Govindaraju vs Mariamman on 4 February, 2005

Equivalent citations: AIR 2005 SUPREME COURT 1008, 2005 AIR SCW 916, 2005 (2) SRJ 471, (2005) 3 ALLMR 553 (SC), (2005) 1 CLR 480 (SC), (2005) 1 KHCACJ 709 (SC), (2005) 3 CTC 504 (SC), (2005) 2 JCR 267 (SC), 2005 (2) ALL CJ 1107, (2005) 2 JT 107 (SC), 2005 (2) UJ (SC) 763, 2005 (3) SLT 84, 2005 UJ(SC) 2 763, (2005) 28 ALLINDCAS 628 (SC), 2005 (1) KHCACJ 709, 2005 (2) SCALE 3, 2005 (3) CTC 504, 2005 (1) HRR 294, 2005 SCFBRC 409, 2005 (3) ALL MR 553, 2005 (1) CLR 480, 2005 (2) SCC 500, 2005 ALL CJ 2 1107, (2005) 2 GUJ LH 305, (2005) 98 REVDEC 731, (2005) 2 SCJ 103, (2005) 1 SUPREME 838, (2005) 2 RECCIVR 105, (2005) 2 ICC 722, (2005) 2 SCALE 3, (2005) 59 ALL LR 133, (2005) 3 CAL HN 64, (2005) 1 CURCC 147, (2005) 2 LANDLR 40, (2005) 1 UC 557, (2005) 1 ALL WC 787, (2005) 2 ANDHLD 90, (2005) 2 CIVLJ 728, (2005) 2 MAD LJ 122, (2005) 2 MAD LW 139, (2005) MATLR 284, (2005) 1 WLC(SC)CVL 391, (2005) 3 BOM CR 87

Bench: Ashok Bhan, A.K. Mathur

CASE NO.:
Appeal (civil) 2292 of 1999

PETITIONER:
Govindaraju

RESPONDENT:
Mariamman

DATE OF JUDGMENT: 04/02/2005

BENCH:
ASHOK BHAN & A.K. MATHUR

JUDGMENT:

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

This appeal by special leave is preferred by the original defendant appellant herein, against the judgment and decree of the High Court of Madras granting declaration and permanent injunction to the original plaintiff respondent herein, with respect to the suit property setting aside the judgment and decree of the Trial Court as well as of the First Appellate Court wherein aforesaid relief was denied to the respondent.

Facts :-

Appellant claims to be the purchaser of suit property from descendants of Muthuswamy Moopanar, brother of Veeramuthu Moopanar and the respondent claims to be the purchaser of the same property from descendants of Veeramuthu Moopanar.

Respondent filed a suit for declaration of title and permanent injunction restraining the appellant from disturbing his possession and causing any inconvenience in the peaceful enjoyment of the suit property. In the plaint it was averred that the suit property belonged to one Veeramuthu Moopanar. He had two daughters viz. Sivamalai Ammal and Thayarammal. Veeramuthu Moopanar sold his entire property to his two daughters through a sale deed dated 1.7.1940 for Rs. 300/-. Veeramuthu Moopanar died and soon after his widowed daughter Sivamalai Ammal also died issueless. Property of Sivamalai Ammal came to the share of Thayarammal. Thayarammal was married to one Sengamalai Moopanar as his second wife. Sengamalai Moopanar died in the year 1973 and in 1976 Thayarammal also died issueless. Ganapathy Moopanar, son of the first wife of Sengamalai Moopanar, succeeded to the estate of Thayarammal by virtue of Section 15(1)(b) of the Hindu Succession Act, 1955 (for short 'the Act') being heir of her husband. Ganapathy Moopanar sold the property to the respondent temple on 25.5.1980. That appellant was obstructing and interfering in the peaceful enjoyment of the property by the respondent. It was prayed that the respondent be declared to be the owner being the vendee from the lawful owner and the appellant be injuncted from interfering with the possession and peaceful enjoyment of the suit property by the respondent.

In the written statement filed by the appellant it was contended that the entire property belonged to the father of Veeramuthu Moopanar and Muthuswamy Moopanar and after the death of their father, partition took place between the brothers in the year 1927 and the suit property fell to the share of Muthuswamy Moopanar. Veeramuthu Moopanar managed the property and took care of small children of Muthuswamy Moopanar. To prevent the property from falling into the hands of the creditors of his deceased brother Muthuswamy Moopanar, Veeramuthu Moopanar executed a sham and nominal sale deed dated 1.7.1940 in favour of his two daughters. That the suit property was always in possession and enjoyment of the children of Muthuswamy Moopanar and the appellant purchased the property from Sornathammal and Nallathambi, daughter and grandson respectively of Muthuswamy Moopanar on 1.4.1980. That marriage between Thayarammal and Sengamalai Moopanar was dissolved under custom by Village Panchayat prior to 1950. That Ganapathy Moopanar was not the son of Sengamalai Moopanar from his first wife and in turn was not the heir of Sengamalai Moopanar. That the suit was not maintainable for non-joinder of necessary parties as well. According to the appellant, he was the owner in possession of the suit property. That respondent was not entitled to the declaration and injunction prayed for. The suit being frivolous deserves to be dismissed with costs.

Trial Court dismissed the suit of the respondent with costs. It was held that both the parties had failed to adduce satisfactory evidence to prove the title of their respective vendors to the suit property. That the sale deed executed in favour of the respondent was not valid and the sale made in favour of the appellant was also not proved. That respondent failed to prove that Ganapathy Moopanar was the son of Sengamalai Moopanar from his first wife. That Ganapathy Moopanar was neither in possession of the suit property nor had any title over the same. That no divorce had taken place between Thayarammal and Sengamalai Moopanar as had been pleaded by the appellant. That sale deed dated 1.7.1940 executed by Veeramuthu Moopanar in favour of his daughters was valid. That the suit was barred for non-joinder of necessary parties.

Being aggrieved, respondent preferred first appeal. Appellate Court upheld the judgment and decree of the Trial Court and dismissed the appeal holding that the respondent was not entitled to the declaration of title and permanent injunction as prayed for. It was held that the title in the suit property did not pass to Veeramuthu Moopanar and the sale deed executed by him in favour of his daughters on 1.7.1940 was sham and nominal. That the marriage between Thayarammal and Sengamalai Moopanar was dissolved under custom and the respondent had also failed to prove that Ganapathy Moopanar was the son of Sengamalai Moopanar. Since Ganapathy Moopanar was not the son of Sengamalai Moopanar, he could not inherit the estate of Thayarammal as the heir of the husband of Thayarammal under Section 15(1)(b) of the Act. In view of the findings that Thayarammal succeeded to the estate of her father by way of inheritance being the daughter and not as a vendee by way of sale from her father, by virtue of Section 15(2)(a) of the Act, in the absence of any direct heir, the property of Thayarammal devolved upon the heirs of her father i.e. the family members of the brother of her father. The family members of Muthuswamy Moopanar had the title and right over the suit property and the sale deeds executed by the daughter and grandson of Muthuswamy Moopanar in favour of the appellant were valid and those executed by Ganapathy Moopanar in favour of the respondent did not convey any title as their vendor did not have the title to the property.

Respondent, being aggrieved, filed Second Appeal No. 595 of 1984 against the judgment and decree of the First Appellate Court in the High Court. The \High Court while admitting the appeal formulated the following substantial questions of law said to be arising in the appeal :-

> "1) Whether the lower appellate court having upheld the sale deed executed by Thayarammal in favour of a third party in relation to the properties said to have been obtained by her through her father Veeramuthu Moopanar could held inconsistently that Thayarammal did not get any property validly from Veeramuthu Moopanar?
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> 2) If Thayarammal can be taken to have acquired title to the suit property whether the plaintiff could be non-suited on the ground that Ganapathy, who sold the property as step son of Thayarammal should be proved by plaintiff as the legitimate son of Thayarammal's husband by another wife, when there is no specific allegations made in the written statement that Ganapathy is the illegitimate son of Sengamalai, husband of Thayarammal?"

High Court on reappraising the entire evidence reversed the findings of both the courts below and decreed the suit of the respondent granting declaration and permanent injunction as prayed for in the suit. It was held that sale deed dated 1.7.1940 executed by Veeramuthu Moopanar in favour of his daughters was not sham and nominal. That no divorce took place between Thayarammal and Sengamalai Moopanar and Ganapathy Moopanar was the son of Sengamalai Moopanar. That by virtue of Section 15(1)(b) of the Act Ganapathy Moopanar succeeded to the estate of Thayarammal and completely excluded the branch of Muthuswamy Moopanar from inheritance to the estate of Thayarammal. That after the death of Thayarammal, her step-son Ganapathy Moopanar inherited the property as heir of her husband and, therefore, had a conveyable title to the suit property. Sale made by him in favour of the respondent was upheld and the suit decreed.

Counsel for the appellant strenuously contended that the High Court has committed jurisdictional error in setting aside the findings of fact recorded by the courts below on re-appreciation of evidence in the Second Appeal in exercise of its jurisdiction under Section 100 of the Code of Civil Procedure (hereinafter referred to as 'the Code'). According to him, the questions of law formulated by the High Court at the time of admission of the appeal did not arise either from the pleadings of the parties, evidence led or the findings recorded by the courts below. That the High Court after referring to the questions of law which had been formulated at the time of admission failed to determine any one of them. That the High Court erroneously assumed that once the questions of law have been framed then it gets the jurisdiction to decide the appeal on re- appreciation of evidence without determining the questions of law.

Per contra, counsel for the respondent did not dispute the proposition of law that the jurisdiction of the High Court under Section 100 of the Code is limited to the substantial questions of law framed at the time of admission of the appeal or further substantial questions which the High Court can frame during the course of hearing of the appeal after recording reasons for the same. He could not seriously dispute the fact that the questions of law formulated at the time of admission of the appeal are not substantial questions of law involved in the case. He submitted that the case be remitted back to the High Court for a fresh decision leaving it open to the High Court to frame additional substantial questions of law, if any, arising in the appeal in order to do substantial justice between the parties.

A 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 questions of law involved in the appeal. It 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.

(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."

Section 100 provides that the second appeal would lie to the High Court from a 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". It further 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 questions of law had been framed in his absence to argue that the case did not involve the questions of law framed. Proviso to sub-section (5) states that the questions of law framed at the time of admission would not take away or abridge the power of the 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. It is abundantly clear from the analysis of Section 100 that if the appeal is entertained without framing the substantial questions of law, then it would be illegal and would amount to failure or abdication of the duty cast on the court. The existence of substantial questions of law is the sine qua non for the exercise of jurisdiction under Section 100 of the Code. { 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] } A three Judge Bench of this Court in Santosh Hazari v. Purushottam Tiwari (Deceased) By LRs. [(2001) 3 SCC 179] after tracing the history of Section 100, the purpose which necessitated and persuaded the Law Commission of India to recommend for amendment of Section 100, concluded that scope of hearing of Second Appeal by the High Court is circumscribed by the questions formulated by the High Court at the time of admission of the appeal and the High Court has to hear the appeal on substantial questions of law involved in the case only. 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." It was observed in para 10 as under :-

> "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."

{Emphasis supplied} As to which would constitute a substantial question of law, it was observed :-

> "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, insofar 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." {Emphasis supplied} This judgment has been followed in a number of decisions including the latest on the point Thiagarajan & Ors. v. Sri Venugopalaswamay B. Koil & Ors. [(2004) 5 SCC 762].

> As per settled law, the scope of exercise of the jurisdiction by the High Court in Second Appeal under Section 100 is limited to the substantial questions of law framed at the time of admission of the appeal or additional substantial questions of law framed at a later date after recording reasons for the same. It was observed in

Santosh Hazari's case (supra) that 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 a 'substantial' question of law must be debatable, not previously settled by law of the land or a binding precedent and answer to the same will have a material bearing as to the rights of the parties before the Court. As to what would be the question of law "involving in the case", it was observed that 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 the court of facts and it must be necessary to decide that question of law for a just and proper decision between the parties.

After perusal of the findings recorded by the courts below and the High Court, we are of the opinion that the questions of law framed at the time of admission of the appeal were not questions of substance arising from the findings record\ed by the courts of fact. The court of fact recorded the finding that the title in the suit property did not pass to Veeramuthu Moopanar and the sale deed dated 1.7.1940 executed by him in favour of his two daughters was a nominal and a sham transaction. The court of fact had also come to the conclusion that there was a divorce between Thayarammal and Sengamalai Moopanar under custom and the respondent herein had failed to prove that Ganapathy Moopanar was the son of Sengamalai Moopanar from his first wife. After recording this finding of fact, the court of fact held that since Ganapathy Moopanar was not proved to be the son of Sengamalai Moopanar and that a divorce had taken place between Thayarammal and Sengamalai Moopanar, Ganapathy Moopanar could not succeed to the estate of Thayarammal being the heir of her husband under Section 15(1)(b) of the Act. That in the absence of any direct heir, the property of Thayarammal reverted back to the heirs of her father i.e. the family members of the brother of her father. The sale effected by Ganapathy Moopanar in favour of the respondent did not convey any title as Ganapathy Moopanar was not proved to be the owner of the property.

The High Court on re-appreciation of evidence recorded a finding to the contrary and held that the marriage between Thayarammal and Sengamalai Moopanar had not been dissolved. It further held that Ganapathy Moopanar was the son of Sengamalai Moopanar from his previous wife. That the sale executed by Veeramuthu Moopanar dated 1.7.1940 in favour of his two daughters was not a nominal and sham transaction. That it conveyed a valid title of the suit property to his two daughters. As the daughters had not inherited the property but purchased the same from their father, they became the absolute owners of the same. Thayarammal had inherited the share of her sister after her death. As Thayarammal had died issueless and had a step-son Ganapathy Moopanar from her husband, Ganapathy Moopanar inherited the suit property being the heir of her husband under Section 15(1)(b) of the Act and succeeded to the estate of Thayarammal. That Ganapathy Moopanar had a conveyable title in the suit property and the sale made by him in favour of the respondent was valid and decreed the suit. This was done on re-appreciation of

> evidence present on record. Questions of law which had been framed at the time of admission and were referred and reproduced in the judgment were not adverted to while deciding the appeal. No finding was recorded on those questions. After reproducing the questions of law, the learned Single Judge did not advert to either of them or record findings on them. The learned Single Judge proceeded to decide the appeal thereafter as if after framing the questions of law the High Court gets the jurisdiction to re- appreciate the evidence and come to a conclusion other than the one recorded by the courts of fact. As observed by this Court in Santosh Hazari's case (supra) for the question of law to be involved in the case, first a foundation for it has to be laid in the pleadings and the question should emerge from the sustainable findings of facts arrived at by the court of fact and it must be necessary to decide that question of law for a just and proper decision of the case. In the present case, the learned Single Judge proceeded to re-appreciate the evidence and on re-appreciating the same, set aside the findings referred to above on facts. On reversal of the findings referred to above on facts, the High Court came to the conclusion that Ganapathy Moopanar would inherit the property under Section 15(1)(b) being the heir of the husband of Thayarammal and not under Section 15(2)(a) under which property was to revert back to the heirs of her father. The questions of law which were framed at the time of admission of the appeal were not decided by the High Court.

Even if the High Court was of the view that the findings of fact recorded by the courts below were wrong, in our opinion, these findings of fact could not be disturbed without coming to the conclusion that the findings recorded were perverse i.e. based on misreading of evidence or based on no evidence. The High Court did not come to such a conclusion. The learned Singh Judge also did not come to the conclusion that the appeal involved other substantial questions of law or formulate the same.

Counsel for the respondent submitted that the case be remitted back to the High Court for a fresh decision. We are not inclined to do so as, in our opinion, a substantial question of law does not arise in the appeal. Counsel for the respondent could not formulate a question of law which could be said to be arising in the second appeal.

For the reasons stated above, this appeal is accepted, the judgment and decree passed by the High Court is set aside and that of the courts below is restored. No order as to costs.