
(2011) 10 KL CK 0031
In the High Court Of Kerala
Case No : S.A. No. 202 of 2001

Retnamma and Others

APPELLANT

Vs

Mehaboob and Others

RESPONDENT

Date of Decision : 27-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10, Order 26 Rule 10(1), Order 26 Rule 10(2), Order 26 Rule 10(3), Order 26 Rule 9
Evidence Act, 1872 — Section 60

Citation : (2013) 2 ILR (Ker) 613

Hon'ble Judges : K. Hema, J

Bench : Single Bench

Advocate : K.S. Hariharaputhran, Sri M.D. Sasikumaran, Sri P.J. Joseph and Sri George Mathew, for the Appellant; Roy Chacko, for the Respondent

Final Decision : Partly Allowed

Judgement

K. Hema, J.—A suit was filed by plaintiffs--respondents before Munsiff Court, for fixation of boundary and recovery of possession of plaint schedule property. After trial, Munsiff Court dismissed suit. Aggrieved by the dismissal of the suit, plaintiffs--respondents filed an appeal. The Sub Court allowed the appeal and a decree was granted for fixation and demarcation of boundary, with reference to the boundary shown in Ext. C-3, Surveyor's plan. A decree for recovery of possession was also granted in respect of the specific plot shown by the Surveyor in Ext. C-3 plan and the said plan forms part of the decree. Aggrieved by the decree and judgment, the defendants in the suit has filed this second appeal. Facts briefly: The suit was filed by respondents herein against appellants on the averments that they are the absolute owners of the plaint schedule property, as per Ext. A-1, which is a sale deed dated 21-11-1966. Out of the said property, two plots having an extent of 10 cents and 7 cents were sold to one Kamaluddin and Jaleel respectively. Excluding the said property, 8 cents of property are still in possession of plaintiffs, which is fragmented into two pieces: the plot having an extent of about VA cents is situated on the south of the 17 cents referred

above and it constitutes residential property of plaintiffs. The plot having a balance extent of 43/4 cents is situated on the north of above-mentioned 17 cents and it is the plaint schedule property.

2. On 15-1-1993, defendants--appellants allegedly trespassed into plaint schedule property and put up three latrine tanks thereon, taking advantage of absence of visible boundary separating plaint schedule properties from defendants' property on the northern side of plaint schedule property. The plaintiffs approached defendants through mediators and asked them to remove the structures put up in the property but the said request was turned down. The defendants have no right over the plaint schedule property. Hence, according to plaintiffs--respondents, they are entitled to recover possession of plaint schedule properties, and also to get boundary fixed and latrine tanks removed. Hence, the suit.

3. A written statement was filed by defendants stating that suit is barred for non-joinder of necessary parties, since all co-owners of the disputed property are not made parties to the suit. The plaintiffs have no right over plaint schedule property. The description of the plaint schedule property is not correct. There is a visible demarcation on the northern boundary of plaintiffs' property by an old fencing and there is no necessity to fix northern boundary.

4. The plaint schedule property does not form part of the 25 cents of land covered by Ext. A-1 but, it is in possession of defendants for the past more than 50 years. The plaint schedule property is actually, a channel running on the northern boundary of plaintiffs property. The plaintiffs are not entitled to recover possession of the plaint schedule property. If at all plaintiffs had any nominal right over plaint schedule property. The defendants have perfected title by long, continuous, uninterrupted and open possession for the past more than 50 years. The plaintiffs lost their rights on the plaint schedule property and suit is to be dismissed.

5. The Munsiff Court framed as many as six issues. P.W. 1 was examined and Exts. A-1 and A-2 were marked on the side of plaintiffs. D.W. 1 and D.W. 2 were examined on the side of defendants. Exts. C-3 to C-3 were also marked.

6. On consideration of evidence and all matters on record, Munsiff Court found that alleged trespass is not true and dismissed the suit. In appeal, Sub Court held that respondents have title to disputed property which is shown in yellow colour in Ext. C-3 and they are also entitled for recovery of possession of the said property and get the boundary fixed and a decree was passed. This second appeal is against the said decree and judgment.

7. Heard both sides. Perused the records. In the memorandum of second appeal, appellants framed certain questions, purporting to be substantial questions of law. But, on a reading of those questions, most of them appear to be only questions of facts and not substantial questions of law. Sri Roy Chacko, learned counsel for respondents therefore, argued that no substantial question of law is

involved in this case and none can be framed by this court also. Therefore, this second appeal is not maintainable, it is argued.

8. Learned counsel for respondents also vehemently argued that in the absence of any substantial question of law being raised by appellants in the appeal memorandum, it would be illegal for this court to frame any substantial question of law and decide the second appeal. He further argued that a respondent can contend that no question of law is involved in this case in view of Section 100(3) of CPC, and second appeal has to be dismissed, as held by the Supreme Court in *vide Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs.*,

9. Learned counsel for respondents also argued that if at all this Court wants any additional question of law to be framed, reasons must be given. He placed reliance upon the decisions reported in *Muthu Gounder Vs. Ammayee Ammal*, in support of his arguments, in the light of the above arguments, I shall first consider the scope of Section 100 CPC. Section 100 CPC reads as follows:

Section 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.

10. A reading of Section 100 CPC reveals that 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. The memorandum of appeal shall precisely state the substantial question of law involved in the appeal. Nevertheless, as per Section 100(3) CPC, the High Court shall formulate the substantial question of law if it is satisfied that such question is involved in any case.

11. As per sub-section (5) of Section 100, the appeal shall be heard on the

question formulated by the High Court and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. But, as per the proviso to Section 100(5), nothing stated in the sub-section shall be deemed to take away or abridge the power of the Court to hear the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question. The only requirement is that the reasons must be recorded.

12. Thus, it is abundantly clear that High Court can hear the second appeal on any substantial question of law which is not even formulated by the court or stated by appellants in the appeal memorandum, if it is satisfied that such question is involved in the second appeal. But, for doing so, the High Court shall record reasons. On hearing both sides and on going through the appeal memorandum and records, I find that this appeal involves more than one substantial question of law. However, none of the purported questions of law stated by the appellants in the appeal memorandum, strictly speaking, can be termed as substantial question of law.

13. A question which is purported to be a substantial question of law which is stated in the appeal memorandum is like this: "whether lower appellate court was justified in relying upon Ext. C-3 plan". Though it may apparently appear that the above question is only a question of fact, on a deeper consideration of entire matter before me, I find that at least two substantial questions of law are latent in the above question (what exactly are such questions will be stated in the appropriate context). Since I am satisfied that two substantial questions of law are involved in this appeal, I have formulated such questions in this appeal.

14. As per Section 100(3) CPC, the appellants are only required to "state" the substantial question of law in the appeal memorandum but, it is for the High Court to "formulate" such question, as per sub-section (4) of Section 100 CPC, if the court is satisfied that a substantial question of law is involved. The difference in the expressions used in Section 100(3) and (4) CPC, with reference to appellant and the court respectively is striking. "State" only means, "to formally write or say some thing, especially in a careful and clear way". But, "formulate" means, "to express your ideas in carefully chosen words; to create or prepare some thing carefully, giving particular attention to the details" (vide Oxford Advanced Learner's Dictionary, 7th Edition).

15. Therefore, on a close reading of Section 100 CPC, I find that even if the appellants have not carefully or clearly "stated" the substantial question of law which is involved in appeal memorandum precisely, the High Court can express the ideas in more carefully chosen words and thereby, formulate the questions of law. Therefore, technically speaking, though it may be said that there is defect in not stating the substantial question of law in the appeal memorandum, on consideration of the scope of Section 100 CPC, I am of view that such defects are not sufficient to dismiss the second appeal.

16. A joint reading of sub-sections (1) to (5) of Section 100 CPC makes it clear that if the High Court is satisfied that the appeal "involves" a substantial question of law in the appeal, it shall "formulate" such question. Even if appellants have not carefully chosen the words and stated the question of law in the appeal memorandum, by giving particular attention to the details, by expressing the ideas carefully, this court shall "formulate" the questions, as stated in Section 100(4), provided the case "involves" a substantial question of law.

17. But, it will be too technical to dismiss an appeal for the reason that the question involved is not correctly stated by the appellants by carefully choosing the words to express the ideas. It is most pertinent to note that as per the proviso to Section 100(5) CPC, even if no substantial question of law is formulated by the High Court, nothing restricts or prohibits the High Court from hearing the appeal on any substantial question of law which is not even formulated by it, if it is satisfied that the case "involves" such a question, provided reasons are recorded for doing so.

18. The facts being so, I am not inclined to dismiss this appeal for a technical reason that appellants did not correctly state the substantial question of law in the appeal memorandum in choosing the apt words. There is nothing in the decisions cited by appellant's counsel which strikes a different note. Of course, respondents are at liberty to argue at the time of hearing that no substantial question of law as formulated by the court is involved in this case. But, the argument here is something else. According to respondents, no question of law as stated by the appellants in the appeal memorandum is involved in this case and hence, appeal is to be dismissed. Such a contention is not permissible u/s 100, CPC.

19. A close reading of Section 100(5), particularly the proviso thereto will make it clear that the challenge is to be made against the questions "formulated" by the court and not those stated by appellants in the appeal memorandum. On going through records and on reading the questions framed by appellants in the appeal memorandum, I find that at least, minimum of two substantial questions of law are actually involved in this appeal relating to the very admissibility of Ext. C-3--plan which is produced by the Commissioner along with his report.

20. To effectively resolve the dispute and to take a right decision in the case, it is necessary for this court to consider such questions of law. Therefore, it is necessary to re-shape or modify the question already stated in the appeal memorandum, "whether lower appellate court was justified in relying upon Ext. C-3--plan" and formulate substantial questions law involved in this appeal. Even though appellants and his counsel omitted or failed to choose the exact words in stating substantial questions of law in the appeal memorandum, I cannot shut my eyes to a very serious illegality committed by the court below in treating Ext. C-3--plan as "evidence" and even ordering it to form part of the decree, which calls for intervention by this court. I am fully satisfied that a very important substantial question of law is involved in the appeal and it is necessary to

consider the same.

21. The role of the court is to do substantial justice to the parties, within the framework of law and not merely to watch who played the game better. Therefore, in my considered opinion, this court shall formulate substantial questions of law if, it finds that a substantial question of law is "involved" and especially if it is essential to consider the same to resolve the dispute between the parties in an effective manner. Even if there is some defect in stating the question of law in the appeal memorandum, nothing prevents this court from formulating the substantial questions of law showing the details in carefully chosen words.

22. On going through the decisions cited by learned counsel for respondent also, I find that there is no bar in adopting such a course. It is useful to refer to Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat, in which the Supreme Court held thus:

14. Proviso to Section 100 of the Code makes it clear that the powers of the High Court cannot be fettered to hear a second appeal on a question which was not formulated by it at the time of admitting a second appeal, if the case involves any other question. So far as the High Court is concerned, the same has been statutorily recognised u/s 100 in the case of second appeal.

23. Therefore, even though appellants have not correctly stated substantial question of law in the appeal memorandum, I have formulated two substantial questions of law which are involved in this appeal. Those questions deserve to be considered for resolving the dispute and arriving at a right decision in this case. I have therefore, formulated such questions, with notice to both sides and heard them on those questions, elaborately. The substantial question of law involved and formulated by this court in this second appeal are as follows:

i. Does the surveyor's plan which is produced along with commission report constitute "evidence" under Order XXVI, Rule 10 of CPC?

ii. Is surveyor's plan admissible in evidence, without examination of the commissioner? If not, will it be legal for the court to enter any finding of fact based on the details of such plan?

24. Substantial questions of law 1 and 2: On going through the impugned judgment, it is evident that appellate court placed explicit reliance upon Ext. C-3--plan produced along with Commission Report and almost all the crucial conclusions of facts are arrived at, mainly on the basis of the details shown in the said plan. Ext. C-3 was ordered to form the part of the decree also. On a perusal of records, particularly, the Commission Report and plan, it can be seen that Ext. C-3 is a plan which is purportedly prepared by a surveyor. It is produced along with the Commission Report and mahazar, Ext. C-1 and Ext. C-2.

25. The Commissioner stated in his report that he visited plaint schedule property and at that time, Surveyor and the parties were present. But, there is

nothing in his report Ext C-1 or Ext. C-2 to show as to who prepared Ext C-3-- plan. The Commissioner also did not report that the disputed property was measured and located by the surveyor or at least that he had seen the measurement being taken by him. There is nothing in the Commission Report to show that commissioner had any direct knowledge about any thing purportedly done by Surveyor at the site or in preparation of the plan.

26. The Commission Report has not even reported that details shown in Ext. C-3 are correct or that those tallied with the observations which he made at the site. There is nothing in Commission Report by which Commissioner vouchsafes the correctness of the details in Ext. C-3. However, lower appellate court held in the impugned judgment, "First Grade Surveyor has measured and located the property covered by Ext. A-1". Merely because a plan which is purportedly prepared by a Surveyor is produced along with a Commission Report and it happened to be marked also, there will be no justification in entering such finding treating the plan as "evidence".

27. The mere marking of a document will not tantamount to proof of its execution nor will it prove correctness of the facts stated in the writing contained in the document, particularly in the absence of any thing to show in the Commission Report that the details shown in the plan are correct. It appears that the court below presumably acted on a wrong assumption that Surveyor's plan also constitutes "evidence" under Order XXVI, Rule 10(2) of CPC. I will consider whether such assumptions are legally correct or not. Order XXVI, Rule 10 of the CPC reads as follows:

Order XXVI, Rule 10. Procedure of Commissioner.--(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit.-- The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Commissioner may be examined in person.--Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

28. Order XXVI, Rule 10(1) CPC lays down that the Commissioner, after making a local inspection and after reducing to writing, the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court. The report of the Commissioner and the evidence so taken by him shall be "evidence" in the suit and shall also form part of the record, as per Order XXVI,

Rule 10(2) CPC. But, it is clear from the said provision that the evidence so taken, without report, will not be "evidence".

29. Therefore, what is "evidence" under Order XXVI, Rule 10(2) CPC is report of the Commissioner. By virtue of the expression, "but not the evidence without the report" contained in Order XXVI, Rule 10(2) CPC, it is clear that what is significant is the report. So also, what is admissible as "evidence" under Order XXVI, Rule 10(2) CPC is the report of the Commissioner and the evidence taken and reduced into writing by the Commissioner and, not the evidence without the report.

30. Significance is given in Order XXVI, Rule 10(2) CPC to the "report" because, as per the said provision, without such report, even evidence taken by the Commissioner and reduced to writing will not constitute "evidence" under Order XXVI, Rule 10(2) CPC. Only if there is a report, "evidence" taken by him on a local inspection will be treated as "evidence". Even if the Commissioner has taken evidence on a local inspection and reduced the same into writing, if such evidence alone is produced in court, such evidence, without the report cannot by itself be treated as "evidence", as per Order XXVI, Rule 10(2) CPC.

31. Therefore, it is clear that the report of the Commissioner alone is intended to by the legislature constitute "evidence" Order XXVI, Rule 10(2) CPC. Even if the Commissioner has taken any evidence on a local inspection and reduced the same into writing, if such evidence alone is produced in court, such evidence cannot by itself be treated as "evidence", as per Order XXVI, Rule 10(2) CPC. What is important is the report of the Commissioner and the facts stated by him in his report.

32. The object of Order XXVI, Rule 10 CPC is to admit in evidence, the facts reported by the Commissioner in his report, of which, he has direct knowledge and thereby, to avoid his examination in court as a witness, to prove all the facts which are perceived by his senses and reported by him in his report. If the Commissioner has seen a fact, he may report such fact seen by him. Such facts will be treated as "evidence" under Order XXVI, Rule 10(2) CPC. So, what is intended to be treated as "evidence" are the facts which the commissioner has reported in his report about which, commissioner has direct knowledge.

33. But, the provision contained in Order XXVI, Rule 10(2) CPC is not meant for admitting any thing which is otherwise inadmissible in law, as "evidence". For example, if a Commissioner Reports any fact on the basis of hearsay, of which he has no direct knowledge, such fact cannot be treated as "evidence", even if he has reported such a fact in the report. The provision contained in Order XXVI, Rule 10(2) CPC is not intended to be invoked to admit in "evidence", whatever the Commissioner may report, based on hearsay.

34. Hearsay is no evidence and it is hit by Section 60 of Evidence Act. So, facts which are inadmissible in evidence as hearsay cannot be admitted in evidence under the shield of Order XXVI, Rule 10(2) CPC, only because such fact is

reported by Commissioner in his report. Order XXVI, Rule 10(2) CPC is introduced in CPC, not with the object of admitting in "evidence", all the facts stated in the report, even if it is otherwise inadmissible in evidence under Evidence Act.

35. Any way, even on a plain reading of Order XXVI, Rule 10(2) CPC itself, the plan purportedly prepared by surveyor, which is produced by Commissioner along with the Commission Report cannot be treated as "evidence", under Order XXVI, Rule 10(2) CPC. However, if commissioner reports any fact in the Commission Report relating to the details in the plan, measurement of property, identification of the property etc., or the correctness of the same, on the basis of what he had personally observed in respect of which, the Commissioner is competent to give direct oral evidence, such fact or facts which are contained in the report also can be treated as "evidence", by virtue of Order XXVI, Rule 10(2) CPC.

36. The Commissioner can, of course, refer to the plan and the details shown therein, for explaining any fact which he reports. If the plan is used to explain certain facts stated in the report, the plan can be treated as part of the report, without which, the report may not be complete. Normally, a Surveyor's plan is appended to the report, for explaining the facts contained in the report in a better and easier manner. So, the plan will form part of the report and it can be admitted in evidence only as part of report and not independently, as a "evidence".

37. If the Commissioner does not state any thing in his report about Surveyor's plan to vouchsafe correctness of the details or measurement shown in the plan etc., details shown in Surveyor's plan cannot be relied upon by the court, to enter any finding on disputed facts. The mere fact that a plan was produced along with the Commission Report will not make such plan admissible under Order XXVI, Rule 10 CPC. A Surveyor's plan left to itself, is not "evidence" under Order XXVI, Rule 10 CPC, going by the language in the said provision.

38. If a Surveyor's plan is used by the Commissioner to explain any thing in his report, it can be treated as part of the Commission Report and in such event, Surveyor's plan can be admitted in evidence under Order XXVI, Rule 10 CPC, as part of the Commission Report and it can be done only to that extent But, in the absence of any reference in the Commission Report about the correctness or truth of the details shown in Surveyor's plan which he can vouchsafe, the Surveyor's plan cannot independently, be admitted as "evidence" under Order XXVI, Rule 10 CPC.

39. Only such facts which can be stated by the Commissioner in his report, based on his direct knowledge alone will be "evidence" under Order XXVI, Rule 10(2) CPC, without his examination in court. Therefore, in the absence of any thing stated in the Commission Report about correctness of the facts stated in Surveyor's plan, those facts cannot be proved either by mere production of the commission report or by production of the Surveyor's plan along with the report.

40. The Surveyor's plan produced along with the Commission Report can only be treated as any other document, and it has to be proved in accordance with law, by examining person or persons who can give direct evidence about the correctness or truth of what is contained in the said document, unless the Commissioner states anything in the report about details or correctness of plan from his personal knowledge.

41. It is well-settled that mere production and even marking of a document may not prove the truth or correctness of the facts stated in the contents of the document. Those have to be proved by the evidence of those persons who can vouchsafe for the truth or correctness of the facts in issue. It is held in *Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import*, thus:

Undoubtedly, mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document. If the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence i.e., by the evidence of those persons who can vouchsafe for the truth of the facts in issue."

42. Now, coming to the facts of this case, it can be seen that neither in the commission report nor in the mahazar Ext. C-1 and Ext. C-2 there is anything to show that Ext. C-3 plan is prepared by the Surveyor. The Commissioner has not stated in the Commission Report that surveyor measured the property. There is nothing in the Commission Report to show whether the Commissioner supervised the measurements, if any taken, or whether the details shown in the plan are correct. The Commissioner has not stated that facts shown in Ext. C-3 are correct or that the Surveyor measured the property in the presence of Commissioner.

43. The Commissioner did not state in his report that he has any direct knowledge about preparation or measurement of property, it is only stated in the report that the surveyor also was present at the time of measurement but he has not mentioned any thing in the report to indicate that the details shown in the plan are correct or true. There is nothing in Ext. C-1 or Ext. C-2 to show that the Commissioner can vouch for the correctness of the details shown in Ext. C-3 plan. In the above circumstances, Ext. C-3 cannot be treated as "evidence", under Order XXVI, Rule 10(2) of CPC.

44. The court below committed a serious illegality in holding that first grade Surveyor measured and located the property covered by Ext. A-1 etc., and a particular coloured portion in the plan is encroached upon etc. The court below also erred in granting a decree for recovery of possession of the portion of the property shown in Ext. C-3. The findings entered into by the court below on the basis of Ext. C-3 about identity of the disputed property are all unsustainable and those are to be set aside.

45. Referring to Ext. C-3, it is stated in the impugned judgment as follows: "after demarcating the properties in their possession, the Surveyor measured and located the plaint schedule property within the property covered by Ext. A-1. In the plaint the area of the plaint schedule property is shown as 4% cents. But the plaint schedule property as located in Ext. C-3 measures only 3.870 cents. As the plaint schedule property has clearly been measured and located after measuring and demarcating the properties possessed by Kamaludeen and Jaleel within Ext. A-1 property it cannot be said that the plaint schedule property is not identified".

46. The above findings are not supported by legally admissible evidence. Even in the Commission Report, such details are not stated. It is also not stated in the Commission Report that the Surveyor demarcated the properties in possession of either of the parties or measured the same and located the plaint schedule property within the property covered by Ext. A-1. The court has entered into relevant findings by merely looking into the plan prepared by the Surveyor. This cannot be done, as per law. Therefore, the findings entered into by the lower appellate court on the basis of the details shown in the plan alone, without anything having stated in the Commission Report is not legal or proper.

47. Learned counsel for appellants also argued that courts below seriously erred in acting upon the Commission Report and plan, by totally ignoring the written objection filed by appellants to the Commission Report. Though appellants filed written objection to Commission Report and a request was also made to set aside the Commission Report on various grounds, neither trial court nor appellate court considered the objections but, both the courts below wrongly placed explicit reliance on the Commission Report.

48. First appellate court even went to the extent of stating that no objection was filed by appellants to the Commission Report and acted upon the Commission Report to enter crucial findings of facts, it is submitted. Therefore, the decree is unsustainable, it is argued. Learned counsel for plaintiffs-respondents however argued that it is not open to appellants to raise any argument in this second appeal that appellants did not file objection to Commission Report, since court below entered a specific finding in impugned judgment that no such objection was filed. According to him, appellant's remedy was to file a petition before the same court itself to review such finding, if they wanted to contradict the said finding but he cannot take it as a ground in this second appeal.

49. Learned counsel for respondents cited a decision reported in State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, , in support of the above argument. It is held in the said decision as follows:

The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the

minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there.

50. It is clear from a reading of above decision itself that Supreme Court was referring to a "statement of facts" contained in the judgment in respect of what transpired in court at the time of hearing. Regarding such fact, normally, there would be no record, except what is recorded in the judgment or on the proceeding sheet, as the case may be. The Supreme Court was therefore, of view that that if a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party to get it corrected, while the matter is still fresh in the minds of the Judge who made the record to the fact. If the party is aggrieved by any alleged mistake or wants to contradict the statement or get the mistake corrected, he will have to approach the same court itself, it is held.

51. But, the situation here is totally different. The controversy is whether a written objection to Commission Report was filed or not. If an objection filed, it will be part of the record and it can be easily verified from the records whether it is filed or not. The correctness or otherwise of the finding on filing of objection can be find out on a mere perusal of records. If the court commits a mistake in entering a finding in the judgment about existence of any relevant fact which can be verified from records of the case, it is open to the party to bring it to notice of appellate court. It is not necessary for him to file a petition for review before the same court, to get such mistake, if any, corrected, as argued by respondents counsel.

52. The dictum laid down in the decision cited above will not be applicable to a case in which the alleged mistake committed by a court in entering a finding can be verified on a perusal of the court's record. If the court ignores a vital piece of material placed before it, is taken into account, would let the court to come to a different conclusion, the aggrieved party can certainly raise it as a ground in second appeal. Hence, the argument advanced to the contrary is rejected.

53. In the light of the contention taken up by appellants, case records were verified by this Court and it is seen from records that written objection to the Commission Report was actually filed by appellants. A prayer is also seen made in the written objection, to set aside the report on various grounds. But, trial court totally ignored the objection filed and failed to consider its merit. Though the omission was taken up as a ground in appeal memorandum, first appellate court also did not even verify whether an objection was actually filed. Instead, it committed a grave error in holding that no objection was filed to the report. It also placed explicit reliance on the Commission Report and the plan to enter crucial findings of facts, proceeding on the premise that there is no objection to Commission Report.

54. There can be no doubt that the findings of fact entered into by the court below, by ignoring the objection to Commission Report and without considering merit of the objection are unsustainable and vitiated, on the principle of natural justice itself. At least while appreciating evidence, the objection raised should have been taken into account. Any way, the procedure adopted by the courts below in dealing with the Commission Report is contrary to the mandatory requirements under the relevant provisions of the CPC ("CPC for short). Order XXVI, Rule 9 of CPC indicates the purpose for which commission is issued. The said provision reads as follows:

Order XXVI, Rule 9. Commissions to make local investigations.-- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

55. A reading of Order XXVI, Rule 9 of C.P.C. reveals that the said provision enables the Court to issue a commission for local investigation, if it is satisfied that such local inspection is requisite or proper for the purpose of elucidating any matter in dispute etc. Such a course may be necessary to enable the court to resolve the dispute and to take a right decision in the matter. In many cases involving dispute relating to identity of immovable property or boundaries, the court may not be in a position to resolve the dispute effectively and pass a decree with clarity in the absence of a Commission Report.

56. Therefore, the Commission Report and plan have great significance in resolving the factual dispute in a civil case and hence, Order XXVI, Rule 9 CPC lays down that court may direct the Commissioner to make such investigation as may be necessary and to report the matter to the Court. When a Commission Report and plan are filed in court as per the direction of the court, the court shall not act merely as a post office and receive it on file. It is the bounden duty of the court to go through the Commission Report and consider whether the Commission Report is satisfactory or not and whether it contains all the relevant details as may be necessary to resolve the dispute. It shall see whether the report is defective or unsatisfactory for any reason or whether any clarification is required in the report.

57. In short, the court shall confirm that Commissioner has elucidated all relevant facts which will help the court to take a right decision in the case. In the light of the provision contained in Order XXVI, Rule 10(3) C.P.C., the court shall go through the report and see whether it is in order, irrespective of whether any objection is filed or not. Order XXVI, Rule 10(3) C.P.C. lays down that where the Court is dissatisfied with the proceedings of the Commissioner, for any reason, it

may direct the Commissioner to make such further inquiry as it thinks fit.

58. If, on a perusal of the report, the court is satisfied that there is any failure or omission on the part of the Commissioner in eliciting the necessary details or if the court doubts the correctness of the details reported by the Commissioner or if the court finds that the report lacks clarity, the court has to direct the Commissioner to make such further inquiry, as it may think fit. This may be done by the court either suo motu or at request of by either of the parties.

59. If any objection is filed to the Commission Report by any of the parties, the court shall necessarily consider the same and pass appropriate order. It shall not under any circumstances ignore such objections raised or fail to consider the merit of the objections raised. If any prayer is made to remit or set aside the Commission Report, it is all the more essential that the court considers the merit in the objection and it may either remit the report to the Commissioner with direction to elicit necessary details and report or set aside the same and issue another commission, if such a course is found necessary.

60. However, if the court finds that it is not necessary to remit or set aside the Commission Report, it shall certainly consider merit of the objection raised to the Commission Report, before reaching any conclusion on facts, based on Commission Report. At any rate, it will be illegal to totally ignore the-objection to Commission Report and proceed with the case, by placing explicit reliance upon the Commission Report, without considering the objection to the report, before entering any finding on the disputed fact, on the basis of the Commission Report.

61. It is relevant to note that in the written objection tiled by appellants to Commission Report, it is specifically stated that report and plan are contrary to the natural lie and boundaries of the land. It is also stated that the channel which lies on southern side of appellants' property is not identified by Commissioner. It is also stated therein that the plan is not prepared by taking measurements, in accordance with relevant title deeds and that the property is not located with reference to survey sub-divisions. Various other objections which deserve consideration are also stated in the written objection.

62. But, court below completely ignored the objections to the Commission Report and accepted the Commission Report and acted upon the same to enter certain findings on disputed fact. The court below did not even consider suo motu whether a further enquiry was necessary, in the light of the objection raised. It also seriously erred in holding that no objection was filed to the Commission Report which is contrary to the records. Learned counsel for appellants argued that even at the appellate stage the court could consider the objection and remit the report, as held in the decision reported in Joy Cherian Vs. George Cherian, [vide also 1987 (1) KLT 714 (D.B.)] 1987 (1) KLT 714 (D.B.), but this was also not done.

63. The appellate court also failed to consider the objections raised to Commission Report, at least while appreciating evidence and before reaching

conclusions on relevant facts, especially on the identity of disputed property. In such circumstances, crucial findings of facts arrived at by the court below on identity of the disputed property, ignoring the objections to Commission Report, are unsustainable. Such failure by itself is a sufficient ground to interfere with the findings of facts, in this second appeal, since appellants can justifiably contend that had such objections been taken into account, the decision would have been different.

64. Learned counsel for respondents argued that if appellants had any objection to the Commission Report, he should have examined the Commissioner but, without examination of the Commissioner, he cannot challenge the Commission Report before the High Court in a second appeal. It is also argued that Commission Report forms part of the record and it is admissible in evidence under Order XXVI, Rule 10(2) of C.P.C. and it can be acted upon by the courts below.

65. Learned counsel for respondents also placed reliance upon the decision reported in *State of Kerala Vs. Kottammal Mammeeriyakutty and Others*, , in support of his arguments. The relevant portion from the said decision is extracted hereunder:

There could be no doubt that the court below was perfectly justified in placing reliance on the materials found in Exts. X-1 and X-2, which formed part of the records, and which is evidence in the case. Of course, if the opposite side had any objection to any of the matters mentioned in the reports, or the manner in which he (the Commissioner) made the investigation, what that party ought to have done was to have the Commissioner examined with the leave for the court and elicit such information as it required. Not having chosen to do that, the appellant State could not at this distance of time make a submission that the court below ought not to have relied on Exts. X-1 and X-2 reports submitted by the Commissioner which, as already noticed, would be evidence in the case and would form part of the record in the case.

66. The above decision was rendered in a case in which the challenge was on admissibility of Commission Report, without examination of Commissioner. It was held by this court therein that as per Order XXVI, Rule 10(2) the Commission Report forms part of record and it is evidence and if a party has any objection to any of the matters mentioned in the report, or the manner in which the Commissioner made the investigation, he ought to have examined the Commissioner, with the leave for the court and elicit such information as it required. The contention that Commission Report cannot be relied upon, without examination of the Commissioner was rejected, in the light of the provision contained in Order XXVI, Rule 10(2).

67. There cannot be any dispute on the above legal proposition. But, the question involved in this case is totally different. This is a case in which objection was filed by a party to the Commission Report and correctness of the report and

plan was challenged on various grounds. The appellants also required that the property be measured and located by the Commissioner. If there is any merit in the objection raised, it would have been essential that the Commission Report be remitted with directions to measure the property etc., and file report in which event, there arises no question of examination of the Commissioner to elicit any fact reported by him in the report.

68. Therefore, it follows that in a case in which objection is raised to Commission Report and such objection is not at all considered by the court or it is totally ignored, the court shall not reject the contention raised by the party on the correctness or validity of a Commission Report, merely on the ground that he ought to have cross-examined the Commissioner, if he had any objection etc. If the court failed or omitted to consider merit of the objection to Commission Report, it will be open to the party who filed the objection to Commission Report to raise a ground that the Commission Report ought not to have been acted upon by the court, having ignored to consider his objection and decided whether it ought to be remitted or set aside.

69. Hence, merely because the Commission Report is admitted in evidence, the court cannot act upon the same, treating that all the facts reported by Commissioner as true especially if objection had been filed by party and the court failed to consider the same. It is also open to a party to satisfy the court that the report ought to have been remitted or set aside in the light of the objection raised, in which event the court shall not place explicit reliance upon the Commission Report to enter findings on disputed facts. Therefore, the dictum laid down in Mammeeriyakutty's case may not be understood to hold that if a party does not cross-examine the Commissioner, he will, under all circumstances be precluded from challenging the reliability of the facts reported in the Commission Report.

70. If a party has filed objection to Commission Report and court have failed to consider the objection and decide whether a further enquiry was necessary or not, it will be open to him to contend in a second appeal that the courts below ought not to have relied upon the report to enter any particular finding of facts on the basis of such report. The contention raised by appellants that the Commission Report and plan ought not to have been acted upon, in the absence of considering the objection to such report and plan is only acceptable. At any rate, the argument that appellants cannot challenge the findings of fact entered into by the court below on the basis of Commission Report, in the absence of cross-examination of the Commissioner in the second appeal cannot be sustained.

71. Learned counsel for respondents also submitted that appellants have not challenged the Commission Report as per appeal memo in this second appeal and no ground is also raised regarding the validity of Commission Report. It is also strongly argued by him that in the absence of any ground being raised in the appeal memo and also in the absence of framing of an issue by this Court relating to Commission Report, it will be illegal to consider the same in this

second appeal.

72. Learned counsel for respondents vehemently argued that in the absence of any ground being taken up and substantial question of law being framed by appellants in the appeal memorandum, it would be illegal for this court to raise such issue and decide the matter. No substantial question of law is involved in this case and appeal deserves to be dismissed, by virtue of Section 100(3) of C.P.C., as held in Boodireddy Chandraiah and Others Vs. Arigela Laxmi and Another, , it is argued.

73. I have already discussed in detail and held that even if appellants do not state any substantial question of law in the appeal memorandum and even if this court omits to even formulate any substantial question of law, this court can hear the parties on such substantial question of law, if this court is satisfied that such question is involved in this case. This is permitted u/s 100 C.P.C. On the facts of this case, a question arises whether the court can place in the absence of considering the objection filed to the same.

74. The above question is a substantial question of law because to resolve the dispute between the parties, it would be essential to consider the same and the factual findings on the dispute will depend upon the answer to the above question. It will be inevitable to consider the question, even to resolve the question of identity of the property, which is crucial. Therefore, the above substantial question of law is involved in this appeal and hence, both sides are heard on the same, as permitted by Section 100, C.P.C.

75. It is only if facts stated in the Commission Report can be acted upon as evidence, the court can appreciate, evaluate and assess the worth of other evidence on the disputed facts on identity of the property. It is needless to say that admissibility is different from reliability of evidence. So, before a piece of evidence is appreciated, the court must make sure that it is admissible in law and it constitutes "evidence" as per law. It will also consider whether explicit reliance can be placed on such materials, for any reason, on the ground taken up. If this is not done, necessarily the findings of fact will be vitiated and will be unsustainable.

76. Any way, I am satisfied that in the absence of considering whether there is merit in the objection filed to the Commission Report, the courts below has committed a serious error in placing reliance upon the facts stated in the Commission Report to enter findings on disputed facts, even with reference to identity of the disputed property. If findings of fact are arrived at by fact finding court by relying upon a piece of material, which is not legally admissible in evidence, it is well-settled that itself is a ground for interference in second appeal. Therefore, it is justifiable and legal for the High Court in a second appeal to formulate questions of law whether the material which is relied upon by fact finding court constitutes evidence as per law or whether it was proper to place reliance upon any piece of evidence to enter findings of fact.

77. In this context, it is also relevant to make a reference to Rule 109 (4) of the Civil Rules of Practice. The said provision lay down that "no question regarding the admissibility of evidence shall be made the subject of an issue". Therefore, such an issue may not arise before the trial court.

78. However, in the second appeal, admissibility of evidence may become a very relevant question because, it will have to be considered whether findings of fact finding court have been vitiated by the reason that any piece of evidence which is legally inadmissible has been taken into account for resolving the disputed questions between the parties. It may also have to be considered whether the courts below committed any error or illegality in eschewing any relevant piece of evidence which is admissible in law, which, if considered will alter the decision.

79. Therefore, framing of issues is different from formulating substantial question of law in a second appeal. Framing of issues arise from the pleadings whereas formulation of raising of substantial question of law in a second appeal does not depend solely upon the issues which may arise in the suit. In a second appeal, court is considering whether the fact finding court has gone wrong, because of any departure from the provisions of law or whether the finding of fact can be sustained or not because of violation of any law or whether such findings of fact are vitiated by any illegality etc. etc.

80. Any way, For resolving the dispute between the parties, the court will have to look into evidence adduced in this case and if the fact finding court relies upon any material which is not "evidence", the second appellate court has the power to frame appropriate substantial question of law and decide the same in second appeal. In such circumstances, I find that it is within the powers of High Court, to formulate substantial question of law for taking a right decision in the second appeal to find out whether the fact finding court has committed any illegality in arriving at a conclusion of facts.

81. While doing so, I find that lower appellate court committed an illegality in relying upon Ext. C-3 to hold that Commissioner measured and located plaintiff schedule property etc. based on Ext. C-3 which is only a plan and inadmissible in evidence either on the provisions of Evidence Act or by virtue of Order XXVI, Rule 10 CPC. Therefore, the decree and judgment which are basically founded on the plan are unsustainable.

82. A further question also arises in the context where the suit is to be dismissed for the sole reason that court committed an illegality in relying upon surveyor's plan which according to me is inadmissible in evidence.

83. The court must bear in mind that an effective decree can be passed in a suit of this nature based only on Commission Report and plan. The plan ordinarily will form part of decree. Therefore, when a direction is issued to the Commissioner to identify and locate plaintiff schedule property and demarcate boundary with measurement and the Commission Report does not reveal or clarify that measurements are taken with the help of surveyor or that plan is not prepared in

accordance with the measurements, it is only just and proper for the court to remit Commission Report even suo motu and get the relevant details reported.

84. In cases in which, such defects in the Commission Report are brought to the notice of the court, the court shall not simply ignore the same but it shall look into the objection raised to the Commission Report. On such objection being raised, the court shall at least examine whether Commission Report and plan are satisfactory or not. But in this case, even though appellants filed written objection stating that the plan is not prepared on the basis of title deeds or survey subdivisions and that properties are not located correctly and that Commissioner has failed to locate a stream etc. and thereby challenged the very measurement being taken, trial court totally ignored such objection.

85. It is pertinent to note that this is a case where, there is nothing in the Commission Report to vouch correctness of the plan submitted along with the Commission Report and hence at least for clarifying this aspect, the court ought to have suo motu remitted the Commission Report to the Commissioner to clarify such fact. The trial court has not exercised the jurisdiction under Order XXVI, Rule 10(3) appropriately and resultantly even this Court is not in a position to grant a decree, even if appellants are able to establish that there is encroachment and that there is demarcating boundary between the two relevant properties.

86. It is relevant to note that Commissioner reported in the Commission Report that there is demarcating boundary and he identified the same and located the property also. But in the light of inadequacy in the Commission Report, court is not in a position to act upon the plan submitted along with Commission Report. The fault is not that of the party alone, the court ought to have heard both sides, at least in the light of objection raised in the Commission Report by appellants and issue such directions as may be necessary for the purpose of elucidating the matter in dispute and for passing effective decree in the matter.

87. Since trial court has failed and the appellate court also ignored this fact, I find that it is necessary to remit the case for fresh consideration and disposal in the light of observations made in this judgment. I am fully satisfied that this is a case where, court will not be in a position to give an effective decree without a proper plan prepared by Commissioner.

88. It may not be just and proper for this court to non suit the plaintiff for the mere reason that there is no proper plan in the matter. It is also essential that appellants gets an opportunity to bring forth all his objections and substantiate whether the property which is allegedly encroached upon by him actually is part of property belonging to plaintiff or it is part of his own property.

89. The main objection raised is not measuring the property with reference to the title deeds. Appellants have a definite case that if property is measured with the extension boundaries and also title deeds, no extent of property will be left on the northern side of property which is sold by the plaintiff to Kamaludeen. It is

pertinent to note in the Commission Report as well as the plan submitted along with Commission Report the property of Kamaludeen is having an extent of 10 cents. In the plan submitted by surveyor, the extent of property of Kamaludeen is 10.580 cents.

Likewise, there is difference in the extent of different properties. Therefore, without getting clarification of these discrepancies and without considering the objection to the Commission Report, it may not be proper to decide the suit either way. Therefore, it has become necessary to remit the case to the trial court for reconsideration and disposal in accordance with law. In the result, the following order is passed:

1. The decree and judgment passed by lower appellate court are set aside.
2. The case is remanded to trial court for fresh consideration and disposal in accordance with law, in the light of the observations made in this judgment, after consideration of the written objection filed by appellants to Commission Report.
3. Refund the court fee (under Section 67 of Court fee's Act)
4. The parties shall appear before the trial court on receipt of notice to their respective counsel.

This appeal is partly allowed.