

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.03.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

C.R.P (PD) No.4014 of 2011

&

M.P.No.1 of 2011

Sadasivam

...Petitioner

VS.

1.Kasilingam

2.Sakunthala

2.Kanagaraj

4.Minor Ezhilarasan

Minor represented by his mother 2nd respondent

...Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India against the judgment and decree in C.M.A No.6 of 2011 on the file of Sub-court, Panruti and dated 29.08.2011 in reversing the order and decretal order in I.A.No.20 of 2011 in O.S.No.8 of 2011 on the file of District Munsif, Panruti, dated 27.04.2011.

For Petitioners : Mr.V.Raghavachari

For Respondents : Mr.Gururaj

ORDER

This civil revision petition arises out of a judgment of the learned Subordinate, Panruti dated 29.08.2011 made in C.M.A.No.6 of 2011, which was in turn filed against the order of the learned District Munsif, Panruti dated 27.4.2011 made in I.A.No.20 of 2011 in O.S.No.8 of 2011 on the file of the District Munsif Court, Panruti. The above said suit was filed for declaration that they have easementary right over the passage to reach their property. The passage admittedly runs through the property of the respondent herein/defendant. Along with the suit, they filed an application in I.A.No.20 of 2011 for an interim injunction pending disposal of the suit not to prevent them from using the passage.

2. The learned trial Judge, by order dated 27.04.2011 allowed the said petition and granted interim injunction pending disposal of the suit. The said order was challenged before the lower appellate Court, namely the Sub-Court, Panruti in C.M.A.No.611 of 2011. The learned Subordinate Judge, panruti, after hearing, allowed the said appeal, set aside the order of the trial Court dated 27.04.2011 by his judgment dated 29.08.2011. Impugning the said judgment, the present civil revision petition has been filed under Article 227 of the Constitution of

India by the revision petitioners, who are the plaintiffs in the original suit.

3. Though Mr.V.Raghavachari, learned counsel for the petitioner argued on the merits of the Civil Revision Petition, Mr.R.Gururaj, learned counsel for the respondent confined his arguments regarding the maintainability of the Civil Revision Petition and did not canvass any point on the merits of the Civil Revision Petition, which would go to show that apart from his contention that the Civil Revision Petition is not maintainable, he has got no valid point to be urged in the Civil Revision Petition in respect of the merits of the case.

4. In the above said background, this Court has to consider the question of maintainability of the Civil Revision Petition raised by the learned counsel for the respondent. According to the submissions made by learned counsel for the respondent, as against the judgment of the lower appellate Court dated 29.08.2011 made in C.M.A No.6 of 2011, a second appeal, namely a Civil Miscellaneous Second Appeal (CMSA) alone will lie and hence, the invocation of the supervisory jurisdiction of this Court under Article 227 of the Constitution of India by way of a revision is not proper and the revision thus filed is liable to

be dismissed as not maintainable. The said contention is raised referring to Section 108 of the Code of Civil Procedure. Section 108 simply says that the provisions of Part VII relating to appeals from original decrees shall, so far as may be, apply to appeals from appellate decrees and from orders made under the Civil Procedure Code or under any special law or local law in which a different procedure is not provided.

5. In reply to the above said contention raised by Mr.R.Gururaj, Mr.V.Raghavachari, learned counsel for the petitioners drawing the attention of this Court to Section 104, in particular Subsection (2) of Section 104 of the Code of Civil Procedure, and also Order 43 Rule 1 of the Civil Procedure Code, contends that unless otherwise expressly provided anywhere in the body of the code or by the law for time being in force, no appeal shall lie from an appellate decree passed under Section 104 CPC. For better appreciation, Section 104 is reproduced hereunder:

"104. Orders from which appeal lies.-(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:—
[CIs. (a) to (f) omitted by Act 10 of 1940]
(if) an order under section 35A;

(ffa) an order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;

(b) an order under section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

Provided that no appeal shall lie against any order specified in clause (if) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section. "

6. Order XLIII deals with appeals from orders. Rule 1 under XLIII CPC specifically refers to Section 104 CPC as the provision under which such an appeal from orders will lie. The other sub-clauses under Order XLIII Rule 1 enumerates the orders which are appealable. The reference made to Section 104 as the provision under which an appeal from an order will lie shall make it clear that any order of the appellate Court to which appeal under Order XLIII Rule 1, shall be tested only under Section 104 of the Code of Civil Procedure. No where in the code, a decree passed by the appellate Court in an appeal (CMA) under

Order XLIII Rule 1(r) has been made an appealable decree. Hence, the bar of further appeal as provided under sub-section (2) of Section 104 stands clearly attracted to any appeal that may be filed against the decree passed in a Civil Miscellaneous Appeal filed against the order passed under Order XXXIX Rule 1(r).

7. The contention of the learned counsel for the respondent, if accepted, shall have the drastic effect of unsettling the settled positions of law, besides the same being totally untenable as one raised without properly understanding the scope of Section 108 of CPC which is concerned with Second Appeal allowed by any other provisions of the Civil procedure Code or by a special enactment. Hence, this Court does have no hesitation to come to a conclusion that the contention raised by the counsel for the respondent regarding the maintainability of the Civil Revision Petition is bound to be discountenanced.

8. As pointed out supra, regarding merits, the learned counsel for the respondent does not have anything to submit. In addition, when the petitioners claim easementary right to use the passage to reach their land pending disposal of the suit, refusing injunction will

result in irreparable loss and hardship to the petitioners. The learned trial Judge, properly appreciating the existence or otherwise of a prima facie case and also balance of convenience, decided the interlocutory application in favour of the revision petitioners, whereas the learned lower appellate Judge committed an error in setting aside the well considered order of the learned trial Judge. It is also brought to the notice of the Court that right from the date of filing of the suit, the petitioners had the benefit of ad-interim injunction and after the disposal of the interlocutory application by the trial Court and during the pendency of the Civil Miscellaneous Appeal before the lower appellate Court, the interim injunction granted in the trial Court had not been suspended and that this Court also granted interim stay pending disposal of the Civil Revision petition. Hence, this Court comes to the conclusion that the revision shall succeed. The decree of the lower appellate Court shall be set aside and the order of the learned trial Judge dated 27.04.2011 made in I.A.No.20 of 2011 in O.S.No.8 of 2011 has to be restored.

9. In the result, Civil Revision Petition is allowed, the decree of the lower appellate Court dated 29.08.2011 made in C.M.A.No.6 of 2011 is set aside and the order of the trial Court dated 27.04.2011

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made in I.A.No.20 of 2011 in O.S.No.8 of 2011 shall stand restored.

No costs. Consequently, the connected miscellaneous petition is closed.

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Index: Yes/No

Internet: Yes/No

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To

1. The Sub-court, Panruti
2. The District Munsif, Panruti,

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