Thiagarajan & Ors vs Sri Venugopalaswamy B. Koil & Ors on 16 March, 2004

Equivalent citations: AIR 2004 SUPREME COURT 1913, 2004 (5) SCC 762, 2004 AIR SCW 1618, 2005 (1) LANDLR 125, 2004 (3) MADLW 452, 2004 (2) PATLJR 215, 2004 (2) ALL CJ 1822, (2004) 5 JT 54 (SC), 2004 (2) SLT 764, 2004 (3) SCALE 345, 2004 (16) INDLD 453, 2004 (3) ALL WC 1988, 2004 (3) RAJLW 378, 2004 (3) MADLJ188, 2004 (4) ANDH LD 8, 2004 (2) KER LT 358, 2004 (2) LRI 26, 2004 (2) RECCIVR 444, (2004) 17 ALLINDCAS 134 (SC), 2004 (3) CAL HN 161, 2004 (2) JLJR 191, 2004 (2) CURCC 165, 2004 (3) SUPREME 474, 2004 (3) BLJ 303, 2004 (3) ICC 326, (2004) 2 ALLMR 446 (SC), (2004) 1 CLR 744 (SC), (2004) 2 JCR 296.2 (SC), (2004) 2 CTC 354 (SC), (2004) 2 WLC(SC)CVL 153, AIRONLINE 2004 SC 242, 2004 AIR JHAR HCR 597, 2004 AIHC 986, (2004) 3 BLJ 303, (2004) 1 CLR 744, (2004) 2 JLJR 191, (2004) 16 IND LD 453, (2004) 3 ICC 326, (2004) 3 ALL WC 1988, (2005) 1 LAND LR 125, (2004) 2 REC CIV R 444, (2004) 4 ANDH LD 8, (2004) 2 CUR CC 165, (2004) 3 RAJ LW 378, (2004) 3 MAD LW 452, (2004) 2 KER LT 358, (2004) 3 CAL HN 161, (2004) 2 PAT LJR 215, (2004) 3 SCALE 345, (2004) 3 MAD LJ 188, 2004 ALL CJ 1822, (2004) 5 JT 54, (2004) 3 SUPREME 474, (2004) 2 TAC 923, (2003) 4 JLJR 767, (2004) 2 ACC 240, (2004) 2 JCR 18 (JHA), (2004) 22 INDLD 159, (2004) 17 ALL IND CAS 134 (SC), (2004) 2 ALL MR 446 (SC), (2004) 2 WLC (SC)CIVIL 153, (1998) 5 JT 610 (SC), (2004) 2 JCR 296 (SC), 2016 (12) SCC 641

Author: Ar. Lakshmanan

Bench: R. C. Lahoti, Ar. Lakshmanan

CASE NO.:
Appeal (civil) 1553 of 1999

PETITIONER:
Thiagarajan & Ors.

RESPONDENT:
Sri Venugopalaswamy B. Koil & Ors.

DATE OF JUDGMENT: 16/03/2004

BENCH:
R. C. Lahoti & Dr. AR. Lakshmanan

JUDGMENT:

J U D G M E N T Dr. AR. Lakshmanan, J.

The above appeal was filed by the plaintiffs against the final judgment and order dated 28.07.1998 passed by the High Court of Judicature at Madras in S.A. No. 2147 of 1985 allowing the same and reversing the judgment dated 14.09.1984 passed by the learned Subordinate Judge, Tiruvallur in A.S. No. 21 of 1983 and restoring the judgment dated 21.01.1981 passed by the learned District Munsif, Poonamallee in O.S. No. 1459 of 1973.

The brief history of the case is as follows:-

> The appellant Nos. 1 and 2 instituted the suit O.S. No. 1459 of 1972 against one Ganesan, Munuswami and the first respondent herein praying for declaration of title in respect of the A Schedule property and for permanent injunction in respect thereof and for possession of the B Schedule property. It was contended that the suit property measuring 66 feet North Southand 43 feet East West in Survey No. 46/2, Nehru Nagar, Kathivakkam Village was a village house site which has been described as A Schedule property and the same had been in possession and enjoyment of the ancestors of the appellants in their own right for several decades and that the appellants were entitled to the said property by virtue of survivorship and inheritance on the death of the second appellant's husband. There appellants herein filed O.S. No. 271 of 1966 against one Shanmugham, Chinnammal, Algappan and Daniel Nadar since Shanmugham and Chinnammal had disputed the appellants title and that during the pendency of the said suit the said Shanmugham and Chinnammal died and by virtue of the appellants being the nearest heirs a decree was passed on 18.08.1972 in the said suit against the surviving defendants therein and that the appellants took delivery of the property through Court pursuant to the said decree and that by virtue of a family arrangement and partition as between the first appellant and appellant Nos. 3 and 4, appellant Nos. 1 and 2 became entitled to the suit A Schedule property and that in a portion thereof measuring 10 feet X 15 feet one Muniswami trespassed and put up a thatched structure thereon and the said Muniswami had been residing in the said hut after trespass which had been done about two years prior to the present suit and that the property trespassed has been described as B Schedule property.
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> On these and among other allegations, the appellant Nos. 1 and 2 prayed for the aforesaid relief.
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> Ganesan and Munuswami who were arrayed as defendant Nos. 1 and 2 filed a written statement contending that the suit property had not been described properly and that Munian, the grandfather of the first appellant had two wives, namely, Yengachari Muniammal and Manali Muniammal and that the said Munian did not have three wives and that the first appellant's father's mother wasnot one of the wives of Munian as she was not married to him and that she was only a concubine and that Kannan the father of the appellant was not a legitimate son and, therefore, he had no manner,

right, title interest or possession of the suit properties at any time and that Munian, the grandfather of the first appellant was in exclusive possession of the suit properties and on his death his two widows succeeded as his only heirs and as per the family arrangement as between them the suit properties was allotted to Yengachari Muniammal and that she was in possession and enjoyment in her own right as full owner and that the appellants and/or their father had no right, title or interest in the suit properties and that the said Muniammal had dealt with the property as absolute owner thereof and had registered settlement deed dated 01.08.1961 in favour of her brother's daughter Pavalakodi Ammal and that she had been in possession and enjoyment as full owner from the date of settlement and that the said Pavalakodi Ammal had executed a gift deed in favour of the first respondent herein of which Ganesan (D-1) was a trustee and that he had been put in possession of the suit property on the date of the gift deed as trustee of the first respondent herein and that Muniammal had also joined the execution of the gift deed by way of abundant caution and that Ganesan had allowed Muniswami (D-2) to occupy the hut as a tenant and on these among other allegations prayed for dismissal of the suit.

The learned District Munsif, Poonamallee, after framing the necessary issues, tried the same and held that Yengachari Muniammal succeeded to the property on the death of Munian and a limited right got enlarged by virtue of the Hindu Succession Act, 1956 and, therefore, the settlement deed executed by her in favour of Pavalakodi Ammal was valid and the gift deed by Pavalakodi Ammal in favour of the first respondent was also valid and that the suit properties had not been in possession of the appellants.

The appellants being aggrieved by the dismissal of the suit preferred A.S. No. 21 of 1983 on the file of the Subordinate Judge, Tiruvallur who heard the appeal held that in view of the decision in C.R.O.P. No. 20 of 1962 there was no doubt that Kannan, the father of the first appellant was the legitimate son of Munian and that no documents had been produced to establish that the suit property was the self acquisition of Munian and that the settlement deed executed by Yengachari Muniammal referred to the property as being ancestral. He also held that the alleged family arrangement pleaded by virtue of which the suit properties was said to be allotted to Yengachari Muniammal had also not been proved and that the appellants cannot be non-suited and that the first respondent cannot claim that it had acquired title by adverse possession and that the appellant had established that they are entitled to 3/4th share which Kannan, the father of the first appellant was entitled to on the death of Munian and that the respondents herein were entitled to the remaining 1/4th share which Yengachari Muniammal was entitled to and that the appellants are entitled to possession to B Schedule property. On these findings, the learned Subordinate Judge allowd the appeal and thereby set aside the judgment passed by the learned District Munsif.

Aggrieved by the appeal being allowed, the respondents herein preferred a Second Appeal on the file of the High Court at Madras. In the memorandum of grounds of second appeal dated 08.10.1985, the respondents herein set forth the grounds as well as raised substantial questions of law which according to them arose for consideration in the Second Appeal. We have perused the copy of the memorandum of grounds of Second Appeal filed before the High Court, Madras filed and marked as Annexure P-3 herein and also the second appeal records.

The learned single Judge of the Madras High Court (S.T. Ramalingam, J.) at the time of admission of the second appeal formulated the following substantial question of law:-

"Whether the respective shares of late Munian were correctly determined in accordance with the principles of Hindu Law and the Hindu Succession Act."

However, another learned single Judge - S.M. Sidickk, J. who finally heard the second appeal framed a fresh set of substantial questions of law for consideration after hearing the arguments advanced on both sides and in the course of rendering the judgment:-

(1) Whether Murivi, mother of Kannan, was the legally wedded wife of one Munian and whether her marriage with Munian is valid under law? (2) Whether Kannan (father of plaintiffs 1, 3 and 4 and husband of 2nd plaintiff) was born to Munian and Murivi out of their lawful wedlock? (3) Whether the plaintiffs became entitled to the plaint A schedule property by virtue of survivorship and inheritance on the death of Kannan, who is the father of plaintiffs 1, 3 and 4 and husband of the 2nd plaintiff as alleged in para 3 of the plaint?

(4) Whether the Respondents/plaintiffs are entitled to the reliefs of declaration and permanent injunction in respect of plaint A schedule property and for delivery of vacant possession of the plaint B schedule property as prayed for in the plaint?

(5) To what reliefs the appellants/defendants are entitled?"

The learned single Judge rendered findings on point Nos. 1 to 5 and held that Muruvi, mother of Kannan and grandmother of first appellant was not the legally wedded wife of Munian and that since Muruvi was not the legally wedded wife, Kannan cannot be said to be borne out a lawful marriage and that the source of title of Kannan to the property had not been traced and, therefore, the appellants were not entitled to the suit property by virtue of survivorship or inheritance on the death of Kannan and that the appellants are, therefore, not entitled to the reliefs claimed and that the suit properties belong to Yengachari Muniammal who settled the same in favour of Pavalakodi who in turn gifted it to the first respondent herein and that the appellants cannot succeed by picking holes in the defence taken and that the appellants have to establish their title independently and thus allowed the second

appeal on a re- appreciation of portions of evidence adduced and thereby set aside the judgment passed by the learned Subordinate Judge and restored the judgment passed by the learned Munsif.

This Court granted leave on 15.03.1999.

We heard Mr. V. Prabhakar, learned counsel appearing for the appellants. Though all the respondents appeared before the High Court did not chose to enter appearance in this Court, in spite of the due service of notice on all of them. Mr. V. Prabhakar took us through the entire pleadings the judgments rendered by all the three courts. Mr. Prabhakar advanced arguments on four contentions. They are :

1. The learned single Judge of the High Court who heard the second appeal framed a fresh set of substantial questions of law for consideration after hearing the arguments advanced on both sides and in the course of rendering the judgment. According to him, the High Court could not frame questions of law at the time of rendering the judgment in the second appeal especially when such a procedure is not contemplated under Section 100 of the Civil Procedure Code.

2. The learned single Judge who disposed of the second appeal has considered the substantial questions of law framed at the time of hearing and rendering the judgment and has failed to consider the substantial question of law framed by another learned single Judge at the time of admission.

3. It was submitted that the opposite party that is the appellants herein/plaintiffs was not put on notice and be given a fair and proper opportunity when the High Court seeks to exercise jurisdiction under the proviso to Section 100 of C.P.C. by formulating questions of law at a later stage. It was further contended that the High Court while disposing of the second appeal and rendering the judgment has not recorded any reasons for formulating a fresh set of questions of law by ignoring the questions already formulated in the memorandum of the grounds of second appeal which thus already formulated by the Court, if any.

4. The High Court hearing a second appeal under Section 100 C.P.C. could not make a roving enquiry into the facts by examining the evidence afresh to upset the findings of fact rendered by the first appellate Court. It was further submitted that the High Court has looked into only portions of the evidence and not the entire evidence while seeking to disturb the factual findings rendered by the first appellate Court.

According to Mr. Prabhakar, the questions that were framed under Section 100 C.P.C. could not be mere questions of law but substantial questions of law as contemplated under the said provision.

In support of the above contention Nos. 1 to 3, Mr. Prabhakar strongly placed reliance in the case of Kshitish Chandra Purkait vs. Santosh Kumar Purkait and Others [(1997) 5 SCC 438].

Section 100 of the C.P.C. reads thus:-

"(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.

(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."

In the instant case, the memorandum of appeal filed by the appellant have precisely stated the substantial question of law involved in the appeal among other grounds. The High Court was satisfied that a substantial question of law was involved in this case and formulated the said substantial question at the time of admission of the appeal on 26.12.1985 which has been extracted in paragraphs above.

Clause 5 of Section 100 C.P.C. says that 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 a question. The proviso states 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. In the instant case, the High Court at the time of final hearing formulated five more questions of law as extracted above after hearing the counsel for both sides have miserably failed to record the reasons

for formulating the other substantial questions of law.

We have perused the entire judgment. The learned single Judge of the High Court has considered only the questions formulated by him at the time of final hearing and has not touched the substantial question of law formulated at the time of admission of second appeal. The jurisdiction of the High Court is now confined to entertain only such appeals as involved substantial question of law specifically set out in the memorandum of appeal and formulated by the High Court. Since the High Court has not adverted to the substantial question of law framed at the time of admission, the High Court has committed a patent error in disposing of the second appeal. It was argued by learned counsel for the appellant that the High Court while formulating substantial questions of law at a later stage and while doing so has not put on notice the opposite party and has given a proper and fair opportunity to meet the same which in the instant case had not been done by the learned single Judge. A perusal of the fresh set of questions framed by the High Court at the time of final hearing cannot be termed to be substantial questions of law in contrast to mere questions of law as contemplated under Section 100 C.P.C. In this context, the ruling cited by the learned counsel for the appellants in Kshitish Chandra Purkait (supra) can be beneficially looked into. A three-Judge Bench of this Court held a) that the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; b) reasons for permitting the plea to be raised should also be recorded; c) it has a duty to formulate the substantial question of law and to put the opposite party on notice and give fair and proper opportunity to meet the point; d) in absence thereof, hearing of the second appeal would be illegal.

This Court further held as follows:

"We would only add that (a) it is the duty cast upon the High Court to formulate the substantial question of law involved in the case even at the initial stage; and (b) that in (exceptional) cases, at a later point of time, when the Court exercises its jurisdiction under the proviso to sub-section (5) of Section 100 CPC in formulating the substantial question of law, the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet the point. Proceeding to hear the appeal without formulating the substantial question of law involved in the appeal is illegal and is an abnegation or abdication of the duty cast on court; and even after the formulation of the substantial question of law, if a fair or proper opportunity is not afforded to the opposite side, it will amount to denial of natural justice. The above parameters within which the High Court has to exercise its jurisdiction under Section 100 CPC should always be borne in mind. We are sorry to state that the above aspects are seldom borne in mind in many cases and second appeals are entertained and/or disposed of, without conforming to the above discipline.

In the light of the legal position stated above, we are of the view that the High Court acted illegally and in excess of its jurisdiction in entertaining the new plea, as it did,

> and consequently in allowing the second appeal. Even according to the High Court, the point urged on behalf of the appellant was only a "legal plea" though no specific plea was taken or no precise issues were framed in that behalf. The High Court failed to bear in mind that it is not every question of law that could be permitted to be raised in second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in sub-section (5) of Section 100 CPC. Under the proviso, the Court should be "satisfied" that the case involves a "substantial question of law" and not a mere "question of law".

The reason for permitting the substantial question of law to be raised, should be "recorded" by the Court. It is implicit therefrom, that on compliance of the above, the opposite party should be afforded a fair or proper opportunity to meet the same. It is not any legal plea that could be raised at the stage of second appeal. It should be a substantial question of law. The reasons for permitting the plea to be raised should also be recorded. Thereafter, the opposite party should be given a fair or proper opportunity to meet the same. In the present case, as the extracts from the judgment quoted hereinabove would show, the High Court has totally ignored the mandatory provisions of Section 100 CPC. The High Court proceeded to entertain the new plea and rendered its decision without following the mandatory provisions of Section 100 CPC. On this short ground, we are of the view that the judgment and decree of the High Court dated 30-11-1982 are illegal and in excess of its jurisdiction and so unsustainable and deserve to be set aside. We hereby do so. The appeal is allowed with costs, including advocates' fee which we estimate at Rs. 10,000."

The existence of a substantial question of law is thus the sine qua non for the exercise of the jurisdiction under the amended provisions of Section 100 CPC. The above judgment squarely applies to the facts and circumstances of the instant case. Thus, we answer the legal contention Nos. 1 to 3 in favour of the appellants/plaintiffs and against the respondents/defendants. Contention No.4:

> It was submitted by Mr. Prabhakar, learned counsel for the appellants that the High Court hearing a second appeal under Section 100 CPC should not make a roving enquiry into the facts by examining the portion of evidence afresh to upset the well considered findings of fact rendered by the first appellate court. Our attention was drawn to the various passages from the judgment of the High Court and in comparison with the judgment rendered by the first appellate Court. On a reading of both the judgments, we are unable to convince ourselves that the High Court has looked into only portions of evidence and not the entire evidence while seeking to disturb the factual findings rendered by the first appellate Court. The learned Subordinate Judge, who heard the appeal, held that in view of the decision in C.R.O.P. No. 20 of 1962 there was no doubt that Kannan, the father of the first appellant was the legitimate son of Munian and that no document had been produced to establish that the suit property was the self-acquisition of Munian and that the settlement deed executed by Yengachari Muniammal referred to the property as being ancestral and that the family arrangement pleaded by virtue of which the suit properties was said to be allotted to Yengachari Muniammal had also not been

proved.

In this context, the High Court has brushed aside the decisions rendered by a competent Court when such decision is marked as an Exhibit A1 and the decision which had become final and is binding on the parties and which contained certain findings which are relevant to decides the instant case. We can also refer to certain other instances where the High Court has committed an error and re-appreciated the evidence. The learned Judge of the High Court erred in holding that the plaint does not state that Kannan, the father of the appellant Nos. 1,3 and 4 and husband of second appellant is a legitimate son of Munian and his wife Muruvi evidently overlooking the dispute as to the status of Kannan was raised in the written statement filed by the respondents and not prior to the same. The High Court also has failed to note that in view of the defence taken by the respondents regarding the existence of more than one wife for Munian the ancestor of the appellants were compelled to give details of the wives of Munain during the course of the evidence and raised the same at the stage of arguments. Likewise, the High Court has exceeded its jurisdiction vested in it holding that the evidence of P.W. 1 is discrepant and far from being satisfactory and not entitled to acceptance especially when the first appellate Court which is the final court of fact had appreciated the evidence and rendered its decision. Again the High Court has exceeded that the jurisdiction vested by holding that the evidence of P.W. 2 is not entitled to any credibility especially when the said evidence has been accepted by the final Court of fact. The High Court has committed an error in seeking to sit in judgment over the decision rendered in the reference under Section 30 of the Land Acquisition Act marked as Exhibit - A1 especially when the same had become final inter parties and under the subject matter of the second appeal. The learned Judge has erred in interpreting and pointing out the alleged floss in the decision rendered in the reference under Section 30 of the Land Acquisition Act without making any reference to the ultimate conclusion which had become final as between parties. Likewise, the Court has committed an error in holding that the appellants are not entitled to any relief claimed in the suit and to the suit A Schedule property in the absence of evidence evidently not adverting to the entire evidence adduced by the appellants. The Court has evidently overlooked that it has been pleaded that the suit properties had been in possession and enjoyment of the appellant's ancestors thus tracing title to the suit property. The learned Judge is also not correct in holding that the suit properties belong to Yengachari Muniammal merely on the basis of some evidence as to her possession especially when her title had not been established or traced by the respondents as required under law. The learned Judge, in our opinion, has misconstrued that the appellants are seeking relief on the basis of discrepancies in the case pleaded by the respondents evidently overlooking that the appellants had pleaded and proved their case and the same had been accepted by the final court of fact.

In our opinion, the High Court has erred in holding that the appellants have failed to establish their title to the suit property evidently without appreciating the evidence

on record in its proper perspective by making only reference to portions of evidence having once decided to reappreciate the evidence. The High Court, in our opinion, ought to have examined the entire evidence both oral and documentary instead of only a portion thereof especially while deciding to look into and reappreciate the evidence despite the limited scope under Section 100 CPC. In our view, the learned single Judge of the High Court has exceeded his jurisdiction in reassessing, reappreciating and making a roving enquiry by entering into the factual arena of the case which is not the one contemplated under the limited scope of jurisdiction of a second appeal under Section 100 CPC.

In the present case, the lower appellate Court fairly appreciated the evidence and arrived at a conclusion that the appellants suit was to be decreed and that the appellants are entitled to the relief as prayed for. Even assuming that another view is possible on a reappreciation of the same evidence, that should not have been done by the High Court as it cannot be said that the view taken by the first appellate court was based on no material.

To say the least the approach of the High Court was not proper. It is the obligation of the Courts of law to further the clear intentment of the legislature and not frustrate it by excluding the same. This Court in a catena of decisions held that where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

We, therefore, hold that the High Court has exceeded its jurisdiction in interfering with the findings of the final court of fact.

We, therefore, hold that the judgment of the High Court under the circumstances cannot be sustained and judgment of the lower appellate Court in A.S. No. 21 of 1983 of the Subordinate Judge, Tiruvallur is restored. The appeal stands allowed. There will be no order as to costs.