

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**RSA 6/2019
CM(1545/2023) CM(2029/2024)
CM(3085/2019) CM(7325/2021) CM(8390/2021)
CM(886/2023) CM(962/2023)**

State of J&K and others

... Petitioner/Appellant(s)

Through: Mr. Zahid Qais Noor, GA

V/s

Mohammad Sayidullah Bhat

... Respondent(s)

Through: Mr. Mohd. Ashraf Malik, Adv. with Mr. Salfi Izhar, Adv.

CORAM: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

**ORDER
20.11.2024**

ORAL

1. In this civil second appeal the genesis of the litigation is traceable to a process of land acquisition undertaken by the appellants herein for construction of four-laning of highway and the respondents herein claimed to be owners in possession of the land measuring 6 kanals 14 marla, 2 kanals 1 marla, 2 kanals 10 marla, 5 kanals 19 marla, 3 kanals 3 marla, and 2 kanals 12 marla respectively, collectively measuring 22 kanals 19 marla covered under Survey No. 193 situated at Damjan, Anantnag, and out of which land, 17 kanals, 16 marlas and 5 Sirsai was stated to be Shamilat land recorded in the relevant revenue records in the name of respondents herein and inherited by them through their ancestors vide Mutation No. 274 attested in their names. The respondents herein also claim that though the appellants herein paid

compensation to them for their proprietary land, yet did not pay any compensation in respect of said Shamilat land, feeling aggrieved whereof the respondents herein approached this court through OWP no. 277/2014, which petition came to be disposed of on 8.7.2015 by this court requiring the appellants herein to accord consideration to the claim of the respondents herein with regard to compensation of the Shamilat land and fruit-bearing trees existing thereon, measuring 17 kanals, 16 marla and 5 Sirsai falling under Survey No. 193 situated at Damjan as a consequence whereof, the appellants herein issued a consideration order dated 31.3.2016 rejecting the claim of the respondents herein for grant of compensation for the land in question on the ground that the mutation attested in respect of the said land bearing no. 274 is outcome of fraud and, as such, the respondents herein are not entitled to any compensation thereof.

2. Feeling aggrieved of the rejection of their claim by the appellants herein, the respondents herein instituted a suit before the court of Sub Judge Chief Judicial Magistrate, Anantnag, (for short “the trial court”) for declaration and injunction on 27.10.2016 against the appellants herein, praying therein for the following reliefs:

- (a) Decree may be passed in favour of the Plaintiffs against the defendants declaring the Plaintiff 1-2 as owners in possession of land measuring 6 Kanals 14 Marlas, Plaintiffs 3-7 as owners in possession of land 2 Kanals 1 Marla, Plaintiff 8 as owner in possession of land 2 Kanals 10 Marlas, Plaintiff 9-24 as owners in possession of land measuring 5 Kanals 19 Marlas, Plaintiffs 25-31 as owners in possession of land measuring 3 Kanals 3 Marlas and Plaintiffs 32-38 as owners in possession of land measuring 2 kanals 12 Marlas (Total Land

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measuring 22 Kanals 19 Marlas) falling under Khasra No.193 situated at Damjan Anantnag.

(b) Decree may be passed directing the defendants to pay/release the compensation along with interest in favour of Plaintiffs as per the proposition statement prepared by the defendants with respect of section 5 Shimlat land measuring 17 Kanals 16 Marlas 5 sersas under survey no. 193 situated at Damjan acquired by the defendants for four laning of National Highway.

3. The defendants before the trial court being appellants herein in the suit *supra* though entered their appearance before the trial court initially but later did not contest the same, and consequently came to be set *ex parte* requiring the plaintiffs respondents herein to lead evidence in *ex parte* as a consequence whereof, the plaintiffs respondents herein led evidence in support of the claim set up in the suit *supra* whereupon the trial court vide judgment and decree dated 16.1.2018 declared the plaintiffs respondents herein as owners in possession of land measuring 22 kanals 19 marlars falling under Survey No. 193 situated at Damjan and entitled to compensation thereto, further commanding by a decree of mandatory injunction the defendants appellants herein to pay compensation to the plaintiffs respondents herein for the land in question along with the interest at the rate of 7% per annum from the date of acquisition of land.
4. Dissatisfied with the said *ex parte* judgment and decree dated 16.01.2018, the defendants appellants herein filed an appeal before the court of Principal District Judge, Anantnag (for short the appellate court) on 16.01.2018 calling in question the said judgment and decree

inter alia on the premise that due to non-availability of their counsel before the trial court inasmuch as on account of turmoil in the Valley, neither the department nor its standing counsel could appear before the trial court as a result whereof, ex parte proceedings came to be initiated against them, followed by the *ex parte* judgment and decree, which judgment and decree besides having been passed at their back is based upon the conclusions drawn by the trial court on a concocted story of the plaintiffs respondents herein.

5. The appellate court, taking cognizance of the case set up by the appellants herein before it, proceeded to decide the appeal after taking into consideration the entire material placed before it by the appellants herein as also the case set up by the plaintiffs respondents herein in the suit, inasmuch as the evidence led in support thereof, and consequently in terms of impugned judgment and decree dated 19.11.2018, dismissed the appeal upholding the decree and judgment dated 16.1.2018 of the trial court.
6. The appellants herein aggrieved of the judgments and decrees passed by the courts below have impugned the same in the instant Civil Second Appeal on the following grounds:
 - a. That the impugned Judgment/orders passed by the Court below are cryptic, arbitrary and have been passed without appreciating the facts of the case, as such are liable to be set aside.
 - b. That the impugned Judgment has been passed by the Appellate Court without appreciating the facts of the case and without applying its judicial mind to the said facts.
 - c. That the Ld. Trial Court without affording any opportunity to the Appellants to file their written statement passed the impugned Judgment and decree in ex parte. The Appellate Court also without appreciating the pleadings and

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evidence passed the impugned Judgment, therefore, on this count also, the impugned Judgment and decree deserves to be set aside.

- d. That the Court below has not appreciated the pleadings and the evidence in its right perspective while passing the impugned Judgment. In this regard it is respectfully submitted that in compliance to the order dated 08.07.2015 passed by this Hon'ble Court in OWP No.277/2014 titled Mohammad Sayidullah Bhat and ors V/S State and others , the claim of the respondents was considered by the Collector Land Acquisition and after conducting an enquiry into the matter by a team of officers, it was found that the Mutation No.274 covering the Suit land is outcome of fraud and as such the Petitioners (responders herein) were not found entitled to any compensation. Copy of the order dated 08.07.2015 and consideration order dated 31.03.2016 is annexed herewith and marked as **Annexure-IXI**.
- e. That the Court below did not appreciate the fact that a team of officers headed by Tehsildar Dooru was constituted, to look into the genuineness of Mutation No. 274 & entitlement for the Respondents which reported glaring aberrations in the said mutation & serious acts of omission and commission on the part of the Revenue officers / officials which shook the foundation of the order over which respondents claim entitlement to compensation, predominantly rests. Copy of the report is annexed herewith and marked as **Annexure- IV**. All these acts vitiated the procedure adopted in carrying out mutation orders and fortified the resolve of the Appellants, State to go for in-depth inquiry into the matter so as to come at real facts and save the public money from going down the drain. All these facts have not been appreciated by the Ld. Appellate Court while passing the impugned Judgment and decree.
- f. That the Ld. Court below did not appreciate that an enquiry was being conducted simultaneously with the acquisition process to clear the air and for taking further action under law. More so, some of the inhabitants of village Damjan made complaints to his Excellency, the Governor of J&K, Chief Vigilance Commissioner J&K, Divisional Commissioner Kashmir & Deputy Commissioner Anantnag, alleging therein that the Respondents were trying to deceive the authorities and obtain compensation for State I Common land in violation of rules and on the basis of fake & forged mutation records. Copy of the complaint and order of the Commission are annexed herewith and marked as **Annexure-V**.
- g. That the impugned Judgment and decree have been passed by the wrong exercise of discretion and the mandate of law has not been complied.
- h. That the impugned Judgment has been passed without following the law and procedure and the court below has exercised its jurisdiction without

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application of mind which makes it imperative for this Hon'ble Court to set aside the same.

- i. That the Ld. Court below did not appreciate that the respondents herein are not entitled to any compensation because the land being the State land and mutation was found to be fake and forged after conducting a detailed enquiry into matter. Hence, on this count alone, the impugned Judgment and decree are bad in law and deserves to be set aside.

7. The appellants herein while maintaining the instant appeal have also proposed the following questions to be as substantial questions of law for adjudication by this court.

1. Whether the Suit for Declaration is maintainable only or it has to file Suit for compensation.
2. Whether the Suit being not maintainable without Notice u/s 80 of CPC?
3. Whether, the Appellate Court has not appreciated the documents and evidence in its right perspective when the matter is pending adjudication before the Hon'ble Court.

Heard learned counsel by the parties and perused the record.

8. Before proceeding to advert to the case set up by the appellants herein in the instant appeal, inasmuch as the aforesaid proposed questions, it would be pertinent and significant to refer to the ambit and scope of provisions of Section 100 CPC, which read as under:

[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*.

(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.

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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.]

What emanates from above section 100 CPC is that sub-section (1) declares that 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. Sub-section (2) supra allows such appeal from an appellate decree passed ex parte, whereas sub-section (3) requires the appellant to precisely state in the memorandum of appeal substantial question of law involved in the appeal. Sub-section (4) supra mandates where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate the question, and sub-section (5) enjoins upon the High Court to hear the appeal on the said substantial question of law so formulated providing further that the respondent shall at the hearing of the appeal be allowed to argue that the case does not involve such question. However, in terms of proviso appended to sub-section (5) being an exception to the general rule laid down therein that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question, however, while doing so the High Court is required to record reasons for such satisfaction.

9. The Apex Court in case titled as “**Pankaj Bhargava and another vs. Mohinder Nath and another** reported in (1991) 1 SCC 556” has held that the High Court can admit a second appeal only if it is satisfied that the case involves a substantial question of law, and though the expression “involves” suggests that such a question must arise in the case and it is necessary to decide it, yet the mere fact that such a question is raised by the appellant in the appeal does not justify the High Court to entertain the appeal unless it is actually involved in the case holding further that the word “involves” implies a considerable degree of necessity and does not mean that in certain contingencies a question of law might possibly arise.

Thus, what emanates from above position and principles of law is that the existence of a substantial question of law is *sine qua non* for exercise of jurisdiction under Section 100 of the CPC.

10. In **Kondiba Dagadu Kadam v. Savitkibai Sopan Gujar and Ors.** reported in (1999) 3 SCC 722, the Apex Court while dealing with the scope of the civil second appeals has observed that in a number of cases no efforts are made to distinguish between a question of law and a substantial question of law and in exercise of the powers under this section the findings of fact of the first appellate court are disturbed, having further observed that the conditions mentioned in the Section 100 CPC must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds for entertaining the second appeal enumerated under Section 100 CPC, in that, a second appeal can neither be decided on merely

equitable grounds nor can the concurrent finding of facts however erroneous be disturbed by the High Court in exercise of power under Section 100 CPC. A reference in this regard to paragraphs 4 and 5 of the judgment supra are extracted and reproduced hereunder:

4. . . . 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 This Court in Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd, AIR (1962) SC 1314 held that :-

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

5. It is not within the domain of the High Court to investigate the grounds on which findings were arrived at, by the last court of fact, being the first appellate court . . . In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second

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appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the tower appellate court were erroneous being contrary to the mandatory provisions of law applicable of its settled position on the basis of pronouncements made by the apex Court, or was based upon in inadmissible evidence or arrived at without evidence.

10. A further reference to the judgment of the Apex Court passed in **Ishwar Dass Jain (Dead) through LRs v. Sohan Lal (Dead) by LRs, reported in (2000) 1 SCC 434** also becomes imperative wherein the Apex Court after considering various earlier decisions has held that in exercise of powers under Section 100 CPC after the Amended Act of 1996 the ambit and scope of second appeal has been circumscribed making it essential for the High Court to frame a substantial question of law for rendering a decision on a second appeal while observing further that there are two situations where interference with findings of facts are permissible, firstly, when material or relevant evidence is not considered, which, if considered would have led to the opposite conclusion, and secondly, interference with findings of facts is permissible only where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible meaning thereby if the findings of facts are perverse to the evidence, unreasonable or irrational. Further, the Apex Court in case titled as **M. G. Hegde v. Vasudev Hegde reported in (2000) 2 SCC 213** has held that the expressions “perverse”, “unreasonable”, and “irrational” are of strong nature and cannot be used lightly and indiscriminately with a view to

set aside the finding arrived at by the first appellate court, having further held that this is not a mantra that can be applied to do in a second appeal what the law enjoins it not to do.

11. Keeping in mind the aforesaid position of law and reverting back to the case in hand, as has been noticed in the preceding paragraphs, the plaintiffs respondents herein maintained the suit against the defendants appellants herein for payment of compensation for the Shamilat land claimed to have been owned, possessed and acquired by them through inheritance from their forefathers on the basis of Elan/Dafa/Order 5 entitling them to compensation thereof in the same way as if their proprietary land had been acquired by the appellants herein.
12. In regard to the Shamilat land, law stands settled by this court in a series of judgements including in case titled as “**Kuldeep Raj and others vs. State of J&K and others** reported in **2022 (2) JKJ(HC) 114**” wherein it has been ruled by this court that the Shamilat land previously being State Land/Khalsa land, came to be converted by Maharaja of the erstwhile State of Jammu and Kashmir in terms of Boon/Elan 4 treating the said land to be Common Land bestowing upon the said landholders in a village the rights as if he is the owner thereof entitling the said holders of the Shamilat land to compensation in the event the said land is acquired. Same view has even been held by a Division Bench of this court in case titled as **State of J&K versus Hamida Begum reported in AIR 1979 J&K 48** wherein it has been held that rights and incidence of Shamilat land in occupation of a person are the same as if he is the owner thereof.

13. Record would reveal that the appellants herein, neither before the trial court nor before the appellate court disputed either the possession of the plaintiffs respondents herein over the land in question, or else the attestation of mutation no. 274 *qua* the said land in their favour. What has been disputed by the defendants appellants herein *qua* the said land is the mutation alleged to have been attested fraudulently. Nonetheless appellants before the appellate court failed to establish the said alleged fraudulent mutation by leading any credible or cogent evidence in support thereof and although the appellants herein in this regard referred to the holding of an enquiry, yet even such enquiry record/report was not produced by way of evidence and proved before the courts below.
14. In presence of the aforesaid undisputed position obtaining in the matter, the appellants herein instead chose to question the judgment and decree of the trial court before the first appellate court fundamentally on the ground that the judgment and decree by the trial court came to be passed in their absence and at their back as they were prevented from contesting the suit before the trial court on account of non-availability of their standing counsel as also due to turmoil in the valley and notwithstanding the said plea raised before the appellate court by the appellants herein against the judgment and decree of the trial court, the first appellate court yet dealt with the judgment and decree of the trial court impugned before it in its totality while scanning and critically analysing the case set up by the appellants before the trial court on merits and consequently rightly concluded that the trial court has

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validly and legally passed the impugned judgment and decree dated 16.1.2018.

15. Having regard to the aforesaid facts and circumstances and the law laid down by the Apex Court in the judgments *supra qua* the ambit and scope of interference into concurrent findings of fact in civil second appeal, the only inescapable conclusion that could be drawn is that the instant Civil Second Appeal is misconceived both on facts as well as on law and *per se* does not involve any substantive question of law much less a question of law for determination.

16. Resultantly, the appeal fails and is **dismissed**.

17. The 50% of the award amount stated to have been deposited by the appellants herein vide order dated 19.11.2021 before this court during the execution pendency of the proceedings pending disposal before the court of Sub Judge Anantnag being the executing court, is directed to be transferred along with interest, if any, to the executing court forthwith to be dealt with in accordance with law.

(JAVED IQBAL WANI)
JUDGE

Srinagar
20.11.2024

N Ahmad

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No