

**SUPEME COURT OF INDIA**

Hardeep Kaur

Vs.

Malkiat Kaur

C.A.No.2870 of 2012

(R.M. Lodha H. L. Gokhale JJ.)

16.03.2012

**JUDGMENT**

**R.M. LODHA, J.**

1. Leave granted.

2. The defendant is in appeal aggrieved by the judgment dated March 9, 2011 of the High Court of Punjab and Haryana whereby the Single Judge of that Court allowed the second appeal filed by the respondent - plaintiff; set aside the judgment and decree dated January 5, 2001 passed by the District Judge, Sangrur and restored the judgment and decree dated April 21, 1997 passed by the Civil Judge, Junior Division, Dhuri.

3. The short question that arises for consideration in this appeal by special leave is whether a second appeal lies only on a substantial question of law and it is essential for the High Court to formulate a substantial question of law before interfering with the judgment and decree of the lower appellate court. This question arises in this way. The respondent (hereinafter referred to as `plaintiff') filed a suit for specific performance of the contract dated May 22, 1993. According to the plaintiff, the appellant (hereinafter referred to as `defendant') being co-owner having 1/12th share in the agricultural land admeasuring 183 bighas 19 biswas situate in Ferozpur Kuthala, Tehsil Dhuri, by an agreement dated May 22, 1993, agreed to sell 15 bighas 4 biswas of land to the plaintiff at the rate of Rs. 15000/- per bigha. The defendant received Rs. 1,48,000/- as earnest money. The sale deed was to be executed on or before March 10, 1994 and the possession of the land was also to be delivered at the time of registration of the sale deed on receipt of

remaining consideration of Rs. 80,000/-. The defendant got the time for execution of sale deed extended upto May 10, - 1995 with the consent of the plaintiff. However, despite repeated requests by the plaintiff, she did not execute the sale deed. It is the plaintiff's case that she had been always ready and willing to perform her part of the contract, but since the defendant failed to perform her part of the contract, the suit for specific performance of the contract had to be filed.

4. The defendant contested the suit and denied the execution of the agreement of sale dated May 22, 1993. She also denied having received any earnest money. She stated that she was illiterate lady and did not know how to write and sign and the subject agreement was false and fabricated document. On the pleadings of the parties, the trial court framed the following issues:-

1. Whether the defendant executed an agreement to sell on 22.5.93 and executed writing dated 10.3.94 on the back of the agreement and received Rs. 1,48,000/- as earnest money?

2. Whether plaintiff is entitled to specific performance of the agreement and for possession?

3. Whether the plaintiff has got no cause of action to file the present suit?

4. Whether the plaintiff is ready and willing and is still ready and willing to perform her part of contract?

5. Relief.

5. On recording the evidence and thereafter hearing the parties, the trial court decided issue nos. 1 to 4 in favour of the plaintiff and decreed the plaintiff's suit on April 21, 1997 by directing the defendant to execute the sale deed by May 31, 1997, failing which it was declared that plaintiff would be entitled to get the same executed through court on payment of remaining consideration.

6. The defendant challenged the judgment and decree of the trial court in appeal before the District Judge, Sangrur. The District Judge, Sangrur, on hearing the parties, although did not interfere with the finding of the trial court in respect of the execution of agreement dated May 22, 1993, but held that both the parties had contributed towards frustration of the execution of the sale deed and, therefore, the plaintiff was not entitled to specific performance of the agreement. The District Judge, accordingly, modified the decree of the trial court by directing refund of Rs.

1,48,000/- along with interest at the bank rate from the date of the agreement until realization.

7. Being not satisfied with the judgment and decree dated January 5, 2001 passed by the District Judge, Sangrur, the plaintiff preferred second appeal before the Punjab and Haryana High Court. As noted above, the Single Judge allowed the appeal; set aside the judgment and decree of the first appellate court and restored the judgment and decree of the trial court.

8. The perusal of the judgment of the High Court shows that no substantial question of law has been framed and yet second appeal was allowed.

9. Sections 100, 101 and 103 of the Code of Civil Procedure, 1908 (for short, 'CPC') read as follows:- S.-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 subsection 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. S.101.-Second appeal on no other grounds.- No second appeal shall lie except on the ground mentioned in section 100.

S.103.- Power of High Court to determine issues of fact. - In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal, -

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in section 100.

10. The jurisdiction of the High Court in hearing a second appeal under Section 100 CPC has come up for consideration before this Court on numerous occasion. In long line of cases, this Court has reiterated that the High Court has a duty to formulate the substantial question/s of law before hearing the second appeal. As a matter of law, the High Court is required to formulate substantial question of law involved in the second appeal at the initial stage if it is satisfied that the matter deserves to be admitted and the second appeal has to be heard and decided on such substantial question of law. The two decisions of this Court in this regard are: *Kshitish Chandra Purkait v. Santosh Kumar Purkait and Others*<sup>1</sup>, and *Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor*<sup>2</sup>. It needs to be clarified immediately that in view of sub-section (5) of Section 100, at the time of hearing of second appeal, it is open to the High Court to re-formulate substantial question/s of law or formulate fresh substantial question/s of law or hold that no substantial question of law is involved. This Court has repeatedly said that the judgment rendered by the High Court under Section 100 CPC without following the procedure contained therein cannot be sustained. That the High Court cannot proceed to hear the second appeal without formulating a substantial question of law in light of the provisions contained in Section 100 CPC has been reiterated in 1 (1997) 5 SCC 438 2 (1999) 2 SCC 471 *Panchugopal Barua and Others v. Umesh Chandra Goswami and Others*; <sup>3</sup>, *Sheel Chand v. Prakash Chand*<sup>4</sup>; *Kanai Lal Garari and Others v. Murari Ganguly and Others*<sup>5</sup>; *Ishwar Dass Jain (Dead) through L.Rs. v. Sohan Lal (Dead) by L.Rs.*<sup>6</sup>; *Roop Singh (Dead) through L.Rs. v. Ram Singh (Dead) through L.Rs.*; <sup>7</sup> *Santosh Hazari v. Purushottam Tiwari (Deceased) by L.Rs.*<sup>8</sup>; *Chadat Singh v. Bahadur Ram and Others*<sup>9</sup>; *Sasikumar and Others v.* 3 (1997) 4 SCC 713 4 (1998) 6 SCC 683 5 (1999) 6 SCC 35 6 (2000) 1 SCC 434 7 (2000) 3 SCC 708 8 (2001) 3 SCC 179 9 (2004) 6 SCC 359 *Kunnath Chellappan Nair and Others*<sup>10</sup>; *C.A. Sulaiman and Others v. State Bank of Travancore, Alwayee and Others*<sup>11</sup>; *Bokka Subba Rao v. Kukkala Balakrishna and Others*<sup>12</sup>; *Narayanan Rajendran and*

Another v. Lekshmy Sarojini and Others<sup>13</sup> and Municipal Committee, Hoshiarpur v. Punjab State Electricity Board and Others<sup>14</sup>.

11. Some of the above decisions and the provisions contained in Sections 100, 101 and 103 CPC were considered in a 10 (2005) 12 SCC 588 11 (2006) 6 SCC 392 12 (2008) 3 SCC 99 13 (2009) 5 SCC 264 14 (2010) 13 SCC 216 recent decision of this Court in Umerkhan v. Bismillabi alias Babulal Shaikh and Others.<sup>15</sup> One of us (R.M. Lodha, J.) speaking for the Bench in Umerkhan<sup>15</sup> stated the legal position with regard to the jurisdiction of the High Court in hearing a second appeal in paragraphs 11 and 12 of the Report (page 687) thus:

“11. In our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal but reversal of the judgment 15 (2011) 9 SCC 684 and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question. (emphasis supplied)

12. This Court has been bringing to the notice of the High Courts the constraints of Section 100 of the Code and the mandate of the law contained in Section 101 that no second appeal shall lie except on the ground mentioned in Section 100, yet it appears that the fundamental legal position concerning jurisdiction of the High Court in second appeal is ignored and overlooked time and again. The present appeal is unfortunately one of such matters where the High Court interfered with the judgment and decree of the first appellate court in total disregard of the above legal position. The above principle of law concerning jurisdiction of the High Court under Section 100

CPC laid down in Umerkhan<sup>15</sup> has been reiterated in a subsequent decision in Shiv Cotex v. Tirgun Auto Plast Private Limited and Others. <sup>16</sup> This <sup>16</sup> (2011) 9 SCC 678 Court through one of us (R.M. Lodha,J.) observed in paragraph 11 of the Report (page 681) as follows:- The judgment of the High Court is gravely flawed and cannot be sustained for more than one reason. In the first place, the High Court, while deciding the second appeal, failed to adhere to the necessary requirement of Section 100 CPC and interfered with the concurrent judgment and decree of the courts below without formulating any substantial question of law. The formulation of substantial question of law is a must before the second appeal is heard and finally disposed of by the High Court. This Court has reiterated and restated the legal position time out of number that formulation of substantial question of law is a condition - precedent for entertaining and deciding a second appeal.....”

12. The relevant discussion in the judgment by the High Court reads as follows:

After hearing learned counsel for the parties and going through the records of the case, this appeal deserves acceptance and the judgment and decree passed by the trial court deserves to be restored for the reasons to be given hereinafter.

In this case, the defendant-respondent could not produce any evidence on record to show that the said agreement to sell was forged or a fabricated document or it was the result of fraud or misrepresentation. The plaintiff-appellant proved on record that she had always been ready and willing to perform her part of the agreement. In fact, filing of the suit by the plaintiff-appellant itself showed that she was ready and willing to perform her part of the agreement. The defendant-respondent had denied her signatures on the agreement to sell (Exhibit P.1) and the endorsement (Exhibit P.3) made on the back of the agreement, vide which the date of execution of the sale deed was extended from 10.3.1994 to 10.5.1995 by claiming that she did not know how to write and sign. However, there is evidence of Telu Ram (P.W.4), produced by the plaintiff. Telu Ram (P.W.4) had brought the original file No. 2110 concerning the defendant-respondent Hardeep Kaur whereby she had taken loan. On the application (Exhibit P.5) for taking loan, on the receipt of payment of loan amount (Exhibit P.6) and on the other documents pertaining to the sanction of loan (Exhibits P.7 to P.12), the defendant had put her signatures. It, thus, belied the stand of the defendant

that she usually thumb marked the documents and had not signed the agreement to sell (Exhibit P.1) and the endorsement (Exhibit P.3). -

Both these documents i.e., Exhibit P.1 and P.3 prove in certain terms that the defendant had agreed to sell the land measuring 15 Bighas 4 Biswas to the plaintiff for Rs. 2,38,000/-. Major part of the sale consideration i.e., Rs. 1,48,000/- had already been paid at the time of execution of the agreement to sell (Exhibit P.1). The remaining amount of sale consideration of Rs. 80,000/- was deposited by the plaintiff in the trial court. It shows that the plaintiff has always been ready and willing to perform her part of the agreement. Under the circumstances, the lower appellate court was not justified in confining the relief of the plaintiff to the return of earnest money only. Under the circumstances, this appeal succeeds. The same is, accordingly, allowed. The judgment and decree passed by the lower appellate court are set aside and those of the trial court are restored. However, there shall be no order as to costs.

13. Apparently, the High Court has ignored and overlooked the mandatory requirement of the second appellate jurisdiction as provided in Section 100 CPC and that vitiates its decision as no substantial question of law has been framed and yet the judgment and decree of the first appellate court has been reversed. However, Mr. Neeraj Kumar Jain, learned senior counsel for the respondent, submitted that though no substantial question of law has been expressly framed by the High Court while accepting the second appeal, but the above discussion by the High Court clearly shows that the High Court considered the questions whether the plaintiff was entitled to the grant of decree of specific performance of the contract once execution of agreement has been duly proved and the plaintiff was always ready and willing to perform her part of the contract and whether the first appellate court has correctly exercised the discretion in terms of Section 20 of the Specific Relief Act, 1963 while refusing the decree for specific performance of the contract as was ordered by the trial court. In this regard, he relied upon a decision of this Court in *M.S.V. Raja and Another v. Seeni Thevar and Others*<sup>17</sup>.

14. In paragraph 18 (pages 659-660) of the Report in *M.S.V. Raja*<sup>17</sup> this Court observed as follows: We are unable to accept the argument of the learned Senior Counsel for the appellants that the impugned judgment cannot be sustained as no substantial question of law was formulated as required under Section 100 CPC. In para 22 of the judgment the High Court has dealt with substantial questions of law. Whether a finding recorded by both the courts below with no evidence to support it was itself considered as a substantial question of law by the High Court. It is

further stated that the other questions considered and dealt with by the learned Judge were also substantial questions of law. Having regard to the questions that were considered and decided by the High Court, it cannot be said that substantial questions of law did not arise for consideration and they were not formulated. Maybe, substantial questions of law were 17 (2001) 6 SCC 652 not specifically and separately formulated. In this view, we do not find any merit in the argument of the learned counsel in this regard.

15. In *M.S.V. Raja*<sup>17</sup> this Court found that the High Court in paragraph 22 of the judgment under consideration therein had dealt with substantial questions of law. The Court further observed that the finding recorded by both the courts below with no evidence to support it was itself considered as a substantial question of law by the High Court. It was further observed that the other questions considered and dealt with by the learned Judge were substantial questions of law. Having regard to the questions that were considered and decided by the High Court, it was held by this Court that it could not be said that the substantial questions of law did not arise for consideration and they were not formulated. The sentence 'maybe substantial questions of law were not specifically and separately formulated' in *M.S.V. Raja*<sup>17</sup> must be understood in the above context and peculiarity of the case under consideration. The law consistently stated by this Court that formulation of substantial question of law is a sine qua non for exercise of jurisdiction under Section 100 CPC admits of no ambiguity and permits no departure.

16. In the present case, the High Court has allowed the second appeal and set aside the judgment and decree of the first appellate court without formulating any substantial question of law, which is impermissible and that renders the judgment of the High Court unsustainable.

17. Consequently, the appeal is allowed and the impugned judgment of the High Court is set aside. The second appeal (R.S.A. No. 1679 of 2001 - *Malkiat Kaur vs. Hardeep Kaur*) is restored to the file of the High Court for fresh consideration in accordance with law. No order as to costs.