

SK. BHIKAN S/O SK. NOOR MOHD.

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v.

MEHAMOODABEE W/O SK. AFZAL & ORS.

(Civil Appeal No. 3048 of 2017)

FEBRUARY 20, 2017

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[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]

Code of Civil Procedure, 1908 - s. 100 - Second appeal - Substantial question of law - On facts, dismissal of second appeal in limine observing that the appeal does not involve any substantial question of law - Correctness of - Held: When the Court is called upon to interpret the documents and examine its effect, it involves questions of law - Thus, it is, obligatory upon the High Court to decide such questions on merits - On facts, having regard to the nature of controversy and issues involved regarding ownership based on interpretation of documents (exhibits), the questions did constitute substantial questions of law - High Court did not examine any document for deciding the ownership issue - High Court could do so after framing substantial questions of law - However, it was not done - High Court committed jurisdictional error - Matter remanded to the High Court for deciding the second appeal afresh on merits.

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Allowing the appeal, the Court

HELD: 1.1 As a matter of fact, having regard to the nature of controversy and the issues involved regarding ownership based on interpretation of documents (exhibits), the questions did constitute substantial questions of law. The High Court unfortunately did not examine any document for deciding the ownership issue in relation to the suit property. [Paras 16-17] [845-B, D-E]

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1.2 When the Court is called upon to interpret the documents and examine its effect, it involves questions of law. It is, therefore, obligatory upon the High Court to decide such questions on merits. In the instant case, the High Court could do so after framing substantial questions of law as required under Section 100 of the Code. It was, however, not done. The High Court committed jurisdictional error when it dismissed the second

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A **appeal *in limine*. The approach of the High Court cannot be countenanced. [Paras 18-19] [845-E-F]**

B **1.3 The reasoning and the conclusion arrived at by the High Court in the impugned order cannot be concurred with. The appeal did involve the substantial questions of law and, therefore, the High Court should have admitted the appeal by first framing substantial questions of law arising in the case and then after giving notice to the respondents for its final hearing as provided under Section 100 CPC decided the appeal on merits. [Para 15] [844-G-H; 845-A]**

C **1.4 The impugned order is set aside. The case is remanded to the High Court for deciding the appeal on merits in accordance with law. [Para 20] [845-G]**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3048 of 2017.

D From the Judgment and Order dated 09.02.2010 of the High Court of Judicature at Bombay Bench at Aurangabad in Second Appeal No. 875 of 2009.

Shyam Divan, Sr. Adv., Atul Babasaheb Dakh, Advs. for the Appellant.

E Makarand D. Adkar, Pravin Satale, Vijay Kumar, Rajiv Shankar Dvivedi, Nar Hari Singh, Advs. for the Respondents.

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J. 1. Leave granted.

F 2. This appeal is filed against the final judgment and order dated 09.02.2010 passed by the High Court of Judicature at Bombay Bench at Aurangabad in Second Appeal No. 875 of 2009 whereby the second appeal filed by the appellant herein was dismissed at the admission stage.

G 3. We herein set out the facts, in brief, to appreciate the issue involved in this appeal.

4. The appellant herein is the first defendant and respondent No. 1 herein is the plaintiff whereas respondent Nos. 2 to 8 herein are defendant Nos. 2 to 8 in the suit.

H 5. The dispute in the appeal arises between the members (brother

and sister) of one Muslim family. It relates to landed and house properties situated at village Satara, District Aurangabad (Maharashtra) as detailed in Para 1 of the plaint (hereinafter referred to as the "suit property"). A

6. Respondent No. 1 is the real sister of the appellant. She filed a civil suit against the appellant and respondent Nos. 2 to 8 (proforma defendants) in the Court of 11nd Jt. Civil Judge (J.D.) at Aurangabad being Civil Suit No. 120 of 1994 and prayed therein the relief of partition by meets and bounds of the suit property and, in consequence, also claimed her separate possession in the suit property *qua* the appellant. B

7. According to respondent No. 1 (plaintiff), the suit property was owned by their late father Sheikh Noor Mohd. and on his death, respondent No. 1, by virtue of inheritance and being one of his legal heirs, got share in the suit property as per the shares defined in the Mohammedan Law. Respondent No.1 alleged that since her father died intestate leaving behind respondent No.1 and the appellant being sister and brother, she is entitled to claim partition of the suit property and its separate possession as tenant in common as against her brother (appellant herein). C D

8. The appellant denied the case set up by respondent No.1 and contended, *inter alia*, in his written statement that the suit property is his self-acquired property because he purchased the same by his own efforts by a registered sale deed (Ex.P-1) and hence neither his late father had any right, title or interest in the said property and, in consequence thereof, nor respondent No.1 could inherit any right, title or interest in the suit property through her father as his legal heir. The appellant also set up a title by alleging his adverse possession over the suit property to the exclusion of all including respondent No.1. E F

9. The Trial Court framed issues and parties adduced their evidence. By a judgment/decree dated 24.12.1999, the Trial Court dismissed the suit filed by respondent No.1. Respondent No.1 (plaintiff), felt aggrieved, filed first appeal being R.C.A. No. 59 of 2000 before the District Judge, Aurangabad. By a judgment/decree dated 30.11.2001, the District Judge allowed the appeal and decreed the plaintiff's suit and accordingly passed a decree for partition and separate possession of the suit property in favour of respondent No.1. G

10. Felt aggrieved, appellant (defendant No. 1) filed second appeal being S.A. No.875 of 2009 before the High Court. By impugned order, H

A the High Court dismissed the second appeal *in limine* observing that the appeal does not involve any substantial question of law.

11. Felt aggrieved, defendant No.1 has filed this appeal by way of special leave before this Court.

B 12. Heard Mr. Shyam Divan, learned senior counsel for the appellant and Mr. Makarand D. Adkar, learned counsel for the respondents.

C 13. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and remand the case to the High Court for deciding the second appeal afresh on merits in accordance with law.

14. Learned Single Judge while dismissing the appeal passed the following order:

D **“1) The appeal is filed mainly against the findings recorded by the first appeal Court that the respondent-plaintiff was entitled to 1/3rd share in the suit property being the daughter of Noor Mohammed who is also the father of the appellant. The fact that Noor Mohammed, the father of the parties held the suit properties at the time of his death is not in dispute so also Noor Mohammed died without leaving a testament is also an admitted fact. Thus, the appellant and the respondent being the brother and sister would take the property, left behind by their father as per provisions of the Mohammedan Law. The appellant, thus would get two parts of the suit property, whereas the third part would go to the respondent no.1-original plaintiff.**

E **2) The findings recorded by the learned Judge of the first appeal Court are cogent. No interference in them is called for. There is no substantial question of law, arising in this appeal. The second appeal stands dismissed. Consequently, Civil Application Nos. 4980 of 2005 and 9547 of 2003 also stand dismissed.”**

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G 15. As observed supra, we do not agree with the reasoning and the conclusion arrived at by the High Court in the impugned order. In our considered view, the appeal did involve the substantial questions of law and, therefore, the High Court should have admitted the appeal by

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first framing substantial questions of law arising in the case and then after giving notice to the respondents for its final hearing as provided under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") decided the appeal on merits. A

16. As a matter of fact, in our view, having regard to the nature of controversy and the issues involved regarding ownership based on interpretation of documents (exhibits), the questions did constitute substantial questions of law. B

17. The questions as to whether the suit property is self-acquired property of late Sk. Noor Mohammad and, if so, whether respondent No.1 was entitled to inherit the same as his legal representative in accordance with the shares defined in the Mohammedan Law and secondly, whether the suit property is self-acquired property of the appellant (defendant No.1) on the strength of documents filed by him and, if so, whether it has resulted in excluding respondent No.1 to claim any share in such property as an heir of Sk. Noor Mohammad, was required to be decided by framing substantial questions of law in the light of proved documents filed by defendant No.1 because it was his case that the suit property was his self-acquired property. The High Court unfortunately did not examine any document for deciding the ownership issue in relation to the suit property. C D

18. When the Court is called upon to interpret the documents and examine its effect, it involves questions of law. It is, therefore, obligatory upon the High Court to decide such questions on merits. In this case, the High Court could do so after framing substantial questions of law as required under Section 100 of the Code. It was, however, not done. E

19. The High Court thus, in our view, committed jurisdictional error when it dismissed the second appeal *in limine*. We cannot countenance the approach of the High Court. F

20. In view of foregoing discussion, the appeal succeeds and is allowed. The impugned order is set aside. The case is now remanded to the High Court for deciding the appeal on merits in accordance with law. G

21. We, however, request the High Court to admit the second appeal, frame appropriate substantial questions of law as required under H

- A Section 100 of the Code, keeping in view the pleadings, findings of the two courts below and the documents (exhibits). Needless to say, the questions to be framed should be specific with reference to exhibits and the findings of the two courts below.

- B 22. Before parting, we consider it proper to mention here that we have not expressed any opinion on the merits of the controversy and confined our inquiry only to examine whether the second appeal involved any substantial question of law within the meaning of Section 100 of the Code?

- C 23. We have noticed that the dispute is between the members of one family. It would, therefore, be in the interest of family that efforts should be made to settle the dispute amicably. Indeed, it was also stated by learned counsel for the parties before us by giving some offer to each other. We grant this liberty to renew their respective offers before the High Court and explore the possibility for amicable settlement before finally hearing the appeal preferably within six months.

- D 24. Record of the case, if requisitioned, be sent back to the High Court forthwith by the Registry.