

(2014) 11 MAD CK 0321

In the Madras High Court

Case No : Second Appeal No. 55 of 2008 and M.P. No. 1 of 2008

G. Kasi Gounder

APPELLANT

Vs

Saravanan

RESPONDENT

Date of Decision : 27-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1

Citation : (2014) 11 MAD CK 0321

Hon'ble Judges : R. Mahadevan, J

Bench : Single Bench

Judgement

1. This second appeal has been filed by the plaintiff against the judgment and decree dated 19.06.2007 passed by the first appellate court in A.S

No. 6 of 2005.

2. The case of the plaintiff is that the government poramboke street running adjacent to his property from East to West is a public street and that

the defendants had no right to prevent the plaintiff from using the same. The specific case of the plaintiff is that he has been using the street to carry

fertilizers through lorry or tractor or bullock carts. Aggrieved by the interference of the defendants, the plaintiff had filed the suit in O.S. No.604 of

1997 seeking permanent injunction restraining the defendants, their men, agents, servants or their representatives from interfering with the plaintiff's

usage and enjoyment of the schedule mentioned property as street either by erecting obstruction or in any other manner. The defendants resisted

the suit claiming that the plaintiff has manipulated the records and that the alleged street is not a government poramboke. After hearing the parties,

considering the report of the advocate commissioner and oral as well as documentary evidence, the suit was decreed.

3. Aggrieved, the first and second defendants filed the appeal in A.S No. 6 of 2005 before the Subordinate Judge, Gudiyatham. After hearing the

parties, the first appellate court dismissed the appeal on 26.06.2006. The first and second defendants, filed a review application under Order 47

Rule 1 of CPC contending that though the appellate court had recorded the width of the street to be only 8 feet has dismissed the appeal and

therefore, warranted reconsideration of the entire case as it is an error apparent on the face of the record. After hearing the parties, the lower

appellate court re-appreciated the entire case, allowed the application for review and modified the judgment passed by it earlier and partly allowed

the appeal holding that the plaintiff is not entitled to take tractors or bullock carts to his premises. Aggrieved, the present second appeal has been

filed.

4. At the time of admission, the following substantial questions of law have been framed;

1. Whether the judgment of the first appellate judge granting the present relief which is beyond the scope of the suit, overlooking the revenue

records exhibited in the suit can be sustained ?

2. Whether the first appellate court was right modifying the decree earlier passed on the basis of a review petition particularly when there was no

error apparent on the face of the record?

3. Whether the first appellate court was right in entertaining an appeal in disguise in the form of a review petition?

5. The learned counsel for the appellant vehemently contended that the first appellate court had earlier dismissed the appeal rightly. Again, without

any error apparent on the face of the record, the entire matter was re-heard and the earlier order was modified and the appeal has been partly

allowed contrary to Order XLVII Rule 1 of C.P.C. The learned counsel further contended that the first appellate court has travelled beyond the

scope of the suit and held that the plaintiff is not entitled to take the tractors, lorries, etc to his property. The learned counsel further contended that

the contention of the defendants that the property is a lane and the plaintiff had never used any vehicle in the suit property was rejected by the trial

court. Under the guise of review, the first appellate court cannot exhibit change of opinion and therefore, sought setting aside of the judgment and

decree dated 19.06.2007 modifying the judgment in A.S No. 6 of 2005. To substantiate his claim, the learned counsel relied on the Judgment of

the Hon"ble Apex Court reported in Inderchand Jain (D) through L.Rs. Vs. Motilal (D) through L.Rs., and prayed for allowing the appeal.

6. Despite several opportunities, the learned counsel for the respondents has not appeared and presented his case. Therefore, this court has

decided to pass orders by perusing the records. Heard the learned counsel for the appellant and perused the entire records.

7. Upon perusal of the question of law framed, this court is of the opinion that the substantial questions of law 2 and 3 are interlinked inasmuch

without error apparent on the face of the record, the first appellate Judge re-heard the matter under the guise of review and modified the decree

passed by it earlier. Hence the substantial questions of law Nos. 2 and 3 are taken up together first. On perusal of the judgment and decree dated

26.06.2006, this court finds that the first appellate court had considered the pleas of the defendants that the suit property is only a lane and the

vehicles were never used. Upon considering the oral as well as documentary evidence, the first appellate court had negated the contention by

giving findings in the judgment as under:

11. From the evidence of D.W.3 and P.Ws.1 and 2, I find that the plaintiff and the public were using the suit property and also Ex.A.3, Ex.A.4,

Ex. A.5, Ex.B.6 and Ex.B.8 show that the suit property is a lane in Government Poramboke. Whether it is called lane or a street, I find it is a lane.

One may call it lane the other may call it a street. It makes no difference.

12. Both the learned counsels vehemently argued, plaintiff's counsel claiming it as street, defendant's counsel claiming it as a lane. It makes no

difference. It being a village. I say that the suit property is a lane, being enjoyed by the plaintiff, defendants and public. In respect of usage, plaintiff

claims that he is taking tractor, lorry, bullock cart, Defendants denied. When the plaintiff has got right to use the suit property as a lane, he can take

any vehicle provided it passes through this suit property. Due to development, the bullock carts have disappeared and tractors have come. The

defendant cannot oppose the plaintiff taking a tractor or a lorry provided it does not affect the defendants property on both sides of the suit

property. Hence, find that the suit property is only a lane not a street and this

point is answered accordingly.

Point No. 2:

13. The learned District Munsif gave a finding it is a street. In view of my finding on Point No. 1, that the suit property is a lane and plaintiff,

defendant and public are using the lane, I find that the defendants have no right to prevent plaintiff from using the suit property in taking vehicles or

persons using. I find that the respondent/ plaintiff is entitled to permanent injunction against the appellant/defendants. Hence, I

find this point in favour of the respondent/plaintiff.

Point No. 3:

14. In the result, appeal is dismissed. Decree and Judgment of the lower court in O.S. No 604/97 dated 10.09.2004 is confirmed. Both parties do

bear their cost.

8. Shockingly, without any error apparent on the face of the records, the first appellate court taking shelter under the principle, in the interest of

justice, has modified its earlier judgment contrary to the oral and documentary evidence. The scope for review as enshrined in Order XLVII Rule 1

is limited. This court finds that the first appellate has erred in modifying the judgment passed earlier on mere change of opinion in the same set of

contentions.

9. In the Judgment reported in Kamlesh Verma Vs. Mayawati and Others, , the Hon''ble Apex Court, after examining various Judgments passed

earlier, has held as follows

12. This Court has repeatedly held in various Judgments that the jurisdiction and scope of review is not that of an appeal and it can be entertained

only there is an error apparent on the face of record. A mere repetition through different counsel, of old and overruled arguments, a second trip

over ineffectually covered grounds or minor mistakes of inconsequential import are obviously insufficient.....

In the above Judgment, the Hon''ble Apex Court has laid down the principles as under:

19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII Rule 1 of CPC. In

review jurisdiction, mere disagreement with the view of the Judgment cannot be

the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned Judgment in the guise that an alternative view is possible under the review jurisdiction. Summary of the principles:

20. Thus, in view of the above, the following grounds of review are maintainable, as stipulated by the statute:

20.1 When the review will be maintainable:-

- (i). Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;
- (ii). Mistake or error apparent on the face of record;
- (iii). Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in AIR 1922 112 (Privy Council) and approved by this Court in *Moran Mar*

Basselios Catholicos and Another Vs. The Most Rev. Mar Poulouse Athanasius and Others, , to mean, "a reason sufficient on grounds at least

analogous to those specified in the rule". The same principles have been reiterated in *Union of India (UOI) Vs. Sandur Manganese and Iron Ores*

Ltd. and Others, . When the review will not be maintainable:-

- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.
- (ii). Minor mistakes of inconsequential import.
- (iii). Review proceedings cannot be equated with the original hearing of the case.
- (iv). Review is not maintainable, unless the material error, manifest on the face of the order, undermine its soundness or results in miscarriage of justice.
- (v). A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.
- (vi). The mere possibility of two views on the subject cannot be a ground for review.
- (vii). The error apparent on the face of the record should not be an error which has to be fished out and searched.
- (viii). The appreciation of evidence on record is fully within the domain of the appellate Court, it cannot be permitted to be advanced in the review

petition.

(ix). Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

10. The impugned judgment of the first appellate court would squarely fall within the second limb. There was no error apparent on the face of the

record in the earlier judgment dated 26.06.2006. The findings are specific and on appreciation of oral and documentary evidence. No new

evidence was produced. The contentions raised in the review application were already raised and argued by the defendants. The same was also

considered and negatived by the first appellate court in the first instance. Now by change of opinion, the earlier order cannot be modified under the

guise of review. What has to be decided by way of appeal cannot be re-looked under the guise of review. The first appellate court has given a

specific finding that it does not matter whether it is a lane or street and has also earlier rightly held that the suit property has been used by the

plaintiff, defendants and public implying it is a public lane. Once it is declared as public lane or street, the right to use cannot be restricted. Having

given a specific finding that the plaintiff is entitled to take the tractors, lorries, etc, the first appellate court cannot modify the same under the guise of

review. Therefore, this court is of the view that the first appellate court committed a grave error in entertaining the application of review. The

substantial questions of law 2 and 3 are answered in favour of the appellant.

11. With regard to the first substantial question of law framed by this court, this court has already held that the application for review ought not to

have been entertained by the first appellate court. The first appellate court, initially has rightly held that the suit property has been used by the

plaintiff and the general public as well. As held by it earlier, irrespective of being a lane or street, the plaintiff is entitled to use the suit property not

only as a pathway but also for taking tractors, lorries or bullock carts. The plaintiff has filed the suit for permanent injunction. The reasons for the

existence of the steps has also been explained by the trial court and at the first instance by the first appellate court. As stated earlier, the first

appellate court having appreciated the same evidence and held that once it is established that the plaintiff has got a right, the plaintiff is entitled to

take any vehicle through the suit property, cannot now modify and give a

completely different decision on change of opinion. The first appellate court, while initially passing the original judgment on 26.06.2006, observed that the trial court has gone beyond the scope and enquired into the correctness of the alteration in the revenue records. However, under the guise of review, by changing its opinion on same set of facts, evidence and arguments, the first appellate court itself has gone beyond the scope of the suit and held that the appellant is not entitled to take the tractors, lorries or bullock carts through the suit property, when the same was never agitated as a separate issue. The entire defence of the defendants stood on the premise that the suit property is not a public street and the core issue all along before the trial as well as the first appellate court has been whether the suit property is a public street or not ?. Once the suit property is declared as public lane or street, there cannot be any bar to ply vehicles on the same. The defendants have not produced any evidence to disprove the claim and evidence let in on behalf of the plaintiff that vehicles were operated in the suit property. In Ex.A2, the Tehsildar has clearly stated that the house patta including a portion of the street was granted and hence by that proceedings, the original position was being restored. The field map of the village marked as Ex.A5 also reflected that the suit property was only a street. The first appellate court termed the suit property as lane on the basis that the alteration in the revenue records were made without notice to the defendants. From the evidence of DW2, it can be seen that the defendants were aware that survey was conducted by the revenue officials before alterations. If the defendants were aggrieved by the alteration in the revenue records, as rightly held by the Trial court, they could have very well approached the Court or the Authorities under the Tamil Nadu Survey and Boundaries Act. Unless the correctness of the alteration is testified in the manner known to law, the same would stand. Hence, this court is of the view that the first appellate court has travelled beyond the scope of the suit to hold that the suit property is a lane and the plaintiff cannot take tractors, lorries, etc., through the suit property, which, in the opinion of this court is unsustainable. As held by this court above, irrespective of whether the suit property is a lane or street, as long as it is public lane or street, the plaintiff will have the right to ply tractors, lorries or bullock carts through the same. The first question of law is also decided in

favour of the appellant/plaintiff.

12. In the result, the order and decreetal order dated 19.06.2007 in I.A No. 4 of 2007 modifying the judgment and decree in 16 A.S. No 6 of

2005 is set aside. The original judgment and decree passed on 26.06.2006 in A.S. No 6 of 2005 is restored. The second appeal is allowed. No

costs. Consequently, connected Miscellaneous Petition is closed.