REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7109 of 2021
(Arising out of S.L.P.(C)No.25119 of 2019)

HASMAT ALI …APPELLANT(S)

VERSUS

AMINA BIBI & ORS. …RESPONDENT(S)

J U D G M E N T

S. ABDUL NAZEER, J.

1. Leave granted.

2. This appeal is preferred against the Order dated 31.07.2019 passed by the High Court of Orissa at Cuttack in Regular Second Appeal No.403 of 2017 whereby the High Court had dismissed the appeal *in limine* thereby confirming the judgment dated 04.08.2017 passed by the Additional District Judge, Rourkela, in RFA No.15 of 2015.

3. Late Md. Mukim, who expired during the trial, was the plaintiff and Hasmat Ali was defendant in the Civil Suit No.15 of 2009 on the file of the Civil Judge, Senior Division, Rourkela. This suit was filed to seek a declaration

that the defendant was a tenant of the plaintiff till 31.03.2003, eviction of the defendant from the suit scheduled property and for certain other reliefs. The defendant entered appearance in the said suit and filed the written statement. After trial, the suit was decreed in part on 21.07.2015 and the defendant was directed to deliver vacant possession of the suit shop to the plaintiff.

4. The defendant challenged the said judgment by filing an appeal and the Appellate Court dismissed the appeal on 04.08.2017. It is unnecessary to record the other factual matrix of the case for the purpose of deciding the question involved in this appeal.

5. The defendant filed regular second appeal before the High Court and the High Court dismissed the said appeal *in limine*. The order of the High Court dismissing the appeal is as under:

R.S.A. No. 403 of 2017

SI. No. of Order	Date of Order	ORDER WITH SIGNATURE	Office note as to action (if any), taken on Order
9	31.07.2019	Heard Sri Mishra, learned senior counsel for the appellant. Considering the submission made herein and going through the question of law, this Court does not find any question of law for admitting the Second Appeal for which the Second Appeal stands dismissed. Sd/-	

6. The order of the High Court is challenged by the defendant mainly on the ground that it is not supported by any reasons. Learned counsel for the appellant submits that the findings of the Trial Court and also by the First

Appellate Court are bad in law. He submits that the appeal involves substantial questions of law and that the High Court ought to have entertained the appeal for considering these questions of law. It was argued that, at any rate, the High Court was not justified in dismissing the appeal *in limine*.

7. On the other hand, learned counsel appearing for the respondent has supported the order of the High Court.

8. Having regard to the contentions urged, the only question for consideration is whether the High Court was justified in dismissing the second appeal, filed under Section 100 of the CPC, *in limine.*

9. Section 100 of the CPC 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 involve a substantial question of law.
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> (2) An appeal may lie under this section from an appellate decree passed ex-parte.
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> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
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> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
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> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

10. Rules 1 to 3 of Order XLII of the CPC provide for procedure for deciding a second appeal in the following terms:

> "Order XLII
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> **APPEALS FROM APPELLATE DECREES**
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> 1. **Procedure.—**The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.
> 2. **Power of Court to direct that the appeal be heard on the question formulated by it.—**At the time of making an order under rule 11 of Order XLI for the hearing of a second appeal, the Court shall formulate the substantial question of law as required by section 100, and in doing so, the Court may direct that the second appeal be heard on the question so formulated and it shall not be open to the appellant to urge any other ground in the appeal without the leave of the Court, given in accordance with the provision of section 100.
> 3. **Application of rule 14 of Order XLI.—**Reference in sub-rule (4) of rule 14 of Order XLI to the Court of first instance shall, in the case of an appeal from an appellate decree or order, be construed as a reference to the Court to which the appeal was preferred from the original decree or order."

11. It is clear from the aforesaid provisions, particularly, sub-section (5) of Section 100 of the CPC, that an appeal shall be heard only on the questions formulated by the High Court under sub-section (4) thereof. The expression 'appeal' has not been defined in the CPC. Black's Law Dictionary (7th Edn.) defines an appeal as "a proceeding undertaken to have a decision reconsidered

by bringing it to a higher authority." An appeal is judicial examination by a higher court of a decision of a subordinate court to rectify any possible error(s) in the order under appeal. The law provides the remedy of an appeal because of the recognition that those manning the judicial tiers too commit errors. In **Shankar Ramchandra Abhyankar** v**. Krishnaji Dattatreya Bapat**[1], it was held thus:

> "5.……In the well known work of *Story on Constitution* (of United States), Vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the Legislature may choose to prescribe. According to Article 1762 the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial……."

12. Order XLII of the CPC provides for the procedure to be followed while deciding appeals from the appellate decrees. It states that the Rules of Order XLI shall apply, **so far as may be,** to the appeals from appellate decrees. Words such as "so far as may be" or "insofar as" mean 'as much' or 'to the extent' or 'to such extent'. By virtue of Order XLII Rule 1, the provisions of Order XLI are applicable to second appeal as well, though not in their entirety, but to certain extent. Having regard to the mandate contained in Order XLII, the

1 1969 (2) SCC74

High Court, while hearing a second appeal, has to follow the procedure contained in Order XLI to the extent possible.

13. Section 100 of the CPC provides for a right of second appeal by approaching a High Court and invoking its aid and interposition to redress error(s) of the subordinate court, subject to the limitations provided therein. An appeal under Section 100 of the CPC could be filed both against the 'concurrent findings' or 'divergent findings' of the courts below. Sub-section (1) of Section 100 of the CPC states that a second appeal would be entertained by the High Court only when the High Court is satisfied that the case 'involves a substantial question of law'. Therefore, for entertaining an appeal under Section 100 of the CPC, it is immaterial as to whether it is against 'concurrent findings' or 'divergent findings' of the courts below. It is needless to state that even when any concurrent finding of fact is appealed, the appellant is entitled to point out that it is bad in law because it was recorded *de hors* the pleadings, or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against the provision of law or the decision is one which no Judge acting judicially could reasonably have reached. Once the High Court is satisfied, after hearing the appeal, that the appeal involves a substantial question of law, it has to formulate that question and direct issuance of notice to the respondent.

14. In case the appeal does not involve any substantial question of law, the High Court has no other option but to dismiss the appeal. However, in order to come to a conclusion that the appeal does not involve any substantial of law, the High Court has to record the reasons. Giving reasons for the conclusion is necessary as it helps the adversely affected party to understand why his submissions were not accepted. The Court must display its conscious application of mind even while dismissing the appeal at the admission stage. In our view, the High Court cannot dismiss the second appeal *in limine* without assigning any reasons for its conclusion.

15. In **Surat Singh (Dead) v. Siri Bhagwan and Others**[2], this Court has laid down that for dismissal of a second appeal without being admitted, the High Court is required to assign reasons. It was held thus:

> "**29.** The scheme of Section 100 is that once the High Court is satisfied that the appeal involves a substantial question of law, such question shall have to be framed under sub-section (4) of Section 100. It is the framing of the question which empowers the High Court to *finally decide* the appeal in accordance with the procedure prescribed under sub-section (5). Both the requirements prescribed in sub-sections (4) and (5) are, therefore, mandatory and have to be followed in the manner prescribed therein. Indeed, as mentioned supra, the jurisdiction to decide the second appeal *finally* arises only after the substantial question of law is framed under sub-section (4). There may be a case and indeed there are cases where even after framing a substantial question of law, the same can be answered against the appellant. It is, however, done only after hearing the respondents under sub-section (5).

2 (2018) 4 SCC 562

> **30. If, however, the High Court is satisfied after hearing the appellant at the time of admission that the appeal does not involve any substantial question of law, then such appeal is liable to be dismissed in limine without any notice to the respondents after recording a finding in the dismissal order that the appeal does not involve any substantial question of law within the meaning of sub-section (4). It is needless to say that for passing such order *in limine*, the High Court is required to assign the reasons in support of its conclusion.**"
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> (emphasis supplied)

16. In the instant case, since the High Court has not assigned any reasons for the dismissal of the appeal, the order needs to be set aside. Therefore, the appeal succeeds and is accordingly allowed. The order of the High Court dated 31.07.2019 is set aside and the matter is remitted back to the High Court for fresh disposal in accordance with law and in the light of the observations made above. There shall be no order as to costs.

…….……J.
(S. ABDUL NAZEER)

…….……J.
(KRISHNA MURARI)

New Delhi;
November 29, 2021.