

[2023] 12 S.C.R. 477 : 2023 INSC 848

CASE DETAILS

HEMAVATHI AND ORS.

v.

V. HOMBEGOWDA AND ANR.

(Civil Appeal Nos. 5780-5781 of 2023)

SEPTEMBER 11, 2023

[B.V. NAGARATHNA AND UJJAL BHUYAN, JJ.]

HEADNOTES

**Issue for consideration:** High Court whether justified in allowing Regular Second Appeal filed u/s.100, Code of Civil Procedure, 1908 without framing the substantial question of law.

**Code of Civil Procedure, 1908 – s.100 – Second Appeal – Substantial question of law not framed – Impropriety:**

**Held:** First appellate court is the final Court insofar as the question of facts are concerned and it is only when substantial questions of law would arise in a case that the High Court can entertain a Regular Second Appeal – If at the stage of admission such substantial questions of law are discerned by the High Court the same would have to be framed and the appeal(s) would have to be admitted – It is only thereafter that the parties have to be heard on the substantial questions of law framed by the High Court at the stage of admission – However, the CPC gives power to the High Court to frame additional substantial questions of law or to mould the substantial questions of law already framed on hearing the parties at the time of final hearing of a Second Appeal – In the event the respondents before the High Court are on record even at the stage of admission of a Regular Second Appeal and the same is to be disposed of finally even at this stage substantial questions of law must be framed and answered before the Regular Second Appeal is admitted and disposed – In the present case, the same was not framed – Said error is compounded by the Judge stating in the order passed in the review petition that no such substantial question of law arose in the appeal(s) – If

no substantial question of law arose in the case then the appeal could not have been entertained and ought to have been dismissed at the stage of admission – But on the other hand, in the absence of framing any substantial question of law the appeal was allowed, that too, at the stage of admission, without issuance of notice to the other respondents Nos.1, 3 and 4 and by hearing only counsel for respondent No.2 before the High Court who was on caveat – Impugned judgment and order passed in Regular Second Appeal as well as Review Petition set aside – Matters remanded to High Court. [Paras 13-16, 18]

**Code of Civil Procedure, 1908 – s.100 – Regular second appeal, practice to be followed – Law – Discussed.**

**Practice and Procedure – First appellate court had not considered the Regular Appeal on merits, matter was remanded to trial court for fresh consideration – Legality:**

**Held:** If the High Court thought it fit to condone the delay in filing the Regular Appeal then the matter had to be remanded to the first appellate court to consider the Regular Appeal on merits and not just set aside the trial court decree and remand the case to the trial court for a fresh adjudication – Code of Civil Procedure, 1908. [Para 12]

#### **LIST OF CITATIONS AND OTHER REFERENCES**

*Bhagyashree Anant Gaonkar vs. Narendra @ Nagesh Bharm Holkar and Anr. Judgment dated 07.08.2023 in C.A. No. 4935 of 2023; Roop Singh v. Ram Singh* (2000) 3 SCC 708: [2000] 2 SCR 605; *C.A. Sulaiman vs. State Bank of Travancore, Alwayee* (2006) 6 SCC 392: [2006] 4 Suppl. SCR 152; *State Bank of India vs. S.N. Goyal* (2008) 8 SCC 9215; *Municipal Committee, Hoshiarpur v. Punjab SEB* (2010) 13 SCC 216: [2010] 13 SCR 658; *Umerkhan v. Bismillabi* (2011) 9 SCC 684: [2011] 9 SCR 551; *Raghavendra Swamy Mutt v. Uttaradi Mutt* (2016) 11 SCC 235: [2016] 3 SCR 11 – relied on.

#### **OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.5780-5781 of 2023.

From the Judgment and Order dated 23.06.2022 and dated 13.04.2022 in RP No.536 of 2022 and RSA No.291 of 2022 respectively of the High Court of Karnataka at Bengaluru.

**Appearances:**

M/s Nuli & Nuli, Anand Sanjay M Nuli, Agam Sharma, Dharm Singh, Shiva Swaroop, Advs. for the Appellants.

Ms. V. Mohana, Sr. Adv., Shanthakumar V. Mahale, Harisha S. R., Rajesh Mahale, Advs. for the Respondents.

<b>JUDGMENT / ORDER OF THE SUPREME COURT</b>
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**JUDGMENT**

**NAGARATHNA, J.**

Leave granted.

These are two more appeals which arise from the High Court of Karnataka within a short period of time wherein, without framing the substantial question of law, Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 (For short the “CPC”) is allowed. Additionally notice to respondent Nos. 1, 3 and 4 may not have been issued and served as the Second Appeal was allowed at the stage of admission and if notice had been issued and served no counsel for the said respondents had been heard. It is on the basis of the aforesaid two grounds alone, the appeals would have to be allowed and the impugned order(s) of the High Court passed in RSA No.291/2022 disposed of on 13.04.2022 and in Review Petition No.536/2022 disposed on 23.06.2022 would have to be set aside.

Briefly stated the facts are that the appellants herein had filed Original Suit No.552/2003 before the Court of II Additional Senior Civil Judge, Bengaluru Rural District, Bengaluru, Karnataka seeking the relief of partition and separate possession of their respective shares in the suit schedule property. By judgment and decree dated 07.02.2012, the suit was decreed granting  $\frac{1}{4}$  share to each of the plaintiffs (appellants herein).

Being aggrieved, the defendants in the said suit preferred Regular Appeal No. 1/2021 before the II Additional Senior Civil Judge, Bengaluru

Rural District at Bengaluru seeking condonation of delay of 2945 days in filing the appeal. By order dated 07.02.2022, the application seeking condonation of delay was dismissed and consequently the appeal also stood dismissed and as a result the judgment and decree of the Trial Court was not interfered with.

Being aggrieved by the dismissal of the Regular Appeal, the defendants preferred the RSA No.291/2022. By the impugned judgment dated 13.04.2022, the appeal filed by the defendant No.1 has been allowed by condoning the delay of 2945 days in filing the Regular Appeal but the matter has been remanded to the Trial Court for a fresh adjudication reserving liberty to file additional written statement and directing the Trial Court to frame additional issues, if necessary, and to take on record the evidence of plaintiffs well as the defendant No.1 within a period of six months and to dispose of the suit within a period of six months thereafter. Further during the pendency of the suit, the parties were directed to maintain status-quo in respect of the suit property as regards possession and alienation while reserving all contentions to be kept open to be urged before the Trial Court. At this stage itself, it may be pointed out that the learned Judge of the High Court also lost sight of the fact that the first appellate court had not considered the Regular Appeal on merits but the matter has been remanded to the trial court by passing the first appellate court.

Being aggrieved by the judgment dated 13.04.2022 the appellants herein, who were plaintiffs in the suit which had been decreed, preferred Review Petition No.536/2022. By order dated 23.06.2022, the review petition has been dismissed. Hence, these appeals.

We have heard learned counsel for the appellants and learned senior counsel for the contesting respondent No.1.

Learned counsel for respondent No.2 submitted that respondent No.2 Venkataramanappa died during the pendency of the matter(s) before this Court on 12.01.2023 and his legal representatives have not been brought on record. He further submitted that the said Venkataramanappa had preferred R.A. No.62/2012 but had withdrawn the same and the said appeal(s) was dismissed as withdrawn on 10.08.2018.

In the circumstances, in view of our proposed judgment, we do not think at this stage the matter(s) would require the legal representatives of the deceased-respondent No.2 to be brought on record.

Learned counsel for the appellants submitted that there are two main serious errors in the impugned judgment: firstly, the Regular Second Appeal has been allowed at the stage of admission without framing a substantial question of law which is contrary to the mandate of Section 100 of the CPC; Secondly, it was submitted that all respondents before the High Court were not heard in the matter(s) and this is evident on a reading of the cause title of the impugned judgment wherein only respondent No.2 was represented by a counsel as a caveator. Therefore, in the absence of hearing respondent Nos.1, 3 and 4 before the High Court, the Second Appeal could not have been allowed. Thirdly, it was contended that the High Court was not right in condoning the delay of 2945 days in filing Regular Appeal No.1/2021 inasmuch as the first appellate court by a detailed order had dismissed the said appeal on the ground of delay and laches. Therefore, the impugned order/judgment of the High Court dated 13.04.2022 as well as the order passed in the Review Petition dated 23.06.2022 may be set aside.

Per contra, learned senior counsel appearing for the first respondent who is the contesting respondent and appellant in R.A. No.1/2021 supported the impugned order and submitted that since the matter(s) was being remanded to the Trial Court reserving all contentions to be left open and by giving additional opportunity to all parties the non-framing of the substantial question of law and non-hearing of some of the respondents before the High Court, is immaterial. She further submitted that ultimately pursuant to the remand made by the High Court full opportunity will be given to all parties and therefore, the impugned judgment and impugned order of the High Court may not be interfered with.

Learned counsel appearing for deceased-respondent No.2 submitted that in the event this Court is to remand these matters to the High Court for fresh consideration then an opportunity may be given to the legal representatives of deceased Respondent No.2 to come on record so as to contest the appeals in accordance with law.

The aforesaid narration of facts and contentions would not require reiteration. Learned counsel for the appellants has brought to our notice the

following three serious lacunae in the impugned judgment as well as the order passed in the review petition by the High Court:

- (i) In the absence of framing any substantial questions of law, the Regular Second Appeal has been allowed. This is in breach of the mandate under Section 100 of the CPC;
- (ii) That the impugned judgment does not indicate that respondent Nos.1, 3 and 4 were heard by the High Court inasmuch as the cause title indicates that only the second respondent as caveator was heard and in the absence of the said respondents being heard, the order and judgment passed by the first appellate court in their favour has been set aside.
- (iii) That a delay of 2945 days has been condoned which has compounded the aforesaid serious infirmity in the impugned judgment of the High Court.
- (iv) We may also add that the matter has been remanded to the trial court for a fresh consideration when the first appellate court had not considered the Regular Appeal on merits. If the High Court thought it fit to condone the delay in filing the Regular Appeal then the matter had to be remanded to the first appellate court to consider the Regular Appeal on merits and not just set aside the trial court decree and remand the case to the trial court for a fresh adjudication.

The jurisdiction of the High Court to entertain a Second Appeal is well-known. It is a unique jurisdiction of the High Court where the High Court can entertain a Regular Second Appeal purely on a “substantial” question of law not even a question of law or a question of fact. It is a settled law that the first appellate court is the final Court insofar as the question of facts are concerned and it is only when substantial questions of law would arise in a case that the High Court can entertain a Regular Second Appeal and if at the stage of admission such substantial questions of law are discerned by the High Court the same would have to be framed and the appeal(s) would have to be admitted. It is only thereafter that the parties have to be heard on the substantial questions of law that are framed by the High Court at the stage of admission.

However, the CPC gives power to the High Court to frame additional substantial questions of law or to mould the substantial questions of law already framed on hearing the parties at the time of final hearing of a Second Appeal. In the event the respondents before the High Court are on record even at the stage of admission of a Regular Second Appeal and the same is to be disposed of finally even at this stage substantial questions of law must be framed and answered before the Regular Second Appeal is admitted and disposed.

On a perusal of the impugned order, we find that the same has not been framed. The said error is compounded by the learned Judge stating in the order passed in the review petition that no such substantial question of law arose in the appeal(s). In fact, it is necessary to highlight this aspect by quoting the learned judge by what he has stated in paragraph ‘3’ of the order passed in the review petition as under:

“3. A perusal of the Judgment dated 13.04.2022 in RSA No.291/2022 shows that the respondent No.2 had entered Caveat. When the appeal was listed for admission, this Court held that the explanation offered by the appellant in not filing the written statement was not completely acceptable but was probable. This Court also found that the appeal filed by the appellant before the First Appellate Court was dismissed as barred by time. Hence this Court felt that the appellant was deprived of an opportunity to defend the action brought by the respondents therein. Hence cost of Rs.50,000/- was imposed and the case was remitted for disposal within six months. This Court did not express any opinion on the merits of the case. This Court was aware of the requirement to frame the substantial question of law before disposing a second appeal, as declared by the Hon’ble Apex Court in the decisions cited by the learned counsel. However, this was not a case where any substantial question was involved, as the Trial Court did not adjudicate question was involved, as the Trial Court did not adjudicate the dispute on merits.”

The aforesaid paragraph would speak for itself vis-a-vis the infirmities in the impugned judgment and order of the High Court. If no substantial question of law arose in the case then the appeal could not have been entertained and ought to have been dismissed at the stage of admission.

But on the other hand, in the absence of framing any substantial question of law the appeal has been allowed, that too, at the stage of admission, without issuance of notice to the other respondents Nos.1, 3 and 4 and by hearing only learned counsel for the respondent No.2 before the High Court who was on caveat. The aforesaid errors are compounded by the fact that a sum of Rs.50,000/- (Rupees fifty thousand only) cost was awarded to the successful plaintiffs who were respondents before the High Court in lieu of any notice being issued to them! The aforesaid infirmities cannot be overlooked and compensated by ordering a sum of Rs.50,000/- to be paid by the first respondent herein (appellant in the Second Appeal before the High Court) to the respondent-plaintiff(s).

In this context, the law on the practice to be followed while considering a regular second appeal, has been re-iterated by this Court in C.A. No. 4935 of 2023 in Bhagyashree Anant Gaonkar vs. Narendra @ Nagesh Bharna Holkar and Anr. dated 07.08.2023, and the relevant extracts in this regard are exposted as under:

a) Roop Singh v. Ram Singh, (2000) 3 SCC 708, as relied upon in C.A. Sulaiman vs. State Bank of Travancore, Alwayee (2006) 6 SCC 392:

“7. 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.”

b) State Bank of India vs. S.N. Goyal (2008) 8 SCC 9215:

“15. It is a matter of concern that the scope of second appeals and as also the procedural aspects of second appeals are often ignored by the High Courts. Some of the oft-repeated errors are:

(a) Admitting a second appeal when it does not give rise to a substantial question of law.

(b) Admitting second appeals without formulating substantial question of law.



(c) Admitting second appeals by formulating a standard or mechanical question such as “whether on the facts and circumstances the judgment of the first appellate court calls for interference” as the substantial question of law.

(d) Failing to consider and formulate relevant and appropriate substantial question(s) of law involved in the second appeal.

(e) Rejecting second appeals on the ground that the case does not involve any substantial question of law, when the case in fact involves substantial questions of law.

(f) Reformulating the substantial question of law after the conclusion of the hearing, while preparing the judgment, thereby denying an opportunity to the parties to make submissions on the reformulated substantial question of law.

(g) Deciding second appeals by reappreciating evidence and interfering with findings of fact, ignoring the questions of law.

These lapses or technical errors lead to injustice and also give rise to avoidable further appeals to this Court and remands by this Court, thereby prolonging the period of litigation. Care should be taken to ensure that the cases not involving substantial questions of law are not entertained, and at the same time ensure that cases involving substantial questions of law are not rejected as not involving substantial questions of law.”

c) *Municipal Committee, Hoshiarpur v. Punjab SEB*, (2010) 13 SCC 216:

“16 A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. 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. It is the obligation on the court to further clear the intent of the legislature and not to frustrate it by ignoring the same.”

d) *Umerkhan v. Bismillabi*, (2011) 9 SCC 684:

“11. 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.”

e) *Raghavendra Swamy Mutt v. Uttaradi Mutt*, (2016) 11 SCC 235

“18. In the instant case, the High Court has not yet admitted the matter. It is not in dispute that no substantial question of law has been formulated as it could not have been when the appeal has not been admitted. We say so, as appeal under Section 100 CPC is required to be admitted only on substantial question/questions of law. It cannot be formal admission like an appeal under Section

96 CPC. That is the fundamental imperative. It is peremptory in character, and that makes the principle absolutely cardinal.”

In the circumstances, the impugned judgment dated 13.04.2022 and impugned order dated 23.06.2022 passed in the Regular Second Appeal as well as the Review Petition are set aside. The matters are remanded to the High Court to consider the same in accordance with law and by being mindful of the aforementioned flaws in the impugned judgment and order.

Since the parties are before the High Court, it is necessary to ensure that the legal representatives of the deceased-Respondent No.2 herein are brought on record (R-4 before the High court) by the first respondent herein who was the appellant in the High court by filing the necessary applications so as to bring his legal representatives on record and thereafter to dispose of the Regular Second Appeal in accordance with law.

Appeals are allowed and disposed of in the aforesaid terms.

No costs.

It is needless to observe that with the cooperation of the learned counsel for respective parties, the Regular Second Appeal shall be disposed of expeditiously.

Pending application(s), if any, shall stand disposed of.