



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.06.2018

C O R A M

WEB COPY

THE HONOURABLE MR.JUSTICE M.SUNDAR

S.A(MD)No.130 of 2018

and

C.M.P(MD)No.3436 of 2018

R.Navaneethan

.. Appellant/Appellant/
Plaintiff

Vs.

Thangamari (died)

1.Mariyammal,W/o.Murugarajan,

2.Mariyammal,W/o.Late Murugesan,

.. Respondents/Respondents
Defendants

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908, against the Judgment and decree dated 08.12.2017 passed in Appeal Suit No.33 of 2011 by the Sub Court, Srivilliputhur confirming the Judgment and decree dated 04.02.2011 passed in Original Suit No.781 of 2004 by the Additional District Munsif Court, Srivilliputhur.

For Appellant

: Mr.V.Balaji
for Mr.Niranjan S.Kumar

JUDGMENT

Sole plaintiff, who was unsuccessful in both the Courts below, is the lone appellant before this Court in this second appeal. Defendants in the Trial Court and respondents in the first appellate Court, are respondents before this Court in the instant second appeal.

2.Plaintiff launched a suit in O.S.No.781 of 2004 on the file of the Additional District Munsif Court, Srivilliputhur, with the prayers for declaration of title, mandatory injunction for demolition of a compound wall and for a permanent injunction not to permit further construction. For clarity in understanding the ~~lis~~ between the parties, it is necessary to extract the plaint plan, which has been placed before me and the same is as follows:



WEB COPY

In the Court of the principal District
Munsif, Saveliputtur.
O.S. NO. 781/2004.

Between:-

Navaneethan

... plaintiff

And:-

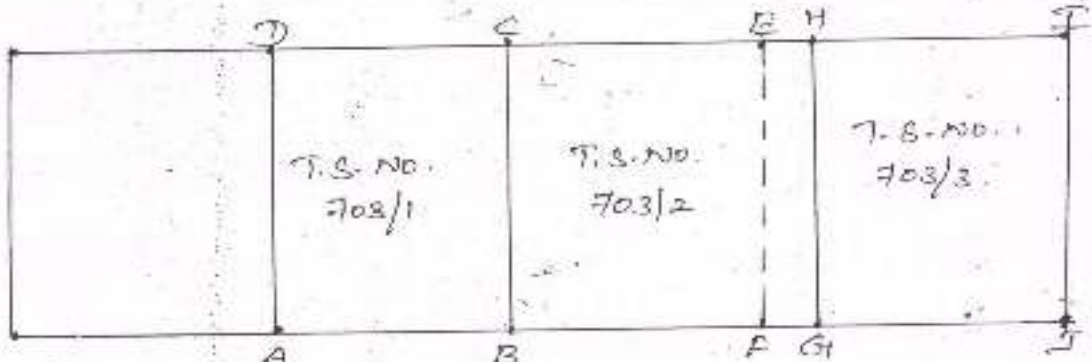
Thargamasi and another

... Defendants

plaint plan drawn not to scale.



தேவியத்திலுள்ள பிள்ளையார் கோவில் அருகே



plan fee fixed at the rate of Rs. 20/-

Ed/- M. M. Additional District Munsif, Saveliputtur.

Index

ABCD - கார்த்திகன் பிளாட் (1 லட்சம் சென்டர்கள்)

CEHGF - சீமன் பிளாட் (2 லட்சம் சென்டர்கள்)

EFGH - பிளாட், அக்கிரமம், பிளாட் கட்டிடம், இடம்.

GHIJ - பிளாட், பிளாட் (3 லட்சம் சென்டர்கள்)

EF - 3 1/4 சதுர

CEH - 7 1/4 சதுர

EH - 3 1/4 சதுர, FG = 3 1/4 சதுர

BFG - 7 1/4 சதுர

XXX, Advocate 27.5.04.

Sd/- Navaneethan.
யாதிவரன்



3.It is submitted that the plaintiff is owner of T.S.No.703/1 and defendants own T.S.No.703/3. What is in dispute is T.S.No.703/2 and a compound wall put up in T.S.No.703/2, which has been shown by way of dotted lines [EH].

4.To be noted, plaintiff's property has Door No.65/A and defendants' property has Door No.64.

5.It is the case of the plaintiff that the property comprised in Survey No.703/2, which has been shown as 'BCHG' in the plaint plan supra, is a common lane. It has been wrongly described as 'BCEFGF' in the plaint, is the submission of the learned counsel for the appellant.

6.Parties went to trial, in the trial there is no dispute that an Advocate Commissioner was appointed, the plan/sketch and report of the Advocate Commissioner, dated 18.04.2009 filed after local inspection, have also been placed before this Court as part of Court file.

7.In the Trial Court, on the side of the plaintiff, plaintiff Navaneethan examined himself as P.W.1. On the side of the defendants, one of the defendants, i.e., second defendant Mariyammal examined herself as D.W.1 and one Velmurugan was examined as D.W.2. As many as eight documents, i.e., Ex.A.1 to Ex.A.8 were marked on the side of the plaintiff and seven documents, i.e., Ex.B.1 to Ex.B.7 were marked on behalf of the defendants.

8.Plaintiff on his side, has marked a sale deed dated 29.08.2003 as Ex.A.2, in an attempt to assert and prove that the aforesaid T.S.No.703/2 is a common lane. Plaintiff had also filed his vendor's sale deed dated 26.08.1974 as Ex.A.8. As opposed to the above, on the side of the defendants, a sale deed, dated 01.04.1952 was marked as Ex.B.6.

9.In the hearing, it is pointed by the learned counsel for the appellant that the aforesaid Ex.B.6 shows that the defendants were in occupation and enjoyment of only a portion of the aforesaid T.S.No.703/2. While defendants contended that the remaining portion are in their enjoyment, pursuant to a document dated 06.10.1958, the same has not been produced and marked as an exhibit in the Trial Court, is his say.

10.After full contest, on a detailed analysis of the deposition [oral evidence] and the aforesaid exhibits, the Trial Court has come to the conclusion that the prayer for permanent injunction alone. Prayers for declaration and mandatory injunction for demolition of the aforesaid wall 'EF' in the plaint plan were negatived. To be

noted, the defendants accepted the decree for permanent injunction restraining them from putting up any construction adjoining the wall described as 'BC' in the plaint plan. Defendants gave legal quietus to the same. Be that as it may, the plaintiff, stating that he is aggrieved, carried the matter by way of an appeal being a regular first appeal under Section 96 of the Code of Civil Procedure, 1908 ['CPC' for brevity]. This regular first appeal is A.S.No.33 of 2011 on the file of the Sub Judge's Court, Srivilliputhur. The first appellate Court concurred with the Trial Court's verdict and confirmed the Judgment and decree of the Trial Court. In other words, the first appellate Court in exercise of powers under Section 96 CPC, after full contest, confirmed the dismissal of the prayers for declaration and mandatory injunction and also confirmed the decree with regard to permanent injunction. One finding returned by the first appellate Court contained/articulated in paragraph No.10 of the Judgment of the first appellate Court may be of relevance and that portion of paragraph No.10 reads as follows:

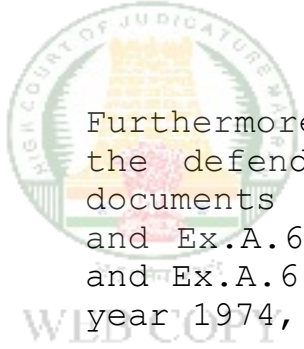
“தாவா 2ம் லக்க சொத்தைப் பொதுசந்தாக பயன்படுத்தும் ஒருவர் குறைந்தபட்சம் சுவற்றில் ஒரு வாசலாவது வைத்திருப்பார். கீழ்ப்பக்க சுவற்றில் எந்த வாசலுமோ அல்லது குறைந்தபட்சம் ஜன்னல்களோ இல்லாமல் 2ம் லக்க சந்தை வாதியின் முன்பாத்தியஸ் தர்கள் அனுபவம் செய்து வந்தார்கள் என்பது ஏற்றுக்கொள்ளும்படியாக இல்லை. அவ்வாறு எந்தவிதமான வாசலும் இல்லாமல் 2ம் லக்க சொத்தை அனுபவித்து இருக்கவும் முடியாது”.

11.Going back to the exhibits that were filed by both sides in an attempt to establish that T.S.No.703/2, i.e., 'BCHG' in the plaint plan is a common lane, the document filed by the defendants is of the year 1952. There is no dispute or disagreement that vide this document, the defendants have established that they were in possession and enjoyment of portions of aforesaid T.S.No.703/2 [BCHG].

12.Learned counsel for the appellant contended that the defendants should have established conclusively and proved that they were in possession and enjoyment of entire 'BCHG'.

13.I have carefully considered the submissions.

14.It cannot be gainsaid that the burden is on the defendants to establish that the contentious common lane was in enjoyment of the defendants. The plaintiff having launched the suit, ought to have established and discharged the burden of proof. Burden of proof never shifts. At best, it can be onus of proof that can shift to the defendants. In the hearing today, there is nothing demonstrated to this Court to show that the plaintiff has discharged his initial burden, wherein and whereby the onus has shifted to the defendants. In the absence of any such discharge of burden by the defendants, the contention that the defendants should have established their title to the common lane [which according to them, is not a common lane] is unacceptable.



Furthermore, one other aspect with regard to these documents is the defendants' document is of the year 1952, whereas the two documents placed before the Court by the plaintiff, i.e., Ex.A.2 and Ex.A.6 are subsequent documents. Ex.A.2 is dated 29.08.2003 and Ex.A.6 being the plaintiff's vendor's sale deed is also of the year 1974, which is a subsequent document.

15. In any event, the Commissioner's report and plan, which have been filed after local inspection have also been the basis for the Courts below to return factual findings with regard to the contentious lane, which according to the plaintiff, is a common lane.

16. This takes us to the questions, which have been propounded by the appellant. Appellant as protagonist has propounded as many as seven questions and according to the appellant, they are substantial questions of law. The seven questions shown as 'A' to 'G' are as follows:

"A. Is not the courts below wrong in dismissing the suit for declaration of the 2nd item as a common pathway inspite of the existence of the 2nd item as the eastern boundary to the 1st item the sale deed dated 29.08.2003?

B. Is not the Courts below wrong in believing the defendants claim for title over the 2nd and 3rd item of the suit properties under two sale deeds dated 01.04.1952 and 06.10.1958 even without any oral and documentary evidence?

C. Is not the Courts below wrong in concluding the North-South BC wall as a common wall to the 1st and 2nd item on the basis of an unregistered agreement between the plaintiff vendor and the defendants on 17.06.1998?

D. Is not the Courts below wrong in believing the unregistered agreement dated 17.06.1998 when the same was not mentioned in the plaintiff sale deed dated 29.08.2003?

E. Is not the Courts below not drawing adverse inference against the defendants for non production of the sale deed dated 06.10.1958 in respect of the western half of item 2nd and 3rd of the suit property?

F. Is not the Courts below wrong in not drawing adverse inference against the defendants for non entering the witness box and not examining any of the parties to the unregistered agreement dated 17.06.1988?

G. Is not the Courts below wrong in concluding that there was no evidence to show plaintiff enjoyment over the 2nd item of the suit property without applying its mind to the report of the Advocate commissioner showing the existence of the door way facing the 2nd item apart from the existence of 3 windows along with lofts on the North-South eastern wall of the item 1 of the suit property?"



17. What is substantial question of law was first dealt with by a Full Bench of this Court in the celebrated Judgment in *Rimmalapudi Subba Rao v. Noony Veeraju*, reported in AIR 1951 Mad 969. This was quoted with approval by the Hon'ble Supreme Court in another celebrated Judgment being *Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.*, reported in AIR 1962 SC 1314. This continues to be good law. To be noted, what is substantial question of law has been followed even in *Santosh Hazari's* case reported in (2001) 3 SCC 179. Paragraph No.14 is of relevance and the same reads as follows:

"14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

Thereafter, this position is lucidly set out in *Malan Bi's* case reported in (2016) 10 SCC 315. Paragraph No.25 is of relevance and the same reads as follows:

"25. A three-Judge Bench of this Court in *Santosh Hazari v. Purushottam Tiwari* [*Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179] speaking through R.C. Lahoti, J. (as his Lordship then was) examined the scope of Section 100 CPC in detail and laid down the following propositions in paras 9, 10, 12 and 14 as under:

"9. The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal and if it does so it acts illegally and in abnegation or abdication of the duty cast on Court. The existence



of substantial question of law is the sine qua non for the exercise of the jurisdiction under the amended Section 100 of the Code. (See *Kshitish Chandra Purkait v. Santosh Kumar Purkait* [*Kshitish Chandra Purkait v. Santosh Kumar Purkait*, (1997) 5 SCC 438], *Panchugopal Barua v. Umesh Chandra Goswami* [*Panchugopal Barua v. Umesh Chandra Goswami*, (1997) 4 SCC 713] and *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar* [*Kondiba Dagadu Kadam v. Savitribai Sopan Gujar*, (1999) 3 SCC 722] .)

10. At the very outset we may point out that the memo of second appeal filed by the appellant-plaintiff before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on "substantial question of law involved in the case". An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction.

... ..

12. The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means – of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something



in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. T. Ram Ditta* [*Guran Ditta v. T. Ram Ditta*, AIR 1928 PC 172 : (1927-28) 55 IA 235 : 1928 SCC OnLine PC 31] , the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 110 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In *Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.* [*Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.*, AIR 1962 SC 1314] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* [*Rimmalapudi Subba Rao v. Noony Veeraju*, AIR 1951 Mad 969 : 1951 SCC OnLine Mad 100] : (*Chunilal V. Mehta case* [*Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.*, AIR 1962 SC 1314] , AIR p. 1318, para 5)

'5. ... when a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law.'

And laid down the following test as proper test, for determining whether a question of law raised in the case is substantial: (AIR p. 1318, para 6)

'6. ... The proper test for determining whether a

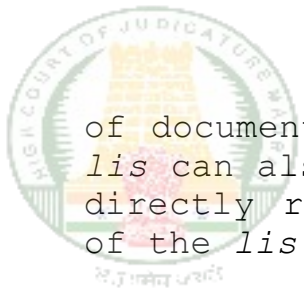


question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.'

... ..

14.A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

18.This Court has also noticed the most recent Judgment of the Hon'ble Supreme Court in Uma Pandey & another v. Munna Pandey & others reported in 2018-3-L.W.212(SC) with regard to substantial question of law. In this Judgment, it has been held that questions pertaining to interpretation, contents and admissibility



of documents which have direct impact on rights of the parties to *lis* can also qualify substantial questions of law, if the same are directly relatable to the pleadings, findings, crux and gravamen of the *lis* out of which, the second appeal arises.

19. This Court has carefully applied its mind to the seven questions that have been propounded by the protagonist in this second appeal, as to whether they would qualify as substantial questions of law in the light of the aforesaid principles. From a perusal of the seven questions, it emerges clearly that they turn predominantly on facts. It is the considered opinion of this Court that none of the seven questions qualify as substantial questions of law. In other words, no substantial question of law arises in this second appeal. Be that as it may, in the light of the narrative supra, this Court is unable to accept the submission that there is any infirmity in the concurrent Judgments of the Courts below.

20. Owing to all that have been set out supra, there is no ground for interfering with the concurrent Judgments and decrees of the Courts below in exercise of powers under Section 100 CPC.

21. This second appeal fails and is dismissed, at the admission stage, confirming the concurrent judgments and decrees passed by the first appellate Court, i.e., Sub Court, Srivilliputhur, dated 08.12.2017 in A.S.No.33 of 2011 and the trial Court, i.e., Additional District Munsif Court, Srivilliputhur, dated 04.02.2011, in O.S.No.781 of 2004. Consequently, connected C.M.P (MD) No.3436 of 2018 is dismissed.

Sd/
Assistant Registrar(CS-I)

/True copy/

Sub Assistant Registrar

To

1. The Subordinate Judge,
Srivilliputhur.
 2. The Additional District Munsif Court,
Srivilliputhur.
- +1cc to Mr. NIRANJAN S. KUMAR, Advocate, SR.No. 69478

S.A(MD) No.130 of 2018

and

C.M.P (MD) No.3436 of 2018

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