

(2023) 04 GUJ CK 0070

In the Gujarat High Court

Case No : R/Second Appeal No. 571 Of 2022, Civil Application (For Stay) No. 1 Of 2022

Umeshbhai Sumanbhai Chamadbhai Chaudhari

APPELLANT

Vs

Tulsibhai Sudharabhai Chaudhari

RESPONDENT

Date of Decision : 19-04-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100, Order 7 Rule 11(a)(d)
Gujarat Land Revenue Code, 1879 — Section 73, 73(A), 73(AA), 73(AC), 73(AD)
Bombay Land Revenue Code 1879 — Section 135(D)

Citation : (2023) 04 GUJ CK 0070

Hon'ble Judges : Rajendra M. Sareen, J

Bench : Single Bench

Advocate : R E Variava

Final Decision : Dismissed

Judgement

Rajendra M. Sareen, J

1. Present Second Appeal has been preferred by the appellants – original plaintiffs against the concurrent findings of the learned courts below arising out of the Regular Civil Suit No.24 of 2012 filed by the appellants – plaintiffs wherein respondent – defendant filed application Ex.30 under Order 7 Rule 11(a)(d) of the Code of Civil Procedure seeking rejection of the plaint, which was allowed and the plaint was rejected by the learned 2nd Additional Senior Civil Judge, Mangrol, against which the appellants – original plaintiffs preferred Regular Civil Appeal and after hearing the parties at length, the said appeal came to be dismissed by the learned 3rd Additional District Judge, Surat vide order dated 31/11/2021. Being aggrieved by the said order, the appellants – original plaintiffs have preferred the present Appeal From Order.

2. Heard Mr.R.E. Variava, learned advocate for the appellants. He has submitted that both the courts below have not appreciated the plaint and the evidence produced on record and failed to appreciate that the question of limitation and

cause of action was mixed question of law and facts, however, the same has not been taken into consideration. It is submitted that the provisions of section 73, 73(A), 73(AA), 73(AC) and 73(AD) of the Gujarat Land Revenue Code are not considered and the Civil Court though has no jurisdiction for transfer of the land involved under the Gujarat Land Revenue Code belonging to the tribal community without prior permission of the Collector, the Court cannot entertain the suit and has erred in dismissing the suit on the ground of limitation.

3. I have examined the findings of both the courts on the issue raised in the suit. Upon examination of the judgement and order of both the courts below, no infirmity, illegality, perversity or impropriety is pointed out in the concurrent findings of the facts rendered by the courts below by the learned advocate for the appellant. Not only that, the learned advocate for the appellant is unable to show to this court any finding recorded by the learned courts is without any evidence or there is any illegality in the findings.

4. The grievance is raised by the appellant with regard to the provisions of section 73, 73(A), 73(AA) etc. of the Gujarat Land Revenue Code where the Civil Court has not entertained the suit, it is apparent that the suit has been filed by the appellant plaintiff himself. Moreover, as regards the jurisdiction of the Civil Court is ousted in the case of transfer of a land by tribals, that issue regarding mutation entry on the ground of Will executed in favour of the defendant respondent is challenged before the revenue authority and it is for the revenue authority to decide whether the property can be transferred by a tribal in the name of another tribal as per the provisions of the Code, but here the suit was filed by the appellant plaintiff challenging the Will executed by the deceased grand-father of the plaintiff in favour of the respondent defendant and in that issue of limitation based upon the cause of action and the plaint has been raised by the defendant, which is a legal issue, as it is to be decided only on the basis of the plaint of the plaintiff and not on the defence of the defendant and here both the courts have rightly observed and held that no cause of action has arisen to file the suit and the suit is beyond the period of limitation.

8. Under the circumstances, this court does not find any error or law in the concurrent findings of the learned courts below. In exercise of powers under section 100 of the Code of Civil Procedure, jurisdiction is confined to substantial question of law only. Here in this case, no substantial question of law has been raised by the appellant so as to enable this Court to admit the present appeal.

9. The scope of Second Appeal under section 100 is limited. Second Appeal is competent only if it involves, at the stage of admission, substantial question of law. High Court can interfere with the concurrent findings of fact, if the findings are perverse but the perversity should be apparent on the face of record.

10. Here in this appeal, the question of law raised cannot be said to be substantial question of law and there are question of law but not the substantial question of law.

11. In the case of *Easwari Versus Parvathi and others*, reported in (2014) 15 SCC 255, it is held that High Court can entertain a Second Appeal on a substantial question of law and it has absolutely no jurisdiction to entertain the Second Appeal on the ground of erroneous findings of fact, however, gross error seems to be looked into. High Court can interfere in the concurrent findings of facts in the Second Appeal if the appellate court has not properly appreciated the evidence on record.

12. In the case of *Samina Khatun*, AIR 1995 Gauhati

104, also it is held that High Court can only entertain Second Appeal only on substantial question of law. High Court has absolutely no jurisdiction to entertain Second Appeal on the ground of erroneous findings of fact.

13. As laid down in the case of *State of Haryana Versus Khalsa Motors Limited*, reported in (1990) 4 SCC 659, on the basis of evidence on record it is held that the trial court and first appellate court has given concurrent findings of facts and the High Court cannot reverse the said findings under ordinary circumstances.

14. In the case of *C.Doddanarayana Reddy & Ors. Vs. C. Jayarama Reddy & Ors.*, reported in (2020) 4 SCC 659, the Hon'ble Apex Court has observed and held as under :-

"25. The question as to whether a substantial question of law arises, has been a subject matter of interpretation by this Court. In the judgment reported as *Karnataka Board of Wakf v. Anjuman-E-Ismail Madris-Un-Niswan* (1999) 6 SCC 343, it was held that findings of the fact could not have been interfered within the second appeal. This Court held as under:

"12. This Court had repeatedly held that the power of the High Court to interfere in second appeal under Section 100 CPC is limited solely to decide a substantial question of law, if at all the same arises in the case. It has deprecated the practice of the High Court routinely interfering in pure findings of fact reached by the courts below without coming to the conclusion that the said finding of fact is either perverse or not based on material on record.

13. In *Ramanuja Naidu v. V. Kanniah Naidu* (1996 3 SCC 392), this Court held:

"It is now well settled that concurrent findings of fact of trial court and first appellate court cannot be interfered with by the High Court in exercise of its (1999) 6 SCC 343 jurisdiction under Section 100 of Civil Procedure Code. The Single Judge of the High Court totally misconceived his jurisdiction in deciding the second appeal under Section 100 of the Code in the way he did."

14. In *Navaneethammal v. Arjuna Chetty* (1996 6 SCC 166), this Court held :

"Interference with the concurrent findings of the courts below by the High Court under Section 100 CPC must be avoided unless warranted by compelling reasons. In any case, the High Court is not expected to reappreciate the evidence just to re-place the findings of the lower courts.

... Even assuming that another view is possible on a reappraisal of the same evidence, that should not have been done by the High Court as it cannot be said that the view taken by the first appellate court was based on no material."

15. And again in *Secy., Taliparamba Education Society v. Moothedath Mallisseri Illath M.N.* (1997 4 SCC 484), this Court held: (SCC p. 486, para 5) "The High Court was grossly in error in trenching upon the appreciation of evidence under Section 100 CPC and recording reverse finding of fact which is impermissible."

26. In a judgment reported as *Kondiba Dagadu Kadam v. Savitkibai Sopan Gujar & Ors.*⁹, this Court held that from a given set of circumstances if two inferences are possible then the one drawn by the lower appellate court is binding on the High Court. In the said case, the First Appellate Court set aside the judgment of the trial court. It was held that the High Court can interfere if the conclusion drawn by the lower court was erroneous being contrary to mandatory provisions of law applicable or if it is a settled position on the basis of a pronouncement made by the 9 (1999) 3 SCC 722 court or based upon inadmissible evidence or arrived at without evidence. This Court held as under:

"5. It is not within the domain of the High Court to investigate the grounds on which findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses 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 had 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."

27. In another judgment reported as *Santosh Hazari v. Purushottam Tiwari*, this Court held as under:

"14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An

entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question 10 (2001) 3SCC 179 of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

28. Recently in another judgment reported as State of Rajasthan v. Shiv Dayal¹¹, it was held that a concurrent finding of the fact is binding, unless it is pointed out that it was recorded de hors the pleadings or it was based on no evidence or based on misreading of the material on records and documents. The Court held as under:

"When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded de hors the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached. (see observation made by learned Judge Vivian Bose, J. as His Lordship then was a Judge of the Nagpur High Court in Rajeshwar Vishwanath Mamidwar & Ors. vs. Dashrath Narayan Chilwelkar & Ors., AIR 1943 Nagpur 117 Para 43)."

29. The learned High Court has not satisfied the tests laid down in the aforesaid judgements. Both the courts, the trial court and the learned First Appellate Court, have examined the School Leaving Certificate and returned a finding that the date of birth does not stand proved from such certificate. May be the High Court could have taken a different view acting as a trial court but once, two 11 (2019) 8 SCC 637 courts have returned a finding which is not based upon any misreading of material documents, nor is recorded against any provision of law, and neither can it be said that any judge acting judicially and reasonably could not have reached such a finding, then, the High Court cannot be said to have erred. Resultantly, no substantial question of law arose for consideration before the High Court.

15. In the recent decision in the Case of Kapil Kumar Vs. Raj Kumar reported in (2022) 10 SCC 281, the Hon'ble Apex Court has observed and held as under :-

"10. At the outset, it is required to be noted that as such there were concurrent findings of facts recorded by the learned trial court as well as the learned first appellate court on execution of pronote by the defendant in favour of the plaintiff. The said findings were on appreciation of entire evidence on record. Therefore, unless the findings recorded by the courts below were found to be perverse, the same were not required to be interfered with by the High Court in exercise of powers under section 100 CPC.

11. Even the substantial question of law framed by the High Court cannot be said

to be as such a question of law much less substantial question of law. From the impugned judgement and order passed by the High Court, it appears that as such no specific substantial question of law seems to have been framed by the High Court. However, it appears that what was considered by the High Court was whether the plaintiff proves the execution of pronote and the receipt by leading cogent evidence.”

16. This appeal, as stated above, is devoid of any substantial question of law. Both the courts have rightly decided the issue between the parties in the right perspective. It appears from the orders of both the courts below that notice under section 135(D) of the Bombay Land Revenue Code was served upon the plaintiff who objected mutation entry, the will under challenge by way of the suit was in the knowledge of the plaintiff in the year 2005 and the suit is filed in 2012 and apparently, as per section 59 of the Limitation Act as held by both the courts below, the suit is not maintainable on the point of limitation. This Court does not find any substance in the present Second Appeal as the same is devoid of any merits both on facts and law and hence the same is dismissed at admission stage.

In view of dismissal of the Second Appeal, Civil Application No.1 of 2022 stands dismissed.