

AZGAR BARID (D) BY LRS.

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v.

MAZAMBI @ PYAREMABI AND OTHERS

(Civil Appeal No. 249 of 2010)

FEBRUARY 21, 2022

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[L. NAGESWARA RAO AND B. R. GAVAI, JJ.]

Appeal – Second Appeal – Suit for partition – Objection of appellant-defendant that since plaintiff Nos.4 to 8, whose claim was denied by the trial court and who had not challenged the same by way of appeal, were not entitled to relief in second appeal – Held: In a suit for partition, the position of the plaintiff and the defendant can be interchangeable – Each party adopts the same position with the other parties – So long as the suit is pending, a defendant can ask the Court to transpose him as a plaintiff and a plaintiff can ask for being transposed as a defendant – In that view of the matter, the contention with regard to plaintiff Nos.4 to 8 being not entitled to relief in the second appeal on the ground that they have not challenged the judgment and decree of the trial court before the First Appellate Court, is not sustainable – Trial court could grant relief even to the non-appealing plaintiffs and make an adverse order against all the defendants and in favour of all the plaintiffs – Merely because the trial court had not granted relief in favour of plaintiff Nos.4 to 8, would not come in their way in the High Court allowing their claim.

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Code of Civil Procedure, 1908 – Second appeal arising from a suit for partition – Interference by High Court – Propriety – Held: On facts, the First Appellate Court had reversed the findings recorded by the trial court which were based upon correct appreciation of evidence – High Court gave sound and cogent reasons as to why interference with findings of the First Appellate Court was required – Also, the First Appellate Court failed to take into consideration the voluminous oral as well as documentary evidence, on basis of which the trial court had recorded its findings – Findings as recorded by First Appellate Court were based on conjectures and surmises – As such, the perverse approach of First Appellate Court in arriving at the findings gave rise to a substantial

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A *question of law, thereby justifying the High Court to interfere with the same.*

B *Bhagwan Swaroop and Others v. Mool Chand and Others (1983) 2 SCC 132; Dr. P. Nalla Thampy Thera v. B.L. Shanker and Others 1984 (Supp) SCC 631 : [1984] SCR 687 and Chandramohan Ramchandra Patil and Others v. Bapu Koyappa Patil (Dead) Through LRs and Others (2003) 3 SCC 552 : [2003] 2 SCR 203 – relied on.*

C *Municipal Committee, Hoshiarpur v. Punjab State Electricity Board and Others (2010) 13 SCC 216 : [2010] 13 SCR 658; Illoth Valappil Ambunhi (D) By LRs. v. Kunhambu Karanavan 2019 SCC OnLine SC 1336; K.N. Nagarajappa and Others v. H. Narasimha Reddy 2021 SCC OnLine SC 694 – referred to.*

	<u>Case Law Reference</u>		
D	(1983) 2 SCC 132	relied on	Para 12
	[1984] SCR 687	relied on	Para 12
	[2003] 2 SCR 203	relied on	Para 13
E	[2010] 13 SCR 658	referred to	Para 16

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 249 of 2010.

From the Judgment and Order dated 17.03.2009 of the High Court of Karnataka at Bangalore in Regular Second Appeal No.160 of 1995.

F Naresh Kaushik, Mrs. Lalita Kaushik, Advs. for the Appellants.

Girish Ananthamurthy, Mrs. Vijayanthi Girish, Advs. for the Respondents.

The Judgment of the Court was delivered by

G **B. R. GAVAI, J.**

1. This appeal challenges the judgment and order dated 17th March 2009, passed by the High Court of Karnataka at Bangalore in Regular Second Appeal No. 160 of 1995, thereby allowing the appeal filed by the respondents herein.

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2. The facts in brief giving rise to filing of the present appeal are A
as under:

A suit for partition being O.S. No. 388/77 came to be filed by B
plaintiff Nos. 1 to 8, who are respondent Nos. 1 to 8 herein before the
Prl. Munshiff at Kolar (hereinafter referred to as the “trial court”), for
partition and separate possession of the suit properties. Vide judgment B
and decree dated 11th September 1987, the said suit came to be decreed,
in part, declaring that plaintiff No. 2 was entitled to 7/24th share and
plaintiff No.3 was entitled to 1/8th share in the suit schedule properties.
It was further held that the plaintiffs were not entitled to any share in
suit Item Nos. 7 to 9 and 22. Vide the said judgment and decree, the C
appellant herein-defendant No.1 was directed to render accounts in
respect of the receipt and expenditure of the money incurred by him on
the suit schedule properties for the period from the date of the suit till the
date of effecting actual partition of the suit schedule properties. It was
further held that the appellant herein, who was defendant No.1, is liable D
to divide the profits earned from the properties in favour of defendant
Nos.2 and 3 to plaintiff Nos.2 and 3 as per their respective shares.

3. Being aggrieved by the said judgment and decree of the trial
court, the appellant-defendant No.1 through L.Rs. had filed Regular
Appeal No. 60 of 1988 before the Prl. Civil Judge at Kolar (hereinafter
referred to as the “First Appellate Court”). The said appeal was allowed E
by judgment and order dated 23rd November 1994, by setting aside the
judgment and decree dated 11th September 1987 passed by the trial court.

4. The judgment and order passed by the First Appellate Court
came to be challenged before the Karnataka High Court by filing Regular
Second Appeal No. 160 of 1995. The High Court vide its judgment dated F
18th March 1998, set aside the judgment and order dated 23rd November
1994 passed by the First Appellate Court and restored the judgment and
decree dated 11th September 1987 passed by the trial court. The judgment
passed by the High Court dated 18th March 1998 came to be challenged
before this Court by filing Civil Appeal No. 6478 of 1998. This Court G
vide its order dated 17th August 2004, found that the High Court had
allowed the appeal without framing the questions of law as required
under Section 100 of the Code of Civil Procedure, 1908 and set aside
the judgment dated 18th March 1998, passed by the High Court and
remanded the matter to the High Court for disposal afresh in accordance
with law.

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A 5. On remand, the second appeal was heard afresh and the High Court framed the following questions of law:

- B (1) Whether the plaintiffs 1 and 2 are entitled to share in the suit schedule properties, particularly when Rehaman Barid through whom plaintiffs 1 and 2 claim partition predeceased his father - Mohiyuddin Pasha - the propositus?
- C (2) Whether the first Appellate Court is justified in negating the case of the plaintiffs 3 to 8 for partition and separate possession after having found that the documents Exs.P-1 to P-7 disclose the paternity of plaintiffs 4 to 8?
- D (3) Whether the first Appellate Court is justified in dismissing the suit filed by plaintiffs 3 to 8 mainly on the ground that the Nikhanama evidencing the marriage of plaintiff No.3 with Mohiyuddin Pasha is not produced?
- (4) Whether the properties found in Mehar Deed Ex.D-1 executed by Mohiyuddin Pasha in favour of first wife Noorabi are liable to be divided among the parties to the present suit?

E 6. After answering the aforesaid questions of law, the High Court vide the impugned judgment, held that all the suit schedule properties were required to be divided amongst Azgar Barid i.e. appellant-defendant No.1 and plaintiff Nos.3 to 8. The High Court also held that plaintiff Nos.1 and 2 were not entitled for any share in the suit schedule properties as Rehaman Barid, husband of plaintiff No.1 and father of plaintiff No.2 predeceased the propositus i.e., Mohiyuddin Pasha. Insofar as the shares of the parties are concerned, the High Court held that the properties are

F liable to be divided amongst the legal heirs of Mohiyuddin Pasha in the following proportion:

- G 1. Plaintiff No.3-Mazambi @ Pyarembi is entitled to - 1/8th share
2. Defendant No.1-Azgar Barid is entitled to - 7/36th share
3. Plaintiff No.4-Syed Rehman Barid @ Sabulal is entitled to - 7/36th share
4. Defendant No.8-Rahiman Barid @ Ikbal Pasha is entitled to - 7/36th share
5. Plaintiff No.5-Shakila Begum is entitled to - 7/72nd share
6. Plaintiff No.6-Zamila Begum is entitled to - 7/72nd share
- H 7. Plaintiff No.7-Akhila Begum is entitled to - 7/72nd share

7. Being aggrieved thereby, the present appeal is filed by the appellant-defendant No.1-Azgar Barid, through L.Rs. A

8. We have heard Shri Naresh Kaushik, learned counsel appearing on behalf of the appellant-defendant No.1 and Shri Girish Ananthamurthy, learned counsel appearing on behalf of the respondents-plaintiffs.

9. Shri Kaushik submitted that the trial court had decreed the suit only in favour of plaintiff Nos.2 and 3. As such, in fact, the trial court held that plaintiff Nos. 4 to 8 were not entitled to any share in the suit schedule properties of Mohiyuddin Pasha. The said judgment and decree of the trial court was not challenged by plaintiff Nos.4 to 8. The same was only challenged by the appellant herein-defendant No.1. It is therefore submitted that the second appeal at the behest of plaintiff Nos.4 to 8 was not at all tenable. He therefore submitted that, on this short ground alone, this appeal deserves to be allowed. B C

10. Shri Kaushik further submitted that though on remand by this Court, the High Court framed the questions of law, they cannot be construed to be questions of law inasmuch as all the said questions pertain to appreciation of evidence. He therefore submitted that this appeal deserves to be allowed and the well-reasoned judgment and order passed by the First Appellate Court deserves to be maintained. D

11. Per contra, Shri Ananthamurthy submitted that the trial court had rightly appreciated the evidence. However, the First Appellate Court had reversed the same on the basis of conjectures and surmises. The High Court has therefore rightly interfered with the same while reversing the judgment of the First Appellate Court. He further submitted that in a partition suit, all the parties stand on a same pedestal and every party is a plaintiff as well as a defendant. E F

12. We will first deal with the objection of the appellant that since plaintiff Nos.4 to 8, whose claim was denied by the trial court and who had not challenged the same by way of appeal, are not entitled to relief in the second appeal. This Court in the cases of *Bhagwan Swaroop and Others v. Mool Chand and Others*¹ and *Dr. P. Nalla Thampy Thera v. B.L. Shanker and Others*², has held that in a suit for partition, the position of the plaintiff and the defendant can be interchangeable. G

¹ (1983) 2 SCC 132

² 1984 (Supp) SCC 631

- A Each party adopts the same position with the other parties. It has been further held that so long as the suit is pending, a defendant can ask the Court to transpose him as a plaintiff and a plaintiff can ask for being transposed as a defendant.

- B 13. This Court in the case of ***Chandramohan Ramchandra Patil and Others v. Bapu Koyappa Patil (Dead) Through LRs and Others***³, has held thus:

- C “14. Order 41 Rule 4 of the Code enables reversal of the decree by the court in appeal at the instance of one or some of the plaintiffs appealing and it can do so in favour of even non-appealing plaintiffs. As a necessary consequence such reversal of the decree can be against the interest of the defendants *vis-à-vis* non-appealing plaintiffs. Order 41 Rule 4 has to be read with Order 41 Rule 33. Order 41 Rule 33 empowers the appellate court to do complete justice between the parties by passing such order or decree which ought to have been passed or made although not all the parties affected by the decree had appealed.

- D 15. In our opinion, therefore, the appellate court by invoking Order 41 Rule 4 read with Order 41 Rule 33 of the Code could grant relief even to the non-appealing plaintiffs and make an adverse order against all the defendants and in favour of all the plaintiffs.
- E In such a situation, it is not open to urge on behalf of the defendants that the decree of dismissal of suit passed by the trial court had become final *inter se* between the non-appealing plaintiffs and the defendants.”

- F 14. In that view of the matter, we find that the contention raised on behalf of the appellant with regard to plaintiff Nos.4 to 8 being not entitled to relief in the second appeal on the ground that they have not challenged the judgment and decree of the trial court before the First Appellate Court, is not sustainable. As held by this Court in the case of ***Chandramohan Ramchandra Patil*** (supra), the trial court could grant relief even to the non-appealing plaintiffs and make an adverse order against all the defendants and in favour of all the plaintiffs. Merely because the trial court had not granted relief in favour of plaintiff Nos.4 to 8, would not come in their way in the High Court allowing their claim.

H ³ (2003) 3 SCC 552

15. That leads us to the other contention of the appellant. It is sought to be urged by him that the High Court, in the second appeal, has framed questions of law, which are, in fact, not questions of law but questions of fact. A

16. In this respect, it will be relevant to refer to the following observations of this Court in the case of *Municipal Committee, Hoshiarpur v. Punjab State Electricity Board and Others*⁴: B

“27. There is no prohibition on entertaining a second appeal even on a question of fact provided the court is satisfied that the findings of fact recorded by the courts below stood vitiated by non-consideration of relevant evidence or by showing an erroneous approach to the matter i.e. that the findings of fact are found to be perverse. But the High Court cannot interfere with the concurrent findings of fact in a routine and casual manner by substituting its subjective satisfaction in place of that of the lower courts. (Vide Jagdish Singh v. Natthu Singh [(1992) 1 SCC 647 : AIR 1992 SC 1604]; Karnataka Board of Wakf v. Anjuman-E-Ismail Madris-Un-Niswan [(1999) 6 SCC 343 : AIR 1999 SC 3067] and Dinesh Kumar v. Yusuf Ali [(2010) 12 SCC 740 : AIR 2010 SC 2679] .) C D

28. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (Vide *Bharatha Matha v. R. Vijaya Renganathan* [(2010) 11 SCC 483 : AIR 2010 SC 2685] .)” E F G

⁴ (2010) 13 SCC 216

A 17. This Court in the case of ***Illoth Valappil Ambunhi (D) By LRs. v. Kunhambu Karanavan***⁵, has observed thus:

“14. It is now well settled that perversity in arriving at a factual finding gives rise to a substantial question of law, attracting intervention of the High Court under Section 100 of the CPC.”

B 18. Recently, this Court in the case of ***K.N. Nagarajappa and Others v. H. Narasimha Reddy***⁶, to which one of us (L.N. Rao, J.) was a party, has observed thus:

C “17. In a recent judgment of this court, *Narayan Sitaramji Badwaik (Dead) Through Lrs. v. Bisaram* 2021 SCC OnLine SC 319, this court observed as follows, in the context of High Courts’ jurisdiction to appreciate factual issues under Section 103 IPC:

D “11. A bare perusal of this section clearly indicates that it provides for the High Court to decide an issue of fact, provided there is sufficient evidence on record before it, in two circumstances. First, when an issue necessary for the disposal of the appeal has not been determined by the lower Appellate Court or by both the Courts below. And second, when an issue of fact has been wrongly determined by the Court(s) below by virtue of the decision on the question of law under Section 100 of the Code of Civil Procedure.”

E 18. In the opinion of this court, in the present case, the High Court recorded sound and convincing reasons why the first appellate court’s judgment required interference. These were entirely based upon the evidence led by the parties on the record. The appreciation of evidence by the first appellate court was on the basis of it having overlooked material facts, such as appreciation of documentary and oral evidence led before the trial court, that the execution of Ex.D-3 was denied.....”

F 19. The parties have claimed through Mohiyuddin Pasha. According to the plaintiffs, Mohiyuddin Pasha had earlier married Noorbi,

⁵ 2019 SCC OnLine SC 1336

H ⁶ 2021 SCC OnLine SC 694

who died in 1944. Out of the said wedlock, two sons namely Rahaman Barid and Azgar Barid-appellant (defendant No.1) were born. Rahaman Barid was married to Rahamathunnisa-plaintiff No.1. Out of the said wedlock, Noorjahan-plaintiff No.2 was born. Rahaman Barid died in 1945 i.e. prior to Mohiyuddin Pasha, who died in 1964. A

20. According to the plaintiffs, after the death of Noorbi in 1944, Mohiyuddin Pasha married Mazambi @ Pyarembi-plaintiff No.3. Out of the said wedlock, five children namely Syed Rahaman Barid @ Sabulal-plaintiff No.4, Shakila Begum-plaintiff No.5, Zamila Begum-plaintiff No.6, Akhila Begum-plaintiff No.7 and Rahiman Barid @ Ikbāl Pasha-plaintiff No.8, were born. B C

21. The appellant-defendant No.1 has not disputed that Rahaman Barid was his brother. However, he contended that plaintiff Nos.1 and 2 i.e. wife and daughter respectively, of Rahaman Barid were not entitled to any share in the suit schedule properties inasmuch as Rahaman Barid had died in 1944 i.e. prior to Mohiyuddin Pasha, who died in 1964. D

22. The appellant-defendant No.1 has specifically denied that Mazambi @ Pyarembi-plaintiff No.3 was married to Mohiyuddin Pasha and that plaintiff Nos.4 to 8 were children of Mohiyuddin Pasha.

23. It is further contended by the appellant-defendant No.1 that Mohiyuddin Pasha had executed a Mehar Deed in favour of his first wife Noorbi, which was registered on 30th July 1936, and as such, the said properties ceased to be the properties of Mohiyuddin Pasha. E

24. The trial court, on the basis of the evidence recorded, had come to a specific finding that after the death of his first wife Noorbi, Mohiyuddin Pasha had married Mazambi @ Pyarembi-plaintiff No.3 and plaintiff Nos.4 to 8 were born out of the said wedlock. While arriving at such a finding, the trial court has relied on oral as well as documentary evidence. The trial court further came to a finding that from the judgment passed in an earlier suit for partition i.e. O.S. No.514/1961, it was clear that Mohiyuddin Pasha as well as the appellant herein-defendant No.1 had taken a specific stand in O.S. No.514/1961 that the said Mehar Deed was a nominal one and was never acted upon. It was also contended in the said suit that the properties were never handed over to the first wife Noorbi and that it was created with a view to avoid the share to the first son Rahaman Barid. F G H

A 25. These findings of fact were reversed by the First Appellate Court. The First Appellate Court held that plaintiff No.3 had failed to prove that she was married to Mohiyuddin Pasha, since she had failed to produce any documentary evidence in support thereof. It further held that plaintiff Nos.4 to 8 had failed to establish that they were the children of deceased Mohiyuddin Pasha. It was held that neither plaintiff No.3
B nor plaintiff Nos.4 to 8 were entitled to any share in the suit schedule properties. Insofar as plaintiff Nos.1 and 2 are concerned, the First Appellate Court held that since they were claiming through Rahaman Barid, who died in 1945 i.e. prior to Mohiyuddin Pasha, who died in 1964, they are also not entitled to any share in the suit schedule properties.

C 26. While holding that the finding of the First Appellate Court that Mazambi @ Pyarembi-plaintiff No.3 was not married to Mohiyuddin Pasha was erroneous in law, the High Court has mainly relied on the oral as well as the documentary evidence.

D 27. Syed Ahmed Ali-PW-1, who was aged 75 years at the time of giving evidence, was the brother of Noorbi, first wife of Mohiyuddin Pasha. As such, he was a maternal uncle of the appellant herein-defendant No.1. He has clearly and emphatically deposed that Mohiyuddin Pasha had two wives i.e. Noorbi and Mazambi @ Pyarembi. He has further deposed that after the death of his sister Noorbi, Mohiyuddin Pashaa
E took Mazambi @ Pyarembi as his second wife. He has also specifically deposed that he has attended the marriage of Mazambi @ Pyarembi-plaintiff No.3 with Mohiyuddin Pasha. The High Court found that in spite of searching cross-examination, nothing came on record to discard the evidence of PW-1. It was further found that the evidence of PW-1 was supported by Nabi Sab-PW-2, who was also an independent witness.
F Appenna-PW-3, who was also an independent witness, supported the case of the plaintiffs.

G 28. The High Court found that the voluminous documents of evidence including the birth certificates of plaintiff Nos.4 to 8, the transfer certificates issued by the Government Higher Primary School, Thadigol and Higher Primary Boys School, Thadigol, established that plaintiff Nos.4 to 8 were the children born to Mohiyuddin Pasha through Mazambi @ Pyarembi. We are of the view that, the High Court rightly interfered with the findings as recorded by the First Appellate Court, inasmuch as the First Appellate Court was not justified in reversing the findings of the trial court in that regard which were based on proper appreciation of
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evidence. We are of the view that the First Appellate Court had failed in A
appreciating the evidence in correct perspective. The High Court was
justified in reversing the same.

29. Similarly, the High Court found that the Mehar Deed in favour
of deceased Noorbi, first wife of Mohiyuddin Pasha, was a nominal one B
and was not acted upon and the reversal of the findings of the trial court
by the First Appellate Court in that regard, was erroneous. It will be
relevant to note that the trial court, on the basis of the proceedings in the
earlier suit for partition i.e. O.S. No.514/1961, had found that in the said
suit for partition, deceased Mohiyuddin Pasha was defendant No.1, C
whereas the appellant herein-defendant No.1 was defendant No.2. In
the said suit, the case pleaded by them was that the first son of Noorbi
and Mohiyuddin Pasha, namely Rahaman Barid, was demanding separate
share in the properties and was residing separately. It was therefore
contended by them in their respective written statements that to avoid
any share in the suit schedule properties, deceased Mohiyuddin Pasha D
had created the Mehar Deed in favour of his first wife Noorbi. The
High Court found that in view of the findings arrived in the said O.S.
No.514/1961, which were based on the admission of Mohiyuddin Pasha
and the appellant herein-defendant No.1 herein, it was not open for the
appellant herein-defendant No.1 again to contend that the properties
belonged to Noorbi exclusively as they were given to her in Mehar. The E
High Court further found that the appellant herein-defendant No.1 himself
had produced the judgment in O.S. No.514/1961 at Ex.D-16 and relied
upon the same for opposing the present suit for partition.

30. It could thus clearly be seen that in the present case, the First
Appellate Court had reversed the findings recorded by the trial court F
which were based upon correct appreciation of evidence. The High
Court has given sound and cogent reasons as to why an interference
with the findings of the First Appellate Court was required. We also find
that the First Appellate Court has failed to take into consideration the
voluminous oral as well as documentary evidence, on the basis of which G
the trial court had recorded its findings. The findings as recorded by the
First Appellate Court are based on conjectures and surmises. As such,
we are of the considered view that the perverse approach of the First
Appellate Court in arriving at the findings would give rise to a substantial
question of law, thereby justifying the High Court to interfere with the
same. H

A 31. In that view of the matter, we do not find any merit in this appeal. Hence, this appeal is dismissed.

 32. No order as to cost. Pending application(s), if any, shall stand disposed of in the above terms.

Bibhuti Bhushan Bose
(Assisted by : Shubhanshu Das, LCRA)

Appeal dismissed.