THERAKHATOON (D) BY LRS. A

v.

SLAMBIN MOHAMMAD

FEBRUARY 26, 1999

[S.B. MAJMUDAR AND M. JAGANNADHA RAO, JJ.] B

Constitution of India, 1950 :

Article 136—Scope and ambit of—Special Leave—Grant of—Discretion of Supreme Court—Continuance of—Held : Supreme Court's discretion at the stage of grant of Special Leave continues when the appeal is heard thereafter—This principle is applicable to all kinds of appeals—Even after SLP is admitted, the appellant must show exceptional and special circumstances to warrant interference—Therefore, Supreme Court may declare the law or point out the error of the lower court but still it may not interfere if special on fact circumstances are not shown and the justice of the case does not require interference or if the relief could be moulded in a different fashion—In the circumstances of the case, the High Court erred in not framing a substantial question of law and in interfering on a pure question of fact—Such a course not permissible in law—However, in the peculiar circumstances not a fit case for interference under Art. 136—The plaintiff could be adequately compensated by way of damages. C D E

Code of Civil Procedure, 1908 : Section 100.

Second appeal—Appellate court—Scope and powers of—Held : Appellate court must frame a substantial question of law when hearing second appeal—Further appellate court cannot interfere with a pure finding of fact when dealing with second appeals—However, appellate court is within its jurisdiction to point out factual errors in a judgment appealed against. F

Evidence Act, 1872 : Sections 3 and 91. G

Document—Genuineness of—Factors affecting—Long gap of five and a half years between date of agreement for sale and execution of sale deed—Also it was written on a small piece of paper with a revenue stamp affixed thereon and not on regular non-judicial stamp paper—Held : These circumstances are all relevant in considering the genuineness of the agreement. H

A The appellant plaintiff had purchased a piece of land under a registered sale deed dated 14.1.1966. The respondent- defendant purchased from the same vendor an adjacent piece of land on 13.12.1967. According to the appellant-plaintiff, on 30.12.1967 the respondent-defendant illegally occupied a portion of the land belonging to the appellant and also constructed two rooms upon it. However, the appellant did not raise any B objections till seven years after the trespass and illegal construction and issued notice only on 14.6.1974. But the respondent refused to vacate or remove the construction. Thereupon, the appellant filed a suit on 14.7.1975 for possession of the disputed portion, for mandatory injunction, for removal of the two rooms and for damages. The respondent contended C before the trial court that he had entered into an agreement for sale on 10.12.1962 in respect of the said adjacent piece of land including the disputed portion and that he had constructed the two rooms long before the appellant purchased her land.

D The Trial Court dismissed the suit. However, the appellate court decreed the suit on the ground that the agreement of purchase set up by the respondent was not genuine inasmuch as there was a long gap of five and a half years between the agreement of sale and execution of sale deed; that it was written on a small piece of paper with a revenue stamp affixed thereon and not upon regular non-judicial stamp paper. However, the E High Court, in second appeal set aside the decree without even framing a substantial question of law. Hence this appeal.

On behalf of the appellant-plaintiff it was contended that the High Court was not right in setting aside the decree without framing any F substantial question of law; and that the High Court could not have interfered with a pure question of fact relating to the genuineness of the agreement of sale in second appeal.

On behalf of the respondent-defendant it was contended that this Court in exercise of its discretion under Article 136, which discretion was G available even after grant of special leave, should not interfere and grant possession coupled with a direction for removal of the rooms; and that this Court under Article 136 could mould the relief and grant compensation.

H Dismissing the appeal, this Court

HELD : 1.1. Though special leave is granted, the discretionary power which vested in the Court at the stage of the special leave petition continues to remain with the Court even at the stage when the appeal comes up for hearing and when both sides are heard on merits in the appeal. This principle is applicable to all kinds of appeals admitted by special leave under Article 136, irrespective of the nature of subject matter. [910-D] A B

Pritam Singh v. *State,* [1950] SCR 453, followed.

Ibrahim v. *Rex,* AIR (1914) PC 615, approved.

Riel's Case 1885-10 AC 675 and *Ex parte Deeming,* (1892) AC 422, cited. C

1.2. Therefore, even after the appeal is admitted and special leave is granted, the appellant must show that exceptional and special circumstances exist, and that, if there is no interference, substantial and grave injustice will result and that the case has features of sufficient gravity to warrant a review of the decision appealed against, on merits. Only then would this Court exercise its over-riding powers under Article 136. [911-G-H] D

Hem Raj v. *State of Ajmer,* [1954] SCR 1133, followed.

1.3. Hence, even if this Court is dealing with the appeal after grant of special leave, it is not bound to go into merits and even if it does so it may not interfere if the justice of the case on facts does not require interference or if it feels that the relief could be moulded in a different fashion. [912-G] E

Bengal Chemical & Pharmaceutical Works Ltd. v. *Their Workman,* [1959] Suppl. 2 SCR 136 and *Municipal Board, Pratapgarh* v. *Mahendra Singh Chawla,* [1982] 3 SCC 331, relied on. F

1.4. Therefore, this court *declares the law* by holding that the High Court while dealing with a second Appeal under Section 100 of the Code of Civil Procedure, 1908 erred in not framing a substantial question of law and that it also erred in interfering with a pure question of fact relating to the genuineness of the agreement. It is declared that this was not permissible in law. However, in the peculiar circumstances this is not a fit case for interference under Article 136. The appellant-plaintiff could be adequately compensated by way of damages. [913-A-C] G H

A **2. The High Court erred in not framing a substantial question of law as required by Section 100 CPC. Again the High Court should not have interfered with a pure finding of fact regarding the genuineness of the agreement of sale when dealing with second appeals under Section 100 CPC. However, the High Court is right in pointing out factual errors in a judgment under appeal. [908-F-H]**

B

Kshitish Chandra Purkait **v.** *Santosh Kumar Purkait,* **[1997] 5 SCC 438 and** *Sheel Chand* **v.** *Prakash Chand,* **[1998] 6 SCC 683, relied on.**

3. There was a long gap of 5 and a half years between the date of the C **alleged agreement of sale and the defendant's sale deed and that the agreement is written up on a small piece of paper with a revenue stamp affixed thereon and not upon regular non-judicial stamp paper. These circumstances are all relevant in considering the genuineness of the agreement. [909-B]**

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4341 of 1988.

From the Judgment and Order dated 19.9.87 of the Bombay High Court in Second Appeal No. 543 of 1979.

E Subrat Birla, Ms. Vipin Gupta and S.C. Birla for the Appellants.

A.P. Mayee and A.M. Khanwilkar for the Respondent.

The Judgment of the Court was delivered by

F **M. JAGANNADHA RAO, J.** This appeal has been preferred by the plaintiff in the suit against the judgment and decree of the Bombay High Court in S.A.No.543 of 1979 dated 19.9.1987. By that judgment the Second Appeal was allowed, the judgment dated 16.3.1979 of the lower appellate court decreeing the plaintiff-appellant's suit was set aside and the judgment of the Trial Court in Civil Suit No. 151 of 1975 passed by the Third Joint G Civil Judge, Junior Division, Aurangabad dated 23.2.1977 was restored. The dispute between the parties, who are neighbours, covers an extent of 25' x 11' upon which the defendant constructed two rooms. The appellant's case is that the above extent is part of the appellant's property and that the defendant-respondent has encroached upon it and has made the construc- H tion of the two rooms. The suit is for possession of the area of 25' x 11' and

for directing removal of the two rooms. Pending these proceedings, the plaintiff-appellant died and her legal representatives were brought on record.

The brief facts of the case are as follows:

The plaintiff-appellant purchased open space 75' x 25' from the common-owner, one Mohd. Ali on 14.1.1966 for Rs.700 under a registered sale deed in Mohalla Shahabazar in Aurangabad town. According to the Plaintiff, she constructed two rooms on western side of the purchased portion leaving some open space on the eastern side and long thereafter, the defendant purchased land from the same vendor, Mohd. Ali on the eastern side on 13.12.1967 and allegedly occupied the disputed area of 25' x 11' in question on 30.12.1967. Subsequently, defendant is said to have illegally constructed those two rooms on this area without the permission of the Municipality. Plaintiff alleges she complained to the Town Surveyor who came to survey the properties but he did not consider her claim but advised her to go to a Civil Court. The plaintiff issued notice on 14.6.1974 and the defendant sent reply refusing to vacate or remove the construction. The suit was, therefore, laid on 14.2.1975 for possession of the land, for mandatory injunction for removal of the two rooms and for damages for 3 years, at Rs.600 in all.

The defendant-respondent contended that prior to his purchase under sale deed dated 13.12.1967, he had entered into an agreement of purchase on 10.2.1962 for an extent of land of 53' x 23 yards 2' which included the disputed portion and that he had constructed the two shops long before 14.1.1966, when the plaintiff purchased the vacant piece of land by the side of the land which he had purchased under the agreement. According to him, there was no question of any encroachment on 30.12.1967.

On these pleadings, the Trial Court framed various issues and held that the evidence of the witnesses produced by the plaintiff was not acceptable and that plaintiff had failed to prove her ownership over the disputed site. Consequently, the plaintiff must be deemed to have failed in proving encroachment by defendant from 30.12.1967. The defendant had examined DW2, the attestor of the agreement of purchase dated 10.2.1962 who was also the mason who was engaged for construction of the rooms.

A DW3 was one of the attestors of the defendant's sale deed. The Trial Court held that in view of the agreement of sale and possession under the agreement of sale of 10.2.1962, the defendant was entitled to the protection of section 53-A of the Transfer of Property Act. The suit was, therefore, dismissed.

B

The plaintiff appealed before the Joint Judge at Aurangabad who reversed the judgment and decree of the Trial Court holding, *inter-alia*, that the suit site formed part of the land conveyed to the plaintiff under the sale deed dated 14.1.1966 and that if that be so, the same vendor had no right to convey the disputed area by including the same in the sale deed C dated 13.12.1967 along with other land sold in favour of the defendant. The agreement of purchase dated 10.2.1962 set up by the defendant was written up in Urdu on a small piece of white paper (with a revenue stamp annexed) and was not a genuine document but was obviously an ante-dated one. If the agreement was not true, the defendant could not have come into D possession of this overlapping part in 1962 nor could he have constructed the two rooms before the sale deed dated 13.12.1967 was executed in his favour. There were also various other circumstances which proved that the agreement of sale could not be true, namely that while the consideration for the agreement was Rs.300, only Rs.50 was paid in 1962 and the balance of Rs.250 remained payable at the time of registration of the regular sale E deed. There was undue delay between the date of the agreement of 1962 and the date of sale- deed in 1967 and this circumstance improbablised the agreement. The defendant never gave any notice to his vendor for 5 1/2 years seeking execution of sale deed. The recitals in the latter sale- deed dated 13.12.1967 showed that defendant was aware of plaintiff's sale-deed F dated 14.1.1966. The plea that defendant constructed two rooms long before plaintiff's sale deed of 14.1.1966 was not acceptable inasmuch as the plaintiff would have objected if the vendor was selling land over which the defendant had already built two rooms. Further, the signature of Mohd. Ali, the vendor was not on the revenue stamp. What was quite un- under- standable was that the boundary description of the plot in the so called G agreement of 1962 showed the name of the plaintiff as the owner of the property on the west, even though by 10.2.1962 plaintiff had not purchased the land on the West. The Appellate Court observed that though the name of the plaintiff was found mentioned in the agreement of 1962, it appeared to have been struck off later. All these circumstances showed that the H agreement was not true. Even if the agreement was true, it would not create

any title in favour of the defendant unless a suit for specific performance was filed and a sale deed was obtained. Inasmuch as the plaintiff had proved title and the defendant had encroached, the suit for possession was required to be decreed and the two rooms were liable to be removed. Mesne profits were accordingly allowed at one rupee per month, in all, Rs.36 for 3 years. In the result, the suit was decreed as stated above.

In Second Appeal by the defendant, the learned single judge of the High Court reversed the appellate decree, in a brief judgment stating that the "reasons given for not believing the agreement by the learned (Appellate) Judge, are not cogent and convincing". The learned Judge observed that it was common knowledge that at the time of an agreement, the entire consideration would not be paid. The fact that the vendor's signature was not found on the revenue stamp was not relevant. The first appellate court was wrong in thinking that plaintiff's name was found in the 1962 agreement and was scored off. This was factually incorrect. On these grounds, the learned single judge held that the lower appellate court erred in not accepting the genuineness of the agreement of 1962 set up by the defendant. The agreement was true. Therefore, the defendant must succeed. The Second Appeal was accordingly allowed and the suit was dismissed.

In this appeal by special leave, learned counsel for the appellant-plaintiff contended before us that the High Court did not frame any substantial question of law and that it could not have gone into the correctness of a finding of fact and that the finding regarding the genuineness of the agreement of 1962 was binding in Second Appeal.

On the otherhand, learned counsel for the respondent-defendant contended that even assuming that the agreement was not true, the plaintiff having purchased the property on 14.1.1966 came forward with a plea in the plaint that she knew that the defendant trespassed into the site on 30.12.1967 but she did not issue any notice for removal of the two rooms till 14.6.1974. She was the next door neighbour. Notice dated 14.6.74 was also belated and even then, she did not allege any forcible trespass by the defendant, as now stated in the plaint. The suit was filed only on 14.2.1975. The plaintiff should not have kept quiet when the construction was going on if, as alleged in the plaint, she was conscious of the trespass by the defendant. It was contended that inasmuch as the plaintiff stood by when

A the construction was being made *bonafide* by the defendant, this Court, in exercise of its discretion under Article 136, which discretion is available even after grant of leave - should not interfere and the plaintiff should not be granted possession coupled with a right to have the rooms removed. This Court has also power under Article 136 to mould the relief and grant B compensation. In any event, this Court could invoke Article 142 of the Constitution of India, in the interests of justice.

The points that arise for consideration in the appeal are:

(1) Whether the High Court could have interfered with the finding C of fact relating to the genuineness of the agreement of sale deed dated 10.2.1962 and that too without framing a substantial question of law?

(2) Whether the discretionary power available to this Court at the time of grant of special leave continues with the Court even after grant of special leave and when the appeal is being heard on merits and whether, D this Court could declare the law and yet not interfere or could mould the relief? Or whether, once the law is declared, this Court is bound to grant possession and the mandatory injunction?

(3) Whether it is necessary to invoke the powers of this Court under E Article 142?

(4) To what relief?

Point 1:

F At the outset, it must be stated that the High Court erred in not framing a substantial question of law as required by section 100 CPC. In view of the Judgments of this Court in *Kshitish Chandra Purkait* v. *Santosh Kumar Purkait & Others,* [1997] 5 SCC 438 and *Sheel Chand* v. *Prakash Chand,* [1998] 6 SCC 683 the High Court should have framed a substantial G question of law and then only disposed of the Second Appeal. Again it could not have interfered with pure finding of fact. We have earlier set out the basis of the finding of the appellate court in this behalf. The finding is based upon a rejection of the oral evidence adduced in the case. It is true that one of the reasons given by the first appellate Court namely that the agreement of 1962 contained a reference to the plaintiff's name (who came H into the picture only in 1966) is not factually correct and the High Court

was right in pointing out this error. But the finding of the first appellate Court is not based only on the said fact. The finding was based on the rejection of the evidence of the attestor of the agreement and the evidence of the defendant in relation to the said agreement. Other facts relied upon are the long gap of 5 1/2 years between the date of the alleged agreement of sale and the defendant's sale deed and that the agreement is written up on a small piece of paper with a revenue stamp affixed thereon and not upon regular non- judicial stamp papers. These circumstances are all relevant in considering the genuineness of the agreement. As long as there is some material for the rejection of the document, the second appellate Court ought not to have interfered with the abovesaid finding of fact. For the above reasons, we are constrained to set aside the said finding of the High Court. Point 1 is decided accordingly.

Points 2 and 3:

These points relate to the plea of the defendant that on the facts of this case this Court should not, in exercise of its discretion, interfere under Article 136 even if this is a stage long after the grant of special leave. Point also is whether it is necessary to invoke Article 142.

It will be noticed that the plaintiff purchased the land by sale deed dated 14.1.1966 while the defendant's sale deed is dated 13.12.1967. The plaint says that the defendant forcibly trespassed into this piece of land on 30.12.1967 with the help of anti social elements and that the plaintiff protested. That means that plaintiff was conscious of the trespass even on 30.12.1967. Though the plaintiff was the next door neighbour the fact remains that the plaintiff did not seek to intervene immediately either by issuing a notice or by filing a suit for permanent injunction with an application for temporary injunction. On the otherhand, the plaintiff allowed the defendant to construct the two rooms. In the cross-examination, the plaintiff admitted as follows:

> "I cannot tell the day pertaining to this encroachment, but the encroachment was committed during night hours. We did not tell any body on the very next day about this encroachment. *Thereafter also we did not tell anybody*.....We being government servants, we did not lodge complaint with the police in this respect. It is true that I am not a government servant."

A The evidence of plaintiff who was the immediate neighbour proceeds on the basis that she knew about the trespass in December 1967 itself, though she filed the suit in 1975. The explanation was that inasmuch as the plaintiff's husband was a government servant, they did not make any complaint.

B It is in the background of the above circumstances that we have to consider the plea of the respondent defendant based upon Article 136 of the Constitution of India. We should not, in this connection, be understood as deciding any question of estoppel for there is no plea of estoppel in the written statement nor any argument in the Courts below. Our discussion is C confined only to exercise of discretion under Article 136.

It is now well settled that though special leave is granted, the discretionary power which vested in the Court at the stage of the special leave petition continues to remain with the Court even at the stage when the appeal comes up for hearing and when both sides are heard on merits in D the appeal. This principle is applicable to all kinds of appeals admitted by special leave under Article 136, irrespective of the nature of the subject matter. It was so laid down by a Constitution Bench of five learned Judges of this Court in *Pritam Singh* v. *The State*, [1950] SCR 453. In that case, it was argued for the appellant that once special leave was granted and the E matter was registered as an appeal, the case should be disposed of on merits on all points and that the discretionary power available at the stage of grant of special leave was not available when the appeal was being heard on merits.

This Court rejected the said contention and referred to the following F dicta of the Privy Council in *Ibrahim* v. *Rex*, AIR (1914) P.C. 615:

> "..... the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: *Riel's* Case [1885-10 A.C. 675 : 55 L.J. p.628]; *Ex parte Deeming* [1892] AC 422. The Board cannot give leave to G appeal where the grounds suggested could not sustain the appeal itself; and conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it."

This Court observed that the rule laid down by the Privy Council is based H on sound principle and only those points could be urged at the final hearing

of the appeal which were fit to be urged at the preliminary stage when leave to appeal was asked for and *it would be illogical to adopt different standards at two different stages of the same case*. This Court observed (para 8) that, so far as Article 136 was concerned, it was to be noted firstly that it was very general and *was not confined merely to criminal cases*, and that (see para 9), the wide *discretionary* power with which the Court was concerned/was applicable to all types of cases. The power under Article 136 according to this Court,

> "is to be exercised *sparingly and in exceptional cases only*, and as far as possible, a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this Article. By virtue of this Article, we can grant special leave in *civil cases*, in *criminal cases*, in *income tax cases*, in cases which come up before different kinds of tribunals and in a variety of other cases."

This Court emphasised:

> "The only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant special leave to appeal in those cases where *special circumstances* are shown to exist."

This Court then concluded:

> "Generally speaking, this Court will not grant special leave, unless it is shown that *exceptional and special circumstances* exist, that *substantial and grave injustice* has been done and that the case in question present features of sufficient gravity to warrant a review of the decision appealed against."

The above principles were followed and reiterated by a three Judge Bench in *Hem Raj* v. *State of Ajmer*, [1954] SCR 1133, holding that that even after the appeal is admitted and special leave is granted, the appellant must show that exceptional and special circumstances exist, and that, if there is no interference, substantial and grave injustice will result and that the case has features of sufficient gravity to warrant a review of the decision appealed against, on merits. Only then would this Court exercise its overriding powers under Article 136.

A *M/s Bengal Chemical & Pharmaceutical Works Ltd.* v. *Their Workmen*, [1959] Suppl. 2 SCR 136 was an appeal by special leave against the Judgment of the Industrial Tribunal. It was held that the power under Article 136 was discretionary and though the said Article 136 was couched in widest terms, it was necessary for this Court to exercise the discretionary B jurisdiction only in cases where awards were passed in violation of principles of natural justice, and substantial and grave injustice was caused to parties or the case raised an important principle of industrial law requiring elucidation and final decision by this Court or disclosed such other exceptional or special circumstances. Subba Rao, J. (as he then was) gave two C important reasons for the said principle and they are set out in the following passage:

> "The limits to the exercise of the power under Article 136 cannot be made to depend upon the appellant obtaining special leave of this Court, for two reasons, viz., (i) *at that stage the Court* D *may not be in full possession of all material circumstances to make up its* mind and (ii) the order is only an *ex parte* one made in the absence of the respondent. .... It would be illogical to apply two different standards at two different stages of the same case."

E We may in this connection also refer to *Municipal Board, Pratapgarh & Another* v. *Mahendra Singh Chawla & Others*, [1982] 3 SCC 331, wherein it was observed that in such cases, *after declaring the correct legal position*, this Court might still say that it would not exercise discretion to decide the case on merits and that it would decide on the basis of equitable considera- F tions in the fact situation of the case and "*mould the final order*"

In view of the above decisions, even though we are now dealing with the appeal after grant of special leave, we are not bound to go into merits and even if we do so and declare the law or point out the error - still we may not interfere if the justice of the case on facts does not require G interference or if we feel that the relief could be moulded in a different fashion. We have already, referred to the various circumstances of the case which show that the plaintiff, on her own admission, had knowledge of the trespass in December 1967 and did not raise any objection to the construction of the two rooms though she was the adjacent neighbour. She gave H notice only after 7 years in 1974 and she filed suit in 1975. These two rooms

have been there for the last 30 years. In those circumstances, we declare the law by holding that the High Court while dealing with a Second Appeal under Section 100 CPC erred in not framing a substantial question of law and that it also erred in interfering with a pure question of fact relating to the genuineness of the agreement. We declare that this was not permissible in law. Even while so declaring, we hold that in the peculiar circumstances referred to above, this is not a fit case for interference and that in exercise of our discretion under Article 136, -a discretion which continues with us even after the grant of special leave, - the decree passed by the High Court dismissing the suit for possession need not be interfered with and the two rooms need not be demolished. The plaintiff could be adequately compensated by way of damages. Point 2 is decided accordingly. Point 3 regarding Article 142 need not therefore be decided.

Point 4:

We had adjourned the case to find out if the parties could agree in regard to the value of the land so that some equitable order could be passed directing the respondent to pay for the land of the appellant under his occupation. But, in view of the affidavit of the respondent dated 20.2.1999 circulated through the Court on 22.2.1999, it is clear that there is no agreement in this behalf. According to the respondent, the present value of the land is Rs. 275 per sq. ft. respondent says that he is still carrying on as a rickshaw puller.

In the circumstances, we are of the view that the judgment of the High Court setting aside the judgment of the lower appellate Court and restoring the judgment of the Trial Court should be confirmed with a modification. We modify the decree of the High Court by directing that the respondent- defendant pay for the value of the suit extent of land in his possession and that the value should be as on 19.9.1987, the date on which the impugned judgment in Second Appeal was allowed in favour of the respondent-defendant. The said value has to be worked out by taking evidence. For this limited purpose we remit the matter to the Trial Court, the Court of the 3rd Joint Judge, Junior Division, Aurangabad, State of Maharashtra for deciding the value of the suit land as on 19.9.1987. Parties are at liberty to adduce evidence in the Trial Court in this behalf. The value as may be fixed by the Trial Court shall be paid by the respondent to the

A appellant within such time as may be fixed by the Trial Court. If such amount is not paid by the respondent-defendant, the plaintiff shall be entitled to recover the said amount as if it is a money decree for the said amount. The appeal is dismissed subject to the above modification. There will be no order as to costs.

B V.S.S. Appeal dismissed.