Syeda Rahimunnisa vs Malan Bi (Dead) By Lrs. & Anr.Etc on 3 October, 2016

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Bench: J. Chelameswar, Abhay Manohar Sapre

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos. 2875-2879 OF 2010

Syeda Rahimunnisa .....Appellant(s)

VERSUS

Malan Bi (Dead) by L.Rs. & Anr. Etc. …Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1. These appeals by special leave are filed by the appellant-defendant against the common judgment dated 21.08.2008 of the High Court of Judicature, Andhra Pradesh at Hyderabad in S.A. Nos. 1151 of 1998, 76, 167, 168 and 169 of 1999 whereby the learned Single Judge of the High Court allowed the appeals filed by the respondents-plaintiffs, in consequence, set aside the decree and common judgment dated 15.10.1998 of the Court of Additional District Judge, Kurnool in A.S. Nos.56, 57, 58 59 and 60 of 1997 dismissing the first appeals filed by the respondents herein.

2. Facts of the case need mention, in brief, infra to appreciate the controversy involved in the appeals.

3. These appeals involve a short point. However, in order to appreciate the point, it is necessary to mention the relevant facts infra.

4. The two appellants – Smt. Syeda Rahimunnisa and Syed Hyder Hussaini are wife and husband whereas the respondent no. 1(a) to 1(f) are the legal heirs of one late Haji Mian being mother, wife, sons and daughters respectively.

5. The dispute between the two aforementioned families relates to the ownership and possession of portion of land (which is a part of entire area classified as Government Burial Poramboke) situated in Kurnool (AP) bearing S.No.35/5 renumbered as 35/5-C1/A-1 (hereinafter called "the suit-land").

6. The appellants filed two civil suits being O.S.No. 77 of 1994 and O.S.No 65 of 1995 against Haji Mian and others. The present respondent nos. 1(a) to 1(f) who were later added as party defendants are legal representatives of Haji Mian.

7. So far as O.S. No 77 of 94 is concerned, the appellants (plaintiffs) claimed therein eviction of the respondents from the suit-land. It was alleged that appellant no. 1 being the owner of the suit-land had inducted respondent no.1 (defendant no.1) as her tenant on a monthly rent of Rs.150/- for a period of three years on the strength of lease deed dated 01.06.1982. It was alleged that contrary to lease conditions and without appellants' consent, the respondent no.1 erected four huts and sublet to defendant nos.2 to 6 on monthly rent. It was also alleged that respondents denied appellants' title.

8. So far as O.S. no. 65 of 1995 is concerned, the appellants (plaintiffs) claimed therein money decree of Rs.5400/- towards damages for use and occupation of the suit-land for the period (01.07.1989 to 31.07.1992) i.e. 36 months and further at the rate of Rs.1507/- per month for preceding three years ending on 30.06.1992 against the respondents.

9. So far as the respondents are concerned, they filed three civil suits being O.S. No. 53 of 1993, O.S.No. 69 of 1994 and O.S.No. 71 of 1994 against the appellants in the Court of Principal Subordinate Judge, Kurnool.

10. So far as O.S.No.53 of 1993 is concerned, the respondents (plaintiffs) filed a suit against appellant No.1 and State of A.P. for a declaration that respondents are the owners of the suit-land and also they are entitled to claim permanent injunction against the appellants from interfering in their possession over the suit-land. The respondents in substance claimed title over the suit-land by adverse possession against the Government alleging that their predecessor were in possession of the suit-land for the last 100 years and on their death, respondents continued to remain in possession throughout and has, therefore, perfected their title by being in adverse possession to the exclusion of all, including the Government as owners.

11. So far as second suit being O.S.No. 69 of 1994 is concerned, it was filed by the respondents against the appellant no.1 and APEB to challenge the notice dated 07.06.1990 issued by APEB for disconnecting the electric supply to the respondents' structure. A relief of permanent injunction restraining the defendants (APEB) from giving effect to the notice was also prayed.

12. So far as the third suit being O.S.No. 71 of 1994 is concerned, the respondents filed this suit against the Municipality and the appellant no. 1 challenging therein the assessment made by the Municipality by which appellants names were entered in the register of Municipality in relation to the suit-land/structure. According to the respondents, they having perfected their title over the suit-land by adverse possession, their names should have been entered in place of the appellants names in the records of the Municipality.

13. Since all the aforementioned five suits were in relation to one suit- land and were between the same parties pending in different courts, all the five civil suits were clubbed together for disposal in accordance with law. Parties adduced common evidence in all the five civil suits.

14. By a common judgment and decree dated 22.04.1997, the learned trial judge dismissed three civil suits being O.S.Nos. 53 of 1993, 69 of 1994 and 71 of 1994 filed by the respondents, whereas decreed the appellants' two civil suits being O.S.Nos. 77 of 1994 and 65 of 1995. It was held that respondents in their suits failed to establish their title over the suit- land. It was held that since they failed to establish their title over the suit-land, a fortiori, they are not entitled to claim permanent injunction against the appellants over the suit-land. So far as appellants' two civil suits are concerned, it was held that appellants were able to establish the relationship of landlord and tenant between appellant No.1 and the respondent and hence they are entitled to claim the eviction of the respondents from the suit-land. It was also held that appellants are also entitled to claim the money by way of damages from the respondents for the period in question for the use and occupation of the suit-land as claimed in the suit.

15. The respondents felt aggrieved, filed five appeals being S.A. No 56 of 1997, 57 of 1997, 58 of 1997, 59 of 1997 and 60 of 1997 before the II Additional District Judge, Kurnool. By five separate judgments dated 15.10.1998, the first appellate court dismissed all the five appeals and affirmed the judgment and decree of the trial judge.

16. Felt aggrieved, the respondents filed five Second appeals before the High Court. The High Court admitted the appeals and by impugned order allowed the appeals and while setting aside the two courts judgment/decree remanded the cases to the trial court for fresh trial on merits by permitting the parties to amend the pleadings, to frame additional issues and to adduce the evidence. The concluding para of the High Court reads as under:-

> ".....in the light of the respective stands taken by the parties, without expressing any further opinion relating to the other aspects, this Court is inclined to set aside the Decrees and common judgment made by the Court of first instance and also the Decrees and judgments made by the appellate Court and remand these matters to the Court of first instance to record the evidence of P.W.4 in toto and also to permit the

> parties to let in further evidence relating to the identity of the property especially in the light of the admissions made by D.W.1 and record further findings if necessary permitting the parties to amend their respective pleadings and also setting additional issues as well and further permitting the parties to it in further evidence on such additional pleadings and additional issues as well which may arise for consideration in the peculiar facts and circumstances of the case."

17. Felt aggrieved, the appellants who are plaintiffs in their two civil suits and defendants in three civil suits filed by the respondents herein have filed these appeals by special leave.

18. Learned counsel for the appellants while assailing the legality and correctness of the impugned judgment urged four submissions.

19. Firstly, the learned counsel contended that the High Court erred in admitting the second appeals on questions, which according to him did not arise out of the case and in any case, the questions framed were not the substantial questions of law within the meaning of Section 100 of Code of Civil Procedure. Secondly, his contention was that High Court erred in setting aside the concurrent findings of facts recorded by the two courts below. It was his submission that these findings were binding on the High Court while hearing the second appeal. Thirdly, his contention was that there was no case made out by the respondents (who were appellants before the High Court in second appeals) before the High Court for remanding the cases to the trial court for de novo trial in the suits. It was urged that firstly it was nobody's case much less of the appellants before the High Court that the trial in the suits was unsatisfactory or/and that the parties were not afforded full opportunity to present their case; secondly, this objection was neither raised by the appellants before the first appellate court and nor before the High Court; thirdly, no question of law was framed by the High Court on the issue of remanding the cases to the trial court. In these circumstances, the remand order is wholly without jurisdiction and fourthly, learned counsel contended that both trial court and the first appellate court on proper appreciation of evidence having rightly held that the respondents failed to establish their title over the suit-land on their plea of adverse possession, whereas the appellants were able to establish the existence of relationship of landlord and tenant between the appellants and the respondents, therefore, these findings were binding on the High Court.

20. Per contra, learned counsel for the respondents supported the reasoning and the conclusion arrived at by the High Court and urged for its upholding.

21. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to accept the submissions urged by the learned counsel for the appellants, as in our view, it has force.

22. The questions which arise for consideration in these appeals are (i) whether the second appeal filed by the respondents involved any substantial question of law within the meaning of Section 100 of the Code of Civil Procedure Code, 1908 (for short "CPC") : (ii) whether the High Court was justified in admitting the respondents' second appeal on the questions framed and if so whether the

questions framed can be regarded as substantial questions of law arising out of the case; (iii) whether the High Court was justified in remanding the case to the trial court for de novo trial in all the five civil suits and (iv) whether the respondents were able to prove their title over the suit-land so also whether the appellants were able to prove the existence of relationship of landlord and tenant between the appellants and the respondents.

23. The scope of Section 100 of CPC while deciding the second appeal by the High Court has been the subject matter of several decisions of this Court and thus remains no more res integra. A reference to the two cases on this question would suffice.

24. A three-judge Bench of this Court in the case of Santosh Hazari vs. Purushottam Tiwari (Deceased) by LRs. reported in (2001) 3 SCC 179 speaking through R.C. Lahoti J (as His Lordship then was) examined the scope of Section 100 of CPC in detail and laid down the following propositions in paragraphs 9, 10, 12 and 14 as under:

> "9. The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal and if it does so it acts illegally and in abnegation or abdication of the duty cast on Court. The existence of substantial question of law is the sine qua non for the exercise of the jurisdiction under the amended Section 100 of the Code. (See Kshitish Chandra Purkait v. Santosh Kumar Purkait (1997) 5 SCC 438, Panchugopal Barua v. Umesh Chandra Goswami (1997) 4 SCC 413 and Kondiba Dagadu Kadam v. Savitribai Sopan Gujar (1999) 3 SCC 722)
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> 10. At the very outset we may point out that the memo of second appeal filed by the plaintiff-appellant before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on "substantial question of law involved in the case". An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature.

At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction.

12. The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means — of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with — technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. T. Ram Ditta (AIR 1928 PC 172), the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 110 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.(AIR 1962 SC 1314) the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju (AIR 1951 Mad 969):

> "When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law." and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:
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> "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."
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> 14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it

must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis".

25. Again in the case of Thiagarajan And Others vs. Sri Venugopalaswamy B. Koil And Others reported in 2004 (5) SCC 762, a two Judge Bench of this Court in paragraphs 17, 24, 25 and 26 observed as under:

"17. Sub-section (5) of Section 100 CPC 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 having miserably failed to record the reasons for formulating the other substantial questions of law.

24. 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.

25. 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.

26. 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 intendment 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".

Reverting to the facts of the case at hand and keeping in view the aforesaid principles of law in mind, we find that the High Court while admitting the second appeal had formulated the following questions:

> 1) Whether the finding of the Court below, that the suit site on O.S.No.53/93 in S.No.35/5, Ex.C.I AI and the leased site, surrendered by P.W.6 in S.No.35/5 CI A 19 arc one and the same, is vitiated by its failure to consider the admissions of D.W.I and the relevant documentary evidence, which establish that there was a sub-division of S.No.35/5, the suit site is S.No.35/5, CI Ex.A.I being a Government poramboke land and the site of the defendant classified as a "Darga Burial Ground Mosque", each distinct and different from the other? Admissions of D.W.I:-
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> 20 Whether the Court below have failed to see that Ex.A.2 (Gift deed being a thirty year old document, the presumption under Section 90 of Evidence Act applies, both with regard to execution and attestation, and as such the opinion of the trial Court that it is suspicious document, is untenable and unsustainable in law?

3) Whether the lower appellate Court erred in law in not framing proper points for consideration, on the validity of Ex.A.2 gift deed and the sub- division of suit property S.No.35/5 C1A1, as required under Order 41 Rule 31 C.P.C. and as such the Judgment of the lower appellate Court as a final Court of fact is vitiated by errors of law?

4) Whether the lower appellate Court has erred in law, in holding that Ex.A2 gift deed is invalid, because the property gifted is poramboke, when the Government itself (second defendant) has not disputed either the long possession or possessory title of the plaintiff of the suit property?

5) Whether the lower appellate Court has erred in law on the question of title, merely by adverting to Ex.A.3, Ex.A.4, Ex.A.5 – tax receipts, and the entire reasoning is based on mere guess work ignoring the relevant and clinching documentary evidence?

6) Whether the finding of the lower appellate Court that P.W.6 (plaintiff's son) did not vacate the site even after the lease period of the site S.No.35/5 C1A19 of D.I is not based on any evidence except the word of D.W.2 (no witnesses wee examined) and the conclusion reached by it that the suit site in O.S.No.53/93 and the leased site are the same, is contrary to the evidence on record?

7) Whether the lower appellate Court has erred in law in its failure to consider the admission of D.W.2 himself that his father encroached into the plaintiff's site and was issued B-Memos and paid the penalty, which conclusively establishes that the two sites are different and not one and the

same?

8) Whether the very approach of the lower appellate Court is essentially erroneous and its findings are liable to be set aside (AIR 1992 S.C., 1604)?

27. In our considered opinion, the aforementioned questions cannot be regarded as satisfying the test of being a "substantial questions of law"

> within the meaning of Section 100 of CPC. These questions, in our view, are essentially questions of fact. In any event, the second appeal did not involve any substantial questions of law as contemplated under Section 100 of CPC and lastly no case was made out by the respondents before the High Court for remanding of the case to the trial court for de novo trial in all the civil suits. This we say for following reasons.

28. Firstly, when the trial court and the first appellate court on appreciation of evidence concurrently held in three civil suits filed by the respondents that they failed to prove their title over the suit-land and further in two civil suits filed by the appellants that they were able to establish their relationship of landlord and tenant in relation to the suit-land, such findings, in our opinion, were binding on the High Court being concurrent in nature.

29. Secondly, none of the findings of the two courts below were perverse to the extent that no judicial person could ever come to such conclusion and that these findings were not in conflict with any provision of law governing the issue and that the findings were also not against the pleadings or evidence. In this view of the matter, in our view, these findings were not capable of being set aside by the High Court in exercise of its second appellate jurisdiction under Section 100 CPC, rather they were binding on the High Court.

30. Thirdly, apart from what is held above, the questions formulated were neither debatable nor arguable and nor did they involve any question of law which could be said to arise in the case. In other words, sine qua non for admitting the second appeal was existence of "substantial question of law in the case" and therefore unless the questions framed were debatable, or/and arguable or/and involving any legal question, the High Court had no jurisdiction to formulate such questions treating them to be substantial question of law. Indeed the High Court had the jurisdiction under sub-Section (5) of Section 100 of CPC to examine at the time of hearing as to whether the questions framed were substantial questions of law or not and whether they arose out of the case, but the High Court failed to do so.

31. Fourthly, having formulated the questions (though wrongly), the High Court went on to discuss all the issues in 59 pages as if it was hearing first appeals and instead of answering the questions, set aside the judgment/decree of the two courts below and proceeded to remand the cases to the trial court for de novo trial in all civil suits. In our opinion, the High Court had no jurisdiction to remand the case to the trial court inasmuch as no party to the appeal had even raised this ground before the first appellate court or/and the High Court as to why the remand of the case to the trial Court is

called for and nor there was any finding recorded on this question by the first appellate court.

32. We also find that no party to the appeals complained at any stage of the proceedings that the trial in the suits was unsatisfactory which caused prejudice to them requiring remand of the cases to the trial court to enable them to lead additional evidence. In any event, we find that the High Court also did not frame any substantial question of law on the question as to whether any case for remand of the case to the trial court has been made out and if so on what grounds?

33. Section 100 empowers the High court to decide the second appeal only on the questions framed. In other words, the jurisdiction of High Curt to decide the second appeal is confined only to questions framed. When the High Court did not frame any question on the question of remand, to the trial court a fortiori it had no jurisdiction to deal with such question much less to answer in respondent's favour.

34. The High Court, in our view, further failed to see that if the first appellate court could decide the appeal on merits without there being any objection raised for remanding of the case to the trial court, we are unable to appreciate as to why the High Court could not decide the appeal on merits and instead raised the issue of remand of its own and passed the order to that effect.

35. It is a settled principle of law that in order to claim remand of the case to the trial court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the appellate court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The appellate court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the trial court. In the absence of any ground taken by the respondents (appellants before the first appellate court and High Court) before the first appellate court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial court. The High Court instead should have decided the appeals on merits. We, however, do not consider proper to remand the case to High Court for deciding the appeals on merits and instead examine the merits of the case in these appeals.

36. We, however, find no error in the judgment of the first appellate court, which in our view rightly upheld the judgment and decree of the trial court.

37. Indeed, it is clear from mere reading of the pleadings. The main case set up by the respondents for claiming title over the suit-land was founded only on the plea of adverse possession against the State. In other words, the respondents' case was that they acquired title over the suit- land on the strength of their adverse possession in the suit-land through their predecessors who were in continuous possession over the suit-land for the last 100 years qua state. The respondents did not claim title on the strength of any grant or Lease Deed or Patta etc. issued by the State in their favour.

38. The only question which, therefore, arose for consideration before the courts below was whether the respondents were able to establish their adverse possession over the suit-land as against the State so as to entitle them to claim title in their favour over the suit-land.

39. The respondents having set up this plea were required to prove it with the aid of satisfactory evidence as the burden of proof lay on them being the plaintiffs. As observed (supra), both the courts held on appreciation of evidence that the respondents were failed to establish their adverse possession over the suit-land qua State for want of adequate evidence. It being a question of fact, a finding on this question was binding on the High Court unless any error of law in such finding had been pointed out. It was not so pointed out.

40. We also find that the High Court had framed one question on the validity of one gift. This question in our view was of no significance for deciding the main question involved in this case. It is for the reason that the dispute in this case was between the respondents on the one hand and the State on the other relating to the title which was claimed by the respondents on the basis of their adverse possession and to decide this question, execution of gift inter se two members of respondents' family was of no relevance.

41. In these circumstances, the alleged gift whether executed between the two members of respondents' family or not and if so whether it was valid or not, did not arise out of the case. It is apart from the fact that it did not constitute any substantial question of law within the meaning of Section 100 of CPC.

42. In the light of foregoing discussion, we are of the considered opinion that the reasoning and the conclusion arrived at by the High Court is not legally sustainable and is accordingly liable to be set aside.

43. As a consequence, these appeals succeed and are hereby allowed. The impugned judgment is set aside and the judgment/decree of the first appellate court and that of the trial court are hereby restored.

44. The respondent no.1 to pay costs quantified at Rs.10,000/- to the appellants.

.....J. [J. CHELAMESWAR] .....J. [ABHAY MANOHAR SAPRE] New Delhi;

October 03, 2016
