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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.02.2021	Pronounced on: 25.02.2021
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CORAM:

THE HONOURABLE Ms.JUSTICE R.N.MANJULA

S.A.No.450 of 2010

1.Vediayappan

2.Rajamanickam

3.Saroja

4.Mari

..Defendants/Appellants/Appellants/Defendants

Vs.

1.Munusamy

2.Perumal

..Respondents/Respondents/Plaintiffs

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree passed in A.S.No.40 of 2008, on the file of Sub Court, Harur and dated 30.09.2009 in confirming the judgement and decree made in O.S.No.212 of 2002, on the file of the Principal District Munsif Court, Harur and dated 03.04.2008.

For Appellants : Mr.V.Raghavachari

For Defendants : No appearance

J U D G M E N T

This second appeal has been preferred against the judgment and decree passed in A.S.No.40 of 2008, on the file of Sub Court, Harur and dated 30.09.2009 in confirming the judgement and decree made in O.S.No.212 of 2002, on the file of the Principal District Munsif Court, Harur and dated 03.04.2008.

2. The short facts of the case is that the plaintiffs are separated brothers. The suit properties Item No.1 & 2 belongs to the first and second plaintiffs respectively and the item No. 3



belong to them jointly. The plaintiffs are irrigating their respective lands from their respective wells in item No.3 through PVC pipe lines laid under the lands of the defendants. The pipe lines have been laid before 25 years with the permission of the defendants and the plaintiffs have been enjoying the same for more than 25 years without any objections from the defendants and other neighbours. Since the pipe lines were laid below to 3 feet from the ground level, it did not cause any inconvenience to the defendants. A suit road of about 10 feet in width and it is running from the suit village of Vediappan Samy Temple through the lands of the defendants and the plaintiffs from time immemorial. This is a mamul pathway used by the villagers including the plaintiffs and the defendants to reach their lands and it has been shown in the suit plan as A B C D E F G H I J K L. The plaintiffs have to reach their properties only through this road and there is no other access to their suit lands. The plaintiffs were using this pathway as an easementary right to take their cart and cattle. Recently, the first plaintiff deepened his well and got copious water. Hence the first defendant got jealous on him and attempted to cut the pipe line at point X. The plaintiff prevented their attempts. The plaintiffs have no other source of irrigation except from the Well in item No.3 of the suit properties. The plaintiffs have invested huge amount of money in laying the pipe lines and to deepen their well. If the suit pipe line is interpreted, the plaintiffs will suffer irreparable loss. Hence the suit has been filed for declaration of the plaintiffs' right of easement over the suit road and the suit pipe lines and for perpetual injunction to restrain the defendants or their persons from obstructing the plaintiffs' passage over the suit road and also from obstructing the flow of water through the pipe lines laid under the same.

3. The short facts of the written statement filed by the 1st defendant is that it is false to allege that the plaintiffs were irrigating their respective lands from their wells in the 3rd item of the suit property by means of pressure pipe lines laid under the lands of the defendants and others. It is also false to state that the suit road has been used as a mamul pathway for more than 40 years and that the plaintiffs have got easementary right over the road and the suit pipe lines. The defendants did not attempt to prevent the passage of the plaintiffs or cut the pipe lines. The written statement of the first defendant was adopted by defendants 2 to 4. The first defendant is having four brothers namely Pachaiappan, Thangarassu (2nd defendant), Rajamanickam (3rd defendant) and one sister Mari (4th defendant). Five years back the defendants, their brothers and sister have set apart a pathway of width 3 to



6 feet on the respective lands to reach their lands and houses. The pathway is not a continuous one. The said pathway reaches the vasals of the defendants and his family members and then proceed to the other vasals in front of their houses. The said pathway is not in existence now. The other brothers of the defendants who are not the parties to the suit, have obstructed the pathway by putting stones in the said pathway. The FMB and Adangal of these defendants their brothers and sisters will not show any existence of pathway. Except these defendants and their siblings no one has got any right over the said pathway. There is no pipeline running under the lands of the defendants and their siblings. The plaintiffs have got electric motors only before six years. Hence it is false to state that the PVC pipe lines are in use for more than 25 years. The 1st defendant and his siblings did not give any permission or assurances to the plaintiff to enjoy the pathway or to lay the pipelines. Even if there is any permission or license that was revoked by the first defendant and his siblings. There is no cause of action for the suit and hence it should be dismissed.

4. After the conclusion of the trial, the learned Trial Judge decreed the suit as prayed for. Aggrieved over that the defendants filed a first appeal before the district Court, Harur and the first appeal was also been dismissed. Hence this second appeal is filed. This appeal has been admitted on the following two substantial questions of law:

(1) Whether the claim for easement on an alleged public road is maintainable in law?

(2) Whether the Easement of necessity will arise if an alternate way is established, as per the Commissioner's Report -Ex-C1?

5. In suits of this nature, the report of the Commissioner who has visited the suit properties would be of much help. On the perusal of the Commissioner's Report- Ex-C1 and the Commissioner's rough plan /Ex-C2, it is seen that a pathway is running from across the defendants lands to the plaintiffs houses. The Commissioner has also observed the two wells belonging to the plaintiffs as 'Q' and 'S' in his rough plan Ex-C2. The Commissioner has also observed that a P.V.C. pipe of 2 to 3 inch diameter was running 3 feet below of the said pathway.

6. The Commissioner's report would also confirm the fact that the pipeline was disrupted at a point 'X' and that water was leaking out there. These essential features have been noticed by the learned trial Judge and he has come to the



conclusion that there was a pathway running across the land of the defendants and it reached the houses of the plaintiffs and that the pipeline has also been laid under the said pathway. However the learned counsel for the second appellant/defendant have submitted that the plaintiffs have claimed that there is a public road in the suit property and they have also claimed easementary rights over the same and hence they can not be accepted.

7. On perusal of the records it is seen that there is no public road running across the land of the defendants. But there is a pathway running on the lands of the defendants which was being used by the plaintiffs and others. PW.2, being a villager would have used the word "road" for the pathway and that alone will not make a pathway a public road. The poor or wrong choice of words adopted by PW.2 during his evidence can not be taken that the plaintiffs claim a public road. The pleadings of the plaintiff as seen from their plaint also confirms that they have not claimed that there is a public road. On the other hand they had claimed that they have a easementary right over the suit pathway. So what has to be essentially seen in this suit is whether there was a pathway in existence as alleged by the plaintiffs and whether they were in enjoyment of the same for the purpose of reaching their properties and whether they have laid pipelines through and under the pathway in order to take water from their wells and irrigated their lands.

8. Whenever, the issues involved in a suit have direct relevance to the physical features of the suit properties, then a Commissioner has to be appointed and his report should be sought for. The Commissioner's report plays a vital role to decide the disputes of this nature. In the case in hand also a Commissioner has been appointed and he has also filed a detailed report with rough plan by showing the physical features of the suit properties. In the plan of the commissioner, some lands of the plaintiffs are shown to be situated on the north-eastern side. The two wells belonging to the plaintiffs are shown in the Commissioner's plan as Q and S and they are situated on the southern side. If the plaintiffs have to use the said wells for irrigating their lands situated on the North East side of the plaintiffs property, they have to necessarily lay pipelines and take water through that only. No well is seen in the properties of the plaintiffs which is laying on the North - East side. These facts are clear from the report and plan of the Commissioner Ex-C1 and C2.



9. Though the Commissioner's report does not show that there was a public road, it is shown that there is a pathway running through the lands of the defendant and others and it reaches to the lands of the plaintiffs on the north eastern side. The very contention of the plaintiffs about the pathway is that the pathway is running across the lands of the defendant and the pipelines have been laid under the same. Since the defendants being the owners of the lands and that has been admitted by the first plaintiff in his evidence, they would be the dominant owners and the plaintiffs who claim right of usage over the same would be the servient owners. The plaintiffs have pleaded that the suit pathway is essential for their routine life as farmers and for the purpose of taking their men, cart and cattle. While deciding this kind of dispute, it is imperative on the part of the trial Court to frame a specific issue as to whether the plaintiffs have got an easementary right on the pathway.

10. Despite the learned Trial Judge has framed specific issues with regard to the existence of the pathway; the enjoyment of the plaintiffs over the same for more than 40 years and the presence of the pipelines under the path way, he omitted to frame a specific issue as to whether the plaintiff has got easementary right over the said pathway. However the judgment of the trial Court would show that the learned trial Judge has dealt at length on the point of easementary rights by making a special reference to the physical features of the suit properties as seen from the report and plan of the Commissioner.

11. The first appellate Court in its judgment has held that the appreciation of evidence done by the trial Court was correct. However on perusal of the judgment of the first appellate court it is seen that the learned Judge of the first appellate Court has simplified his job by just extracting the contents of the judgments of the trial court and completed his judgment.

12. The learned counsel for the Appellants submitted that the first appellate Court ought to have framed points for determination while appreciating the correctness of the Trial Court judgment on the basis of the grounds of appeal. Even while accepting the lower court findings and judgment, it is obligatory on the part of the first Appellate Court to frame points for consideration in the Appeal. Since the first appellate court being the last court on facts, it should have made an independent analysis of all the facts and materials available before it and then proceed to endorse its opinion.



The entire judgment of the first Appellate Court would show that no such exercise is done by the first appellate court. Since the appellants have claimed before the first Appellate Court the plaintiffs have not proved that they have an easementary right on the lands of the defendants and hence, the first Appellate Court should have framed a specific issue as to whether the plaintiffs have proved the easementary right in compliance of Order 41 Rule 31 of CPC.

13. The task done by the trial court seems to be better. Even though the trial court omitted to frame a specific issue on easement by incorporating the key words, it has dealt about the right of easement of the plaintiff in its discussion basing on the materials available before it and rendered findings.

14. The learned counsel for the appellant cited the decision reported in 2006 (3) SCC 224 in support of his contentions that the judgment delivered by the first appellate court is vitiated since it is not in compliance with the provision of Order 41 Rule 31 of CPC. For the purpose of convenience, the provision of Order 41 Rule 31 of CPC is extracted below:

"Order 41 Rule 31 CPC reads as follows:

"Contents, date and signature of judgment- The judgment of the Appellate court shall be in writing and shall state-

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

15. However the honorable Supreme Court has held in the judgement reported in (2006) 3 Supreme Court Cases 224 (G.Amalorpavam and others Vs R.C.Diocese of Madurai and Others) that the non compliance of the above provisions may not vitiate the judgment, if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered and that the second appellate court is in a position to ascertain the findings of the lower court. In the above judgement, the Supreme Court has relied its earlier judgments rendered in Girijanandini Devi and Ors. v. Bijendra Narain Choudhary (AIR 1967 SC 1124) and Santosh Hazari v. Purshottam Tiwari (Deceased) by Lrs. (2001 (3)



SCC 179) by extracting the key findings of those judgments as under:

"10. At this juncture it would be relevant to note what this Court said in *Girijanandini Devi and Ors. v. Bijendra Narain Choudhary* (AIR 1967 SC 1124). In para 12 it was noted as follows:

"It is not the duty of the appellate court when it agrees with the view of the Trial Court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the Trial Court. Expression of general agreement with reasons given by the Court decision of which is under appeal would ordinarily suffice."

11. The view was reiterated in *Santosh Hazari v. Purshottam Tiwari (Deceased)* by Lrs. (2001 (3) SCC 179). In para 15 it was held with reference to *Girijanandini Devi's* case (supra) as follows:

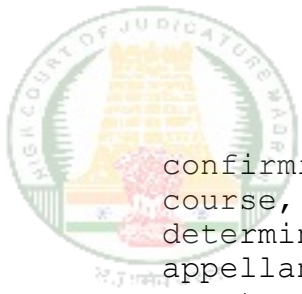
"The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (*Girijanandini Devi v. Bijendra Narain Choudhary* (AIR 1967 SC 1124)). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does



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not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (Madhusudan Das v. Narayanibai ((1983) 1 SCC 35 : AIR 1983 SC 114)). The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh (AIR 1951 SC 120) Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one."

16. If the judgment of the first appellate court read under the light of the above findings of the honorable Supreme Court, it would show that the first appellate court did not venture to make an independent analysis of the facts and circumstances of the case by framing specific points for determination while



confirming with the judgement of the trial court. In normal course, if the first appellate court fails to frame points for determination and if it caused prejudice to the interest of the appellant the matter would be remanded to the first appellate court with directions. But it has to be resorted on a case specific manner and hence it has to be seen whether the circumstances of this case requires such an approach.

17. This court being the second Appellate court can not render a finding on the basis of pure facts. However this court can not over look those facts which are required to be seen in order to answer the substantial questions of law raised in the second appeal. The facts as revealed with the help of the commissioner's report and other materials and discussed above would show that the plaintiffs have claimed only easementary right on the lands of the defendants. Further, it is neither pleaded by the defendants nor proved by them that the plaintiffs have got any other alternate path way to reach their lands on the north-eastern side and to take water from their wells lying on the southern side in order to irrigate their lands on the northern side. These facts have been well captured in the discussions made in the judgement of the trial court with the help of the commissioner's report, though specific issues have not been framed. And the first Appellate Court has also accepted the same. In view of the same, the substantial questions of law Nos. 1 and 2 themselves will not raise. And hence this matter need not be sent on remand for fresh appreciation by the first Appellate Court. Thus the substantial questions of law No.1 and 2 are answered against the Appellants.

In the result, this second Appeal is dismissed and the judgement and decree of the trial court and the first appellate courts are confirmed. No costs. The connected Miscellaneous Petitions if any are also closed.

s/d-

Assistant Registrar(CS-III)

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Sub-Assistant Registrar

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To

1. The Principal District Munsif Court, Harur
2. The Sub Court, Harur
3. The Section Officer, V.R. Section,
High Court, Madras.

+1 CC to Mr.V. Raghavachari, Advocate sr 10924.

S.A.No.450 of 2010

CA(CO)

SP(13/09/2021)