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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.06.2021

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

S.A.No.413 of 2021

Sellammal ... Appellant/Appellant/Plaintiff

Vs.

1. Chithanathan
2. Rayadurai
3. Mahalingam ... Respondents/Respondents/Defendants

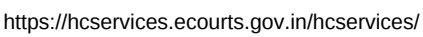
Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 to set aside the judgment and decree dated 16.03.2020 rendered in A.S.No.18 of 2019 on the file of the Subordinate Judge, Rasipuram confirming the decree and the judgment dated 02.01.2019 rendered in O.S.No.138 of 2015 on the file of the District Munsif, Rasipuram.

For Appellant : Mr.Ralph V. Manohar

JUDGMENT

Captioned second appeal arises out of a lis which is more than half a decade old as the original suit being O.S.No.138 of 2015 was presented in the 'District Munsif's Court, Rasipuram' (hereinafter 'trial Court' for the sake of brevity) on 15.09.2015.

2. The suit was filed by the appellant in captioned second appeal {as lone plaintiff} against three defendants (three respondents in captioned second appeal) seeking a declaration of easement by grant qua 'A B C D E' cart track appended to the plaint. For ease of reference and for better appreciation of this judgment, this Court deems it appropriate to scan and reproduce the sketch and the same is as follows:





3. In the aforementioned sketch, the property shown as P is plaintiff's property and property shown as D is defendants' property. The track shown as 'ABCDE' is the cart track in which declaration of easementary right by grant is claimed by the plaintiff. After full contest, trial Court dismissed the suit in and by decree dated 02.01.2019. Plaintiff carried the matter in appeal by way of a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity) vide A.S.No.18 of 2019 on the file of 'Subordinate Judge's Court, Rasipuram' ('first Appellate Court' for the sake of brevity) and first Appellate Court, after full contest, vide judgment and decree dated 16.03.2020 dismissed the appeal confirming the decree of the trial Court non-suiting the plaintiff. The plaintiff, who has been non-suited concurrently by the trial Court and the first Appellate Court, is now before this second appeal Court vide the captioned second appeal, which is obviously under Section 100 CPC.

4. Learned counsel for appellant in his endeavour to assail the judgments of trial Court and first Appellate Court made submissions, a summation of which is as follows:

a) The Courts below have non-suited the plaintiff only for non-compliance with Order VII Rule 3 of CPC ignoring the principle that it is a curable defect;

b) The Courts below have erred in proceeding on non-joinder principle as the defendants alone are objecting to the use of the 'ABCDE' cart track by the plaintiff;

and

c) The Courts below have referred to report of Advocate Commissioner whereas there is none and therefore, this would be a case of non-application of mind.

5. This Court carefully considered the submissions made by learned counsel besides carefully examining the case file that has been placed before this Court.

6. From the case file placed before this Court it comes to light that the plaintiff has predicated her prayer for declaration of easement by grant on one document and that is a gift settlement deed dated 25.03.2013 (Ex.A1), which this Court is informed was executed by her son in her favour. The description of the property in this Ex.A1 has been captured by the first Appellate Court in Paragraph 16 of its judgment which will be extracted and reproduced elsewhere infra in this judgment.



7. In the trial Court, plaintiff examined himself as PW1 and second defendant (Rayadurai) examined himself as DW1. Only three documents were marked on the side of plaintiff and they (as extracted and reproduced from trial Court judgment) are as follows:

'Plaintiff's side Exhibits:-

Ex.A1 - 25.03.2013 Gift Settlement deed (Certified copy)

Ex.A2 - 31.08.2015 Computerised Patta and Citta (Download copy)

Ex.A3 - ----- Rough plan (Original)'

8. There are no exhibits on the side of the defendants. Therefore, it is clear that the case of the plaintiff is predicated solely on Ex.A1, which is a gift settlement deed executed by her son. Trial Court has returned a finding that there is no mention about suit cart track in Ex.A1 and has also wrongly described Ex.A1 as a sale deed while this Court is informed that it is a gift settlement deed. However, the first Appellate Court which exercises jurisdiction under Section 96 of CPC is also a Court of fact albeit a last court of fact and the first Appellate Court in Paragraph 16 of its judgment has returned a factual finding that no other document has been filed by the plaintiff to prove that predecessor-in-title has granted easementary right qua 'ABCDE' cart track. The first Appellate Court also has examined Ex.A1 (sole document and sheet anchor of the plaintiff) and returned a finding that it has been broadly mentioned in generic terms as properties transferred along with easementary rights and there is no specific averments in this regard.

9. In this regard, Paragraphs 16 to 20 of the judgment of first Appellate Court articulate this aspect of the matter and make it clear as to how no document other than Ex.A1 has been filed and there is nothing to demonstrate that there is grant of easementary right by the owners of servient heritage. Learned counsel for appellant attempted to say that there is some recital in Ex.A1 touching upon the rights acquired by the plaintiff's son who is the donor/settlor qua Ex.A1, but that can hardly take the appellant any further in her campaign in this captioned second appeal as it has to be demonstrated that the owners of servient heritage have made a grant qua the cart track. Learned counsel submits that there are some predecessor documents qua plaintiff's son i.e, the donor/settlor. On a extreme demurrer, assuming this to be true, there is no explanation forthcoming as to why no recourse was taken under Order XLI Rule 27 CPC in the first Appellate Court. This Court has already observed supra that the first Appellate Court has captured the crux and gravamen of the lis and given its dispositive reasoning in Paragraphs 16 to 20 of its judgment.



This Court deems it appropriate to extract paragraphs 16 and 20 alone to avoid this judgment becoming verbose. Paragraphs 16 and 20 of the first Appellate Court judgment read as follows:

'16. The alleged gift deed is marked as Ex.A1, which reveals that a son of the plaintiff had executed the gift deed infavour of the plaintiff on 25.3.2013 and transfer rights over the lands in S.No.496/2, 496/3, 496/2 total extent of 4/92 acres. The plaintiff contended that in the settlement deed itself it is stated that the plaintiff is having easementary right over the ABCDE cart track. In the description of property it is stated that

“இதற்கு மாமூல்படியும், அனுபவப்படியும் முல்பத்திரங்கள்படியும் உண்டான ஆட்கள், கால்நடைகள், வண்டி, வாகனாதிகள் நவீனரக வாகனங்கள் முதலியவைகள் போகவர உண்டான தடபாத்தியமும் மற்றும் சகல பாத்திரங்களும் ஈஸ்மெண்ட் உரிமைகளும் ஆக இவைகள் பூராவும் இந்த தானசெட்டில்மெண்ட் பத்திரத்திற்கு சம்மந்தப்பட்டது. ”

By enlighten those description, the plaintiff pleaded that she is having usage rights over ABCDE cart track. Except the Ex.A1 no other document is filed by the plaintiff to prove that her predecessor had been granted usage right over the ABCDE cart track. On careful reading of the said document it reveals that it was commonly mentioned as the plaintiff is tranfered property along with easementary right. There is no specific averments seen as the plaintiff is having easementary right over the ABCDE portion of common cart track. As rightly pointed out by the learned counsel for the respondents that the plaintiff is claiming right on easement on grant and hence it is duty of the plaintiff to prove that the survinent owner of the lands in which the common track runs shall grant some right of usage through a registered document. The Ex.A1 is the document between the plaintiff and the donor. Though the plaintiff had contended that the predecessor and herself are using the ABCDE cart track from the date of gift settlement deed, there is no documentary evidence is produced by the plaintiff to prove that predecessor had been granted easement right over the suit cart track.

20. Considering the above facts and circumstances the plaintiff failed to establish that the dominant land owners in which the ABCDE track runs had granted the usage right to the plaintiff through a written document. Though the plaintiff had contended that she herself and her predecessor are using the track for long back, no evidence adduced to prove the same. The plaintiff failed to submit the survey numbers in which the suit track is running and the other owners of the land in which the suit track runs are also not added as a party



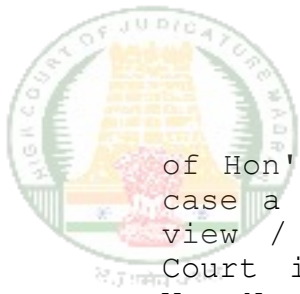
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to the proceedings. More over the plaintiff had not proved the cause of action as she pleaded. Therefore the trial Court had rightly concluded the suit as the plaintiff is not entitled for any relief as she prayed and answered the issues against the plaintiff. There is no discrepancy seen in the decision of the trial Court and this court is in a firm view that there is no necessity arises to interfere with the decision of the trial Court and hence the appeal fails.'

10. The aforementioned extract makes it clear that the trial Court and first Appellate Court have not non-suited the plaintiff merely on the ground of non-compliance with Order VII Rule 3 CPC, non-joinder and non-existent Advocate Commissioner's report as the court below has appreciated the exhibit before it and returned a finding that plaintiff has not proved grant qua easement by grant that is sought i.e., declaratory decree. Therefore, all three points urged by learned counsel for appellant does not find favour with this second appeal Court.

11. To put it differently, the trial Court and the first Appellate Court have sifted/appreciated the evidence before it, examined whether the plaintiff has discharged her burden and proved that she has got grant of easementary right qua 'ABCDE' cart track and have come to the conclusion that it has not been proved in any manner as plaintiff has merely filed Ex.A1 settlement deed executed by her son, all of which have been alluded to supra. Though the three points projected by learned counsel do not find favour with this Court, it is deemed appropriate to peruse the questions that have been proposed as substantial questions of law in the memorandum of grounds of second appeal. The four questions adumbrated in Paragraph 16 of the memorandum of grounds of second appeal reveal that they turn on a) necessity of a party to prove grant by owner's servient heritage, b) Order VII Rule 3 CPC; c) whether the plaintiff is bound to produce documents on the teeth of purported admission by defendants; and d) non-joinder i.e., joining parties who have not obstructed the plaintiff qua cart track.

12. This Court refrains itself from extracting and re-producing the substantial questions of law as propounded by protagonist of second appeal to avoid verbosity. Suffice to say that they do not qualify as substantial questions of law on the facts and circumstances of this case. In this regard, this Court reminds itself that the expression 'substantial question of law' occurring in Section 100 CPC has been elaborately explained by Hon'ble Courts in a long line of authorities starting from Sir Chunilal Mehta's case [Sir Chunilal V.Mehta and Sons Ltd., Vs. Century Spinning and Manufacturing Co. Ltd., reported in AIR 1962 SC 1314] rendered by a Constitution Bench



of Hon'ble Supreme Court. To be noted, in Sir Chunilal Mehta's case a Constitution Bench of Hon'ble Supreme Court affirmed the view / principles laid down by a Hon'ble Full Bench of this Court in Rimmalapudi Subba Rao's case [Rimmalapudi Subba Rao Vs. Noony Veeraju And Others reported in AIR 1959 Madras 969]. Suffice to say that this is the obtaining position of law as it has been reiterated by Hon'ble Supreme Court as recently as on 27.08.2020 in Nazir Mohamed case [Nazir Mohamed Vs. J.Kamala reported in 2020 SCC OnLine SC 676]. Most relevant paragraph in Nazir Ahmed case is Paragraph 29 and the same reads as follows:

'29. The principles for deciding when a question of law becomes a substantial question of law, have been enunciated by a Constitution Bench of this Court in Sir Chunilal v. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.1, where this Court held:-

"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." '

13. In aforementioned Nazir Ahmed case, Hon'ble Supreme Court has held that paramount overall consideration is the need for striking a judicious balance between indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. Thereafter, Hon'ble Supreme Court has held that second appeal jurisdiction of a High Court is confined to substantial question of law.

14. Though not directly turning on the submissions and dispositive reasoning, this Court deems it appropriate to notice from the sketch (scanned and reproduce supra) that the plaintiff does have access and 'ABCDE' cart track is not the only access to the plaintiff's property as there is an access track running North to South which leads to the public road. That this is a slightly longer or circuitous route is hardly a ground in seeking declaration qua an easement by grant.



15. In the light of narrative and dispositive reasoning thus far, this Court has no hesitation in coming to the conclusion that no substantial question of law arises in the case on hand. Hon'ble Supreme Court in recently decided Kirpa Ram case [Kirpa Ram Vs. Surendra Deo Gaur and others reported in 2020 SCC Online SC 935] has reaffirmed the position that a second appeal can be dismissed at the admission stage without formulation of substantial question/s of law if none arise/s in a given case.

Ergo, captioned second appeal is dismissed at the admission stage holding that no substantial question of law arises in the case on hand, considering the nature of the matter, considering the trajectory the matter has taken in the two Courts below and the nature of the arguments made before this Virtual Court, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

gpa
To

1. The Subordinate Judge,
Rasipuram.
2. The District Munsif,
Rasipuram.

+2cc to M/s.Ralph V.Manohar, Advocate Sr.29086

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