NARAYANAN RAJENDRAN & ANOTHER A
V.
LEKSHMY SAROJINI & OTHERS
Civil Appeal No.742 Of 2001

FEBRUARY 12, 2009

B

(DALVEER BHANDARI AND HARJIT SINGH BEDI, JJ.)

Code Of Civil Procedure, 1908 :

s.100 – Second appeal – High Court setting aside concurrent findings of courts below – ***Held:*** *Scope of interference* C
by High Court after 1976 Amendment is strictly confined to cases involving substantial questions of law – It is reiterated that High Court would not be justified in dealing with any second appeal without first formulating substantial question of law – In the instant case, High Court erred in interfering with the D
findings of facts arrived at by the trial court and affirmed by first appellate court – Judgment of High Court set aside.

The respondents-plaintiffs filed a suit contending that the suit property was a subtarward property of defendant no. 1 and, therefore, the plaintiffs and defendants no. 1 to E
3 being members of the subtarward, were entitled to 1/11 share each in the suit property under the customary law. The stand of defendant no. 1 was that he had exclusive right, title and possession over the property under a registered settlement deed executed by his grand parents F
and, as such, the suit property was not partible. The trial court dismissed the suit holding that the plaintiffs failed to prove the suit property as subtarward property or that the parties were marumakkathayee ezhavas and were governed by the customary marumukkathayam law, on G
the other hand, the parties were governed by makkathayam law. The first appellate court affirmed the judgment. But the High Court in second appeal filed by the plaintiffs held that parties to the suit being residents

A of Kollam District and the property also being situated in the said district, they were following Misravazhi system of inheritance which was essentially based on the principle of marumakkathayam system of inheritance with modifications recognized by judicial pronouncements.

B In the appeal filed by the defendants it was contended for the appellants that the High Court erred in interfering with the concurrent findings of fact of the courts below, particularly, when the second appeal did not involve any substantial question of law. It was further con-
C tended that the burden was on the plaintiffs, and they failed to prove that they were governed by the customary marumakkathayam law of inheritance.

Allowing the appeal, the Court

D HELD: 1.1 Section 100 of the Code of Civil Procedure, 1908 shows that the High Court can exercise its jurisdiction thereunder only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal which has to be heard
E and decided only on the basis of such duly framed substantial questions of law. The judgment under appeal shows that no such procedure was followed by the Single Judge. It is held by a catena of judgments by this Court, that the judgment rendered by High Court u/s 100 C.P.C.
F without following the procedure laid down therein cannot be sustained.[para 33] [87-G, H; 88-A,B]

Sheel Chand v. Prakash Chand (1998) 6 SCC 683; Kanai Lal Garari v. Murari Ganguly (1999) 6 SCC 35; Panchugopal Barua v. Umesh Chandra Goswami (1997) 4
G *SCC 713; Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179; K. Raj and Anr. v. Muthamma (2001) 6 SCC 279; Ishwar Dass Jain v. Sohan Lal (2000) 1 SCC 434; Roop Singh v. Ram Singh (2000) 3 SCC 708; Santosh Hazari v. Purushottam Tiwari (deceased) by LRs. (2001) 3 SCC 179; Kamti Devi*
H *(Smt.) and Anr. v. Poshi Ram (2001) 5 SCC 311; Thiagarajan*

v. Sri Venugopalaswamy B. Koil (2004) 5 SCC 762; Commissioner, Hindu Religious & Charitable Endowments v. P. Shanmugama (2005) 9 SCC 232; State of Kerala v. Mohd. Kunhi (2005) 10 SCC 139; Madhavan Nair v. Bhaskar Pillai (2005) 10 SCC 553; Harjeet Singh v. Amrik Singh (2005) 12 SCC 270; H. P. Pyarejan v. Dasappa (2006) 2 SCC 496; Chandrika Singh (Dead) by LRS & Another v. Sarjug Singh & Another (2006) 12 SCC 49; Chacko & Another v. Mahadevan (2007) 7 SCC 363; Bokka Subba Rao v. Kukkala Balakrishna & Others (2008) 3 SCC 99; Nune Prasad & Others v. Nune Ramakrishna (2008) 8 SCC 258; Basayyal Mathad v. Rudrayya S. Mathad & Others (2008) 3 SCC 120; Dharam Singh v. Karnail Singh & Others (2008) 9 SCC 759; Narendra Gopal Vidyarthi v. Rajat Vidyarthi, 2008 (16) SCALE 122; and U.R. Virupakshaiah v. Sarvamma & Another 2009 (1) SCALE 89 – relied on.

1.2 The analysis of cases decided by the Privy Council and this court prior to 1976 clearly indicated the scope of interference u/s 100 C.P.C. by this Court. Even prior to 1976 amendment, the consistent position has been that the courts should not interfere with the concurrent findings of facts. [para 63] [97-F, G]

Pratap Chunder v. Mohandranath (1890) ILR 17 Calcutta 291 (P.C.); Durga Chowdharani v. Jawahar Singh (1891) 18 Cal 23 (PC); Ramratan Shukul v. Mussumat Nandu (1892) 19 Cal 249 (252) (PC); Ram Gopal v. Shakshaton (1893) ILR 20 Calcutta 93 (P.C.); Rudr Prasad v. Baij Nath (1893) ILR 15 Allahabad 367 – referred to.

1.3 After 1976 Amendment, the scope of s.100 has been drastically curtailed and narrowed down. The effect of the amendment mainly is: (i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved; (ii) substantial question of law to precisely state such question; (iii) a duty has been cast on the High Court to formulate substantial

A **question of law before hearing the appeal; (iv) the appeal shall be heard only on that question. The High Court would not be justified in dealing with any second appeal without first formulating substantial question of law. [para 64] [96-G, H; 97-A,B]**

B *Kshitish. Chandra Purkait v. Santosh Kumar Purkait (1997) 5 SCC 438; Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor* (1999) 2 SCC 471 – relied on.

1.4 The rationale behind allowing a second appeal
C **on a question of law is, that there ought to be some tribunal having a jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should**
D **be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher courts have authority to make binding decisions on question of**
E **law. [para 57] [94-G, H; 97-A]**

1.5 The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of s.100 C.P.C. have neither been appreciated nor applied. A class of judges while adminis-
F **tering law honestly believe that, if they are satisfied that in any second appeal brought before them evidence has been grossly mis-appreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree follow-**
G **ing upon a gross mis-appreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. It is reiterated that justice has to be administered in accordance with law. When s.100 C.P.C. is critically examined then, according to the legislative mandate,**
H **the interference by the High Court is permissible only in**

cases involving substantial questions of law. [para 65-66] [97-F, G, H; 98-A]

Deity Pattabhiramaswamy v. S. Hanymayya and Others AIR 1959 SC 57; M. Ramappa v. M. Bojjappa (1963) SCR 673; and Bholaram vs. Amirchand (1981) 2 SCC 414 – relied on.

Luchman v. Puna (1889) 16 Calcutta 753 (P.C.) – referred to.

1.6 It is a matter of common experience in this Court that despite clear enunciation of law in a catena of cases of this court, in a large number of cases the High Courts u/s 100 CPC are disturbing the concurrent findings of fact without formulating the substantial question of law. Unfortunately, several years are lost in the process. Litigants find it both extremely expensive and time consuming. This is one of the main reasons of delay in the administration of justice in civil matters. It is hoped that the High Courts would refrain from interfering with the concurrent findings of fact without formulating substantial question of law. [para 71-72] [98-F, G, H; 99-A, B]

Gurdev Kaur and Others v. Kaki and Others (2007) 1 SCC 546 – relied on.

2. In the instant case, the High Court seriously erred in interfering with the findings of facts arrived at by the trial court and affirmed by the first appellate court. The judgment of the High Court is wholly unsustainable in law and is set aside. The findings of the trial court as upheld by the first appellate court are restored.[paras 68 & 73] [98-C, 99-C]

Radha Amma & Anr. Vs. C. Balaakrishnan Nair & Ors. (2006) 8 SCC 546 – referred to.

Case Law Reference

(2006) 8 SCC 546	**referred to**	**para 16**
(2007) 1 SCC 546	**relied on**	**para 16**

A	(1889) 16 Calcutta 753 (P.C.)	referred to	para 19
	(1890) ILR 17 Calcutta 291 (P.C.)	referred to	para 20
	(1891) 18 Cal 23 (PC)	referred to	para 21
	(1892) 19 Cal 249 (252) (PC)	referred to	para 21
B	(1893) ILR 20 Calcutta 93 (P.C.)	referred	para 22
	(1893) ILR 15 Allahabad 367	referred to	para 23
	AIR 1959 SC 57	relied on	para 24
C	(1963) SCR 673	relied on	para 25
	(1981) 2 SCC 414	relied on	para 30
	(1997) 5 SCC 438	relied on	para 32
D	(1999) 2 SCC 471	relied on	para 32
	(1998) 6 SCC 683	relied on	para 33
	(1999) 6 SCC 35	relied on	para 34
	(1997) 4 SCC 713	relied on	para 34
E	(2001) 3 SCC 179	relied on	para 34
	(2001) 6 SCC 279	relied on	para 34
	(2000) 1 SCC 434	relied on	para 35
F	(2000) 3 SCC 708	relied on	para 36
	(2001) 5 SCC 311	relied on	para 38
	(2004) 5 SCC 762	relied on	para 39
	(2005) 9 SCC 232	relied on	para 41
G	(2005) 10 SCC 139	relied on	para 42
	(2005) 10 SCC 553	relied on	para 43
	(2005) 12 SCC 270	relied on	para 44

H

(2006) 2 SCC 496	**relied on**	**para 45**
(2006) 12 SCC 49	**relied on**	**para 46**
(2007) 7 SCC 363	**relied on**	**para 47**
(2008) 3 SCC 99	**relied on**	**para 48**
(2008) 8 SCC 258	**relied on**	**para 49**
(2008) 3 SCC 120	**relied on**	**para 50**
(2008) 9 SCC 759	**relied on**	**para 51**
2008 (16) SCALE 122	**relied on**	**para 52**
2009 (1) SCALE 89	**relied on**	**para 53**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.742 of 2001

From the Judgement and Order dated 23.03.2000 of the High Court of Kerala at Ernakulam in S.A. No 518 of 1990–C

C.S. Ranjan, E.M.S. Anam, for the Petitioned.

P. Krishnamoorthy, Romy Chacko, for the Respondent.

The Judgement of the Court was delivered by

DALVEER BHANDARI, J.

1. This appeal is directed against the judgment dated 23rd March, 2000 passed by the High Court of Kerala at Ernakulam in Second Appeal No.518 of 1990.

2. The appellant is aggrieved by the order of the High Court because the High Court in second appeal under section 100 of Civil Procedure Code, 1908 reversed the concurrent findings of the trial court and the first appellate court. According to the appellant, the second appeal did not involve any question of law much less any substantial question of law warranting inter-

A ference by the High Court under section 100 of the Code of Civil Procedure.

3. The facts which are necessary to dispose of the appeal are recapitulated as under:

B The appellants were defendants in the suit and the respondents were the plaintiffs. The plaintiffs filed a suit contending that the property in question is a subtarwad property of defendant no.1 and, therefore, the members of the subtarwad including the plaintiffs and defendants no.1 to 3 are entitled to 1/11 C share each for each member of the subtarwad under the customary law. Defendant nos.1 to 3 and defendant nos.4 and 5 who got assignment of the property for a valuable consideration from defendant nos.1 to 3 contended that the suit property is the personal property of defendant no.1 who has exclusive right D of title and possession ever since 1103 M.E. under registered settlement deed executed by the grandfather and grandmother of defendant no.1, therefore, the suit property is not partible.

4. Both the trial court as well as the first appellate court concurrently found that defendant no.1 has exclusive right and E possession over the suit property and that the plaintiffs have failed to prove that the suit property is subtarwad property or that the parties are governed by the customary marumakkathayam law. The court further held that the burden is on the plaintiffs to prove the customary law is applicable which F the plaintiffs have failed to prove. On the other hand, several documents executed in the family of the parties prove that the parties are governed by makkathayam law.

5. In the impugned judgment, the High Court on re-appreciation of the evidence in the case reversed the concurrent find- G ings of the courts below and held that the suit property is the subtarwad property and the parties are governed by ezhava marumakkathayam customary law. According to the appellants, the findings of the High Court are wholly unsustainable. The burden of proof of the customary law is upon the person who H alleges it. In the instant case, the respondents who were the

plaintiffs before the trial court have clearly failed to prove the customary law. On the other hand, the trial court and the first appellate court on evidence found that the parties are following makkathayam system and not marumakkathayam system. Under the marumakkathayam law, every member is entitled to one share in the property. The law of succession and inheritance followed by the parties is makkathayam law.

6. The trial court on the documents and evidence on record framed the following issues:

i. Whether the suit is maintainable?

ii. Whether the Munsiff's Court has pecuniary jurisdiction to try this suit?

iii. Whether the plaintiffs have paid proper court fees?

iv. Whether the plaint schedule property is the subtarwad property of plaintiffs and defendants 1 to 3?

v. Whether the plaintiffs are entitled to get share in the plaint schedule property and if so, what is the share due to the plaintiffs?

vi. Whether defendants 4 and 5 have done any improvements in the property and if so what is the quantum thereof?

vii. Whether the plaintiffs are entitled to get any mesne profits and if so, what is its extent?

viii. Reliefs and Costs?

Additional

ix. Are plaintiffs and defendants 1 to 3 Marumakkathayee Ezhavas? Are they governed by Marumakkathayam law?

7. According to the trial court, issues no.(iv), (v) and (ix) were main issues and they were decided together. The trial court came to the conclusion that the plaintiffs have not proved that

A they are Marumakkathayee ezhavas. The defendants have succeeded in showing that the parties are governed by makkathayam law and that the plaint schedule property is not the subtarwad property as claimed by the plaintiffs. This necessarily follows that the plaintiffs are not entitled to claim partition
B and get any share in the plaint property. The issues, therefore, were found accordingly against the plaintiffs and in favour of the defendants holding that the plaint schedule property is not the subtarwad property of the plaintiffs and defendant nos.1 to 3 and they are not Marumakkathayee ezhavas and hence the
C plaintiffs are not entitled to get any share in the said property.

8. The first appellate court also comprehensively re-evaluated and re-examined the entire evidence on record and came to the conclusion that the evidence led by the side of the plaintiffs is not convincing and reliable to uphold the case advanced
D by the plaintiffs and on the other hand, the evidence pointed out by the defendants would lead to the inference that the parties are makkathayee ezhavas. Therefore, there is no reason to interfere with the reasoning and findings of the lower court that the parties are governed by makkathayam system of inheritE ance, that there exists no subtarwad property of plaintiffs and defendant nos.1 to 3 and as such the plaintiffs are not entitled to get any share in the suit property. The first appellate court upheld the judgment and decree passed by the trial court.

9. The appellants aggrieved by the judgment of the trial
F court and the first appellate court preferred second appeal before the High Court.

10. In the impugned judgment, while setting aside the concurrent findings of fact, the High Court observed that "parties to
G the suit being persons residing in Kollam District and the property over which they claim right also being situated in Kollam District, they were following misravazhi system of inheritance which was essentially the principles of Marumakkathayam system of inheritance with modifications recognized by judicial pronouncement".

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11. The entire basis of the aforesaid finding of the High Court is without any basis and unsustainable in law. It is astonishing how the person residing in a particular district would be governed by misravazhi system of inheritance. The customary laws cannot be applied on the yardstick as adopted by the High Court.

12. The appellants submitted that it is the settled legal position that the burden of proof was on the plaintiffs to prove that they are governed by the customary law of marumakkathayam law of inheritance which the plaintiffs have failed to prove.

13. The appellants are seriously aggrieved by the judgment of the High Court. According to them, the High Court was in error in interfering with the findings of the fact of the courts below, particularly when the second appeal did not involve any question of law much less than any substantial question of law.

14. The counsel for the plaintiffs placed reliance on the judgment of this court in ***Radha Amma & Another*** *v.* ***C. Balakrishnan Nair & Others*** (2006) 8 SCC 546 dealing with marumakkathayam law. The court observed as under:

> **"12.** So far as the first submission is concerned it is not disputed before us that the question as to whether those items, namely, Items 8 to 16 belonged to the puthravakasam thavazhi, never arose for consideration in the suit or in the appeal. Defendant 2 never raised such a plea. No such issue was framed. Neither any evidence was recorded on this aspect of the matter, nor were the courts called upon to record a finding on that question. This position is not disputed by the counsel appearing for the respondents. If such be the legal and factual position, we find no justification for the High Court to interfere in appeal and modify the decree of the courts below on a question which did not arise for its consideration...."

15. Similarly, in the instant case, the High Court set aside the concurrent findings of fact of the courts below on the ground

A that the parties to the suit being persons residing in Kollam district and the property over which they claim right also being situated in Kollam district, they were following misravazhi system of inheritance which was essentially the principles of marumakkathayam system of inheritance. This was not the case
B of either of the parties. No documents were filed. No evidence was led. No issues were framed by the trial court. Therefore, the High Court was clearly in error in setting aside the concurrent findings of fact on virtually non-existent material. According to the appellants, the impugned judgment is liable to be set aside
C and the findings of the trial court and as affirmed by the first appellate court are liable to be restored.

16. In ***Gurdev Kaur and Others*** v. ***Kaki and Others*** (2007) 1 SCC 546 in which one of us (Bhandari, J.) was party to that judgment crystallized the entire legal position but unfortu-
D nately even thereafter in the number of cases it has come to our notice that the law declared by this court is not followed in a large number of cases by the High Courts. Once again we are making serious endeavour to recapitulate the legal position with the fond hope that the High Courts would keep in mind the legal
E position before interfering in a case of concurrent findings of facts arrived at by the trial court and upheld by the first appellate court.

17. Section 100 of the Code of Civil Procedure, 1908 (for short, C.P.C.) corresponds to Section 584 of the old Civil Pro-
F cedure Code of 1882. The Section 100 (prior to 1976 amendment) reads as under:

> "100. *Second appeal* – (1) "Save where otherwise provided in the body of this Code or by any other law for
G the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the following grounds, namely :
>
> (a) the decision being contrary to law or to some usage
H having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law; A

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits. B

(2) An appeal may lie under this section from an appellate decree passed *ex parte*."

18. A reference of series of cases decided by the Privy Council and this court would reveal true import, scope and ambit of Section 100 C.P.C. C

Cases decided prior to 1976 amendment both by the Privy Council and the Supreme Court dealing with the scope of Section 100 C.P.C. D

19. The Privy Council, in ***Luchman*** v. ***Puna*** [(1889) 16 Calcutta 753 (P.C.)], observed that a second appeal can lie only on one or the other grounds specified in the present section.

20. The Privy Council, in another case ***Pratap Chunder*** v. ***Mohandranath*** [(1890) ILR 17 Calcutta 291 (P.C.)], the limitation as to the power of the court imposed by sections 100 and 101 in a second appeal ought to be attended to, and an appellant ought not to be allowed to question the finding of the first appellate court upon a matter of fact. E F

21. In ***Durga Chowdharani*** v. ***Jawahar Singh*** (1891) 18 Cal 23 (PC), the Privy Council held that the High Court had no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross or inexcusable the error may seem to be. The clear declaration of law was made in the said judgment as early as in 1891. This judgment was followed in the case of ***Ramratan Shukul*** v. ***Mussumat Nandu*** (1892) 19 Cal 249 (252) (PC) and many others. The court observed: G

"It has now been conclusively settled that the third court...cannot entertain an appeal upon question as to the H

A soundness of findings of fact by the second court, if there is evidence to be considered, the decision of the second court, however unsatisfactory it might be if examined, must stand final."

22. In the case of ***Ram Gopal*** v. ***Shakshaton*** [(1893) ILR
B 20 Calcutta 93 (P.C.)], the court emphasized that a court of second appeal is not competent to entertain questions as to the soundness of a finding of facts by the courts below.

23. The same principle has been reiterated in ***Rudr***
C ***Prasad*** v. ***Baij Nath*** [(1893) ILR 15 Allahabad 367]. The court observed that a judge to whom a memorandum of second appeal is presented for admission is entitled to consider whether any of the grounds specified in this section exist and apply to the case, and if they do not, to reject the appeal summarily.

D 24. Similarly, before amendment in 1976, this court also had an occasion to examine the scope of Section 100 C.P.C.. In ***Deity Pattabhiramaswamy*** v. ***S. Hanymayya and Others*** [AIR 1959 SC 57], the High Court of Madras set aside the findings of the District Judge, Guntur, while deciding the second
E appeal. This court observed that notwithstanding the clear and authoritative pronouncement of the Privy Council on the limits and the scope of the High Court's jurisdiction under section 100, Civil Procedure Code, "some learned Judges of the High Courts are disposing of Second Appeals as if they were first appeals.
F This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public. This case affords a typical illustration of such interference by a Judge of the High Court in excess of his jurisdiction under Section 100, Civil Procedure Code. We have, therefore, no alternative but to set aside the judgment of the High Court which had no jurisdiction to interfere in second appeal with the findings of fact arrived at by the first appellate court based upon an appreciation of the relevant evidence.

H 25. In ***M. Ramappa*** v. ***M. Bojjappa*** [(1963) SCR 673], the

Andhra Pradesh High Court interfered with the finding recorded by the Appellate Court which, in turn, had itself reversed the trial court's finding on the same question of fact. While setting aside the decree of the second Appellate Court, this court observed:

> "It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact, but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

26. It may be pertinent to mention that as early as in 1890 the Judicial Committee of the Privy Council stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be and they added a note of warning that no Court in India has power to add, or enlarge, the grounds specified in Section 100 of the Code of Civil Procedure.

27. Even before the amendment, interference under Section 100 C.P.C. was limited, which has now been further curtailed, which we would be dealing in cases decided by this court after the amendment.

28. We have given reference of a large number of cases decided by the Privy Council and this court to clearly understand the ambit and scope of Section 100 *before amendment.*

29. The Amendment Act of 1976 has introduced drastic

A changes in the scope and ambit of Section 100 C.P.C. A second appeal under Section 100 C.P.C. is now confined to cases where a question of law is involved and such question must be a substantial one. Section 100, as amended, reads as under:

B **"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
C 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.

D (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
E 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:

F

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
G formulated by it, if it is satisfied that the case involves such question."

Cases decided after 1976 amendment

30. In ***Bholaram*** v. ***Amirchand*** (1981) 2 SCC 414 a three-
H Judge Bench of this court reiterated the statement of law. The

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

31. In ***Kshitish Chandra Purkait*** v. ***Santosh Kumar Purkait*** [(1997) 5 SCC 438], a three judge Bench of this court held: (a) that the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; (b) reasons for permitting the plea to be raised should also be recorded; (c) it has the duty to formulate the substantial questions of law and to put the opposite party on notice and give fair and proper opportunity to meet the point. The court also held that it is the duty cast upon the High Court to formulate substantial question of law involved in the case even at the initial stage.

32. This court had occasion to determine the same issue in ***Dnyanoba Bhaurao Shemade*** v. ***Maroti Bhaurao Marnor*** (1999) 2 SCC 471. The court stated that the High Court can exercise its jurisdiction under Section 100 C.P.C. only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of the such duly framed substantial questions of law.

33. A mere look at the said provision shows that the High Court can exercise its jurisdiction under Section 100 C.P.C. only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. The impugned judgment shows that no such procedure was followed by the learned Single Judge. It is held by a catena of judgments by this

A court, some of them being, Kshitish Chandra Purkait v. Santosh Kumar Purkait (1997) 5 SCC 438 and Sheel Chand v. Prakash Chand (1998) 6 SCC 683 that the judgment rendered by the High Court under Section 100 C.P.C. without following the aforesaid procedure cannot be sustained. On this short ground alone, B this appeal is required to be allowed.

34. In ***Kanai Lal Garari*** v. ***Murari Ganguly*** (1999) 6 SCC 35 the court has observed that it is mandatory to formulate the substantial question of law while entertaining the appeal in absence of which the judgment is to be set aside. In Panchugopal C Barua v. Umesh Chandra Goswami (1997) 4 SCC 713 and Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179 the court reiterated the statement of law that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law. These judgments have been referred to D in the later judgment of K. Raj and Anr. v. Muthamma (2001) 6 SCC 279. A statement of law has been reiterated regarding the scope and interference of the court in second appeal under Section 100 of the Code of Civil Procedure.

35. In ***Ishwar Dass Jain*** v. ***Sohan Lal*** (2000) 1 SCC E 434, this court in para 10, has stated:

> "Now under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the F judgment of the first appellate court without doing so."

36. Again in ***Roop Singh v. Ram Singh*** (2000) 3 SCC 708, this court has expressed that the jurisdiction of a High Court is confined to appeals involving substantial question of law. Para 7 of the said judgment reads:

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> "7. It is to be reiterated that under Section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while

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exercising its jurisdiction under Section 100 CPC. That apart, at the time of disposing of the matter the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment,..." A

37. Again in ***Santosh Hazari*** v. ***Purushottam Tiwari (deceased) by LRs.*** (2001) 3 SCC 179, another three-Judge Bench of this court correctly delineated the scope of Section 100 C.P.C.. The court observed that an obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the court. In the said judgment, it was further mentioned that the High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. According to the court the word substantial, as qualifying "question of law", means – of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code of Article 133(1) (a) of the Constitution. B C D E

38. In ***Kamti Devi (Smt.) and Anr.*** v. ***Poshi Ram*** (2001) 5 SCC 311 the court came to the conclusion that the finding thus reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding. F

39. In ***Thiagarajan*** v. ***Sri Venugopalaswamy B. Koil*** [(2004) 5 SCC 762], this court has held that the High Court in its jurisdiction under Section 100 C.P.C. was not justified in interfering with the findings of fact. The court observed that to say the least the approach of the High Court was not proper. It is the G H

A obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This court in a catena of decisions held that where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on
B reappreciation of evidence merely on the ground that another view was possible.

40. In the same case, this court observed that in a case where special leave petition was filed against a judgment of the High Court interfering with findings of fact of the lower appellate
C court. This court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This court further observed that the High Court in second appeal cannot substitute its own
D findings on reappreciation of evidence merely on the ground that another view was possible.

41. This court again reminded the High Courts in ***Commissioner, Hindu Religious & Charitable Endowments*** v. ***P. Shanmugama*** [(2005) 9 SCC 232] that the High Court has
E no jurisdiction in second appeal to interfere with the finding of facts.

42. Again, this court in the case of ***State of Kerala*** v. ***Mohd. Kunhi*** [(2005) 10 SCC 139] has reiterated the same principle
F that the High Court is not justified in interfering with the concurrent findings of fact. This court observed that, in doing so, the High Court has gone beyond the scope of Section 100 of the Code of Civil Procedure.

43. Again, in the case of ***Madhavan Nair*** v. ***Bhaskar Pillai***
G [(2005) 10 SCC 553], this court observed that the High Court was not justified in interfering with the concurrent findings of fact. This court observed that it is well settled that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the
H same.

44. Again, in the case of ***Harjeet Singh*** v. ***Amrik Singh*** [(2005) 12 SCC 270], this court with anguish has mentioned that the High Court has no jurisdiction to interfere with the findings of fact arrived at by the first appellate court. In this case, the findings of the trial court and the lower appellate court regarding readiness and willingness to perform their part of contract was set aside by the High Court in its jurisdiction under Section 100 C.P.C. This court, while setting aside the judgment of the High Court, observed that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the courts below.

45. In the case of ***H. P. Pyarejan*** v. ***Dasappa*** [(2006) 2 SCC 496] delivered on 6.2.2006, this court found serious infirmity in the judgment of the High Court. This court observed that it suffers from the vice of exercise of jurisdiction which did not vest in the High Court. Under Section 100 of the Code (as amended in 1976) the jurisdiction of the court to interfere with the judgments of the courts below is confined to hearing of substantial questions of law. Interference with the finding of fact by the High Court is not warranted if it invokes reappreciation of evidence. This court found that the impugned judgment of the High Court was vulnerable and needed to be set aside.

46. In ***Chandrika Singh (Dead) by LRS & Another*** *v.* ***Sarjug Singh & Another*** (2006) 12 SCC 49, this court again reiterated legal position that the High Court under section 100 CPC has limited jurisdiction. To deal with cases having a substantial question of law, this court observed as under:

> "12. ... While exercising its jurisdiction under Section 100 of the Code of Civil Procedure, the High Court is required to formulate a substantial question of law in relation to a finding of fact. The High Court exercises a limited jurisdiction in that behalf. Ordinarily unless there exists a sufficient and cogent reason, the findings of fact arrived at by the courts below are binding on the High Court..."

47. In ***Chacko & Another*** *v.* ***Mahadevan*** (2007) 7 SCC

363, while dealing with the jurisdiction of sections 96 and 100 CPC, this court laid down as under:

> "6. It may be mentioned that in a first appeal filed under Section 96 CPC, the appellate court can go into questions of fact, whereas in a second appeal filed under Section 100 CPC the High Court cannot interfere with the findings of fact of the first appellate court, and it is confined only to questions of law."

48. In ***Bokka Subba Rao v. Kukkala Balakrishna & Others*** (2008) 3 SCC 99, this court has clearly laid down that without formulating substantial questions of law under section 100 CPC, the High Court cannot interfere with the findings of fact. The court laid down as under:

> "4. ... It is now well settled by a catena of decisions of this Court that the High Court in second appeal, before allowing the same, ought to have formulated the substantial questions of law and thereafter, to decide the same on consideration of such substantial questions of law ... ."

49. In ***Nune Prasad & Others v. Nune Ramakrishna*** (2008) 8 SCC 258, this court laid down that the legislature has conferred a limited jurisdiction under section 100 CPC on the High Court to deal with the cases where substantial question of law is involved.

50. In ***Basayyal Mathad v. Rudrayya S. Mathad & Others*** (2008) 3 SCC 120, this court has held that interference by the High Court without framing substantial question of law is clearly contrary to the mandate of section 100 CPC.

51. In ***Dharam Singh v. Karnail Singh & Others,*** (2008) 9 SCC 759, this court again crystallized the legal position in the following words:

> "13. The plea about proviso to Sub-section (5) of Section 100 instead of supporting the stand of the respondent rather goes against them. The proviso is applicable only

when any substantial question of law has already been formulated and it empowers the High Court to hear, for reasons to be recorded, the appeal on any other substantial question of law. The expression "on any other substantial question of law" clearly shows that there must be some substantial question of law already formulated and then only another substantial question of law which was not formulated earlier can be taken up by the High Court for reasons to be recorded, if it is of the view that the case involves such question."

52. In ***Narendra Gopal Vidyarthi v. Rajat Vidyarthi,*** 2008 (16) SCALE 122, this court laid down that the High Court would be justified to interfere under section 100 CPC only if it involves substantial question of law.

53. In a recent judgment ***U.R. Virupakshaiah v. Sarvamma & Another,*** 2009 (1) SCALE 89, this court has once again crystallized the legal position after 1976 Amendment of the CPC. The court observed as under:

"The Code of Civil Procedure was amended in the year 1976 by reason of Code of Civil Procedure (Amendment) Act, 1976. In terms of the said amendment, it is now essential for the High Court to formulate a substantial question of law. The judgments of the trial court and the First Appellate Court can be interfered with only upon formulation of a substantial question of law..."

Legislative Background in the 54th Report of the Law Commission of India submitted in 1973:

54. The comprehensive 54th Report of the Law Commission of India submitted to the Government of India in 1973 gives historical background regarding ambit and scope of Section 100 C.P.C. According to the said report, any rational system of administration of civil law should recognize that litigation in civil cases should have two hearings on facts – one by the trial court and one by the court of appeal.

A 55. In the 54th Report of the Law Commission of India, it is incorporated that it may be permissible to point out that a search for absolute truth in the administration of justice, however, laudable, must in the very nature of things be put under some reasonable restraint. In other words, a search for truth has to be B reconciled with the doctrine of finality. In judicial hierarchy finality is absolutely important because that gives certainty to the law. Even in the interest of litigants themselves it may not be unreasonable to draw a line in respect of the two different categories of litigation where procedure will say at a certain stage C that questions of fact have been decided by the lower courts and the matter should be allowed to rest where it lies without any further appeal. This may be somewhat harsh to an individual litigant; but, in the larger interest of the administration of justice, this view seems to us to be juristically sound and pragmatically wise. It is in the light of this basic approach that we will now D proceed to consider some of the cases which were decided more than a century ago.

56. The question could perhaps be asked, why the litigant who wishes to have justice from the highest Court of the State E should be denied the opportunity to do so, at least where there is a flaw in the conclusion on facts reached by the trial court or by the court of first appeal. The answer is obvious that even litigants have to be protected against too persistent a pursuit of their goal of perfectly satisfactory justice. An unqualified right of F first appeal may be necessary for the satisfaction of the defeated litigant; but a wide right of second appeal is more in the nature of a luxury.

57. The rational behind allowing a second appeal on a question of law is, that there ought to be some tribunal having G jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, H tribunals and authorities within the area over which it has juris-

diction. This is implicit in any legal system where the higher courts have authority to make binding decisions on questions of law.

58. It may be relevant to recall the statement of Douglas Payne on "Appeals on Questions of Fact" reported in (1958) Current Legal Problem 181. He observed that the real justification for appeals on questions of this sort is not so much that the law laid down by the appeal court is likely to be superior to that laid down by a lower court as that there should be a final rule laid down which binds all future courts and so facilitates the prediction of the law. In such a case the individual litigants are sacrificed, with some justification, on the altar of law-making and must find such consolation as they can in the monument of a leading case.

Historical Perspective:

59. The predecessors of the High Courts in their civil appellate jurisdiction were the Sadar Divani Adalats. The right of appeal to the Sadar Divani Adalat was very wide initially, but came to be severely curtailed in the course of time. The "Conwallis Scheme", for example, made provision for two appeals in every category of cases, irrespective of its value. By 1814, this was reduced to one appeal only. Only in cases of Rs.5,000 or over, there could be two appeals; one to the Provincial Court of Appeal and second to the Sadar Divani Adalat. As Lord Hastings observed, -

> "The facility of appeal is founded on a most laudable principle of securing, by double and treble checks, the proper decision of all suits, but the utopian idea, in its attempt to prevent individual injury from a wrong decision, has been productive of general injustice by withholding redress, and general inconvenience, by perpetuating litigation".

Arrears:

60. The primary cause of the accumulation of arrears of second appeal in the High Court is the laxity with which second

A appeals are admitted without serious scrutiny of the provisions of Section 100 C.P.C. It is the bounden duty of the High Court to entertain second appeal within the ambit and scope of Section 100 C.P.C.

61. The question which is often asked is why should a liti-
B gant have the right of two appeals even on questions of law? The answer to this query is that in every State there are number of District Courts and courts in the District cannot be final arbiters on questions of law. If the law is to be uniformly interpreted and applied, questions of law must be decided by the highest
C Court in the State whose decisions are binding on all subordinate courts.

Rationale behind permitting second appeal on question of law:

D 62. The rationale behind allowing a second appeal on a question of law is, that there ought to be some tribunal having a jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it
E is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher courts have authority to make binding decisions on question of law.

F 63. The analysis of cases decided by the Privy Council and this court prior to 1976 clearly indicated the scope of interference under Section 100 C.P.C. by this Court. Even prior to amendment, the consistent position has been that the courts should not interfere with the concurrent findings of facts.

G 64. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in
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the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question.

65. The fact that, in a series of cases, this court was compelled to interfere was because the true legislative intendment and scope of Section 100 C.P.C. have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law.

66. When Section 100 C.P.C. is critically examined then, according to the legislative mandate, the interference by the

A High Court is permissible only in cases involving substantial questions of law.

67. The Judicial Committee of the Privy Council as early as in 1890 stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be and they added a note of warning that no Court in India has power to add to, or enlarge, the grounds specified in Section 100.

68. The High Court seriously erred in interfering with the findings of facts arrived at by the trial court and affirmed by the first appellate court.

69. The scope of interference by the High Court in second appeal under section 100 CPC after 1976 Amendment is strictly confined to cases involving substantial questions of law. The High Court would not be justified in dealing with any second appeal without first formulating substantial question of law.

70. The legislative intention has been clearly spelt out in a series of cases of this court. In ***Gurdev Kaur (supra)***, this court exhaustively dealt with the cases before and after 1976 Amendment of CPC. This court clearly observed that the scope and ambit of section 100 CPC has been drastically changed after the amendment.

71. It is a matter of common experience in this court that despite clear enunciation of law in a catena of cases of this court, a large number of cases are brought to our notice where the High Court under section 100 CPC are disturbing the concurrent findings of fact without formulating the substantial question of law. We have cited only some cases and these cases can be easily multiplied further to demonstrate that this court is compelled to interfere in a large number of cases decided by the High Courts under section 100 CPC. Eventually this court has to set aside these judgments of the High Courts and remit the cases to the respective High Courts for deciding them *de novo* after formulating substantial question of law. Unfortunately,

several years are lost in the process. Litigants find it both extremely expensive and time consuming. This is one of the main reasons of delay in the administration of justice in civil matters. A

72. We have once again undertaken this exercise and tried to crystallize the legislative intention by referring to a number of cases decided by this court with the hope that now the High Courts would refrain from interfering with the concurrent findings of fact without formulating substantial question of law. B

73. In this view of the clear legal position which emerges by the legislative intention and ratio of the judgments of aforementioned cases, the impugned judgment of the High Court is wholly unsustainable in law and is accordingly set aside and consequently the findings of the trial court as upheld by the first appellate court are restored. C

74. Accordingly, the appeal is allowed. In the facts and circumstances of the case, the parties are directed to bear their own costs. D

R.P. Appeal allowed.