Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos.3066-3067 OF 2015
(Arising out of S.L.P. (Civil) Nos. 25754-55 of 2014)

Lisamma Antony and another ... Appellants

Versus

Karthiyayani and another ...Respondents

J U D G M E N T

Prafulla C. Pant, J.

These appeals have arisen out of judgment and decree dated 6.6.2013, passed by the High Court of Kerala in Regular Second Appeal No. 188 of 2013, whereby said appeal was allowed by the High Court. By the order dated 7.2.2014, passed by the High Court, Review Petition No. 611 of 2013 in second appeal was dismissed.

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Date: 2015.03.20 16:52:14 IST
Reason:

2. We heard learned counsel for the parties and perused the papers on record.

3. Briefly stated, plaintiff Annamma Thomas (predecessor-in-title of the present appellants) instituted suit No. 415 of 2005 before the Principal Munsiff, Alappuzha, for injunction restraining the defendants from trespassing into the property mentioned in the schedule of the plaint, and from demolishing its boundary. It is pleaded in the plaint that the plaintiff Annamma and her two children Mathew and Benny were the absolute owners of the property, which they purchased vide Sale Deed No. 824/80 dated 3.5.1980. They further pleaded that they were in possession of the property. It is also pleaded by the plaintiffs that the defendants are the Kudikidappukari (persons holding tenancy rights) of the previous owners to the extent of 10 cents of property (1/10th of an acre), which is on the northern side of the property in suit. The defendants were in possession of said part. It is further pleaded by the plaintiffs that boundary between the property in question and that of the defendants is well demarcated. It is alleged by the plaintiffs that on 19.6.2005, the defendants

attempted to demolish the existing fence. Therefore, the suit filed.

4. The defendants filed written statement and additional written statement, and contested the suit. They denied the title of the plaintiff over the land in question. They also denied having attempted to demolish the fencing as alleged by the plaintiff. It is stated in the written statement that mother of the defendant No. 1 was given 10 cents of the land on the north of 'Thodu' (water channel), lying on the northern side of the property.

5. The trial court framed as many as five issues, including the issue relating to correctness of description of the property in suit. After giving opportunity to the parties to adduce evidence, and after hearing them, the trial court found that the property in the suit is owned by the plaintiffs and decreed the suit with following directions: -

> "1. The defendants are restrained by a decree of permanent prohibitory injunction from trespassing into the plaint schedule property i.e. property on the south of the boundary fence consisting of poovarash trees existing on the northern boundary of the plaint schedule property and from demolishing this boundary.

> 2. The northern boundary of the plaint schedule property is fixed as the existing boundary fence, constituted of poovarash trees i.e. 40 cms, to the south of EF line of the C1 (b) plan. C1(b) plan is attached along with the decree."

6. Aggrieved by said judgment, the defendants filed A.S. No. 123 of 2009 before the District Judge, Alappuzha. At the appellate stage, the defendants sought to adduce additional evidence which was allowed by the first appellate court, and documents Ext. B-1 to B-9 were taken on record. The first appellate court, after hearing the parties, affirmed the decree of the trial court, vide its judgment and decree dated 19.10.2012, with following directions and modifications: -

> "In the result, the appeal allowed in part. Suit decreed fixing the northern boundary of plaintiff's property as EF line. Ext. C1(b) plan will form part of the decree and granted a permanent prohibitory injunction restraining the defendants from trespassing into the property of plaintiff or causing any kind of obstruction of its peaceful possession and enjoyment."

7. Following reasons are given in para 8 of the judgment of the first appellate court for the above directions: -

> "On measurement by the commissioner it was found that 20 cents of property available and there is no reduction in extent. If that be so, the property can be located based on the title of plaintiff at first and the

> remaining 10 cents will go to the defendants as the defendants have obtained title subsequently under Ext. B1 document and that is what actually done by the commissioner who prepared Ext. C1(b) plan. The existence of thodu and road in their respective properties will not affect their title. The commissioner who prepared Ext C1(b) plan has located the property of 10 cents owned by the plaintiff as well as the 10 cents owned by the defendants and the dividing line correctly located as EF line in the plan. The location of Poovarash tree also located in the plan. The property is seen measured and located in reference to the old survey stones which are also located. All these would clearly show that the boundary line separating these two properties was fixed in accordance with the survey plan as well as document of title of plaintiff. So there cannot be any reason for interference to the finding of the survey line separating these properties. The place wherein the fencing situated not noted in Ext. C1(b) plan. No attempt was made by the defendants in order to locate the place wherein the fencing is situated. There is no prayer for recovery of possession of any portion of property by the respective parties and hence the finding of the lower court that the EF line is the boundary line in between the property of plaintiff and defendants can safely accepted."

8. Dissatisfied from the decree of the first appellate court, the defendants filed Second Appeal No. 188 of 2013 before the High Court which was disposed of by said court vide impugned judgment and decree dated 6.6.2013.

9. Paragraph 7 of the impugned judgment and decree, passed by the High Court, shows that the High Court framed following question as substantial question of law: -

> "Did the courts below go wrong in overlooking the boundaries and descriptions in Ext. B1, which is a vital document so far as it relates to the identity of the property claimed by the defendants?"

10. It is argued before us on behalf of the appellants that the High Court has erred in law in upsetting the concurrent findings of fact recorded by the courts below. On the other hand, learned counsel for the respondents contended that the appellants have still right to prove their claim as the matter has been remanded by the High Court to the trial court.

11. It is settled principle of law that second appeal under Section 100 of the Code of Civil Procedure, 1908, cannot be admitted unless there is substantial question of law involved in it. As to what is substantial question of law, in ***Kondiba Dagadu Kadam* v. *Savitribai Sopan Gujar and others***[1], this Court has explained the position of law as under: -

> "**6.** 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

1 (1999) 3 SCC 722

> 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."

12. In view of the above position of law, the question formulated by the High Court in the present case, as quoted above, cannot be termed to be a question of law, much less a substantial question of law. The above question formulated is nothing but a question of fact. Merely for the reason that on appreciation of evidence another view could have been taken, it cannot be said that the High Court can assume the jurisdiction by terming such a question as a substantial question of law.

13. Having gone through the impugned order challenged before us and after considering the submissions of learned counsel for the parties, we are of the view that the High Court has simply re-appreciated the evidence on record and allowed the second appeal and remanded the matter to the trial court.

14. Rule 23 of Order XLI of Code of Civil Procedure Code, 1908, (for short "the Code") provides that where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

15. Rule 23A of Order XLI of the Code provides that where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

16. Rule 24 of Order XLI of the Code further provides that where evidence on record is sufficient, appellate court may determine case finally, instead of remanding the same to the lower court.

17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial court. The second appellate court should have restrained itself from remanding a case to the trial court. Remanding a case for re-appreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis, shakes the faith of litigants in the court.

18. With the above observations, after having found that there was no substantial question of law involved in the second appeal before the High Court, and that the High Court has, by merely re-appreciating the evidence, reversed concurrent findings of fact, and remanded the matter, we have no option but to allow these appeals.

19. Accordingly the appeals are allowed. The impugned judgment and decree dated 6.6.2013, passed by the High Court

in Regular Second Appeal NO. 188 of 2013 and order dated 7.2.2014 in Review Petition No. 611 of 2013, passed by the High Court, are set aside. The judgment and decree as modified by the first appellate court shall stand affirmed. There shall be no order as to costs.

.....J.
[Dipak Misra]

.....J.
[Prafulla C. Pant]

New Delhi;
March 20, 2015

ITEM NO.1 COURT NO.5 SECTION XIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s).3066-3067 of 2015

LISAMMA ANTONY & ANR. Appellant(s)

VERSUS

KARTHIYAYANI & ANR. Respondent(s)

Date : 20/03/2015 These appeals were called on for judgment today.

For Appellant(s) Mr. Harshad V. Hameed,Adv.
Mr. Dileep Poolakkot, Adv.
Mrs. Ashly Harshad, Adv.

For Respondent(s)

*** * * * * ***

Hon'ble Mr. Justice Prafulla C. Pant pronounced the judgment of the Bench comprising Hon'ble Mr. Justice Dipak Misra and His Lordship.

The appeals are allowed in terms of the signed reportable judgment

(Gulshan Kumar Arora) (H.S. Paresher)
Court Master Court Master

(The signed reportable judgment is placed on the file)