

CASE NO.:
Appeal (civil) 5295 of 2005

PETITIONER:
Rajeshwari

RESPONDENT:
Puran Indoria

DATE OF JUDGMENT: 25/08/2005

BENCH:
G.P. MATHUR & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T
(SPECIAL LEAVE PETITION (CIVIL) NO. 16821 OF 2002)

P.K. BALASUBRAMANYAN, J.

Leave granted.

1. This appeal is by the defendant. The plaintiff-respondent sued for specific performance of an agreement to sell the suit property having an extent of 2000 sq.feet. The price fixed was Rs. 2,500/-. A sum of Rs. 1,000/- was paid as advance. The agreement was entered into on 23.2.1981. The agreement did not fix any date for performance. The plaintiff issued a notice to the defendant on 31.7.1989, more than seven years after the agreement, calling upon the defendant to execute the sale deed on receipt of the balance consideration. The defendant not having responded, the plaintiff filed the suit on 01.11.1990 for specific performance.

2. The defendant having denied the claim for specific performance made by the plaintiff and having raised several defences the trial court raised the following issues for trial:

(1) Whether the plaintiff had been ready and willing to perform his part of the contract in pursuance of the agreement dated 23rd February, 1981 with respect to the part of the land measuring to 50 x 40 ft. described in paragraph no.2 of the plaint?

(2) Whether the plaintiff cancelled the aforesaid agreement to sell the land after receiving a sum of Rs. 3,500/- from the defendant?

(3) Whether the suit had been filed by the plaintiff within time?

(4) Relief.

The trial court answered these issues in favour of the plaintiff and decreed the suit. The defendant filed an appeal under Section 96 of the Code of Civil Procedure, 1908. The Additional District Judge concurred with the decision of the trial court and dismissed the appeal, thus, confirming the decree of the trial court. Feeling aggrieved, the defendant filed a second appeal before the High Court under Section 100 of the Code of Civil Procedure, 1908. The defendant submitted in his memorandum of second appeal that the following substantial questions of law were involved in the case.

"A. Whether the courts below have committed a grave legal error in not taking into consideration the great variance between the pleading and the proof of the plaintiff which was sufficient for dismissing the suit of the plaintiff for specific performance of the agreement for sale?

B. Whether the courts below were wrong in passing a decree for specific performance of the agreement for sale in favour of the plaintiff as a matter of course by ignoring the legal position that the grant of relief of specific performance is always discretionary and the courts are not bound to grant the same in all cases?

C. Whether the courts below have committed a grave legal error in holding the suit of the plaintiff to be within the period of limitation although the same was filed after 7 years of the agreement for sale which was clearly time barred?

D. Whether the courts below have committed a grave legal error in not dismissing the suit of the plaintiff on the ground of delay and laches even assuming that the same was filed within the period of limitation?

E. Whether the courts below have committed a grave legal error in rejecting the document Ex-A-1 on irrelevant considerations which was executed by the plaintiff after obtaining a consideration of Rs.3500/-?"

When the second appeal came up before the High Court, the High Court dismissed the same in the following words:
"Heard Learned Counsel.

I do not find the appeal to be involving any substantial question of law. The appeal thus lacks merit and is hereby dismissed summarily."

Aggrieved by this dismissal, the defendant filed the petition for special leave before this Court invoking Article 136 of the Constitution of India. This Court issued notice thereon in the following words.

"Issue notice to the respondent to show cause why the appeal be not remanded to the High Court for examining, if any, the question of law suggested in the memorandum of second appeal deserves to be heard as substantial question of law"

On receipt of the notice, the plaintiff-respondent appeared and sought an early hearing of the matter and with the consent of counsel, it was heard in detail, and the matter is being disposed of finally by this judgment.

3. Normally, a suit for specific performance of an agreement for sale of immovable property, involves the question whether the plaintiff was ready and willing to perform his part of the contract in terms of Section 16 of the Specific Relief Act, whether it was a case for exercise of discretion by the court to decree specific performance in terms of Section 20 of the Specific Relief Act and whether there were laches on the part of the plaintiff in approaching the court to enforce specific performance of the contract. In some cases, a question of limitation may also arise in the context of Article 54 of the Limitation Act on the terms of the agreement for sale. Other questions like the

genuineness of the agreement, abandoning of the right to specific performance, a novation and so on, may also arise in some cases. No doubt, a finding on the three primary aspects indicated earlier would depend upon the appreciation of the pleadings and the evidence in the case in the light of the surrounding circumstances. Could it be appropriate to understand these questions purely as questions of fact in the context of Section 100 of the Code of Civil Procedure, 1908? In *Raghunath Prasad Singh Vs. Deputy Commissioner of Pratabgarh*, (54 Indian Appeals 126), the Privy Council, though, in the context of Section 110 of the Code of Civil Procedure, negatived the theory that to be a substantial question of law, a question of law has to be of general importance and stated that "a substantial question of law" is a substantial question of law as between the parties in the case involved. This approach was adopted by this Court in *Deputy Commissioner Vs. Rama Krishna*, (AIR 1953 SC 521). This Court held, again in the context of Section 110 of Code of Civil Procedure, that since the ground on which the appeal was dismissed by the High Court raised a question of law of importance to the parties, on that ground alone the appellant was entitled to a certificate under Section 110 of the Code. In *Chunilal V. Mehta and Sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd.* (AIR 1962 SC 1314) this Court, again in the context of Section 110 of the Code and Article 133 (1) (a) of the Constitution of India, had occasion to consider the question. A Constitution Bench of this Court held that the proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law. Thus, it was accepted that a question of law would be a substantial question of law if it directly and substantially affects the rights of the parties and if it was not covered by a decision of the Supreme Court or of the Privy Council or of the Federal Court.

4. The right to specific performance of an agreement for sale of immovable property, when filed, raises questions of substantial importance between the parties as to whether the plaintiff has satisfied the requirements of Section 16 of the Specific Relief Act, whether it is a case in which specific performance of the contract is enforceable in terms of Section 10, whether in terms of Section 20 of the Act, the discretion to decree specific performance should be exercised by the court and in some cases, whether the suit was barred by limitation and even if not, whether the plaintiff has been guilty of negligence or latches disentitling him to a decree for specific performance. These questions, by and large, may not be questions of law of general importance. But they cannot also be considered to be pure questions of fact based on an appreciation of the evidence in the case. They are questions which have to be adjudicated upon, in the context of the relevant provisions of the Specific Relief Act and the Limitation Act (if the question of limitation is involved). Though, an order in exercise of discretion may not involve a substantial question of law, the question whether a court could, in law, exercise a discretion at all for decreeing specific performance, could be a question of law that substantially affects the rights of parties in that suit. Therefore, in the case on hand, the High Court was not justified in dismissing the second appeal in the manner in which it has done. Be it noted, that the High Court has also not spoken while dismissing the second appeal. We are therefore of the view that it is necessary for the High Court to consider whether a substantial question of law is involved or not and to give its reasons for

coming to its conclusion either way, and if it finds that a substantial question of law or substantial questions of law is or are involved, to frame that question or those questions and to answer it or them in accordance with law. In the context of the notice issued by this Court while entertaining the Petition for Special Leave to Appeal, the proper course to adopt is to set aside the judgment and decree of the High Court in the second appeal and remand the second appeal to the High Court for a consideration of the question whether any substantial question of law is involved in the case in the light of the pleadings and the facts established and if it arises, to decide whether any interference in second appeal under Section 100 of the Code of Civil Procedure, 1908 is warranted or justified.

5. In view of the fact that we are remanding the second appeal for a proper decision by the High Court, we are not advertent to the contentions raised on behalf of the plaintiff-respondent that there is no question of limitation in this case and that no substantial question of law arose for decision. It is open to the plaintiff-respondent to raise all available contentions before the High Court, while that court considers the second appeal afresh pursuant to the remand. We once again clarify that this remand is based only on the argument that the High Court has not properly applied its mind to the aspects that may have to be considered in the second appeal and has dismissed the second appeal in a cursory and unsatisfactory manner.

6. Before parting, we feel that we would be justified in pointing out that the amendment brought to Section 100 of the Code with effect from 1.2.1977 by Act 104 of 1976, has really not advanced the cause of justice. Earlier, interference could be had under Section 100 of the code if the decision was contrary to law or some usage having the force of law; or the decision had failed to determine some material issue of law or usage having the force of law; or suffered from a substantial error or defect in procedure provided by the Code or any other law for the time being in force, which may possibly have produced the error or defect in the decision of the case upon the merits. The provision enabled the court to correct errors of law or of procedure in an appropriate case and even unreasonable appreciation of evidence could have been brought within the contours of error of law in the circumstances of a given case. But by introducing the concept of "substantial question of law" in Section 100 of the Code, the right of the litigant to have a decision after a re-appraisal of the relevant materials by the High Court has been curtailed. Though, courts of first appeal are made the final courts of facts, there are instances when first appellate courts merely, mechanically, confirm the findings of fact rendered by the trial court without an independent reappraisal of the pleadings and the evidence in the case. Since a judgment of affirmance need not be as elaborate as a judgment reversing the decision of the court below, it is often contended that the judgment of the appellate court satisfies the requirements of Order XLI Rule 31 of the Code. There are occasions when the High Court feels the constraint of Section 100 and reluctantly declines to interfere though interference would have been proper to render justice between the parties. High Courts are often confronted with an argument that even if what was involved was a mixed question of fact and law or even a question of law, that did not constitute a substantial question of law justifying interference under Section 100 of the Code. Why not an error of law committed by the appellate court be corrected in Second Appeal? Why should not a litigant have an opportunity of having the decision in his case corrected for an error of law by the High Court at the second appellate stage? When a substantial question of law as expounded by this Court is only an open question of law substantial as between the parties, a restoration of the position as it existed prior to 1.2.1977 does not appear to be re-opening of the door too wide. It must be remembered, that now, after the amendment of the Code by Act 22 of 2002, interference in revision under Section 115 of the Code of Civil Procedure, 1908 has also been

substantially curtailed. Even if the High Court is satisfied that there would be failure of justice if the order is allowed to stand, the High Court cannot interfere under Section 115 of the Code, in view of the deletion of the particular proviso which existed prior to the amendment. Therefore, the High Courts cannot correct errors that could lead to a mis-trial or a finding of fact to be arrived at based on an erroneous approach that is proposed then and there by exercising a revisional jurisdiction, even at the initial stage so that at a later stage, a remand by the first appellate court is avoided. The curtailment of the right to interfere under Section 115 of the Code has only resulted in the High Courts being flooded with proceedings under Article 227 of the Constitution of India challenging all sorts of interlocutory orders. It is for the law makers to consider whether it would not be more appropriate to restore Section 115 of the Code as it existed prior to its amendment by Act 22 of 2002 and confer a broader right of second appeal as it existed prior to the introduction of the concept of substantial question of law into Section 100 of the Code, by Act 104 of 1976.

7. It is true that it is in consonance with public policy, to curtail a right of appeal (that too, a second appeal) so as to ensure that a litigation attains finality as early as possible. At the same time, it has also to be ensured that justice, according to law, is made available to the litigant who approaches the court. Our experience, as lawyers and Judges of High Courts shows that more often than not, first appellate courts, simply, mechanically, reiterate what is stated by the trial court and confirm findings of fact rendered by the trial court without making an independent reappraisal of the pleadings and the evidence in the case as they are bound to do as courts of appeal. But even in such cases, the High Courts find it difficult to interfere, though, they do interfere, when the injustice caused to the litigant is so apparent that the same could not be overlooked and the judgment under appeal allowed to pass muster. There have also been occasions when the High Courts had felt compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100 of the Code of Civil Procedure, and on occasions such decisions have been interfered with by this Court, on the ground that the High Court has exceeded its jurisdiction under Section 100 of the Code of Civil Procedure. After all, the purpose of the establishment of courts of justice is to render justice between the parties. Is it necessary to unduly curtail the jurisdiction of the High Courts, either under Section 100 of the Code of Civil Procedure or under Section 115 of the Code of Civil Procedure in that context? Of course, the High Courts have to act with circumspection while exercising these jurisdictions. Certainly, it is for the Parliament to take into account all the relevant aspects. We are making these observations only with a view to highlight the position that has emerged in the light of the amendments to Sections 100 and 115 of the Code of Civil Procedure as they are now obtaining.

8. In view of our conclusion in the present case that the High Court was not justified in dismissing the second appeal by a non-speaking order, we allow the appeal, set aside the judgment and decree of the High Court and remand the second appeal to the High Court for a fresh hearing and disposal and we make it clear that we have not decided whether the second appeal involves any substantial question of law or expressed any view on any of the aspects on the merits of the case. The parties are directed to appear in the High Court on 26.9.2005.