

(2019) 10 JH CK 0021
In the Jharkhand High Court
Case No : Second Appeal No.52 Of 2016

Radha Devi

APPELLANT

Vs

Madan Lal Kumar

RESPONDENT

Date of Decision : 21-10-2019

Acts Referred:

Specific Relief Act, 1963 — Section 10, 14, 16, 20
Code Of Civil Procedure, 1908 — Section 96, 100, 110, Order 7 Rule 2, Order 9 Rule 6(1), Order 9 Rule 13, Order 41 Rule 7
Limitation Act, 1963 — Article 54
Constitution Of India, 1950 — Article 133(1)(a)

Citation : (2019) 10 JH CK 0021

Hon'ble Judges : Sanjay Kumar Dwivedi, J

Bench : Single Bench

Advocate : Anil Kumar, Chanda Kumari, Amit Kumar Das, Pooja Kumari

Final Decision : Dismissed

Judgement

1. Heard Mr. Anil Kumar, learned senior counsel appearing for the appellant and Mr. Amit Kumar Das, learned counsel appearing for the respondent.
2. This Second Appeal has been preferred against the judgment and decree dated 12.09.2014 and 28.03.2016 respectively, passed by the (District Judge-III), Chaibasa in Title Appeal No.05 of 2010 whereby he has affirmed the exparte judgment and decree dated 22.02.2007 and 02.03.2007 respectively, passed by the learned Sub-ordinate Judge, I Chaibasa in Title Suit No.06 of 2004.
3. It transpires from the judgments of the trial court as well as the appellate court that suit for specific performance of the agreement dated 17.06.2002 entered into by and between the respondent/plaintiff and appellant/defendant for directing the appellant/defendant to execute and get the same registered a formal sale deed in respect of the suit property and in case of failure/neglect, refusal of appellant/defendant to do so a formal sale deed in respect of suit property be executed and registered in favour of respondent/plaintiff through the

process of the court and in case decree for specific performance is granted then the respondent/plaintiff be put into the possession of suit property after evicting the appellant/defendant therefrom and in alternatively a money decree of Rs.1,50,000/- be passed against the appellant/defendant directing her to pay the same to respondent/plaintiff with an interest @ 18% on the principal amount on and from the date of agreement till the date of realization/payment whichever is earlier.

4. The respondent/plaintiff was pleaded before the court below that the plots of land, being plot no.39-A, 39-F and 39-G standing on ward no.2 of Chakradharpur Municipality is the absolute property of defendant, which she holds, possessed and enjoys on the basis of registered deed of sale being Sale Deed No.1670 of 1994. Further appellant/defendant purchased that property from one Mohammad Islam of Chakradharpur for valuable consideration. The property was described in Sheduled at the foot of that plaint. Further the appellant/defendant who was a widow, was in urgent need of some money and as such she approached plaintiff to sell out the suit property. Keeping in view her urgent need for money, plaintiff agreed to purchase the suit property from appellant/defendant. The consideration money was fixed and settled at a sum of Rs.1,50,000/- and that by and under the aforesaid agreement appellant/defendant agreed to sell the suit property to the respondent/plaintiff and respondent/plaintiff agreed to purchase the same and in pursuant to the above, the respondent/plaintiff paid the entire consideration amount amounting to Rs.1,50,000/- only to the appellant/defendant, which appellant/defendant acknowledged to have received in full and final satisfaction of consideration amount. It was further agreed in between the parties that the appellant/defendant would execute a formal sale deed in favour of the plaintiff with regard to the suit property by the end of the month of May, 2003. It was also agreed that the appellant/defendant would, pursuant to the aforesaid agreement, handover all the relevant papers and documents relating to the title and possession of the suit property to respondent/plaintiff, which she actually did. Further, respondent/plaintiff requested to the appellant/defendant in the month of May, 2003 to execute and register the formal sale deed but appellant/defendant avoided to execute the same. Further, respondent/plaintiff also requested her to allow him the required stamp papers purchased after calculating the valuation of the suit premises. When the appellant/defendant avoided to execute the sale deed, then the respondent/plaintiff sent a legal notice upon the appellant/defendant on 09.07.2003 through registered post with A.D., which was duly served upon her but appellant/defendant neither gave reply to the same nor complied the notice. Further the respondent/plaintiff was still ready and willing to purchase the suit land from the appellant/defendant as per the agreement dated 17.06.2002. Since, the appellant/defendant was not performing her part of agreement. Further, in view of the agreement dated 17.06.2002, appellant/defendant is legally bound to execute a formal sale deed with respect to the suit property in alternatively. If the trial court finds that the specific performance of contract is not possible, then respondent/plaintiff is

entitled to a money decree of Rs.1,50,000/- against the appellant/defendant with interest @ 18% per annum from the date of agreement till the realisation/ payment.

5. It further transpires from the judgment of the court below that notice issued upon the appellant/defendant, appellant/defendant did not turn up in the court and so, the suit was posted for ex-parte hearing vide order dated 18.10.2004 and on 20.01.2005 and then sub-Judge decreed the suit ex-parte. Against that, the appellant/defendant filed a miscellaneous application being Miscellaneous Case No.09 of 2006 and the court below after considering the submissions made by the parties set aside the ex-parte order and decree passed in the suit and restored the suit to its original file and the appellant/defendant was directed to file the written statement but despite of several adjournments given to the appellant/defendant for filing the written statement but the appellant/defendant failed, then the court vide order dated 05.01.2007 debarred the appellant/defendant from filing the written statement and fixed the case for evidence of the plaintiff and a liberty was given to the defendant to cross-examine the witnesses of the respondent/plaintiff but thereafter, appellant/defendant left the parvi in the suit and even the conducting lawyer Sri G. Ravishankar Rao was informed by the court but he made his endorsement that he has got no instruction. The another conducting lawyer Sri A.K. Rai, had also been informed by the court but despite several adjournments given to the appellant/defendant for making parvi, appellant/defendant did not appear nor made any parvi, then the court vide order dated 02.02.2007 again fixed the case for ex-parte hearing under Order VII Rule 2 read with Order IX Rule 6(1) C.P.C.

6. The trial court decreed the suit ex-parte against the appellant/defendant with cost. The appellant/defendant was directed to execute the sale deed in favour of the respondent/plaintiff in respect of the suit property and hand over the possession of the suit property shown in the scheduled of the plaint to the respondent/plaintiff after executing the sale deed within six months from the date of decree, failing which the sale deed shall be executed through the process of the court on the cost of the appellant/defendant.

7. Aggrieved with the judgment and decree of the trial court, the appellant/defendant filed the appeal being Title Appeal No.05 of 2010 before the (District Judge-III), Chaibasa.

8. The said appeal was admitted and after appreciating the evidences and documents relied upon by the parties, the appellate court also came to the finding that the appellant/defendant has not been able to make out a case of interference and dismissed the appeal and confirmed the judgment and decree passed by the trial court.

9. Aggrieved with the judgment dated 12.09.2014 passed by the appellate court below, the appellant/defendant has filed this Second Appeal.

10. Mr. Anil Kumar, learned senior counsel appearing for the appellant argues

that the appellant/defendant was kept in dark by his conducting lawyer in the court below. By referring to the supplementary affidavit filed on behalf of the appellant/defendant in several paragraphs of the supplementary affidavit he submits that when matter was adjourned on several occasions the appellant/defendant was not informed by the conducting lawyer about the proceeding of the case and that's why she has not been able to contest the case properly.

11. He further argues that even after setting aside of the first ex-parte decree, the learned lawyer appearing on behalf of the appellant/defendant did not inform this appellant and that's why she has not been able to file even the written statement before the court below. He further argues that even the second ex-parte decree was informed after much delay and that's why the appeal against the said judgment was passed after substantial delay which shows that due to the conduct of the lawyer, the appellant has suffered a lot.

12. Mr. Anil Kumar, learned senior counsel appearing for the appellant firstly, relied upon the judgment passed by the Hon'ble Supreme Court in the case of Surat Singh (Dead) Vrs. Siri Bhagwan and Anr. reported in (2018) 4 SCC 562 wherein at Paragraph-27 and 28 which are quoted hereinbelow:

27. It cannot be disputed that sub-section (5) gives the respondents a right to know on which substantial question of law, the appeal was admitted for final hearing. Sub-section (5) enables the respondents to raise an objection at the time of final hearing that the question of law framed at the instance of the appellant does not really arise in the case.

28. Yet, the other reason is that the respondents are only required to reply while opposing the second appeal to the question formulated by the High Court under sub-section (4) and not beyond that. If the question of law is not framed under sub-section (4) at the time of admission or before the final hearing of the appeal, there remains nothing for the respondent to oppose the second appeal at the time of hearing. In this situation, the High Court will have no jurisdiction to decide such second appeal finally for want of any substantial question(s) of law.

By way of referring the above judgment learned counsel for the appellant submits that it is well settled law that if the second appeal is not admitted on a substantial question of law, the respondent has got no right to argue the second appeal at the time of admission. He placed much emphasis at paragraph nos.27 and 28 of the aforesaid judgment.

13. Mr. Anil Kumar, learned counsel for the appellant further relied upon the judgment passed by the Hon'ble Supreme Court in the case of Rafiq and Anr. Vrs. Munshilal and Anr. reported in (1981) 2 SCC 788, by referring to the paragraph 3 he submits that the Hon'ble Supreme Court in the said judgment has come to a conclusion that the Court cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted.

14. He further relied upon the judgment passed by the Hon'ble Supreme Court in

the case of *Rajeshwari Vrs. Puran Indoria* reported in (2005) 7 SCC 60, wherein at paragraph 5 and 6 which are quoted hereinbelow:

5. Normally, a suit for specific performance of an agreement for sale of immovable property involves the question whether the plaintiff was ready and willing to perform his part of the contract in terms of Section 16 of the Specific Relief Act, whether it was a case for exercise of discretion by the court to decree specific performance in terms of Section 20 of the Specific Relief Act and whether there were laches on the part of the plaintiff in approaching the court to enforce specific performance of the contract. In some cases, a question of limitation may also arise in the context of Article 54 of the Limitation Act on the terms of the agreement for sale. Other questions like the genuineness of the agreement, abandoning of the right to specific performance, a novation and so on, may also arise in some cases. No doubt, a finding on the three primary aspects indicated earlier would depend upon the appreciation of the pleadings and the evidence in the case in the light of the surrounding circumstances. Could it be appropriate to understand these questions purely as questions of fact in the context of Section 100 of the Code of Civil Procedure, 1908? In *Raghunath Prasad Singh v. Dy. Commr. of Partabgarh* the Privy Council, though, in the context of Section 110 of the Code of Civil Procedure, negated the theory that to be a substantial question of law, a question of law has to be of general importance and stated that "a substantial question of law" is a substantial question of law as between the parties in the case involved. This approach was adopted by this Court in *Dy. Commr. v. Rama Krishna Narain*. This Court held, again in the context of Section 110 of the Code of Civil Procedure, that since the ground on which the appeal was dismissed by the High Court raised a question of law of importance to the parties, on that ground alone the appellant was entitled to a certificate under Section 110 of the Code. In *Chunilal V. Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.* this Court, again in the context of Section 110 of the Code and Article 133(1)(a) of the Constitution, had occasion to consider the question. A Constitution Bench of this Court held that the proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law. Thus, it was accepted that a question of law would be a substantial question of law if it directly and substantially affects the rights of the parties and if it was not covered by a decision of the Supreme Court or of the Privy Council or of the Federal Court.

6. The right to specific performance of an agreement for sale of immovable property, when filed, raises questions of substantial importance between the

parties as to whether the plaintiff has satisfied the requirements of Section 16 of the Specific Relief Act, whether it is a case in which specific performance of the contract is enforceable in terms of Section 10, whether in terms of Section 20 of the Act, the discretion to decree specific performance should be exercised by the court and in some cases, whether the suit was barred by limitation and even if not, whether the plaintiff has been guilty of negligence or laches disentitling him to a decree for specific performance. These questions, by and large, may not be questions of law of general importance. But they cannot also be considered to be pure questions of fact based on an appreciation of the evidence in the case. They are questions which have to be adjudicated upon, in the context of the relevant provisions of the Specific Relief Act and the Limitation Act (if the question of limitation is involved). Though an order in exercise of discretion may not involve a substantial question of law, the question whether a court could, in law, exercise a discretion at all for decreeing specific performance, could be a question of law that substantially affects the rights of parties in that suit. Therefore, in the case on hand, the High Court was not justified in dismissing the second appeal in the manner in which it has done. Be it noted, that the High Court has also not spoken while dismissing the second appeal. We are therefore of the view that it is necessary for the High Court to consider whether a substantial question of law is involved or not and to give its reasons for coming to its conclusion either way, and if it finds that a substantial question of law or substantial questions of law is or are involved, to frame that question or those questions and to answer it or them in accordance with law. In the context of the notice issued by this Court while entertaining the petition for special leave to appeal, the proper course to adopt is to set aside the judgment and decree of the High Court in the second appeal and remand the second appeal to the High Court for a consideration of the question whether any substantial question of law is involved in the case in the light of the pleadings and the facts established and if it arises, to decide whether any interference in the second appeal under Section 100 of the Code of Civil Procedure, 1908 is warranted or justified.

By referring to the above paragraph, Mr. Kumar, learned counsel for the appellant submits that a question of law would be a substantial question of law if it directly and substantially affects the rights of the parties and if it was not covered by a decision of the Hon'ble Supreme Court or of the Privy Council or of the Federal Court. Therefore, he submits that the right of the appellant is being affected and that's why the substantial question of law is involved in this case, as such, on that ground, the Second Appeal is fit to be admitted on a substantial question of law.

By referring to the above paragraph 6, Mr. Kumar, learned counsel for the appellant submits that the discretion has not been exercised in view of Section 10 and 14 of the Specific Relief Act.

15. Per contra, Mr. A.K. Das, learned counsel appearing for the respondent submits that he has not suo-moto appeared before this Court and he submits

that in pursuant to notice served upon him in (I.A. No.820 of 2016) in limitation matter he has appeared in this case. This Second Appeal was heard on several occasions before a Co-ordinate Bench of this Court and the appellant filed interlocutory application being I.A. No.8344 of 2016 for stay the proceeding of execution being Execution Case No.04 of 2011 and at the admission stage this Court vide order dated 16.12.2016 disposed of the said I.A. He further argues that the said I.A. he was heard and that's why he is before this Court.

16. Mr. Das, learned counsel for the respondent further argues that the sufficient opportunity was allowed to contest the suit in favour of the appellant. He further submits that the ex-parte decree was set aside by the trial court itself and in spite of that the appellant has not contested the case on merit. He further submits that the counsel for the appellant went on taking adjournments and submits that the argument on behalf of the learned counsel for the appellant with regard to the lawyer is also not tenable in view of the fact that one another advocate was engaged before the court for further conducting the case.

17. He further submits so far as the appeal is concerned, the another lawyer was conducting the appeal before the appellate court below and submits that in appeal also no steps was taken on behalf of the appellant either to lead any additional evidence under Order XLI Rule 7 or leave of filing the written statement was taken. He further argues that even if the appellant was debarred from filing the written statement, he failed to avail another remedy available under the law.

18. Mr. A.K. Das, learned counsel appearing for the respondent relied upon the judgment passed by the Hon'ble Supreme Court in the case of Gurunam Singh (Dead) by Legal Representatives and Ors. Vrs. Lehna Singh (Dead) By Legal Representatives reported in (2019) 7 SCC 641, wherein at paragraph 15, which is quoted hereinbelow:

15. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that the High Court has erred in reappreciating the evidence on record in the second appeal under Section 100 CPC. The High Court has materially erred in interfering with the findings recorded by the first appellate court, which were on reappreciation of evidence, which was permissible by the first appellate court in exercise of powers under Section 96 CPC. Cogent reasons, on appreciation of the evidence, were given by the first appellate court. The first appellate court dealt with, in detail, the so-called suspicious circumstances which weighed with the learned trial court and thereafter it came to the conclusion that the will, which as such was a registered will, was genuine and did not suffer from any suspicious circumstances. The findings recorded by the first appellate court are reproduced hereinabove. Therefore, while passing the impugned judgment and order, the High Court has exceeded in its jurisdiction while deciding the second appeal under Section 100 CPC.

By way of referring the above judgment Mr. Das, argues that it is well settled proposition of law that the High Court is not empowered to reappraise the evidence under Section 100 of the CPC. He further submits that the first appellate court dealt with, in detail, the so-called suspicious circumstances, therefore, there is no substantial question of law involved in this case.

19. Mr. A.K. Das, learned counsel appearing for the respondent further relied upon the judgment passed by the Hon'ble Supreme Court in the case of Sugani Vrs. Rameshwar Das reported in (2006) 0 Supreme(SC) 396, wherein at Paragraphs 23, 24 and 25 which are quoted hereinbelow:

23. 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.

24. 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 Section 100 CPC. 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. This Court in *Sir Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.* (1962 Supp (3) SCR 549) held that :

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so

whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

25. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact. It is true that the lower appellate court should not ordinarily reject witness accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal, when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible. One drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.

By referring to the above paragraphs he argues that the second appeal cannot be decided on equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of powers under this Section.

In the light of the facts and submissions, Mr. Das, learned counsel for the respondent submits that there is no substantial question of law involved in the second appeal, therefore, the second appeal is fit to be dismissed.

20. Having heard the learned counsel appearing for both the parties, this Court finds that the trial court as well as the appellate court has provided opportunity to contest the case to the appellant/defendant. When a petition was filed by the appellant under Order IX Rule 13 the trial court itself set aside the ex-parte decree and posted the case for further hearing on merit and the appellant was called for to contest the case. Record of the trial court further shows that the lawyer of the appellant has taken adjournment on several occasions and he did not file the written statement. It also transpires from the judgment that the another advocate was engaged by the appellant for contesting the case and the second lawyer has also went on taking time.

21. In view of the facts and submissions of Mr. Anil Kumar, learned Senior counsel for the appellant with regard to conduct to the lawyer cannot be accepted as the second lawyer was also engaged by the appellant after sometime, for contesting the suit.

22. This Court further finds that so far as the judgment passed by the Hon'ble Supreme Court in the case of Rafiq and Anr. Vrs. Munshilal and Anr. (supra) is concerned, that is the case arises out of a case which has been dismissed for default due to conduct of the lawyer, thus, the said judgment is not coming in the rescue of the appellant.

23. Mr. Kumar, learned Senior counsel for the appellant relied upon the judgment passed by the Hon'ble Supreme Court in the case of Surat Singh (Dead) Vrs. Siri Bhagwan and Anr.(supra) is concerned, this Court is in agreement with that it is well established principle of law in deciding the second appeal under Section 100 of the C.P.C. at the admission stage, if the substantial question of law is involved, the respondent is not required to be heard but in this instant appeal, court has called upon the respondent in the limitation matter that's why he has appeared before this Court.

24. In the facts and circumstances of the judgment passed by the Hon'ble Supreme Court in the case of Rajeshwari Vrs. Puran Indoria (supra) is concerned, Mr. Anil Kumar, learned Senior counsel for the appellant relied upon but the same is not applicable as the appellant was provided full opportunity to contest the case.

25. Finally, the substantial question of law which has been filed alongwith the memo of appeal, this Court finds that those are not the substantial question of law for admitting this Second Appeal. In view of the law laid down by the Hon'ble Supreme Court in the case of Sugani Vrs. Rameshwar Das (supra) this Court comes to the conclusion that the conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has power to add to or enlarge those grounds, in which, the second appeal cannot be decided on merely equitable grounds, therefore, there is no substantial question of law involved in the Second Appeal.

26. Accordingly, the Second Appeal No.52 of 2016 stands dismissed.

27. As the second appeal is dismissed, I.A.s also stands disposed of.