

**(1996) 07 AHC CK 0079**  
**In the Allahabad High Court**  
**Case No : Second Appeal No. 157 of 1996**

Satya Narain

APPELLANT

Vs

Lakshmi Narain Purwar & Ors.

RESPONDENT

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**Date of Decision :** 10-07-1996

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100

**Citation :** (1996) 07 AHC CK 0079

**Hon'ble Judges :** S.K.Phaujdar, J

**Final Decision :** Allowed

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## Judgement

S. K. Phaujdar, J.

1. When the matter was taken up for hearing on the point of admission, the caveator desired a right of audition. The appellant objected stating that the caveator had a right of being heard only on an application, e.g. on the application for interim order and not on the point of admission. The caveator relied upon a decision of the Allahabad High Court reported in AIR 1987 All 360, wherein it was held that although Order XLI, Rule 11 did not grant a right of hearing at the admission stage to the caveator, but the court had every authority to hear him for the ends of justice as justice was likely to be done if the two sides were heard. Accordingly the caveator was allowed, at this stage, only to urge that the substantial questions of law framed in the memo of appeal were not at all substantial.

2. The parties were heard not only on the above question but also on the question as to what was a substantial question of law in terms of Section 100, C.P.C. and if any such substantial question of law was there for the purpose of admitting the appeal.

3. The suit in question was filed by the plaintiffrespondent Lakshmi Narain Purwar against the appellantdefendant and others praying for injunction. The suit property was a house and four shop rooms specifically described by certain

letters in the map annexed to the plaint. The plaintiff initially prayed for a direction upon the defendants that they may not disturb the possession of the plaintiff on the suit property and may not make any construction thereon. Subsequently, the plaint was amended to insert a prayer for possession in respect of a portion of the suit property against specifically described by certain different letters. There was a prayer for damages also.

4. The defendant contested the suit and denied the claim of the plaintiff to say that the property had never belonged to Jagannath or to Smt. Ram Payari and also denied that any Will was executed by Smt. Ram Payari, which was the line of claim of the plaintiff. They asserted that the suit property was in possession of the defendant. It was insisted that Jagannath had accepted in an earlier proceeding, by his action and by his papers, that the property belonged to defendant Nos. 1 and 2.

5. On the basis of the pleading the trial Court had framed several issues concerning the ownership of the suit property by Jagannath, the Will made in respect of it by Smt. Ram Payari in favour of the plaintiff, the ownership of the plaintiff and his possession of the suit property, the ownership of the defendant their possession thereon, valuation, limitation etc. Two advocate commissioners were appointed during the trial of the suit. The first commissioner was deputed at the instance of the plaintiff and he had held an ex pane inspection of the site. His report was on record. The second advocate commissioner had gone at the instance of the defendants and his report was also on record. The learned trial Court, after a discussion of the cases of the parties and the evidence on record, had dismissed the suit of the plaintiff.

6. The aggrieved plaintiff filed a first appeal and the first appellate Court allowed the appeal, set aside the decree of dismissal passed by the trial Court and decreed the suit of the plaintiff and allowed damages from 1493 at the rate of Rs. 3, 000 per month. The defendants were directed to remove the structure from the suit property within three months from the date of the decree. The first appellate Court had called for certain documents from the municipality and had relied upon the same. This judgment is now in challenge in the present appeal at the instance of the defendantappellant Satya Narain.

7. The substantial questions of law as were proposed are as follows:

(1) Whether reversal of the trial Court judgment, without hearing in mind the reasons ascribed by the trial Court on coming to grip and indeed without discussing of even alluding to its reasoning and without meeting it and in fact ignoring it is illegal.

(2) Whether legal ingredients of adverse possession were satisfied and could there be adverse possession in the circumstances of the case.

(3) Whether the exparte first commission was contrary to provisions of Order XXVI, Rules 18(1) and 9, C.P.C. and also contrary to fundamental principles of

natural justice and fair play and inadmissible in evidence.

(4) Whether the procedure followed by the lower appellate Court in summoning and looking into the Municipal Boards records violated fundamental principles of natural justice and fair play and was illegal.

(5) Whether boundaries in the deeds executed by third person, who are alive are admissible in evidence.

(6) Whether the approach of the lower appellate Court was in accordance with law.

(7) Whether the decree for damages was legal in the circumstances of the case.

(8) Whether successive amendments made at the appellate stage changed the nature of the suit and were illegal, and rendered the whole a mistrial, and at any rate, necessitated a fresh trial.

(9) Whether the amendment by adding prayer "da" was in accordance with law and could such a prayer be granted in circumstances of the case.

(10) Whether discarding of the second commission's report was legal. As to what was a substantial question of law was seriously disputed by the learned Counsels for the parties. Section 100 of the C.P.C. allows a second appeal only if the High Court is satisfied that the case involved a substantial question of law. This section has been substituted in place of old Section 100 of the C.P.C. by the amending Act of 1976 and the requirement of a substantial question of law being involved in the matter is an introduction in 1976. When the High Court is satisfied that a substantial question of law is involved, law requires that it should formulate the same and the appeal could be heard only on those points unless some other point is allowed to be raised by the Court. The expression "substantial question of law" occurred in Section 110 of the C.P.C. which stood repealed in 1973 and by the same amending Act, Section 109 of the C.P.C. also stood substituted. Section 109, C.P.C. speaks of appeal to the Supreme Court and such appeals would only lie if the High Court, against whose order an appeal is intended, certifies that the case involves a substantial question of law of general importance. The parties disputed the point whether the substantial question of law required under Section 100, C.P.C. should be one of general importance.

8. The respondent relied on a decision of the Supreme Court, pronounced by a five judge Bench, in the case of *Sir Chunilal Mehta and Sons Ltd, v. Century Spinning and Manufacturing Co. Ltd.*, AIR1962SC 1314. It was a case prior to the two amendments of the C.P.C. in 1973 and 1976. It was held therein that the construction of a document of a title or of a document which is the foundation of the rights of parties necessarily raises a question of law. Reading Article 133 (1) (a) of the Constitution and Section 110, C.P.C. (as it stood prior to amendment in 1973) the Supreme Court observed in this case 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 or is not free from difficulty or calls for discussion of alternative view"s. If the question is settled by the highest Court or the general principles to be applied in determining the question are wellsettled 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."

9. On this point the appellant relied on a decision of the Privy Council as reported in AIR 1927 Privy Council at page 110. It was also on the point of interpretation of Section 110, C.P.C. It was observed herein that where the decree or final order appealed from affirms the decision of the court immediately below the court passing such decree or final order, the appeal must involve some substantial question of law. The Privy Council went onto say "substantial question of law" means a substantial question of law as between the parties in the case involved. Reliance w i also placed on a decision of the Supreme Court interpreting Section 110, C.P.C. as reported in AIR 1953 SC at page 521. It was observed herein that the ground on which the appeal was dismissed by the High Court raised a question of law of importance to the parties and that being so, on that ground alone, the appellant was entitled to a certificate under Section 110, C.P.C. This point came up for consideration before the Lucknow Bench of the Allahabad High Court and a Division Bench hold (AIR 1953 Allahabad at page 129) that a substantial question of law need only be of importance between the parties and need not necessarily be of public importance. No doubt, it must be substantial, that is to say, of substance and not a question which, on the face of it, is of no force or is immaterial for the decision of the appeal. Reference was also made to a note on a case decided by the Calcutta High Court (AIR 1984 NOC 304, Cal.) the expression "substantial question of law" as used in Section 100, C.P.C. visavis a similar expression used in Section 109, C.P.C. came for interpretation before the High Court and it was held that the expression "substantial question of law" in Section 100, C.P.C. could not be equated with similar expression appearing in Section 109 of the C.P.C. of Article 133 of the Constitution of India.

10. When the same expression is used once without any rider in one section and with a rider in another section it must be held that the rider is not to be read therewith in the first mentioned section. In Section 109, C.P.C. the expression "substantial question of law" is followed by another expression "of general importance". In Section 100, C.P.C., however, no such expression is thereto qualify the expression "substantial question of law". It can only be interpreted, therefore, that Section 100, C.P.C. did not require the substantial question of law to be of general importance. It must, according to the aforementioned case laws, be a question of substance and not a question for the sake of academic discussion alone. It must be a question, under Section 100, C.P.C., which would have an effect on the judgment between the parties and once this test is passed it would be a substantial question of law. It could not again be a substantial question of law if the point had already been decided by the apex Court or by a

superior Bench of the same High Court.

11. The questions raised by now may be examined in the above light to see if the same are substantial questions of law. On question No. 1 case laws were submitted before me to say that the scope of the second appeal is very limited and the High Court would be reluctant to interfere with a finding on fact. But decisions are there to say that the first appellate Court is required to read an impugned judgment and meet the reasoning advanced by the trial Court before reversing the findings of the Court below. Whether the first appellate Court properly discussed the reasoning's would be a matter on the merit of the case not to be gone at this stage of admission itself. The first point may be urged as a substantial question of law. Regarding the second point, it is found that a plea of adverse possession was raised and a question was proposed if the legal ingredients of adverse possession were there. In the course of argument, the learned counsel proposed to drop the word "adverse" from this question, once such word is dropped the question that remains is "whether legal ingredients of possession were satisfied and could there be possession in the circumstances of the case. These words do not carry any sense without the words adverse which the learned counsel had dropped. Question No. 2 may not, therefore, be urged. Regarding question No. 3 a true interpretation of Order XXVI, Rules 18(1) and 9, C.P.C. has been sought to be made out. This question may be tagged with question No. 10 and may be taken up as a substantial question of law. The first appellate Court had called for a document and relied on the same without formal prove or without admission of the same by the parties. In this light point No. 4 is also a substantial one. It appears that the learned first appellate Court had relied on the description of the boundaries in the deeds executed by third persons who were not examined. The statements were accepted although these persons were alive but not examined question No. 5 is also a substantial one. Question No. 7 is against a substantial one as damages have been allowed even beyond the rate prayed for.

12. The learned counsel for the respondent placed before me case laws touching the scope of Section 100, C.P.C. These decisions require going into the matter and will be open for consideration when the matter is taken up for hearing. The case laws on the true interpretation of the Order XXVI, Rule 18 are also matters for discussion at the time of the hearing.

13. It was a case not of confirmation of the trial Court judgment rather the trial court judgment was reversed on a certain approach by the first appellate Court and the substantial questions as indicated above are necessary to be gone into detail for an appropriate decision of the appeal.

14. The appeal accordingly stand admitted on the substantial question of law in point Nos. 1, 3, 4, 5 and 7 and point No. 10, being read along with point No. 3. The points refer to those mentioned in the memo of appeal. Respondent No. 1 has appeared as a caveater. The other respondents be noticed. The lower Court record be called for and the matter be listed in the third week of December,

1996, for hearing.