



2023:KER:71447

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 13TH DAY OF NOVEMBER 2023 / 22ND KARTHIKA, 1945

MSA NO. 31 OF 2023

AGAINST THE ORDER DATED 3.10.2023 IN I.A.NO.158/2023 IN REFA
NO.28/2023 OF KERALA REAL ESTATE APPELLATE TRIBUNAL, ERNAKULAM

AGAINST THE ORDER DATED 20.2.2023 IN COMPLAINT NO.17/2020 OF KERALA
REAL ESTATE REGULATORY AUTHORITY, THIRUVANANTHAPURAM

APPELLANT/RESPONDENT/RESPONDENT:

P. V. NIDHISH
AGED 54 YEARS
S/O. P.V. CHANDRAN, PARTNER, M/S PVS APARTMENT, KTC
BUILDING, YMCA ROAD, CALICUT, PIN - 673001

BY ADV BIJU ABRAHAM

RESPONDENT/PETITIONER/APPELLANT/COMPLAINANT:

SIVAPRAKASH
AGED 63 YEARS
S/O. KRISHNAN, PRESIDENT, THE ORCHID GARDEN APARTMENT
OWNERS ASSOCIATION, RESIDING AT G4, C BLOCK, ORCHID
GARDENS, P.V.S. PARK APARTMENTS, GOVINDAPURAM P.O.,
KUTHIRAVATTAM, KOZHIKODE, PIN - 673016

THIS MISC. SECOND APPEAL HAVING COME UP FOR ADMISSION ON 13.11.2023,

THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**CR****JUDGMENT**

Dated this the 13th day of November, 2023

This Miscellaneous Second Appeal has been filed under Section 58 of the Real Estate (Regulation and Development) Act, 2016 (for short, 'the Act, 2016' hereinafter) r/w Section 100 of the Code of Civil Procedure (for short 'the C.P.C.' hereinafter). The appellant is the respondent in Complaint No.17/2020 before the Authority and in REFA No.28/2023 before the Appellate Tribunal.

2. This appeal has been filed, challenging order in I.A.No.158/2023 in REFA No.28/2023, dated 3.10.2023, passed by the Kerala Real Estate Appellate Tribunal, Ernakulam.

3. Heard the learned counsel for the appellant on admission.

4. I have perused the relevant documents placed by the learned counsel for the appellant and the statutory provisions.



5. In this matter, the appellant in REFA No.28/2023, filed I.A.No.158/2023 and sought for appointment of a Commission, for the purpose of collecting some information in order to decide the matter in controversy between the parties.

6. The respondent therein, who is the appellant herein, opposed the application, mainly on the ground that materials sought to be collected, by appointing Commission, would come under the purview of Order XLI Rule 27 of the C.P.C. and the Appellate Tribunal had no such power.

7. After considering the rival contentions raised, the Appellate Tribunal negated the contention of the respondent therein and found in paragraph No.7 of the order that, in order to decide the very material issue, the Tribunal would require certain materials, as indicated in paragraph No.24 of the order passed by the Tribunal on 24.5.2022 and in such view of the matter, a Commission was appointed to get details of the said vital materials.

8. At the time of hearing, the learned counsel for the appellant would submit that, appointment of a Commission by the Appellate Tribunal, is not legally permissible and the same



would come within the ambit of Order XLI Rule 27 of the C.P.C. According to the learned counsel for the appellant, in order to adduce additional evidence in appeal, the mandate of Order XLI Rule 27 of the C.P.C. should have been complied. In this connection, the learned counsel placed a decision in **Raveendranadhan and Others v. State of Kerala and Another** reported in **[2017 (1) KHC 302]**, referring paragraph No.18 of the above judgment. Paragraph No.18 is as under:

“18. It is well settled that normally the Appellate Court should not travel outside the records produced before the Trial Court and cannot take any evidence in appeal. O.41 R.27 of CPC enables the Court to take additional evidence only in the circumstances specifically enumerated therein. The first point to be established by a person seeking introduction of additional evidence is that even after due diligence such evidence was not within his knowledge or could not after exercise of due diligence be produced by him at the time when the decree appealed against was passed. Therefore, the Appellate Court is entitled to call for fresh evidence only on satisfaction of the conditions laid down in the rules. Here, it is to be noted that in the appeal



memorandum, there is no mention that the documents produced along with the petition were not within their knowledge or could not produce before the Trial Court even after exercise of due diligence. It is also well established that the power under O.41 R.27 of CPC should be used sparingly and only if the party is able to establish that even after their best efforts, such additional evidence could not be adduced at the first instance and the documents are relevant for deciding the issue. Here it is to be noted that there is no whisper regarding the same in the appeal memorandum, but they have simply produced the documents, without any satisfactory explanation for not having produced it before the Trial Court. So, it is not just and proper to accept Exts.A1 to A6 produced along with the appeal memorandum in evidence as prayed for by the appellants. Moreover, most of the documents have been obtained only much later after disposal of the OAs. by the learned Forest Tribunal. So, the prayer for acceptance of additional documents under O.41 R.27 is rejected. In short, we find absolutely no justification to interfere with the findings of the learned Forest Tribunal.”

The learned counsel for the appellant also pointed out Section 53 of the Act, 2016, which deals with the powers of the Tribunal. After reading the powers of the Tribunal, the learned



counsel for the appellant argued that, appointment of a Commission, by the Tribunal, is as against the mandate of Section 53 of the Act, 2016 and therefore, the order passed is non-est and the same is liable to be set aside.

9. While addressing the contention raised by the learned counsel for the appellant, I am inclined to refer Section 53 as well as Section 35 of the Act, 2016, which deal with the powers of the Appellate Tribunal and the Authority, under the Act.

10. Section 53 of the Act, 2016 provides as under:

53. Powers of Tribunal.— (1) *The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice.*

(2) *Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure.*

(3) *The Appellate Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872 (1 of 1872).*

(4) *The Appellate Tribunal shall have, for the purpose of discharging its functions under this Act, the same powers as are vested in a Civil Court under*



the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examinations of witnesses or documents;

(e) reviewing its decisions;

(f) dismissing an application for default or directing it ex parte; and

(g) any other matter which may be prescribed.

(5) All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 for the purposes of Section 196 of the Indian Penal Code (45 of 1860), and the Appellate Tribunal shall be deemed to be Civil Court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

11. Section 35 of the Act, 2016 provides as under:

35. Powers of Authority to call for information, conduct investigations.— (1) *Where the Authority considers it expedient to do so, on a complaint or suo motu, relating to this Act or*



the rules of regulations made thereunder, it may, by order in writing and recording reasons therefor call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require and appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be.

(2) Notwithstanding anything contained in any other law for the time being in force, while exercising the powers under sub-section (1), the Authority shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:-

(i) the discovery and production of books of account and other documents, at such place and at such time as may be specified by the Authority;

(ii) summoning and enforcing the attendance of persons and examining them on oath;

(iii) issuing commissions for the examination of witnesses or documents;

(iv) any other matter which may be [prescribed].”

12. As per Section 53 of the Act, 2016, it has been provided that, *the Appellate Tribunal shall not be bound by the*



procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and as per Section 53(2), it has been provided that, subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure. As per Section 53(4), the Appellate Tribunal shall have, for the purpose of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the matters, namely:-(a) summoning and enforcing the attendance of any person and examining him on oath;(b) requiring the discovery and production of documents;(c) receiving evidence on affidavits;(d) issuing commissions for the examinations of witnesses or documents; (e) reviewing its decisions; (f) dismissing an application for default or directing it ex parte; and (g) any other matter which may be prescribed.

13. Summarising the powers of the Appellate Tribunal within the orbit of Section 53 of the Act, 2016, the Appellate Tribunal shall not be bound by the procedure laid down by the C.P.C. and shall be guided by the principles of natural justice. However, it has been dealt in sub-section 4 that, Appellate



Tribunal shall have, for the purpose of discharging its functions under the Act, the same powers as are vested in a Civil Court under the C.P.C. in respect of the matters specifically mentioned therein. That apart, the Appellate Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872. It is in this context, sub-section (2) of Section 53 assumes significance. Sub-section (2) provides specifically that, subject to the provisions of this Act, the Appellate Tribunal shall have the power to regulate its own procedure. Therefore, the Appellate Tribunal has the power to regulate its own procedure and the said power is given to deal with a matter, where the Appellate Tribunal requires anything to be done within the mandate of law for addressing the real dispute in between the litigants. It is apropose to note that Section 35 of the Act, 2016, in fact, gives wide power to the Authority to enquire and appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be. In the said circumstances, it is difficult to lay down law, holding that the powers of the Appellate Tribunal is much less than that of the



Authority when the statute specifically provides power to the Appellate Tribunal to regulate its own procedure. To be more vivid, it could not be held that the power to appoint a Commission to have enquiry available to the Authority, is not available to the Appellate Tribunal.

14. Thus, a conjoint reading of the above provisions make the point clear that the Appellate Tribunal, which has special power to regulate its own procedure, can appoint a Commission also, if the Tribunal is of the opinion that, appointment of such a Commission, for getting certain material aspects, which are necessary for the purpose of deciding the matter in controversy in between the promoter and allottee, and the said power not drawn from Order XLI Rule 27 of the C.P.C. Therefore, the challenge raised by the appellant herein, found to be meritless.

15. In this case, in fact, 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."

16. 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.

17. In the decision in **Nazir Mohamed v. J. Kamala and Others** reported in **[2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168]**, 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 referring **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, [(1999) 3 SCC 722]**.*

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



Purushottam Tiwari, [2001 (3) SCC 179] (three - Judge Bench), 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.

19. 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.

20. In view of the above fact, 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.

All interlocutory applications pending in this second appeal, stand dismissed.

Registry shall inform this matter to the trial court as well as the appellate court, forthwith.

Sd/-
A. BADHARUDEEN
JUDGE