

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

CSA No. 10/2009
IA No. 99001/2009
IA No. 12/2009

Swarn Salaria

.... Appellant(s)

Through :- Ms. Mandeep Reen, Advocate

V/s

Baldev Raj Sharma & Ors.

...Respondent(s)

Through :- Mr. A V Gupta, Sr. Advocate with
Mr. Aditya Gupta, Advocate

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

JUDGMENT
15.05.2023

(ORAL)

1. The instant Civil Second Appeal filed under Section 100 of the Code of Civil Procedure (*herein, for short 'CPC'*) is directed against judgment and decree passed by the Court of Sub-Judge Katra dated 15.12.2008 in a suit titled as "*Baldev Raj Sharma vs. Swarn Salaria & Ors.*" (*for short, 'the Trial Court'*) as also judgment and decree passed by the Court of District Judge Reasi in an appeal titled as "*Swaran Salaria vs. Baldev Raj & Ors.*" dated 30.04.2009 (*for short, 'the Appellate Court'*).
2. The facts leading to the filing of instant Civil Second Appeal as emerging from the record would reveal that a suit for injunction came to be filed by the plaintiff/Respondent 1 herein before the trial court in respect of a patch of a land covered under Survey No. 17 situated at village Kundarodian, Katra (*for short, 'the Suit Land'*) impleading the present appellant as

defendant 1 besides other defendants, on the premise that the plaintiff/Respondent 1 herein is one of the co-owner in possession of the land covered under Survey No. 12, 14, 15, 16, 17, 18 & 212 situated at village Kundrorian Katra in terms of 04 sale deeds executed on 01.03.2000 and that the defendant 1/appellant herein had also purchased land measuring 42 Kanals under Survey No. 11 adjacent to the land of the plaintiff/Respondent 1 herein in terms of 03 sale deeds dated 19th and 20th of August, 1999 and constructed a hotel thereon under the name and style of Hotel SIM-SUM and for making an approach road for the said hotel, started cutting and digging land covered under Survey No. 17 without any legal authority or right amounting to interference into the land owned by the plaintiff/Respondent 1.

3. The suit (supra) is stated to have proceeded with the trial before the trial court and on 15.05.2006, the defendant/appellant herein came to be set exparte, whereafter, the defendant/appellant herein, appeared through his counsel on 27.04.2006, yet absented on 21.04.2006 and came to be proceeded exparte again on 19.02.2007, whereafter again, the defendant/appellant herein entered appearance through his counsel on 15.03.2007 and filed an application for setting aside exparte proceedings but again absented and came to be proceeded exparte on 20.08.2007.
4. On 12.11.2007, defendant/appellant filed 02 applications before the trial court wherein, objections came to be invited from the plaintiff/respondent herein, however, the defendant/appellant herein thereafter, did not appear in the matter, resulting into calling upon, the plaintiff/respondent herein by the trial court to produce evidence in exparte, whereafter, the trial court

decreed the suit in exparte in terms of impugned judgment dated 15.12.2008 in favour of the plaintiff/Respondent 1 herein and against defendants being the present appellant and Respondents 2 & 3 herein.

5. The defendant 1/appellant herein being aggrieved of the exparte judgment and decree instead of seeking setting aside of the said judgment and decree chose to assail the same in an appeal before the Appellate Court which appeal, however, came to be dismissed by the Appellate Court in terms of impugned judgment upholding the judgment and decree passed by the trial court.
6. The impugned judgment(s) and decree(s) are being assailed in the instant appeal on the grounds urged in the appeal. The appellant has drawn and proposed the following questions as “substantial questions of law” in the Memo of appeal:
 - A. That the judgment and decree of the trial court as well as the 1st Appellate court are not sustainable in the eyes of law, as such are required to be set aside being illegal, perverse and opposed to law.
 - B. Whether the suit of the plaintiff/Respondent No. 1 was maintainable in view of the intentional omission of Respondent No. 1 to array other co-owners with possession as parties in the suit?
 - C. Whether the court could have passed a judgment and decree by believing the statement of the Respondent No. 1 (plaintiff) to be in exclusive possession of the land under Khasra No. 17, in the absence of other joint owners of the said land, and particularly when all the sale-deeds placed on record by the plaintiff mentioning in clear terms that 85% share belongs to the other co-owners?

- D.** Whether the title and possession of the Respondent No. 1/plaintiff could have been deemed to be proved by the trial court and the 1st Appellate court even when the alleged private title documents were not proved by primary evidence by Respondent No. 1/plaintiff as mandated by Sec-64 of the Evidence Act?
- E.** Whether the trial court did not err in presuming the exclusive possession of the Respondent No. 1/plaintiff over Khasra No. 17, when the Khasra girdawaris produced by the plaintiff does not contain a whisper about the Respondent No. 1/plaintiff's possession thereon?
- F.** Whether the trial court could have proceeded to determine the possession over the land under Khasra No. 17, when even the patwari halqa produced as a witness by the Respondent No. 1/plaintiff does not depose a word about the possession of the Respondent No. 1/plaintiff over the Khasra No. 17?
- G.** Whether the trial court was legally competent to conclude the possession over Khasra No. 17 in favour of Respondent No. 1/plaintiff in absence of any revenue record and thus could pass a decree of injunction in his favour?
- H.** Whether by agreeing to the existence of road in his application for status-qua-ante by Respondent No. 1/plaintiff, the suit of the plaintiff is not rendered infructuous in view of the prayer made in the suit and the decree so passed in infructuous suit completely illegal?
- I.** Whether the Respondent No. 1/plaintiff waving off the implementation of the status-qua-ante order (Annexure G herewith)

as passed by the court and thus consenting to the existing position of usage of road of road in Khasra No. 17, as on the date of passing of said order dated 31.10.2008, dis-entitles the plaintiff to claim a decree of permanent prohibitory injunction?

- J.** Whether the courts below ignored the factum of usage of road by the appellant for his guests' ingress and egress and also by other villagers, even during the subsistence of the status-quo order passed by trial court?
- K.** Whether the trial court erred in law to proceed with the trial court without framing the points to be proved by the Respondent No. 1/plaintiff for determination by the court, even though the appellant was in ex-parte, in view of the law laid down by the Hon'ble Supreme Court of India in Ramesh Chand Ardawatiya's case?
- L.** Whether the trial court was right in proceeding with the trial and holding the plaintiff to be in possession of land under Khasra No. 17 to base a decree of injunction, even when the revenue record produced by the Respondent No. 1/plaintiff as also the statement of patwari concerned categorically assert that there was already a status-quo order passed by a superior court with respect to same subject matter?
- M.** Whether the trial court and the 1st Appellate court erred in law to proceed with the trial of the suit, by ignoring the application of the appellant/defendant under O.7 r.11 CPC striking at the jurisdiction of the civil courts and without conferring upon itself the jurisdiction?

- N.** Whether the trial court being a civil court had jurisdiction to try and decide about the nature and possession of the suit property, when the alleged title documents produced by the Respondent No. 1/plaintiff, themselves detail the land to be agricultural and the Respondent No. 1 purchasing it only for agricultural purposes?
- O.** Whether the judgment(s) and decree(s) by the court below are nullity as having been obtained by playing fraud upon the courts below when the same Respondent No. 1, acting as defendant in other suits concerning same subject-matter (including land under Khasra No. 17) before same court disputes the jurisdiction of the decreeing court by citing nature of the land as agricultural land?
- P.** Whether the trial court and 1st Appellate court erred in law by not impleading the other co-owners of Respondent No. 1 as party in the suit, when the agreement executed by the co-owners, authorizing the appellant to use the road was placed on record by the appellant/defendant?
- Q.** Whether the court below erred in law in completely ignoring the agreement dated 20.08.1999 and its effect upon the claim of the Respondent No. 1/plaintiff.
- R.** Whether, even though proceeding ex-parte with the trial, the trial court erred in law in omitting to notice the existence of road on spot as finds mentioned in the revenue record as also the alleged title-deeds produced by the Respondent No. 1/plaintiff and deciding its impact on the plaintiff's claim, which remains un-explained by the plaintiff's ex-parte evidence?

- S.** Whether the judgment and decree passed by the Id. Trial court is nullity and not based on sufficient material, as substantiated by its order dated 10.04.2009 (Annexure L) in a suit that came to be filed against the Respondent No. 1, concerning same subject matter?
- T.** Whether the 1st Appellate court also omitted to frame the definite points of determination by the trial court in view of the pleas taken before it and left untouched by the trial court?
- U.** Whether a refusal of the entire relief as claimed by the Respondent No. 1/plaintiff in his prayed leaves the decrees passed by the courts below completely redundant and void for legal perversity?
- V.** Whether the 1st Appellate court also erred in law in not appreciating the statement of witnesses and giving its reasoning before concurring with the finding of the trial court?
- W.** Whether the 1st Appellate court committed an illegality in ignoring the admitted material on record of the file (agreement dated 20.08.1999) and ignoring to advert to any of the grounds raised by the appellant and thus dismissing the appeal of the appellant?
- X.** Whether the 1st Appellate court was wrong in being overwhelmed by the non filling of the application under O.9 r.13 CPC and thus choosing not to exercise its powers as an Appellate court, even when in the wake of sufficient material placed before it and grounds raised thereon, the ex-parte decree ought to have been set aside for a return of findings on the merits of the case?
- Y.** Whether a denial of a right of audience to the appellant by the 1st Appellate court on additional points of law, after engaging a new

counsel, before the pronouncement of judgment, vide its order dated 25.04.2009 (Annexure-R), vitiates the judgment and decree passed by it, on a simple proposition of denial of a proper right of hearing?

- Z.** Whether the ends of justice require that the suit fo the Respondent No. 1 be remanded back for trial on merits, after framing the points for determination by the civil court, if it has the jurisdiction, to prevent disposal of all contentious issues between parties hereto on merits rather than on technicalities?

Heard learned counsel for the parties and perused the record.

- 7.** Before advertng to the appeal, it would be appropriate and advantageous to refer to the legal position in so far as ambit and scope of Civil Second Appeal enshrined in Section 100 of the Code of Civil Procedure (CPC) is concerned.

Section 100 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, not formulated by it, if it is satisfied that the case involves such question.]”

It needs to be mentioned here that after the amendment of Section 100 CPC by way of Code of Civil Procedure (Amendment) Act of 1976, the following consequences enshrined:

- (I) The High Court must be satisfied that the case involves a substantial question of law.
- (II) The memorandum of appeal must precisely states such questions.
- (III) The High Court at the time of admitting the appeal should formulate substantial questions of law.
- (IV) The appeal shall be heard only on that question.
- (V) At the hearing of the appeal, the respondent can argue that the case does not involve such question.
- (VI) The High Court, however, can hear the second appeal on any other substantial questions of law formulated by it, if it is satisfied that the appeal involves such questions.
- (VII) In doing so, High Court should record the reasons.

In view of the aforesaid legal position, the scope of second appeal under Section 100 of the CPC has been considerably narrowed down and substantially curtailed and under the amended Section

100 CPC, a party aggrieved by a decree passed by the first Appellate Court has no absolute right of appeal and a party can neither challenge the decree on a question of fact nor on a question of law.

In regard to above reference to the judgment of the Apex court passed in case titled "*Gurnam Singh (dead) by Lrs. & Ors. vs. Lehna Singh (dead) by Lrs. & Ors.*" reported in (2019) 7 SCC 641, would also be appropriate and advantageous hereunder, wherein at Para No. 13.1 following has been held:-

"13.1..... As per the law laid down by this Court in a catena of decisions, the jurisdiction of High Court to entertain second appeal under Section 100 CPC after the 1976 Amendment, is confined only when the second appeal involves a substantial question 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 inadmissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if 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."

A further reference to the Judgment of the Apex Court titled "*Santosh Hazari vs. Purshottam Tiwari, AIR 2001 SC 965*" would also be

relevant and germane herein, wherein law has been laid down as what constitute a substantial question of law and following has been provided at Para No. 14 of the Judgment:-

“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, nor 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, in so far 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.”

8. Keeping in mind, the aforesaid position and principles of law, the instant appeal would be considered.
9. It's not in dispute that the trial court passed the impugned judgment and decree ex parte, notwithstanding the pendency of an application filed by the defendant/appellant herein under Order 7 Rule 11 of the Code of Civil Procedure seeking rejection of the plaint. The said ex parte judgment and decree passed by the trial court indisputably was not sought by the defendant/appellant herein to be set aside before the trail court while invoking provisions of Order 9 Rule 13 of the Code of Civil Procedure and the Appellate Court upon entertaining the appeal filed against the said impugned judgment and decree have had not been oblivious to the said fact

and as such chose to deal with the appeal on its merits. The law is settled that both the remedies under Order 9 Rule 13 CPC and under Section 96 of the Code of Civil Procedure are concurrent and can be resorted to simultaneously, as one does not debar the other, in that, the said two remedies are provided by the statute and in law one cannot be said to be operating in derogation of the other and though, there is a cavalcade of opinions on the question whether the power of Appellate Court while testing the validity of an ex parte judgment and decree is confined to the merits of the case and passing of the decree or that it has also jurisdiction to decide proprietary of the ex parte proceedings against the defendant.

- 10.** Be that as it may, the Appellate Court, admittedly, has chosen to deal with the appeal on merits, while following the principle that the ex parte judgment and decree under challenge could be dealt only on merits, without going into the sufficiency or otherwise of the cause of non-appearance of the defendant at the hearing of the suit.
- 11.** Notwithstanding the multiple grounds of challenge urged in the Memo of Appeal in as much as the proposed substantial questions of law stated in the appeal, the appearing counsel for the appellant herein would urge the ground of perversity alone allegedly committed by both the courts below for having kept undecided the application filed by the defendant/appellant herein under Order 7 Rule 11 of CPC for rejection of the plaint. Learned counsel thus would contend that the said perversity in essence constitutes a substantial question of law involved in the instant appeal.
- 12.** Ordinarily, this Court may not enter into the realm of the aforesaid issue being raised by the counsel for the appellant herein in view of concurrent

judgment(s)/decree(s) passed by the courts below but the courts below admittedly having not adverted to the said application filed by the defendant/appellant herein, this Court, as such, deems it appropriate to examine and consider the appeal qua the only issue being raised by the counsel for the appellant herein.

13. Perusal of the application (supra) filed by the defendant/appellant herein before the trial court under Order 7 Rule 11 of CPC for rejection of the plaint would demonstrate that the defendant/appellant herein have had raised a plea qua the right and competence of the plaintiff/Respondent 1 herein for maintaining the suit in respect of the land claimed to have been owned and possessed by him, on the ground that the plaintiff have had not acquired a status of being in joint common possession of the said land as the said land have had been purchased by the plaintiff with other purchasers and as such, the plaintiff/Respondent 1 was neither recorded a shareholder of the land nor had he impleaded the other co-sharers as party in the suit, so much so, the said land have had not been partitioned amongst the co-sharers i.e. between plaintiff and his co-sharers under Section 105 of the Land Revenue Act, Svt. 1996 and that the provisions of Section 139 (2) of the Land Revenue Act, Svt. 1996 bars the jurisdiction of a Civil Court under clause (XVIII) in respect of the issue raised in the suit. The further perusal of the application (supra) would reveal that the defendant/appellant herein have had therein, also alleged that the claim lodged by the plaintiff in the plaint is unnecessary, scandalizing the defendant of possessing fake state subject and that the claim had been

vexatious being lodged as an abuse of process of court for using it as psychological pressure.

14. In order to address to the application (supra), a reference to the provisions of Order 7 Rule 11 of the Code of Civil Procedure needs to be made hereunder:

Rejection of plaint: The plaint shall be rejected in the following cases:

- “[O.7 r.11... (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where is not filed in duplicate;
- (f) where the plaintiff fails to comply with the provisions of Rule 9;
- Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court

and the refusal to extend such time would cause grave injustice to the plaintiff.

- 15.** Looking to the provisions of Order 7 Rule 11 (*supra*) in the context of the application filed by the defendant/appellant herein, it is manifest that the said application does not fall within any of the clauses provided therein Order 7 Rule 11, which would have warranted the rejection of the plaint of the plaintiff/Respondent 1 herein. Even if, it is assumed that, the plaintiff/Respondent 1 herein was barred by any law to maintain the suit in question, yet indisputably neither Section 105 nor Section 139 of the Land Revenue Act referred in the application barred with the institution or the trial of the suit filed by the plaintiff/Respondent 1 herein. The ground urged by the counsel for the appellant thus, is not legally sustainable and the application (*supra*) filed by the defendant/appellant herein before the trial court *ex facie* is misconceived both on facts as well as law and could not lend any support to the case of the appellant set up by the counsel for the appellant now before this Court seeking quashment of impugned judgment(s) and decree(s) on the ground of **perversity**.
- 16.** Even otherwise as well, perusal of the impugned judgment(s) and decree(s) passed by the courts below, seemingly, have been correctly and rightly passed having regard to the case setup by plaintiff/Respondent 1 herein and evidence in *ex parte* led in support thereof. The impugned judgment(s) and decree(s) thus, do not call for any interference as this Court is not persuaded to accept the contention raised either in the Memo of Appeal or now raised by the counsel for the appellant herein. Resultantly, this Court is not inclined to interfere in the instant second

appeal with the concurrent impugned judgment(s) and decree(s) moreso there being no substantial question of law involved in the appeal.

17. Accordingly, **appeal fails and is dismissed** alongwith connected application(s), if any.

(Javed Iqbal Wani)
Judge

Jammu:
15.05.2023
Manan

Whether the order is speaking : **Yes**

Whether the order is reportable : **Yes**

