REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3190 OF 2016
(Arising out of S.L.P. (Civil) No. 6662 of 2016)

Raghavendra Swamy Mutt ...Appellant

Versus

Uttaradi Mutt ...Respondent

J U D G M E N T

Dipak Misra, J.

The present appeal, by special leave, assails the order dated 11.02.2016 passed by the learned Single Judge of the High Court of Karnataka at Dharwad in I.A. No.1 of 2016 in RSA No.100446 of 2015 whereby he has vacated the interim order dated 16.12.2015 passed in I.A. No.1 of 2015.

2. The facts for the purpose of adjudication of the present appeal need to be stated in brief. The respondent, Uttaradi Mutt, filed O.S. No.193/1992 in the Court of Civil Judge, Koppal but in due course the said suit was transferred to

the Court of Additional Civil Judge, Gangavati and was registered as O.S. No.74/2010. The suit was filed by the plaintiff-respondent for the relief(s) for perpetual injunction for restraining the defendant-Mutt, its agents, servants, devotees, etc., from entering upon the suit schedule property or interfering with its possession and enjoyment of the suit property and/or interfering or disturbing with the performance of annual *"Aradhana"* of His Holiness Sri Padmanabha Teertharu, Sri Kavindra Teertharu and Sri Vageesha Teertharu. The suit preferred by the plaintiff was dismissed.

3. The judgment and decree passed in the suit was assailed before the Principal Civil Judge, Senior Division, Gangavati and eventually by virtue of the order passed by this Court in Special Leave Petition (Civil) No. 20346 of 2014, it stood transferred to the Court of Civil Judge, Senior Division, Dharwad and numbered as R.A. No.123/2014. The first appellate Court allowed the appeal in part. The appellate Court restrained the present appellant from interfering with the plaintiff/respondent Mutt's possession and enjoyment of suit property subject to the right of the

defendant Mutt to perform *Adradhanas* and *Poojas* of the Vrindavanas at Navavrindavanagatti.

4. After the appeal was disposed of, the respondent filed execution petition, E.P. No.122/2015 before the Principal Civil Judge, Junior Division, Gangavati. The executing court passed certain orders on 10.12.2015. In the meantime, the appellant, being grieved by the order in the Regular Appeal, had preferred RSA No.100446/2015. As the order passed by the executing court affected certain rights of the appellant, it filed IA No.1 of 2015 seeking temporary injunction against the respondent. Be it stated, the respondent had filed a caveat which was defective but it was allowed to represent through the counsel when the IA No.1 of 2015 was argued. As is discernible from the narration of facts, the executing court had directed the Deputy Superintendent of Police, Gangavati to give police protection to the decree-holder for possession and enjoyment of the suit scheduled property and preventing the judgment-debtor from trespassing into the suit property violating the decree in RA No.123/2014.

5. When the matter stood thus, IA No.1 of 2015 was

taken up by the High Court. The learned Single Judge, while considering the interlocutory application for injunction, passed the following order:-

> "List this matter on 20.01.2016 for filing of objections to I.A.1/2015 and 2/15. In the meanwhile, registry to secure the LCR from both the courts below. The same should reach this court on or before 16.01.2016. However, it is made clear that the appellant, who is defendant in O.S., and respondent who is plaintiff in the O.S., shall have their right to perform pooja on regular basis without staking claim with respect to disputed land, which shall be subject to out come of this appeal."

6. As is manifest, the respondent filed objections to I.A. No.1/2015 and also filed I.A. No.1/2016 for vacation of the interim order. I.A. No.1/2016 was taken up by the learned Single Judge who referred to Order XXXIX Rule 3-A of the Code of Civil Procedure (CPC), the authority in ***A. Venkatasubbiah Naidu v. S. Chellappan & others***[1], noted the contentions advanced by the learned counsel for the parties, adverted to the litigations that had been taken recourse to by both sides, acquainted itself with the earlier order passed by the High Court and came to hold thus :-

> "On a reading of the aforesaid order it becomes

1 AIR 2000 SC 3032

> clear that the interim application filed by the appellant along with the appeal before this Court had to be considered independently and on its own merits. But, in the instant case what has happened is that this Court, without issuing notice to the respondent in the second appeal has granted an interim order which is to be in operation till the end of the appeal. It is not known as to whether the appellant had satisfied the Court on any substantial question of law that would arise in the matter as the matter was listed for admission."

7. After so stating, the High Court opined that the principle stated in Order XXXIX Rule 3 had not been followed, notice to the respondent had not been issued although permission was granted to the counsel to raise objections and further delved into the distinction between an appeal under Section 100 CPC and the regular first appeal, and in the ultimate eventuate, concluded thus:-

> "If notice to respondent was to be dispensed with prior to grant of an ad interim order till the conclusion of the second appeal then reasons for doing so had to be recorded. But the interim order which is sought to be vacated is bereft of any reason. I am of the view that on this short ground alone order dated 16.12.2015 has to be vacated as there are procedural irregularities in the grant of the ad interim order. Secondly, it is also not known at this point of time as to whether, the order passed by this Court in M.F.A. no.21690/2012 was brought to the notice of this Court by the appellant or not before the interim

order was passed.

> In view of the above, the application I.A. no.1/2016 for vacating interim order dated 16.12.2015 is allowed. Order dated 16.12.2015 stands vacated. The appellant to seek any date for admission of the matter and after hearing learned counsel for the appellant on admission of the appeal, this Court to consider I.A. no.1/2015 afresh. All contentions on both sides on I.A. No.1/2015 are kept open."

8. When the matter was taken up on 18.03.2016, this Court, after hearing the learned counsel for the parties, had passed the following order :-

> "Having heard learned counsel for the parties, as an interim measure, it is directed that the petitioner, Sri Raghavendra Swamy Mutt, is permitted to do 'aradhana' from 24th to 26th March, 2016 and not a day prior to that or beyond that. Needless to say, no equity shall be claimed by the petitioner on the basis of this order. That apart, the present arrangement shall be restricted to this occasion only."

9. We had, at that time, blissfully perceived being under the impression that *"Aradhana"* is a yearly event, that request to the High Court to dispose of the second appeal could sub-serve the cause of justice, but the learned counsel for the parties apprised us that it is a monthly affair. Ergo, we have heard Dr. Rajiv Dhawan and Mr. R.

Venkataramani, learned senior counsel for the appellant and Mr. Fali S. Nariman, learned senior counsel for the respondent.

10. It is submitted by Dr. Dhawan and Mr. Venkataramani, learned senior counsel, that the High Court was not justified in vacating the order of stay on the grounds it has done, for the principle of Order XXXIX Rule 3-A is not applicable when the appellant had prayed for stay and passing of interim orders. It is urged by them that the respondent had entered caveat which was defective in nature but it had participated in the hearing and, therefore, the interim order could not be regarded as an *ex parte* order. Learned senior counsel appearing for the appellant would further submit that when the judgment and decree passed in the regular appeal is demonstrably unsustainable, the High Court should have maintained the order of stay and finally disposed of I.A. No.1/2015 and should not have entertained I.A. No.1/2016 seeking vacation of the order of stay. It has been highlighted that the language employed in Section 100 CPC though stipulates that appeal is to be entertained on substantial

question of law involved in the case, it does not bar the High Court to pass an *ad interim* order in a grave situation and that is the basic purport of Order XLI Rule 5 and Order XLII CPC.

11. Combating the aforesaid submissions, it is urged by Mr. Nariman, learned senior counsel appearing for the respondent that the interim order passed by the High Court in I.A. No.1/2015 from all angles is an *ex parte* order, for adjournment was sought on behalf of respondent to argue the matter but the same was declined. Learned senior counsel would propone that passing an order of stay or issuing an order of injunction in a second appeal is quite different than an interim order passed in a regular first appeal preferred under Section 96 CPC. It is canvassed by him that formulation of substantial question of law by the Court under Section 100 CPC is an imperative to proceed with the appeal and the Court cannot proceed unless the condition precedent is satisfied and in such a situation, the question of passing any interim order or granting any interim relief does not arise. Mr. Nariman has drawn support from a two-Judge Bench decision in ***Ram Phal* v.**

Ba*narasi* & *Ors.*[2].

12. To appreciate the controversy, it is seemly to refer to Section 100 CPC. It reads as follows:-

> **"Section 100. Second appeal.—**
> (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) An appeal may lie under this section from an appellate decree passed ex-parte.
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> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
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> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
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> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

13. Section 101 CPC reads as under:-

2 (2003) 11 SCC 762

> **"Section 101. Second appeal on no other grounds.—**No second appeal shall lie except on the ground mentioned in section 100."

14. A plain reading of Section 100 CPC makes it explicit that the High Court can entertain a second appeal if it is satisfied that the appeal involves a substantial question of law. More than a decade and a half back, in ***Ishwar Dass Jain v. Sohan Lal***[3] it has been ruled that 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 judgment of the first appellate court without doing so.

15. In ***Roop Singh v. Ram Singh***[4] the Court had to say thus:-

> "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 exercising its jurisdiction under Section 100 CPC."

16. In ***Municipal Committee, Hoshiarpur v. Punjab SEB***

3 (2000) 1 SCC 434
4 (2000) 3 SCC 708

& Others[5] it has been categorically laid down that the existence of a substantial question of law is a condition precedent for entertaining the second appeal and on failure to do so, the judgment rendered by the High Court is unsustainable. It has been clearly stated that existence of a substantial question of law is the *sine qua non* for the exercise of jurisdiction under the provisions of Section 100 CPC.

17. In ***Umerkhan v. Bismillabi alias Babulal Shaikh and others***[6] a two-Judge Bench was constrained to ingeminate the legal position thus:-

> "In our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code

5 (2010) 13 SCC 216
6 (2011) 9 SCC 684

> provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question."

18. In the instant case, the High Court has not yet admitted the matter. It is not in dispute that no substantial question of law has been formulated as it could not have been when the appeal has not been admitted. We say so, as appeal under Section 100 CPC is required to be admitted only on substantial question/questions of law. It cannot be formal admission like an appeal under Section 96 CPC. That is the fundamental imperative. It is peremptory in character, and that makes the principle absolutely cardinal. The issue that arises for consideration is; whether the High Court without admitting the second appeal could have entertained IA No. 1/2015 which was filed seeking interim relief. In ***Ram Phal*** (supra), from which Mr. Nariman, learned senior counsel has drawn immense inspiration, the two-Judge Bench was dealing with a case where the High

Court had granted an interim order by staying the execution of the decree but had not framed the substantial question of law. In that context, the Court held:-

> "... However, the High Court granted interim order by staying the execution of the decree. It is against the said order granting interim relief the respondent in the second appeal has preferred this appeal. This Court, on a number of occasions, has repeatedly held that the High Court acquires jurisdiction to decide the second appeal or deal with the second appeal on merits only when it frames a substantial question of law as required to be framed under Section 100 of the Civil Procedure Code. In the present case, what we find is that the High Court granted interim order and thereafter fixed the matter for framing of question of law on a subsequent date. This was not the way to deal with the matter as contemplated under Section 100 CPC. The High Court is required to frame the question of law first and thereafter deal with the matter. Since the High Court dealt with the matter contrary to the mandate enshrined under Section 100 CPC, the impugned order deserves to be set aside."

19. To meet the reasoning in the aforequoted passage, Dr. Dhawan and Mr. Venkataramani with resolute perseverance submitted that the decision in ***Ram Phal*** (supra) is distinguishable as it does not take note of Order XLI Rule 5 and Order XLII Rule 1 CPC.

20. Order XLI Rule 5 reads as follows:-

"5. *Stay by appellate court*.—(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the appellate court may for sufficient cause order stay of execution of such decree.

Explanation : An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the court of first instance.

(2) ***Stay by court which passed the decree.—*** Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the court making it is satisfied—

(*a*) that substantial loss may result to the party applying for stay of execution unless the order is made;

(*b*) that the application has been made without unreasonable delay; and

(*c*) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Subject to the provisions of sub-rule (3), the court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of Rule 1, the court shall not make an order staying the execution of the decree."

21. Order XLII Rule 1 that occurs under the Heading "Appeals From Appellate Decrees" is as follows:-

"1. Procedure.— The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees."

22. In this context, it is useful to refer to Order XLII Rule 2 which has been inserted by Act 104 of 1976 with effect from 01.02.1977. It provides as under:-

"**2. Power of court to direct that the appeal be heard on the question formulated by it.—** At the time of making an order under rule 11 of Order XLI for the hearing of a second appeal, the court shall formulate the substantial question of law as required by section 100, and in doing so, the court may direct that the second appeal be heard on the question so formulated and it shall not be open to the appellant to urge any other ground in the appeal without the leave of the court, given in accordance with the provision of section 100."

23. Submission of the learned senior counsel for the

appellant is that Order XLI Rule 5 confers jurisdiction on the High Court while dealing with an appeal under Section 100 CPC to pass an *ex parte* order and such an order can be passed deferring formulation of question of law in grave situations. Be it stated, for passing an *ex parte* order the Court has to keep in mind the postulates provided under sub-rule (3) of Rule 5 of Order XLI. It has to be made clear that the Court for the purpose of passing an *ex parte* order is obligated to keep in view the language employed under Section 100 CPC. It is because formulation of substantial question of law enables the High Court to entertain an appeal and thereafter proceed to pass an order and at that juncture, needless to say, the Court has the jurisdiction to pass an interim order subject to the language employed in Order XLI Rule 5(3). It is clear as day that the High Court cannot admit a second appeal without examining whether it raises any substantial question of law for admission and thereafter, it is obliged to formulate the substantial question of law. Solely because the Court has the jurisdiction to pass an *ex parte* order, it does not empower it not to formulate the substantial question of law for the purpose of

admission, defer the date of admission and pass an order of stay or grant an interim relief. That is not the scheme of CPC after its amendment in 1976 and that is not the tenor of precedents of this Court and it has been clearly so stated in ***Ram Phal*** (supra). Therefore, the High Court has rectified its mistake by vacating the order passed in IA No. 1/2015 and it is the correct approach adopted by the High Court. Thus, the impugned order is absolutely impregnable.

24. Having so concluded, we would have proceeded to record dismissal of the appeal. But in the obtaining facts and circumstances, we request the High Court to take up the second appeal for admission and, if it finds that there is a substantial question of law involved, proceed accordingly and deal with IA No. 1/2015 as required in law. Needless to say, the interim order passed by this Court on earlier occasion should not be construed as an expression of any opinion from any count. It was a pure and simple *ad interim* arrangement.

25. Resultantly, the appeal, being sans substance, stands dismissed with no order as to costs.

.....J.
[Dipak Misra]

.....J.
[Shiva Kirti Singh]

New Delhi.
March 30, 2016.