

Peer Ghulam Mustafa Shah Vs Manzoor Ahmad Malik And Others

Court: Jammu And Kashmir High Court (Srinagar Bench)

Date of Decision: April 23, 2021

Acts Referred: Specific Relief Act 1963 " Section 9, 38
Code Of Civil Procedure, 1908 " Section 100, 109
Constitution Of India, 1950 " Article 133(1)(a)

Hon'ble Judges: Vinod Chatterji Koul, J

Bench: Single Bench

Advocate: M.M.Dar, M.A.Qayoom

Final Decision: Dismissed

Judgement

1. This Civil Second Appeal is against and seeking setting-aside of judgement and decree dated 29th November 2018, passed by Principal District

Judge, Kulgam (for short "1st Appellate Court") and upholding of judgement and decree dated 28th February 2018, passed by Sub Judge, Kulgam

(Trial Court "for short") on the grounds contained therein.

2. Perusal of record on file reveals that on 26th June 2003, plaintiff "respondent no.1 herein, filed a Suit for permanent prohibitory injunction before

the Trial Court, stating therein that he purchased land measuring 01 Kanal 07 Marlas falling under Survey no.397 min situated at Nagam Tehsil

Kulgam (for brevity "suit property"), from defendant no.4 "appellant herein and in this connection a sale agreement was also executed and that

he had been in possession of suit property for thirty years. Over suit land, plaintiff claimed to have constructed a cowshed and a Kothar. However,

defendants were alleged to have been causing interference in and trying to dispossess plaintiff from suit property and, therefore, he filed the suit

before the Trial Court praying for grant of decree for permanent prohibitory injunction restraining defendants from causing any interference over the

suit property. Defendants, including appellant appeared before Trial Court, and filed written statement.

3. The Trial Court in view of the pleadings of the parties, on 21st June 2006, framed following issues for adjudication of the case:

1) Whether plaintiff has purchased suit land from defendant No.4 by virtue of agreement to sell and is in possession of suit land since last thirteen

years enjoying usufruct out of it? "OPP

2) Whether house and cowshed constructed by the plaintiff is existing on the suit land? Å¢â,¬Ä!OPP

3) Whether suit land has been sold by the father of the defendant no.4 to the panchayat department and is in possession of department? Å¢â,¬Ä!OPD

4) Whether Panchayat Ghar is existing on the suit land? Å¢â,¬Ä!.OPD

5) Whether plaintiff has been ejected from the suit land by order of Deputy Commissioner Anantnag dated 25.04.2003? Å¢â,¬Ä!OPD

6) Whether plaintiff has admitted in writing on 25.04.2003 that he will vacate the suit land within a one week? Å¢â,¬Ä!.OPD

7) Relief? Å¢â,¬Ä!OP Parties.

4. However, on 16th August 2013, the Trial Court recast the following issues for proper adjudication of the matter:

1) Whether the plaintiff is in possession of suit land over which he has raised construction in the shape of house and a cowshed? Å¢â,¬Ä!.OPP

2) Whether the defendants are causing illegal interference in the suit land without any right and justification? Å¢â,¬Ä!.OPP

3) Relief? Å¢â,¬Ä!.OP Parties

5. Plaintiff/respondent no.1 produced four witnesses, besides himself, before the Trial Court in support of his case. Defendant/appellant produced

three witnesses. The Trial Court by judgement and decree dated 28th February 2018 dismissed suit of plaintiff/respondent no.1.

6. Plaintiff Å¢â,¬" respondent no.1 preferred an Appeal before 1st Appellate Court against Trial Court judgement and decree, in which it was urged that

Trial Court failed to appreciate material produced by parties in its right and proper perspective and that all the witnesses produced by him had in one

voice acknowledged that plaintiff/respondent no.1 was in possession of suit property and the sale agreement was proved. It was also averred that

Trial Court had brushed aside the evidence adduced by parties, especially evidence adduced by plaintiff and confirmed by witnesses of

defendant/appellant to the extent that defendant/appellant had given possession of suit property to plaintiff and thereover plaintiff had made

constructions.

7. The 1st Appellate Court while considering the appeal preferred by plaintiff/respondent no.1, has comprehensively discussed all issues concerning

subject-matter of the Lis. The 1st Appellate Court has held that plaintiff Å¢â,¬" respondent no.1, has proved his possession and also interference on the

part of defendants in the suit property, so the 1st Appellate Court protected the plaintiff against illegal or unlawful eviction and also from interference

from defendants. The defendants, including appellant herein, have been directed not to make any interference or dispossess the plaintiff from suit

property, but appellant can take legal action as prescribed under law in the court of competent jurisdiction. It is this judgement and decree dated 29th

November 2018 of the 1st Appellate Court that is under challenge before this Court.

8. The proposed substantial questions of law as framed in this Civil Second Appeal are extracted hereunder:

i) Whether the appeal of respondent no.1 was liable to be dismissed when appellant/defendant in the suit had denied the averments made by

respondent herein in the plaint regarding the agreement to sell and also consideration of Rs.10,000/- to the appellant herein and has denied the said

agreement to sell on the count that neither he has signed the said document nor is he knowing witness to the said document and which fact was

considered by Sub Judge, Kulgam, while passing the judgement and decree dated 28.02.2018;

ii) Whether the court below has ignored the material evidence and non-consideration of the same as appreciated by Sub Judge, Kulgam, while passing

the judgement and decree dated 28.02.2018 thereof renders the said judgement and decree to be set-aside;

iii) Whether there has been misreading and mis application of evidence to the facts of the case rendering the judgement and decree under appeal

unsustainable in law;

iv) Whether the court below has misunderstood the case as put forward in the plaint by respondent no.1 and as held by Sub Judge, Kulgam, while

passing judgement and decree dated 28.02.2018 whereby the suit of respondent no.1 has been dismissed into a different aspect of the case by holding

that even a trespasser cannot be evicted without following the procedure provided under law while taking recourse of Section 38 of the Specific Relief

Act instead of Section 9 of the Specific Relief Act;

v) Whether the evidence led by appellant before the Trial Court could be relied upon by appellate court as well because the case was in conflict with

the stand taken by respondent herein in his suit and was as such inadmissible;

vi) Whether it was open to appellate court in presence of evidence appreciated by Sub Judge, Kulgam, while passing judgement and decree dated

28.02.2018 whereby the suit filed by respondent no.1 herein was dismissed and appeal filed by respondent no.1 herein when the appellant had not

entered into any agreement with respect to property in question and has never received any consideration amount from respondent no.1 arising out of

the contract and aid to him commit fraud by passing decree for dispossessing respondent no.1 from property which was never purchased by him from

the appellant.

9. In the above backdrop, it may be mentioned here that Section 100 of the Code of Civil Procedure (CPC), providing for a Second Appeal, is

reproduced hereunder:

Section 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 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:

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.Ã¢â¬â¢

10. A second appeal, or for that matter, any appeal is not a matter of right. The right of appeal is conferred by statute. A second appeal only lies on a

substantial question of law. If statute confers a limited right of appeal, the Court cannot expand the scope of the appeal. It is not open to the appellant

to re-agitate facts or to call upon the Court to reanalyze or re-appreciate evidence in a Second Appeal.

11. Section 100 restricts right of second appeal to only those cases where a substantial question of law is involved. The existence of a Ã¢â¬â¢substantial

question of lawÃ¢â¬â¢ is sine qua non for exercise of jurisdiction under Section 100 of the CPC.

12. The principles to decide when a question of law becomes a substantial question of law, have been enunciated by a Constitution Bench of the

Supreme Court in *Sir Chunilal v. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.*, AIR 1962 SC 1314, where the Supreme Court held:

Ã¢â¬â¢The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, 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.

13. In *Hero Vinodh v. Seshammal*, 2006 (5) SCC 545, the Supreme Court referred to and relied upon *Chunilal v. Mehta and Sons* (supra) and other

judgments and summarised the tests to find out whether a given set of questions of law were mere questions of law or substantial questions of law.

Relevant extract of judgment is set out hereinbelow:-

21. The phrase "substantial question of law", as occurring in the amended Section 100 CPC 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

Section 109 of the Code or Article 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.

In *Guran Ditta v. Ram Ditta* [(1927-28) 515 IA 235 : AIR 1928 PC 172] the phrase substantial question of law as it was employed in the last clause of

the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not

mean a substantial question of general importance but a substantial question of law which was involved in the case.

In *Sir Chunilal* case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] the Constitution Bench expressed agreement with the following view taken by a

Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* [AIR 1951 Mad 969 : (1951) 2 MLJ 222 (FB)] : (*Sir Chunilal*

case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR p. 557) "When a question of law is fairly arguable, where there is room for difference of

opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would

be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general

principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the

case it would not be a substantial question of law.

14. For being "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must

have a material bearing on the decision of the case and/or the rights of parties before it, if answered either way. For being a question of law

"involved in the case", there must be first, a foundation for it laid in the pleadings, and the question should emerge from the sustainable findings of

fact, arrived at by Courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case.

15. Where no such question of law, nor even a mixed question of law and fact was urged before the Trial Court or First Appellate Court, as in this

case, a second appeal cannot be entertained, as has been held by the Supreme Court in *Panchagopal Barua v. Vinesh Chandra Goswami*, AIR 1997

SC 1047.

16. Whether a question of law is a substantial one and whether such question is involved in the case or not, would depend on the facts and

circumstances of each case. The paramount overall consideration is the need for striking a judicious balance between the indispensable obligation to

do justice at all stages and the impelling necessity of avoiding prolongation in the life of any lis. This proposition finds support from *Santosh Hazari v.*

Purushottam Tiwari, 2001 (3) SCC 179. In a Second Appeal, the jurisdiction of the High Court being confined to substantial question of law, a finding

of fact is not open to challenge in second appeal, even if the appreciation of evidence is palpably erroneous and the finding of fact incorrect as held in

Ramchandra v. Ramalingam, AIR 1963 SC 302. An entirely new point, raised for the first time, before the High Court, is not a question involved in the

case, unless it goes to the root of the matter. The Supreme Court in *Nazir Mohamed v. J. Kamala and others*, AIR 2020 SC 4321, summarized the

following principles concerning to Section 100 CPC:

“(i) An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a

question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is

misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a

material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question

of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal

issue.

(iii) A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law

or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of

cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates

the settled position of law.

(iv) The general rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the

well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong

inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no

evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not

reasonably capable of supporting the finding.

17. In the above backdrop, let me advert to case in hand. The first substantial question of law proposed by appellant is “whether the appeal of

respondent no.1 herein was liable to be dismissed when appellant/defendant in the suit had denied the averments made by respondent herein in the

plaint regarding the agreement to sell and also consideration of Rs.10,000/- to the appellant herein and has denied the said agreement to sell on the

count that neither he has signed the said document nor is he knowing witness to the said document and which fact was considered by Sub Judge,

Kulgam, while passing the judgement and decree dated 28.02.2018. This issue on the face of it is a question of fact and not substantial question of

law. The said Issue relates to the document stated to have been executed by the parties, with respect whereof the 1st Appellate Court discussed

statement of witnesses, who supported the contents of the document.

18. The second Issue proposed by appellant is whether the court below has ignored the material evidence and non-consideration of the same as

appreciated by Sub Judge, Kulgam, while passing the judgement and decree dated 28.02.2018 thereof renders the said judgement and decree to be

set-aside. Again, the said issue pertains to question of fact and does not at all entail substantial question of law. Same is true with respect to other

issues proposed in the appeal on hand. It may be added here that none of the questions proposed by the appellant is a question of law, far less a

substantial question of law. There is no controversy before this Court with regard to interpretation or legal effect of any document nor any wrong

application of a principle of law, in construing a document or otherwise, which might have given rise to a question of law. There is no debatable issue

before this Court which was not covered by settled principles of law and/or precedents.

19. The First Appellate Court has examined the evidence on record at length and arrived at a reasoned conclusion that plaintiff is in possession of suit

property. Witnesses, namely, Gh. Mohi-ud-din Lone, Bashir Ahmad Lone, Ab. Aziz, Patwari Halqa concerned, as is discernible from the file, proved

possession of plaintiff upon suit property as also he having raised construction of a cowshed and Kothar inasmuch as defendant/appellant admitted

possession of plaintiff over suit property and further submitted that his possession over the suit property is illegal. Son of defendant/appellant also

admitted possession of plaintiff over suit property. Evidence of parties has proved possession of plaintiff over suit property. The 1st Appellate Court

decreed the suit to the extent that defendants would not make any interference in or dispossess plaintiff from suit land. However, defendants can take

legal action as prescribed under law in the court of competent jurisdiction.

20. It is pertinent to mention here that condition precedent for entertaining and deciding a Second Appeal being 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.

21. In *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar*, 1999 (3) SCC 722, the Supreme Court held:

“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 Section 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.Ã¢â¬â¸

22. From the above it emerges that mere appreciation of facts, documentary evidence or meaning of entries and contents of document cannot be held

to be raising 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. In the present case, the 1st Appellate Court has exercised

its discretion in a judicial manner and therefore, impugned judgement need not be interfered with and as a corollary thereof appeal on hand is liable to

be dismissed.

23. For the reasons discussed above, the appeal is dismissed with connected CM(s), and as a consequence thereof, judgement and decree passed by

1st Appellate Court is upheld. Interim direction, if any, shall stand vacated.

24. Decree sheet be drawn, accordingly.

25. Registry to send down the record, called for and/or received from the courts below, along with a copy of this judgment.