

Suresh Babu vs Suresh

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Court : Kerala

Decided On : Jan-09-2024

Judge : Honourable Mr. Justice a. Badharudeen

Appeal No. : RSA/764/2022

Appellant : Suresh Babu

Respondent : Suresh

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN
TUESDAY, THE 9TH DAY OF JANUARY 2024 / 19TH POUSHA, 1945
RSA NO. 764 OF 2022 AGAINST THE DECREE AND JUDGMENT
DATED 16.08.2022 IN A.S.NO.137/2018 ON THE FILES OF THE
COURT OF THE ADDITIONAL

**DISTRICT JUDGE-V, PALAKKAD AROSE FROM THE DECREE
AND JUDGMENT**

DATED 08.08.2018 IN O.S.NO.284/2012 ON THE FILES OF THE MUNSIF
COURT, ALATHUR APPELLANTS/APPELLANTS/PLAINTIFFS: 1 SURESH
BABU AGED 69 YEARS, S/O MADHAVAN, ARAYAMPARAMBIL, KODUMBALA,

KIZHAKKENCHERRY AMSOM DESOM, ALATHUR TALUK, PALAKKAD DISTRICT 2 SARADA AGED 67 YEARS, W/O SURESH BABU, ARAYAMPARAMBIL, KODUMBALA, KIZHAKKENCHERRY AMSOM DESOM, ALATHUR TALUK, PALAKKAD DISTRICT BY ADVS. ALEX ANTONY SEBASTIAN P.A. M.B.VINOD RESPONDENTS/RESPONDENTS/DEFENDANTS: 1 SURESH AGED 42 YEARS, S/O PANKUNNI, MANDAKATH, KALATHOTTAM, KODUMBALA, KICHAKKENCHERRY AMSOM DESOM, ALATHUR TALUK 2 SUMESH, AGED 39 YEARS, S/O PANKUNNI, MANDAKATH, KALATHOTTAM, KODUMBALA, KIZHAKKENCHERRY AMSOM DESOM, ALATHUR TALUK BY ADVS. K.MOHANAKANNAN M.A.ZOHRA THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 09.01.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 9th day of January, 2024 This regular second appeal has been filed under

order XLII Rule 1 read with Section 100 of the Code of Civil

Procedure (CPC hereinafter) challenging the decree and

judgment in A.S. No.137 of 2018 dated 16.08.2022 on the

files of the Court of the Additional District Judge-V, Palakkad arose from the decree and judgment in O.S. No.284 of 2012 dated 08.08.2018 on the files of the Munsiff Court, Alathur. The appellants are the plaintiffs and respondents are defendants in O.S. No.284/2012.

2. Heard the learned counsel for appellants as well as the learned counsel appearing for respondents, on admission.

3. I shall refer the parties in this appeal as plaintiffs and defendants with reference to their status before the trial court.

4. In this matter, originally the suit was filed for

permanent prohibitory injunction asserting possession over 3.50 acres of land obtained by the father of the 2 nd plaintiff as C-schedule as per partition deed No.780/1949 of S.R.O, Alathur. The 2nd plaintiff obtained G-schedule property as per partition deed No.4032/1995 of S.R.O, Vadakkanchery. Thereafter, the 2nd plaintiff settled 50 cents of plaint G- schedule property in favour of the 1st plaintiff, who is the husband of the 2nd plaintiff by virtue of settlement deed No.636/2003 of S.R.O, Vadakkanchery. According to the plaintiffs, defendants made attempt to trespass upon plaint schedule property and accordingly suit for prohibitory injunction was pressed into.

5. The 2nd defendant filed written statement and

resisted the suit on the specific contention that the derivation of the plaint schedule property is not properly pleaded in the plaint and the attempt of the plaintiff is to grab property of the defendants. Apart from that, the identity of the plaint schedule property also is disputed.

6. The trial court tried the matter. PW1 examined

and Exts.A1 to A19 marked on the side of the plaintiffs. Exts.B1 to B6 marked on the side of the defendants. CW1 examined as court witness and Exts.C1 to C3(a) marked as court exhibits.

7. Finally, the trial court upheld the contention of the defendants and dismissed the suit.

8. When appeal filed before the Appellate Court as

A.S. No.137/2018, the Appellate Court also re-appreciated the evidence and concurred the finding of the trial court. The Appellate Court found that though the plaintiffs produced Exts.A1 to A19 to prove their title and possession in respect of the plaint schedule property, where the 2 nd defendant raised a contention that, a portion of the plaintiffs property is the property of the 2 nd defendant. The Appellate Court also found that as per Ext.C(3) report, the Commissioner measured the entire plaint schedule property based on partition deed No.780/1949 and the entire property as per the partition deed is comprised in Resurvey

No.154/1. But, two more properties in another survey number also included as the property of the defendants. But, the Commissioner did not inspect documents of the defendants and given evidence that, defendants were not parties to partition deed No.780/1949 and it is not possible to find out the extent of property devolved upon the defendants.

9. The learned counsel for the plaintiffs/appellants

submitted that as per Ext.C3 commission report, the properties were well identified. At the same time, he conceded that, even though the properties covered by partition deed is 3.50 acres, 50 cents out of the same was exchanged by the 2nd plaintiff in favour of her brother. The said fact was not pleaded in the plaint and the schedule in the plaint includes the said 50 cents of property also.

10. In the case at hand, the suit is one filed for

prohibitory injunction. Therefore, possession of the property by exactly identifying the same would suffice to grant decree of permanent prohibitory injunction. However, when there is dispute as to the title and identity of the property, the property in possession should have been specifically identified. In this case, commissions were deputed for three times. But, no effective steps taken by the plaintiffs to identify the property actually in possession of the plaintiffs, in any manner. It is the settled law that, when the relief of prohibitory injunction being asked, the party who seeks the relief shall approach the Court, with clean hands, without suppressing any material facts. In this matter, inclusion of 50 cents of property in the schedule after suppressing exchange of the same would go to show that the plaintiffs approached the Court after suppressing material facts. Therefore, for the said reason alone, the suit must fail. Thus, for want of identity of the property and for suppression of material facts, decree of prohibitory injunction could not be granted as rightly done by the trial court and confirmed by the Appellate Court. Accordingly, the concurrent verdicts of the trial court and Appellate Court do not require any interference at the hands of this Court.

11. Thus, it appears that no substantial question of

law is available in this matter to be formulated to maintain and admit this regular second appeal. Order XLII Rule 2 of CPC 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 appellant to urge any other ground in the appeal without the leave of the Court, given in accordance with the provision of section 100.

12. Section 100 of CPC 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 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 stipulates 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.

13. In the decision reported in [2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168] Nazir

Mohamed v. J. Kamala and Others, 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. In *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar*, [(1999) 3 SCC 722], the Apex

Court held that: "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 the 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" "It has been noticed 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 S.100 of the Code of Civil Procedure. 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 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 to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of

fact." "If the question of law termed as a substantial question 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, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document 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 first 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."

When no substantial question of law is formulated, but a Second Appeal is decided by the High Court, the judgment of the High Court is vitiated in law, as held by this Court in *Biswanath Ghosh v. Gobinda Ghose*, AIR

2014 SC 152. Formulation of substantial question of law is mandatory and the mere reference to the ground mentioned in Memorandum of Second Appeal can not satisfy the mandate of S. 100 of the CPC.

14. 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. We may only refer to Santosh Hazari v. Purushottam Tiwari, [2001 (3) SCC 179] (three - Judge Bench) wherein this Court observed as follows: 12. The phrase substantial question

of law, as occurring in the amended S.100 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 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.

15. 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 CPC, 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 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 CPC must be complied to admit and maintain a second appeal.

16. In the instant case, it appears that the judgment

entered into by the Appellate Court based on the facts and evidence are found to be in order. Therefore, the same does not require any interference at the hands of this Court.

17. In this matter, no substantial question of law

arises for consideration so as to admit this second appeal. It is the well settled law that a second appeal involving no substantial question of law cannot be admitted. Therefore, the decree and judgment under challenge do not require any interference and no substantial question of law to be formulated to adjudicate in this regular second appeal.

18. Accordingly, this regular second appeal stands

dismissed, without being admitted, as indicated above. All interlocutory applications also stand dismissed. Sd/- A. BADHARUDEEN JUDGE SK
APPENDIX OF RSA 764/2022

PETITIONERS ANNEXURES : Annexure A1 COPY OF THE LOCATION
SKETCH Annexure A2 DIGITAL COPY OF LAND TAX RECEIPT
NOKLO9010811331 /2023 DATED 22/11/2023 Annexure A3 DIGITAL
COPY OF LAND TAX RECEIPT NOKLO9010811332 /2023 DATED

22/11/2023 Annexure A4 TRUE COPY OF THE EXTRACT OF
THANDAPPER ACCOUNT NO 10489 Annexure A5 TRUE COPY OF
THE EXTRACT OF THANDAPPER ACCOUNT NO 10488 Annexure A6
DIGITAL COPY OF POSSESSION CERTIFICATE NO 82109360
DATED 28-11-2023 Annexure A7 DIGITAL COPY OF POSSESSION
CERTIFICATE NO 82109386 DATED 28-11-2023

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