

CASE NO.:  
Appeal (civil) 60 of 1994

PETITIONER:  
K. RAJ AND ANR.

Vs.

RESPONDENT:  
MUTHAMMA

DATE OF JUDGMENT: 17/04/2001

BENCH:  
D.P. Mohapatra & Brijesh Kumar

JUDGMENT:

BRIJESH KUMAR, J.  
L...I...T.....T.....T.....T.....T.....T.....T..J

This appeal arises out of a judgment and order passed by the Madras High Court, dated January 30, 1992 in Second Appeal NO. 291/1982. A suit filed by the Predecessor-in-Interest of the present appellants, claiming one-half share in the property in question, was dismissed by the Trial Court but in First Appeal the order of the Trial Court was set aside and a preliminary decree for redemption of the property, as prayed for, was passed and the plaintiff was held to be entitled for the relief claimed. Aggrieved by that order the respondent preferred the Second Appeal in the High Court which has been allowed and the said order has been impugned in the present appeal.

The main question which has been raised in the present appeal is whether the High Court was justified in interfering with the findings of fact recorded by the First Appellate Court, by re-appraising the evidence in violation of provisions contained in Section 100 CPC. A perusal of the judgment passed by the High Court also shows that the Court had not framed any substantial question of law while entertaining and deciding the Second Appeal.

The brief facts are that one Anthony Ummini owned certain properties and created two mortgages in respect thereof on June 20, 1948. The mortgage was in favour of one Ananthan. Anthony died later as a bachelor. His another brother Ponnu who pre-deceased him, was also as a bachelor. He had two sisters namely, Muthamma and Kannamma. Muthamma paid the mortgage money on 14.3.1960 and obtained a document of release of the property from Ananthan. In the year 1978, a suit was filed by Kannamma impleading Muthamma as defendant with a prayer for redemption of plaintiff schedule properties, basing her claim on the facts that on the death of Anthony Ummini her brother, the two sisters namely, the plaintiff and the defendant would inherit his property. At the time of his death Anthony Ummini had none of his parents living nor any other brothers or sisters except the plaintiff and the defendant.

In paragraph 5 of the plaint, it is averred that plaintiff and the defendant are sisters and that the plaintiff is entitled to one-half of the property, whereas defendant is entitled to the other half. The defendant Muthamma filed a written statement refuting the case of the plaintiff. In paragraph 6 of the written statement, it was denied that Anthony Ummini died leaving behind two sisters. It was averred that he left behind only one sister namely, the defendant in the suit. It is also specifically averred that plaintiff is not the sister of Anthony Ummini. She is also said not to be the daughter of Anpudayan Anthony. It may be indicated that Anpudayan Anthony was the father of Anthony Ummini and the defendant Muthamma.

The averments made in paragraph 5 of the plaint have been denied. It is to be noticed that in the plaint the plaintiff has described the title of the case as Kannamma, the daughter of Valliamma and defendant has also to be described as Muthamma daughter of Valliamma. Father's name has not been given. In the written statement, it has not been denied that the plaintiff and the defendant both are daughters of Valliamma. The case, however, is that the plaintiff Kannamma was daughter of Valliamma from her previous husband and not out of the wedlock between Anpudayan Anthony and Valliamma. The Trial Court as indicated earlier dismissed the suit recording a finding that the plaintiff was one of the daughters of Valliamma but the plaintiff and the defendant are not sisters born to the same father. According to defendant, she and Anthony Ummini are from the same father viz. Anpudayan Anthony.

It may also to be noticed here that under the Hindu Succession Act, sisters fall in Class II heirs but a note appended to the provision clarifies that sisters do not include uterine sisters. That is to say, according to the said provision an uterine sister will not be an heir of such brother's property. In appeal, the judgment of the Trial Court was set aside and the suit was decreed.

The First Appellate Court has referred to a number of documents for arriving at the findings as recorded by it. One of the reasons indicated in the order passed by the First appellate Court is that it was not specifically pleaded that the plaintiff was daughter of first husband of Valliamma nor name of the first husband of Valliamma was given by the defendant. The First Appellate Court also observed strong and mature evidence has to be adduced to reject the case of the plaintiff that she is daughter of Anthony. It is also observed that the plaintiff was not asked to meet the case that she was the daughter of first husband of Valliamma. We, as a matter of fact, may point out that the plaint does not indicate anywhere that plaintiff's case was that she is daughter of Anpudayan Anthony. She has described herself as daughter of Valliamma. She does not give father's name. The High Court in Second Appeal set aside the order passed by the First Appellate Court and also referred to the documents exhibited in the case. The Second Appellate Court observed that the burden was on the plaintiff to establish that she is the daughter of Valliamma and Anpudayan Anthony. It is also observed that the First Appellate Court had wrongly thrown the burden of proof upon the defendant in respect to the facts indicated above. Yet another observation to be found

is that the First Appellate Court totally misled itself in not appreciating the facts in proper perspective. It is also found that at several places in the judgment rendered by the First Appellate Court, the facts stated therein are different from what is contained in the respective documents. With the above findings, the order of the First Appellate Court was reversed.

Our attention has been rightly drawn by the learned counsel for the parties that Second Appeal under Section 100 CPC lies to the High Court if the Court is satisfied that the case involves a substantial question of law. It would be appropriate to reproduce Section 100 CPC which reads as under:

100. Second Appeal. (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 involving 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.

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.

According to the above provision, the substantial questions of law as may be involved in the appeal are to be precisely stated in the memorandum of appeal itself. If the High Court feels satisfied about existence of substantial question of law, it is for the High Court to formulate that question and the appeal is generally to be heard on the questions so formulated.

It has been observed by this Court in several decisions that the High Court must conform to the requirements laid down in sub-section 4 of Section 100 CPC. Formulation of such questions of law gives proper direction in which arguments have to be advanced by the parties. The facts and the questions of law are also appreciated in correct perspective. Such provisions as made under sub-sections 3 and 4 of Section 100 CPC are meant to be acted upon and complied with. It appears that the High Court did not advert to the said requirement of law and without addressing itself to that aspect of the matter heard the appeal and disposed of the same.

Some decisions on the point may be referred to, namely, Kanailal Garari and Ors. Vs. Murari Ganguly and Ors. (1999 (6) SCC 35). It has been held that it is mandatory to formulate a substantial question of law while entertaining the appeal in absence of which the judgment is to be set aside. The Court relied upon a decision of this Court in Panchugopal Barua Vs. Umesh Chandra Goswami (1997(4) SCC 713). In Santosh Hazare Vs. Purshotam Tiwari (2001 S.C.W. 723), it has been held that High Court cannot proceed to hear a second appeal without formulating the substantial question of law.

It is submitted that prima facie some question of law should be involved in the case, then alone the case need be remanded to the High Court to consider that aspect of the matter. A case where no such question arises at all, it would not serve any purpose to remand the case. In connection with this submission, the findings as recorded in the Second Appeal, may be seen. It has been found that burden of proof was wrongly shifted on certain questions by the First Appellate Court. Yet another finding which has been recorded is that documents relied upon by the First Appellate Court actually do not contain, what has been indicated in the judgment of the First Appellate Court. It may perhaps then amount to mis-reading of the documents or wrong interpretation of the documents. We have also noticed that in the plaint the plaintiff has described herself and the defendant only as daughters of Vallliamma. Fathers name in respect of none has been disclosed. It has also been averred that the plaintiff and the defendant are sisters of Anthony Ummini. Disclosure of the name of the father may perhaps be more relevant and of special importance while property of the deceased brother is claimed by a sister since the expression sister does not mean an 'uterine sister as provided under the note to the schedule of inheritance in the Hindu Succession Act. An averment of a general description, 'sister may perhaps fall short of entitlement to inherit the property of the deceased brother as all categories of sisters would not be heir to the brothers property. This seems to be an important aspect of the matter which emerges regarding the framing of the pleadings, fulfillment of requirements to be heir to the property of the deceased brother and as to who has to prove these facts. Perhaps, these are the matters which are to be considered by the High Court to come to a conclusion as to whether any substantial question of law is involved or not in the Second Appeal and a decision to that effect has to be taken by the court concerned namely, the High Court. In the present case, we find that the High Court has not only made any effort to find out whether any substantial question of law is involved or not, it has also totally failed to address itself to that aspect of the matter in utter dis-regard of the provisions contained under sub-section 4 of Section 100 CPC which has been held to be mandatory in nature. In such facts and circumstances of the case, it would be a fit case for remand to the High Court to consider this aspect of the matter and to find out itself if any substantial question of law is involved or not. In case, such a question or questions arise, the same should be formulated and the appeal be heard thereafter in accordance with law.

We would however particularly take care to observe that none of the observations made by us in this order would

prejudice the case of the parties while being heard by the High Court after remand. The High Court may take any view of the matter on its merit.

In the result, the appeal is allowed, the judgment and order passed by the High Court in Second Appeal is set aside and the case is remanded back to the High Court to consider the same in the light of the observations made above. Since the matter is pending for long, it is requested that the High Court may dispose of the case expeditiously as far as possible within six months of receipt of the record from this Court.

In the facts and circumstances of the case, there would however be no order as to costs.

JUDIS