SASIKUMAR AND ORS.

v.

KUNNATH CHELLAPPAN NAIR AND ORS.

OCTOBER 19, 2005

[ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

Code of Civil Procedure, 1908:

ss.100(3) and (4)—Second appeal—Substantial question of law—Not stated in second appeal—High Court hearing and deciding the appeal without formulating any substantial question of law—Held, judgment of High Court cannot be sustained—Matter remitted to High Court.

Ishwar Dass Jain **v.** *Sohan Lal,* **[2000] 1 SCC 434;** *Roop Singh* **v.** *Ram Singh,* **[2000] 3 SCC 708;** *Kanhaiyalal* **v.** *Anupkumar,* **[2003] 1 SCC 430 and** *Chadat Singh* **v.** *Bahadur Ram and Ors.,* **[2004] 6 SCC 359, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 976 of 1998.

From the Judgment and Order dated 9.12.97 of the Kerala High Court in S.A. No. 174 of 1990.

P. Krishnamoorthy, A.K. Jha and Ms. V. Mohana for the Appellants.

Vishnu B. Saharya for M/s. Saharya & Co. for the Respondents.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Heard learned counsel for the parties.

This appeal relates to a judgment delivered by a learned single Judge of the Kerala High Court in Second Appeal No. 174/90-D. It may be noted that by a common judgment dated 09.12.1997 two appeals, both filed by the present respondent No. 1 were disposed of. Second Appeal No. 174/1990 to which the present appeal relates was directed against the judgment and decree in A.S. No. 42 of 1986 of Sub Court, Palakkad. Same was filed against the judgment and decree in O.S. No. 118 of 1970 of the Munsiff's Court, Palakkad. The other Second Appeal No. 531 of 1990 was preferred against the judgment

and decree passed by Sub-Judge, Palakkad in appeal which was filed against the judgment and decree in O.S. No. 126 of 1977 of the Munsiff's Court, Palakkad. By a common judgment, as noted above, the High Court disposed of both the matters. Learned Single Judge dismissed Second Appeal No. 531 of 1990, but set aside the judgment and decree of the courts below in the other appeal i.e. Second Appeal No. 174 of 1990. Though several points were urged in support of the appeal, we find that the basic issue which requires to be adjudicated is whether the Second Appeal in terms of Section 100 of the Code of Civil Procedure, 1908 (in short 'the Code') could have been disposed of without formulating substantial question of law by the High Court. It is, therefore, not necessary to deal with the factual aspects in detail.

Mr. P. Krishnamoorthy, learned senior counsel appearing for the appellants submitted that the High Court was not justifies in disposing of the Second Appeal without formulating the substantial question or questions of law, as mandated by Section 100 of the Code.

Learned counsel for respondent No. 1 submitted that though the High Court has not formulated the questions of law, as required, yet, on analyzing the evidence, it concluded that the view expressed by the courts below were not tenable in law.

Section 100 of the Code deals with "second appeal". The provision reads as follows:

> "100(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: A

Provided that nothing in this subsection 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."

B

A perusal of the impugned judgment passed by the High Court does not show that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated. That being so, the judgment cannot be maintained.

In *Ishwar Dass Jain* v. *Sohan lal,* [2000] 1 SCC 434, this Court in para C 10 has stated thus:

"10. Now under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so." D

Yet again in *Roop Singh* v. *Ram Singh,* [2000] 3 SCC 708 this Court has expressed that the jurisdiction of a High Court is confined to appeals involving substantial question of law. Para 7 of the said judgment reads:

"7. It is to be reiterated that under Section 100 CPC jurisdiction of E the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC. That apart, at the time of disposing of the matter, the High F Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. Further, the fact finding courts after appreciating the evidence held that the defendant entered into the possession of the premises as a batai, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as G to when it became adverse and hostile. These findings recorded by the two courts below were based on proper appreciation of evidence and the material on record and there was no perversity, illegality or irregularity in those findings. If the defendant got the possession of suit land as a lessee or under a batai agreement then from the

H

A permissive possession it is for him to establish by cogent and convincing evidence to show hostile *animus* and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession *Thakur Kishan Singh* v. *Arvind Kumar*, [1994] 6 SCC 591. Hence the High Court ought not to have interfered with the finding of fact recorded by both the courts below.
B

The position has been reiterated in *Kanhaiyalal* v. *Anupkumar,* [2003] 1 SCC 430.

C In *Chadat Singh* v. *Bahadur Ram and Ors.*, [2004] 6 SCC 359, it was observed thus:

"6. In view of Section 100 of the Code the memorandum of appeal shall precisely state substantial question or questions involved in the appeal as required under Sub Section (3) of Section 100. Where the
D High Court is satisfied that in any case any substantial question of law is involved, it shall formulate that question under sub-section (4) and the second appeal has to be heard on the question so formulated as stated in sub-section (5) of Section 100."

Under the circumstances, the impugned judgment is set aside. We remit
E the matter to the High Court so far as it relates to Second Appeal No. 174 of 1990 for disposal in accordance with law. The appeal is disposed of on the aforesaid terms with no order as to costs.

Since the matter is pending since long, we request the High Court to dispose of the appeal as early as practicable.

F

R.P. Appeal disposed of.