Supreme Court of India Santosh Hazari vs Purushottam Tiwari (Dead) By Lrs on 8 February, 2001 Author: R Lahoti Bench: Cji, R.C. Lahoti, Briijesh Kumar. CASE NO.: Appeal (civil) 1117 of 2001

PETITIONER: SANTOSH HAZARI

Vs.

RESPONDENT: PURUSHOTTAM TIWARI (DEAD) BY LRS.

DATE OF JUDGMENT: 08/02/2001

BENCH: CJI, R.C. Lahoti, & Briijesh Kumar.

JUDGMENT: L...I...T.....T.....T.....T.....T.....T.....T..J R.C. Lahoti, J. Leave granted. On 4.3.1983, the plaintiff-appellant filed a suit for declaration of title and recovery of possession and issuance of permanent preventive injunction restraining the defendant from interfering with the possession of the plaintiff over the suit property described as khasra No.41/1 area 1.09 acres (0.441 hectares) situated in Village Patharia, District Damoh. According to the plaintiff, the defendant had illegally dispossessed the plaintiff from his possession over 110x80 ft. area of land out of the suit property on 20.8.1981. The defendant in his written statement denied all material averments and in addition submitted that the defendant has been in possession of the suit property since 1940-41, i.e. since the times of his grand father. The suit filed by the plaintiff was alleged to have been barred by limitation in view of the same having been filed more than 12 years after the date of dispossession of the plaintiff. A plea of the defendant having acquired title by adverse possession was also raised in the written statement. The trial Court, on an evaluation of oral and documentary evidence adduced by the parties, found that ownership in the suit property vested in the plaintiff and the defendant had forcibly occupied the disputed area of 110x80 ft. sometime in the year 1980-81. The defendants plea of adverse possession was negatived and the suit filed by the plaintiff was held to have been filed within the period of limitation. On these findings the suit was decreed in its entirety. The defendant preferred an appeal. The learned additional district Judge held that in so far as ownership over the suit land is concerned, the same vested in the plaintiff. However, he found that the possession of the land was given to the plaintiff by the State Government on 6.11.68 but the plaintiff has not shown to have taken any steps for dispossessing the defendant and the plea raised by the plaintiff of the defendant having forcibly occupied the land in dispute on 20.8.1981 did not appear to be tenable. On these findings the appeal was allowed and in reversal of the judgment and decree of the trial Court the suit was directed to be dismissed. The plaintiff preferred a second appeal which has been dismissed in limine by the High Court passing a brief order that the matter stood concluded by findings of fact and no substantial question of law arose for determination. The aggrieved plaintiff has filed this appeal by special leave. On 4.5.1999 this Court directed a notice to be issued to the defendant-respondent on the limited question as to why the matter should not be remanded to the High Court for deciding the appeal after

framing the question of law. We have heard the learned counsel for the parties and perused the judgments of the trial Court and the first appellate Court. We have also perused the application dated 12.1.2001 filed in this Court on behalf of the plaintiff-appellant setting out the substantial questions of law which in his submission arose in the case and on which the High Court ought to have heard the appeal. What is a substantial question of law involved in the case? Section 100 of the Code of Civil Procedure, 1908 (hereinafter, the code, for short) as substituted by the Code of Civil Procedure Amendment Act, 1976 (104 of 1976) w.e.f. 1.2.1977 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. The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal and if it does so it acts illegally and in abnegation or abdication of the duty cast on Court. The existence of substantial question of law is the sine qua non for the exercise of the jurisdiction under the amended Section 100 of the Code. [See Kshitish Chandra Purkait Vs. Santosh Kumar Purkait & Ors., (1997) 5 SCC 438, Panchugopal Barua Vs. Umesh Chandra Goswami, (1997) 4 SCC 713 and Kondila Dagadu Kadam Vs. Savitribai Sopan Gujar & Ors., (1999) 3 SCC 722]. At the very outset we may point out that the memo of second appeal filed by the plaintiff-appellant before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on substantial question of law involved in the case. An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of

a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction. Even under the old Section 100 of the Code (pre-1976 amendment), a pure finding of fact was not open to challenge before the High Court in second appeal. However the Law Commission noticed a plethora of conflicting judgments. It noted that in dealing with second appeals, the Courts were devising and successfully adopting several concepts such as, a mixed question of fact and law, a legal inference to be drawn from facts proved, and even the point that the case has not been properly approached by the Courts below. This was creating confusion in the minds of the public as to the legitimate scope of second appeal under S.100 and had burdened the High Courts with an unnecessarily large number of second appeals. Section 100 was, therefore, suggested to be amended so as to provide that the right of second appeal should be confined to cases where a question of law is involved and such question of law is a substantial one. (See Statement of Objects and Reasons). The Select Committee to which the Amendment Bill was referred felt that the scope of second appeals should be restricted so that litigations may not drag on for a long period. Reasons, of course, are not required to be stated for formulating any question of law under sub-section(4) of Section 100 of the Code; though such reasons are to be recorded under proviso to sub-section (5) while exercising power to hear on any other substantial question of law, other than the one formulated under sub- section(4). The phrase substantial question of law, as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying question of law, means - of having substance, essential, real, 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 general importance as has been done in many 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 & Anr. Vs. T. Ram Ditta, AIR 1928 Privy Council 172, the phrase substantial question of law as it was employed in the last clause of the then existing Section 110 of the C.P.C. (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 which was involved in the case as between the parties. In Sir Chunilal V. Mehta & Sons Ltd. Vs. The Century Spinning and Manufacuring Co., Ltd., (1962) Supp.3 SCR 549, the Constitution Bench expressed agreement with the following view taken by a Full Bench of Madras High Court in Rimmalapudi Subba Rao Vs. Noony Veeraju, ILR 1952 Madras 264:- ..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 view, 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 of applying those principles to the particular fact of the case it would not be a substantial question of law. and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:- 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. In Deputy Commr., Hardoi, in charge Court of Wards, Bharawan Estate Vs. Rama Krishna Narain & Ors., AIR 1953 SC 521, also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to certificate under (the then) Section 110 of the Code. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving 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 court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. 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. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. A perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ evidence adduced by the parties for deciding the issues on@@ JJJJJJJJJJJJJJJJJJ which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate Court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse

possession as pleaded by the defendant. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. The task of an appellate Court affirming the findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi & Ors. Vs. Bijendra Narain Choudhary, AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact (See Madhusudan Das Vs. Smt. Narayani Bai & Ors., AIR 1983 SC 114). The rule is ___ and it is nothing more than a rule of practice ___ that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judges notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact.(See Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Narain Singh & Ors., AIR 1951 SC 120). Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the

jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one. Reverting back to the facts of the case at hand, prima facie we find the first appellate Court did not discharge the duty cast on it as a Court of first appeal. The High Court having noticed failure on the part of the appellant in not discharging the statutory obligation cast on him by sub-section (3) of Section 100 of the Code, on account of the substantial question of law involved in the appeal having not been stated, much less precisely, in the memorandum of second appeal, ordinarily an opportunity to frame such question should have been afforded to the appellant unless the deficiency was brought to the notice of the appellant previously by the High Court Registry or the court and yet the appellant had persisted in his default. That was not done. In our opinion, the following substantial question of law does arise as involved in the case and worth being heard by the High Court:- Whether on the pleadings and the material brought on record by the defendant, the first appellate Court was right in holding that the case of adverse possession was made out by the defendant and the suit filed by the plaintiff was liable to be dismissed as barred by time under Article 65 of the Limitation Act, 1963, more so when such finding was arrived at in reversal of the findings of the trial Court? The appeal is allowed. The case is remitted back to the High Court for hearing and deciding the second appeal afresh. We make it clear that we have not expressed any opinion either way on any of the issues arising for decision in the case. We also make it clear that our framing the question of law involved in the appeal shall not take away the jurisdiction of the High Court vesting in it under provisio to sub-section(5) of Section 100 of the C.P.C. to formulate any other question of law involved in the case The second appeal shall be decided by the High Court uninfluenced by any of the observations made hereinabove which have been made solely to support our opinion that the appeal did not merit a summary dismissal by the High Court. The appeal stands disposed of in the terms stated hereinabove. No order as to the costs.@@ JJJJJJJJJJJJJJJJJJJJJJJJ