence that the plaintiffs pleaded in their plaint their title to the land called ' Narayanavalavu ' which, they said, was irrigated by water drawn from the well referred to in two ways :

(*a*) by reason of dowry in favour of the second plaintiff,
(*b*) by prescriptive title.

The defendants-appellants put the plaintiffs-respondents to the proof of their title by dowry and denied that the plaintiffs-respondents were entitled by prescriptive possession to the land ' Narayanavalavu '. At the trial the plaintiffs produced three documents marked P1, P2 and P3, P3 being the alleged dowry deed in favour of the second plaintiff from her mother. The document marked being, however, a certified copy. The first plaintiff who gave evidence, however, stated that P3 was a forgery and a fabrication, and upon this evidence the learned Commissioner of Requests found that there was no paper title proved by the plaintiffs to ' Narayanavalavu '.

It also appears from the evidence led in the case that the apparatus referred to as the ' water lifting machine ' is fixed on land which belongs to a person called Suppar Ponnambalam. It further appears from the

evidence in the case that the well in question as well as what is referred to as the 'Toorvai' land is situated on soil which belongs to several persons, some of whom are not defendants or parties to this case.

Now, it seems that both the parties, as well as the learned Commissioner who tried the case, did not clearly appreciate the nature of the legal rights in dispute in the action. In the first instance one cannot claim, in law, a share to a well except in the sense that the well is situated on a land owned in common, of which the plaintiffs, admittedly, are co-owners. That is not the case here. The plaintiffs do not aver that they are co-owners of the land on which the well is situated. What they really intended to prove and to claim a declaration for was that they as owners of the dominant tenement Narayanavalavu were entitled to a servitude of *aquae haustus* over the well in question, namely, to draw water from it, and to a servitude of *aquae ductus*, namely, to conduct or lead that water from the well in this over the 'Toorvai' land and the land on which the well is situated to their land 'Narayanavalavu'. The plaint has been inartistically framed and the correct legal conceptions utterly confused. This court has held in *Singaram v. Shanmugam*[1] that there is no such claim as a claim to a share in a well except in the limited sense I have referred to. But the claim must be for the servitude of *aquae haustus* and *aquae ductus*. So that the portion of the learned Commissioner's judgment granting a share in the well cannot stand on that ground alone. Even if we can construe the claim for a declaration in a share of the well made by the plaintiffs-respondents as a claim for the servitude of *aquae haustus* and *aquae ductus*, such an action cannot be maintained in the absence of the other co-owners who owned the servient tenements, as they are not defendants in this case. Vide *32 N. L. R. at page 328.*

As far as the claim to a share in the water lifting apparatus is concerned it is not quite clear from the evidence whether the plaintiffs-respondents considered that apparatus as a movable or as an immovable. If the water lifting apparatus is movable, the plaintiffs-respondents clearly not being co-owners of that movable have no share in the ownership of that apparatus. If their claim to a share in the water lifting apparatus is in the nature of a declaration that they are entitled to certain servitual rights upon that movable, such a claim is untenable in law. If, as the learned Judge finds, the water lifting apparatus is a fixture or immovable, admittedly it is situated on the separate land of Suppar Ponnambalam and is his immovable property. If so the plaintiffs-respondents cannot get a declaration to such a servitual right unless Suppar Ponnambalam is a party to these proceedings.

Mr. Advocate Renganathan who appeared for the plaintiffs-respondents very ably sought to get over these difficulties by stating that his clients were really entitled to admit servitual rights of drawing

[1] *(1958) 61 N. L. R. at page 520.*

and leading water in the well and of using the water lifting apparatus as part and parcel of those rights, and that this action was merely one for a claim in damages and for an injunction against the defendants-appellants as *tort in feasors* who were unlawfully interfering with his admitted rights. He said his clients had to prove those rights not because they were the substantial claim in his action, but as media upon which to sustain his claim for the tortious acts of the defendants-appellants. But it would not be realistic to accede to this argument in view of the terms in which the plaint is couched, and the relief prayed for and the issues framed in the action. Almost 90 per cent of the claim in the prayer deals with declarations for a share in the well, a share in the ' Toorvai ' land, a share in the water lifting apparatus, etc. I think the real situation is the plaintiffs-respondents intended to claim servitual rights of *aquae haustus* and *aquae ductus*, but have had their pleadings framed in a clumsy manner.

Mr. Jayewardene, counsel for the defendants-appellants strenuously argues that this appeal should be allowed and the plaintiffs-respondents' action dismissed. He points out that the litigation has taken six years; that the issues of non-joinder of parties were framed at the trial, and that it would not be correct at this stage to give the plaintiffs-respondents an opportunity of amending their pleadings so as to clearly bring out the real legal nature of their claims and to give them an opportunity of joining such necessary parties as they may be advised. However, I have a discretion in the matter and I find from the evidence in the case that the position taken up by the defendants-appellants at the trial was that if the plaintiffs-respondents satisfied the court that they were owners of ' Narayanavalavu ', then, admittedly, they were entitled to the servitude of *aquae haustus* and *aquae ductus* from the well in question. I think justice would be satisfied by allowing this appeal and setting aside the judgment and decree of the learned Commissioner of Requests by directing the plaintiffs-respondents to pay the defendants-appellants the costs of appeal as well as the costs of the abortive trial, and by remitting this case for a fresh trial before another Judge with an opportunity for the plaintiffs-respondents to amend their pleadings in order to set out the legal position now clarified and to join such necessary parties as they may be advised who should be joined for a proper trial of the issues involved in the case.

I, therefore, set aside the judgment and decree of the learned Commissioner, order the plaintiffs-respondents to pay the defendants-appellants costs of this appeal and costs of the abortive trial in the court of first instance, and I remit this case for trial before another Judge, giving the plaintiffs-respondents an opportunity of amending their pleadings if they so desire and of joining such parties as they may be advised, if necessary, in order to get the relief they claim.

Case remitted for fresh trial