SUPREME COURT OF INDIA

B.C.Shivashankara

Vs.

B.R.Nagaraj

(Arijit Pasayat and Tarun Chatterjee,JJ.,)

27.02.2007

JUDGMENT

Dr.Arijit Pasayat, J.,

1. Challenge in this appeal is to the judgment of a learned Single Judge of the Karnataka High Court allowing the Second Appeal filed by respondent No.1. Originally, there were three defendants and the present appeal has been filed only by defendant no.1. The other defendants were impleaded as respondents 2 and 3 in the present appeal but their names were deleted at the request of the appellant. Though several points were urged in support of the appeal, we think it unnecessary to deal with them in detail considering the primary stand taken that the Second Appeal was allowed without formulating any substantial question of law as required under Section 100 of the Code of Civil Procedure, 1908 (in short the 'Code'). None appeared for the respondents in spite of service of notice. Section 100 of the Code deals with "second appeal". The provision reads as follows:

> "100 (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.
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> (2) An appeal may lie under this section from an appellate decree passed ex-parte.
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> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
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> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
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> (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."

A perusal of the impugned judgment passed by the High Court does not show that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated. That being so, the judgment cannot be maintained.

In *Ishwar Dass Jain v. Sohan Lal*[1] this Court in para 10 has stated thus:

"10. Now under Section 100 Code Of Civil Procedure, 1908, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so."

2. Yet again in *Roop Singh v. Ram Singh* [2] this Court has expressed that the jurisdiction of a High Court is confined to appeals involving substantial question of law. Para 7 of the said judgment reads:

"7. It is to be reiterated that under Section 100 Code Of Civil Procedure, 1908 jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 Code Of Civil Procedure, 1908. That apart, at the time of disposing of the matter, the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. Further, the fact finding courts after appreciating the evidence held that the defendant entered into the possession of the premises as a batai, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. These findings recorded by the two courts below were based on proper appreciation of evidence and the material on record and there was no perversity, illegality or irregularity in those findings. If the defendant got the possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus Page 1532 and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession (*Thakur Kishan Singh v. Arvind Kumar*[3]) . Hence the High Court ought not to have interfered with the findings of fact recorded by both the courts below."

3. The position has been reiterated in *Kanhaiyalal v. Anupkumar* [4]. In *Chadat Singh v. Bahadur Ram and Ors*[5]. , it was observed thus:

"6. In view of Section 100 of the Code the memorandum of appeal shall precisely state substantial question or questions involved in the appeal as required under Sub-

section (3) of Section100. Where the High Court is satisfied that in any case any substantial question of law is involved, it shall formulate that question under Sub-section (4) and the second appeal has to be heard on the question so formulated as stated in Sub-section (5) of Section 100."

4. The position was highlighted by this Court in *Joseph Severane and Others v. Benny Mathew and Others*[6], *Sasikumar and Others v. Kunnath Chellappan Nair and Others*[7]. *and Gian Dass v. Gram Panchayat, Village Sunner Kalan and Ors*[8]. Sub-section (5) of Section 100 is applicable only when any substantial question of law has already been formulated and it empowers the High Court to hear, for reasons to be recorded, the appeal on any other substantial question of law. The expression "on any other substantial question of law" clearly shows that there must be some substantial question of law already formulated and then only another substantial question of law which was not formulated earlier can be taken up by the High Court for reasons to be recorded, if it is of the view that the case involves such question.

5. Under the circumstances the impugned judgment is set aside. We remit the matter to the High Court so far as it relates to Second Appeal No. 236 of 1991 for disposal in accordance with law. The appeal is disposed of in the aforesaid terms with no order as to costs.

Judgment Referred.

[1]*(2000) 1 SCC 0434*
[2]*(2000) 3 SCC 0708*
[3]*(1994) 6 SCC 0591*
[4]*(2003) 1 SCC 0430*
[5]*(2004) 6 SCC 0359*
[6]*(2005) 7 SCC 0667*
[7]*(2005) 12 SCC 0588*
[8]*(2006) 6 SCC 0271*