Manicka Poosali (Dead) By Lrs. & Others vs Anjalai Ammal & Another on 17 March, 2005

Equivalent citations: AIR 2005 SUPREME COURT 1777, 2005 (10) SCC 38, 2005 AIR SCW 1639, (2005) 2 ALLMR 471 (SC), (2005) 1 CLR 542 (SC), (2005) 3 CTC 233 (SC), (2005) 3 JCR 16 (SC), 2005 (4) SRJ 300, 2005 (3) SLT 237, 2005 (3) CTC 233, 2005 (3) SCALE 345, 2005 SCFBRC 263, (2005) 29 ALLINDCAS 779 (SC), 2005 (2) ALL MR 471, 2005 (1) CLR 542, (2005) 3 JT 443 (SC), (2005) 2 MAD LJ 116, (2005) 4 MAD LW 467, (2005) 99 REVDEC 241, (2005) 2 SUPREME 636, (2005) 2 RECCIVR 190, (2005) 3 ICC 45, (2005) 59 ALL LR 646, (2005) 2 ALL RENTCAS 406, (2005) 3 CAL HN 18, (2005) 3 CIVLJ 207, (2005) 2 CURCC 17, (2005) 2 LANDLR 1, (2005) 1 WLC(SC)CVL 557, (2005) 2 ALL WC 1430, (2005) 3 SCJ 142, (2005) 3 ANDHLD 27, (2005) 3 SCALE 345

Bench: Ashok Bhan, A.K. Mathur

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           CASE NO.:
Appeal (civil)  6736 of 1999

PETITIONER:
Manicka Poosali (Dead) by LRs. & Others

RESPONDENT:
Anjalai Ammal & Another

DATE OF JUDGMENT: 17/03/2005

BENCH:
ASHOK BHAN & A.K. MATHUR

JUDGMENT:
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J U D G M E N T BHAN, J.

This appeal by grant of leave has been filed by the original defendants-the appellants herein, against the judgment and decree of the High Court at Madras granting preliminary decree of partition and separate possession to plaintiffs-the respondents herein, with respect to certain suit properties setting aside the judgment and decree of Trial Court as well as that of Lower Appellate Court, wherein aforesaid decree with respect to same properties had been denied to respondents.

Facts necessary for the disposal of this appeal are as follows:

> One Thandavaraya Poosali had three sons Mottaya Poosali, Ayyasamy Poosali and Ammasi Poosali. In the present case, the dispute is between the children of Mottaya

Poosali over the division of property inherited by them. Mottaya Poosali had two sons Manicka Poosali, Sadaya Poosali and a dauthter, Ellammal. Sadaya Poosali died on 9.5.1962 leaving behind his widow and daughter respondent nos.1 and 2 respectively. Appellants are Manicka Poosali, appellant No.1(since deceased and now represented through his LRs., his wife Mahalakshmi, appellant No.3 and Ellammal, his sister and appellant No.2 herein. They would be referred to as the 'appellants' herein.

Through a registered partition deed dated 19.07.1970 between Mottaya Poosali and his brothers, Plaint A Schedule item Nos.11 to 21 and 28 were allotted to Mottaya Poosali out of their joint family properties. Mottaya Poosali executed a settlement deed dated 22.03.1977 in favour of Manicka Poosali conveying his share in Plaint A Schedule item nos.11 to 14, 17 to 20 and 28 allotted to him in partition dated 19.07.1970. Further Mottaya Poosali executed a registered will dated 23.03.1977 bequeathing his share in Plaint A Schedule item nos.15, 16 and his self acquired properties item nos. 22 to 26 and 29 in favour of Manicka Poosali. Mottaya Poosali died on 01.11.1978.

In 1980, respondents instituted original suit no.806/1980 against appellants for partition and separate possession of their share in respect of whole Plaint A and B Schedule items.

In the plaint, it was averred that Plaint A Schedule item nos.1 to 9 were joint family properties of Mottaya Poosali and Plaint A Schedule item nos.10 to 29 were allotted to Mottaya Poosali in partition dated 19.07.1970 and after his death they are entitled to a share in those properties. It was further averred that settlement deed dated 22.03.1977 executed by Mottaya Poosali in favour of Manicka Poosali is valid only to extent of 1/3 share of Mottaya Poosali and will dated 23.03.1977 executed by Mottaya Poosali in favour of Manicka Poosali is not valid and at best could be valid with respect to 1/3 share of Mottaya Poosali since the said properties were joint family properties. Respondents prayed for a decree of partition and separate possession of 4/9 share in Plaint A Schedule item nos.1 to 14, 17 to 21 and 27 to 29 and Plaint B Schedule items and to an extent of 1/3 share in Plaint A Schedule item nos.15, 16, 22 to 26 and 29 alongwith future income and costs of suit.

In the written statement, filed by appellant no.1 and adopted by appellant no.3, wife of appellant no. 1, it was averred that all the properties included in Plaint A and B Schedules were not joint family properties and respondents are entitled to claim a share only with respect to Plaint A Schedule item nos.11 to 21 and 28 which were allotted to Mottaya Poosali under partition deed dated 19.07.1970 and respondents are in joint possession with respect to these properties only. That Plaint A Schedule item nos.1 to 9 were self acquired properties of appellant no.1 and 3 purchased out of their own funds prior to 1970 and not out of joint family funds. The same were not a part of larger Joint Hindu Family properties and for this reason they were not included in partition dated 19.07.1970. That Plaint A Schedule item nos.22 to 26 and 29 were the self acquired properties of Mottaya Poosali purchased prior to 1970 out of his separate funds earned by purchasing the produce of tamarind trees on highway roads and selling them in the open market. These items were also not included in the partition dated 19.07.1970. That settlement deed dated 22.03.1977 and registered will dated

23.03.1977 executed by Mottaya Poosali in favour of appellant no.1 are true and valid, executed by Mottaya Poosali in sound disposing mind on his own after understanding the contents of the same. That respondents cannot claim any share in Plaint B Schedule items and Plaint A Schedule item nos. 10 and 27 are not owned by family now and were wrongly claimed in Plaint.

Trial Court on appraisal of evidence partly decreed the suit of respondents. Trial Court held that Plaint A Schedule item nos. 1 to 9 were self acquired properties of appellant nos.1 and 3 and Plaint A Schedule item nos. 22 to 26 & 29 were self acquired properties of Mottaya Poosali. That settlement deed dated 22.03.1977 and will dated 23.03.1977 executed by Mottaya Poosali in favour of Manicka Poosali were valid and genuine and respondents are not entitled to any share in properties included in both the deeds. That respondents were entitled to preliminary decree for partition and separate possession of 7/27 share only in Plaint A Schedule i\tem nos.11 to 21 and 28 which were allotted to Mottaya Poosali vide partition dated 19.07.1970 and also to the extent of 7/27 share in Plaint B Schedule items.

Being aggrieved, respondents preferred Appeal Suit no. 162/1983, wherein issue as to the right of respondents to claim share in Plaint A Schedule i\tem nos. 1 to 9, 18, 22 to 26 and 29 was raised.

Appellate Court partly allowed the appeal of respondents upholding the findings of Trial Court with respect to all properties, except Plaint A Schedule i\tem no 10. Plaint A Schedule i\tem no. 10 was also found by Appellate Court to be forming part of the joint family property of Mottaya Poosali along with Plaint A Schedule i\tem nos. 11 to 21 and 28 allotted to him vide partition dated 19.07.1970. Appellate Court observed that Plaint A Schedule i\tem nos. 1 to 9 were self acquired properties of appellant nos. 1 and 3 and Plaint A Schedule i\tem nos. 22 to 26 and 29 were self acquired properties of Mottaya Poosali and settlement deed dated 22.03.1977 and will dated 23.03.1977 executed by Mottaya Poosali in favour of Manicka Poosali were valid. Further it was observed that though respondents were entitled to < share in Plaint A Schedule i\tem nos. 10 to 21 and 28, but since no cross appeal is preferred by appellants agitating the quantum of share, respondents were entitled to take the share as given by Trial Court. Respondents preferred Second Appeal no. 1017/1985 against judgment and decree of Appellate Court. High Court, while admitting the appeal, framed following substantial question of law:

> Whether the lower appellate Court was right in holding that the appellants are not entitled to any share in items 1 to 9, 22 to 26 and 29 of the plaint "A" schedule properties on the footing that they were not joint family properties available for partition?
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> High Court partly allowed the second appeal filed by respondents with costs. High Court granted preliminary decree of partition to respondents to the extent of 4/9 share with respect to Plaint A Schedule i\tem nos. 10 to 29. It was held that Plaint A Schedule i\tem nos. 22 to 26 and 29 were purchased by Mottaya Poosali out of joint family nucleus and thus were not his self acquired properties. That the settlement deed dated 22.03.1977 was void in law as the items mentioned therein formed coparcenary property and no coparcener, like Mottaya Poosali, could dispose of his

> undivided interest by way of gift. It was also held that Plaint A Schedule i\tem nos. 1 to 9 were self acquired properties of appellants 1 and 3 and thus not amenable to partition. High Court though found the will dated 23.03.1977 to be duly executed and proved but observed that the same was not genuine and valid as it was surrounded by numerous suspicious circumstances and appellants failed to wipe off the clouds of suspicion, surrounding the will.

Being aggrieved by the findings of High Court with respect to settlement deed, will and Plaint A Schedule i\tem nos. 22 to 26 and 29, this appeal has been preferred by original defendants. Learned Counsel for appellants has put forth his two fold contentions before us in the following terms:

> 1) High Court has exceeded its jurisdiction while sitting as Second Appellate Court by reversing the concurrent finding of fact recorded by both the Courts below after reappraising the entire evidence and holding that Plaint A Schedule i\tem nos. 22 to 26 and 29 were not the self acquired properties of Mottaya Poosali and were purchased by him out of joint family nucleus.
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> 2) High Court has gone beyond the mandate of S. 100 Civil Procedure Code, 1908 by needlessly addressing the questions of genuineness and validity of settlement deed and will of Mottaya Poosali despite the fact that no substantial question of law, with respect to same, was framed either at the time of admission or at the time of hearing of the Second Appeal.

Section 100 of the Code of Civil Procedure provides that the second appeal would lie to the High Court from a decree passed in an appeal by any court subordinate to the High Court, if the High Court is satisfied that the case "involves a substantial question of law". Bare perusal of Section 100 of the Code makes it clear that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal. Section 100 reads :-

> "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.
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> (2) An appeal may lie under this section from an appellate decree passed ex-parte.
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> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
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> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
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> (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."

Clause 3 of Section 100 provides that the memorandum of appeal shall precisely state the substantial question of law involved in the appeal and the High Court on being satisfied that the substantial question of law is involved in a case formulate the said question. Sub-section (5) provides that "the appeal shall be heard on the question so formulated." It reserves the liberty with the respondent against whom the appeal was admitted ex-parte and the question of law was framed in his absence to argue that the case did not involve the question of law so framed. Proviso to sub-section (5) states that the question of law framed at the time of admission would not take away or abridge the power of High Court to frame any other substantial question of law which was not formulated earlier, if the court is satisfied that the case involved such additional questions after recording reasons for doing so. A reading of Section 100 makes it abundantly clear that if the appeal is entertained without framing the substantial question of law, then it would be illegal and would amount to failure or abdication of the duty cast on the court. In a number of judgments it has been held by this Court that the existence of the substantial question of law is the sine qua non for the exercise of jurisdiction under Section 100 of the Code of Civil Procedure. { Refer to Kshitish Chandra Purkait v. Santosh Kumar Purkait & Ors. [(1997) 5 SCC 438], Panchugopal Barua v. Umesh Chandra Goswami [(1997) 4 SCC 413], Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [(1999) 3 SCC 722], Santosh Hazari v. Purushottam Tiwari (Deceased) By LRs. [(2001) 3 SCC 179], Thiagarajan & Ors. v. Sri Venugopalaswamay B. Koil & Ors. [(2004) 5 SCC 762]}.

In Santosh Hazari's case (supra) a three Judge Bench of this court after examining the provision of Section 100 exhaustively has concluded that the scope of hearing of the second appeal by the High Court is circumscribed by the questions formulated by the High Court at the time of the admission of the appeal and that the High Court has to hear the appeal on the substantial questions of law so framed. That the High Court would be at liberty to hear the appeal on any other substantial question of law, not earlier formulated by it, if the court is satisfied of two conditions i.e. (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction.

This judgment was followed by this Court in Civil Appeal No.2292 of 1999 [Govindaraju Vs. Mariamman, (2005) 2 SCC 500] decided on 4th February, 2005. In Govindaraju's case (supra) it has been held that the High Court while exercising its powers under Section 100 of the Code of Civil Procedure on re-appreciation of the evidence cannot set aside the findings of the fact recorded by the first appellate court unless the High Court comes to the conclusion that the findings recorded by the first appellate court were perverse i.e. based on misreading of evidence or based on no evidence.

Coming to the facts of the present case, we find that the two courts on appreciation of the entire evidence came to the conclusion that the Plaint A Schedule properties at item nos.22 to 26 and 29

were self acquired properties of Mottaya Poosali and were not purchased with the funds of the Joint Hindu Family. The High Court, on re- appreciation of evidence has held that these properties were not the self acquired properties of Mottaya Poosali and were purchased with the funds of the Joint Hindu Family. Apart from the fact that the High Court on re-appreciation of evidence could not set aside the findings recorded by the courts below on facts, the fact that these properties were the self acquired properties is demonstrated by the fact that the properties at item nos.22 to 26 and 29 were purchased by Mottaya Poosali between 29th April, 1953 to 19th January, 1956. Item nos.23 & 24 were purchased vide sale deed (Ex.B-12) dated 04.06.1952, item no.22 was purchased vide sale deed (Ex.B-13) dated 29.4.1953, item no.26 was purchased vide sale deed (Ex.B-14) dated 20.01.1955 and item nos. 25 & 29 were purchased vide sale deed (Ex.B-15) dated 19.01.1956. During this period Mottaya Poosali was a member of the Joint Hindu Family consisting of himself and his two brothers Ayyaswamy Poosali and Ammasi Poosali. The partition between Mottaya Poosali, Ayyaswamy Poosali and Ammasi Poosali took place in the year 1970. Had these properties been purchased with the funds of the Hindu Joint Family property, then the same would have formed part of the Joint Hindu Family consisting of Mottaya Poosali, Ayyaswamy Poosali and Ammasi Poosali. In the registered partition deed dated 19th July, 1970 between Mottaya Poosali, Ayyaswamy Poosali and Ammasi Poosali these properties were treated to be the self acquired properties of Mottaya Poosali and were not subjected to the partition. Mottaya Poosali in partition was allotted properties item nos.11 to 21 and 28 only. This clearly demonstrates that the properties item nos.22 to 26 and 29 were the self acquired properties of Mottaya Poosali and were treated by him as such throughout. Being the self acquired property, Mottaya Poosali had the absolute right to dispose them of in any manner he liked i.e. by way of sale, gift or will. The findings recorded by the High Court that these properties were acquired with the funds of Joint Hindu Family is factually incorrect and the finding recorded by the courts below on facts were correct and the High Court has clearly erred in reversing the same. The counsel for the appellants is right in his submission that the High Court has overstepped in the exercise of its jurisdiction in reversing the concurrent findings of fact recorded by the courts below in a second appeal filed under Section 100 CPC. Coming to the second point raised by the counsel for the appellants, it may be stated that the trial court as well as the first appellate court on appreciation of oral and documentary evidence rendered a finding that the settlement deed dated 22.03.1977 and the will dated 23.03.1973 were genuine and had been duly executed. The respondents either in their pleadings or in their evidence or in the memorandum of grounds of second appeal did not question the genuineness or due execution of the settlement deed and the will. No substantial question of law was framed at the time of admission of the appeal or at a subsequent stage regarding the due execution and the validity of the settlement deed and the will. The High Court could not go into the questions which had not been raised by the respondents either in their pleadings or in the evidence or in the memorandum of grounds of second appeal. Jurisdiction of the High Court under Section 100 CPC is limited to a substantial question of law framed at the time of admission of the appeal or at a subsequent stage if the High Court is satisfied that such a question of law arises from the facts found by the courts below. The High Court could not go into the question regarding the due execution and the validity of the settlement deed or the genuineness of the will which had not been challenged by the respondents either in their pleadings or in their evidence or in the memorandum of grounds of second appeal. As has been pointed out earlier in Clause 3 of Section 100 the person preferring the second appeal is required to precisely state the substantial question of law involved in the case and the High Court being satisfied that a

substantial question of law is involved in the case shall formulate the said question. The appeal can be heard on the questions so formulated or on any additional question of law which may be framed later on if the Court is satisfied that the case involves such question. The only question of law framed in this appeal was, as to whether the properties at item nos.1 to 9, 22 to 26 and 29 of the Plaint A Schedule properties were Joint Hindu Family properties available for partition or not. The High Court could hear the appeal on the question of law formulated and not on any other point without framing additional substantial question of law which it did not do. Since there was no substantial question of law framed either at the time of the admission or later regarding the validity and genuineness of the settlement deed and the will the High Court did not have the jurisdiction to set aside the findings recorded by the courts below regarding the validity or the genuineness of the will executed by Mottaya Poosali. The findings recorded by the High Court regarding the validity and genuineness of the will are thus vitiated and cannot be sustained.

For the reasons stated above, this appeal is allowed and the judgment under appeal is set aside and that of the first appellate court is restored. There shall be no order as to costs.