
(2019) 03 MP CK 0193

In the Madhya Pradesh High Court

Case No : Second Appeal No. 359 Of 2011

Hanuman (Minor) Through His Father Ramvilash Meena & Ors.

APPELLANT

Vs

Ramlakhan & Anr

RESPONDENT

Date of Decision : 04-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 133(1)(a)

Code Of Civil Procedure Act, 1908 — Section 96, 100, 100(5), 101, 103, 103(b), 109

Succession Act, 1925 — Section 63

Evidence Act, 1872 — Section 67, 68

Citation : (2019) 03 MP CK 0193

Hon'ble Judges : G.S. Ahluwalia, J

Bench : Single Bench

Advocate : Pradeep Kumar Shrivastava,

Final Decision : Dismissed

Judgement

1. Heard on the question of admission.

2. This Second Appeal under Section 100 CPC has been filed against the Judgment and Decree dated 16-3-2011 passed by District Judge, Sheopur in R.C.A. No. 16-A/2010 arising out of Judgment and Decree dated 21-12-2009 passed by 3rd Civil Judge, Class II, Sheopur in Civil Suit No.89-A/2008.

3. The necessary facts for disposal of the present appeal in short are that the plaintiffs/appellants filed a civil suit for declaration of title and permanent injunction. The share of Ramkanwaribai in Survey No. 86 area 14 Bigha 6 Biswa, and Survey No. 126 area 12 Bigha and 10 Biswa situated in village Kanapur Tahsil and Distt. Sheopur is the disputed property. It is the case of the plaintiffs/appellants that Survey Nos.86 and 126 were jointly owned by Ramkanwari (mother of Plaintiff no.2 Ramprasad), Plaintiff no. 3 Bajranga (Died during the pendency of the Civil Suit) and Plaintiff no. 4 Kasturibai. Ramkanwari bai expired on 30-1-2004. She had executed a "Will" dated 1-1-2004 in favor of plaintiff no.1 Hanuman and bequeathed her share. After the death of Ramkanwaribai, it is

pleaded that Ramvilas (father of Plaintiff No.1 Hanuman), Kasturibai and Bajranga are in cultivating possession of equal share in the property. It was pleaded that on 1-3-2004, the plaintiff no.1 filed an application for mutation of his name, which is still pending. It was further pleaded that the plaintiffs have come to know that the name of Ramlakhan/Defendant No.1 has been wrongly mutated in the revenue records, which is null and void. It was further pleaded that the defendant no.1, Ramlakhan is trying to illegally take possession of the land in dispute and thus, the suit was filed for declaration of title and permanent injunction.

4. The defendants filed their written statement and pleaded that in place of Ramkanwaribai, the name of the defendant no.1 has been recorded in the revenue records. It was further pleaded that no "Will" was ever executed by Ramkanwaribai in favor of plaintiff no.1. It was further pleaded that defendants are in possession of the disputed property.

5. The Trial Court framed issues and after recording the evidence of the parties, dismissed the suit by holding that the plaintiffs have failed to prove the execution of "Will".

6. Being aggrieved by the Judgment and Decree passed by the Trial Court, the appellants filed an appeal, which too has been dismissed by the impugned Judgment and Decree.

7. The appellants have filed the present appeal on the following proposed Substantial Questions of Law :

iii) Whether in facts and circumstances of the case, the Gram Panchayat was competent to mutate the name of the plaintiff/appellant No.1-Hanuman in place of Ramkuanri Bai?

ii) Whether refusal of the Naib Tehsildar to accept the will executed in favour of Ramlakhan goes adverse to the respondents/defendants?

iii) Whether the appellate court was justified to mechanically confirmed the judgment of the trial court without marshalling the evidence?

8. It is submitted by the Counsel for the appellants, that they have proved the execution of "Will" beyond reasonable doubt, and the Courts below have wrongly disbelieved the "Will" executed by Ramkunwaribai.

9. Heard the learned Counsel for the appellants.

10. Section 63 of Succession Act, 1925 reads as under :

63. Execution of unprivileged wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1[or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:-

(a) The testator shall sign or shall affix his marks to the will, or it shall be signed

by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

11. Before considering the evidence led by the plaintiff, this Court think it proper to consider the law governing the "Will".

12. The Supreme Court in the case of S.R. Srinivasa v. S. Padmavathamma, reported in (2010) 5 SCC 274, has held as under :

38. In H. Venkatachala Iyengar v. B.N. Thimmajamma, Gajendragadkar, J. stated the true legal position in the matter of proof of wills. The aforesaid statement of law was further clarified by Chandrachud, J. in Jaswant Kaur v. Amrit Kaur as follows: (SCC pp. 373-74, para 10)

"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and

such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion, etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

Applying the aforesaid principles to this case, it would become evident that the will has not been duly proved.

39. As noticed earlier in this case, none of the attesting witnesses have been examined. The scribe, who was examined as DW 2, has not stated that he had signed the will with the intention to attest. In his evidence, he has merely stated that he was the scribe of the will. He even admitted that he could not remember the names of the witnesses to the will. In such circumstances, the observations made by this Court in *M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons* become relevant. Considering the question as to whether a scribe could also be an attesting witness, it is observed as follows: (SCC p. 577, para 7)

"7. ... It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

The Supreme Court in the case of *H. Venkatachala Iyengar v. B.N. Thimmajamma*, reported in 1959 Supp (1) SCR 426, has held as under :

18. What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would *prima facie* be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills

the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

* * * * *

19. In *Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao* this Court held: (SCC p. 447, paras 32-33)

"32. Section 63 of the Succession Act lays down the mode and manner of execution of an unprivileged will. Section 68 of the Evidence Act postulates the mode and manner of which proof of execution of document which is required by law to be attested. It in unequivocal terms states that execution of will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A will is to prove what is loosely called as primary evidence, except where proof is permitted by leading

secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

33. The burden of proof that the will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. (See *Madhukar D. Shende v. Tarabai Aba Shedage and Sridevi v. Jayaraja Shetty.*) Subject to above, proof of a will does not ordinarily differ from that of proving any other document."

20. Therein, this Court also took into consideration the decision of this Court in *H. Venkatachala Iyengar*, wherein the following circumstances were held to be relevant for determination of the existence of the suspicious circumstances: (*Mrudula Jyoti Rao case*, SCC pp. 447-48, para 34)

"34 (i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the will;

(ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) where propounder himself takes prominent part in the execution of will which confers on him substantial benefit."

The Supreme Court in the case of *Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao*, reported in (2006) 13 SCC 433, has held as under :

32. Section 63 of the Succession Act lays down the mode and manner of execution of an unprivileged will. Section 68 of the Evidence Act postulates the mode and manner of proof of execution of document which is required by law to be attested. It in unequivocal terms states that execution of will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Evidence Act, execution must be proved at least by one of the attesting

witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

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34. There are several circumstances which would have been held to be described by this Court as suspicious circumstances:

- (i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the will;
- (ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;
- (iii) where propounder himself takes prominent part in the execution of will which confers on him substantial benefit.

(See *H. Venkatachala Iyengar v. B.N. Thimmajamma and Management Committee, T.K. Ghosh's Academy v. T.C. Palit.*)

35. We may not delve deep into the decisions cited at the Bar as the question has recently been considered by this Court in *B. Venkatamuni v. C.J. Ayodhya Ram Singh*, wherein this Court has held that the court must satisfy its conscience as regards due execution of the will by the testator and the court would not refuse to probe deeper into the matter only because the signature of the propounder on the will is otherwise proved.

13. The burden is on the propounder of the "Will" to remove all the suspicious circumstances and explain reasonable doubts attached to a "Will" as well as to prove the "Will" as per the provisions of Section 63 of Succession Act and Section 68 of Evidence Act.

14. Ram Singh (P.W.2), Bablu (P.W.3) and Mangilal (P.W.4) are the attesting witnesses of the "Will".

15. Ram Singh (P.W.1) has stated that Ramkanwaribai (testator) had 1/3rd share in the property and had executed a "Will" in favor of plaintiff no.1. At the time of

execution of "Will", this witness, Mangilal, Bablu, Ramprasad, Ramvilas and other persons were present. The "Will" was prepared in village Kanwarsili and Ramkunwaribai had affixed her thumb impression. The signature of this witness are at A to A on the "Will", Ex. P.1.

16. Bablu (P.W.3) has stated that Ramkanwaribai had put her thumb impression on the "Will". In the "Will" it was mentioned that after her death, the land in dispute would go to Hanuman.

17. Mangilal (P.W.4) has stated that Ramkunwaribai had executed a "Will". The signatures of this witness is at D to D.

18. Both the Courts below have held that the plaintiffs have failed to prove the execution of "Will" as per the provisions of Section 63 of Succession Act. If the evidence of the attesting witnesses is considered, then it is clear that there is no evidence to show that who had prepared the "Will", whether the said "Will" was read over to the testator, the attesting witnesses have also not stated that the testator had put her thumb impression on the "Will" in their presence. The plaintiffs have failed to prove that the testator was in fit state of mind at the time of execution of "Will". Further, the testator expired within a month from the alleged date of execution of "Will".

19. Thus, the concurrent findings of facts recorded by both the Courts below are based on sound appreciation of evidence. The Counsel for the appellants could not point out any perversity in the findings of facts. It is well established principle of law that this Court, while exercising powers under Section 100 of CPC cannot interfere with findings of facts unless and until they are erroneous.

20. The Supreme Court in the case of Damodar Lal Vs. Sohan Devi and others reported in (2016) 3 SCC 78 has held as under :

"8. "Perversity" has been the subject-matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of the Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam, it has been held at para 11 that: (SCC pp. 192-93) "11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."

10. In Gurvachan Kaur v. Salikram, at para 10, this principle has been reiterated: (SCC p. 532)

"10. It is settled law that in exercise of power under Section 100 of the Code of

Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."

The Supreme Court in the case of Pakeerappa Rai Vs. SeethammaHengsu Dead by L.R.s and others reported in (2001) 9 SCC 521 has held as under :

"2..... But the High Court in exercise of power under Section 100 CPC cannot interfere with the erroneous finding of fact howsoever gross the error seems to be....."

The Supreme Court in the case of Gurdev Kaur Vs. Kaki reported in (2007) 1 SCC 546 has held as under :

"46. In Bholaram v. Ameerchand a three-Judge Bench of this Court reiterated the statement of law. The High Court, however, seems to have justified its interference in second appeal mainly on the ground that the judgments of the courts below were perverse and were given in utter disregard of the important materials on the record particularly misconstruction of the rent note. Even if we accept the main reason given by the High Court the utmost that could be said was that the findings of fact by the courts below were wrong or grossly inexcusable but that by itself would not entitle the High Court to interfere in the absence of a clear error of law.

47. In Kshitish Chandra Purkait v. Santosh Kumar Purkait a three-Judge Bench of this Court held: (a) that the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; (b) reasons for permitting the plea to be raised should also be recorded; (c) it has the duty to formulate the substantial questions of law and to put the opposite party on notice and give fair and proper opportunity to meet the point. The Court also held that it is the duty cast upon the High Court to formulate substantial question of law involved in the case even at the initial stage.

48. This Court had occasion to determine the same issue in DnyanobaBhauraoShemade v. MarotiBhauraoMarnor. The Court stated that the High Court can exercise its jurisdiction under Section 100 CPC only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law.

49. A mere look at the said provision shows that the High Court can exercise its jurisdiction under Section 100 CPC only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly

framed substantial questions of law. The impugned judgment shows that no such procedure was followed by the learned Single Judge. It is held by a catena of judgments by this Court, some of them being, *Kshitish Chandra Purkait v. Santosh Kumar Purkait and Sheel Chand v. Prakash Chand* that the judgment rendered by the High Court under Section 100 CPC without following the aforesaid procedure cannot be sustained. On this short ground alone, this appeal is required to be allowed.

50. In *Kanai Lal Garari v. Murari Ganguly* this Court has observed that it is mandatory to formulate the substantial question of law while entertaining the appeal in absence of which the judgment is to be set aside. In *Panchugopal Barua v. Umesh Chandra Goswami and Santosh Hazari v. Purushottam Tiwari* the Court reiterated the statement of law that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law. These judgments have been referred to in the later judgment of *K. Raj v. Muthamma*. A statement of law has been reiterated regarding the scope and interference of the Court in second appeal under Section 100 of the Code of Civil Procedure.

51. Again in *Santosh Hazari v. Purushottam Tiwari* another three-Judge Bench of this Court correctly delineated the scope of Section 100 CPC. The Court observed that 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 Court. In the said judgment, it was further mentioned that 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. According to the Court 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 and Article 133(1)(a) of the Constitution.

52. In *Kamti Devi v. Poshi Ram* the Court came to the conclusion that the finding thus reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding.

53. In *Thiagarajan v. Sri Venugopalaswamy B. Koil* this Court has held that the High Court in its jurisdiction under Section 100 CPC was not justified in interfering with the findings of fact. The Court observed that 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 reappraisal of evidence merely on the ground that another view was possible.

54. In the same case, this Court observed that in a case where special leave petition was filed against a judgment of the High Court interfering with findings of fact of the lower appellate court. This Court observed that 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 further observed that the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

55. This Court again reminded the High Court in *Commr., HRCE v. P. Shanmugama* that the High Court has no jurisdiction in second appeal to interfere with the finding of facts.

56. Again, this Court in *State of Kerala v. Mohd. Kunhi* has reiterated the same principle that the High Court is not justified in interfering with the concurrent findings of fact. This Court observed that, in doing so, the High Court has gone beyond the scope of Section 100 of the Code of Civil Procedure.

57. Again, in *Madhavan Nair v. Bhaskar Pillai* this Court observed that the High Court was not justified in interfering with the concurrent findings of fact. This Court observed that it is well settled that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

58. Again, in *Harjeet Singh v. Amrik Singh* this Court with anguish has mentioned that the High Court has no jurisdiction to interfere with the findings of fact arrived at by the first appellate court. In this case, the findings of the trial court and the lower appellate court regarding readiness and willingness to perform their part of contract was set aside by the High Court in its jurisdiction under Section 100 CPC. This Court, while setting aside the judgment of the High Court, observed that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the courts below.

59. In *H.P. Pyarejan v. Dasappa* delivered on 6-2-2006, this Court found serious infirmity in the judgment of the High Court. This Court observed that it suffers from the vice of exercise of jurisdiction which did not vest in the High Court. Under Section 100 of the Code (as amended in 1976) the jurisdiction of the Court to interfere with the judgments of the courts below is confined to hearing of substantial questions of law. Interference with the finding of fact by the High Court is not warranted if it invokes reappreciation of evidence. This Court found that the impugned judgment of the High Court was vulnerable and needed to be set aside."

The Supreme Court in the case of *Municipal Committee, Hoshiarpur Vs. Punjab SEB*, reported in (2010) 13 SCC 216 has held as under:-

"16. Thus, it is evident from the above that the right to appeal is a creation of statute and it cannot be created by acquiescence of the parties or by the order of

the court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a court or authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance with the conditions mentioned in the provision that creates it. Therefore, the court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. It is the obligation on the court to further clear the intent of the legislature and not to frustrate it by ignoring the same. (Vide Santosh Hazari v. Purshottam Tiwari; Sarjas Rai v. Bakshi Inderjit Singh; ManickaPoosali v. AnjalaiAmmal; Sugani v. Rameshwar Das; Hero Vinoth v. Seshammal; P. Chandrasekharan v. S. Kanakarajan; Kashmir Singh v. Harnam Singh; V. Ramaswamy v. Ramachandran and Bhag Singh v. Jaskirat Singh.)

17. In Mahindra & Mahindra Ltd. v. Union of India this Court observed*:

"12. ... it is not every question of law that could be permitted to be raised in the second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in sub-section (5) of Section 100 CPC. Under the proviso, the Court should be 'satisfied' that the case involves a 'substantial question of law' and not a mere 'question of law'. The reason for permitting the substantial question of law to be raised, should be 'recorded' by the Court. It is implicit therefrom that on compliance of the above, the opposite party should be afforded a fair or proper opportunity to meet the same. It is not any legal plea that would be alleged at the stage of second appeal. It should be a substantial question of law. The reasons for permitting the plea to be raised should also be recorded." [Kshitish Chandra Purkait v. Santosh Kumar Purkait, (1997) 5 SCC 438, pp. 445-46, para 10]

18. In MadamanchiRamappa v. MuthaluruBojjappa this Court observed: (AIR pp. 1637-38, para 12)

"12. ... Therefore, whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by Section 100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact;

but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of Section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

19. In *Jai Singh v. Shakuntala* this Court held as under: (SCC pp. 637-38, para 6)

"6. ... it is only in very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible - it is a rarity rather than a regularity and thus in fine it can be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection."

20. While dealing with the issue, this Court in *LeelaSoni v. Rajesh Goyal* observed as under: (SCC p. 502, paras 20-22)

"20. There can be no doubt that the jurisdiction of the High Court under Section 100 of the Code of Civil Procedure (CPC) is confined to the framing of substantial questions of law involved in the second appeal and to decide the same. Section 101 CPC provides that no second appeal shall lie except on the grounds mentioned in Section 100 CPC. Thus it is clear that no second appeal can be entertained by the High Court on questions of fact, much less can it interfere in the findings of fact recorded by the lower appellate court. This is so, not only when it is possible for the High Court to take a different view of the matter but also when the High Court finds that conclusions on questions of fact recorded by the first appellate court are erroneous.

21. It will be apt to refer to Section 103 CPC which enables the High Court to determine the issues of fact:

* * *

22. The section, noted above, authorises the High Court to determine any issue which is necessary for the disposal of the second appeal provided the evidence on record is sufficient, in any of the following two situations: (1) when that issue has not been determined both by the trial court as well as the lower appellate court or by the lower appellate court; or (2) when both the trial court as well as the appellate court or the lower appellate court have wrongly determined any issue on a substantial question of law which can properly be the subject- matter of second appeal under Section 100 CPC."

21. In *Jadu Gopal Chakravarty v. PannalalBhowmick* the question arose as to whether the compromise decree had been obtained by fraud. This Court held that though it is a question of fact, but because none of the courts below had pointedly addressed the question of whether the compromise in the case was

obtained by perpetrating fraud on the court, the High Court was justified in exercising its powers under Section 103 CPC to go into the question. (See also *Achintya Kumar Saha v. Nanee Printers.*)

22. In *Bhagwan Sharma v. Bani Ghosh* this Court held that in case the High Court exercises its jurisdiction under Section 103 CPC, in view of the fact that the findings of fact recorded by the courts below stood vitiated on account of non-consideration of additional evidence of a vital nature, the Court may itself finally decide the case in accordance with Section 103(b) CPC and the Court must hear the parties fully with reference to the entire evidence on record with relevance to the question after giving notice to all the parties. The Court further held as under: (*Bhagwan Sharma case*, SCC p. 499, para 5)

"5 The grounds which may be available in support of a plea that the finding of fact by the court below is vitiated in law, does not by itself lead to the further conclusion that a contrary finding has to be finally arrived at on the disputed issue. On a reappraisal of the entire evidence the ultimate conclusion may go in favour of either party and it cannot be prejudged, as has been done in the impugned judgment."

23. In *Kulwant Kaur v. Gurdial Singh Mann* this Court observed as under: (SCC pp. 278-79, para 34)

"34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication - what is required is a categorical finding on the part of the High Court as to perversity.

...

The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above . The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."

21. Considering the totality of the circumstances of the case, this Court is of the considered opinion, that no Substantial Question of Law arises in the present appeal.

22. Consequently, the Judgment and Decree dated 16-3-2011 passed by District Judge, Sheopur in R.C.A.No.16-A/2010 and Judgment and Decree dated 21-12-2009 passed by 3rd Civil Judge, Class II, Sheopur in Civil Suit No. 89-A/2008 are hereby affirmed.

23. The Appeal fails and is hereby Dismissed.