2023:APHC:18765

HIGH COURT OF ANDHRA PRADESH :: AMARAVATI

+ SECOND APPEAL NO.372 OF 2009

AND

CIVIL REVISION PETITION No.153 of 2019

SA No.372 of 2009

Between:

Marisetti Nageswara Rao, S/o Veeraiah

... Appellant

And

$ Lokam Venkateswara Rao (died)
2. Lokam Syama Surndara Rao, S/o. Venkateswar Rao
Aged about 44 years, Hindu, r/o. Manchikalapudi
Village, Duggirala Mandal, Guntur District (2nd plaintiff)
And 6 others.

.... Respondents

JUDGMENT PRONOUNCED ON **14.06.2023**

THE HON'BLE DR.JUSTICE K. MANMADHA RAO

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? - Yes -
2. Whether the copies of judgment may be marked to Law Reporters/Journals - Yes -
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? - Yes – -

DR.JUSTICE K. MANMADHA RAO

* **THE HON'BLE DR.JUSTICE K. MANMADHA RAO**

+ SECOND APPEAL NO.372 OF 2009

AND

CIVIL REVISION PETITION No.153 of 2019

% **14.06.2023**

SA No.372 of 2009

Between :

Digumarthi Suresh Babu, S/o Yanadi Rao

... Petitioner

And

$ B.A.S. Granites, Kurnool,
Rep. by its Managing Partner,
Boggavarapu Venkata Subba Rao,
S/o. Subbarayudu, aged about 67 years
R/o Nehru Nagar, Kurnool and 17 others.

.... Respondents

! **Counsel for the Petitioner** : Sri N. Sriram Murthy

^Counsel for Respondents: Sri A.S.C. Bose

<Gist :

>Head Note:

? Cases referred:

1. AIR 2017 SC 4472
2. AIR 2014 SC 937
3. AIR 2009 SC 1103
4. 2015 (4) ALD 546
5. 2020 AIR (Mad) 72
6. 2020 AIR (Mad) 237
7. AIR 1987 Mad 102
8. (2022) 10 Supreme Court Cases 281
9. (2019) 8 Supreme Court Cases 637
10. AIR 1961 Supreme Court 1821
11. 2022 (6) ALT 321 (S.B)

HON'BLE DR. JUSTICE K. MANMADHA RAO

SECOND APPEAL No.372 of 2009
And
CIVIL REVISION PETITION No.153 of 2019

COMMON JUDGMENT:

As the issue involved in both the cases is one and the same, they are being taken up for hearing as well as disposed of by way of this Common judgment.

2. Second Appeal No.372 of 2009 is filed by the appellant/1st defendant, aggrieved by the judgment and decree dated 25.02.2009 made in A.S.No.1 of 2005 on the file of the Court of Principal Senior Civil Judge, Tenali, dismissing the Appeal filed by the appellant and 7th respondent/2nd defendant by confirming the decree and judgment dated 24.11.2004 made in A.S.No.451 of 2001 on the file of Principal Junior Civil Judge, Tenali directing the plaintiffs declaring that ABCD channel is a joint channel from AD point and till Northern point towards BC side and upto the Northern boundary of the land of 1st plaintiff comprising in D.No.332/2 as shown in the plaint plan and granting permanent injunction restraining the defendants and their men from using the ABCD channel upto point

located abutting the Northern boundary of the land of the 1st plaintiff in D No.332/2 as shown in the plaint plan and granting permanent injunction restraining the defendants and their men from using the ABCD channel upto point located abutting the Northern boundary of the land of the 1st plaintiff in D.No.332/2.

3. Originally the suit in O.S No.451 of 2001 was filed by the plaintiffs for declaration that they are having right to take water through ABCD A1 A2 X1 X2 and E F G A2 channel for irrigating their lands from the bore-well as well as the canal shown in the plaint plan and for consequential permanent injunction restraining the defendants from interfering with their right to use and take water through the said channels which are situated to the east of the plaintiffs and defendants land.

4. For the sake of convenience, the parties herein after referred to as arrayed in the suit in O.S.No.451 of 2001.

5. The 2nd defendant is the nephew of the 1st defendant. Items 1 and 2 of the plaint schedule property

belong to the plaintiff. Item 3 belongs to the 2nd defendant. There were disputes between the plaintiffs and defendants from the past few years. The defendants filed O.S No.165 of 1990 on the file of the Junior Civil Judge, Tenali for declaration of their right in the cart track and for injunction. The said suit was dismissed. The channels ABCD and EFG A2 have been in existence since times immemorial. The plaintiffs and defendants have been using the said channels to irrigate their lands. As the defendants have causing obstruction, the plaintiffs preferred suit in O.S.No.451 of 2001.

6. The 1st defendant has filed written statement and denied all the averments made in the plaint. It is stated that the plaintiffs have not shown the 4 ½ cents in D.No.329/2 and 3 ½ cents in D No.333/10 belonging to the 1st defendant. The channels ADA1A2 and A2EFG channel are common channels for irrigating the plots P1P2 and D2. The plaintiffs and defendants have got joint rights in half of the well and the remaining half belongs to the 1st defendant and his sister Nageswarmma the mother of the 2nd defendant. The plaintiffs are not entitled to take water from

a different source through the subject channels without the consent of the defendants. The plaintiffs being dominant owners must exercise their rights in the channel causing less onerous to the defendants. It is further stated that the plaintiffs have no right to alter the mode of enjoyment. It is also stated that the cart track will also be submerged if excess water is drawn. Hence, prayed to dismiss the suit.

7. Basing on the pleadings, the trial Court framed the following issues:

1) Whether the plaintiff is entitled to declaration having right of water through ABCD A A2 X1 X2 and EFG A2 channel for irrigation of land?
2) Whether the plaintiff is entitled for injunction as prayed for?
3) To what relief.

8. On behalf of the plaintiffs/ PW.1 and 2 were examined and marked Ex.A1 to Ex.A6 and on behalf of the defendants, DW.1 to DW3 were examined and marked Ex.B1 to Ex.B6.

9. After careful examination of oral and documentary evidence, the trial Court decreed the suit declaring that

ABCD channel is a joint channel from AD point and till northern point. Aggrieved by the said judgment, the unsuccessful defendants preferred A.S No.1 of 2005 before the Principal Senior Civil Judge, Tenali (for short "the first appellate Court").

10. On a perusal of the record shows that, the 1st defendant's father purchased land in Survey No.333/10 and 333/9. Survey No.333/10 is no other than the northern land shown as D1 in the plaint plan. This is abutting on the western side of this channel at point BC. The document is dated 24.9.1966. The eastern boundary is mentioned in the document as the land of Lokam Subbaiah i.e., father of the plaintiff. The southern boundary is described as a 7 links 'pantakaluva'. Ex.B2 is the sale deed under which the Tulabandula Nageswaramma purchased the property in D.No.333/10 which is to the south of this ExB1 land and north of Ex.A3 land. She is no other than the daughter of Narisetty Veeraiah and sister of D1. ExB3 and Ex.B4 are sael deeds of the 1st defendant for the land in Survey No.329/2. It is apparent from the record that the sale deed recitals show that the irrigation channel is continuing

beyond A1 A2 points and nowhere it is mentioned in the sale deeds Ex.B1 and Ex.B2 that the irrigation canal is the exclusive canal of the defendants. Therefore, it is clear that ABCD channel is joint canal even beyond points A1 A2 upto the point BC which is abutting the land of the first defendant on the western side. It is the contention of the appellants that the defendants have got exclusive right in the ABCD channel falls to the ground and is not acceptable as it is against the evidence of both oral and documentary evidence. When it is a joint canal both the plaintiffs and defendants have got equal rights to draw water through this canal. Therefore, the appellants failed to substantiate their contention in the appeal that this ABCD channel is a joint channel only up to A1 A2 and beyond it towards north up to BC is their exclusive channel. Hence, after considering the material available on record and on considering the submissions of both the counsels, the first appellate court dismissed the Appeal Suit confirming the findings of the learned trial Court made in O.S.No.451 of 2001, dated 24.11.2004. Being not satisfied with the same, the 1st defendant preferred the present Second Appeal.

11. This Court vide order dated 24.04.2009, while granting interim suspension as prayed for, has **Admitted** the Second Appeal basing on the substantial question of law raised in Ground No.14(1) of the Memorandum of the Grounds, reads as under:

> *"...when the title deeds of the plaintiffs i.e., B5 and B6 reveal that the western boundary of their land is 'Inam land', whether the courts below are justified in holding that it is a joint channel and the plaintiffs are entitled for declaration and consequential permanent injunction as sought for..."*

12. Heard Mr. N. Sriram Murthy, learned counsel appearing for the appellant and Mr. A.S.C. Bose, learned counsel appearing for the respondents.

13. Learned counsel for the appellant submits that the judgment and decree passed by the first appellate Court is not according to law and facts of the case. He further submits that when the suit is filed to declare that the plaintiffs are having right of taking water through "ABCDA1A2X1X2" and "EFGA2" channel for irrigating their lands from the bore well as well as the canal as shown in the plaint plan and when there is no specific pleading and issue regarding right of drawing water from the bore well,

the Courts below should have disallowed the claim of the plaintiffs. He further submits that when it is not the plea of the plaintiffs that they are having easementary right in ABCD channel located on the western side of the land in D No.332/2 of 1st plaintiff and there is no issue or evidence pertaining to the alleged right of easement, the trial Court gravely erred in holding that the 1st plaintiff had acquired easementary right and the lower appellate gravely erred in confirming the same without appreciating the oral and documentary evidence. He further submits that the lower appellate court should have held that the plea of the plaintiffs is that ABCD is joint channel and the plaintiffs failed to prove the same for the reason that the suit for the relief in respect of part of ABCD channel existing in between the lands of the appellant in D.No.332/1 and the land in D.No.333/10 shown as plot D1 is dismissed. In such an event, the first appellate court should have held that the same relief should follow with respect to the other part of the alleged ABCD channel also and consequently it should have allowed the appeal filed by the appellant and 2nd defendant.

14. Learned counsel further submits that the courts below should have held that there is neither plea nor evidence to the effect that in part of the alleged ABCD channel situated to the North of A1A2, the plaintiffs have got easementary rights, particularly when Tulabandula Nageswaramma is not a party to the suit. In such an event, the courts below should have dismissed the suit of the plaintiffs. Learned counsel mainly contended that the first appellate court should have held that the appellant did not admit the existence of ABCD channel in his evidence. It should have also held that the appellant did not show or admit the existence of A1A2BC channel in OS No.165 of 1990 on the file of Principal Junior Civil Judge, Tenali. It should have further held that the OS No.165 of 1990 pertains to a cart track and the appeal of the appellants in AS No.54 of 1996 on the file of Additional Senior Civil Judge, Tenali was allowed in part.

15. During pendency of the present second appeal, the plaintiffs preferred O.S No.150 of 2005 for declaration that C1 and C2 marked channels commencing from C1 channel point to the north upto the northern bund of A2

marked plot exclusively belong to the 2nd plaintiff and for consequential relief of injunction. During pendency of the said suit, the plaintiffs preferred I.A.No.526 of 2015 in O.S No.150 of 2005 under Section 10 of CPC seeking to stay the suit till disposal of S.A.No.372 of 2009 on the file of this Court. The trial Court vide order dated 08.02.2016 has allowed the said I.A. by granting stay of the suit proceeds in further, till disposal of S.A No.372 of 2009. Thereafter, the plaintiffs preferred another I.A No.638 of 2018 in O.S.No.150 of 2005 under Section 10 of CPC seeking to extend the stay order passed by the trial Court in I.A No.526 of 2015 till the disposal of Second Appeal No.372 of 2009.

16. The trial Court vide order, dated 14.12.2018 has allowed the said I.A No.638 of 2018 conditionally by extending the stay for a period of one month only directing the petitioners/plaintiffs to take steps either to get stay orders from this Court in the Second Appeal No.372 of 2009 or by way of preferring any revision or appeal against this order, failing which the matter will be proceeded further and further time shall not be extended by the court. Aggrieved

by the same, the plaintiffs preferred the present CRP No.153 of 2019 before this Court.

17. This Court, on considering the submissions of learned counsel for the petitioner in CRP No.153 of 2009 that the trial in O.S No.150 of 2005 already came to an end and it is coming up for arguments, as such the Court below ought to have extended the stay granted earlier pending SA No.372 of 2009 before this Court, vide order, dated 15.02.2019, has granted stay, as under:

> ".....In view of the above, there shall be stay of all further proceedings in O.S No.150 of 2005 on the file of the Principal Junior Civil Judge, Tenali for a period of four weeks from today."

The same is extended from time to time.

18. On hearing, learned counsel for the appellant/1st defendant has relied upon a catena of decisions of Hon'ble Supreme Court reported in :

1). State of **Uttarkhand and another v. Mandir Sri Laxman Sidh Maharaj**[1], wherein it was held that:

> *27. In our considered opinion, a case with which we are dealing here, the aforesaid material facts were necessarily to be pleaded*

[1] AIR 2017 SC 4472

to establish prima facie the legal right of the plaintiff in such type of suit property.

28. As mentioned above, since the plaint did not contain aforementioned pleadings, the suit was liable for rejection at the threshold. That apart, there was absolutely no evidence (documentary) adduced by the plaintiff to prove and establish his legal ownership rights over the temple and the land and nor did he adduce any documentary evidence to show his so-called "Mahantship" or "Managership", except making bald averments in the plaint running in four pages and that too with no material details set out above.

31. By no stretch of imagination, in our view, such a declaration of ownership over the suit property and right of easement over a well could be granted by the Trial Court in plaintiff's favour because even the plaintiff did not claim title in the suit property on the strength of "adverse possession". Neither there were any pleadings nor any issue much less evidence to prove the adverse possession on land and for grant of any easementry right over the well. The Courts below should have seen that no declaration of ownership rights over the suit property could be granted to the plaintiff on the strength of "adverse possession" (see Gurdwara Sahib vs. Gram Panchayat Village Sirthala & Anr., (2014) 1 SCC 669. The Courts below also should have seen that courts can grant only that relief which is claimed by the plaintiff in the plaint and such relief can be granted only on the pleadings but not beyond it. In other words, courts cannot travel beyond the pleadings for granting any relief. This principle is fully applied to the facts of this case against the plaintiff.

2). In a case of **Union of India and others v. Vasavi Co.op. Housing Society Ltd and others**[2], wherein the Hon'ble Apex Court held that :

15. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against, in the absence of establishment of plaintiff's own title, plaintiff must be non-suited.

[2] AIAR 2014 SC 937

3). In a case of **Bachhaj Nahar v. Nilima Mandal and others**[3], wherein it was held that:

8. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are :

(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.

(ii) A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfillment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation, should not be a ground to float the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.

9. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and

[3] AIR 2009 SC 1103

that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right, relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner/occupier of such property.

14. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to water course. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

17. In the absence of a claim by plaintiffs based on an easementary right, the first defendant did not have an opportunity to demonstrate that the plaintiffs had no easementary right. In the absence of pleadings and an opportunity to the first defendant to

deny such claim, the High Court could not have converted a suit for title into a suit for enforcement of an easementary right. The first appellate court had recorded a finding of fact that plaintiffs had not made out title. The High Court in second appeal did not disturb the said finding. As no question of law arose for consideration, the High Court ought to have dismissed the second appeal. Even if the High Court felt that a case for easement was made out, at best liberty could have been reserved to the plaintiffs to file a separate suit for easement. But the High court could not, in a second appeal, while rejecting the plea of the plaintiffs that they were owners of the suit property, grant the relief of injunction in regard to an easementary right by assuming that they had an easementary right to use the schedule property as a passage.

4). In a case of **Vaddarj Jhatipat Ramloo v. T.Srihari**[4], wherein the High Court of Judicature, Telangana and Andhra Pradesh at Hyderabad held that:

"A right of easement can be declared only when the servient owner is a party to the suit. But nowhere in the plaint, the plaintiffs allege, and nowhere in the judgment, the High Court holds, that the first or second defendant is the owner of the suit property. "

5). In another case reported in **Raja S/o Maya Gounder vs. Vedi Raj (Died); Rajavelu; Vallikannu Ammal and others**[5], wherein the Madras High Court held that :

The easementary of necessity is not to be granted on the ground of convenience and consistence but solely on the ground of easementary of necessity. When there are other way to ingress and egress, the easement of necessity cannot be claimed merely on the ground that other ways are inconvenient. Further the right of way as easement of necessity implies that there is no other means of access, however, inconvenient. When the dominant tenement cannot be enjoyed without imposing a burden on the servient tenement, then the question of easementary does not arise.

[4] 2015 (4) ALD 546
[5] 2020 AIR (Mad) 72

6). In another case reported in **Radhabai; Sugunabai vs. G. Bheeman @ Bheema Raju**[6], wherein the Madras High Court held that :

> *Easements Act, 5 of 1882 : S.15 – Acquisition by prescription – plaintiffs, failed to adduce evidence to establish that they had enjoyed footpath peacefully with knowledge of servient owner for more than 20 years – Alternative passage available to access plaintiff's property established by defendants-plaintiffs not entitled relief claimed.*

7). In another case reported in **E. Elumalaichetty vs Naina Mudalia And others**[7], wherein it was held :

1. The plaintiff who succeeded in the first court but failed before the lower appellate Court is the appellant in this second appeal. The plaintiff claimed a right to a 2 ft broad space, B schedule Property, on the western side of his house and for an injunction restraining the defendants from taking their cattle and men through that space and for an injunction directing the defendants to remove the cement tub built at the southern end of that space which obstructs the passage and stagnates the water. The lower appellate court considered the title deeds relied upon by the plaintiff, Exs. A. 1 and A. 2. It is found that the plaintiff made no attempt to fix the boundary line of the concerned street and the Commissioner's plan.

Ex. C. 2 shows that the plaintiff has constructed two platforms on the eastern side of his house: one platform is 4' broad and another platform is 3'. 6" broad and if the measurements are taken from the platforms then the plaintiff will have no tile to the disputed space, B schedule property. I cannot say that the assessment of this question by the lower appellate Court on the basis of the factual materials disclosed is perverse and requires review by this court sitting in second appeal on that ground. However. Mr. M. V. Krishnan, learned counsel for the plaintiff appellant, herein, would submit that the plaintiff must succeed at least on the basis of assessment and wants to take advantage of the substantial question of law formulated to this effect by this Court at the time of the admission of the second appeal.

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[6] 2020 Air (Mad) 237
[7] AIR 1987 Mad 102

8) In another case reported in Kapil Kumar Versus Raj Kumar[8], wherein the Hon'ble Apex Court held that:

Now so far as the consideration mentioned in the pronote is concerned there may be some minor contradictions in the depositions of PW1 and PW3. However, at the same time if the deposition of PW3 as a whole is considered, in the crossexamination it has come out that when the deed writer asked the defendant that he has received the consideration, he has admitted the same.

6.1 In view of the above facts and circumstances of the case emerging from the evidence on record, nonexamination of the witness to the pronote cannot be held against the plaintiff. At this stage it is required to be noted that as per the provision of Section 118 of the NI Act there is a presumption of consideration in the negotiable instrument [Section 118(a)]. It is true that such presumption may be rebutted. However, no rebuttal evidence is led by the defendant. Under the circumstances also the High Court has erred in allowing the second appeal and quashing and setting aside the decree passed by the learned Trial Court confirmed by the learned First Appellate Court.

19. Per contra, learned counsel for the respondents has also relied upon decisions of Hon'ble Supreme Court reported in (1) **State of Rajasthan and others Versus Shiv Dayal and another**[9], wherein the Hon'ble Apex Court held that:

> *Indeed, we find that the High Court dismissed the second appeals essentially on the ground that since the two Courts have decreed the suit, no substantial question of law arises in the appeals. In*

[8] (2022) 10 Supreme Court Cases 281
[9] (2019) 8 Supreme Court Cases 637

other words, the High Court was mostly swayed away with the consideration that since two Courts have decreed the suit, resulting in passing of the decree against the State, there arises no substantial question of law in the appeals. It is clear from the last paragraph of the impugned order, which reads as under:

"Under these circumstances, when both the Ld. Courts have arrived at the conclusion that the disputed area is outside the forest area. Therefore, the principles laid down in T.N. GODAWARAN vs. U.O.I. (abovequoted) cannot be enforced in this appeal." (Emphasis supplied)

15. We do not agree with the aforementioned reasoning and the conclusion arrived at by the High Court.

16. It is not the principle of law that where the High Court finds that there is a concurrent finding of two Courts (whether of dismissal or decreeing of the suit), such finding becomes unassailable in the second appeal.

17. True it is as has been laid down by this Court in several decisions that "concurrent finding of fact" is usually binding on the High Court while hearing the second appeal under Section 100 of the Code of Civil Procedure, 1908(hereinafter referred to as "the Code").However, this rule of law is subject to certain well known exceptions mentioned infra.

18. It is a trite law that in order to record any finding on the facts, the Trial Court is required to appreciate the entire evidence (oral and documentary) in the light of the pleadings of the parties.

19. Similarly, it is also a trite law that the Appellate Court also has the jurisdiction to appreciate the evidence de novo while hearing the first appeal and either affirm the finding of the Trial Court or reverse it.

20. If the Appellate Court affirms the finding, it is called "concurrent finding of fact" whereas if the finding is reversed, it is called "reversing finding". These expressions are well known in the legal parlance.

21. When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded de hors the pleadings or it was based on no evidence or it wasbased on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached. (see observation made by learned Judge Vivian Bose,J. as His Lordship then was a Judge of the

Nagpur High Court in Rajeshwar Vishwanath Mamidwar & Ors. vs. Dashrath Narayan Chilwelkar & Ors., AIR 1943 Nagpur 117 Para 43).

22. In our opinion, if any one or more ground, as mentioned above, is made out in an appropriate case on the basis of the pleading and evidence, such ground will constitute substantial question of law within the meaning of Section 100 of the Code.

23. Coming to the facts of the case, we are of the view that the following are the questions which do arise for consideration in the suit/appeal for proper adjudication of the rights of the parties to the suit andare in the nature of substantial questions within the meaning of Section 100 of the Code.

2). In another case reported in **Patneedi Rudrayya v. Velugubantla Venkayya and others**[10], wherein the Hon'ble Apex Court held that :

It would thus be clear that even in the revised finding the appellate court has not been able to fix the precise year of commencement of the phenomenon. It would, therefore, follow that upon the evidence available in this case the proper inference to be drawn would be that this phenomenon has been known from time immemorial. A phenomenon is said to be happening from time immemorial when the date of its commencement is not within the memory of man or the date of its commencement is shrouded in the mists of antiquity. No doubt the lower appellate court has referred to the years 1920 and 1924 in its finding but it has not said that the phenomenon was observed for, the first time in 1924 or even in 1920 It has made it quite clear that the phenomenon was known to be happening in these years and that it must have been happening for many years prior to that. The basis of the plaintiff's claim is not the natural right of the owner of higher land to drain off water falling on his land on to lower lands but the basis is that this right was being exercised with respect to the land of the defendants 1 and 2 from time immemorial. The finding of fact of the lower appellate court being in his favour on this point his suit must succeed.

[10] AIR 1961 Supreme Court 1821

3). In another case reported in **G. Subba Narasaiah vs. Badam Uma Maheswar Rao**[11], wherein the Hon'ble Apex Court held that :

> " "19. The findings of the facts recorded by the Courts below are based on appreciation of both oral and documentary evidence. Unless, the appellant demonstrates that substantial question of law involved in the second appeal, interference of this Court in exercise of jurisdiction under Section 100 of CPC is not warranted. In this case on hand, as observed supra, no question of law much less substantial questions of law arose in he appeal. Hence the second appeal is liable to be dismissed. However, without costs."

20. On perusing the material available on record, this Court observed that, in the present case, the plaintiffs and the defendants are nearer relatives. A1 the lands at suit locality are dry lands, though they are situate in Delta system of Krishna River. The bore-well utilization has been there since a long time. So only the defendants have accepted to draw the water from the bore-well existing in the land of father of 1st plaintiff in D.No.343/2 through the ABCD channel and it has been done as of right and to the knowledge of the defendants and their relatives from a long time. Even more than the statutory period of twenty years. It is further observed that, even the vendor of

[11] 2022(6) ALT 321 (S.B.)

Nageswaramma left the eastern side cahnnel a part of ABCD channel abutting the land in D.No.333/10 and it was left by the original vendor even by the year 1966 under Ex.B1 sale deed. The said channel is a part of ABCD channel which has been used by the father of the 1st plaintiff. Therefore, the 1st plaintiff and his father had acquired the easementary right in the part of ABCD channel located on the western side of the land in D.No.332/2 of 1st plaintiff. Thus, it is clear that, from more than 20 years prior to filing of the suit the 1st plaintiff and his predecessor in interest had been utilizing such part of the channel as of tight and to the knowledge of the defendants and neighbouring land owners. Thus the plaintiffs had acquired right in part of ABCD channel beyond A1A2 points. With regard to the part of ABCD channel existing in between the plots of Nageswararao as per plaint plan there is no proof of utilization of it from long time to get easementary right and thereby declaration to it. In view of the same, it is clear that this ABCD channel is a joint canal even beyond points A1A2 upto point BC which is abutting the land of the 1st defendant on the western side. This court further observed

that both the plaintiffs and his father acquired easementary rights in this ABCD canal on their western side of their land in D.No.333/2. There is no contra evidence placed defying the plaintiff's easementary right to use the said channel beyond A1A2 points also.

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

(i) …

(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.

22. On hearing the submissions of learned counsels appearing on behalf of the respective parties at length and have gone through the judgment and findings recorded by the learned Trial Court while decreeing the suit confirmed by the learned First Appellate Court, this Court also re-appreciated the entire evidence on record including the deposition of relevant witnesses examined by both the sides.

23. At the outset, it is required to be noted that, there were concurrent findings of facts recorded by the learned Trial Court as well as the learned First Appellate Court. The said findings were on appreciation of entire evidence on record. Therefore, unless the concurrent findings recorded by the courts below were found to be perverse, the same were not required to be interfered with by the High Court in exercise of powers under Section 100 of CPC. Even the

substantial question of law framed by the High Court cannot be said to be as such a question of law much less substantial question of law.

24. Having regard to the facts and circumstances of the case and on a perusal of the citations referred to above relied upon by both the learned counsels, this Court is of the opinion that the appellant failed to substantiate his contention in this appeal that this ABCD channel is a joint channel only up to A1A2 and beyond it towards north up to BC is their exclusive channel. Therefore, and no questions of law much less substantial question of law arose in this appeal.

25. In view of the foregoing discussion, this Court finds that the courts below have analyzed the evidences both the documentary and oral in detail, adduced by the parties and by giving cogent reasons, concluded rightly decreed the suit and the same was rightly confirmed by the first appellate court. It is to be noted that this Court **Admitted** the Second Appeal only on the substantial question of law raised in Ground No.14(1) of Memorandum

of the Grounds i.e., the title deeds of the plaintiffs i.e., Ex.B5 and Ex.B6, but nowhere demonstrated in the judgments of trial Court as well as first appellate Court and the same is not appreciated by way of oral and documentary evidence, and demonstrating the same issue before this Court in the Second Appeal. Unless the appellant demonstrates that substantial question of law involved in the Second appeal, interference of this Court in exercise of jurisdiction under Section 100 of CPC is not warranted. No questions of law much less substantial question of law arose in the appeal. Hence, this Court finds no illegality or perversity in the judgment and decree passed by the first appellate court and devoid of merits and hence the same is liable to be dismissed.

26. Insofar as CRP No.153 of 2019 is concerned, in view of the final orders passed in S.A No.372 of 2009, no cause of action survives in this civil revision petition and hence the same is liable to be dismissed.

27. Accordingly, the **Second Appeal No.372 of 2009** is dismissed. Consequently, **CRP No.153 of 2019** is also dismissed. There shall be no order as to costs.

As a sequel, all the pending miscellaneous applications shall stand closed.

DR. K. MANMADHA RAO, J.

Date : 14 -06-2023
Note : L. R Copy to be marked.
(b/o)Gvl

2023:APHC:18765

HON'BLE DR. JUSTICE K. MANMADHA RAO

SECOND APPEAL No.372 of 2009
And
CIVIL REVISION PETITION No.153 of 2019

Date : 14.06.2023

Gvl