NAZIR MOHAMED

v.

J. KAMALA AND ORS.

(Civil Appeal Nos. 2843-2844 of 2010)

AUGUST 27, 2020

[NAVIN SINHA AND INDIRA BANERJEE, JJ.]

Code of Civil Procedure, 1908:

s.100 – Second appeal – Nature and scope of – Held: A right to appeal is conferred by a statute – If the statute confers a limited right of appeal, the Court cannot expand the scope of the appeal – s.100 restricts the right of second appeal only where a substantial question of law is involved – In order to be substantial, the question must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/ or rights of the parties, if answered either way – Whether a question of law is substantial and whether such question is involved in the case is to be determined on the facts and circumstances of the case – A finding of fact is not open to challenge in second appeal even if the appreciation of evidence is palpably erroneous and finding of fact is incorrect – An entirely new point raised for the first time, before High Court is not a question involved, unless it goes to the root of the matter – In the facts of the present case, no substantial questions was involved in the second appeals and hence High Court wrongly entertained the second appeals.

Adverse Possession:

Suit for declaration of ownership and for possession of the suit premises – Alleging that the suit premises was let out to the defendant – Written statement denying the tenancy and claiming absolute ownership – Trial Court dismissed the suit – First Appellate Court partly decreed the suit holding that the plaintiff was entitled to ownership of half portion of the suit property which his father had purchased and not the other portion which was purchased by father of the defendant – However, First Appellate Court denied decree of possession to the plaintiff on the ground that the plaintiff failed to prove the tenancy and that the defendant was in occupation

A *of the premises for a long time – Second appeal by both the parties – High Court dismissed the appeal of defendant and allowing the appeal of the plaintiff granted him relief of recovery of possession – Appeal to Supreme Court – Held: A person in possession, in the assumed character of owner has a perfectly good title against all but the rightful owner – But if the rightful owner does not assert his right of possession, within limitation period, his right is extinguished forever, and the possessory owner acquires an absolute title – The conclusion of the First Appellate Court did not warrant interference – High Court could not have reversed the finding of First Appellate Court and allowed relief of recovery of possession when the defendant was in complete possession of the suit premises, as owner with absolute rights for over 28 years.*

Maxims:

'Possession follows title' – Applicability of – Held: The maxim is limited in its application to property – The presumption that possession must be deemed to follow title, arises only where there is no definite proof of possession by anyone else – A person claiming decree of possession needs to establish his entitlement to get such possession and also establish that his claim is not barred by law of limitation.

Words and Phrases:

'Mesne profit' – *Meaning of.*

Allowing the appeals, the Court

HELD: 1.1 A second appeal, or for that matter, any appeal is not a matter of right. The right of appeal is conferred by statute. A second appeal only lies on a substantial question of law. If statute confers a limited right of appeal, the Court cannot expand the scope of the appeal. It was not open to the Respondent-Plaintiff to re-agitate facts or to call upon the High Court to reanalyze or re-appreciate evidence in a Second Appeal. [Para 25][777-B-C]

1.2 Section 100 of the CPC, as amended, restricts the right of second appeal, to only those cases, where a substantial question of law is involved. The existence of a "substantial question of law" is the *sine qua non* for the exercise of jurisdiction under Section 100 of the CPC. [Para 26][777-C-D]

1.3 There was no question of law involved in either of the second appeals, far less any substantial question of law, to warrant inference of the High Court in the Second Appeal filed by the defendant. [Para 28][777-F]

1.4 To be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way. To be a question of law "involved 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 Courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case. Where no such question of law, nor even a mixed question of law and fact was urged before the Trial Court or the First Appellate Court, as in the present case, a second appeal cannot be entertained. [Paras 32-34][779-D-F]

Panchagopal Barua v. Vinesh Chandra Goswami **AIR 1997 SC 1047 – relied on.**

1.5 Whether a question of law is a substantial one and whether such question is involved in the case or not, would depend on the facts and circumstances of each case. The paramount overall consideration is the need for striking a judicious balance between the indispensable obligation to do justice at all stages and the impelling necessity of avoiding prolongation in the life of any lis. [Para 35][779-G; 780-A]

Santosh Hazari v. Purushottam Tiwari **(2001) 3 SCC 179 : [2001] 1 SCR 948 – relied on.**

1.6 In a Second Appeal, the jurisdiction of the High Court being confined to substantial question of law, a finding of fact is not open to challenge, even if the appreciation of evidence is palpably erroneous and the finding of fact incorrect. 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. [Para 36][780-B]

Ramchandra v. Ramalingam **AIR 1963 SC 302 : [1963] 3 SCR 604 – relied on.**

1.7 An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law. The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law. The general rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding. [Para 37][780-C-G; 781-A-B]

1.8 The condition precedent for entertaining and deciding a second appeal being the existence of a substantial question of law, whenever a question is framed by the High Court, the High Court will have to show that the question is one of law and not just a question of facts, it also has to show that the question is a substantial question of law. When no substantial question of law is formulated, but a Second Appeal is decided by the High Court,

the judgment of the High Court is vitiated in law. [Paras 57 and 59] [786-D-E; 788-B]

Kondiba Dagadu Kadam v. Savitribai Sopan Gujar **(1999) 3 SCC 722 : [1999] 2 SCR 728;** *Biswanath Ghosh v. Gobinda Ghose* **AIR 2014 SC 152 – relied on.**

1.9 Formulation of substantial question of law is mandatory and the mere reference to the ground mentioned in Memorandum of Second Appeal can not satisfy the mandate of Section 100 of the CPC. [Para 59][788-C]

1.10 In the present case neither of the two questions framed by the High Court is a question of law, far less a substantial question of law. There was no controversy before the High Court with regard to interpretation or legal effect of any document nor any wrong application of a principle of law, in construing a document, or otherwise, which might have given rise to a question of law. There was no debatable issue before the High Court which was not covered by settled principles of law and/or precedents. [Para 38][781-C-D]

1.11 It is nobody's case that the decision rendered by the First Appellate Court on any material question, violated any settled question of law or was vitiated by perversity. It is nobody's case that the evidence taken as a whole does not reasonably support the finding of the First Appellate Court, or that the First Appellate Court interpreted the evidence on record in an absurd and/or capricious manner. It is also nobody's case that the First Appellate Court arrived at its decision ignoring or acting contrary to any settled legal principle. [Para 39][781-E-F]

1.12 The finding by First Appellate Court is based on cogent and binding documents of title, including the registered deeds of conveyance by which the respective predecessors-in-interest of the Appellant-Defendant and Respondent-Plaintiff had acquired title over the suit premises. There was no erroneous inference from any proved fact. Nor had the burden of proof erroneously been shifted. [Para 40][781-G]

Sir Chunilal v. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. **AIR 1962 SC 1314 : [1962] Suppl. SCR 549 – followed.**

A *Hero Vinoth v. Seshammal* **(2006) 5 SCC 545 : [2006] 2 Suppl. SCR 79 – relied on.**

1.13 The conclusion of the First Appellate Court, of the entitlement of the Respondent Plaintiff to a declaration in respect of his half share in the suit property does not warrant interference B **in a second appeal. [Para 41][782-B]**

2.1 The first question framed by the High Court, that is, the question whether the Lower Court /Appellate Court was right in refusing the Respondent Plaintiff relief of possession, when the Appellate Court had granted *mesne* profits to the Respondent C **Plaintiff, is based on the erroneous factual premises that the First Appellate Court had granted *mesne* profits to the Respondent Plaintiff, which the First Appellate Court had not done. The first question is not at all a question of law, far less any substantial question of law involved in the case. [Paras 42-43][782-B-D]**

D **2.2 The High Court has patently erred in its conclusion that there was contradiction in the findings of the First Appellate Court, in that the First Appellate Court had declined the Respondent Plaintiff the relief of delivery of possession of the suit property but had granted the Respondent Plaintiff *mesne* profits for three years, prior to the institution of the suit. '*Mesne*** E **profits' are profits which a person in wrongful possession of property might have derived, but would not include profits due to improvements. There is no finding of the Appellant-Defendant being in wrongful possession of any part of the suit premises either by the Trial Court or by the First Appellate Court. The** F **First Appellate Court has, nowhere used the expression '*mesne* profit'. What the High Court granted to the Respondent-Plaintiff was in the nature of reimbursement of profit derived by the Appellant by use, occupation and enjoyment of the Respondent-Plaintiff's portion of the suit premises and/or in other words reimbursement of income from the said portion of the suit** G **premises or charges for use, occupation and enjoyment thereof. [Paras 44-45][783-E-G]**

3.1 A decree of possession does not automatically follow a decree of declaration of title and ownership over property. Where

H

a Plaintiff wants to establish that the Defendant's original possession was permissive, it is for the Plaintiff to prove this allegation and if he fails to do so, it may be presumed that possession was adverse, unless there is evidence to the contrary. The Appellant-Defendant has in his written statement in the suit, denied the title and ownership of the Respondent-Plaintiff to the suit property. The Appellant-Defendant has asserted that the Appellant-Defendant is the owner of the suit property and has been in possession and in occupation of the suit premises as owner from the very inception. The High Court erred in law in proceeding to allow possession to the Respondent-Plaintiff on the ground that the Appellant-Defendant had not taken the defence of adverse possession, ignoring the well established principle that the Plaintiff's claim to reliefs is to be decided on the strength of the Plaintiff's case and not the weakness, if any, in the opponent's case. [Paras 46-48][783-H; 784-A-D]

Baba Kartar Singh v. Dayal Das **AIR 1939 PC 201 – relied on.**

3.2 From the pleadings filed by the Appellant-Defendant, it is patently clear that the Appellant-Defendant claimed the right of ownership of the suit property on the basis of a deed of conveyance, executed over 75 years ago. The Appellant-Defendant has claimed continuous possession since the year 1966 on the strength of a deed of release executed by his father. In other words, the Appellant-Defendant has claimed to be in possession of the suit premises, as owner, for almost 28 years prior to the institution of suit. In the facts and circumstances of the case, where the Appellant-Defendant was owner of only a portion of the suit property but has admittedly been in possession of the entire suit property, and the Appellant-Defendant has, in his written statement, claimed to be in continuous possession for years as owner, the defence of the Appellant in his written statement was, in effect and substance, of adverse possession even though ownership by adverse possession had not been pleaded in so many words. It is, however not necessary for this Court to examine the question of whether the Appellant-Defendant was entitled to claim title by adverse possession or not. [Paras 49-50][784-D-G]

3.3 A person claiming a decree of possession has to establish his entitlement to get such possession and also establish that his claim is not barred by the laws of limitation. He must show that he had possession before the alleged trespasser got possession. The maxim "possession follows title" is limited in its application to property, which having regard to its nature, does not admit to actual and exclusive occupation, as in the case of open spaces accessible to all. The presumption that possession must be deemed to follow title, arises only where there is no definite proof of possession by anyone else. In the present case it is admitted that the Appellant-Defendant is in possession and not the Respondent-Plaintiff. [Paras 51-52][784-H; 785-A-B]

3.4 A suit for recovery of possession of immovable property is governed by the Limitation Act, 1963. Section 3 of the Limitation Act bars the institution of any suit after expiry of the period of limitation prescribed in the said Act. The Court is obliged to dismiss a suit filed after expiry of the period of limitation, even though the plea of limitation may not have been taken in defence. The period of limitation for suits for recovery of immovable property is prescribed in Part V of the Schedule to the Limitation Act, 1963, and in particular Articles 64 and 65 thereof. [Paras 53-54][785-B-D]

3.5 In the absence of any whisper in the plaint as to the date on which the Appellant-Defendant and/or his Predecessor-in-interest took possession of the suit property and in the absence of any whisper to show that the relief of decree for possession was within limitation, the High Court could not have reversed the finding of the First Appellate Court, and allowed the Respondent-Plaintiff the relief of recovery of possession, more so when the Appellant-Defendant had pleaded that he had been in complete possession of the suit premises, as owner, with absolute rights, ever since 1966, when his father had executed a Deed of Release in his favour and/or in other words for over 28 years as on the date of institution of the suit. [Para 55][785-G-H; 786-A-B]

3.6 A person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership

has a perfectly good title against all the world but the rightful owner and if the rightful owner does not come forward and assert his right of possession by law, within the period prescribed by the provisions of the statute of limitation applicable to the case, his right is forever distinguished, and the possessory owner acquires an absolute title. [Para 56][786-C-D]

Peri v. Chrishold **(1907) PC 73 – relied on.**

4. For the reasons discussed above, the appeals are allowed. The judgment and order of the High Court under appeal is set aside to the extent Second Appeal No.558 of 2000 has been allowed and the judgment and decree of the First Appellate Court is restored. [Para 62][788-E-F]

Case Law Reference

[1962] Suppl. SCR 549	**followed**	**Para 29**
[2006] 2 Suppl. SCR 79	**relied on**	**Para 30**
AIR 1997 SC 1047	**relied on**	**Para 34**
[2001] 1 SCR 948	**relied on**	**Para 35**
[1963] 3 SCR 604	**relied on**	**Para 36**
[1999] 2 SCR 728	**relied on**	**Para 58**
AIR 2014 SC 152	**relied on**	**Para 59**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2843-2844 of 2010.

From the Judgment and Order dated 06.11.2008 of the Madurai Bench of Madras High Court in S.A. (MD) Nos. 64 and 558 of 2000.

K. K. Mani, Mrs. T. Archana, Advs. for the Appellant.

S. Thananjayan, Adv. for the Respondents.

A The Judgment of the Court was delivered by

INDIRA BANERJEE, J.

1. These appeals are against a common judgment and order dated 06.11.2008 dismissing the Second Appeal being S.A. (MD) No.64 of
B 2000, filed by the Appellant, but allowing the Second Appeal being S.A. (MD) No. 558 of 2000 filed by the Respondent, and setting aside the judgment and decree dated 17.09.1999 of the First Appellate Court in A.S. No.16/1998, to the extent the First Appellate Court had declined the Respondent's claim to a decree of recovery of possession of the suit premises. The High Court held that the Respondent, being the Plaintiff
C in the suit was entitled to a declaration of title in respect of half portion of the suit premises, recovery of possession of the said half portion of the suit premises and also to recovery of income from the said half of the suit property owned by the Respondent and/or charges for use, enjoyment and/or occupation thereof.

D 2. The Appellant claims to be the owner of the suit premises, being the building and premises at Door No.4 in R.S. No.120/13 at Mela Senia Street, Aduthurai, Tamil Nadu.

3. According to the Appellant, the Appellant's father purchased the suit premises for valuable consideration, by a registered deed of sale
E dated 17.2.1938. The Appellant claims to have been in possession of the suit premises, as owner, from the inception and not as tenant.

4. In 1994, the Respondent, hereinafter referred to as the 'Respondent Plaintiff', filed a suit being O.S. No.169/1994 in the Court of the District Munsif, Valaingaiman at Kumbhakonam, claiming
F declaration of ownership of the suit premises, a direction on the Appellant, being the Defendant, to deliver possession of the suit premises to the Respondent Plaintiff, a decree for payment of Rs.900/- towards arrears of rent/occupation charges in respect of the suit premises, and a decree for payment of future profits.

G 5. In the plaint filed in the said suit, it has been alleged that the said premises, which had been purchased by the Respondent Plaintiff's father, by a registered sale deed dated 17.9.1940, had originally been let out to the Appellant's father M. Abdul Aziz. After the death of M. Abdul Aziz, the tenancy was attorned in the name of the Appellant,
H who agreed to pay rent of Rs.25/- per month, and also the requisite Panchayat Tax.

6. Alleging that the Appellant had been trying to set up title in respect of the said premises, by applying for 'Patta' to the Tahsildar Natham, and further alleging that the Appellant was in arrears of rent to the tune of Rs.1225/- up to February, 1994, the Respondent Plaintiff filed the aforesaid suit.

7. In the suit, the Respondent Plaintiff *inter alia* claimed a decree of Rs.900/- towards rent and/or occupation charges. The Respondent-Plaintiff restricted his claim to arrears of rent and/or occupation charges to three years, as the claim to rent and/or occupation charges for the earlier period, had become barred by limitation, there being no acknowledgement of liability by the Appellant-Defendant.

8. The Appellant-Defendant filed his written statement in the Suit, denying title and/or ownership of the Respondent Plaintiff to the suit premises and also contending that the Appellant-Defendant was not a tenant. The Appellant-Defendant claimed absolute ownership of the suit premises, which he claimed had been purchased by his father, by a registered sale deed dated 17.2.1938, for valuable consideration.

9. The Appellant-Defendant further contended that the suit premises had all along, been assessed to tax in the name of the Appellant-Defendant's father, Abdul Aziz, and not in the name of the Respondent Plaintiff or his father. The Appellant-Defendant claimed to have got the suit premises from his father, under a registered Deed of Release dated 14.3.1966. According to the Appellant-Defendant, he has, since 1966, owned and enjoyed the suit premises, with absolute rights.

10. The learned District Munsif (Trial Court) framed the following three issues for adjudication in the said suit :-

(i) Whether the Respondent Plaintiff was entitled to declaration of title to the suit property and recovery of possession of the suit property from the Defendant (the Appellant in this Appeal)

(ii) Whether the Defendant (the Appellant herein) was a tenant at the suit property or not;

(iii) To what other relief was the Respondent Plaintiff entitled.

11. By a judgment and decree dated 22.1.1998, the Trial Court dismissed the said suit, holding that the Respondent Plaintiff had failed to prove that the suit property had been purchased by his father. All the three issues were decided against the Respondent Plaintiff.

A 12. The Trial Court found that the Respondent Plaintiff had not been able to produce any rent agreement, rent receipts or any other oral or documentary evidence to establish that the Appellant was a tenant at the said premises. The Trial Court held that the Respondent Plaintiff was not entitled to any relief in the said suit.

B 13. Being aggrieved by the said judgment and decree dated 22.1.1998 passed by the Trial Court, the Respondent Plaintiff appealed to the Subordinate Court at Kumbhakonam, hereinafter referred to as the 'First Appellate Court'.

14. By a judgment and order dated 17.9.1999, the First Appellate C Court allowed the said appeal, and set aside the said judgment and order dated 22.1.1998 of the Trial Court , holding that the Respondent Plaintiff was entitled to declaration of title over half portion of the suit premises and also to recovery of income, if any, from the said half portion of the suit premises owned by the Respondent Plaintiff and/or charges for use, occupation and/or enjoyment thereof, but not to recovery of possession.

D

15. The claim of the Respondent Plaintiff in the suit was based on the assertion that one Rajagopala Pattar, who had purchased the suit premises in a Court Auction, had sold the said premises to the Respondent Plaintiff's father in 1940.

E 16. The First Appellate Court analyzed the oral evidence adduced on behalf of the parties, scrutinized and examined the documentary evidence on record, including in particular the registered deed of conveyance by which the Respondent Plaintiff's father had purchased his portion of the suit premises from Rajagopala Pattar (Exhibit P1), the registered documents by which Rajagopala Pattar had acquired the suit F premises in a Court Auction (Exhibits P2 and P3) and the registered deed of conveyance executed on 17.02.1938 being Exhibit D1 by which the Appellant-Defendant's father M. Abdul Aziz had purchased his portion of the suit premises, examined the extent of the rights of the respective vendors of the Appellant-Defendant's father and the Respondent-G Plaintiff's father and/or their predecessors-in-interest, and concluded that the Appellant-Defendant's father had only purchased a portion of the suit premises, not the entire suit premises, and the other portion had been purchased by the Respondent-Plaintiff's father. The First Appellate Court, therefore, held that the Respondent-Plaintiff was entitled to a declaration in respect of the said portion of the suit premises, purchased H by his father.

17. The First Appellate Court also took note of the fact that the Appellant-Defendant's family had been residing in the suit property since 1940, and that the Respondent-Plaintiff had not produced any rent agreement or receipts or any tax receipts in respect of the suit premises to show that the Respondent-Plaintiff or his father or any other family member had ever paid any taxes in respect of the suit premises.

18. The First Appellate Court concurred with the finding of the Trial Court, that the Respondent-Plaintiff had failed to establish that the said premises had been rented out to M. Abdul Aziz father of the Appellant-Defendant. On the other hand, the Appellant had been in possession of and had been enjoying the suit premises for a long time. The First Appellate Court thus found the Appellant liable to pay "backage income" in respect of the portion of the suit property, of which the Respondent Plaintiff was the owner.

19. The First Appellate Court, in effect, held that the Appellant was liable to make over to the Respondent Plaintiff, income if any, derived from the said portion of the suit premises which was owned by the Respondent Plaintiff and/or pay charges for use, occupation and enjoyment of the portion of the suit premises owned by the Respondent Plaintiff.

20. The First Appellate Court, however, held that the Respondent Plaintiff was not entitled to recovery of possession since the Respondent Plaintiff had failed to establish landlord-tenant relationship between the Respondent Plaintiff and the Appellant defendant, and that in any case the Appellant had been in possession of the suit premises for a long time.

21. The First Appellate Court passed a fair and just order, holding that the Respondent-plaintiff, being the owner of a portion of the said premises, was entitled to declaration of title in respect of the said portion of the suit property owned by him, but not to recovery of possession, since the defendant being the Appellant herein had been enjoying the suit property for a long time. In effect and substance, the First Appellate Court found that the relief of recovery of possession was barred by delay and/or in other words the laws of limitation, although this has not clearly been stated in the judgment and order of the First Appellate Court.

22. Being purportedly aggrieved by the reversal of the judgment and decree of the Trial Court, dismissing the said suit, the Appellant-Defendant filed a Second Appeal being S.A. No. 64/2000 in the Madras

A High Court, against the judgment of the First Appellate Court. The Respondent Plaintiff also filed Second Appeal No.558 of 2000 in the Madras High Court, against the same judgment and decree dated 17.9.1999, to the extent the Respondent Plaintiff had been denied the relief of delivery of possession in respect of his half share in the suit premises.

B

23. By the judgment and order of the High Court under appeal before this Court, the Second Appeal No. 64 of 2000 filed by the Appellant-Defendant has been dismissed, the Second Appeal No.559 of 2000 filed by the Respondent Plaintiff has been allowed and the judgment and decree of the First Appellate Court set aside, to the extent the Respondent Plaintiff had been denied the relief of recovery of possession in respect of half of the suit premises. The High Court held that the Respondent Plaintiff was entitled to recovery of half of the plaint scheduled property, after identifying the same with the help of an Advocate Commissioner, at the time of the execution of the decree. In all other respects, the decree of the First Appellate Court was confirmed.

C

D

24. Section 100 of the Civil Procedure Code (CPC) which provides for a Second Appeal, as amended by the Civil Procedure Code (Amendment) Act, 104 of 1976, with effect from 1.2.1977,provides as follows:-

E

"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.

F

(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.

G

(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:

H

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.]"

25. A second appeal, or for that matter, any appeal is not a matter of right. The right of appeal is conferred by statute. A second appeal only lies on a substantial question of law. If statute confers a limited right of appeal, the Court cannot expand the scope of the appeal. It was not open to the Respondent-Plaintiff to re-agitate facts or to call upon the High Court to reanalyze or re-appreciate evidence in a Second Appeal.

26. Section 100 of the CPC, as amended, restricts the right of second appeal, to only those cases, where a substantial question of law is involved. The existence of a "substantial question of law" is the *sine qua non* for the exercise of jurisdiction under Section 100 of the CPC.

27. The High Court framed the following Questions of law:-

"1. Whether the Lower Appellate Court is right in refusing the relief of possession especially when the Lower Appellate Court granted relief of mesne profits till delivery of possession.?

2. Whether the Lower Appellate Court is right in holding that the plaintiff is entitled to a declaration in respect of half of the suit property overlooking the pleadings and the documents of title in the instant case?"

28. On behalf of the Appellant-Defendant, it has strenuously been contended, and in our view, with considerable force, that there was no question of law involved in either of the second appeals, far less any substantial question of law, to warrant inference of the High Court in Second Appeal No. 64 of 2000.

29. The principles for deciding when a question of law becomes a substantial question of law, have been enunciated by a Constitution Bench of this Court in ***Sir Chunilal v. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.***[1]**,** where this Court held:-

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

[1] AIR 1962 SC 1314

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

B

C 30. In ***Hero Vinoth v. Seshammal***[2]**,** this Court referred to and relied upon ***Chunilal v. Mehta and Sons*** (supra) and other judgments and summarised the tests to find out whether a given set of questions of law were mere questions of law or substantial questions of law.

D 31. The relevant paragraphs of the judgment of this Court in ***Hero Vinoth*** (supra) are set out hereinbelow:-

"21. The phrase "substantial question of law", as occurring in the amended Section 100 CPC is not defined in the Code. 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

E *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*

F *provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. Ram Ditta [(1927-28) 5I5 IA 235 : AIR 1928 PC 172] the phrase substantial question of law as it was employed in*

G *the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial*

H [2] (2006) 5 SCC 545

question of law which was involved in the case. In Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju [AIR 1951 Mad 969 : (1951) 2 MLJ 222 (FB)] : (Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR p. 557)

"When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."

32. To be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way.

33. To be a question of law "involved 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 Courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case.

34. Where no such question of law, nor even a mixed question of law and fact was urged before the Trial Court or the First Appellate Court, as in this case, a second appeal cannot be entertained, as held by this Court in ***Panchagopal Barua v. Vinesh Chandra Goswami***[3]**.**

35. Whether a question of law is a substantial one and whether such question is involved in the case or not, would depend on the facts and circumstances of each case. The paramount overall consideration is the need for striking a judicious balance between the indispensable obligation to do justice at all stages and the impelling necessity of avoiding

[3] AIR 1997 SC 1047

A prolongation in the life of any lis. This proposition finds support from ***Santosh Hazari v. Purushottam Tiwari***[4].

36. In a Second Appeal, the jurisdiction of the High Court being confined to substantial question of law, a finding of fact is not open to challenge in second appeal, even if the appreciation of evidence is B palpably erroneous and the finding of fact incorrect as held in ***Ramchandra v. Ramalingam***[5]**.** 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.

37. The principles relating to Section 100 CPC relevant for this C case may be summarised thus :

(i) An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is D also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a E substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, F involves a debatable legal issue.

(iii) A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting G contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

[4] (2001) 3 SCC 179

H [5] AIR 1963 SC 302

(iv) The general rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

38. With the greatest of respect to the High Court, neither of the two questions framed by the High Court is a question of law, far less a substantial question of law. There was no controversy before the High Court with regard to interpretation or legal effect of any document nor any wrong application of a principle of law, in construing a document, or otherwise, which might have given rise to a question of law. There was no debatable issue before the High Court which was not covered by settled principles of law and/or precedents.

39. It is nobody's case that the decision rendered by the First Appellate Court on any material question, violated any settled question of law or was vitiated by perversity. It is nobody's case that the evidence taken as a whole does not reasonably support the finding of the First Appellate Court, or that the First Appellate Court interpreted the evidence on record in an absurd and/or capricious manner. It is also nobody's case that the First Appellate Court arrived at its decision ignoring or acting contrary to any settled legal principle.

40. The First Appellate Court examined the evidence on record at length, and arrived at a reasoned conclusion, that the Appellant-Defendant was owner of a part of the suit premises and the Respondent-Plaintiff was owner of the other part of the suit premises. This finding is based on cogent and binding documents of title, including the registered deeds of conveyance by which the respective predecessors-in-interest of the Appellant-Defendant and Respondent-Plaintiff had acquired title over the suit premises. There was no erroneous inference from any proved fact. Nor had the burden of proof erroneously been shifted.

41. The second question of law, that is, the question of whether the First Appellate Court was right in holding that the plaintiff was entitled

A to a declaration of title in respect of half of the suit property, has, as observed above, been decided in favour of the Respondent Plaintiff, based on pleadings and evidence. The conclusion of the First Appellate Court, of the entitlement of the Respondent Plaintiff to a declaration in respect of his half share in the suit property does not warrant interference in a second appeal.

B

42. The first question framed by the High Court, that is, the question of whether the Lower Court /Appellate Court was right in refusing the Respondent Plaintiff relief of possession, when the Appellate Court had granted mesne profits to the Respondent Plaintiff, is based on the erroneous factual premises that the First Appellate Court had granted mesne profits to the Respondent Plaintiff, which the First Appellate Court had not done.

C

43. The first question is not at all a question of law, far less any substantial question of law involved in the case. The High Court held:-

D

"8. Substantial Question of law No. 1:-

After declaring one half right in respect of the plaint schedule property, the learned first appellate Judge has refused the relief for recovery of possession on the ground that the defendants have produced the documents to show that they are in possession and enjoyment of the property (Ex.B9 to B.32). There is no pleadings in the written statement filed by the defendant that he has prescribed title by way of adverse possession in respect of the entire plaint schedule property. The learned first appellate Judge at one place has rejected the relief of delivery of recovery of possession in respect of the suit property has granted mesne profit for three years prior to the institution of the suit. Both the above said findings are diametrically opposite to each other. Once the recovery of possession is denied, then there is no question of granting any mesne profit arises. After declaring one half right in the plaint schedule property in favour of the plaintiff, the learned appellate Judge ought to have granted recovery of possession also in respect of one half share in the plaint schedule property. Both the courts below have concurrently held that there is not landlord-tenancy relationship between the plaintiff and the defendant. Under such circumstances, there is no question of mesne profit arises in this case. So far as the

E

F

G

H

refusal of the relief of recovery of possession in respect of the half of the plaint schedule property by the learned first appellate Judge, warrants interference from this Court. Substantial Question of Law No.1 is answered accordingly.

9. In fine, the Second Appeal No.558 of 2000 is allowed and the decree and judgment of the learned first appellate Judge in A.S. No.16/1998 on the file of the Court of Subordinate Judge, Kumbakonam is set aside in respect of dismissal of the suit for recovery of possession in respect of half of the plaint schedule property. The plaintiff is entitled to recover half of the plaint schedule property after identifying the same with the help of an Advocate Commission at the time of execution of the decree In other respects, the decree of the learned first appellate Judge in A.S. No.16/1998 on the file of the Court of Subordinate Judge, Kumbakonam is hereby confirmed. Second Appeal No. 64 of 2000 is dismissed. No costs. Consequently, connected miscellaneous petition is closed."

44. The High Court, with greatest of respect, has patently erred in its conclusion that there was contradiction in the findings of the First Appellate Court, in that the First Appellate Court had declined the Respondent Plaintiff the relief of delivery of possession of the suit property but had granted the Respondent Plaintiff mesne profits for three years, prior to the institution of the suit.

45. 'Mesne profits' are profits which a person in wrongful possession of property might have derived, but would not include profits due to improvements. There is no finding of the Appellant-Defendant being in wrongful possession of any part of the suit premises either by the Trial Court or by the First Appellate Court. The First Appellate Court has, nowhere used the expression 'mesne profit'. What the High Court granted to the Respondent-Plaintiff was in the nature of reimbursement of profit derived by the Appellant by use, occupation and enjoyment of the Respondent-Plaintiff's portion of the suit premises and/or in other words reimbursement of income from the said portion of the suit premises or charges for use, occupation and enjoyment thereof.

46. A decree of possession does not automatically follow a decree of declaration of title and ownership over property. It is well settled that, where a Plaintiff wants to establish that the Defendant's original

possession was permissive, it is for the Plaintiff to prove this allegation and if he fails to do so, it may be presumed that possession was adverse, unless there is evidence to the contrary.

47. The Appellant-Defendant has in his written statement in the suit, denied the title and ownership of the Respondent-Plaintiff to the suit property. The Appellant-Defendant has asserted that the Appellant-Defendant is the owner of the suit property and has been in possession and in occupation of the suit premises as owner from the very inception.

48. In our considered opinion, the High Court erred in law in proceeding to allow possession to the Respondent-Plaintiff on the ground that the Appellant-Defendant had not taken the defence of adverse possession, ignoring the well established principle that the Plaintiff's claim to reliefs is to be decided on the strength of the Plaintiff's case and not the weakness, if any, in the opponent's case, as propounded by the Privy Council in ***Baba Kartar Singh v. Dayal Das*** reported in AIR 1939 PC 201.

49. From the pleadings filed by the Appellant-Defendant, it is patently clear that the Appellant-Defendant claimed the right of ownership of the suit property on the basis of a deed of conveyance, executed over 75 years ago. The Appellant-Defendant has claimed continuous possession since the year 1966 on the strength of a deed of release executed by his father. In other words, the Appellant-Defendant has claimed to be in possession of the suit premises, as owner, for almost 28 years prior to the institution of suit.

50. In the facts and circumstances of this case, where the Appellant-Defendant was owner of only a portion of the suit property but has admittedly been in possession of the entire suit property, and the Appellant-Defendant has, in his written statement, claimed to be in continuous possession for years as owner, the defence of the Appellant in his written statement was, in effect and substance, of adverse possession even though ownership by adverse possession had not been pleaded in so many words. It is, however not necessary for this Court to examine the question of whether the Appellant-Defendant was entitled to claim title by adverse possession or not.

51. A person claiming a decree of possession has to establish his entitlement to get such possession and also establish that his claim is not barred by the laws of limitation. He must show that he had possession before the alleged trespasser got possession.

52. The maxim "possession follows title" is limited in its application to property, which having regard to its nature, does not admit to actual and exclusive occupation, as in the case of open spaces accessible to all. The presumption that possession must be deemed to follow title, arises only where there is no definite proof of possession by anyone else. In this case it is admitted that the Appellant-Defendant is in possession and not the Respondent Plaintiff.

53. A suit for recovery of possession of immovable property is governed by the Limitation Act, 1963. Section 3 of the Limitation Act bars the institution of any suit after expiry of the period of limitation prescribed in the said Act. The Court is obliged to dismiss a suit filed after expiry of the period of limitation, even though the plea of limitation may not have been taken in defence.

54. The period of limitation for suits for recovery of immovable property is prescribed in Part V of the Schedule to the Limitation Act, 1963, and in particular Articles 64 and 65 thereof set out hereinbelow for convenience:-

*"**PART V.— Suits Relating to Immovable Property**..*

Description of suit	*Period of Limitation*	*Time from which period begins to run*
.....		
64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	*Twelve years.*	*The date of dispossession.*
65. For possession of immovable property or any interest therein based on title;	*Twelve years.*	*When the possession of the defendant becomes adverse to the plaintiff.*
Explanation.- For the purposes of this article -		
(a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession;		
(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;		
(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession		

55. In the absence of any whisper in the plaint as to the date on which the Appellant-Defendant and/or his Predecessor-in-interest took possession of the suit property and in the absence of any whisper to show that the relief of decree for possession was within limitation, the

A High Court could not have reversed the finding of the First Appellate Court, and allowed the Respondent-Plaintiff the relief of recovery of possession, more so when the Appellant-Defendant had pleaded that he had been in complete possession of the suit premises, as owner, with absolute rights, ever since 1966, when his father had executed a Deed of Release in his favour and/or in other words for over 28 years as on the date of institution of the suit.

56. As held by the Privy Council in ***Peri v. Chrishold*** reported in (1907) PC 73, it cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner...and if the rightful owner does not come forward and assert his right of possession by law, within the period prescribed by the provisions of the statute of limitation applicable to the case, his right is forever distinguished, and the possessory owner acquires an absolute title.

57. The condition precedent for entertaining and deciding a second appeal being the existence of a substantial question of law, whenever a question is framed by the High Court, the High Court will have to show that the question is one of law and not just a question of facts, it also has to show that the question is a substantial question of law.

58. In ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar***[6]**,** this Court held:

> *"After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of the hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. The proviso to the section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it*

[6] (1999) 3 SCC 722

with the object of ensuring that no injustice is done to the litigant where such a question was not formulated at the time of admission either by mistake or by inadvertence"

"It has been noticed time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 of the Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact."

"If the question of law termed as a substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question

A *of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring*
B *interference in second appeal."*

59. When no substantial question of law is formulated, but a Second Appeal is decided by the High Court, the judgment of the High Court is vitiated in law, as held by this Court in ***Biswanath Ghosh v. Gobinda Ghose***[7]**.** Formulation of substantial question of law is mandatory and the
C mere reference to the ground mentioned in Memorandum of Second Appeal can not satisfy the mandate of Section 100 of the CPC.

60. The judgment and order of the High Court under appeal does not discuss or decide any question of law involved in the case, not to speak of substantial question of law.
D

61. Just as this Court has time and again deprecated the practice of dismissing a second appeal with a non-speaking order only recording that the case did not involve any substantial question of law, the High Court cannot also allow a second appeal, without discussing the question of law, which the High Court has done.
E

62. For the reasons discussed above, the appeals are allowed. The judgment and order of the High Court under appeal is set aside to the extent Second Appeal No.558 of 2000 has been allowed and the judgment and decree of the First Appellate Court is restored.

Kalpana K. Tripathy Appeals allowed.

[7] AIR 2014 SC 152