Azgar Barid (D) By Lrs. vs Mazambi @ Pyaremabi . on 21 February, 2022

Author: B.R. Gavai

Bench: B.R. Gavai, L. Nageswara Rao

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 249 OF 2010

AZGAR BARID (D) BY LRS. AND OTHERS ...APPELLANT(S)

VERSUS

MAZAMBI @ PYAREMABI AND OTHERS ...RESPONDENT(S)

JUDGMENT

B.R. GAVAI, J.

1. This appeal challenges the judgment and order dated 17 th 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.

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

> A suit for partition being O.S. No. 388/77 came to be filed by 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 and decree dated 11 th September 1987, the said suit came to be decreed, in part, declaring that plaintiff No. 2 was entitled to 7/24 th 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 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 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 by judgment and order dated 23 rd 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 18 th 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 18 th March 1998 came to be challenged before this Court by filing Civil Appeal No. 6478 of 1998. This Court vide its order dated 17 th 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.

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

> (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?
>
> (2) Whether the first Appellate Court is justified in negativing 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?
>
> (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?

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

1. Plaintiff No.3□Mazambi @ □1/8th share Pyarembi is entitled to

2. Defendant No.1□Azgar Barid □7/36th share is entitled to

3. Plaintiff No.4□Syed Rehman □7/36th share Barid @ Sabulal is entitled to

4. Defendant No.8□Rahiman □7/36th share Barid @ Ikbal Pasha is entitled to

5. Plaintiff No.5□Shakila Begum □7/72nd share is entitled to

6. Plaintiff No.6□Zamila Begum □7/72nd share is entitled to

7. Plaintiff No.7□Akhila Begum □7/72nd share is entitled to

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

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.

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.

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.

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 Others1 and Dr. P. Nalla Thampy Thera v. B.L. Shanker and Others2, has held that 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. It has 1 (1983) 2 SCC 132 2 1984 (Supp) SCC 631 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.

13. This Court in the case of Chandramohan Ramchandra Patil and Others v. Bapu Koyappa Patil (Dead) Through LRs and Others3, has held thus:

> "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□a□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.
>
> 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. In such a situation, it is not open to urge on behalf of the defendants that the decree of 3 (2003) 3 SCC 552 dismissal of suit passed by the trial court had become final inter se between the non□appealing plaintiffs and the defendants."

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.

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.

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 Others4:

> "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] .)
>
> 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 4 (2010) 13 SCC 216 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] .)"

17. This Court in the case of Illoth Valappil Ambunhi (D) By LRs. v. Kunhambu Karanavan5, 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."

18. Recently, this Court in the case of K.N. Nagarajappa and Others v. H. Narasimha Reddy6, to which one of us (L.N. Rao, J.) was a party, has observed thus:

> "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:
>
> 5 2019 SCC OnLine SC 1336 6 2021 SCC OnLine SC 694 "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."
>
> 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....."

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

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 @ Ikbal Pasha-plaintiff No.8, were born.

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.

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 30 th July 1936, and as such, the said properties ceased to be the properties of Mohiyuddin Pasha.

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.

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 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.

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.

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 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. Appenna□PW□3, who was also an independent witness, supported the case of the plaintiffs.

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 evidence. We are of the view that the First Appellate Court had failed in 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 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, 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 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 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 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 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.

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.

.....J. [L. NAGESWARA RAO] .....J. [B.R. GAVAI] NEW DELHI;

FEBRUARY 21, 2022.