HIGH COURT OF KERALA

Bench: Justice A. BADHARUDEEN

Date of Decision: 1 November 2023

RSA NO. 630 OF 2023
AGAINST THE JUDGMENT & DECREE DATED 21.08.2023 IN AS 35/2018

OF ADDITIONAL DISTRICT COURT-II, PALAKKAD IN JUDGMENT & DECREE DT.31.01.2018 IN OS 511/2014 OF MUNSIFF COURT, ALATHUR

PREMADASAN ….. APPELLANT/APPELLANT/PLAINTIFF

Versus

PUSHPARAJAN …….. RESPONDENT/RESPONDENT/DEFENDANT

Sections, Acts, Rules, and Article:
Order XLII Rule 1 of the Code of Civil Procedure
Section 100 of the Code of Civil Procedure

Subject: Civil Appeal – Permanent Prohibitory Injunction – Dispute over the use of a motorable way – Plaintiff claiming co-ownership and seeking injunction against obstruction – Defendant disputing plaintiff's claim – Trial court and appellate court dismissing the suit – Appeal to High Court – No substantial question of law formulated – Appeal dismissed.

Headnotes:

Regular Second Appeal – Civil Procedure Code (C.P.C) – Appeal under Order XLII Rule 1 read with Section 100 of the C.P.C against the decree and judgment in A.S.No.35 of 2018 dated 21.08.2023 by the Additional District Judge-II, Palakkad, which confirmed the decree and judgment in O.S.No.511/2014 by the Munsiff Court, Alathur – Appellant, being the plaintiff, challenges the decree and judgment on grounds of erroneous negation of co-ownership claims over plaint `D' schedule property. [Para 1]

Injunction – Permanent Prohibitory Injunction – Plaintiff sought a permanent prohibitory injunction against the defendant to restrain obstruction of the peaceful use of plaint `D' schedule motorable way for ingress and egress to plaint `A' to `C' schedule properties and to the common tank – Claim based on asserted co-ownership of the plaint `D' schedule property by the plaintiff. [Para 5]

Title Dispute – Co-ownership Claim – Defendant disputes plaintiff's title over plaint `A', `B' and `C' schedule properties, and particularly, the co-ownership claim over plaint `D' schedule property – Contention that plaint `D' schedule is not a common motorable road and plaintiff has no rights over it either as co-owner or otherwise. [Para 8]

Evidence – Title Establishment – Trial and appellate court's negation of plaintiff's co-ownership claim due to lack of cogent evidence establishing title over plaint `D' schedule property – Reference to plaintiff's admission during cross-examination regarding the absence of documentary evidence to support co-ownership claim. [Para 11-12]

Substantial Question of Law – Second Appeal Admissibility – Emphasis on the mandatory formulation of substantial question/s of law to admit and maintain a second appeal under Section 100 of the C.P.C – Absence of substantial question of law leading to the dismissal of the appeal without admission. [Para 13-20]

Referred Cases:

- Nazir Mohamed v. J. Kamala and Others [2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168]
- Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [1999) 3 SCC 722]
- Biswanath Ghosh v. Gobinda Ghose AIR 2014 SC 152
- Government of Kerala v. Joseph [2023 (5) KHC 264 : 2023 (5) KLT 74 SC]

Representing Advocates:

Advocates for Appellant/Plaintiff: P.B. Subramanyan, P.B. Krishnan, Sabu George, B. Anusree, Manu Vyas, Peter Meera P., Chithira Venugopal

Advocate for Respondent/Defendant: None

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THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON16.10.2023, THE COURT ON 01.11.2023 DELIVERED THE FOLLOWING:

J U D G M E N T

This Regular Second Appeal has been filed under Order XLII Rule 1 read with Section 100 of the Code of Civil Procedure and appellant is the plaintiff in O.S.No.511/2014 on the files of Munsiff Court, Alathur. The appellant assails decree and judgment in A.S.No.35 of 2018 dated 21.08.2023 on the files of the Additional District Judge-II, Palakkad, whereby the learned District Judge confirmed decree and judgment in O.S.No.511/2014. The sole respondent herein is the defendant in the Suit.

2. I shall refer the parties in this appeal with reference to their status before the trial court, as `plaintiff' and `defendant' hereafter for easy reference.

3. Heard the learned counsel for the appellant/plaintiff on admission.

4. Perused the judgments under challenge and the documents placed by the learned counsel for the plaintiff.

5. In this matter, the plaintiff, who is none other than the elder brother of the defendant, filed Suit for permanent prohibitory injunction restraining the defendant and his henchmen from obstructing peaceful use of plaint `D' schedule motorable way to have ingress and egress to plaint `A' to `C' schedule properties and to the common tank. Further, prohibitory injunction also sought against obstruction of the peaceful possession and enjoyment of plaint `A' to `C' schedule properties by the plaintiff. According to the plaintiff, the plaintiff is the absolute owner in possession of plaint `A', `B' and `C' schedule properties. The specific case put up by the plaintiff before the trial court is that the plaint `D' schedule item is a motorable way having a width of 10-15 feet and an approximate length of 300 meters, starting from VarukunnuThenidukku P.W.D road situated on the east available, for the ingress and egress to plaint B and C schedule properties. The plaintiff's further case is that the defendant is having property on the southern side of the plaint `D' schedule motorable way.

6. According to the plaintiff, plaint `D' schedule motorable way starts from the above mentioned P.W.D road and leads to plaint `C' schedule property and common tank situated on the north-eastern end of the plaint `D' schedule motorable way. The plaint `D' schedule motorable way being used as ingress and egress to the properties of the plaintiff and legal heirs of Late Mayan.

7. In paragraph 6 of the plaint, the plaintiff averred that the plaintiff is one of the co-owners in relation to plaint `D' schedule way, set apart for the common use of the members of Kollancode house. Plaintiff and defendant are the members of Kollancode house.

8. The defendant resisted the Suit and filed written statement. The defendant disputed title of the plaintiff over plaint `A', `B' and `C' schedule properties and in particular, title of `D' schedule item, as claimed by the plaintiff being co-owner. The specific contention, *inter alia*, is that plaint `D' schedule is not a common motorable road, as contended by the plaintiff and the plaintiff has no manner of right over `D' schedule either as coowner or otherwise. Further, plaint `B' and `C' schedule properties were provided with convenient access for ingress and egress and there is no justification to claim plaint `D' schedule way.

9. The trial court recorded evidence in this matter with reference to the issues raised. PW1 was examined and Exts.A1 to A3 were marked on the side of the plaintiff. DW1 examined on the side of the defendant. Exts.C1, C1(a), C2 and C2(a) were also marked as court exhibits.

10. The trial court appraised the contention as to coownership claimed by the plaintiff in relation to plaint `D' schedule property and negatived the contention. Thereby the Suit was dismissed. On appeal, the appellate court also confirmed the finding of the trial court.

11. In this matter, even though the plaintiff, who was examined as PW1, filed affidavit in lieu of chief examination, claiming co-ownership right over plaint `D' schedule, during cross examination, he deposed that it would not be possible to seek the co-ownership right in the plaint `D' schedule property, in any manner, as per records. He also deposed that no pathway seen provided in the partition deed of 1974. The trial court also found that during cross examination of PW1 he had given evidence that there is no impediment to have access to plaint C schedule from the way on its east and plaint `B' schedule could be accessed through plaint `C' schedule. In fact,

this aspect is specifically pointed out in Ext.C2 report of the Commissioner. PW1 also given evidence before the trial court that there is nothing on records to show that plaint `D' schedule property is a way having width of 10-15 feet. In this matter, plaint `A' schedule property is having direct access to PWD road and `B' and `C' schedule properties also having convenient access, as deposed by PW1.

12. In this matter, the specific assertion of the plaintiff is that plaint `D' schedule motorable way is kept in common for the benefit of the plaintiff, defendant and others and the specific contention is that the plaintiff is one among the co-owners. The learned counsel for the appellant attempted to establish coownership based on a document, which was not produced before the trial court and produced before the appellate court. Though it was produced before the appellate court, the appellate court did not receive the same. However, I have perused the certified copy of the said document, viz., settlement deed No.3506/1996, in order to see as to whether the said settlement deed in any way shows co- ownership right of the plaintiff over `D' schedule. It is true that in the said document its eastern boundary is shown as road and other boundaries as way. I do not think that merely because of the boundaries narrated in this document show road and way, the plaintiff could be held as the co-owner of `D' schedule property. Right and ownership over an immovable property shall be established independently and mere conjunctions and surmises would not suffice. So the said settlement deed also is of no avail to the plaintiff. Relying on the available records or even referring the copy of settlement deed No.3506/1996, the learned Senior Counsel failed in his attempt to prove ownership of the plaintiff over plaint `D' schedule, in a case where PW1 categorically admitted during cross examination that he did not have any records to establish joint ownership, as claimed.

13. In fact, when a party claims title over an immovable property, the same shall be proved by cogent and convincing evidence by the title document/s. It is true that adverse possession may be an exception and for which specific pleadings in the plaint, supported by evidence are necessary. No doubt, in order to perfect possessory title by adverse possession, the essentials to be pleaded and, proved are; `*nec vi*', `*nec clam*' and `*nec precario*', ie. without force, without secrecy and without permission. Otherwise, it is possible for a party to claim right of way as provided under the Easement Act. In this case, the plaintiff raised his claim based on the assertion that he is a co-owner of the `D' schedule. But the coownership right

is not at all established and as such the prohibitory injunction claimed, based on the said assertion, rightly negatived the trial court as well as the appellate court. In view of the matter, no substantial question of law to be formulated in this Second Appeal to admit and maintain the same.

14. In order to admit and maintain the 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.

15. In this case, the learned counsel for the defendant failed to raise any substantial question of law warranting admission of the Second Appeal. 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."*

16. 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 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.

17. 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. 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.

18. 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.*

19. 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 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.

20. 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 the pending Interlocutory Applications in this Second

Appeal shall stand dismissed.