REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.5057 OF 2009

Narayana Gramani & Ors. ....Appellant(s)

VERSUS

Mariammal & Ors. ...Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1. This appeal is filed by the plaintiffs against the final judgment and order dated 09.07.2007 passed by the High Court of Judicature at Madras in Second Appeal No.652 of 1995 whereby the Single Judge of the High Court allowed the second appeal filed by defendant Nos.2 to 5 and set aside the judgment and decree dated 05.08.1994 passed by the Additional

Subordinate Judge, Chingalpattu in A.S. No.72 of 1993 and dismissed the suit filed by the appellants herein.

2. In order to appreciate the issues involved in the appeal, which lie in a narrow compass, few facts need mention hereinbelow.

3. Appellant Nos. 1 and 2 are the plaintiffs whereas appellant No. 3 is the legal representative of third plaintiff-Thirunavukkarasu, who died pending litigation. The respondents are defendants in the civil suit.

4. The three plaintiffs claiming to be the members of one family filed a civil suit against the defendants for a declaration and permanent injunction in relation to the land situated at No. 294/1 Vembanur Village, Kadapakkam Firka, (patta No. 491), Old Paimash No. 201/8 renumbered as S. No 399/4, Acs. 1.08 (hereinafter referred to as "suit land").

5. The plaintiffs traced the title to the suit land through their predecessor-in-title coupled with Patta issued by the Estate Manager in relation to the suit land. According to the plaintiffs, there had been a family partition *inter se* the plaintiffs wherein the suit land fell to their share. The plaintiffs alleged that they have been in possession of the suit land, invested money and paying revenue taxes. The plaintiffs alleged that the defendants are trying to disturb their possession over the suit land without any legal authority and are also asserting their title over the suit land, which they do not have in their favour and hence there arise a need to file the civil suit and claim declaration and permanent injunction in relation to the suit land.

6. The defendants filed their written statement and denied the plaintiffs' claim over the suit land. According to them, they are the owners of the suit land having purchased the same vide sale deed dated

15.02.1967 for Rs.200/- from one Muthu Mudaliar and his son Rajaram Mudaliar who, according to the defendants, were the owners of the suit land. Defendant No. 1 also claimed to be in possession of the suit land and cultivating the same.

7. The Trial Court framed two issues, viz., (1) Whether the plaintiffs are entitled for seeking declaration and permanent injunction; and (2) If so, for what reliefs. Parties adduced their evidence (oral and documentary). By Judgment and decree dated 23.11.1993, the Trial Court decreed the plaintiffs' suit. It was held that the plaintiffs are able to prove their ownership over the suit land on the basis of the documents filed by them; that the plaintiffs are in possession of the suit land; that they are, therefore, entitled to claim a declaration of their title over the suit land as its owners so also are entitled to claim permanent injunction against the defendants

restraining them from interfering in their (plaintiffs') peaceful possession over the suit land.

8. The defendants felt aggrieved and filed first appeal before the Additional Sub-Judge (Appeal Suit No. 72/1993). By Judgment dated 05.08.1994, the Appellate Court dismissed the defendants' appeal and affirmed the judgment and decree passed by the Trial Court.

9. The defendants pursued the matter further and filed second appeal in the High Court at Madras. The High Court admitted the second appeal on the following substantial question of law:

> **"Whether the same judge can dismiss an appeal on the ground that he has already rejected the appellants' case in an earlier appeal against different parties in the absence of pleadings of rejudicata or estoppel by judgment by neither of the parties, especially when the issue is pending for decision before the High Court by way of second appeal."**

10. By impugned judgment, the High Court allowed the appeal and set aside the judgment and decree of the two courts below and, in consequence, dismissed the suit giving rise to filing of the present appeal by way of special leave in this Court by the plaintiffs.

11. The short question, which arises for consideration in this appeal, is whether the High Court was justified in allowing the defendants' appeal and, in consequence, dismissing the plaintiffs' suit which was decreed by the two Courts below.

12. Mr. MSM Asaithambi, learned counsel appeared for the appellants. Despite notice, none appeared for the respondents.

13. Having heard the learned counsel for the appellants and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside the impugned judgment remand the case to the High Court for deciding the appeal afresh on merits in

accordance with law after framing appropriate substantial question of law as indicated below.

14. Before we examine the facts of the case, it is necessary to see the scope of Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"), which empowers the High Court to decide the second appeals. Indeed, it is explained in several decisions of this Court and thus remains no more *res integra.*

15. Section 100 of the Code reads as under:

"100. Second appeal.- (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 formulated by it, if it is satisfied that the case involves such question."

16. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case

involves a "substantial question of law". Sub- section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section(4). The respondent, however,

at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of respondent and, therefore, sub-section(5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognizes the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of

hearing of the appeal. (See **Sanatosh Hazari** vs. **Purushottam Tiwari** [(2001) 3 SCC 179] and **Surat Singh** vs. **Siri Bhagwan & Ors.** [(2018) 4 SCC 562]

17. Keeping in view the scope and ambit of the powers of the High Court while deciding the second appeal when we advert to the facts of the case, we find that the High Court committed an error in allowing the defendants' second appeal and further erred in dismissing the plaintiffs' suit by answering the substantial question of law. This we say for more than one reason.

18. First, mere perusal of the impugned order would go to show that the High Court had admitted the second appeal by framing only one substantial question of law, namely, whether the first Appellate Court was justified in dismissing the defendants' first appeal by taking into consideration one earlier

litigation in relation to the suit land, which was not between the same parties.

19. The High Court held that the first Appellate Court was not justified because the earlier litigation was not between the present plaintiffs and the defendants but it was between the different parties and, therefore, any decision rendered in such litigation would not operate as *res judicata* in the present litigation between the parties. This resulted in allowing of the appeal and dismissing the suit.

20. The High Court (Single Judge), in our opinion, failed to see that even if the said question was answered in defendants' favour, yet the plaintiffs' suit could not have been dismissed much less in its entirety unless the High Court had further examined the main issue of ownership of the plaintiffs over the suit land, which was decided by the two Courts below in plaintiffs' favour on merits.

21. In other words, we are of the view that it was necessary for the High Court to have proceeded to examine the issue relating to the plaintiffs' title over the suit land, which was decided by the two Courts in plaintiffs' favour holding that the plaintiffs were able to prove their title over the suit land on the basis of documentary evidence whereas the defendants failed to prove their title though asserted.

22. Second, the High Court committed another error when it failed to frame any substantial question of law on the issue of the plaintiffs' ownership over the suit land.

23. So long as no substantial question of law was framed, the High Court had no jurisdiction to examine the said issue in its second appellate jurisdiction. In other words, the High Court having framed only one question, which did not pertain to issue of ownership of the suit land, had no jurisdiction to examine the issue of ownership. It was not permissible in the light

of Section 100 (5) of the Code, which empowers the High Court to decide the appeal only on the question framed and not beyond it.

24. Third, the High Court could invoke its powers under proviso to sub-section (5) of Section 100 and frame one or two additional questions, as the case may be, even at the time of hearing of the second appeal. It would have enabled the High Court to examine the issue of ownership of the suit land in its correct perspective. It was, however, not done by the High Court.

25. Fourth, the High Court, while examining the question framed, also cursorily touched the ownership issue which, in our opinion, the High Court could not have done for want of framing of any substantial question of law on the ownership issue. That apart, the High Court also failed to see that the issue of *res judicata* and the issue of ownership were independent issues and the decision on one would not have

answered the other one. In other words, both the issues had to be examined independent of each other on their respective merits. It was, however, possible only after framing of substantial questions on both the issues as provided under Section 100(4) and (5) of the Code. This was, however, not done in this case.

26. In the light of aforementioned four reasons, we are of the considered opinion that the impugned judgment is not legally sustainable and, therefore, it has to be set aside.

27. Since the High Court failed to examine the issue of ownership of the plaintiffs on its merits for want of framing of the substantial question(s) of law, the matter has to be remanded to the High Court for deciding the question as to whether two Courts below were right in their respective jurisdiction in holding that the plaintiffs were able to prove their title over the suit land on the basis of evidence (oral/documentary)

adduced by them and, if so, whether such finding should be upheld or not.

28. In view of the foregoing discussion, the appeal succeeds and is allowed. Impugned order is set aside. The case is remanded to the High Court for deciding the second appeal afresh on merits in accordance with law by properly framing the substantial question(s) of law on the question of ownership of the plaintiffs over the suit land and then to examine as to whether the findings on the said question recorded by two Courts suffer from any error(s) or not.

29. We, however, make it clear that we have not applied our mind on the merits of the controversy having formed an opinion to remand the case to the High Court for deciding the appeal afresh as observed above and, therefore, the High Court will decide the appeal strictly in accordance with law uninfluenced by any of our observations.

30. Since the matter is quite old, we request the High Court to decide the appeal as expeditiously as possible preferably within 6 months from the date of this judgment.

.....J.
[ABHAY MANOHAR SAPRE]

.....J.
[VINEET SARAN]

New Delhi;
September 11, 2018