

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 7<sup>TH</sup> DAY OF SEPTEMBER 2023 / 16TH BHADRA, 1945

RSA NO. 574 OF 2023

FROM JUDGMENT AND DECREE DATED 14.02.2023 OF ADDITIONAL SUB  
COURT-1 THRISSUR IN A.S.NO.30/2016 FROM ORDER DATED 28.11.2008 OF  
MUNSIFF COURT THRISSUR IN I.A.NO.8524/03 IN O.S.NO.2100/2000

APPELLANT/APPELLANT/1ST RESPONDENT:

GOKULDAS

[REDACTED]

BY ADV DILIP J. AKKARA

RESPONDENTS/RESPONDENTS/PETITIONER, 2ND & 3RD RESPONDENTS, LRS OF  
PETITIONER & 2ND RESPONDENT:

1 GOPALAKRISHNAN

[REDACTED]

2 MRS. INNIRAMANI

[REDACTED]

3 MRS. LATHIKA VALSAN

[REDACTED]

4 RATHNAM GOPALAKRISHNAN

[REDACTED]

5 VEENA GOPALAKRISHNAN

[REDACTED]

6 VENU GOPALAKRISHNAN

[REDACTED]

7 K.S. BIMAL

[REDACTED]

8 SANDHYA JAYAKUMAR

[REDACTED]

9 K.S. BISWAS

[REDACTED]

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON  
07.09.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**"C.R"**

## **JUDGMENT**

**Dated this the 7<sup>th</sup> day of September, 2023**

This regular second appeal has been filed under order XLII Rule 1 read with Section 100 of the Code of Civil Procedure.

2. The 1<sup>st</sup> respondent in I.A. No.8524/2003 in O.S. No.2100/2000 is the appellant herein and he impugns final decree and judgment dated 28.11.2008 in I.A. No.8524/2003 (final decree application) on the files of Court of I Additional Munsiff, Thrissur and final decree and judgment in A.S. No.30/2016 dated 14.02.2023 on the files of Court of the Additional Sub Judge-I, Thrissur.

3. Heard the learned counsel for the appellant on admission. In fact, the learned counsel for the appellant miserably failed to point out any question of law in this matter. But the learned counsel for the appellant submitted that the appellant is aggrieved in the matter of reservation made as per the final decree and therefore, the matter may

be admitted with liberty to settle the matter by mediation.

4. Therefore, the question arises is: whether second appeal can be admitted without formulating question of law, and merely to refer the parties for mediation?

5. In this matter, a suit was filed as early in the year 2000 for partition of the plaint schedule items by the plaintiff, wherein the appellant was the 1<sup>st</sup> defendant. On contest, the learned Munsiff passed preliminary decree. Later, final decree was passed in consideration of the commission report filed as Ext.C1 series.

6. In the order of the trial court, it has been stated that after filing of Ext.C1 report and Ext.C1 (a) plan, the appellant herein filed I.A. No. 10698/2007 to set aside Ext.C1 report and Ext.C1 (a) plan and the same was dismissed on merits, after examining the Commissioner and Surveyor, for which no challenge was raised. Accordingly, acting on Ext.C1 report and Ext.C1 (a) plan, the learned Munsiff passed final judgment and decree, thereby plot C was allowed to the 1<sup>st</sup> respondent. In the final judgment of the trial court no contention raised by the 1<sup>st</sup> defendant/1<sup>st</sup>

respondent, disputing allotment of shares in any manner. When appeal was considered by the Appellate Court, the 1<sup>st</sup> respondent raised objection as to allotment of shares and the learned Appellate Court found that no serious challenge raised as regards to allocation of plot and also regarding the valuation of the property before the trial Court, during examination of PW2 and PW3, the Commissioner and the Surveyor in this case. Accordingly, the Appellate Court dismissed the appeal.

7. In this case, the learned counsel for the appellant failed to raise any substantial question of law warranting admission of the second appeal. Order XLII Rule 2 provides thus:

***"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."*

8. Section 100 of CPC provides that, (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: Provides 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.

9. In the decision reported in **[2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168] Nazir Mohamed v. J. Kamala and Others**, the Apex Court held that:

*The condition precedent for entertaining and deciding a second appeal being the existence of a substantial question of law, whenever a question is framed by the High Court, the High Court will have to show that the question is one of law and not just a question of facts, it also has to show that the question is a substantial question of law. In **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, [(1999) 3 SCC 722]**, the Apex Court held that:*

*"After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of the hearing of the appeal has a right to argue that the case in the*

*court did not involve any substantial question of law. The proviso to the section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it with the object of ensuring that no injustice is done to the litigant where such a question was not formulated at the time of admission either by mistake or by inadvertence"*

*"It has been noticed time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under S.100 of the Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the*



*power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact."*

*"If the question of law termed as a substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial*

*manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal."*

*When no substantial question of law is formulated, but a Second Appeal is decided by the High Court, the judgment of the High Court is vitiated in law, as held by this Court in Biswanath Ghosh v. Gobinda Ghose, AIR 2014 SC 152. Formulation of substantial question of law is mandatory and the mere reference to the ground mentioned in Memorandum of Second Appeal can not satisfy the mandate of S. 100 of the CPC.*

10. In a latest decision of the Apex Court reported in **[2023 (5) KHC 264 : 2023 (5) KLT 74 SC] Government of Kerala v. Joseph**, it was held as under:

*For an appeal to be maintainable under Section 100, Code of Civil Procedure ('CPC', for brevity) it must fulfill certain well – established requirements. The primary and most important of them all is that the appeal should pose a substantial question of law. The sort of question that qualifies this criterion has been time and again reiterated by this Court. We may only refer to **Santosh Hazari v. Purushottam Tiwari, [2001 (3) SCC 179]** (three – Judge Bench) wherein this*

*Court observed as follows:*

*"12. The phrase "substantial question of law", as occurring in the amended S.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 S.109 of the Code or Art.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.*

11. The legal position is no more *res-integra* on the point that in order to admit and maintain a second appeal under Section 100 of CPC, the Court shall formulate substantial question/s of law, and the said procedure is mandatory. Although the phrase 'substantial question of law'

is not defined in the Code, 'substantial 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 S.109 of the Code or Art.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. As such, second appeal cannot be decided on equitable grounds and the conditions mentioned in Section 100 read with Order XLII Rule 2 of CPC must be complied to admit and maintain a second appeal.

12. In the instant case, it appears that the trial court passed final decree and judgment after effecting separation of shares by metes and bounds and the said final decree and judgment were confirmed by the Appellate Court.

13. In this matter, on evaluation of the materials, I have already discussed, no substantial question of law arises for consideration so as to admit this second appeal. It is held further that a second appeal involving no substantial question of law cannot be admitted, only for the purpose of referring the parties for mediation. Therefore, the decree and judgment under challenge do not require any interference and no substantial question of law to be formulated to adjudicate in this regular second appeal.

Accordingly, the regular second appeals stands dismissed, without being admitted.

sd/-

**A. BADHARUDEEN  
JUDGE**

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