

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

SECOND APPEAL No.354 OF 2000

JUDGMENT:

This Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') aggrieved by the judgment and decree dated 13.12.1999 passed in A.S. No.22 of 1995 on the file of the Principal Senior Civil Judge, Gudur (for short, 'first appellate court'), wherein the first appellate court partly allowed the appeal modifying the judgment and decree dated 17.07.1995 passed in O.S. No.460 of 1986 on the file of the District Munsif, Gudur (for short, 'the trial court') and partly decreed the original suit granting injunction in favour of the plaintiff restraining the defendant and his men from interfering with the plaintiff's peaceful possession and enjoyment of the private lane shown as 'MNOPIE' in the plaint plan and dismissed the original suit with regard to the relief of permanent injunction so far as the construction of wall 'EFGH' by the appellant-plaintiff.

2. Heard the learned counsel for the appellant-plaintiff and perused the material available on record. Though the matter is posted today under the caption "For orders", there is no representation on behalf of the respondent-defendant.

3. For the sake of convenience, the parties hereinafter are referred to as they were arrayed before the trial Court.

4. Learned counsel for the plaintiff-appellant would contend that the finding of the first appellate court that the defendant and his predecessor had acquired easementary right to light and air through the open lane is contrary to law, weight of evidence and probabilities of the case; the Commissioner exceeded the warrant entrusted to him and the report of the Commissioner cannot be taken into consideration in deciding the issue that the defendant had

acquired easementary right; the findings of the first appellate court are perverse; and ultimately, prayed to allow the second appeal by setting aside the findings of the first appellate court.

5. To adjudicate the *lis* and to answer the substantial questions of law, it is necessary to refer to the relevant pleadings of the parties.

(a) The plaintiff filed the original suit for grant of permanent injunction restraining the defendant and his men from interfering with the construction of room through 'EFGH' portion and also from using the private lane shown in the plan as 'MNOPIE'. It is averred in the plaint that Vakati Venkata Subbareddy and Vakati Subbaramireddy are brothers and the house shown in the plaint plan as 'ABCD' is that of Vakati Venkata Subbareddy and the house shown as 'BCEF' is that of said Vakati Subbaramireddy, and those houses fell to their shares in their family partition. The plaintiff is the grandson of Vakati Venkatasubbareddy and the plaintiff purchased the house of Vakati Subbaramireddy on 13.07.1986 under a registered sale deed executed by Smt. Vakati Sridevamma, wife of Subbaramireddy and her children. Both the brothers have got cattle sheds and site on such east corner of their house and to reach the cattle yard and backyard of the plaintiff's house, there is a lane shown as 'EFGH' in the plaint. The plaintiff's vendor Sridevamma got permission from the Gudur Municipality and intended to construct a room on the south-east corner shown as 'EFGH' in the plaint plan and she constructed the said room in that place to a height of four feet on the basement and she could not complete the construction of the room due to lack of funds and the plaintiff after purchasing the suit schedule site and house, the plaintiff's father tried to complete the said room after getting the plan approved from the Gudur Municipality and in the meanwhile, the defendant filed a civil suit in O.S. No.346 of 1986 on the file of the District Munsif, Gudur against the father of the plaintiff seeking interim injunction and the District Munsif Court

refused to grant interim injunction and the suit was dismissed on 25.08.1986 for non-payment of batta. When the plaintiff repairing the house purchased from Vakati Sridevamma and proposed to construct the room on the walls already raised in 'EFGH' portion, the defendant and his men threatened to stop the work and caused obstructions for constructing the room in 'EFGH' portion. The defendant had no right, title or interest over the site covered by 'EFGH' portion.

(b) The defendant filed written statement denying all the averments made in the plaint and contended that the plaint plan is incorrect and the lane shown as private lane of the plaintiff is not his private lane, but it is the joint lane of the defendant and plaintiff and they are using the lane jointly to reach their respective cattle sheds on the south-east. The lane extended upto point 'G' and it was 10 feet wide and the plaintiff's vendor Vakati Sridevamma encroached into the joint lane upto 7 feet towards east from her eastern house wall and started constructing rooms and the defendant's father protested against the said encroachment and by use of force the said Sridevamma and her men had constructed two rooms starting from sough and constructed a wall of three feet height in respect of the proposed third room. The defendant's father gave a report to the Municipal Commissioner about the highhanded construction and the Municipal Commissioner with the police aid stopped further construction. The defendant's house was constructed about 40 years ago and there is a varandah, hall with two windows on the west of the hall adjoining the lane on the east of the unfinished construction and the defendant and his father are receiving air and light to their varandah and the windows of the wall from the open lane including the unfinished construction. If the unfinished construction is completed by the plaintiff, it will cause obstruction for passage of air and light to their varandah and the hall and they will be engulfed in darkness. The plaintiff has not approached the court with clean hands and he wants to perpetuate a wrong already committed by him instead of removing the encroachment into the joint lane and to

take advantage of the wrong committed by his predecessors by trying to obtain permanent injunction against the defendant.

(c) Basing on the pleadings, the trial Court framed the following issues:

- 1) Whether the plaint plan is not correct?
- 2) Whether the lane is the private lane or the plaintiff?
- 3) Whether the defendant and his predecessor acquired easementary right to light and air through the open lane?
- 4) Whether the plaintiff is entitled for permanent injunction?
- 5) To what relief?

(d) Basing the evidence of P.Ws.1 to 5 and the documents Exs.A.1 to A.17 marked on behalf of the plaintiff and the evidence of D.Ws.1 to 3 and the documents Exs.B.1 to B.11 marked on behalf of the defendant and the documents Exs.C.1 and C.2 marked through the Commissioner, the trial Court dismissed the suit, vide judgment and decree dated 17.07.1995. Aggrieved by the said judgment and decree of the trial Court, the plaintiff preferred A.S. No.22 of 1995 and the first appellate court, after appreciating the evidence on record, vide decree and judgment dated 13.12.1999, partly allowed the appeal modifying the judgment and decree dated 17.07.1995 passed the trial court and partly decreed the original suit granting injunction in favour of the plaintiff restraining the defendant and his men from interfering with the plaintiff's peaceful possession and enjoyment of the private lane shown as 'MNOPIE' in the plaint plan and dismissed the original suit with regard to the relief of permanent injunction so far as the construction of wall 'EFGH' by the appellant-plaintiff. Aggrieved by the finding of the first appellate court that the defendant and his predecessors acquired easementary right to light and air in the open lane and dismissing the

original suit with regard to the relief of permanent injunction so far as the construction of 'EFGH' wall, the plaintiff filed this second appeal.

6. While admitting this second appeal on 28.04.2000, this Court framed the following substantial question of law for determination:

- 1) Whether the Commissioner exceeded his warrant by giving his opinion in the report?
- 2) Whether the report filed by the Commissioner who exceeded his warrant by giving his opinion and whether the said report can be taken as an evidence in deciding an issue framed and in dispute?

7. There cannot be any dispute that under the amended Section 100 C.P.C., a party aggrieved by the decree passed by the first appellate court has no absolute right of appeal. He can neither challenge the decree on a question of fact or on a question of law. The second appeal lies only where the High Court is satisfied that the case involves a substantial question of law. The word 'substantial' as qualifying 'question of law', means and conveys of having substance, essential, real, of sound worth, important, considerable, fairly arguable. A substantial question of law should directly and substantially affect the rights of the parties. A question of law can be said to be substantial between the parties if the decision in appeal turns one way or the other on the particular view of law. But, if the question does not affect the decision, it cannot be said to be substantial question between the parties. Recording a finding without any evidence on record; disregard or non-consideration of relevant or admissible evidence; taking into consideration irrelevant or inadmissible evidence; perverse findings are some of the questions, which involve substantial questions of law.

8. While dealing with the subject matter of this second appeal with regard to the defendant acquired a right of easement to light and air in the open lane, both the trial court as well as the first appellate court elaborately dealt with

and answered the issue. The first appellate court having elaborately dealt with the issue with regard to the relief of permanent injunction so far as the construction of wall 'EFGH' by the plaintiff, held that the plaintiff is not entitled to permanent injunction with regard to the construction of 'EFGH' wall and ultimately, dismissed the suit for the said relief. The advocate-commissioner while examining the physical features of the subject premises, had observed that if 'EFGH' wall is raised upwards, it would cause obstruction for free passage of natural air and light to the defendant's house and he recorded the same in his report. When the commissioner having examined the physical features of the subject premises and recorded his observations in his report, it cannot be said that the commissioner has exceeded his limits. The first appellate court had examined this issue which is raised in this second appeal, held that the defendant perfected his right of easement with regard to free flow of light and air in the subject premises and restrained the plaintiff from constructing a wall marked as 'EFGH'. The findings of the first appellate court with regard to the right of easement are all factual aspects and those are elaborately dealt with by the first appellate court. There is no perversity in the said findings of the first appellate court.

9. It is appropriate to state that under Section 100 of the C.P.C., the jurisdiction of the High Court to interfere with the judgment of the Court below is confined to substantial question of law. The findings recorded with regard to the factual aspects by the first appellate court are final. Those findings of facts are not amenable to the jurisdiction of this Court by way of second appeal. The first appellate court had elaborately dealt with regard to the right of easement of the defendant over the disputed lane. In the circumstances of the case, this Court cannot re-appreciate the evidence and arrive at a different conclusion. Neither inadmissible evidence has been considered nor admissible evidence not acted upon. Viewing from any angle, no questions of law much less substantial

questions of law do arise for determination in this second appeal. Therefore, this second appeal is devoid of merit and is liable to be dismissed.

10. In the result, the Second Appeal is dismissed confirming the judgment and decree dated 13.12.1999 passed in A.S. No.22 of 1995 on the file of the Principal Senior Judge, Gudur, Nellore District. Miscellaneous Petitions pending, if any, shall stand closed. There shall be no order as to costs.

Date: 30.08.2018
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Dr. SHAMEEM AKTHER, J

