

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO. 528/2019

1. Smt. Sonibai d/o Late Virson Munot, (Deleted).
2. Prakashchand S/o Virsen Munot,
Aged about 67 years, Occ. Business
& others.

APPELLANTS
(Ori. Defendants
Nos. 6 & Lrs of
Defendant No. 7)
(On R.A.)

//VERSUS//

1. Bansilal Jainarayan Sard (Dead)
through L.Rs.
Ori. Plaintiff through Lr's
 - (a) Vallabhdas S/o Bansilal Sard (dead) by L.Rs.
 - (i) Ramadevi wd/o Vallabhdasji Sard & ors.

RESPONDENTS

Shri P. P. Kothari, Advocate for appellant.
Shri J.T. Gilda, Sr. Advocate assisted by Shri A.J. Gilda, Advocate for
respondent (IA, II), (IB)

CORAM : VINAY JOSHI, J.

DATE : DECEMBER 18, 2019.

ORDER ON PRELIMINARY OBJECTION

Heard.

2. At the threshold, controversy arose to the extent, whether the respondent/caveator can be heard at the initial stage of the second appeal? The learned Counsel for appellant would submit that the scheme under Section 100 of the Code of Civil Procedure (herein after referred to as 'the Code') nowhere contemplates a stage to hear respondent even before formulating substantial question of law. According to him, after hearing appellant, it is for the satisfaction of the Court about existence of substantial questions of law, in which respondent has no role. The learned counsel for appellant would submit that in terms of Sub-clause (5) of Section 100 of the Code, after issuance of notice, the respondent would get jurisdiction to advance submission to resist the appeal on the questions so formulated by the Court.

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3. As against this, the learned counsel for respondent submitted that there is no prohibition in the Code so as to deny right of hearing to respondent at initial stage of the appeal. According to him, at initial stage, while entertaining second appeal, the Court has to formulate substantial questions of law before issuance of notice to the respondent. At this stage also respondent can assist the Court about existence or non-existence of substantial questions of law. He has also referred the commentary on the Code of Civil Procedure by Shri Justice C. K. Thakkar, Judge, Supreme Court of India (Retd.), First Edition 2012, Volume 6 pertaining to the admission of second appeal. It is his contention that the very legislative intention is to weed out uncalled second appeals at the initial stage.

4. Being aggrieved and dissatisfied by the judgment and decree passed by the learned District Judge-5, Amravati in R.C.A. No. 350/2000,

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this appeal is preferred by the original defendant Nos. 6 and 7. Needless to say that at initial stage after hearing appellant or his counsel, if the Court is satisfied that substantial questions of law are involved in the case, the Court has to formulate such questions and to issue notice to other side. The learned counsel for the appellant before advancing argument, stated that the hearing may not be given to respondent since no such stage is provided under the Code. In this regard, he relied on the judgment of Hon'ble Supreme Court in case of *Surat Singh (dead) Vs. Siri Bhagwan and others, (2018) 4 SCC 562*. Appellant would submit that the respondent has right under Section 100(5) of the Code to raise objections that questions framed by this Court under Sub-clause (4) of section 100 of the Code does not involve in the appeal, and that stage would come after formulation of question. Both the learned counsel requested to answer this controversy at initial stage. Both equally submitted that they are unable

to find any precedent on this point.

5. Second appeal lies in terms of Section 100 of the Code which 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.”

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6. The manner and the mechanism for dealing second appeal has been specified in the Section itself. The second appeal would be entertained by this Court only if the Court is “satisfied” that the case involves a substantial question of law. It is obligatory on the appellant to precisely carve out the substantial questions of law in the memorandum of appeal. If this Court is “satisfied” that substantial question of law is involved in the case, it shall formulate that question and to call upon respondent. The next stage is about hearing both sides on the questions so formulated and to decide the appeal in accordance with law.

7. True the legible stage of hearing of the respondent on the formulated substantial question of law is under Sub-section (5) of Section 100 of the Code. However, the Code never expressly precludes the respondent from advancing submission at initial stage. Sub-section (4) of Section 100 of the Code merely states that “where

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the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question”. Pertinent to note that Sub-section (4) of Section 100 of the Code never contemplates that, upon hearing the appellant, if the High Court is “satisfied” then to formulate the question. The clause is silent about hearing of either of the party at this stage, therefore, it cannot be construed that at this stage, if the respondent *suo moto* appears or appears as a caveator then he cannot be heard. If legislators were intending to hear appellant only, in that case Sub-section (4) of Section 100 of the Code, would have been coached by prefixing, “after hearing the appellant, if Court is satisfied”. In that case one can understand that the Code contemplates hearing of appellant only and not the respondent.

8. No doubt, there is no obligation on the Court to issue notice to respondent at initial stage even before formulating opinion about existence of substantial questions of law. The situation

emerges that, the respondent has *suo moto* appeared and is seeking to give hearing on the point whether there exist substantial question of law. In case of Surat Sing (supra) the then High Court did not frame substantial question of law while admitting the appeal, and deciding the appeal without hearing contesting respondent. In that context, the Hon'ble Supreme Court has explained the scheme of second appeal in-extenso as formulated under Section 100 of the Code. It is expressed that the procedure provides to formulate the substantial question of law as per Sub-sections (4) and (5) of Section 100 of the Code and it is mandatory to hear the respondent on the substantial question of law so framed. So far as the procedure prescribed under Sub-sections (4) and (5) of Section 100 of the Code is concerned, which in-fact, the said stage has yet not come in this case. Therefore, the said decision is of no assistance to the appellant to strengthen his contention as aforesaid mentioned.

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9. On the other hand, the learned counsel for respondent by relying on the commentary of the Code of Civil Procedure, has took me through the observations of Law Commission while incorporating the provisions of Order XLI Rule 11 of the Code. Needless to say that in terms of Order XLII Rule 1 of the Code, the Rule of Order XLI shall apply so far as may be, to appeals from appellate decrees. Order XLI Rule 11 empowers the Court to dismiss the appeal even without issuing notice. In that context, it is expressed by Law Commission that this Rule has been enacted to enable the Court to dismiss second appeal in cases of decision based on the findings of fact, which do not disclose a point of law, such as required by Section 100 of the Code. Law Commission further commented that having regard to the terms of Section 100 of the Code, appeal should not be admitted merely because the appellant has shown arguable or a prima-facie valid point of law.

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10. Reverting to Section 100 of the Code, it is essential for this Court at the first instance to have self satisfaction about the existence of substantial questions of law, and if it so exists then to call upon other side to respond on the substantial questions of law so formulated. If at this juncture, respondent appears suo moto and assists the Court to show that it is not a case wherein substantial questions of law arose, it would not cause prejudice to other side. The hearing given to respondent would be for assisting to the Court and nothing else. I may reiterate that the Court is not obliged to call respondent by notice before its own satisfaction, but, if respondent suo moto appears then there appears to be no legal embargo in giving him right of hearing.

11. In our system, right of hearing is valuable right which can be accorded to a party if the Court deems it fit. In absence of any express

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provision to foreclose the respondent from making submission at the initial stage, it would be unjust to shut his mouth even if he is before the Court. In view of that, this Court is of the opinion that if respondent suo moto or in the capacity of caveator appears at initial stage of the proceedings, the right of hearing can be given to him. Preliminary objection is answered accordingly. Parties to proceed further.

JUDGE

Gohane.