**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**

**Hero Vinoth (Minor) Vs. Seshammal**

**Hero Vinoth (Minor) Vs. Seshammal**

**SooperKanoon Citation** : sooperkanoon.com/675466

**Court** : Supreme Court of India

**Decided On :** May-08-2006

**Reported in** : AIR2006SC2234; 2006(4)ALD28(SC); 2006(4)AWC3299(SC); (SCSuppl)2006(3)CHN165; 102(2006)CLT393(SC); 2006(4)CTC79; JT2006(5)SC436; (2006)3MLJ121(SC); 2007MPLJ17(SC); 2006(5)SC; (2006) 5 SCC 545; 2006:INSC:305; MANU/SC/2774/2006

**Judge** : Arijit Pasayat and; R.V. Raveendran, JJ.

**Acts** : Code of Civil Procedure (CPC) , 1908 - Sections 100 and 109; ;Code of Civil Procedure (CPC) (Amendment) Act, 1973 - Sections 100; ;Indian Easement Act, 1882 - Sections 13 and 41; ;Constitution of India - Article 133(1)

**Appeal No.** : Civil Appeal No. 4715 of 2000

**Appellant** : Hero Vinoth (Minor)

**Respondent** : Seshammal

**Advocate for Def.** : V. Prabhakar, ; Ashok K. Sadhu Khan, ; Ramjee Prasad an

**Advocate for Pet/Ap.** : K.K. Mani,; K.B. Sandeep,; Mayur R. Shah and;

**Disposition** : Appeal dismissed

**Prior history** : From the Judgment/Order dated 30.11.1999 of the High Court of Judicature at Madras in Second Appeal No. 75 of 1998

**Judgement** :

**Arijit Pasayat, J.**

1. Appellant calls in question legality of the judgment rendered by a learned Single Judge of the Madras High Court allowing the Second Appeal filed by the defendant i.e. respondent herein under Section 100 of the Code of Civil Procedure, 1908 (in short 'CPC').

2. Material facts in a nutshell are as follows:

A suit was filed by the appellant as plaintiff for permanent prohibitory injunction to restrain the defendant from causing obstruction in plaintiff putting up compound wall in his portion of property bearing R.S. No. 418/5, South Padari Street, Seerkazi Town along the 'GH' line in the rough plan attached to the plaint.

3. A Partition deed dated 23.11.1950 was executed among five brothers; Narayanaswami, Parangusa Chettiar, Purushothaman Chettiar, Radhakrishnan Chettiar and Aravamutha Chettiar. Under the said partition, 'C' Schedule items were allotted to Purushothaman Chettiar and 'E' schedule items were allotted to Aravamutha Chettiar. Under the said partition, a portion of property No. 418/5, South Padari Street, Seerkazi measuring 19'6' + 22'6' x 160'/2 was allotted to Purushothaman Chettiar and another portion to the east thereof measuring 22'6' x 160' was allotted to the share Aravamutha Chettiar. On the death of Aravamutha Chettiar, his portion of R.S. No. 418/5 was purchased by plaintiff from his legal heir. Defendant is the widow of Purushothaman Chettiar and her property is situated on the western side of plaintiff's property, which was originally allotted to Aravamutha Chettiar.

4. According to plaintiff, he is entitled to enclose entire property and defendant has no right of access to the backyard of her premises, through the passage (lane) situated in the eastern extremity of plaintiff's property and the backyard of plaintiff's property. Defendant was causing obstruction in the construction of compound wall by him on the 'GH' line and the same was to be prevented by a decree of permanent prohibitory injunction. According to plaintiff, the defendant would reach

her backyard through her main house situated in the front side of the property and, therefore, she was not entitled to claim any right of way through his property.

5. Defendant did not dispute the ownership of plaintiff over the property which was originally allotted to Aravamutha Chettiar and subsequently purchased by plaintiff. Her stand was that she has a right of way in terms of the partition deed and if construction is put on the entire 'GH' line, her right of way will be obstructed. She contended that plaintiff if at all entitled to construct any compound wall, should not cause any obstruction to her right to way granted under the Partition deed.

6. Trial Court took oral and documentary evidence and came to the conclusion that plaintiff is entitled to succeed. Trial court was of the view that the right of way provided to Purushothaman Chettiar (defendant's husband) under the partition deed was an easement of necessity and when appellant has got other access situated on the northern side the necessity has ceased to exist under Section 41 of the Indian Easement Act, 1882 (in short the 'Act') and consequently, plaintiff is entitled to put up construction as prayed for.

7. Against the said decision of trial court, defendant- respondent preferred appeal as A.S. 98 of 1996 on the file of Additional Sub Judge, Mayiladuthurai, but without success.

8. In the second appeal filed by the defendant-respondent, the following questions were formulated as substantial questions of law arising for consideration:

(a) Whether the courts below are right in giving a finding regarding extinguishment of easementary right without any pleading or evidence regarding the same? Whether the courts below are justified in presuming extinguishment when there is no pleading or evidence to what effect?

(b) Whether the courts below are right in stating that to prove easement by prescription, it is necessary to show the existence of easement by necessity is a condition precedent to plead and prove easement by prescription?

(c) Whether the courts below are erred in stating that the dominant tenement owner's right over servient tenement will get extinguished when the servient

tenement's ownership transferred to another person by way of sale by servient owner?

(d) Whether the courts below are correct in stating that the easement created got extinguished when there is no change in physical features of the property covered render that easement right as useless or unnecessary?

9. The High Court noted that the questions which need consideration were the questions a & d. The High Court found that the approach of the Trial court and the first appellate court were clearly erroneous as they failed to distinguish between the easement of necessity and an easement acquired by grant. Considering the relevant clause in the Partition deed it was held that the right of way given was one of grant and not an easement of necessity. Accordingly the Second Appeal was allowed and the plaintiff's suit was dismissed.

10. In support of the appeal learned Counsel for the appellant submitted that the parameters of Section 100, CPC were not kept in view by the High Court. It was also contended that as there was no specific pleading regarding the easement by grant in the written statement, the High Court could not have decided the matter on that basis.

11. Learned counsel for the respondent on the other hand submitted that the reading of the relevant clause leaves no manner of doubt that the right flowing from the relevant portion of the partition deed was one of grant and not an easement of necessity.

12. We shall first deal with the question relating to jurisdiction of the High Court to interfere with the concurrent findings of fact. Reference was made by learned Counsel for the appellant to Chandra Bhan v. Pamma Bai and Anr. : (2002)9SCC565 Sakhahari Parwatrao Karahale and Anr. v. Bhima shankar Parwatrao Karahale : (2002)9SCC608 . So far as the first decision is concerned, in view of the factual findings recorded by the lower Court and the first Appellate Court it was held that interference with the concurrent findings of fact are not justified. The question related to possession and two Courts primarily considering factual position had decided the question of possession. In that background, this

Court observed that jurisdiction under Section 100 CPC should not have been exercised. So far as the second decision is concerned, the position was almost similar and it was held that findings contrary to concurrent findings of lower Courts and having no basis either in pleadings, issues framed or in questions actually adjudicated upon by any of the lower Courts cannot be sustained. That decision also does not help the appellant in any manner as the factual scenario is totally different in the present case.

13. Though as rightly contended by learned Counsel for the appellant the scope for interference with concurrent findings of fact while exercising jurisdiction under Section 100 CPC is very limited, and re-appreciation of evidence is not permissible where the trial Court and/or the first Appellate Court misdirected themselves in appreciating the question of law or placed the onus on the wrong party certainly there is a scope for interference under Section 100 CPC after formulating a substantial question of law.

14. As was noted in Yadarao Dajiba Shrawane (dead) by Lrs. v. Nanilal Harakchand Shah (dead) and Ors. : AIR 2002 SC2849 if the judgments of the trial Court and the first Appellate Court are based on miss interpretation of the documentary evidence or consideration of inadmissible evidence or ignoring material evidence or on a finding of fact has ignored admissions or concession made by witnesses or parties, the High Court can interfere in appeal.

15. In Neelakantan and Ors. v. Malika Begum : AIR 2002 SC827 it was held that findings of fact recorded must be set aside where the finding has no basis in any legal evidence on record or is based on a misreading of evidence or suffers from any legal infirmity which materially prejudices the case of one of the parties. (See: Krishna Mohan Kul alias Nani Charan Kul and Anr. v. Pratima Maity and Ors. : AIR 2003 SC4351 ).

16. It is now well settled that an inference of fact from a document is a question of fact. But the legal effect of the terms or a term of a document is a question of law. Construction of a document involving the application of a principle of law, is a question of law. Therefore, when there is a misconstruction of a document or wrong application of a principle of law while interpreting a document, it is open to

interference under Section 100 CPC. If a document creating an easement by grant is construed as an 'easement of necessity' thereby materially affecting the decision in the case, certainly it gives rise to a substantial question of law.

17. After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. The proviso to the section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it with the object of ensuring that no injustice is done to the litigant where such a question was not formulated at the time of admission either by mistake or by inadvertence.

18. It has been noted time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 of the CPC. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section in several cases, the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add or to enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts will not be disturbed by the High Court in exercise of the powers under this section. Further, a substantial question of law has to be distinguished from a substantial question of fact. This Court in Sir Chunilal V.

Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. : AIR 1962 SC1314 held that:

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.

19. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.

20. The question of law raised will not be considered as a substantial question of law, if it stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court. Where the facts required for a point of law have not been pleaded, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. There mere appreciation of facts, the documentary evidence or the meaning of

entries and the contents of the documents cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the fact appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in Reserve Bank of India v. Ramkrishna Govind Morey : AIR 1976 SC830 held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference.(See: Kondiba Dogadu Kadam v. Savitribai Sopan Gujar and Ors. : [1999]2SCR728 ).

21. The phrase 'substantial question of law', as occurring in the amended Section 100 of the CPC is not defined in the Code. The word substantial, as qualifying 'question of law', means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of 'substantial question of law' by suffixing the words 'of general importance' as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. T. Ram Ditta , the phrase 'substantial question of law' as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In Sri Chunilal's case (supra), the Constitution Bench expressed agreement with the following view taken by a full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju : AIR1951 Mad969 :

When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a

substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to be particular facts of the case it would not be a substantial question of law.

22. This Court laid down the following test as proper test, for determining whether a question of law raised in the case is substantial

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.

23. In Dy. Commnr. Hardoi v. Rama Krishna Narain : AIR 1953 SC521 also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to a certificate under (the then) Section 100 of the CPC.

24. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall

consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See: Santosh Hazari v. Purushottam Tiwari (deceased) by Lrs. : [2001]251ITR84(SC) .

25. The principles relating to Section 100 CPC, relevant for this case, may be summerized thus:-

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the

evidence, taken as a whole, is not reasonably capable of supporting the finding.

26. In the case at hand the High Court found that the approach of the trial court and the first appellate court was erroneous inasmuch as they proceeded on the basis as if it is a case of easement of necessity. Had the trial court and the first appellate court considered the evidence in the light of the respective stands of the parties and then concluded one way or the other, the position would have been different. When the approach was fundamentally wrong the High Court cannot be faulted for having gone into the question as to what was the proved intention of the party as culled out from the Partition deed. The relevant (translation) portion reads as follows:

Aravumuda Chettiar commonly enjoy the well situate on the portion allotted to Purushottama Chettiar, likewise Purushothama Chettiar commonly enjoy the lane situate on the portion allotted to Aravumuda Chettiar. Well is the exclusive property of Purushothama Chettiar and Lane is the exclusive property of Aravumuda Chettiar.

27. Though an attempt was made by learned Counsel for the appellant to contend that the quoted portion was only the preamble and not the intention of the parties, the same is clearly untenable. Earlier to the quoted portion it has been noted as follows:

As per the above arrangement we decided to enter into the Partition deed and hence we are writing this Partition deed. We should take possession of our respective shares and enjoy the same uninterruptedly for ever.

Therefore, there is no manner of doubt that the intention was clear that it was a grant and not an easement of necessity which could be extinguished.

28. The question whether an easement is one acquired by grant (as contrasted from an easement of necessity) does not depend upon absolute necessity of it. It is the nature of the acquisition that is relevant. Many easements acquired by grant may be absolutely necessary for the enjoyment of the dominant tenement in the sense that it cannot be enjoyed at all without it. That may be the reason for the

grant also. But easement of grant is a matter of contract between the parties. In the matter of grant the parties are governed by the terms of the grant and not anything else. Easement of necessity and quasi easement are dealt with in Section 13 of the Act. The grant may be express or even by necessary implication. In either case it will not amount to an easement of necessity under Section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Any how the scope of the grant could be determined by the terms of the grant between the parties alone. When there is nothing in the term of the grant in this case that it was to continue only until such time as the necessity was absolute. In fact even at the time it was granted, it was not one of necessity. If it is a permanent arrangement uncontrolled by any condition, that permanency in user must be recognized and the servient tenement will be recognized and the servient tenement will be permanently burdened with that disability. Such a right does not arise under the legal implication of Section 13 nor is it extinguished by the statutory provision under Section 41 of the Act which is applicable only to easement of necessity arising under Section 13.

29. An easement by grant does not get extinguished under Section 41 of the Act which relates to an easement of necessity. An easement of necessity is one which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternate access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily recognized in Section 41. Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant and Section 41 is not applicable in such case.

30. Above being the position, the High Court was right in holding that the parties clearly provided for a right of access to the backyard of the defendant's house when the Partition deed was executed and shares were allotted to various sharers taking into account various factors and it is a matter of contractual arrangement between them. In such a contract if a right of way is provided to a particular sharer, it cannot be extinguished merely because such sharer has other alternative way. The High Court's reasoning and conclusions do not suffer from any infirmity to warrant interference.

The appeal is accordingly dismissed. No costs.

**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**