



IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 6526 OF 2024
(@Petition for Special Leave to Appeal (C) No.27109/2018)

R. VERONICA & ANR.

...APPELLANTS

VERSUS

RUDRAYANI DEVAKI(D) THROUGH

LRS. S. SATHA KUMAR & ORS.

...RESPONDENTS

J U D G M E N T

J.B. PARDIWALA, J.,

1. This appeal is at the instance of the original defendants and is directed against the judgment and order passed by the High Court of Kerala dated 11.07.2018 in Regular Second Appeal No. 163 of 2007 by which the Second Appeal preferred by the respondents herein (original plaintiffs) came to be allowed, thereby setting aside the judgment and order passed by the First Appellate Court dismissing the suit instituted by the plaintiffs and restoring the original decree passed by the

trial court allowing the suit instituted by the original plaintiffs, i.e., the respondents before us.

2. The facts giving rise to the present appeal may be summarised as under:

- a. The respondents before us (original plaintiffs) instituted original suit no. 88 of 1996 in the Court of the learned Munsif Nedumangad for declaration of title of plaint "A" Schedule property, recovery of possession of "B" Schedule property (big part of "A" Schedule) and for cancellation of the sale deed Ext. A-4 purported to have been executed by the original defendant no. 3 in favour of the defendant no. 1.
- b. It appears from the materials on record, more particularly from the pleadings, that out of 13 cents of plaint "A" Schedule property, 6.5 cents originally was of the ownership of the defendant no. 3, namely, Rajeswari. Rajeswari derived title over the same as per the partition deed no. 2461 of 1978. The other half, i.e., 6.5 cents came to the share of one Ashok Kumar and Lalitha by way of the very same partition deed dated 13.07.1978.
- c. On 19.12.1978, the defendant no. 3 Rajeswari/respondent no. 4 before us sold her part of

the property admeasuring 6.5 cents to one Vanajakshi by way of the registered sale deed no. 4477/1978. This sale deed came to be registered in the office of the Sub-Registrar, Nedumangad.

- d. The said property which forms part and parcel of plaint “A” Schedule property is described as “B” Schedule property in the suit.
- e. On 31.12.1979 Ashok Kumar, Lalitha and Vanajakshi, jointly executed a sale deed in favour of the plaintiff/respondent no. 1 before us in respect of the entire 13 cents by way of registered sale deed no. 5 of 1980. This sale deed came to be registered with the office of Sub-Registrar Nedumangad.
- f. The dispute cropped up between the parties when the defendant no. 3, namely, Rajeswari executed one another sale deed dated 24.01.1996 with respect to the very same property in favour of the appellants before us/ original defendant no. 1 bearing document no. 276/96 (Ext. A4 sale deed).
- g. It is the case of the plaintiffs that on the strength of sale deed dated 24.01.1996 the appellants/defendant nos. 1 and 2 took over the possession of plaint “B” Schedule property illegally and forcefully (i.e., 6.5

cents) originally owned by the defendant no. 3, namely, Rajeswari and started putting up construction on the same.

- h. The aforesaid led to the institution of the original suit referred to above on the ground that the sale deed (Ext. A4) purported to have been executed by the defendant no. 3 in favour of the defendant no. 1 is *void ab initio* in so far as the plaintiff/respondent no. 1 is concerned and has no legal enforceability as against the plaintiff and the appellants/defendant nos. 1 and 2 respectively could not have taken over the possession of the suit property illegally and put up any construction on the same.
- i. Upon institution of the original suit, the appellants/defendant nos. 1 and 3 respectively entered their appearance and filed a joint written statement. The original defendant no. 2 remained *ex parte*.
- j. In the written statement, the appellants/original defendants stated that the suit was not maintainable either in law or on facts. They further stated that the 3rd defendant had not executed any sale deed in favour of Vanajakshi or in favour of anyone else. The sale deed sought to be relied upon by the original plaintiff was

bogus and fabricated. They took the stance that they derived title over the plaint “B” Schedule property on the strength of the document no. 2461 of 1978 and since the execution of the said document, they remained in uninterrupted possession and enjoyment of the plaint “B” Schedule property.

k. **While so** the 3rd defendant executed a sale deed in favour of the 1st defendant in respect of the schedule “B” property as per the document no. 276/1996 upon purchase of the plaint “B” Schedule property by the 1st defendant. She constructed a building in the 6.5 cents of the property and also got her name mutated in the revenue records.

1. Having regard to the pleadings, the trial court framed the following issues:

- i. Whether the suit is maintainable?
- ii. Whether the document no. 276/96 executed by the 3rd defendant in favour of the 1st defendant is liable to be cancelled?
- iii. Whether the declaration prayed for is allowable?
- iv. Whether the recovery prayed for is allowable?
- v. Whether the injunction prayed for is allowable?
- vi. Reliefs and costs?

- m. In the course of the trial, the plaintiff examined herself and also examined 2 other witnesses. The plaintiff also adduced documentary evidence in the form of Ext. A1 to A4 respectively. The defendants thought fit not to lead any oral or documentary evidence. The reports of the Commissioner and the plan came to be marked as Ext. C1, C1(a), C2 and C2(a) respectively.
- n. Upon appreciation of the oral as well as documentary evidence on record, the suit came to be allowed.
- o. The sale deed no. 276/96 said to have been executed by the 3rd defendant in favour of the 1st defendant, was declared as *null and void*.
- p. The plaintiff was declared as the lawful owner of the plaint "A" Schedule property including the plaint "B" schedule property.
- q. The plaintiff was permitted to recover the possession of plaint "B" Schedule property from the defendant nos. 1 and 2 respectively.
- r. The defendant nos. 1 and 2 respectively were directed to remove the structures and constructions put up by them on the suit property, failing which the plaintiff was permitted to get them removed through the Court.

- s. The defendants were restrained by way of permanent injunction from felling any trees standing in plaint “B” Schedule property or putting up any further construction on the same.
- t. The original defendants being dissatisfied with the decree passed by the trial court went in First appeal. The First appeal came to be filed in the court of Sub-Judge, Nedumangad and was registered as Appeal Suit No. 59 of 1998.
- u. In the First appeal, the Appellate Court determined the following points for its consideration:
 - i. Whether the plaint schedule properties identified by the Advocate Commissioner are correct and proper?
 - ii. Whether the execution of Ext. A3 is proved?
 - iii. Whether the plaintiff has title over the plaint “B” Schedule property?
 - iv. Whether the plaintiff is entitled for a decree for cancellation of document no. 276/1996?
 - v. Whether the plaintiff is entitled is entitled for a declaration as sought for?
 - vi. Whether the plaintiff is entitled for recovery of “B” Schedule property as sought for?

- vii. Whether the plaintiff is entitled for an injunction as prayed for?
- viii. Whether the judgment and decree of the court below are legally sustainable?
- v. Upon reappreciation and evaluation of the evidence on record, the First Appellate Court allowed the appeal and thereby set aside the judgment and decree passed by the Court of the learned Munsif.
- w. The First appeal was allowed essentially on the ground that the Commissioner appointed by the Court had failed to identify the plaint Schedule properties correctly. The plaintiff failed to prove the execution of Ext. A3 since the execution of the same was specifically denied by the defendant no. 3. Although the plaintiff examined one of the attesting witnesses, i.e., the PW3 to prove the execution of the Ext. A3 yet the oral evidence of PW3 does not inspire any confidence. PW3 is none other but the husband of the deceased Vanajakshi.
- x. Being aggrieved and dissatisfied with the judgment and order passed by the First Appellate Court dismissing the suit the plaintiff went before the High Court by way of Second Appeal No. 163 of 2007.

- y. The Second Appeal came to be allowed vide the impugned judgment and order passed by the High Court.
- z. While allowing the Second Appeal, the High Court observed thus:

“The expression “the person by whom it purports to have been executed” engrafted under the proviso to Section 68 stands for a denial of execution of the document by the person who purports to have been executed the same ‘in a suit brought by that person’. The further expression “specifically denied” should be understood as the denial of execution of document specifically by the person by whom it purports to have been executed, in a suit or proceeding initiated by him. It is available only in a suit or proceeding initiated by the person by whom it purports to have been executed. In other words, (1) there should be a specific denial of execution of document by the person by whom it purports to have been executed, and (2) it has been raised by that person in a suit or proceeding initiated by him for that purpose. Unless there is a suit or counter claim or proceeding either filed or initiated or brought into existence by that person, there cannot be any requirement of compliance of mandate as envisaged in the main body of Section 68 of the Indian Evidence Act. Proviso to Section 68 of the said Act is an exception to its main body and a further exception carved out in the proviso avoiding the application of the proviso when there is specific denial of execution by the person by whom it purports to have been executed. In all other cases of execution of documents required by law to be attested, except a will or codicil, there is no requirement of compliance of mandate as envisaged in the

main body of Section 68 of the Indian Evidence Act for its proof. A mere challenge by the executant/the person who purported to have been executed the document alone is not sufficient to bring the matter within the exception to the proviso to Section 68 of the Indian Evidence Act, though he is in the party array of the suit either as a defendant or as a co-defendant unless there is a relief sought by him challenging its execution. The fact that the executant (defendant No.3) is in the party array of the suit alone will not bring the document within the purview of the exception carved out of the proviso to Section 68 of the Evidence Act and hence, the proviso to Section 68 alone would come into play without its exception and hence, there is no need or necessity for summoning or examining any of the attesting witnesses to prove the document.

8. No suit or counter claim or proceeding was admittedly initiated by defendant No.3, the person who purports to have executed Ext.A3 sale deed dated 19.12.1978. The production of the original of the said document would satisfy the requirement of proof of its execution. Necessarily, the subsequent execution of another deed of conveyance by defendant No.3 with respect to the same property in favour of defendant No.1 is without any authority, right, title or interest over the property and hence the same is not binding on the rights of the plaintiff over the plaint schedule property. The plaintiff can very well ignore the same without seeking a remedy by way of setting aside the document or declaration but it may be a clog on its title to the property in future and hence the relief sought for by the plaintiff has to be granted by setting aside Ext.A4 sale deed. The decree passed by the first appellate court reversing the judgment and decree of the lower court hence liable to be set aside.

9. Another ground was also raised by the learned counsel for the defendants disputing the location of the property in Ext.C1 mahazar and Ext.C1(a) plan. It is submitted by the learned counsel for the respondents that one property is lying on the south-eastern corner and the other one is lying on the north-eastern corner of a large extent of one acre 93 cents. But the commissioner who visited the property located both plaint 'E' and 'G' schedule as a single compact plot without commissioner, it is clear that these two properties were located as a single compact plot without any separation. The respective description of 'G' and 'E' schedule would show that these two properties would take the eastern part of a large extent of one acre 93 cents. There is no intervening property and hence it is perfectly in tune with the description given in both the title deeds as well as the parental document Ext.A2. The trial court has accepted the abovesaid plan and decreed the suit.

In the result, the second appeal is allowed. The decree and judgment of the first appellate court is hereby set aside. The decree and judgment passed by the trial court is restored. No costs."

(emphasis supplied)

3. In such circumstances referred to above, the appellants are here before us with the present appeal.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

(ORIGINAL DEFENDANTS)

4. Mr. Prakash Ranjan Nayak, the learned counsel appearing for the appellants vehemently submitted that the High Court committed an egregious error in passing the impugned judgment and order in exercise of its jurisdiction under Section 100 of the CPC without formulating any substantial question(s) of law.
5. The learned counsel submitted that without formulating the substantial question(s) of law, if any, involved in the Second Appeal the High Court could not have proceeded to hear the same on merits and allow the same.
6. The learned counsel would submit that the interpretation by the High Court of Section 68 of the Evidence Act could be termed as absolute erroneous. In other words, according to the learned counsel, the two requirements which the High Court has held as necessary for invoking Section 68 of the Evidence Act is nowhere provided in the said section.
7. The appellants/defendants had specifically and in categorical terms denied the execution of Ext. A3 in their written statement, and in such circumstances, the onus of proving the said document was on the plaintiff. The evidence of PW3 (attesting witness) was found to be unreliable by First Appellate Court.

8. In the last, it was submitted that the High Court failed to address itself on any of the findings recorded by the First Appellate Court.
9. In such circumstances referred to above, the learned counsel prayed that there being merit in his appeal, the same may be allowed and the impugned judgment and order passed by the High Court be set aside.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

(ORIGINAL PLAINTIFFS)

10. On the other hand, while opposing the present appeal, Mr. Ankur S. Kulkarni, the learned counsel appearing for the respondents, original plaintiff vehemently submitted that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned judgment and order.
11. He would submit that the interpretation put forward by the High Court, in so far as Section 68 of the Evidence Act is concerned, is absolutely correct.
12. He argued that Ext. A3 was executed in the year 1978. Till 1995, the title over the suit property never came to be questioned by the appellants/original defendants. The sale

deed dated 19.12.1978 could be said to have been validly proved by the plaintiff.

13. It was argued that there was no good reason or rather no good ground for the First Appellate Court to disbelieve the oral evidence of PW3 (one of the attesting witnesses to the sale deed of 1978 executed by Vanajakshi).
14. In such circumstances referred to above, the learned counsel prayed that there being no merit in the present appeal, the same may be dismissed.

ANALYSIS

15. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:
 - i. Whether the High Court could have proceeded to hear the Second Appeal on merits and allow the same without formulating any substantial question of law as required under Section 100 of the CPC?
 - ii. Whether the High Court is correct in saying that the expression “the person by whom it purports to have been executed” engrafted in the proviso to Section 68 of the Evidence Act stands for denial of the execution of the document by the person who purports to have

executed the same “in a suit brought by that person”?

In other words, whether the High Court is correct in taking the view that the expression “specifically denied” should be understood as the denial of execution of document specifically by the person by whom it purports to have been executed in a suit or proceeding and not just a bald denial in the written statement instituted by him?

- iii. Whether the High Court is justified in taking the view that in the absence of any specific denial of execution of the sale deed of 1978, the proviso to Section 68 of the Evidence Act would not come into play?

QUESTION NO. 1

16. Order XLII Rule 2 of the CPC provides thus:

“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.”

17. Section 100 of the CPC provides that, (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*. (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 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. Proviso says 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.
18. In ***Nazir Mohamed v. J. Kamala and Others***, reported in (2020) 19 SCC 57, this Court held that:

“53. 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.

54. In Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722], this Court held : (SCC pp. 724-26, paras 3-4 & 6)

“3. 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 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.

4. 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.

...

6. 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 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 interference in second appeal."

55. 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 Ghosh* [Biswanath

Ghosh v. Gobinda Ghosh, (2014) 11 SCC 605 : (2014) 4 SCC (Civ) 192 : AIR 2014 SC 1582]. Formulation of substantial question of law is mandatory and the mere reference to the ground mentioned in memorandum of second appeal cannot satisfy the mandate of Section 100 CPC.

(emphasis supplied)

19. In the **Government of Kerala v. Joseph** reported in 2023

INSC 693, this Court held as under:

“8. For an appeal to be maintainable under Section 100, Code of Civil Procedure (‘CPC’, for brevity) it must fulfil certain well-established requirements. The primary and most important of them all is that the appeal should pose a substantial question of law. The sort of question that qualifies this criterion has been time and again reiterated by this Court. We may only refer to *Santosh Hazari v. Purushottam Tiwari* (2001) 3 SCC 179 (three-Judge Bench) wherein this Court observed as follows:

“12. The phrase “substantial question of law”, as occurring in the amended Section 100 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 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 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.”

(emphasis supplied)

20. In **Ishwar Dass Jain v. Sohan Lal**, reported in (2000) 1 SCC 434, this Court in para 10, has stated thus:

“10. 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 judgment of the first appellate court without doing so.”

(emphasis supplied)

21. Yet again in **Roop Singh v. Ram Singh**, reported in (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 thus:

“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 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. Further, the fact-finding courts after appreciating the evidence held that the defendant entered into the possession of the premises as a batai, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. These findings recorded by the two courts below were based on proper appreciation of evidence and the material on record and there was no perversity, illegality or irregularity in those findings. If the defendant got the possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to

establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession. (Thakur Kishan Singh v. Arvind Kumar [(1994) 6 SCC 591]). Hence, the High Court ought not to have interfered with the findings of fact recorded by both the courts below.”

22. The position has been reiterated in **Kanhaiyalal v. Anupkumar** reported in (2003) 1 SCC 430, **Premabai v. Jnaneshwar Ramakrishna Patange**, reported in, (2000) 9 SCC 418, **Chadat Singh v. Bahadur Ram**, reported in (2004) 6 SCC 359 and **Mathakala Krishnaiah v. V. Rajagopal** reported in (2004) 10 SCC 676.
23. Thus, the legal position is no more *res integra* on the point that in order to admit and maintain a second appeal under Section 100 of the CPC, the Court shall formulate substantial question(s) of law, and the said procedure is mandatory. Although the phrase 'substantial question of law' is not defined in the CPC, yet 'substantial 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 CPC 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. As such, Second Appeal cannot be decided on equitable grounds and the conditions mentioned in Section 100 read with Order XLII Rule 2 of the CPC must be complied to admit and maintain a Second Appeal.

24. A perusal of the impugned judgment passed by the High Court does not show in any manner that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated. That being so, the judgment cannot be maintained.
25. We looked into the memorandum of the Second Appeal which is on the record. In the memorandum of the Second Appeal, the original plaintiff formulated the following substantial questions of law for the consideration of the High Court:

“(A) Whether after jointly executing the sale deed in favour of the plaintiff for the entire 13 cents described as “A” schedule any objection regarding the description, if any of the properties as between the one mentioned in Exhibit -A2 partition deed and Exhibit A3 sale deed, is sustainable.

(B) Is not Exhibit-A3 sale deed valid and binding on the 3rd defendant especially when the latter had not

adduced any oral or documentary evidence, against its authenticity, validity or genuineness.

(C) In view of the execution and registration of Ext. B3 sale deed, was not the lower Appellate Court bound to presume that all formalities, in connection with the registration were properly and regularly done and that on the failure of the 3rd defendant to prove that fraud was played on the Sub-Registrar, Ext. B3 was beyond challenge and unquestionable.

(D) Whether the lower Appellate Court was justified in upsetting the judgment and decree of the trial court when the same did not suffer from any infirmities, like perverse appreciation of evidence taking into account irrelevant facts and non-consideration of relevant facts.

In other words, even if a different view is possible, whether the lower Appellate Court was justified in reversing the judgment of the trial court.”

26. However, the picture is not clear, as to how and in what manner, the Second Appeal came to be admitted and heard finally. Ordinarily, when the High Court finds merit in the substantial questions of law formulated by the appellant, the Second Appeal would be admitted by way of an order wherein, the questions of law are reproduced. It may happen that the matter may be at the stage of notice and after other side appears the High Court may decide to take up the Second appeal for final hearing and dispose of the same. However, once the High Court decides to hear the Second Appeal on merits it is mandatory to incorporate the

substantial questions of law in the judgment and answer those questions accordingly.

27. In the case at hand, the High Court failed to formulate any substantial questions of law and decide those questions, accordingly. In fact, the High Court set aside the first appellate court's judgment and allowed the Second Appeal, and thereby restored the original decree that came to be passed by the trial court in favour of the plaintiff, i.e., the respondents before us. The impugned judgment could be said to be vitiated in law.
28. In such circumstances referred to above, we are left with no other option but to set aside the impugned judgment and remit the matter to the High Court for disposal after formulating the substantial questions of law, if any, in accordance with law.

QUESTION NOS. 2 & 3

29. We could have closed this matter by answering the question no. 1 as above. However, we have noticed two egregious errors in the impugned judgment passed by the High Court. We are of the view that we should not overlook the two egregious errors, more particularly, when we have decided to remit the matter to the High Court for *de novo* consideration

and hearing of the second appeal. If we do not correct the same, it may have its own legal implications and the subordinate courts may get misled with the proposition of law that the High Court has explained in so far as the interpretation of the proviso to Section 68 of the Evidence Act is concerned.

30. As noted above, the suit came to be allowed by the trial court.

The trial court took the view that the sale deed of the year 1978, executed by one Vanajakshi is legal and valid, and in such circumstances, the subsequent sale deed of the year 1996 cannot be said to be legal and valid. The trial court looked into the oral as well as documentary evidence adduced by the original plaintiff, more particularly the oral evidence of one of the attesting witnesses (PW-3) to the sale deed of 1978, and found the oral testimony of the PW3 to be true, trustworthy and reliable.

31. In the First Appeal preferred by the original defendants, the First Appellate Court disbelieved the very execution of the sale deed of 1978. To put in other words, the First Appellate Court took the view that the oral evidence of PW3, i.e., one of the attesting witnesses examined by the plaintiff did not inspire any confidence, and in such circumstances, allowed the First Appeal. When the matter went before the High Court

in the Second Appeal, the High Court for no good reason looked into Section 68 of the Evidence Act. We say so because Section 68 of the Evidence Act as a whole has no application to a registered sale deed. The High Court should have concentrated only on the grounds that weighed with the First Appellate Court in allowing the appeal and thereby setting aside the decree passed by the trial court in favour of the plaintiff.

32. What has the High Court said? The High Court has said two things. First, the High Court said that for the purpose of applicability of Section 68 of the Evidence Act, the denial by the defendant as regards any one of the documents relied upon by the plaintiff has to be very specific. A mere bald or vague denial is not sufficient to attract the proviso to Section 68 of the Evidence Act. The High Court observed that the denial or challenge at the end of the defendants cannot be said to be specific.
33. The second thing that the High Court said is that if the defendant wants to deny the execution of any particular document relied upon by the plaintiff, then such denial cannot be only by way of written statement. The denial has to be by way of a separate suit or a counter claim.

34. We are of the opinion that on both the aforesaid counts, the High Court fell in error. We do not agree with the proposition of law as sought to be laid down by the High Court.
35. In the first place there was no good reason for the High Court to touch or look into the proviso to Section 68 of the Evidence Act as Section 68 as a whole does not apply to a registered sale deed.
36. Section 54 of the Transfer of Property Act, 1882 defines “sale” as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. It also provides that such transfer, in case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. It is not the requirement of law that the sale deed is to be attested by any attesting witness so as to prove the due execution by examining at least one attesting witness.
37. Section 68 of the Indian Evidence Act provides how a document, required to be attested by law, is to be proved. It provides that such a document is to be proved by examining at least one attesting witness, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. The proviso to Section 68 stipulates that it

shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied. A sale deed being not required by law to be attested, the provisions of Section 68 of the Indian Evidence Act on the face of it is not applicable.

38. In taking the aforesaid view, we are fortified by the decision of this Court in the case of ***Hans Raji (Smt.) v. Yosodanand*** reported in **(1996) 7 SCC 122** wherein this Court observed as under:-

“So far as the applicability to the proviso to Section 68 is concerned, it must be noted that there was no occasion for the respondent to examine any attesting witness to the document in question as it was a sale deed which never required any attestation and even if some ‘marginal’ witnesses had attested the document the document did not attract Section 68 of the Evidence Act which in term applies to the proof of execution of document required by law to be attested. It reads as under:

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

Therefore, Section 68 would not cover such a transaction. Hence there would remain no occasion to invoke the proviso to Section 68 with a view to finding out whether the execution of such a document was specifically denied by the adverse party or not. Consequently, all the main contentions canvassed before the High Court which are repelled by the High Court cannot be said to be wrongly repelled.”

(Emphasis supplied)

39. We may also refer to one another decision of this Court in the case of **Bayanabai Kaware v. Rajendra s/o Baburao Dhote** reported in **(2018) 1 SCC 585** wherein this Court observed as under:

“It is for the reasons that, firstly, the execution of the sale deed does not need any attesting witness like the gift deed, which requires at least two attesting witnesses at the time of its execution as per Section 123 of the Transfer of Property Act, 1882; and secondly, Section 68 of the Evidence Act, 1872, which deals with the examination of the attesting witness to prove the execution of the document, does not apply to sale deed, which is governed by Section 54 of the Transfer of Property Act.”

(Emphasis supplied)

40. *Prima facie* it appears that the High Court misconstrued the expression “*execution of any document, not being a Will*” appearing in the proviso to Section 68 of the Evidence Act. The High Court construed “*execution of any document*” to include a registered sale deed also. We are of the view that the High Court committed an error in understanding the true purport of the proviso to Section 68 of the Evidence Act. The “*execution of any document, except a Will*” means those documents which require compulsory attestation like a Gift deed, Mortgage deed, Settlement deed, etc., but it is not mandatory to examine any attesting witnesses in proof of such documents unless its execution is specifically denied. In the case of a Will, the examination of one of the attesting witnesses is a necessary requirement, irrespective of whether its execution has been specifically denied or not. This is all that the proviso to Section 68 of the Evidence Act seeks to convey or clarify.

INTERPRETATION OF THE PROVISO:

41. The term proviso is used to qualify a preceding provision and the purpose of the proviso is to restrict or to explain the general terms of the provisions of which it forms part of and not to add to the body of the substantive provision nor to take away

anything there from. A proviso cannot travel beyond the provisions to which it is provided. This proposition is well founded by this Court in the decision reported in **Ram Narain Sons Ltd. v. STO**, reported in **(1955) 2 SCC 64**. In the above judgment, this Court held as follows:

“11. (...) It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other (...)”.

(Emphasis supplied)

42. The view of this Court as above was followed in a later judgment reported in **CIT v. Indo-Mercantile Bank Ltd.**, reported in **1959 SCC OnLine SC 5**, wherein it was observed as follows:

“The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment.

It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso.

Therefore, it is to be construed harmoniously with the main enactment”.

(Emphasis supplied)

43. It has to be noted that the function of a proviso attached to a statute, Act or Ordinance, is to explain, qualify or restrain the operation of the preceding provision and it has to be read in light of the subject matter of the main statute, Act or Ordinance. Proviso in a statute has to be strictly construed as it is instead to qualify what is affirmed in the body of the statute, provision, section or paragraph preceding it.
44. Justice V.R. Krishna Iyer (as His Lordship then was) speaking for the Bench in the case **Dwarka Prasad v. Dwarka Das Saraf** reported in **(1976) 1 SCC 128** observed as follows:-

“17. While rulings and text books bearing on statutory construction have assigned many functions for provisos, we have to be selective, having regard to the text and context of a statute. Nothing is gained by extensive references to luminous classics or supportive case-law. Having explained the approach we make to the specific “proviso” situation in Section 2(a) of the Act, what strikes us as meaningful here is that the Legislature by the amending Act clarified what was implicit earlier and expressly carved out what otherwise might be mistakenly covered by the main definition. The proviso does not, in this case, expand, by implication, the protected area of building tenancies to embrace “business” leases.

18. We may mention in fairness to Counsel that the following, among other decisions, were cited at the Bar bearing on the uses of provisos in statutes: CIT v. Indo-Mercantile Bank Ltd, [AIR 1959 SC 713; Ram Narain Sons Ltd. v. Asstt. CST [AIR 1955 SC; Thompson v. Dibdin [(1912) AC 533, 541; Rex v. Dibdin [1910 Pro Div 57, 119, 125] and Tahsildar Singh v. State of U.P. [AIR 1959 SC 1012. The law is trite. A proviso must be

limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. "Words are dependent on the principal enacting words to which they are tacked as a proviso. They cannot be read as divorced from their context" (Thompson v. Dibdin, 1912 AC 533). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

"The proper course is to apply the broad general Rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.

The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail. (Maxwell on Interpretation of Statutes, 10th Edn., p. 162)"

(Emphasis supplied)

45. This Court in **Rohitash Kumar & Ors vs. Om Prakash Sharma & Ors.**, reported in **(2013) 11 SCC 451** observed while explaining how to interpret a proviso as under:

"20. The normal function of a proviso is generally to provide for an exception i.e. exception of

something that is outside the ambit of the usual intention of the enactment, or to qualify something enacted therein, which, but for the proviso would be within the purview of such enactment. Thus, its purpose is to exclude something which would otherwise fall squarely within the general language of the main enactment. Usually, a proviso cannot be interpreted as a general rule that has been provided for. Nor it can be interpreted in a manner that would nullify the enactment, or take away in entirety, a right that has been conferred by the statute. In case the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude by implication, what clearly falls within its expressed terms. If, upon plain and fair construction, the main provision is clear, a proviso cannot expand or limit its ambit and scope. [Vide CIT v. Indo Mercantile Bank Ltd. [AIR 1959 SC 713] , Kush Saigal v. M.C. Mitter [(2000) 4 SCC 526 : AIR 2000 SC 1390] , Haryana State Coop. Land Development Bank Ltd. v. Employees Union [(2004) 1 SCC 574] , Nagar Palika Nigam v. Krishi Upaj Mandi Samiti [(2008) 12 SCC 364] and State of Kerala v. B. Six Holiday Resorts (P) Ltd. [(2010) 5 SCC 186]]

21. The proviso to a particular provision of a statute, only embraces the field which is covered by the main provision, by carving out an exception to the said main provision. (Vide Ram Narain Sons Ltd. v. CST [AIR 1955 SC 765], AIR p. 769, para 10 and A.N. Sehgal v. Raje Ram Sheoran [1992 Supp (1) SCC 304], SCC p. 315, para 14.)

22. In a normal course, a proviso can be extinguished from an exception for the reason that exception is intended to restrain the enacting clause to a particular class of cases while the proviso is used to remove special cases from the general enactment provided for them specially.”

(Emphasis supplied)

46. There is no gainsaying that Section 68 opens with the words, “*if a document is required by law to be attested...*”. Since the proviso cannot be construed independently of the main provision that it attaches to, it is as clear as a noon day that the proviso to Section 68 cannot create an independent rule as regards “specific denial” for all attested documents. In other words, the proviso to Section 68 carves out an exception only in respect of documents that are required to be mandatorily attested by law. A sale deed does not fall in the category of such documents, therefore, the proviso to Section 68 would not be applicable in the present matter.

CONCLUSION

47. In the overall view of the matter, we have reached the conclusion that we should set aside the impugned judgment and order passed by the High Court and remit the matter to the High Court for *de novo* hearing of the Second Appeal after giving an opportunity to all the parties concerned to put forward their case. We accordingly pass such order.

48. The appeal stands allowed in the above terms.

49. We request the High Court to ensure that the Second Appeal is heard afresh after formulating substantial question(s) of

law and the same is disposed of within a period of three months from the date of the receipt of the writ of this order.

50. The High Court shall inform about the disposal of the Second Appeal to this Court.

51. The Registry shall forward one copy each of this judgment to all the High Courts.

.....J.
(J.B. PARDIWALA)

.....J.
(MANOJ MISRA)

14th July, 2026
New Delhi.