

HON'BLE SRI JUSTICE S. RAVI KUMAR

SECOND APPEAL No.182 of 2000

JUDGMENT:

This appeal is preferred against decree and judgment dated 01.11.1999 in A.S.No.67 of 1994 on the file of the District Judge, Chittoor, whereunder judgment dated 12.08.1994 in O.S.No.1292 of 1987 on the file of the III Additional District Munsiff, Chittoor (presently III Additional Junior Civil Judge, Chittoor) is confirmed.

2. The appellant herein is unsuccessful defendant in both the Courts. Plaintiff filed O.S.No.1292 of 1987 initially for the relief of permanent injunction and subsequently converted it into a suit for declaration and the trial Court on consideration of evidence of PWs.1 and 2 and documents Exs.A.1 to A.27 and the evidence of DW.1 and document Ex.B.1, decreed the suit in favour of plaintiff holding that plaintiff has a legal right in the disputed passage and thereby injuncted defendant permanently. Aggrieved by the decree of the trial Court, defendant preferred appeal to the District Judge, Chittoor, and on reappraisal of the oral and documentary evidence, appellate Court dismissed the appeal confirming the findings of the trial Court. Aggrieved by the judgments of both the Courts, defendant preferred the second appeal and this Court on 23.06.2000 admitted the second appeal treating the following as substantial questions of law.

- “a) Whether the findings reached by the lower appellate court and the approach to decide the case is erroneous, perverse, patently illegal, suffers from procedural illegality.
- b) Whether the court below is justified in not framing an issue with regard to the alleged prescriptive right of the plaintiff over the suit passage.
- c) Whether the court below is justified in considering and relying upon the report of the Commissioner and plan, without marking them as exhibits.

- d) Whether the plaintiff can succeed his case on the weakness of the defendant.
- e) Whether the findings of the court below is in conformity of order 41, rule 31 of C.P.C.
- f) Whether the plaintiff has discharged his burden that he got the right of way in the suit schedule portion shown as 'A B S Q P R A' in the plaint plan, Ex.A.1. ”

3. Heard arguments.

4. Advocate for appellant submitted that the trial Court mainly relied on the Advocate Commissioner's report, which was not marked as a document during trial and the appellate Court though a specific ground was raised with regard to the Commissioner's report observed that Commissioner's report is a part of record and that the trial Court was justified in considering the Commissioner's report for rendering justice in the matter and that the finding of the appellate Court is not at all correct. He further submitted that though Ex.B.1 clearly disclose that there was no pathway as shown in plaint as ABSQPRA, both the Courts below have not considered those document on the ground that plaintiff is not a party to that document and that the findings of the Courts below are not in accordance with law, hence, the said findings have to be set aside by this Court in the second appeal.

5. On the other hand, advocate for respondent/plaintiff supporting the findings recorded by both the trial Court and appellate Court, contended that there is no substantial question of law to be determined by this Court in the second appeal.

6. Now the point that arises for consideration in this second appeal is :

Whether the trial Court was justified in recording the finding with regard to the easementary right of plaintiff without there being the issue, which finding was confirmed by the appellate Court?

POINT :

7. Admittedly, the suit was originally filed for mere injunction, but subsequently it was converted into a suit for declaration of plaintiff's way through an amendment petition in I.A.No.456 of 1994, which was ordered on 04.07.1994. After the amendment, the trial Court framed an additional issue on 05.08.1994, which is as follows:

“Whether the plaintiff is entitled for declaration of his right of passage through the B-schedule property as he prayed?”

8. The trial Court decided both the issues including additional issue while considering the evidence of both parties. So, the contention that trial Court recorded finding without there being an issue which is claimed as a substantial question of law is not correct since only after framing the additional issue declaratory right of plaintiff was decided.

9. One of the submissions of learned counsel for petitioner is that the report of the Advocate Commissioner is not marked as a document during trial, but the trial Court relied on Commissioner's report and that finding was confirmed by the appellate Court holding that the Commissioner's report is part of record. As seen from the material, it appears that no objections are filed to the Commissioner's report and both parties allowed the trial Court to receive Commissioner's report on record. Simply because, report is not marked it cannot be said that Commissioner's report has to be excluded from consideration Advocate Commissioner is a Court Officer and his report has to be treated as part of record as rightly observed by the appellate Court. If any prejudice is caused to the party on account of the findings recorded by Advocate Commissioner, those aspects have to be brought on record by way of filing objections to the Commissioner's report, when no such steps are taken, the contention of appellant with regard to the Commissioner's report cannot be sustained. On a scrutiny of the material on record, I am of the considered view that

both the trial Court and appellate Court have rightly considered the entire evidence on record including the Commissioner's report in arriving just decision. For these reasons, I am of the view that no question of law is involved in the second appeal, much less, any substantial question of law, therefore, the second appeal is devoid of merits.

10. Accordingly, the second appeal is dismissed, without costs.

11. Miscellaneous petitions pending, if any, shall stand closed.

S. RAVI KUMAR, J

3rd November 2015.

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