S. Subramanian vs S. Ramasamy And Ors on 1 May, 2019

Equivalent citations: AIR 2019 SUPREME COURT 3056, 2019 (6) SCC 46, AIRONLINE 2019 SC 452, (2019) 2 CURCC 299, (2019) 135 ALL LR 884, (2019) 2 ALL RENTCAS 366, (2019) 2 ALL RENTCAS 562, (2019) 2 CLR 25 (SC), (2019) 3 CIVILCOURTC 499, (2019) 3 ICC 322, 2019 (3) KCCR SN 208 (SC), (2019) 3 RECCIVR 96, (2019) 4 ALL WC 3793, (2019) 4 ANDHLD 294, (2019) 4 CAL HN 209, (2019) 4 CIVLJ 65, (2019) 6 ADJ 718 (ALL), (2019) 7 SCALE 254, AIR 2019 SC (CIV) 2234

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Bench: M.R. Shah, L. Nageswara Rao

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 4536-4537 OF 2019
(Arising out of SLP (C) NOS.31125-26 of 2013)

S.Subramanian ..Appellant

Versus

S. Ramasamy Etc. Etc. ..Respondents

JUDGMENT

M.R. SHAH, J.

Leave granted in both the special leave petitions.

2. As common question of law and facts arise in both these appeals and as such arise out of the impugned common Judgment and Order passed by the High Court, both these appeals are being decided and disposed of together by this common Judgment and Order.

16:27:12 IST Reason:

3. Feeling aggrieved and dissatisfied with the impugned common Judgment and Order passed by the High Court of Judicature at Madras in Second Appeal Nos.4 and 5 of 2009 by which the High Court while exercising powers under Section 100 of the CPC has allowed the said Second Appeals and has quashed and set aside the Judgement and Decree passed by the Trial court as well as the First Appellate Court dismissing the suits and consequently has decreed the suits preferred by the respondent herein – original plaintiff, the original defendant has preferred the present appeals.

4. The facts leading to the present appeals in nutshell are as under :

> That the original plaintiff (Respondent No.1 herein) – S. Ramasamy initially filed a suit being OS No.10 of 2006 in respect of the immovable properties described in the schedule of plaint to restrain original defendant No.2 (appellant herein) from alienating or encumbering or creating any kind of document in respect of plaintiff's common one – third share of the suit properties, till final partition takes place between the plaintiff and original defendant No.2 by metes and bounds by a decree of permanent injunction. That the said suit was filed by the original plaintiff against his father Sengoda Gounder (died) as well as his younger brother Subramanian. That during the pendency of the said suit, the same plaintiff – Ramasamy filed a suit being OS No.19 of 2005 against his younger brother Subramanian and his father Sengoda Gounder for partition of the suit properties. It was the case on behalf of the original plaintiff that the plaintiff and his father and his younger brother constituted a Hindu Joint Family which owned ancestral properties. It was further the case on behalf of the plaintiff that the father of the plaintiff, namely, Sengoda Gounder, by way of settlement, got the suit properties, vide Ex – A1 dated 07.04.1956 – the Settlement Deed executed by one Kumarasamy Gounder in favour of Sengoda Gounder. It was the case on behalf of the plaintiff that since that time, the suit properties along with the ancestral properties were treated as joint family properties and all the three coparceners were enjoying them together. It was alleged that since the father and the younger brother of the plaintiff, in collusion with each other were attempting to alienate the suit properties, the first injunction suit (OS No.19 of 2005) was filed. 4.1 The suit was resisted by the original defendant – younger brother of the plaintiff Ramasamy. It was the case on behalf of the original defendant that no joint family at all ever existed amongst Sengoda Gounder and his two sons, namely Ramasamy and Subramanian. That the suit properties were obtained by Sengoda Gounder as per Ex – A1 – the Settlement Deed during the year 1956 as his self – acquired properties. That Sengoda Gounder's sons, namely Ramasamy and Subramanian had nothing to do with the suit properties and they had no proprietary right or share in that and that they were never treated as joint family properties. It was the specific case on behalf of the defendant that, in fact, the Sengoda Gounder, during his lifetime, executed two settlement deeds Ex – A13 and A14 in favour of Subramanian and subsequently he also executed Ex – B24, a will dated 08.11.2004 in favour of Subramanian. It was the case on behalf of the defendant that as such, Subramanian – the defendant became absolute owner of the suit properties. It was also contended on behalf of the defendant that the second suit is also barred by Order 2 Rule 2 of CPC. It was the case

on behalf of the defendant that before filing the injunction suit (first suit) the plaintiff issued notice seeking partition and despite the same he initially filed the injunction suit only and thereafter, without any rhyme or reason and without obtaining any permission from the Court at the time of filing the injunction suit to file a partition suit subsequently, he simply filed the second suit, which was barred by Order 2 Rule 2 of CPC.

4.2 That the Trial Court framed the issues. Both the suits were tried jointly. The plaintiff Ramasamy examined himself as PW1 along with PWs 2 to 4 and Exs. A1 to A46 were brought on record. Subramanian the defendant examined himself as DW1 along with DWs 2 to 4 and he brought on record Exs. B1 to B31.

That thereafter, on appreciation of evidence, the learned Trial Court dismissed both the suits. The appeals by the unsuccessful plaintiff came to be dismissed by the learned First Appellate Court.

4.3 Feeling aggrieved and dissatisfied with the common Judgment and Order passed by the First Appellate Court dismissing the appeals and confirming the Judgment and Decree passed by the learned Trial Court dismissing the suits, the original plaintiff filed two second appeals before the High Court. The High Court formulated and framed the following questions of law as substantial questions of law :

"(1) Whether both the Courts below were justified in holding that the generosity shown by Sengoda Gounder should not be treated as an act of blending of the sit properties with the ancestral properties and whether the Courts below were justified in ignoring the factum of describing the properties found in Ex.A1 as "Pidhirajyam" (Ancestral property) and also Exs.A19, 24, 45 and 46 and in deciding the lis by holding as though there was no blending or treating the suit properties as joint family properties?

(2) Whether the courts below were justified in upholding Exs.A13 and A14 the settlement deeds and Ex.B24 the Will as valid, even though those documents according to the plaintiff were not allegedly proved by the propounder of those documents as per law?

(3) Whether the Courts below were justified in rendering judgment, without referring to Order 2 Rule 2 of CPC despite a plea taken in that regard in the written statement?

(4) Whether there is any perversity or illegality in the judgments of both the fora below?" That thereafter, by the impugned Judgment and Order and after re appreciating the entire evidence on record, the High Court has answered the aforesaid questions of law/substantial questions of law as under :

"Substantial Question of Law (1) is decided to the effect that both the Courts below were not justified in holding that the generosity shown by Sengoda Gounder should

not be treated as an act of blending of the suit properties with the ancestral properties and the Courts below were not justified in ignoring the factum of describing the properties found in Ex.A1 as "Pidhirajyam" (Ancestral property) and also Exs. A19, 24, 45 and 46 in deciding the lis by holding as though there was no blending or treating the suit property as a joint family property.

Substantial Question of Law No.(2) is decided to the effect that the courts below were justified in upholding the execution of Exs.A13 and A14 the settlement deeds and Ex.A24 the Will, however, in view of my discussion supra Sengoda Gounder had no competence to execute the settlement deeds treating the suit property as self acquired property in entirely, but his 1/3rd share could only be considered as the one relinquished by him in favour of the remaining two coparceners namely, his sons. Wherefore, the suit property shall be divided into two shares. The plaintiff and the defendant shall be entitled to half share each in the suit property.

Substantial Question of Law No.(3) is decided to the effect that the Courts below were justified in rendering judgment, without referring to Order 2 Rule 2 of CPC, in view of my finding supra that the cause of action for seeking partition is a continuing one." Consequently, the High Court has allowed both the appeals and set aside common Judgment and Decree of the Trial Court as well as the First Appellate Court and has directed to draw the preliminary decree for partition allotting half share each in favour of the plaintiff and the defendant.

4.4 Feeling aggrieved and dissatisfied with the impugned Judgment and Order passed by the High Court by which, while exercising powers under Section 100 of the CPC, the High Court has re appreciated the entire evidence on record and has set aside the findings of facts recorded by both the Courts below, the original defendant has preferred the present appeals.

5. Shri Siddharth Naidu, learned Advocate has appeared on behalf of the appellant original defendant and Shri V Prabhakar, learned Advocate has appeared on behalf of the Respondent No.1 original plaintiff.

6. Shri Siddharth Naidu, learned Advocate appearing on behalf of the original defendant has vehemently submitted that in the facts and circumstances of the case, the High Court has manifestly committed a grave error in allowing the appeals and interfering with the findings of facts recorded by the Courts below. 6.1 It is vehemently submitted by Shri Siddharth Naidu, learned Advocate appearing on behalf of the original defendant that by passing the impugned Judgment and Order, the High Court has exceeded in its jurisdiction while exercising powers under Section 100 of the CPC.

6.2 It is further submitted by Shri Siddharth Naidu, learned Advocate appearing on behalf of the original defendant that as held by this Court in catena of decisions and

even as per Section 100 of the CPC, while exercising powers under Section 100 of the CPC, the High Court is not required to re□appreciate the entire evidence on record as if the High Court is deciding the first appeal.

6.3 It is further submitted by Shri Siddharth Naidu, learned Advocate appearing on behalf of the original defendant that the substantial questions of law framed by the High Court cannot be said to be the substantial questions of law at all. It is submitted that Section 100 of the CPC provides for a second appeal only on the substantial questions of law. It is submitted that even second appeal is not required to be entertained on question of law only.

It is submitted that the question of law must be a substantial question of law and not mere a question of law. It is submitted that the substantial questions of law formulated and framed by the High Court, while deciding the second appeals, cannot be said to be substantial questions of law at all. It is submitted that on the face of it, even the substantial questions of law formulated and framed by the High Court, are the questions of fact. It is submitted, therefore, the High Court has committed a grave error in allowing the Second Appeals.

6.4 It is further submitted by Shri Siddharth Naidu, learned Advocate appearing on behalf of the original defendant that even otherwise, the impugned Judgment and Order passed by the High Court cannot be sustained in as much as while exercising powers under Section 100 of the CPC, the High Court has re□appreciated the entire evidence on record, which is wholly impermissible. It is submitted that so far as the question of fact is concerned, the First Appellate Court is the final Court on facts. It is submitted that unless and until the findings recorded are found to be perverse and/or contrary to the evidence on record, the High Court would not be justified in upsetting such findings recorded by the Courts below, more particularly, the First Appellate Court. It is submitted that in the present case, if we see the entire Judgment and Order passed by the High Court, the High Court has re□appreciated the entire evidence on record and has given its own conclusion and findings and thereafter has interfered with the findings of facts recorded by both the Courts below, which were on appreciation of evidence, which is wholly impermissible. In support of his above submissions and on the scope and ambit of the jurisdiction of the High Court while deciding the second appeal under Section 100 of the CPC, learned counsel appearing on behalf of the appellant has heavily relied upon the decisions of this Court in the case of Panchugopal Barua v. Umesh Chandra Goswami, (1997) 4 SCC 713; Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722; Ishwar Dass Jain v. Sohan Lal, (2000) 1 SCC 434.

6.5 It is further submitted by Shri Siddharth Naidu, learned Advocate appearing on behalf of the original defendant that even otherwise the grounds on which the High Court has held that there was blending of the suit properties with the ancestral properties, are not sustainable.

6.6 It is further submitted by Shri Siddharth Naidu, learned Advocate appearing on behalf of the original defendant that admittedly and even as per the High Court also, the suit properties were self□acquired properties of Sengoda Gounder (father) because those properties were obtained by him not from his direct male ancestors but from his mother's sister's husband. It is submitted that

therefore, merely because as Sengoda Gounder and his two sons were residing together and some loan on land might have been taken by all of them, it cannot be said that there was a blending of the suit properties with the ancestral properties by Sengoda Gounder. It is submitted that it was the specific case on behalf of the defendant that the loan was repaid/discharged by Sengoda Gounder from out of the income derived by him from the suit property itself.

6.7 It is further submitted by Shri Siddharth Naidu, learned Advocate appearing on behalf of the original defendant that the fact that the father Sengoda Gounder, during his lifetime, executed two settlement deeds Exhibits A13 & A14 and subsequently he also executed Exhibit B24, a will dated 08.11.2004, the same is suggestive of the fact that there was no intention of the father Sengoda Gounder to blend the suit properties with the joint family properties. It is submitted that as such the High Court has specifically observed and held that the Courts below were justified in upholding the execution of Exhibits A13 & A14 the Settlement Deeds and Exhibit B24 the Will. It is submitted that however, thereafter the High Court has erred in holding that the Sengoda Gounder had no competence to execute the Settlement Deeds treating the suit property as self acquired property in entirely, but his one third share could only be considered as the one relinquished by him in favour of the remaining two coparceners namely his sons.

6.8 Making the above submissions and relying upon the above decisions of this Court, it is prayed to allow the present appeals and quash and set aside the impugned Judgement and Order passed by the High Court and consequently restore the Judgement and Decree passed by the Courts below dismissing the suits.

7. Shri V. Prabhakar, learned counsel appearing on behalf of the original plaintiff while opposing the present appeals has vehemently submitted that as such the High Court was cautious of its limitations while deciding the Second Appeals under Section 100 of the CPC. It is submitted that however, as the High Court found that both the Court below have not properly appreciated the relevant material and evidence on record, more particularly, Exhibit A1 and also Exhibits A19,24,45, & 46, thereafter the High Court has rightly held that there was a blending of the suit properties with the joint family properties/ancestral properties by Sengoda Gounder. 7.1 It is submitted by Shri V. Prabhakar, learned counsel appearing on behalf of the original plaintiff that cogent reasons have been given by the High Court while holding that the generosity shown by Sengoda Gounder should be treated as an act of blending of the suit properties with the ancestral properties/joint family properties.

7.2 It is further submitted by Shri V. Prabhakar, learned counsel appearing on behalf of the original plaintiff that after considering the Sale Deed dated 05.02.1975 Exhibit A10 and Sale Deed dated 25.03.1977 Exhibit A2, by which some of the properties specified in Exhibit A1 Settlement Deed dated 07.04.1956, were sold treating the same as ancestral properties, the High Court has rightly held that thereafter there was a blending of suit properties with the ancestral properties by Sengoda Gounder and all the properties specified in Exhibit A1 Settlement Deed dated 07.04.1956 were treated as joint family properties. It is submitted that thereafter and having found so, the High Court has rightly held that once there was blending of the suit properties with the ancestral properties by Sengoda Gounder, thereafter it was not open for him and/or Sengoda Gounder had no

competence to execute the settlement deeds and/or will treating the suit properties as self□acquired properties in entirely.

7.3 Now, so far as the submissions made by the learned counsel appearing on behalf of the appellants that while passing the impugned Judgment and Order, the High Court has re□ appreciated the entire evidence on record is concerned, it is submitted by Shri V. Prabhakar, learned counsel appearing on behalf of the original plaintiff that while discussing and/or deciding the substantial questions of law, the High Court is bound to consider and/or appreciate the evidence on record and to reach to a conclusion that the findings recorded by the Courts below are perverse or contrary to the evidence on record. It is submitted therefore that appreciation of evidence by the High Court while deciding the second appeals in exercise of its powers under section 100 of the CPC, is permissible.

7.4 Making the above submissions it is prayed to dismiss the present appeals.

8. Heard learned Counsel appearing on behalf of the respective parties at length.

8.1 At the outset, it is required to be noted that as such, both, the learned Trial Court as well as the First Appellate Court dismissed the suits, more particularly, the suit for partition filed by the original plaintiff by holding that the suit properties were not ancestral properties of Sengoda Gounder but were self□acquired properties of Sengoda Gounder. That on appreciation of evidence, both the Courts below specifically came to the conclusion that, as such, there was no blending of the suit properties with the ancestral properties by Sengoda Gounder. However, the said findings recorded by both the Courts below have been upset and set aside by the High Court, while deciding the second appeals in exercise of its powers under Section 100 of the CPC. We have gone through and considered the findings recorded by the learned Trial Court as well as the First Appellate Court. On appreciation of entire evidence on record, more particularly, the documentary evidence which came to be considered by the High Court as Exhibit A1 and Exhibits A 19, 24, 45 and 46, thereafter both the Courts below came to the conclusion that there was no blending or treating of the suit property as a joint family property. Despite the above, the High Court while passing the impugned common Judgment and Order, has re□appreciated the entire evidence on record including the documentary evidence which as such were considered by both the Courts below and has upset the findings of facts recorded by both the Courts below on the blending of suit property as a joint family property and has given its own findings, which in exercise of its powers under Section 100 of the CPC is wholly impermissible. As per catena of decisions of this Court, while deciding the second appeal under Section 100 of the CPC, the High Court is not required to re□appreciate the entire evidence on record and to come to its own conclusion and the High Court cannot set aside the findings of facts recorded by both the Courts below when the findings recorded by both the Courts below were on appreciation of evidence. That is exactly what is done by the High Court in the present case while deciding the second appeals, which is not permissible under the law. 8.2 Even otherwise, it is required to be noted that as per catena of decisions of this Court and even as provided under Section 100 of the CPC, the Second Appeal would be maintainable only on substantial question of law. The Second Appeal does not lie on question of facts or of law. The existence of ‘a substantial question of law’ is a sine qua non for the exercise of the jurisdiction under

Section 100 of the CPC. As observed and held by this Court in the case of Kondiba Dagadu Kadam (Supra), in a second appeal under Section 100 of the CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being:

(i) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on in□admissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal. It is further observed that the Trial Court could have decided differently is not a question of law justifying interference in Second Appeal.

8.3 When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in the case of Ishwar Dass Jain (Supra). In the aforesaid decision, this Court has specifically observed and held :

> "Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise." 8.4 Applying the law laid down by this Court in the aforesaid decisions and the substantial questions of law formulated/framed and answered by the High Court, reproduced hereinabove, it cannot be said that the said questions of law can be said to be substantial questions of law. All can be said to be questions of law or questions of fact and cannot be said to be Substantial Questions of law.
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> 8.5 As observed hereinabove, while passing the impugned Judgment and Order, the High Court has re□appreciated the entire evidence on record as if the High Court was deciding the first appeal. By the impugned Judgment and Order, while exercising the powers under Section 100 of the CPC and on re□appreciation of entire evidence on

record, the High Court has set aside the findings of facts recorded by both the Courts below on blending of the suit properties with the joint family properties.

The same is wholly impermissible. So far as the facts are concerned, the First Appellate Court is the final court and unless and until the findings of facts recorded by the Courts below are found to be manifestly perverse and/or contrary to the evidence on record, the High Court would not be justified in setting aside the findings of facts recorded by the Courts below which were on appreciation of evidence on record. It is not permissible for the High Court to re-appreciate the entire evidence on record and come to its own finding when the findings recorded by the Courts below, more particularly, the First Appellate Court are on appreciation of evidence. Therefore, the procedure adopted by the High Court while deciding the Second Appeals, is beyond the scope and ambit of exercise of its powers under Section 100 of the CPC.

9. Even otherwise, on merits also, the High Court has erred in holding that there was blending of the suit properties with the joint family properties by Sengoda Gounder. It is an admitted position that and even as observed and held by the High Court, the suit properties were self-acquired properties of Sengoda Gounder pursuant to the Settlement Deed Exhibit A1 dated 07.04.1956 as the properties were obtained by Sengoda Gounder not from his direct male ancestors but from his mother's sister's husband. High Court also held that when some of the properties were sold, some of these properties specified in Exhibit A1 dated 07.04.1956-Settlement Deed were sold, in the recitals it was mentioned that the properties sold for urgent necessity of family expenses and farm expenses and it was mentioned that the same properties were belonging to them jointly through their ancestors However, considering the documentary evidence, more particularly, the settlement deeds Exhibits A13 and A14 and Exhibit B24, Will, executed by the Sengoda Gounder himself, by which the same properties were given to the original defendant-his son Subramanian, the intention of the father-Sengoda Gounder was very clear and the suit properties were treated as the self-acquired properties and not the joint family properties. 9.1 Even the reasons given by the High Court that as the loans were taken on the suit properties for borewell, crop loan, electric motor pump set loan, jewel loan by all the three joint family members, namely Sengoda Gounder, Ramasamy and Subramanian and, therefore, there was a blending of the suit properties into join family properties also, cannot be accepted. As all the three were residing together and some loans might have been taken by the family members residing together, by that itself, it cannot be said that there was a blending of the suit properties into joint family properties. The law on the aspect of blending is well settled that property separate or self-acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein; but to establish such abandonment a clear intention to waive separate rights must be established. Clear intention to abandon the separate rights in the property must be proved. Even abandonment cannot be inferred from mere allowing other family members also to use the property or utilisation of income of the separate property out of generosity to support the family members. At this stage, it is required to be noted that there was a serious dispute regarding who repaid the loan. It was the plaintiff who claimed that he only discharged that loan, however, the defendant Subramanian contended that the loan was discharged by Sengoda Gounder from out of the income derived by him from the suit properties itself. In any case, when on appreciation of evidence on record including the documentary evidence which came

to be re□appreciated by the High Court, both the Courts below came to the conclusion that there was no blending of the suit properties into joint family properties, the High Court in exercise of its powers under Section 100 of the CPC, is not justified in reversing those findings which were on appreciation of evidence on record.

10 In view of the above and as per the reasons stated above, both the present appeals are allowed. Impugned common Judgment and Order passed by the High Court in S.A. Nos. 4 and 5 of 2009 is quashed and set aside and common Judgment and Decree passed by the Trial Court dismissing the suits are hereby restored. However, in the facts and circumstances of the case, there shall be no order as to costs.

.....J.
[L. NAGESWARA RAO]

New Delhi;
May 01, 2019.

.....J.
[M.R. SHAH]