

Rosy vs Merry

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Court : Kerala

Decided On : Mar-07-2024

Judge : Honourable Mr. Justice a. Badharudeen

Appeal No. : RSA/86/2024

Appellant : ROSY

Respondent : MERRY

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN
THURSDAY, THE 7TH DAY OF MARCH 2024 / 17TH PHALGUNA,
1945 RSA NO. 86 OF 2024 AGAINST THE DECREE AND JUDGMENT
DATED 22.12.2023 IN AS NO.118 OF 2022 OF ADDITIONAL DISTRICT
COURT, IRINJALAKUDA ARISING OUT OF THE DECREE AND

**JUDGMENT DATED 31.03.2022 IN I.A.No.3150/2011 in OS NO.404
OF 1983 OF**

ADDITIONAL MUNSIFF COURT, IRINJALAKUDA
APPELLANTS/RESPONDENTS 5, 6, 8,9 IN FDIA/APPELLANTS 1 TO
13/ADDL.PETITIONERS:

1 ROSY AGED 49 YEARS D/O PAYYAPILLYKUNJUVAREETH, KIZHAKUMARI VILLAGE, THIRUMUDIKUNNUDESOM, CHALAKUDY TALUK, PIN - 680308. 2 MERY AGED 45 YEARS D/O PAYYAPILLYKUNJUVAREETH, KIZHAKUMARI VILLAGE, THIRUMUDIKUNNUDESOM, CHALAKUDY TALUK, PIN - 680308. 3 ELSY AGED 39 YEARS D/O PAYYAPILLYKUNJUVAREETH, KIZHAKUMARI VILLAGE, THIRUMUDIKUNNUDESOM, CHALAKUDY TALUK, PIN - 680308 4 LISSY AGED 42 YEARS D/O PAYYAPILLYKUNJUVAREETH, KIZHAKUMARI VILLAGE, THIRUMUDIKUNNUDESOM, CHALAKUDY TALUK, PIN - 680308. BY ADVS. SHIBU JOSEPH M.S.ANEER

RESPONDENTS/RESPONDENTS/RESPONDENTS/PETITIONERS AND LR OF 4TH PETITIONER: 1 MERRY PULLAN ANTHONY, MELOOR VILLAGE, PALAPILLYDESOM, MUKUNDAPURAM TALUK, PIN - 680301. R.S.A.No.86/2024 2

2 JOSE S/O PAYYAPILLY DEVASSY, KUTTICHIRA VILLAGE, CHAIPANKUZHYDESOM, MUKUNDAPURAM TALUK, PIN - 680301. 3 THOMAS S/O PAYYAPILLY DEVASSY, MARATHAKKARAVILLAGE, MARATHAKKARADESOM, THRISSUR TALUK. (DIED), PIN - 680302. 4 JOHNY S/O PAYYAPILLY DEVASSY, MUKKANNUR VILLAGE, POOTHANKUTTYDESOM, ALUVA TALUK., PIN - 683577. 5 ALPHONSA D/O PAYYAPILLY DEVASSY, MUKKANNUR VILLAGE, POKKUNNUDESOM, ALUVA TALUK, PIN - 683577. 6 PHILOMINA D/O PAYYAPILLY DEVASSY, KUTTICHIRA VILLAGE, CHAIPANKUZHYDESOM, MUKUNDAPURAM TALUK, PIN - 680301. 7 DEVASSY S/O PANADAN OUSEPH, KARUKUTTY VILLAGE, PALISSERYDESOM, ALUVA TALUK, PIN - 683576. 8 ANTHONY S/O PANADAN DEVASSY, KARUKUTTYVILLAGE, PALISSERYDESOM, ALUVA TALUK, PIN - 683576. 9 POULOSE, S/O PANADAN DEVASSY, KARUKUTTY VILLAGE ,PALISSERYDESOM, ALUVA TALUK, PIN - 683576. 10 ALPHONSA D/O PANADAN DEVASSY,

MUKKANNURVILLAGE, PILLYDESOM, ALUVA TALUK, PIN - 683576. 11 SAVIOUR S/O PANADAN DEVASSY, KARUKUTTY VILLAGE, PALISSERYDESOM, ALUVA TALUK, PIN - 683572. 12 MERY D/O PANADAN DEVASSY, MUKKANNUR VILLAGE, PILLYDESOM, ALUVA TALUK., PIN - 683576. 13 OUSEPH S/O PADATHANVEETIL OUSEPH, KORATTY VILLAGE, THIRUMUDIKUNNUDESOM, MUKUNDAPURAM TALUK, PIN - 682301.

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14 VARGHESE S/O PADATHANVEETIL OUSEPH, KORATTY VILLAGE, THIRUMUDIKUNNUDESOM, MUKUNDAPURAM TALUK., PIN - 682301. 15 SAJU S/O PADATHANVEETIL OUSEPH, KORATTY VILLAGE, THIRUMUDIKUNNUDESOM, MUKUNDAPURAM TALUK, PIN - 682301. 16 JOHNSON S/O PADATHANVEETIL OUSEPH, KORATTY VILLAGE, THIRUMUDIKUNNUDESOM, MUKUNDAPURAM TALUK, PIN - 682301. 17 GRACY D/O PADATHANVEETIL OUSEPH, KORATTY VILLAGE, THIRUMUDIKUNNUDESOM, MUKUNDAPURAM TALUK, PIN - 680301. 18 PRIYA THANKACHAN W/O VITHAYATHIL THANKACHAN, KIZHAKUMURI VILLAGE, KORATTYDESOM, MUKUNDAPURAM TALUK, PIN - 682301. 19 MERYKUTTY W/O PAYYAPILLY THOMAS, MARATHAKKARA VILLAGE, MARATHAKKARADESOM, THRISSUR TALUK, PIN - 680306. 20 MEJO S/O PAYYAPILLY THOMAS, MARATHAKKARA VILLAGE, MARATHAKKARADESOM, THRISSUR TALUK., PIN - 680306 21 MELBY D/O PAYYAPILLY THOMAS, MARATHAKKARA VILLAGE, MARATHAKKARADESOM, THRISSUR TALUK, PIN - 680306.

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 15.02.2024, THE COURT ON 07.03.2024 DELIVERED THE FOLLOWING:
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A. BADHARUDEEN, J.

JUDGMENT

Respondents 5, 6, 8 and 9 in final decree in I.A.No.3150/2011 in O.S.No.404/1983 on the files of the Additional Munsiff Court, Irinjalakuda, are the appellants in this Second Appeal and they impugn final decree and judgment dated 31.03.2022 therein and in A.S.No.118/2022 on the files of Additional District Court, Irinjalakuda dated 22.12.2023. The respondents are the petitioners and other respondents in the final decree application.

2. Heard the learned counsel for the appellants/respondents 5, 6,

8 and 9 in the final decree application, on admission. Perused the copies of relevant documents and verdicts under challenge placed by the learned counsel for the appellants. R.S.A.No.86/2024 5

3. It is pointed out by the learned counsel for the appellants that

as per the preliminary decree there is a specific direction that the property to be allotted to the original plaintiff shall be one abutting to the property comprised in Ext.A1 title deed. Further it was stipulated that the house in which the 2nd defendant resides to be excluded while allotting share to the plaintiff. According to the learned counsel for the appellants, the Advocate Commissioner filed report as against the preliminary decree and that the plot where the house situated was also allotted to the plaintiff.

4. In response to this argument, I have perused the trial court

judgment. It was observed by the learned Munsiff in paragraph 9 that as per the commission report, the Commissioner not reported the existence of the house in the plaint schedule property and accordingly partition was effected deeming that no house in existence in conformity with the preliminary decree. I have gone through the copy of the objection filed by respondents 4 to 9 as also the petition filed by the appellants. In the objection, the main contention is that the

Commissioner allotted the R.S.A.No.86/2024 6 properties as against the terms of the preliminary decree and against the description in the title deed. It is discernible from the judgment of the trial court as well as Ext.C1(a) plan relied on by the trial court in preliminary decree that plot `E shown in the green shade is 12 cents of property which is found not partible as per the decree. Plot `C marked in pink shade is allotted to the 3rd respondent, who is the successor of the original plaintiff. Plot `A shown in yellow shade is allotted to the legal heirs of original defendants 1, 3 and 4, who are petitioners 2 to 18. Plot `B shown in blue shade is allotted to respondents 4, to 9. Advocate Commissioner also marked plot `F in violet shade as poramboke land and not allotted the same to anybody. Thus the Advocate Commissioner allotted plot `C to the 3rd respondent in the original plaint, the successor of the original plaintiff abutting his 12 cents of property in tune with the preliminary decree. It has been observed by the trial court that respondents 4 to 9 alone filed objection to Commission report and filed petition to set aside Commission report and the said petition was dismissed by order dated 07.03.2022. R.S.A.No.86/2024 7

5. On perusal of the available materials it is discernible that

originally Suit for partition was filed in the year 1983. Thereafter, 40 years elapsed. Thus, in culmination of the long pending litigation, final decree was passed, and the same absolutely in tune with the preliminary decree since the Commissioner reported that no house is in existence at present to consider the stipulation in the preliminary decree that the property where the house of the 2nd respondent to be excluded. The above discussion persuades this Court to hold that the trial court as well as the appellate court rightly rendered the verdicts acting on Ext.C1 series Commission report and plan in tenure and terms of the preliminary decree and therefore the same do not require any interference at the hands of this Court and as such there is no substantial question of law arises to admit and maintain these appeals.

6. In order to admit and maintain a Second Appeal, substantial question of law necessarily to be formulated by the High Court within the mandate of Order XLII Rule 2 Read with Section 100 of C.P.C. R.S.A.No.86/2024 8

7. In this case, the learned counsel for the appellants failed to raise any substantial question of law warranting admission of the Second Appeals. Order XLII Rule 2 provides thus: 2. Power of Court to direct that the appeal be heard on the question formulated by it.-At the time of making an order under rule 11 of

Order XLI for the hearing of a second appeal, the Court shall formulate

the substantial question of law as required by section 100, and in doing so, the Court may direct that the second appeal be heard on the question so formulated and it shall not be open to the defendant to urge any other ground in the appeal without the leave of the Court, given in accordance with the provision of section 100.

8. Section 100 of the C.P.C. provides that, (1) Save as

otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. (2) An Appeal may lie under this section from an appellate decree passed ex parte. (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. (4) Where the High Court is satisfied that a R.S.A.No.86/2024 9 substantial question of law is involved in any case, it shall formulate that question. (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. Proviso says that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

9. In the decision in [2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168], Nazir Mohamed v. J. Kamala and Others reported in the Apex Court held that:

The condition precedent for entertaining and deciding a second appeal being the existence of a substantial question of law, whenever a question is framed by the High Court, the High Court will have to show that the question is one of law and not just a question of facts, it also has to show that the question is a substantial question of law referring *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar*, [(1999) 3 SCC 722].

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10. In a latest decision of the Apex Court reported in [2023 (5) KHC 264 : 2023 (5) KLT 74 SC], *Government of Kerala v. Joseph*, it was held as under:

For an appeal to be maintainable under Section 100, Code of Civil Procedure ('CPC', for brevity) it must fulfill certain well - established requirements. The primary and most important of them all is that the appeal should pose a substantial question of law. The sort of question that qualifies this criterion has been time and again reiterated by this Court.

11. The legal position is no more res-integra on the point that in

order to admit and maintain a second appeal under Section 100 of the

C.P.C, the Court shall formulate substantial question/s of law, and the said procedure is mandatory. Although the phrase 'substantial question of law' is not defined in the Code, 'substantial 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 R.S.A.No.86/2024 11 importance as has been done in many other provisions such as S.109 of the Code or Art.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. As such, second appeal cannot be decided on equitable grounds and the conditions mentioned in Section 100 read with Order XLII Rule 2 of the C.P.C. must be complied to admit and maintain a second appeal.

12. In view of the above fact, no substantial question of law

arises in this matter to be decided by admitting this appeal. In the result, this appeal is found to be meritless and the same is dismissed without being admitted. All pending Interlocutory Applications stand dismissed. Sd/- (A.BADHARUDEEN, JUDGE) rtr/

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