

**HIGH COURT OF KERALA**

Bench: Justice A. Badharudeen

Date of Decision: 31 October 2023

**RSA NO. 158 OF 2022**

**AGAINST JUDGMENT AND DECREE DT.31.07.2017 IN AS 305/2011 OF  
ADDITIONAL DISTRICT JUDGE-II (SPECIAL)-II, KOTTAYAM  
IN JUDGMENT AND DECREE DT.25.07.2011 IN O.S.NO.466/2007 OF  
PRINCIPAL SUB COURT, KOTTAYAM**

BABU M.P., ..... APPELLANT/APPELLANT/PLAINTIFF

Versus

1

THANKAMMA,

(R1 DIED AND RESPONDENT NOS.2 TO 4 ARE RECORDED AS  
LEGAL REPRESENTATIVES OF R1 VIDE ORDER DATED 13.10.2023 IN  
RSA.NO.158/2022)

2

PRASAD,

3

ANITA,

4

AJITHA,

..... RESPONDENTS/DEFENDANTS

**Sections, Acts, Rules, and Article:**

Order XLII Rule 1 of the Code of Civil Procedure

Section 100 of the Code of Civil Procedure

Section 53A of the Transfer of Property Act

Section 17 of the Registration Act

**Subject:** Civil Appeal concerning the specific performance of an agreement for sale and a dispute over the execution of agreements.

**Headnotes:**

**Specific Performance – Execution of Agreement for Sale – Plaintiff alleges execution and renewal of agreements between parties for sale of property – Defendant denies execution and contends trespass and unlawful possession by the plaintiff – Trial Court and Appellate Court reject plaintiff’s claims, disbelieving execution of agreements – Courts**

**below held plaintiff as trespasser, dismissing the suit and granting decree for recovery of possession to defendant. [Para 5-12]**

**Evidence – Contradictory Testimonies – Evidence of plaintiff and witness regarding place of execution of agreement found contradictory – Failure to examine other attestors to agreements – Courts below find evidence insufficient to prove execution of agreements. [Para 12]**

**Documentary Proof – Execution of Agreements – Courts below find plaintiff failed to prove execution of Ext.A1 and Ext.A1(a) agreements due to insufficient evidence and contradictory testimonies – Dismisses claim based on unregistered agreements citing Section 17 of the Registration Act. [Para 12]**

**Limitation – Renewal of Agreement – Finding of appellate court on limitation rebutted by renewal agreement Ext.A1(a) dated 05.09.2003 – Courts below erred in holding claim based on Ext.A1 or Ext.A1(a) agreements as barred by limitation. [Para 12]**

**Second Appeal – Substantial Question of Law – High Court finds no substantial question of law arises for admitting Second Appeal – Emphasizes mandatory formulation of substantial question of law under Section 100 read with Order XLII Rule 2 of the C.P.C. for admitting and maintaining a second appeal – Dismisses appeal finding it meritless without admitting. [Para 13-20]**

**Referred Cases:**

- **[2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168] Nazir Mohamed v. J. Kamala and Others**
- **[2023 (5) KHC 264 : 2023 (5) KLT 74 SC] Government of Kerala v. Joseph**

**Representing Advocates:**

**Adv G. Sreekumar (Chelur) for the Appellant/Plaintiff**

**Adv Rajeev V. Kurup for the Respondents/Defendants**

\*\*\*\*\*

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 17.10.2023, THE COURT ON 31.10.2023 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, assailing judgment in A.S.No.305/2011 dated 31.07.2017 on the files of Additional District Court, Kottayam arose out of judgment and decree in O.S.No.466/2007 on the files of the Principal Sub Court, Kottayam dated 25.07.2011.

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

3. Heard the learned counsel for the appellant/plaintiff and the learned counsel for the contesting respondents/defendants on admission.

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

5. The plaintiff filed suit for specific performance of an agreement for sale alleged to be executed between the plaintiff and the original defendant, who is now no more. According to the plaintiff, the defendant agreed to execute sale deed in respect of plaint schedule property for a total consideration of Rs.1,25,000/-. On the date of execution of the agreement, ie. on 25.05.2003, Rs.10,000/- was paid as advance sale consideration. But there existed a mortgage to the tune of Rs.75,000/- with Njeezhoor Service Co-operative Bank. Accordingly, on 05.09.2003, the defendant accepted Rs.40,000/- more as advance and renewed the agreement after parting possession of plaint schedule property with the plaintiff. Though the defendant agreed to clear the balance outstanding in the Co-operative Bank amounting to Rs.23,461/-, when he received Rs.40,000/- the defendant failed to clear the same. Consequently, the plaintiff paid the amount and cleared the mortgage liability. According to the plaintiff, the plaintiff is always

ready and willing to perform his part of contract and to execute the sale deed after paying Rs.51,539/- as balance sale consideration.

6. The defendant filed written statement and denied execution of the original agreement dated 25.05.2003 and its renewal as on 05.09.2023. The defendant contended that the defendant never handed over possession of the property to the plaintiff at any point of time. According to the defendant, the plaintiff obtained order of prohibitory injunction and trespassed upon the plaint schedule property and he constructed a shed therein. The defendant raised counter claim for recovery of possession of the property from the plaintiff.

7. The plaintiff filed replication and resisted the counter claim banking on the allegation that he got possession over the property on the basis of the agreement for sale.

8. The trial court raised necessary issues and tried the matter. PW1 and PW2 were examined and Exts.A1 to A4 were marked on the side of the plaintiff. DW1 and DW2 were examined and Exts.B1 and B2 were marked on the side of the defendant.

9. On meticulously analysing the evidence, the trial court found that the plaintiff miserably failed to prove execution of Exts.A1 and A1(a) agreements. Accordingly, it was found that the plaintiff is a trespasser and he is bound to part possession of the property to the defendant. Accordingly, the suit was dismissed with cost of the Additional 4<sup>th</sup> defendant and the additional 4<sup>th</sup> defendant was allowed to recover possession of the plaint schedule property after evicting the plaintiff from the property.

10. On appeal, the learned Additional District Judge also, on re-appreciation of the evidence, confirmed the decree and judgment of the trial court.

11. At the time of admission, the learned counsel for the plaintiff vehemently argued to hold that execution of Exts.A1 and A1(a) agreements by the defendant, agreeing to execute sale deed in favour of the plaintiff in relation to the plaint schedule property, is well established by the evidence of PW1 and PW2 and the trial court as well as the appellate court went wrong in holding otherwise. It is also submitted that the finding of the appellate court that the suit in so far as execution of Ext.A1 is barred by limitation is also incorrect since Ext.A1 agreement was renewed as per agreement dated 05.09.2003.

12. In this matter, Ext.A1 is the first agreement executed between the plaintiff and the 1<sup>st</sup> defendant on 25.05.2003. As per Ext.A1(a) dated 05.09.2003, Ext.A1 was renewed. Therefore, at the outset, in view of Ext.A1(a) agreement, it could not be held that the relief claimed based on Ext.A1 or Ext.A1(a) agreements is barred by limitation and the said finding of the courts below is wrong. However, the crucial question is whether the plaintiff succeeded in establishing that the defendant executed Ext.A1 and Ext.A1(a) agreements? It is interesting to note that PW1, who is none other than the plaintiff, and PW2, who is a witness to Ext.A1 agreement, were examined to prove execution of the same. In this matter it has to be read out from the available materials that though PW1 filed chief affidavit and supported execution of Ext.A1 and Ext.A1(a) agreements, regarding the place of execution of Ext.A1, the evidence of PW1 is that Ext.A1 was executed at the residence of the defendant's daughter at Kanjirakkatt. However, the evidence of PW2, who is the brother in law of PW1, is that the same was executed at the residence of the defendant at Mankarakkunnel. It is relevant to note that the other attestator to Ext.A1 was not examined. The attestator to Ext.A1(a) agreement also not examined. The second attestator to Ext.A1(a) is the son of the defendant and the first attestator is the wife of the brother in law of the plaintiff. The second attestator, who is none other

than the brother in law of the plaintiff alone was examined as PW2. It has to be noticed that evidence of PW1 and PW2 in the matter of execution of Ext.A1 is contrary. In fact, on scanning the evidence of PW1 and PW2, who had contra versions regarding the place of execution of Ext.A1, it could be gathered that the evidence adduced by the plaintiff is quite insufficient to prove execution of Ext.A1 and A1(a) agreements, as contended. Therefore, the trial court as well as the appellate court rightly held that Exts.A1 and A1(a) were not at all proved and accordingly, dismissed the suit and also granted decree for recovery of possession, where admittedly the owner of the property is the additional 4<sup>th</sup> defendant as of now. Thus it appears that even though the application of Section 53A of the Transfer of Property Act has been pressed into before the appellate court, in fact, Ext.A1 or Ext.A1(a) are not registered documents as mandated by law and, therefore, the said claim could not be adjudged acting on unregistered agreements in view of the rider under Section 17 of the Registration Act.

13. Thus it appears that in this matter no substantial question of law arises to admit and maintain this Second Appeal.

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 Rights Reserved @ LAWYER E NEWS

\*Disclaimer: Always compare with the original copy of judgment from the official website.