

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

**Reserved on 16.12.2023
Pronounce On 30.12.2023**

RSA No. 14/2021
CM No. 9691/2021

Rajinder Singh Jamwal

....Petitioner(s)/Appellant(s)

Through :- Mr. Dinkar Gupta, Advocate

V/s

Neelam Khajuria and others

....Respondent(s)

Through :- Mr. Rohit Balwal, Advocate

CORAM: HON'BLE MR. JUSTICE VINOD CHATTERJI KOUL, JUDGE

Judgment
16.12.2023

1. This appeal has been directed against the judgment and decree dated 31.12.2019 passed by the learned District Judge, Udhampur, whereby the first Appellate Court has dismissed the appeal and upheld the judgment and decree passed by the Sub-Judge, (Special Mobile Magistrate), Udhampur.
2. The impugned judgment and decree passed by the trial Court and upheld by the Appellate Court is being challenged on the ground that the said judgment is against facts of the law; that the trial Court as well as Appellate Court have fallen in error by not impleading Asha Slathia as defendant being a necessary party; that the trial Court and Appellate Court had misconstrued evidence led by the plaintiff; that the trial Court in view

of the denial of the landlord -tenant relationship in the written statement as well as in view of documentary evidence brought on record has not properly framed the issue and Appellate Court instead of framing the issues has decided the suit that the existence of landlord - tenant relationship is *sine-qua non* and in the absence of written rent agreement or rental receipts, the onus lies upon landlord to prove existence of such relationship; that the Appellate Court has fallen in error of law by holding that the appellant/defendant has not raised plea regarding reframing/recasting the issues and that the Appellate Court ought to have remanded the case after reframing of the issue, but by not remanding the case Appellate Court has committed the grave error.

3. The appellant in this appeal has proposed following substantial question of law for determination:-

1. *Whether the suit filed by the respondents/plaintiffs is liable to be dismissed for non-joinder and mis-joinder of necessary parties and whether trial Court as well as first appellate court have committed an error of law by not framing appropriate issue regarding the existence of landlord tenant relationship between the appellant and respondents in view of specific denial of the appellant in written statement, documents annexed along-with written statement as well as averments made in memo of appeal ? If So what is its effect?*
2. *Whether the first appellate court has committed error in law by not remanding the case to the trial court for proper adjudication on the issue pertaining to land lord-tenant relationship as well as for deciding application under Section 12(4) of J&K Rent Control Act, If so what is its effect?*
3. *Whether the trial court as well as first appellate court have committed grave error*

of law by not invoking provisions of Order 1 Rule 10(2) of Code of Civil Procedure to add Asha Slathia as party defendant in view of clear and unambiguous averments made in written statement? If so what its effect and whether the judgment and decree passed by the trial Court and upheld by the first appellate court is nullity?

4. *Whether the first Appellate Court has committed grave error in law by not preparing decree sheet the judgment passed by the first Appellate Court is legally not executable for want of decree Sheet? Whether the Judgments and decree impugned are perverse?*

4. I have heard learned counsel for the parties and perused the record on the file and after having been considered the same, what is required to be seen in this appeal is that as to whether any substantial questions of law arises for determination, because in Civil Second Appeal under Section 100 of CPC would lie only when substantial questions of law are involved.

5. Section 100 CPC provided for Civil Second Appeal 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 as 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 an 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.”

10. A second appeal, or for the 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 “Substantial question of law” 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.

“ 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 it 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.”

6. In *Hero Vionoth V. Seshammal*, 2006 () SCC 545, the Supreme Court referred to and relied upon *Chunilal V. Mehta and Sons*(Supra) and other judgments and summarized the tests to find out whether a given set of questions of law were questions of law or substantial questions of law. Relevant extract of judgment is set out herein below:-

“21. The phrase ‘ substantial question of law’, as occurring in the amended section 100 CPC is not

defined in the code. The word CSA no. 02/2019 substantial, as qualifying “question of law”, means of having substance, essential read, 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 substantial question of law” by suffixing the words “of general importance” as has been done in any 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) 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 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 Rimmalpudi Subba Rao V. Noony Veeraju {AIR 1951 Mad 969: (1951) 2 MLJ 222 (FBI) (Sir Chunilal case { 1962 Supp (3) SCR 549 : AIR 1962 SC 1314} SCR.

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 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 he has been held by the CSA No. 02/2019 Supreme Court in Panchagorapl 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 sticking 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 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 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 CSA no. 02/2019 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-recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the court 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 total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding”.

7. The plea taken by the appellant is that there was no relationship of landlord -tenant as the appellant has specifically denied such relationship and has pleaded that it was Asha Salathia his wife who was the tenant and as there was no finding on the issue, therefore, according to him, substantial question of law which arises for determination in this case is whether defendant was not tenant and was there any relationship of landlord-tenant between him and the plaintiffs.
8. On the denial of the defendant appellant herein the landlord-tenant relationship the trial Court framed as many as six issues, issue No. 1 reads as under:-

“Whether two shop were let out by Chander Bhan Khajuria (deceased husband of plaintiff No. 1 and father of

plaintiff No. 2 to 4) to defendant orally about 8 years prior to the institution of the suit on monthly rent of Rs. 150/- per shop.”

9. This is a specific issue which was framed by the trial Court and what was to be determined was that as to whether there was relationship of landlord-tenant between the plaintiff and the defendant appellant herein. Evidence was produced before the trial Court and the trial Court on the basis of evidence had held that the suit shop was given on rent to the defendant. There is specific finding with regard to the landlord-tenant relationship given by the trial Court on the basis of the evidence produced before it. There is concurrent findings with regard to the fact that the relationship of plaintiff and defendant as landlord-tenant relationship by the trial Court as well as by the Appellate Court, therefore this concurrent findings of facts which is based upon the evidence has been properly appreciated by the trial Court cannot disturbed nor appeal would lie under Section 100 of C PC against such concurrent findings. The finding of the trial Court returned on this issue is as under:-

“All these above different narrations of the defendant witness lead to only one conclusion that these defendant witness are not reliable and there testimony/ deposition does not inspire confidence as in view of above severe contradictions there testimony is not trust worthy. Besides this, the defendant did not chose to produce Asha Slathia (his Wife) as witness in support of his stand. In fact the Asha Slathia is the only best witness as per the stand taken by the defendant in the instant suite. The defendant claims that the suit shops given on rent by late husband of the plaintiff to Asha Slathia his wife and not him. But at the same time said Asha Slathia has not turned up

in witness box to depose the same. In fact it is the defendant who contested otherwise, and filed reply and led evidence to oppose all the facts and grounds taken in the suit. The suit shops given on rent by the late husband of the plaintiff/ tenancy is not denied by the defendant but the simple defence projected by the defendant that the suit shops given on rent to her wife and not to him. It has also come on record that the defendant is a government employee and whatever the business, he is running, same is run by him but on the name of her wife. The defendant also annexed in support of his claim the electricity bill which is in the name of Asha Slathia and also annexed some retails invoices/ bills of Maha Feed Agrotech address to A. S Feed Store, Udhampur which also do not support/ prove the case of defendant from these invoices/bills. It does not prove that the Asha Slathia is the tenant. The defendant states that tenancy is oral one whereas DW Mohan Lal states that Asha Slathia told him that there was rent agreement executed. The defendant's counsel relied upon the law i,e (2001) 0 Supreme (HP) 4551 and (1976) 0 Supreme (J&K) 2540

In view of the above position, with all probabilities the plaintiff succeeded to prove the onus. Accordingly, the issue (Issue No 1) proved in favour of plaintiff and against the defendant.

10. I have considered the proposed issues framed in the appeal file by the defendant/appellant and on perusal of the record it appears that the relationship and issues framed by the trial Court in the said suit for determination, none of the issues so proposed are involved in this case nor any substantial question of law arises for consideration in this appeal. The plaintiff had filed the said suit for ejectment of the defendant claiming to have taken the suit shop on rent from his father Chander Bhan Khajuria on

monthly rent of Rs. 150/- for each shop, the said shop was given on oral rent by his father about 08 years. The defendant had made default in payment as such, it was on the basis of said ground that the said shop was required by the plaintiff for personal use. However, defendant claims that suit shop was not given on rent to him but to his wife who was not party in the said suit, thus, the stand taken that there was no landlord-tenant relationship between him and the plaintiffs this issue has been decided on the basis of the evidence. The trial Court has held that the defendant had taken shop on rent and defaulted in making the payment of the rent of the shop and on the basis of the finding given on such issues of fact and trial Court had pass the decree in question which have been upheld by the Appellate Court.

11. Since there is concurrent findings to the fact that so far as relationship between plaintiff and defendant is that of landlord-tenant, such finding cannot be disturbed and there is no perversity in given such finding on the basis of evidence produced by the parties, thus, no substantial question of law arises for determination in this appeal. Therefore, this appeal is, accordingly, dismissed.

(Vinod Chatterji Koul)
Judge

Jammu:
30.12.2023
Javid Iqbal