

10.08.2022
KC(3)

S.A. 117 of 2017
Smt. Anu Mondal and Anr.
-versus-
Smt. Jayanti Mondal and Anr.
With
CAN 1 of 2017 (Old CAN No. 4280 of 2017)
(not found in file)
With
CAN 3 of 2022

Mr. Animesh Paul.....For the appellants.

Mr. Rahul Karmakar,
Mr. Subham Ghosh.....For the respondents.

At the stage of admission of the second appeal, we allowed learned counsel for the appellants and the respondents to participate in the proceeding. We have examined in detail the judgment and decree of the learned first court and of the first appellate court.

One Bhupal Mondal was an employee of the respondent no. 2. He died on 12th June, 2006 after nominating the respondent no. 1 as his nominee to receive the benefits receivable on his death from the respondent no. 2.

The material issue for consideration before both the courts below was whether the appellant no. 1 and the respondent no. 1 were or any of them was the legally wedded wife of Bhupal Mondal or whether neither was.

The consequential question, which arose, was which of the two the appellant no. 1 or the respondent no. 1 was entitled to receive this benefit.

On a prima facie examination of the judgments of the courts below, we find that there is grossly insufficient and inadequate appreciation of the material evidence by the learned judge. This in our opinion raises the question whether those decisions are perverse?

On that very question, we admit the appeal.

We heard out the appeal itself today in the presence of learned counsel for the parties, dispensing with all formalities.

Both the appellant no. 1 and the respondent no. 1 claim to have been married to Bhupal. Neither of them has been able to produce any certificate of marriage. Also neither of them has been able to produce any person or persons who were witnesses to such marriage.

The appellant no. 1 has averred in the plaint that she was married to Bhupal on 9th December, 1973 and that the appellant no. 2 was born to them on 2nd April, 1975. In evidence she has been able to produce the records of the hospital where the appellant no. 2 was born. In those records the name of Bhupal is recorded as his father. She has also produced a deed of transfer where she was a party and where she was described as

Bhupal's wife. There are other documents also viz. voter's identity card, ration card, identity card and so on of the appellant no. 1/appellant no. 2 where the name of Bhupal finds mention as the appellant no. 1's husband or appellant no. 2's father.

The respondents also filed documents like records of the Howrah Improvement Trust, salary bills of Bhupal, his membership form for the Howrah Municipal Corporation Trust contributory provident fund, gratuity form filled up by Bhupal Mondal and so on where the respondent no. 1 is declared as the nominee.

On the basis of these documents both the courts below have come to the finding that the appellant no. 1 has not been able to prove that she was the legally married wife of Bhupal.

In our opinion, the documents produced by the appellants were neither contemporaneous to the death of Bhupal nor contemporaneous to filing of the suit. They were executed over a long period of time. Bhupal never came forward to challenge the use of his name by the appellant no. 1, as her husband. All these are relevant facts which needed active consideration by the learned courts below.

Under Section 100 of the Code of Civil Procedure, an appeal lies from a decree passed in appeal by any court subordinate to the High Court only if a

substantial question of law is involved. Is a substantial question of law involved in this case?

The first appellate court is the last court for determination of facts. Usually that determination is final. It is well settled that this determination can be interfered with on second appeal only if it is perverse. A perverse finding of facts gives rise to a substantial question of law.

The Supreme Court has made pronouncements on this subject.

In *Damodar Lal -vs- Sohan Devi and Ors.*, reported in (2016) 3 SCC 78 it observed on what is a substantial question of law as follows:

“6. The tenants pursued the matter in Second Appeal No. 109 of 2000 before the High Court of Rajasthan which was allowed by the impugned judgment dated 27-9-2012 [*Sohan Devi v. Damodar Lal*, Civil Second Appeal No. 109 of 2000, decided on 27-9-2012 (Raj)] . The following were the substantial questions of law framed in the second appeal:

“(1) Whether on the facts and in the circumstances of this case, the learned courts below have erred in granting a decree for eviction on the ground of material alteration while ignoring the relevant considerations and proceeding on irrelevant considerations?

(2) Whether on the facts of this case, the learned courts below have erred in not drawing adverse inference for non-appearance of the plaintiff Damodar Lal in the witness box?”

8. “Perversity” has been the subject-matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of the Civil Procedure Code, 1908, is the last court of facts unless the findings are based on no evidence or are perverse.

9. In *Krishnan v. Backiam* [*Krishnan v. Backiam*, (2007) 12 SCC 190] , it has been held at para 11 that: (SCC pp. 192-93)

“11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect.”

10. In *Gurvachan Kaur v. Salikram* [*Gurvachan Kaur v. Salikram*, (2010) 15 SCC 530 : (2013) 2 SCC (Civ) 113] , at para 10, this principle has been reiterated: (SCC p. 532)

“10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court [*Salik Ram Boloram Mehar v. Guruvachan Kaur*, 2000 SCC OnLine MP 340] was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent.”

13. In *Kulwant Kaur v. Gurdial Singh Mann* [*Kulwant Kaur v. Gurdial Singh Mann*, (2001) 4 SCC 262] , this Court has dealt with the limited leeway available to the High Court in second appeal. To quote para 34: (SCC pp. 278-79)

“34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if

erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication — what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:

‘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 by both 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.’

The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with.”

In *Dinesh Kumar -vs- Yusuf Ali*, reported in (2010) 12 SCC 740 cited by Mr. Paul, learned advocate for the appellant the Supreme Court remarked as follows:

“24. There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were

vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter.”

With regard to substantial question of law the Supreme Court in *State Bank of India and Ors. -vs- S.N. Goyal*, reported in (2008) 8 SCC 92 has laid down the following dictum:

“13. Second appeals would lie in cases which involve substantial questions of law. The word “substantial” prefixed to “question of law” does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the *lis* between the parties. “Substantial questions law” means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of Section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law. It is said that a substantial question of law arises when a question of law, which is not finally settled by this Court (or by the High Court concerned so far as the State is concerned), arises for consideration in the case. But this statement has to be understood in the correct perspective. Where there is a clear enunciation of law and the lower court has followed or rightly applied such clear enunciation of law, obviously the case will not be considered as giving rise to a substantial question of law, even if the question of law may be one of general importance. On the other hand, if there is a clear enunciation of law by this Court (or by the High Court concerned), but lower court had ignored or misinterpreted or misapplied the same, and correct application of the law as declared or enunciated by this Court (or the High Court concerned) would have led to a different decision, the appeal would involve a substantial question of law as between the parties. Even where there is an enunciation of law by this Court (or the High

Court concerned) and the same has been followed by the lower court, if the appellant is able to persuade the High Court that the enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two viewpoints, it can be said that a substantial question of law arises for consideration. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case.

The other two cases were cited by Mr. Karmakar, learned advocate for the respondent no. 1.

If there is inadequate, irrational, insensible or unreasonable appreciation of evidence, the judgment is perverse. Similar is the result if there is total non-application of mind to appreciate evidence.

On the evidence produced before the court it was open to the court to come to one of the following findings (i) the appellants/plaintiffs have been able to prove their case, (ii) the appellants/plaintiffs have not been able to prove their case, (iii) the respondent no. 1/defendant no. 1 has been able to prove her case and (iv) none of the parties has been able to prove her case.

It should be remembered that it is not denied that the appellant no. 2 was born from the union of Bhupal and the appellant no. 1. Further, the respondent no. 1 has two issues through him. Even if the alleged marriages are held to be void, the issues are recognised by law to be legitimate and have a claim over the father's estate.

In our opinion, all these issues were required to be comprehensively analysed and decided by the learned trial court.

A more judicious finding of facts by the learned courts below was necessary. On the basis of the documents produced and other evidence adduced before the courts, in our opinion, the findings of fact arrived at by them do not stand the test of reason. Hence, they are perverse in the eye of law.

Both the courts failed to take a complete and reasonable picture of the controversy. The court was not asked to determine whether the appellant no. 1/plaintiff no. 1 had succeeded in proving her case. A more judicious and realistic approach would have been to determine whether the appellant no. 1 or the respondent no. 1 had been able to prove that she was the legally wedded wife of Bhupal. The rights of the appellant no. 2 claiming to be the son of Bhupal through the appellant no. 1 and his issues through the respondent no. 1 were also before the court. Even assuming that there was no evidence of marriage of Bhupal to either the appellant no. 1 or the respondent no. 1 by way of a marriage certificate or witness to the marriage, a legal and just view based on rational and reasonable analysis of evidence was expected.

For those reasons we set aside the judgment and decree of the appellate court and remand the matter to

the learned first court to decide the appeal afresh on the evidence before it. If an application is made by either party to adduce additional evidence the prayer may be considered by the learned judge. We request the learned judge to pronounce a judgment and decree within six months of communication of this order.

The order of injunction operative during pendency of the appeal before the learned first appellate court is reinstated and shall continue until further orders and subject to the decree to be passed by the said court.

The appeal (S.A. 117 of 2017) and the connected applications [CAN 1 of 2017 (Old CAN No. 4280 of 2017) and CAN 3 of 2022] are disposed of.

(I.P. MUKERJI, J.)

(SUBHENDU SAMANTA, J.)