Sebastiao Luis Fernandes(Dead)By ... vs K.V.P.Shastri & Ors on 10 December, 2013

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Bench: C. Nagappan, V. Gopala Gowda, G.S. Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6183 OF 2001

Sebastiao Luis Fernandes (Dead) Through
Lrs. & Ors. … Appellants

Vs.

K.V.P. Shastri (Dead) Through Lrs.
& Ors. … Respondents

J U D G M E N T

V. Gopala Gowda, J.

This civil appeal is filed by the appellants as they are aggrieved by the judgment and decree of the High Court of Bombay at Goa passed on 14.9.1998 by the learned single Judge in Second Appeal No. 30 of 1986 raising various questions of law and grounds in support of the same. In this judgment for the sake of convenience the rank of the parties is described according to their position before the trial court. The appellants are the legal representatives of the plaintiff and the respondents are the legal representatives of the defendants. The suit was instituted by the original plaintiff in the Court of Civil Judge, Sr. Division at Quepem (hereinafter referred to as "the trial court") in Civil Suit No.14091 of 1948.

2. The relevant brief facts are stated for the purpose of appreciating the rival legal contentions with a view to examine and find out as to whether the impugned judgment of the High Court of Bombay warrants interference by this Court in this appeal in exercise of its jurisdiction under Article 136 of the Constitution of India.

The original plaintiff, Inacinha Fernandes filed Civil Suit No. 14091 of 1948 on 1.1.1948 before the trial court for declaration that she is the lawful owner in possession of 1/3rd of the property bearing land registration No.16413 and consequential relief for cancellation of registration in favour of the defendants-respondents in respect of such 1/3rd share in the suit schedule property and to register the same in the name of the plaintiff. Presently the legal representatives of the original plaintiff are before us as appellants. It is the case of the plaintiff- appellants that suit schedule property is bearing land registration No.16413 and the claim of the plaintiff-appellants is that it belonged to three brothers namely, Francisco Fernandes (who was the father-in-law of the original plaintiff), Francisco Fernandes junior and Pedro Sebastiao Fernandes and they owned and possessed the same jointly and in equal shares. The defendant No. 2-Tereza is the daughter of Francisco Fernandes junior and the original plaintiff-Inacinha Fernandes is the wife of Luis Fernandes, the son of Francisco Fernandes, the first brother. It is their further case that on the death of Francisco Fernandes, he was survived by the husband of the original plaintiff. It is their case that on the death of said Francisco Fernandes, the 1/3rd share of the suit schedule property devolved upon Luis the late husband of the original plaintiff and it was accordingly enjoyed by the plaintiff. Further case of the plaintiff is that on account of a debt of Rs.198/- to one Naraina Panduronga Porobo, the property was attached and thereafter the liability was paid by way of subrogation of rights in favour of the father of the first defendant, K.V.P. Shastri who bought this property which was sold in public auction on 26th April, 1935 and thereafter granted aforementioned property in favour of the husband of Tereza, namely, Tomas Fernandes vide perpetual lease. It is the case of the plaintiff that the right of subrogation in favour of the father of the first defendant should have been granted by the defendant No.2-Tereza only in respect of 1/3rd share and not in relation to the entire property.

3. The case of the plaintiff was sought to be contested by the defendant No.1 inter alia contending that the claim of the plaintiff is false and ownership and possession of the suit schedule property stands transferred in favour of the defendant No.1 with effect from 26.4.1935 and he had acquired right by way of prescription as it has been enjoyed for 10 years, pursuant to the registration of the suit schedule property in his name. The defendant No.2 also denied the case of the plaintiff and claimed to be in possession pursuant to conveyance thereof by the defendant No.1.

4. On the basis of the pleadings of the parties issues were framed and the matter went for trial and both the parties adduced evidence. On appreciation of evidence on record the trial court decreed the suit vide its judgment dated 29.4.1978. The trial court decreed the suit holding it to be tenable and directed the defendants to acknowledge that the plaintiff along with her children is the lawful owner in possession of 1/3rd share of the suit schedule property and to release that 1/3rd share in favour of the plaintiff, by declaring to be null and void the inscription done in the Land Registration Office in respect to the said property which is described under No. 16413 in so far as it covered the 1/3rd part of the plaintiff. Further, the defendants were directed to pay damages caused to the original plaintiff by depriving her of the income corresponding to her 1/3rd portion. The trial court held that the alleged prescription does not operate because the defendant Shastri was never in the possession of the property, much less in good faith. It was also observed that it is proved from the proceedings by a fact otherwise admitted that the plaintiff has her residential house in the suit schedule property with a common wall with the house of the defendant-Tereza and this is one more important fact to corroborate the case of the plaintiff, for being relatives descending from the same common trunk

having ancestral house.

5. Being aggrieved by the said judgment and decree the defendants preferred Civil Appeal No. 237 of 1981 before the District Court at Margao and the same was disposed of by judgment dated 16.12.1985 by recording reasons. The first appellate court held that the evidence on record shows that neither the original plaintiff nor the original defendants were able to produce any documentary evidence to support their title to the suit schedule property, besides the claim made by them that the property was acquired from the common ancestors. Further, it observed that the learned trial judge rightly pointed out that the specific claim made by the plaintiff with regard to the common ownership to the suit schedule property and the houses was not specifically denied by the defendants being a fact that only defendant No.1 namely, Venctexa Govinda Porobo Shastri took a definite stand in this respect. It was thus held that the trial Judge was justified in holding that the common ownership of the suit schedule property had been admitted by the defendants in their written statement and that they could not prove how the suit schedule property in view of this fact this common ownership could subsequently belong exclusively to the daughters of one of the co-owners of the suit schedule property who were the heirs of one of the sons of the original title holder of the property. Further, the circumstances of Tereza and Conceicao having acquired their right through the creditor Shastri who purchased their property in a public auction after its attachment by the court from the heirs of one of the co-owners are certainly not binding on the respondents who were not parties in the said proceedings being also a fact that simply because the original plaintiff did not react either against the attachment or the auction, it cannot be said that this circumstance made her lose her right of the share acquired by her husband through his father who was one of the sons of the original owner of the suit schedule property. Besides, the evidence on record shows that the original plaintiff and her family were residing in the house situated in the suit schedule property even at the time of the filing of the suit and subsequently they shifted their residence after their ancestral house collapsed having built another house in a different property which had been acquired by the plaintiff. It was further held by the first appellate court that the trial Judge has correctly assessed the evidence on record while adjudicating the rights of the parties to the suit in favour of the plaintiff, and the judgment could not be said as having caused any grievance to the defendants-respondents and must be fully affirmed.

6. Being aggrieved by the said judgment Second Appeal No. 30 of 1986 was filed by the defendants before the learned single Judge of the High Court by urging certain substantial questions of law as required under Section 100 of the Civil Procedure Code, 1908 (for short “the CPC”). The High Court admitted the appeal by framing the following substantial questions of law :-

> 1) The plaintiffs not having produced any document of title, could the courts below decree the suit?
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> 2) The decision is contrary to the pleadings. The courts below committed breach of procedure in holding that there was admission of original plaintiff, in the pleading when there is no such admission.

3) The courts below failed to consider that the defendants had pleaded prescription and that Article 526(2) was fully attracted.

7. After hearing the learned counsel for the parties and the translated pleadings from Portuguese language to English in the plaint with regard to the claim of ownership of the plaintiff and the pleadings of defendants, the learned single Judge of the High Court has examined the rival legal contentions urged with reference to the substantial questions of law framed by it at the time of admission of the second appeal and placed reliance upon the judgment of this Court in the case of Hira Lal and Anr. v. Gajjan and Ors.[1] wherein this Court laid down the statement of law regarding the substantial questions of law in the second appeal under Section 100 of the CPC. The relevant portion of paragraph 8 from the aforesaid judgment reads thus :-

> "8....if in dealing with a question of fact that the lower appellate court has placed the onus on wrong party and its finding of fact is the result substantially of this wrong approach that may be regarded as a defect in procedure. When the first appellate court discarded the evidence as inadmissible and the High Court is satisfied that the evidence was admissible that may introduce an error or defect in procedure. So also in a case where the court below ignored the weight of evidence and allowed the judgment to be influenced by inconsequential matters, the High Court would be justified in reappreciating the evidence and coming to its own independent decision." With reference to the statement of law laid down by this Court in the aforesaid case, the learned single Judge of the High Court proceeded to answer the substantial questions of law Nos. 1 and 2 together by recording its reasons in paragraphs 7, 8 and 9 of the impugned judgment. In the second appeal, the High Court on the basis of the statement of law laid down by this Court in Hira Lal case (supra) examined the correctness of the concurrent findings of fact recorded by the first appellate court to answer the substantial questions of law referred to supra. The High Court has re-appreciated the evidence in the backdrop of the statement of law laid down by this Court after noticing the fact that the courts below ignored the pleadings of the defendants-respondents and the weight of their evidence and allowed its judgments to be influenced by inconsequential matters, therefore, the High Court was of the view that it is justified in re- appreciating the evidence and coming to its independent decision and answered the substantial questions of law Nos. 1 and 2 in favour of the defendants holding the findings of the courts below on the relevant contentious issues as perverse. In this regard, at paragraph 7, the High Court considered the evidence on record and non-appreciation of the same by the courts below, particularly, the finding recorded by the first appellate court that the plaintiff-appellants have established their title in respect of the suit schedule property, that the defendant Shastri had not denied the claim of ownership of the plaintiff-appellants and further that there is no specific denial of the ownership by Tereza, holding that the lower courts have erroneously recorded findings on these aspects. The High Court has further proceeded to hold that the fact remains that Tereza is not claiming right independently herself but her claim to the property is through said Shastri. The case of the defendants before the trial court is that the said

property was purchased by Shastri in a court auction and subsequently conveyed to Tereza. Therefore, the case of the defendants was accepted by the High Court stating that the pleading of K.V.P. Shastri in relation to the denial of ownership of the plaintiff is more relevant and material rather than that of Tereza. The High Court further made observation that denial of Tereza without there being any such denial by Shastri would have been of no consequence because consequent to the auction to the property through court, Tereza is claiming right to the property only through Shastri and not independently. Therefore, the High Court has arrived at valid finding on this aspect of the matter that irrespective of the denial of such claim of Tereza, had Shastri accepted the claim of the plaintiff then such denial of Tereza would have been of no consequence in the facts and circumstances of the case. The High Court has arrived at a conclusion on the basis of pleadings that undisputedly Shastri has denied the claim of the ownership of the plaintiff-appellants in respect of the suit schedule property, therefore, the findings of both the courts below that there is no denial of the plaintiff's case regarding the ownership right of the suit schedule property is not factually correct and the said finding is held to be totally contrary to the record and the same is arbitrary and perverse and cannot be sustained. The High Court has also come to the conclusion on the basis of the pleadings on record that the claim of the plaintiff-appellants to the suit schedule property is clearly in dispute and plaintiff-appellants have not proved their title to the suit schedule property and further rightly came to the conclusion that the courts below have not properly analyzed the material evidence on record though plaintiff-appellants have failed to produce documentary evidence in so far as the title of their ownership of the suit schedule property is concerned and further the finding recorded by the High Court in its judgment at para 8 namely, to the effect that the challenge of the plaintiff with regard to the acquisition of his right to the suit schedule property by Shastri and Tereza is essentially and solely based on the basis of the claim of ownership of the plaintiff to the suit schedule property.

8. The learned counsel for the plaintiff-appellants has submitted their legal and factual contentions before us. It was contended that the High Court failed to appreciate that under Section 100 of the CPC, only a substantial question of law could be framed for the purposes of examining the contentions of parties and that a substantial question of law is distinctly different from a substantial question of fact.

9. Further the learned counsel contended that the High Court failed to advert to the fact that possession of the ancestral property continued with the original plaintiff. It was contended that the High Court should have considered the fact that the two fact-finding courts had come to the conclusion on fact that the deceased-plaintiff was in possession of the suit schedule property as a co-owner thereof, as 1/3rd of the suit schedule property belonged to her father-in-law Francisco Fernandes. It is submitted that the learned single Judge of the High Court has misread the evidence and pleadings in arriving at the impugned findings. The learned counsel for the plaintiff- appellants has relied on the judgments of this Court in Deity Pattabhiramaswamy v. S. Hanymayya & Ors.[2], Dollar Company, Madras v. Collector of Madras[3] and Ramanuja Naidu v. V. Kanniah Naidu &

Anr.[4] to support the contention that in the facts and circumstances of the present appeal the High Court has tried to re-appreciate the evidence in second appeal under Section 100 of the CPC which cannot be done in the second appeal, in the backdrop of the concurrent finding of facts by the lower courts on appreciation of pleadings and evidence on record.

10. It is further contended by the learned counsel that the High Court failed to appreciate that defendant-Tereza was not claiming rights independently and her claim to the suit schedule property is through the said Shastri, when on the contrary, the purported right and interest of Shastri was in view of a purported public auction of the property held to recover the debts of the said Tereza and by an illegal means the said Tereza obtained a perpetual lease of the suit schedule property in her favour from the said Shastri.

11. It was further contended that there was no question of selling the entire property in the public auction in pursuance to court decree when the rights of the said Tereza was only to the extent of 1/3rd of the entire property and the purported attachment of the same is null and void and without any legal effect.

12. The learned counsel has also drawn our attention towards the three points, which arise for consideration by this Court:-

> (1) In the absence of documentary proof, whether oral evidence can be relied upon for granting a decree declaring the rights of a party? (2) Whether the High Court in a Second Appeal should set-aside concurrent findings of fact upon re-appreciating evidence? (3) Whether improper admission or rejection of evidence can be a ground for new trial or reversal of any decision in any case?

13. He has further submitted that it is manifest that a court is empowered to grant a decree of declaration of title on the basis of only oral evidence and further submitted that this Court has settled the scope, limitation of jurisdiction and power of a second appellate court under Section 100 of the CPC specifically after the amendment in 1976. This Court has held that in proceedings under Section 100 of the Code, power to set aside concurrent finding of fact can be exercised only when a substantial question of law exists irrespective of the fact that the finding of fact is erroneous.

14. The learned counsel has also stated that the Indian Evidence Act, 1872 creates a specific bar against conducting a new trial merely on the ground of improper admission or rejection of evidence and that Section 167 of the Indian Evidence Act is specific in this behalf.

15. On the contrary, the learned counsel for the defendants-respondents contended that the present appeal is misconceived and deserves to be dismissed as the High Court has rightly exercised its jurisdiction under Section 100 of the CPC. It is evident from the extracts of the findings of the courts below that the courts below have proceeded on the basis that there is an admission of the claim of the plaintiff regarding 1/3rd ownership of the suit schedule property as the same has not been specifically denied by the respondents. The said finding is not only contrary to the pleadings on record but is also contrary to the well-established principles of law viz. (a) that the burden of proof is

upon the person who approaches the court, and (b) any averment to be taken as an admission must be clear and unambiguous. It is submitted that it is an admitted fact that the plaintiff-appellants could not produce any document before the trial court to prove their title regarding the suit schedule property.

16. It was further contended by the learned counsel that Sections 101 and 102 of Evidence Act clearly states that burden of proof lies on the person who desires the court to give a judgment on a legal right or liability and who would otherwise fail if no evidence was given on either side. In the present case the plaintiffs-appellants would have to satisfy that burden under the above said sections of the Evidence Act, failing which the suit would be liable to be dismissed. In this regard, defendants placed reliance on the judgments of this Court in Corporation of City of Bangalore v. Zulekha Bi & Ors.[5], Gurunath Manohar Pavaskar & Ors. v. Nagesh Siddappa Navalgund & Ors.[6] and Anil Rishi v. Gurbaksh Singh[7], wherein it has been specifically held by this Court that in a suit for disputed property the burden to prove title to the land squarely falls on the plaintiff.

17. The learned counsel further contended that the trial court and the first appellate court have erroneously discharged the burden of proof as well as the onus of proof on the plaintiff-appellants to prove (a) the title to the property or for that matter (b) that the same was ancestral, by referring to the written statements of Tereza Fernandez and recording an erroneous finding that the rights of the plaintiff was not disputed by the defendants and, therefore, the same amounted to an admission. In this regard the pleadings of the parties become relevant which have been reproduced at page 8 of the impugned judgment and a perusal of which clearly show that there was a clear and specific denial of the right of the plaintiff over the said property as well as the right of the ancestors of the said plaintiff, by the auction purchaser/defendant No. 1. The relevant pleadings regarding the claim of ownership as found on page 8 of the impugned judgment are extracted below :-

> “In the village of Loliem there exists a property known as ‘Bodquealem Tican’ now described in the Land Registry of this Judicial Division under No.sixteen thousand four hundred thirteen (16,413) and which belonged jointly to Francisco Fernandes, the father-in-law of the plaintiff and his brothers Francisco Fernandes junior, and Pedro Sebastiao Fernandes, who all three had been always holding possession the property jointly and in equal shares.
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> In answer to the said pleadings the defendant No.1 the predecessor of the appellant no.1 stated thus:-
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> ‘The plaintiff her husband Luis or the father of this Francisco Fernandes Senior never held in possession the property- Bodquealem Tican-situate at Loliem and described in the Land Registry under No.16413, the boundaries of which and other details set out in the doc. of fls. 5 are deemed to have been reproduced herein for all purposes of law.
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> The property at issue was always and originally in possession and ownership of the judgment debtors Tomas Fernandes his wife Tereza Fernandes, Santana deSouza and

his wife Conceicao Fernandes of Loliem.' The Other defendants, namely the other appellants stated thus :-

'For neither she nor her husband held in possession any property and much less Bodquealem Tican-No.16413 the details of identification of which are borne out from Doc. of fls. 5 and are deemed to have been reproduced herein."

18. It is further submitted that it is settled law that for a decree to be passed on admission, the admission should be clear and unambiguous. In this regard reliance is placed on the judgment of this Court in Jeevan Diesels & Electricals Ltd. v. Jasbir Singh Chadha, (HUF) & Anr.[8] Further, he has urged that so far as the written statement is concerned, this Court in the case of Rachakonda Venkat Rao & Ors. v. R. Satya Bai & Anr.[9] held that :

"20. The learned counsel for the plaintiff also tried to build argument based on the fact that the 1978 decree has been referred to as a preliminary decree by Defendant 1 in his reply to the plaintiff's application under Order 26 Rules 13 and 14 CPC. According to him this shows that the defendant himself treated the said decree as a preliminary decree. This argument has no merit. We have to see the tenor of the entire reply and a word here or there cannot be taken out of context to build an argument. The reply by Defendant 1 seen as a whole makes it abundantly clear that the defendant was opposing the prayer in the application including the prayer for taking proceedings for passing a final decree."

19. It was further submitted by the learned counsel for the defendant- respondents that in any event of the matter it is an admitted fact that there was clear and specific denial by the defendant No.1/the auction purchaser and owner of the suit schedule property and that the said finding is concurrent vide trial court judgment (para 12) and first appellate court judgment (para 8). The relevant portions of which paragraphs are extracted below:-

Trial Court judgment dated 29.4.1978 "12...On the other hand a careful perusal of the written statement of the defendant reveals that even though they might have denied that 1/3rd of that property had belonged to the couple of the plaintiff, only the defendant no.1 clearly stated that the same belonged entirely to the defendants Tereza and Conceica..." First Appellate Court Judgment dated 16.12.1985 "8.However it was rightly pointed out by the learned Trial Judge, the specific claim taken by the respondents with regard to common ownership of the suit property and the houses was not specifically denied by the Appellants being a fact that only the original defendant no.1 Xastri took a definite stand in this respect..." It was further submitted that the owner of the property having specifically denied title of the plaintiffs as well as the fact that the said property was ancestral; it was incumbent upon the plaintiff to prove the title as well as the fact that the said property was ancestral. It was contended that even assuming for the sake of argument that the other defendant viz. Tereza who was in possession of the property as a lessee does not deny the title, the same would make no difference as the owner of the property defendant No.1 had

specifically denied the title.

20. Learned counsel further argued that the High Court has correctly exercised its jurisdiction under Section 100 of the CPC. It is further submitted that the findings rendered by the courts below on no evidence or drawn on wrong inference from the evidence, as well as casting of onus on the wrong party, are admittedly substantial questions of law.

21. The submissions of both the learned counsel for the parties with reference to the case law referred to supra upon which reliance was placed, are carefully examined by us with a view to find out whether the substantial questions of law Nos. 1 and 2 framed and answered in favour of the defendants-respondents and against the plaintiff- appellants are correct or not. After having heard learned counsel for the plaintiff-appellants as well as defendants-respondents, we have to hold that the High Court has rightly held to the effect that it was primarily and essentially necessary for the plaintiff-appellants to establish their claim of ownership before they could invite the court to address itself to the issue of their challenge to the title of the defendants-respondents to the suit schedule property. The plaintiff- appellants having failed to do so, their entire claim was liable to be rejected. The High Court further recorded the finding, that the factum of registration of the suit schedule property under No.16413 in favour of the defendants-respondents is not in dispute, yet the plaintiff- appellants have not produced on the record any document of inscription of the suit schedule property in their name. Therefore, the High Court has rightly come to the conclusion and held that the answer to the first substantial question of law is to be answered in the negative and held that since plaintiff-appellants have not produced any document of title in relation to the suit schedule property, the grant of decree in favour of them is erroneous in law. Further, on the second substantial question of law, the High Court has rightly answered in favour of the defendants in the affirmative for the reason that the courts below, without considering the denial made by the defendant no.1 with regard to the ownership claim made by the plaintiff-appellants in respect of the suit schedule property, have come to the erroneous conclusion that there is no pleading of fact by the defendants-respondents and lack of evidence in favour of the plaintiff-appellants to prove their title to the suit schedule property. Therefore, the High Court has arrived at the right conclusion and held that the courts below committed serious error in holding that there was admission of defendants in the pleadings with respect to ownership of 1/3rd of the suit schedule property by the plaintiff.

22. After careful scrutiny of the finding of fact and reasons recorded by the courts below with reference to the substantial questions of law framed by the High Court at the time of admission of the second appeal filed by the defendants, we are satisfied that the ratio laid down by this Court in Hira Lal's case (supra) and other decisions referred to supra upon which defendants' counsel placed reliance in justification of the findings and reasons recorded by the High Court in the impugned judgment are applicable to the fact situation of this case as the courts below have erred in assuming certain facts which are not in existence to come to the erroneous conclusion in the absence of title document in justification of the claim of the plaintiff in respect of the suit schedule property and ignored the pleadings of the defendants though they have specifically denied the ownership right claimed by the plaintiff in respect of the suit schedule property and on wrong assumption of the facts which are pleaded on the contentious issues, they have been answered in favour of the plaintiff,

therefore, the High Court has rightly exercised its appellate jurisdiction by framing the correct substantial questions of law with reference to the legal position and applied the same to the fact situation of case on hand.

23. In our considered view, the substantial questions of law framed by the High Court at the time of the admission of the second appeal is based on law laid down by this Court in the above referred case of Hira Lal which view is supported by other cases referred to supra. Therefore, answer to the said substantial questions of law by the High Court by recording cogent and valid reasons to annul the concurrent findings that the non-appreciation of the pleadings and evidence on record by the courts below rendered their finding on the contentious issues/points as perverse and arbitrary, and therefore the same have been rightly set aside by answering the substantial questions of law in favour of the defendants.

24. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth (minor) v. Seshammal[10], wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below :

> "24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:
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> (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
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> (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.
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> (iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where

> (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding." We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same.

25. In the matter of onus of proof and burden of proof as per Sections 101 and 102 of the Evidence Act, we have to hold that it was upon the plaintiff-appellants to furnish proof regarding ownership of 1/3rd share of the suit schedule property and discharge their burden of proof as per the afore-mentioned sections. The relevant extract from Anil Rishi v. Gurbaksh Singh (supra) is reproduced below:-

> "19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.
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> 20. In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple the law is stated in the following terms: (SCC p. 768, para
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> 29) "29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in Addagada Raghavamma v.

Addagada Chenchamma there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been

discharged so as to amount to proof of the plaintiff's title." We therefore do not find any reason whatsoever to interfere with the impugned judgment and decree passed by the High Court on this aspect of the case as well.

26. For the reasons stated above, the appeal is dismissed, there will be no order as to costs. Orders passed by this Court on 27.8.1999 and 3.9.2001 stand vacated.

……J. [G.S. SINGHVI] ……J. [V. GOPALA GOWDA] .....J. [C. NAGAPPAN] New Delhi, December 10, 2013.

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[1] (1990) 3 SCC 285
[2] AIR 1959 SC 57
[3] (1975) 2 SCC 730
[4] (1996) 3 SCC 392
[5] (2008) 11 SCC 306
[6] (2007) 13 SCC 565
[7] (2006) 5 SCC 558
[8] (2010) 6 SCC 601
[9] (2003 (7) SCC 452
[10] (2006) 5 SCC 545
