

THE HON'BLE DR JUSTICE SHAMEEM AKTHER

SECOND APPEAL No. 312 OF 2017

JUDGMENT:

1. The Second Appeal is filed by the appellants/defendants against the judgment and decree dated 28.11.2016 in Appeal Suit No.4 of 2016 on the file of the Senior Civil Judge, Kadiri, whereby the judgment and decree dated 20.01.2016 in Original Suit No.219 of 2012 on the file of the Principal Junior Civil Judge, Kadiri, were confirmed.

2. The appellants herein are defendants, the respondents herein are the plaintiffs, in the suit. For better appreciation of facts, the parties are hereinafter referred to, as they are arrayed in the trial court.

3. The Second Appeal is sought to be admitted on the following substantial questions of law.

a) Whether both the courts below were justified in decreeing the suit of the respondents/plaintiffs, especially when PW1 and PW2 admit there is no rastha shown as ABCD and there is voni/rastha for the use of the plaintiffs' land which runs towards East in the Buddappagaripalle and reaches Seshaiahgaripalle road ?

b) Whether both the courts below were justified in ignoring material admissions made by PW1 and PW2 with regard to alternative rastha for the use of the plaintiffs' land which runs towards East in the Buddappagaripalle and reaches Seshaiahgaripalle road ?

c) Whether both the courts below were justified in ignoring the principle as defined under Section 13 of the Easements Act ?

d) Whether the judgments of both the courts are perverse ?

4. Plaintiffs filed the suit seeking -to declare easementary right of necessity of way of the plaintiffs to use the plaint B-schedule ABCD cart track shown in the plaint plan and to take carts, yokes, bulls, etc. and to reach their plaint A-schedule mentioned property; to restrain defendants and their men from blocking by putting any kind of obstruction to easementary right of way of necessity in the plaint B-schedule cart track shown as ABCD in the plaint plan for free passage and user by the plaintiffs to take carts, yokes, bulls, etc. and to reach their plaint A-schedule mentioned property by means of permanent injunction, and to direct defendants to remove the blockade i.e. the big stones pum up across in B-schedule ABCD cart track in the shape of wall up to height of about 6 to 7 feet by way of mandatory injunction.

5. The averments, in brief, in the plaint are as follows.

Plaintiffs got plaint A-schedule property by virtue of gift deed dated 25.3.1994. Pattadar pass books and title deeds were issued in their favour, and they have been exercising the easementary rights of way of necessity and using the plaint B schedule ABCD cart track by taking carts, bulls, etc. to reach plaint A schedule property as of right and that the said right

was also enjoyed by their predecessors in title and that the plaint B schedule ABCD cart track is the only way to take carts, bulls, etc. and to reach plaint A schedule property. Therefore, it is an easement of necessity to enjoy the plaint A schedule property. But, the defendants are bent upon to cause obstruction to the plaintiffs for enjoyment of easementary right, and they started making obstruction when the plaintiffs refused to sell the plaint A schedule property to them. Pending disposal of the suit, the defendants blocked 'B' schedule ABCD cart track by raising stones in the shape of a wall up to 6 to 7 feet, and it is obstructing the plaintiffs to use B schedule ABCD cart track to reach their A schedule property. Hence, the plaintiffs amended their prayer seeking relief of mandatory injunction to remove the blockade. Hence, the suit.

6. Defendants 1 and 3 filed written statement denying the existence of rastha and covenant thereon for passage of carts to eastern portion of the land in survey no.886-2. There is no right of easement by way of necessity. Plaint plan is not correct. Physical features of the schedule property are not correct. The sale deed dated 17.3.1986 and the gift in between the plaintiffs and their grand father, are denied. There was no existence of cart track running east to west in the land of defendants for use by the plaintiffs or their predecessors-in-title. There was a cart track running from

north from Bodigundlapalle village and there was a turn in the land of defendants towards east, and that the said cart track leads to Seshaiahgaripalle and other villages. There is poromboke land towards north of the land of the defendants and there are houses. As such, it became impossible to run carts through the said cart track and so it was closed long ago. Adjacent to Bodiganipalle village, a road was formed running to east, taking a turn towards south to reach Seshaiahgaripalle and other villages. The said cart track was being used by defendants to reach their lands. As such, there is no rasta shown in the registered sale deed dated 14.12.1957. Regarding the rasta shown in registered sale deed dated 14.12.1957, the old rasta referred therein lies to east of the land of defendants. As such, there is no covenant to the effect in the sale deed that there is a cart track running west to east in the said land. The above cart track became extinct in view of formation of new cart track about 30 years ago and the same is in use since then. There is a borewell in western portion of land of defendants and as such there is no possibility to have a rasta from west to east in the land of defendants. When there is no rasta or cart track described as ABCD in the plaint existing on the land of defendants, the question of its use either by the plaintiffs or their predecessors-in-title does not arise. Plaintiffs are not entitled to the reliefs sought.

7. Basing on the above pleadings, the trial Court settled the following issues for trial.

- 1) Whether the plaintiffs are entitled for easementary right by way of necessity to B-schedule ABCD cart track shown in the plaint as prayed for ?
- 2) Whether the plaintiffs are entitled to permanent injunction in B-schedule ABCD cart track shown in the plaint as prayed for ?
- 3) Whether the plaintiffs are entitled to remove blockade i.e. big stones in B-schedule ABCD cart track by way of mandatory injunction as prayed for ?
- 4) To what relief ?

8. During trial, on behalf of the plaintiffs, P.Ws.1 to 3 were examined and Ex.A1-certified copy of sale deed dated 14.12.1957; Ex.A2-certified copy of sale deed dated 17.3.1986; Ex.A3-original gift deed dated 25.3.1994; Exs.A4 and A5-pattadar pass books issued in favour of plaintiffs 1 and 2, and Ex.A6-photographs, were got marked, and on behalf of defendants, D.W.1 was examined and Ex.B1 original sale deed dated 14.12.1957 was got marked. Exs.C1 to C8 were marked by the Advocate Commissioner.

9. The trial Court, upon appreciation of the evidence on record, decreed the suit with costs. Challenging the judgment and decree of the trial Court, the defendants preferred Appeal Suit No.4 of 2016 on the file of the Senior Civil Judge, Kadiri. The first appellate court vide the impugned judgment and decree, dismissed the appeal confirming the judgment

and decree of the trial Court. Challenging the same, the present Second Appeal has been preferred by the defendants.

10. Heard both sides and perused the record.

11. Learned counsel for the appellants would contend that the trial court has not properly appreciated the facts and circumstances of the case, and without there being any oral evidence to substantiate the case of the plaintiffs to establish the right of way by easement, and by ignoring the material omissions in the evidence of P.Ws.1 and 2, decreed the suit which was erroneously confirmed by the first appellate court; that the findings of both the courts below are perverse, and ultimately prayed to admit the Second Appeal on the substantial questions of law stated above.

12. On the other hand, learned counsel for respondents would contend that both the courts below appreciated the oral and documentary evidence in right perspective and decreed the suit granting the reliefs sought, and there is no infirmity; that all the findings of courts below are on factual aspects; that there is no substantial question of law to deal with in this Second Appeal, and ultimately, prayed to dismiss the Second Appeal.

13. 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 finding- are some of the questions, which involve substantial questions of law.

14. As seen from the entire evidence on record, admittedly, to reach B schedule property, there is no other passage. Case of the plaintiffs is that they have been using the passage, shown as ABCD in plaint plan, which was in usage from long time. During pendency of the suit, P.W.3-advocate commissioner was appointed, who filed his report Ex.C8, along with rough sketch and F.M.B. sketch Exs.C7 and C6,

wherein existence of passage and putting some hurdles therein was noted. There is no way to proceed to A schedule property except B schedule ABCD cart track. After considering the oral and documentary evidence, the suit was decreed in favour of the plaintiffs declaring easementary right of necessity of way of plaintiffs to use the plaint B schedule ABCD cart track shown in plaint plan and to take carts, yokes, bulls, etc. to reach their plaint A schedule property, and restraining the defendants from blocking the same and granting mandatory injunction directing defendants to remove the blockade put up in B schedule ABCD cart track in the shape of wall up to height of 6 to 7 feet. Both the courts below recorded concurrent findings on the said aspect. None of the findings is shown to be perverse or not based on record. The substantial questions of law raised are only with regard to entitlement of plaintiffs to reach B schedule property through ABCD cart track by way of easement by necessity. The question whether the plaintiffs have a right of easement by necessity or not, and whether the same is blocked by the defendants, are factual aspects. The same is established by the plaintiffs by adducing cogent and convincing evidence. The findings on factual aspects are not amenable to jurisdiction of this Court in a Second Appeal under Section 100 CPC.

15. As regards the appreciation of the evidence on record is concerned, both the courts below dealt with all the aspects in right perspective, and neither any inadmissible evidence is admitted, nor any admissible evidence was not acted upon, by the first appellate court. The courts below gave elaborate reasons for decreeing the suit. The findings of the courts below are based on the evidence. There are no grounds to take a different view. The scope of Second Appeal under Section 100 C.P.C. is only to the extent of substantial question of law. The proposed substantial questions of law are only on factual aspects. Under these circumstances, no question of law, much less substantial question of law, as contended by the appellants, under Section 100 of the Code of Civil Procedure, 1908, to admit the Second Appeal. The Second Appeal is devoid of merit and is liable to be dismissed.

16. In the result, the Second Appeal is dismissed at the stage of admission. No costs.

Miscellaneous Petitions pending, if any, in the Second Appeal shall stand closed.

26.09.2018
DRK

(Dr.SA, J.)

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