HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Civil Second Appeal No. 172/2024

1. Madan Lal S/o Late Gopal Dutt, R/o
2. Ram Kishor S/o Gopal Dutt, Deceased

2/1. Mst. Sulochna Devi W/o Late Ram Kishor, Aged About 55 Years, R/o Narayanpur, Tehsil Thanagaji, District Alwar

2/2. Mahesh Kumar S/o Late Ram Kishor, Aged About 23 Years, R/o Narayanpur, Tehsil Thanagaji, District Alwar

2/3. Kamlesh Kumar S/o Late Ram Kishor, Aged About 19 Years, R/o Narayanpur, Tehsil Thanagaji, District Alwar

2/4. Santosh Kumar S/o Late Ram Kishor, Aged About 13 Years, Minor Through Guardian Mst. Sulochna Devi, Mother, R/o Narayanpur, Tehsil Thanagaji, District Alwar

2/5. Rajbala D/o Late Ram Kishor, Aged About 20 Years, R/o Narayanpur, Tehsil Thanagaji, District Alwar

2/6. Sanju Kumari D/o Late Ram Kishor W/o Rajesh Kumar, Aged About 27 Years, At Present Residing At Bagas Ahiran, Tehsil Viratnager, District Jaipur

2/7. Anju Kumari D/o Late Ram Kishor W/o Vipin Kumar, Aged About 25 Years, R/o Harner, Tehsil Thanagaji, District Alwar,

3. Rajendra Prasad S/o Gopal Dutt, R/o Narayanpur, Tehsil Thanagaji, District Alwar, Rajasthan

----Appellants

Versus

1. Smt. Dhundha D/o Late Durga Prasad W/o Hardwari Lal, R/o Village Karwa Bairath/ Viratnagar, District Jaipur
2. Nani Bai @ Nana Bai D/o Durga Prasad, Through Janardhan Sharma, Dhai Mandi Daulatganj, Post Badepe Mst. Lashker Gwaliyar (Madhyapradesh) (Deceased)
3. Mst. Dakhli W/o Shambhu Dayal, R/o Narayanpur (Deceased)
4. Mst. Manni Devi W/o Jagdish Prasad, R/o Narayanpur
5. Kaluram S/o Jagdish Prasad, R/o Narayanpur
6. Smt. Prem Devi D/o Jagdish W/o Ramotar, R/o Village Jawanpura (Bagawas) Town Viratnagar, Jaipur

7. Chunna Devi D/o Jagdish W/o Govindram, R/o Village Jawanpura (Bagawas) Town Viratnagar, Jaipur
8. Sarbati Devi D/o Gopal W/o Babulal, Deceased, R/o Narayanpur, Tehsil Thanagaji, District Alwar, Rajasthan
9. Chandrakala D/o Gopal Dutt W/o Sambhu Dayal, R/o Narayanpur, Tehsil Thanagaji, District Alwar, Rajasthan
10. Sushila D/o Gopal Dutt W/o Hukam Chand, R/o Narayanpur, Tehsil Thanagaji, District Alwar, Rajasthan
11. Sumitra D/o Gopal Dutt W/o Umakant, R/o Narayanpur, Tehsil Thanagaji, District Alwar, Rajasthan

----Respondents

For Appellant(s)	:	Mr. Gajendra Singh Rathore
For Respondent(s)	:	

HON'BLE MR. JUSTICE ASHOK KUMAR JAIN

Judgment / Order

12/12/2024

1. Instant second appeal is preferred by appellants-plaintiff aggrieved from dismissal of civil appeal number 50/2009 by learned Additional District Judge No.2, District Alwar on 01.12.2023, affirming the judgment and decree dated 15.11.2002 in civil suit number 39/1972 passed by learned Civil Judge No.1, Thanagaji, District Alwar.

2. Learned counsel for the appellants submits that the appellants (plaintiff) have filed a suit for declaration and permanent injunction on the ground that the parties are descendants of a common ancestors and the dispute pertains to a common bada used by both the parties. Learned counsel further submits that in August, 1972, when defendant number 3 made interference in bada then it has come to their notice that

defendant number 2 has sold the bada to defendant number 3 through registered sale deed on 04.04.1972. He also submitted that prior to this registered sale deed a gift deed was executed by Durga Prasad on 23.12.1961. He also submitted that a gift deed executed by Durga Prasad is null and void against the appellants as Durga Prasad has no right to dispose of the bada by executing a gift deed. He also submitted that the sale deed was without any basis and without any right and the appellants have challenged the sale deed along with right to gift. He further referred the evidence on record and submitted that the bada was never divided between the co-shareres and Durga Prasad has never acquired any exclusive right on this bada. He further submitted that the trial court and the appellate court has committed serious error while not considering the evidence of plaintiff on record. He specifically submitted that the issue number 1 and 5 were erroneously decided against the plaintiff and same are liable to be set aside. He also submitted that the appellate court has also not considered the grounds raised by the appellants while dismissing the appeal. Atlast, he submitted that in para no.'K' of memo of appeal he suggested substantial question of law arisen from material referred by him.

3. Heard learned counsel for the appellants and perused the record.

4. Facts giving rise to instant second appeal are that appellants (plaintiff) filed a civil suit for declaration and permanent injunction on 07.12.1972 on the ground that except bada as mentioned in para number 2 of plaint, all other properties were divided between

the ancestors of Jamna Sahai. Defendant Durga Prasad has executed a gift deed on 23.12.1961 in favour of defendant number 2 Dhunda. Defendant number 2-Dhunda has executed a sale deed in favour of defendant number 3-Jagdish Prasad on 04.04.1972. The plaintiffs after knowledge about gift deed and sale deed on 01.08.1972 filed a civil suit for declaration and permanent injunction.

5. Defendant number 1 has filed written statement denying the claim of plaintiff as joint bada and pleaded that disputed bada exclusively belongs to him. Defendant number 2 has also maintained that after gift the bada is in her possession and same is not a common bada. After death of defendant number 3, substituted legal heirs 3/1 to 3/5 have filed written statement and denied averments of plaintiff.

6. Learned trial court has framed as many as 7 issues on basis of pleadings of the parties. Initially, three witnesses and later Radheshyam were examined on behalf of plaintiff and three documents were exhibited by plaintiff. The defendants have examined 7 witnesses and later examined Ganga Lehri and exhibited one document.

7. Learned trial court has decided issue numbers 1 and 5 jointly against the plaintiff which resulted into dismissal of suit of the plaintiff. The plaintiff (deceased through LRs) filed an appeal and same was also dismissed by first appellate court.

8. The burden on the plaintiff was to prove that the bada or piece of land as mentioned in para number 2 is a common property between plaintiff and defendant number 1. The plaintiff

was required to show that he is in joint possession with defendant number 1 over the disputed property. An issue was also framed whether bada is an exclusive property of defendant no.1. Since, issue numbers 1 and 5 are contrary to each other so the trial court has decided both the issues by a common finding.

9. A perusal of finding recorded on issue numbers 1 and 5 suggests that PW1-Gopal Dutt, PW2-Ghisalal, PW3-Amrit Singh and Radheyshyam were produced by the plaintiff in support of their case whereas DW1-Jagdish Prasad, DW2-Rudda, DW3-Ladiram, DW4-Phoolchand, DW5-Omkar, DW6-Hardwari Lal Sharma, DW7-Leelaram and Ganga Lehri were examined by defendants to rebut the claim of plaintiff and also assert reiteration made by the defendants. In order to ascertain appreciation of facts by the Courts below, we have considered the statement of these witnesses.

10. Whether the bada or the land in dispute is a joint property or not is a factual issue and herein both the courts below have recorded same findings that the disputed property (bada) is not a common property between plaintiff Gopal and Durga Prasad, therefore, defendant number 1 has a right to dispose of the property. The suit was brought by plaintiff Gopal and burden of proof is upon him to prove his claim.

11. The statement and admission of PW1-Gopal Dutt suggests that this bada was given on rent by him to Radheshyam. The statement of Radheshyam was recorded after remand of the matter and not at first instance. The admission of PW1 clearly indicate that he has not mentioned receipt of rent from

Radheshyam in his account books. The statement of PW1 and Radheshyam also shows that the period of rent was 10.07.1961 to May, 1962 but no document on record is available which supports the oral evidence of PW1-Gopal Dutt and Radheshyam. Moreover, there is no other documentary evidence to support that the suit property was in joint possession of PW1 and defendant Durga Prasad. No evidence on record, suggests that when other properties were divided between co-sharers then why this bada was left out and not divided. The gift deed was executed on 23.12.1961 and on date of execution of gift deed, whether the property was in possession of plaintiff, has to be established from the evidence. Herein, there is no document to support the contention that the property was in joint possession of plaintiff and defendant number 1 on date of execution of gift deed. Moreover, the evidence of defendant clearly suggested that defendant is in exclusive possession of the property and the witnesses of defendant have supported the case of defendant number 1. Learned trial court has considered the evidence of both the parties and trial court has opined that no witness from vicinity was produced by the plaintiff to establish his possession over the suit property. A joint possession of the property can be presumed if it is establish that property is undivided, between the parties. Herein, except the oral evidence in examination in chief, the plaintiff has failed to prove that the disputed bada was joint property between him and the defendant no.1.

12. The issue number 1 is a issue based on fact and issue number 5 was erroneously framed, same is contrary to issue

number 1. The trial court has rightly considered the evidence on record. After discussing the evidence on record, the trial Court has drawn a conclusion that the property was gifted by defendant number 1 to his daughter defendant number 2 and defendant number 2 has executed a sale deed in favour of defendant no.3. It was held that bada belong to defendant no.1 and plaintiff has no right in said bada. Considering the contentions of learned counsel for the appellants, I am of the view that the issue raised by learned counsel pertains to facts and both the courts below have considered these issues and recorded a concurrent findings on facts. There is neither case of erroneous reading of evidence nor recording of finding contrary to the record. None of the ground give rise to any substantial question of law, therefore, no ground to entertain civil second appeal for consideration by this court.

13. Section 100 of CPC provides for second appeal in case wherein the High Court is satisfied that the case involves a substantial question of law. Thus, the First Appellate Court is final court on facts and in second appeal normally cannot re-appreciate the evidence or facts.

14. Just to determine whether a question is substantial question of law or not, was laid down by a Constitution Bench of Hon'ble Supreme Court in case of **Chunilal V. Mehta & Sons. Ltd. Vs. Century Spg. and Mgf. Co. Ltd**. **AIR 1962 SC 1314,** as under:

> "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 is 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."

15. Recently Hon'ble Supreme Court in case of **Suresh Lataruji Ramteke versus Sau. Sumabai Pandurang Petkar & Ors. (Civil Appeal No. 6070/2023,** arising out of **SLP(C)No.20183 of 2022** decided on **21.09.2023)** considered the scope of Section 100 of CPC and summarised the law as under:

> 13. The jurisprudence on Section 100, CPC is rich and varied. Time and again this Court in numerous judgments has laid down, distilled and further clarified the requirements that must necessarily be met in order for a Second Appeal as laid down therein, to be maintainable, and thereafter be adjudicated upon. Considering the fact that numerous cases are filed before this Court which hinge on the application of this provision, we find it necessary to reiterate the principles.
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> 13.1 The requirement, most fundamental under this section is the presence and framing of a "substantial question of law". In other words, the existence of

such a question is sine qua non for exercise of this jurisdiction.

13.2 The jurisdiction under this section has been described by this Court in **Gurdev Kaur v. Kaki (2007) 1 SCC 546** (Two-Judge Bench) stating that post 1976 amendment, the scope of Section 100 CPC stands drastically curtailed and narrowed down to be restrictive in nature. The High Court's jurisdiction of interfering under Section 100 CPC is only in a case where substantial questions of law are involved, also clearly formulated/set out in the memorandum of appeal. It has been observed that:

"At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the section is that the appeal shall be heard only on that question."

Gurdev Kaur (supra) was referred to and relied upon in **Randhir Kaur v. Prithvi Pal Singh & Ors. (2019) 17 SCC 71**

13.3 In **Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179** a Bench of three Judges, held as under in regard to what constitutes a substantial question of law:-

a) Not previously settled by law of land or a binding precedent.

b) Material bearing on the decision of case; and (c) 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. Therefore, it will depend on facts of each case.

Such principles stand followed in **Government of Kerala v. Joseph 2023 SCC Online SC 961** and **Chandrabhan v. Saraswati 2022 SCC Online SC 1273.**

16.5 Interference on findings of fact permitted in exceptional cases, i.e., when finding is based on either inadmissible or, no evidence. This Court in **Dinesh Kumar v. Yusuf Ali (2010) 12 SCC 740**

referring to various other cases held:- a) It is not permissible for High Court to reappreciate evidence as if it was the first appellate court unless findings were perverse.

b) Finding of fact can be interfered in exceptional circumstances as rarity, rather than a regularity.

c) Scrutiny of evidence in second appeal is not prohibited but has to be exercised upon proper circumspection.

16. In case of **Amar Singh Vs. Dalip Singh (2012) 13 SCC 405**, Hon'ble Supreme Court explained the purpose of framing question of law in following manner:

"a) The purpose of framing of substantial question of law is to give the parties an opportunity to come prepared on that particular question.

b) When a substantial question of law is formulated by the Court then the same must be made known to parties and thereafter they have to be given an opportunity to advanced arguments thereon.

c) If any additional questions were framed at the time of hearing, the Court must hear the parties on that question as well."

17. Hon'ble Court in case of **Chandrabhan Vs. Saraswati 2022 SCC Online (SC) 1273 (decided on 22.09.2022)** has summarised principle relating to Section 100 of CPC in following words:-

> "(i) the courts below have ignored material evidence or acted on no evidence;
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> (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or
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> (iii) the courts have wrongly cast the burden of proof."

18. In view of discussion made herein above, the instant second appeal is hereby dismissed.

19. Misc. application(s), if any, stands disposed of.

(ASHOK KUMAR JAIN),J

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