

SUPREME COURT OF INDIA

Vijay Arjun Bhagat

Vs.

Nana Laxman Tapkire

C.A.No.6272 of 2010

(Abhay Manohar Sapre and S.Abdul Nazeer,JJ.,)

11.05.2018

JUDGMENT

Abhay Manohar Sapre,J.,

1. This appeal is directed against the final judgment and order dated 19.07.2007 passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Second Appeal No.274 of 2002 whereby the Single Judge of the High Court allowed the appeal filed by respondent Nos.1 & 2 herein and set aside the judgment/order dated 16.01.2002 passed by the District Judge, Ahmednagar in R.C.A. No.21 of 2000 and confirmed the judgment dated 10.12.1999 passed by the Civil Judge, Junior Division, Ahmednagar in R.C.S. No.600 of 1982.

2. In order to appreciate the issues involved in the appeal, few relevant facts need to be mentioned hereinbelow.

3. The appellants are the plaintiffs whereas the respondents are the defendants in a civil suit out of which this appeal arises.

4. The appellants filed a civil suit (R.C.S. No. 600/1982) against the respondents in the Court of Civil Judge, Junior Division, Ahmednagar for declaration that, (1) the suit properties described in detail in the schedule are ancestral properties of the plaintiffs (2) the plaintiffs are the owners of the suit properties, and (3) the suit property described in schedule 1(A) is not a Trust property and be declared as the plaintiffs' private property.

5. Defendant No. 1 filed its written statement whereas defendant Nos. 3 and 4 filed their joint written statement. The defendants raised several objections about maintainability of the suit. They also denied plaintiffs' claim on merits.

6. The Trial Court framed issues. Parties adduced evidence in support of their case. By judgment and decree dated 10.12.1999, the Trial Judge though answered some issues in plaintiffs' favour but eventually dismissed the plaintiffs' suit on merits.

7. The plaintiffs felt aggrieved and filed First Appeal (R.C.A. No.21/2000) in the Court of District Judge, Ahmednagar. By order dated 16.01.2002, the first Appellate Court allowed the appeal, set aside the judgment and decree of the Trial Court and decreed the plaintiffs' suit.

8. Against the said judgment, Defendant Nos. 3 & 4 (respondent Nos. 1 & 2 herein) filed appeal being Second Appeal No. 274/2002 in the High Court of Bombay (Bench at Aurangabad). The High Court on 30.11.2002 admitted the second appeal on the following substantial questions of law:

“(A) Whether the first appellate court has misread the document of partition deed(Exh.81) and therefore the finding in this behalf suffers from perversity.

(B) Whether the first appellate Court has failed to consider the appropriate provisions of Order VII Rule 3 of C.P.C.

(C) Whether the first appellate Court has erroneously relied upon Xerox copies of the mortgage deed which is not registered.

(D) Whether the first appellate Court has erroneously that the suit properties are the private properties of original plaintiffs.

(E) Whether the Civil Court has jurisdiction to decide the nature of the property which issue required to be dealt with by the Charity Commissioner.

(F) Whether the suit is barred by limitation.”

9. By impugned judgment, the Single Judge of the High Court allowed the appeal and, in consequence, set aside the order passed by the District Judge in R.C.A. No.21 of 2000 and confirmed the judgment passed by the Civil Judge in R.C.S. No.600 of 1982 which has given rise to filing of the present appeal by way of special leave by the plaintiffs before this Court.

10. The short question, which arises for consideration in this appeal, is whether the High Court was justified in allowing the appeal.

11. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal, set aside the impugned judgment and remand the case to the High Court for deciding the appeal afresh on merits in accordance with law.

12. In our considered view, the need to remand the case to the High Court has occasioned because the High Court while deciding and eventually allowing the second appeal did not follow the mandatory procedure prescribed under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”).

13. In other words, we find that the manner in which the High Court proceeded to decide the second appeal did not appear to be in conformity with the mandatory procedure prescribed under Section 100 of the Code. It is clear from our reasoning given infra.

14. Section 100 of the Code reads as under:

“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.”

15. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Sub-section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section(4). The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the

respondent. In other words, the question is framed behind the back of the respondent and, therefore, sub-section(5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognizes the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal (See C.A. Nos.9118-9119 of 2010 titled Surat Singh (Dead) vs. Siri Bhagwan & Ors. decided on 19.02.2018).

16. Adverting to the facts of the case at hand, we find that the High Court on 30.11.2002 admitted the second appeal and framed six substantial questions of law quoted supra as required under sub-sections (1) and (4) of Section 100 of the Code which, according to the High Court, arose in the second appeal.

17. The High Court was, therefore, required to decide the second appeal only on the six formulated substantial questions of law as provided under sub-section (5) of Section 100 of the Code.

18. We, however, find that the High Court instead of deciding the second appeal on these six substantial questions of law framed at the time of admission allowed the appeal on two additional substantial questions of law (see Para 10 of the impugned judgment) which were neither framed by the High Court at the time of admission of the second appeal on 30.11.2002 and nor at the time of hearing the second appeal.

19. In other words, the High Court allowed the appeal on the two questions, which were framed in the impugned judgment only. These two questions read as under:

“In S.A. No.274/2002, following substantial questions of law arise:

(i) Whether the Civil Court has jurisdiction to decide the question whether a particular property is that of a Public Trust or that it is not a property of the Public Trust and belongs to individual claimant?

(ii) Whether the suit for declaration that the properties were not of the Public Trust was barred by limitation and, therefore, the impugned judgment of the first appellate Court deserves interference?”

20. In our considered opinion, the High Court, therefore, committed two jurisdictional errors while deciding the second appeal.

21. First, though it rightly framed six substantial questions of law at the time of admission of the appeal on 30.11.2002 as arising in the case but erred in not answering these questions.

22. As mentioned above, the High Court had the jurisdiction to decide the second appeal only on the six substantial questions of law framed at the time of admitting the appeal. In

other words, the jurisdiction of the High Court to decide the second appeal was confined only to six questions framed and not beyond it.

23. Second, the High Court though had the jurisdiction to frame additional question(s) by taking recourse to proviso to sub-section(5) of Section 100 of the Code but it was subject to fulfilling the three conditions, first "such questions should arise in the appeal", second, "assign the reasons for framing the additional questions" and third, "frame the questions at the time of hearing the appeal".

24. In this case, the High Court committed an error because it framed two additional questions in the judgment itself.

25. This procedure adopted by the High Court while deciding the second appeal caused prejudice to the rights of the parties because the parties, especially the appellants herein, who suffered the adverse order, had no knowledge about framing of the two additional questions inasmuch as they were deprived of the opportunity to address the Court on the two additional questions on which the impugned judgment was founded.

26. Learned counsel for the respondents, however, made sincere efforts to persuade the Court to uphold the impugned judgment on merits but in the light of what we have held above, it is not possible to accept the submissions of the learned counsel for the respondents much less the submissions urged on the merits of the controversy.

27. We, however, make it clear that having formed an opinion to remand the case, we have refrained from applying our mind to the merits of the case. It is now for the High Court to decide the appeal on merits.

28. In the light of the foregoing discussion, the appeal succeeds and is allowed. The impugned judgment is set aside. The case is remanded to the High Court for deciding the appeal afresh on merits in accordance with law without being influenced by any of our observations.

29. Since the appeal is quite old, the same shall be decided expeditiously.