

## **Umerkhan vs Bismillabi @ Babulal Shaikh & Ors on 28 July, 2011**

**Equivalent citations: AIR 2012 SUPREME COURT 1646, 2012 AIR SCW 2269, 2012 (3) AIR BOM R 575, (2011) 114 REVDEC 369, (2011) 4 ICC 238, (2011) 8 SCALE 85, (2011) 88 ALL LR 459, (2011) 6 ALL WC 6357, (2011) 5 CAL HN 170, (2011) 3 CAL LJ 33, (2012) 2 CIVLJ 213, (2011) 4 MAD LW 623, (2011) 4 JCR 61 (SC), (2012) 2 MAH LJ 434, (2011) 4 CIVILCOURTC 518, AIR 2012 SC (CIV) 1299, 2011 (9) SCC 684, (2011) 5 ALLMR 481 (SC), (2011) 105 ALLINDCAS 27 (SC), (2011) 2 CLR 451 (SC), (2011) 3 ALL RENTCAS 1, (2011) 3 CURCC 170, (2012) 1 MPLJ 507, (2011) 2 ORISSA LR 702, (2011) 4 PAT LJR 113, (2012) 2 BOM CR 710**

**Author: R.M. Lodha**

**Bench: R.M. Lodha, Aftab Alam**

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6034 OF 2011

(Arising out of SLP (Civil) No. 18923 of 2010)

Umerkhan

.... Appellant

Versus

Bismillabi @ Babulal Shaikh & Ors.

.... Respondents

## JUDGMENT

R.M. Lodha, J.

Leave granted.

2. This appeal, by special leave, has been preferred by the original 1st defendant against the judgment of the High Court of Judicature of Bombay, Aurangabad Bench whereby the learned Single Judge of that Court reversed the judgment and decree passed in the appeal by the Additional District Judge, Osmanabad and restored the judgment and decree of the trial court.

3. Sardar Khan was the owner of a property bearing land Block No. 386 and House No. 206 situate at Mangrul, Taluqa Kallam, District Osmanabad. He died in 1948 leaving behind a son --

Umerkhan and two daughters--Bismillabi and Aminabi. Both daughters were minor at the time of the death of their father. They got married later. Bismillabi (hereinafter referred to as, 'plaintiff') filed a suit for partition and separate possession to the extent of 1/4th share in the above property against her brother Umerkhan (hereinafter referred to as, '1st defendant') and her sister Aminabi (hereinafter referred to as, '2nd defendant'). The plaintiff's case in the plaint was that as per the Muhammadan Law, the 1st defendant has 1/2 share while the 2nd defendant like her has 1/4th share in the suit property.

4. The 1st defendant contested the suit on diverse grounds.

Inter alia, a plea was taken by him that plaintiff has been ousted of her right, title and possession in 1967 and the suit having been brought in 1990 was not only barred by limitation but also he has acquired title by adverse possession as he has been holding hostile possession over the property to the knowledge of the plaintiff. The 2nd defendant did not file any written statement and the suit proceeded against her ex-parte.

5. The trial court framed as many as four issues; issue no. 4 being whether 1st defendant has proved that he has become owner of the suit property by adverse possession. The trial court recorded the evidence and after hearing the advocates for the plaintiff and the 1st defendant vide its judgment and decree dated October 18, 1993 declared that plaintiff and 2nd defendant were entitled to 1/4th share each and the 1st defendant was entitled to 1/2 share in the suit property. The trial court ordered for effecting partition by metes and bounds accordingly.

6. Against the judgment and decree of the trial court, the 1st defendant preferred first appeal before the District Court, Osmanabad which was transferred to the Court of Additional District Judge, Osmanabad for its disposal. The first appellate court reversed the finding of the trial court on issue no.4 and held that the 1st defendant became owner of the suit property by adverse possession and,

accordingly, allowed the first appeal on August 1, 2001 and set aside the judgment and decree of the trial court.

7. The plaintiff challenged the judgment and decree of the first appellate court in the second appeal before the High Court. In the course of second appeal, 2nd defendant died and her legal representatives were brought on record. The High Court allowed the second appeal and, as noticed above, set aside the judgment and decree of the first appellate court.

8. Pertinently, the judgment of the High Court that runs into eight foolscap pages does not indicate that scope of second appeal as provided in Section 100 and Section 101 of the Code of Civil Procedure, 1908 (for short, 'the Code') was kept in mind while hearing the second appeal. In para 7 of the judgment, the High Court observed thus:

"I have minutely gone through both the judgments of the Courts below only on the issue of adverse possession which is also a mixed question of law and fact."

9. The High Court then proceeded to record the arguments of the counsel for the 1st defendant (respondent no. 1 therein) in paragraph 8. Thereafter in paragraphs 9, 10 and 11 it was observed and held as follows :

"9. The case of ouster is pleaded by Respondent No. 1 in the written statement stating that after two years of her marriage sometime in the year 1967 both the sisters asked for their share and it was denied to them.

10. Party when plead adverse possession it must be proved by the evidence. The suit property is immovable property and there is no documentary evidence supporting the case of the Respondent No. 1 that he is in exclusive possession of the agricultural land and the same was held by him in his exclusive possession after death of his father or from 1967. Only one document i.e. 7/12 extra of the year 1989-90 was filed by Respondent No. 1 showing his possession and cultivation which is jointly in the name of Respondent No. 1 and his wife. Crop statements are prepared every year and 7/12 extract has a presumptive value for possession and cultivation of agricultural land. Since there are no such crop statements of 7/12 extract filed on record, adverse inference will have to be drawn against the Respondent No. 1. His exclusive or continuous possession is not established on record for a period of over 12 years preceding to the filing of the suit. No case of ouster is made out. Oral evidence of Vishnu Baburao Jadhav, witness No. 2, cannot be accepted as evidence of possession for such long period and has been rightly rejected and not considered by the trial court in the light of the evidence of Respondents. So also case of adverse possession was dismissed by learned trial Court after going through the evidence of Respondent No. 1.

11. Mere refusal to give share will not give rise to claim adverse possession and thus it is seen that learned appellate Court failed to appreciate the evidence on the point of

demand of share by the plaintiff from the Respondent No. 1 and further law on the point of adverse possession in the light of the authorities referred above. In that view of the matter, the impugned judgment of the 1st appellate Court does not sustain in law. The appeal deserves to be allowed. The judgment and decree of the learned trial Court is hereby upheld and appeal is allowed with costs."

10. Section 100 of the Code reads as follows :

"S.-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."

11. Section 101 of the Code provides that no second appeal shall lie except on the ground mentioned in Section 100.

12. Section 103 of the Code empowers High Court to determine any issue necessary for disposal of the second appeal in the circumstances stated therein. Section 103 reads as under:-

"S.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 both by 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."

13. In our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question. This Court has been bringing to the notice of the High Courts the constraints of Section 100 of the Code and the mandate of the law contained in Section 101 that no second appeal shall lie except on the ground mentioned in Section 100, yet it appears that the fundamental legal position concerning jurisdiction of the High Court in second appeal is ignored and overlooked time and again. The present appeal is unfortunately one of such matters where High Court interfered with the judgment and decree of the first appellate court in total disregard of the above legal position.

14. In *Ishwar Dass Jain (Dead) through LRs. v. Sohan Lal (Dead) by LRs.*<sup>1</sup>, in paragraph 10 (page 441) of the Report, this Court stated :

"Now under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so."

15. In *Roop Singh (Dead) through L.Rs., v. Ram Singh (Dead) through L.Rs.*<sup>2</sup>, this Court reminded the High Courts, in para 7 (page 713) of the report, that the second appellate jurisdiction of High Court was confined to appeals involving substantial question of law. This Court said :

"It is to be reiterated that under Section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC.....".

<sup>1</sup> (2000) 1 SCC 434 <sup>2</sup> (2000) 3 SCC 708

16. In *Chadat Singh v. Bahadur Ram and Ors.*<sup>3</sup>, this Court set aside the judgment of the High Court that was passed without formulating the substantial question of law. In para 8 (page 361) of the Report, the Court said :

"A perusal of the impugned judgment passed by the High Court does not show that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated. That being so, the judgment cannot be maintained."

17. The above three judgments have been relied upon in *Sasikumar and Ors. v. Kunnath Chellappan Nair and Ors.*<sup>4</sup> and *C.A. Sulaiman and Ors. v. State Bank of Travancore, Alwayee and Ors.*<sup>5</sup> and this Court set aside the judgments of the High Court and the matters were remanded to the High Court for disposal of second appeal in accordance with law.

18. Recently, in the case of *Municipal Committee, Hoshiarpur v. Punjab State Electricity Board and Ors.*<sup>6</sup>, the above legal position has been restated. This Court stated in paragraph 16 (page 225) of the Report as under :

3 (2004) 6 SCC 359 4 (2005) 12 SCC 588 5 (2006) 6 SCC 392 6 (2010) 13 SCC 216  
".....The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC....."

19. In light of the above, the appeal is allowed and impugned judgment of the High Court is set aside. The second appeal No. 528 of 2001, *Bismillabi v. Umerkhan and Ors.*, is restored to the file of the High Court for fresh consideration in accordance with law. No order as to costs.

.....J. (Aftab Alam) ..... J.

(R.M. Lodha) NEW DELHI.

JULY 28, 2011.