**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT**

**THE HONOURABLE MR. JUSTICE A. BADHARUDEEN**

**WEDNESDAY, THE 25TH DAY OF OCTOBER 2023 / 3RD KARTHIKA, 1945**

**RSA NO. 412 OF 2023**

**AGAINST THE JUDGMENT & DECREE DT.28.10.2019 IN OS 262/2014 OF MUNSIFF COURT, DEVIKULAM**

**JUDGMENT AND DECREE 23.12.2022 IN AS NO.34/2019 OF DISTRICT COURT, THODUPUZHA**

**APPELLANT/APPELLANT/PLAINTIFF:**

PHILOMINA,
AGED 64 YEARS,
W/O. GEORGE, KOCHUNIRAVATHU HOUSE, RAJAKUMARY SOUTH KARA,RAJAKUMARI. P.O., RAJAKUMARI VILLAGE, UDUMBANCHOLA TALUK, IDUKKI DISTRICT, PIN - 685619.

BY ADVS.
M.NARENDRA KUMAR
HARSHADEV M.
B.RAJESH (KOTTAYAM)

**RESPONDENTS/RESPONDENTS/DEFENDANTS:**

1 BERNARDSHAW
AGED ABOUT 70 YEARS
S/O. BHAGYAM, PUTHUPARAMBIL HOUSE, RAJAKUMARY ESTATE KARA,KHAJANAPPARA. P.O., RAJAKUMARI VILLAGE, UDUMBANCHOLA TALUK, IDUKKI DISTRICT, PIN - 685619.

2 THRESSIAMMA @ AYYAMMA
AGED 64 YEARS
W/O. BERNARDSHAW, PUTHUPARAMBIL HOUSE, RAJAKUMARY ESTATE KARA, KHAJANAPPARA. P.O., RAJAKUMARI VILLAGE, UDUMBANCHOLA TALUK, IDUKKI DISTRICT, PIN - 685619.

3 GEORGE,
AGED ABOUT 39 YEARS,
S/O. BERNARDSHOW, PUTHUPARAMBIL HOUSE, RAJAKUMARY ESTATE KARA, KHAJANAPPARA. P.O., RAJAKUMARI VILLAGE, UDUMBANCHOLA TALUK, IDUKKI DISTRICT, PIN - 685619.

4 VINCENT,
AGED 35 YEARS,
S/O. BERNARDSHOW, PUTHUPARAMBIL HOUSE, RAJAKUMARY ESTATE KARA,KHAJANAPPARA. P.O., RAJAKUMARI VILLAGE, UDUMBANCHOLA TALUK, IDUKKI DISTRICT, PIN - 685619.

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 05.10.2023, THE COURT ON 25.10.2023 DELIVERED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

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R.S.A No.412 of 2023

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Dated this the 25th day of October, 2023

**J U D G M E N T**

This Regular Second Appeal has been filed under Order XLII Rule 1 read with Section 100 of the Code of Civil Procedure, challenging decree and judgment in A.S.No.34 of 2019 dated 23.12.2022 on the files of the District Court, Thodupuzha, arising from decree and judgment dated 28.10.2019 in O.S.No.262/2014 on the files of Munsiff Court, Devikulam. Appellant in this Second Appeal is the sole plaintiff in the above Suit and the appellant in the First Appeal. Respondents are the defendants in the Suit.

2. Heard the learned counsel for the appellant on

admission.

3. The parties in this appeal shall be referred as to their status in the Suit as `plaintiff' and `defendants' hereafter for easy reference.

4. The Suit was one filed seeking the relief of prohibitory injunction restraining the defendants and men under them from trespassing into the plaint schedule property, annexing a portion of the same into their possession, destroying the boundaries, boundary marks and cultivation in the plaint schedule property, committing any sort of waste and mischief therein the plaint schedule property and in any manner interfering with the peaceful possession and enjoyment of the same by the plaintiff.

5. According to the plaintiff, the plaintiff got right and possession over the plaint schedule property on the strength of an unregistered agreement dated 28.04.2009 executed by one K.V.Paulose. The specific case was that the said Paulose obtained

right and possession over 2 ½ acres of land including the plaint schedule property as per another agreement dated 01.08.1988. The plaintiff pressed for grant of prohibitory injunction to protect his possession based on agreement dated 28.04.2009.

6. The defendants entered appearance and countered the Suit. The possession of the plaint schedule property by the plaintiff on the strength of agreement dated 28.04.2009 executed by K.V.Paulose was denied. The specific allegation raised by the defendants was that the said agreement was created by the plaintiff in collusion with K.V.Paulose for the purpose of filing the Suit. It was also contended that K.V.Paulose never had possession of plaint scheduled property at any point of time. The further contention that K.V.Paulose obtained right and possession over 2 ½ acres of property as per agreement dated 01.08.1988 executed by Advocate G.N.Thampi also was denied and it was specifically contended that no person by name Advocate G.N.Thampi ever lived in the locality

and any item of property covered by the agreements dated 01.08.1988 and 28.04.2009.

7. Referring to the rival contentions, the trial court ventured the matter. PWs 1 to 5 examined and Exts.A1 to A11 were marked on the side of the plaintiff. Exts.C1 and C1(a) were marked as court exhibits. No evidence let in by the defendants.

8. The trial court dismissed the Suit mainly on four grounds. It was found by the learned Munsiff that agreement dated 28.04.2009 marked as Ext.A1 is not admissible in evidence, since the said document, which created a right over the plaint schedule immovable property having value of more than Rs.100/-, requires registration as mandated under Section 17 of the Registration Act. It was also found that Ext.A1 could not also be used for collateral transaction under Section 49 of the said Act since the document has been pressed into to prove possession and possession is not a collateral transaction or collateral purpose.

Similarly, the trial court also disbelieved Exts.A2 and A11 reports of the Village Officers since PW4, the Village Officer, Rajakumari, had given evidence before the court stating that the same were issued by one Stanley John and one Gopal Pillai, but they were not examined to prove the same and PW4 could not account for the same. Further, proceedings of the Tahsildar, Udumbanchola issued, relying on Exts.A2 and A11 also were not produced by the plaintiff, to prove his case. Although the said decree and judgment were challenged before the appellate court, the learned District Judge also dismissed the same.

9. It is argued by the learned counsel for the plaintiff that the finding of the trial court as well as the appellate court holding the view that Ext.A1 requires registration is absolutely wrong, since as per Ext.A1 the usufructs as well as possession over the plaint schedule property were transferred by K.V.Paulose for consideration, and for such an agreement, registration is not

mandatory. In order to appraise this contention, I have read copy of Ext.A1 placed by the learned counsel for the plaintiff. On reading Ext.A1, the same is having the nomenclature of a sale deed and the same is one executed to transfer right over immovable property. It is also stated therein that the plaint schedule property having an extent of 1.50 Acres was obtained by K.V.Paulose as per agreement dated 01.08.1988 executed by Advocate G.N.Thampi. As per the narration in the agreement, the right obtained by K.V.Paulose, including improvements in the property and possession were sold in favour of the plaintiff, on accepting Rs.75,000/- as sale consideration. Therefore, Ext.A1 is a document intended to create a right in the immovable property.

10. In this context, the legal question arises is; what are the documents mandatorily be registered? In this context, it is relevant to refer Section 17(1)(b) of the Registration Act and the same is extracted as under:

> *"17. Documents of which registration is compulsory:- (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—*
>
> *(a) xxxx xxxx xxxx xxxx*
>
> *(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;*
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> *xxxx xxxx xxxx (rest omitted)*

Reading Section 17(1)(b), it is emphatically clear that other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property would require registration. Therefore, no doubt, Ext.A1, which is purported to convey right over the immovable property having value more than Rs.100/-, should require registration as

rightly found by the trial court as well as the appellate court.

11. Even though Exts.A2 and A11 were pressed into to prove right and possession over the plaint schedule property, which is the Government property, it is shocking to note that base document, whereby the plaintiff asserts right and possession over the property of the Government, Ext.A1 and its prior document, another agreement, are unregistered agreements, for which no legal sanctity to be attached. The prior agreement even not produced before the court to see what actually transferred by Advocate G.N.Thampi in favour of K.V.Paulose. In fact, when the property is of the Government, documents between private parties in relation to Government property have no legal effect or implication on the right of the Government, in any manner. Ext.A2 or Ext.A11 were not substantially proved by examining its authors or by placing the proceedings before Tahsildar, Udumbanchola to act upon the same. PW4 did not support the contents of the said documents. The

genesis of Exts.A2 and A11 at the option of the respective Village Officers also is in serious doubt and this Court feels that an enquiry shall be ordered in this regard following the verdicts of the Hon'ble Supreme Court, which dealt with Government properties. Thus it appears that Ext.A1 was generated in tune with another unregistered agreement dated 01.08.1988, to grab Government property. In fact, the said documents were intended with a view to grab Government property and such agreements have no binding effect on the Government to hold any right for the plaintiff in the Government property.

12. In this context, it is apposite to refer two decisions of the Apex Court: ***2010 (2) SCC 461 in Mandal Revenue Officer v, Goundla Venkaiah*** and ***2023 (5) KHC 264 Government of Kerala v. Joseph.*** In the decision reported in ***Mandal Revenue Officer (Supra),*** it was held that "……*it is our considered view that where an encroacher, illegal occupant or land grabber of public property*

*raises a plea that he has perfected title by adverse possession, the court is duty-bound to act with greater seriousness care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give an upper hand to the encroachers, unauthorized occupants or land grabbers"*. The second one, ***Government of Kerala v. Joseph*** (Supra), it was held that *"when the land subject of proceedings wherein adverse possession has been claimed, belongs to the Government, the Court is duty-bound to act with greater seriousness, effectiveness, care and circumspection as it may lead to Destruction of a right/title of the State to immovable property. In state of* ***Rajasthan v. Harphool Singh*** *(two-judge Bench) it was held: "So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of*

*right/title of the State to immovable property and conferring upon a third party encroacher title where he had none." Further, in Manadal Revenue officer v. Goundla Venkaiah (two-judge Bench) it was stated: "It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the Court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give an upper hand to the encroachers, unauthorized occupants or land grabbers".*

13. Therefore the court is duty bound to look into the claim over government properties with greater seriousness, care, and circumspection and the possibility of destruction of the right and title of the Government properties by the unauthorized occupants, land grabbers, and upper-hand encroachers should be avoided.

14. In this case, the learned counsel for the appellant failed

to raise any substantial question of law warranting admission of the second appeal. Order XLII Rule 2 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."*

15. Section 100 of the C.P.C. 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.

16. In the decision in [2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168], ***Nazir Mohamed v. J. Kamala and Others*** reported in the Apex Court held that:

> *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. In* ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, [(1999) 3 SCC 722]****, the Apex Court held that:*

*"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."*

*"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 S.100 of the Code of Civil*

*Procedure. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact."*

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

*meaning of entries and the contents of the document cannot be held to be raising a substantial question 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."*

*When no substantial question of law is formulated, but a Second Appeal is decided by the High Court, the judgment of the High Court is vitiated in law, as held by this Court in Biswanath Ghosh v. Gobinda Ghose, AIR 2014 SC 152. Formulation of substantial question of law is mandatory and the mere reference to the ground mentioned in Memorandum of Second Appeal can not satisfy the mandate of S. 100 of the CPC.*

17. In a latest decision of the Apex Court reported in [2023 (5) KHC 264 : 2023 (5) KLT 74 SC], ***Government of Kerala v. Joseph***, it was held as under:

*For an appeal to be maintainable under Section 100, Code of Civil Procedure ('CPC', for brevity) it must fulfill 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 S.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 S.109 of the Code or Art.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.*

18. 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 C.P.C., 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 Code, '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 S.109 of the Code or Art.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 C.P.C. must be complied to admit and maintain a second appeal.

19. On evaluation of the documents available, it could be gathered that no substantial question of law arises in this matter to

be decided by admitting this appeal.

In the result, this appeal is found to be meritless and the same is dismissed without being admitted.

Registry is directed to forward a copy of this judgment to the Secretary, Revenue Department, State of Kerala, Thiruvananthapuram; to the District Collector, Idukki and Tahsildar, Udumbanchola Taluk, for , future guidance in this matter and to consider appropriate enquiry, how Exts.A2 and A11 documents were issued and further action thereof, without much delay.

*Sd/-*

***(A.BADHARUDEEN, JUDGE)***

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