

B.C. SHIVASHANKARA

v.

B.R. NAGARAJ

FEBRUARY 27, 2007

[DR. ARIJIT PASAYAT AND TARUN CHATTERJEE, JJ.]

Code of Civil Procedure, 1908:

s.100—Second appeal allowed by High Court without formulating any substantial question of law—Justification of—Held, not justified.

s.100(5)—Applicability of—Held: It is applicable only when any substantial question of law has already been formulated and it empowers the High Court to hear, for reasons to be recorded, the appeal "on any other substantial question of law".

Words and Phrases—"On any other substantial question of law"—Meaning of.

Challenge in the present appeal is to the judgment of the High Court allowing the Second Appeal filed by Respondent No.1. It was contended that the Second Appeal was allowed without formulating any substantial question of law as required under Section 100, CPC.

Disposing of the appeal, the Court

HELD: 1.1. 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. [Para 4] [391-E]

1.2. Sub-section (5) of Section 100, CPC is applicable only when any substantial question of law has already been formulated and it empowers the High Court to hear, for reasons to be recorded, the appeal on any other substantial question of law. The expression "on any other substantial question of law" clearly shows that there must be some substantial question of law already formulated and then only another substantial question of law which

A was not formulated earlier can be taken up by the High Court for reasons to be recorded, if it is of the view that the case involves such question. [Para 10]

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; *Chadat Singh v. Bahadur Ram and Ors.*, [2004] 6 SCC 359; *Joseph Severane and Ors. v. Benny Mathew and Ors.*, [2005] 7 SCC 667; *Sasikumar and Ors. v. Kunnath Chellappan Nair and Ors.*, [2005] 12 SCC 588 and *Gian Dass v. Gram Panchayat, Village Sunner Kalan and Ors.*, [2006] 6 SCC 271, relied on.

C 2. Under the circumstances the impugned judgment is set aside. The matter is remitted to the High Court so far as it relates to the Second Appeal for disposal in accordance with law. [Para 11] [393-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5452 of 2000.

D From the final Judgment and Decree dated 27.5.1998 of the High Court of Karnataka at Bangalore in R.S.A. No. 236/1991.

S.N. Bhat for the Appellant.

The Judgment of the Court was delivered by

E **DR. ARIJIT PASAYAT, J.** 1. Challenge in this appeal is to the judgment of a learned Single Judge of the Karnataka High Court allowing the Second Appeal filed by respondent No.1. Originally, there were three defendants and the present appeal has been filed only by defendant no.1. The other defendants were impleaded as respondents 2 and 3 in the present appeal but their names were deleted at the request of the appellant. Though several points were urged in support of the appeal, we think it unnecessary to deal with them in detail considering the primary stand taken that the Second Appeal was allowed without formulating any substantial question of law as required under Section 100 of the Code of Civil Procedure, 1908 (in short the 'Code').

G 2. None appeared for the respondent in spite of service of notice.

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

H "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. A

(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. B

(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: C

Provided 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." D

4. 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. E

5. In *Ishwar Dass Jain v. Sohan Lal*, [2000] 1 SCC 434 this Court in para 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." F

6. 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: G

"7. It is to be reiterated that under Section 100 CPC jurisdiction of 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 H

A questions of fact while exercising its jurisdiction under Section 100
CPC. That apart, at the time of disposing of the matter, the High 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
B 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 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
C in those findings. If the defendant got the possession of suit land as
a lessee or under a batai agreement then from the permissive possession
it is for him to establish by cogent and convincing evidence to show
hostile animus Page 1532 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*
D *Kishan Singh v. Arvind Kumar*, [1994] 6 SCC 591. Hence the High
Court ought not to have interfered with the findings of fact recorded
by both the courts below.

E 7. The position has been reiterated in *Kanhaiyalal v. Anupkumar*,
[2003] 1 SCC 430.

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

F “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 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.”

G 9. The position was highlighted by this Court in *Joseph Severane and Ors.*
v. Benny Mathew and Ors., [2005] 7 SCC 667, *Sasikumar and Ors. v. Kunnath*
Chellappan Nair and Ors., [2005] 12 SCC 588] and *Gian Dass v. Gram*
Panchayat, Village Sunner Kalan and Ors., [2006] 6 SCC 271.

H 10. Sub-section (5) of Section 100 is applicable only when any substantial

question of law has already been formulated and it empowers the High Court to hear, for reasons to be recorded, the appeal on any other substantial question of law. The expression "on any other substantial question of law" clearly shows that there must be some substantial question of law already formulated and then only another substantial question of law which was not formulated earlier can be taken up by the High Court for reasons to be recorded, if it is of the view that the case involves such question.

11. Under the circumstances the impugned judgment is set aside. We remit the matter to the High Court so far as it relates to Second Appeal No. 236 of 1991 for disposal in accordance with law. The appeal is disposed of in the aforesaid terms with no order as to costs.

B.B.B.

Appeal disposed of.