

41 **24.08.
2023**

Ct. No. 04

Ab

**SAT 48 of 2022
IA No. CAN 1 of 2022**

**Jharna Banik and another
Vs.
Jagabandhu Roy Chowdhury.**

**Mr. Sounak Bhattacharyya,
Mr. Sounak Mandal,
Mr. Abhirup Halder.**

... for the appellants.

The defendants/appellants filed the instant second appeal assailing the concurrent finding of facts returned by both the Courts below on the ground that there has been a misconstruction of the language used in the sale deeds by which the defendants/appellants purchased the respective properties and, therefore, it involves the substantial question of law.

It admits no ambiguity in our mind that the finding made on the basis of an interpretation of a document if appears to be perverse, involves substantial question of law to be decided by the High Court under Section 100 of the Code of Civil Procedure.

Admittedly, the plaintiff/respondent is a tenant in respect of a property described in Schedule-A to the plaint under the defendants/appellants. The dispute hovers around the common passage comprised in Schedule-B to the plaint, which, according to the plaintiff/respondent, is always regarded as common passage for ingress and egress not only to the tenanted portion but also to another saw mill belonging to it situated in an adjacent land.

A suit was filed alleging that the defendants/appellants have created an obstruction in free ingress and egress to the common passage and, in fact, denied the right to use the said common passage, which, in fact, also used by the public at large. The

defendants/appellants founded their defence on the basis of the sale deeds executed in their favour by the admitted owner who took a defence that the said deeds do not envisage the existence of a common passage and, therefore, a person being a tenant cannot assert that he would use and utilize the property exclusively owned by the defendants/appellants in the garb of a common passage.

The Commission was held in the suit and the Commissioner submitted the report, which was never challenged by the defendants/appellants by filing an application taking exception thereto. Importantly, the defendants/appellants did not come up with the sale deeds, as it appears that the first witness of the plaintiff/respondent tendered the certified copy of the sale deeds executed in favour of the defendants/appellants in support of the contention that there is a reflection of a common passage in both the sale deeds, which were exhibited in the said suit.

A point is sought to be taken in the instant appeal that the Court cannot solely rely upon the report of the Commissioner filed in the said suit while delivering a judgment, as such report cannot be said to be sacrosanct for all purposes. There is no quarrel to the point sought to be agitated before us in this regard as the report is merely an opinion expressed by the Commissioner and it is a paramount duty of the Court to decide the issues based upon the other evidence forthcoming from the evidence of the respective parties. That itself does not efface the evidentiary value of the report provided the findings recorded therein are corroborated by the other evidence.

Both the Courts found from the respective sale deeds the reference of a common passage and arrived at the conclusion that even the Commissioner during inspection found the existence of a common passage meant for the purpose of ingress and egress and,

therefore, it cannot be said that the entire judgment of both the Courts below was founded upon the report of the Commissioner only.

However, learned Advocate for the defendants/appellants is very much critical on the recital of the aforesaid deeds and sought to contend that the reference of the common passage has to be construed in the perspective of its existence adjacent to the plot purchased by his clients and both the Courts below have wrongly held that the common passage exists on the western side of the Schedule-A property.

We had an occasion to peruse both the sale deeds handed over to us by the learned Advocate for the defendants/appellants, which are marked as Exhibits in the said suit. There is no ambiguity that there is a reference of a common passage in the said deeds, but we find the discrepancy in the boundary depicted therein and the map annexed thereto.

The recital is explicit, clear and lucid to the extent that the vendor of the defendants/appellants while divesting their right, title and interest in respect of the property has also transferred not only the easementary right but also right to use the common passage. Both the sale deeds are executed at the gap of two months and the discrepancy as noted above is eminent and evident therefrom. The common thread, which can be seen from the aforesaid two deeds, is that there is an existence of a common passage, which is intended to be used in common with the others, although there is no indication relating to its exact position of its existence therein.

The Commissioner found that there is a common passage leading from the main road up to the river Hooghly accessible by not only the plaintiff/respondent but also by the defendants/appellants to their respective factory sheds situated either within the subject plot or beyond the peripheral thereof. The trial court further found from the LR Record of Rights being Exhibit-3

series standing in the name of the predecessor in interest of the vendor of the defendants/appellants in respect of the Dag No. 2, 90 and 91, which are not the suit plot shown to be comprised in Dag No. 90 and the nature of the land has shown as 'sali' land meant to be used for public at large for ferrying boats.

The aforesaid documentary evidence is corroborated by a report of the Commissioner and, therefore, the finding of the trial court cannot be said to be solely based upon the said report. Though it is sought to be contended before us that there is no existence of a passage but we find that the first witness of the defendants/appellants in his affidavit as to examination in chief admitted the existence of a passage but claimed to be a private passage exclusively used by him.

In view of the stand taken by the defendants/appellants, both the Courts have not committed any error in arriving at the finding that there exists the passage and whether the same is private or the common has been held on the basis of the interpreting the sale deeds executed in favour of the defendants/appellants, which also cannot be said to be perverse and/or misplaced.

We, thus, do not find that the above point raised before us involves substantial question of law.

Accordingly, the appeal and the connected application being CAN 1 of 2022 is dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

(Harish Tandon, J.)

(Ajay Kumar Gupta, J.)

