Penu Balakrishna Iyer and Ors

Vs

Sri Ariya M. Ramaswami Iyer and Ors

Civil Appeal No. 79 of 1962

(CJI P. B. Gajendragadkar, K. N. Wanchoo, J. C. Shah, N. Rajgopala Ayyangar S. M. Sikri JJ)

06.03.1964

JUDGMENT

GAJENDRAGADKAR, C.J. –

This appeal by Special leave raises a short question about the correctness, propriety and legality of the decree passed by the Madras High Court in second appeal No. 91 of 1955. The respondents had sued the appellants in the Court of the District Munsif of Thiruvaiyaru for a mandatory injunction directing the removal of certain masonry structure standing on the suit site which was marked as A B C D in the plan attached to the plaint and for a permanent injunction restraining the appellants from building upon or otherwise encroaching upon the suit property and from causing obstruction to the right of way of the residents of the village in which the suit property was situated. According to the respondents, the plot on which encroachment had been caused by the construction of the masonry structure by the appellants was a street and the reliefs they claimed were on the basis that the said property formed part of a public street and the appellants had no right to encroach upon it. This suit had been instituted by the respondents in a representative capacity on behalf of themselves and other residents in the locality.

The appellants disputed the main allegation of the respondents that the masonry structure to which the respondents had objected, stood on any part of the public street. According to them, the plot on which the masonry structure stood along with the adjoining property belonged to them as absolute owners and as such, they were entitled to use it in any manner they pleased. On these pleadings, appropriate issues were framed by the learned trial Judge and on considering the evidence, findings were recorded by him in favour of the respondents. In the result, the respondents' suit was decreed and injunction was issued against the appellants.

The appellants then took the dispute before the Subordinate Judge at Kumbakonam. On the substantive issues which arose between the parties, the learned Subordinate Judge made findings against the respondents and in consequence, the decree passed by the Trial Court was set aside. The learned Subordinate Judge, however, made it clear that it might be open to the respondents to agitate "against any case of customary rights in the nature of an easement in their favour, if they can legally do so, without any bar, and if they are so advised." That question was left by him as undecided as it did not arise before him in the present suit.

This decree was challenged by the respondents by preferring a second appeal before the Madras High Court. Basheer Ahmed Sayeed J. who heard this appeal, passed a decree which is challenged before us by the appellants in the present appeal. All that the learned Judge has done in his judgment is to state that "after a careful consideration of all the issues that arise for decision in this Second

Appeal, I am of the opinion that the best form in which a decree could be given to the plaintiffs is in the following terms," and then the learned Judge has proceeded to set out the terms of his decree in clauses (1), (2) & (3), the 3rd clause being sub-divided into clauses (a), (b) & (c). As to the costs, the learned Judge directed that parties should bear their own costs throughout. The appellants contend that the method adopted by the learned Judge in disposing of the second appeal before him clearly shows that the judgment delivered by him cannot be sustained.

Before dealing with this contention, however, it is necessary to refer to a preliminary objection raised by Mr. Rajagopal Sastri on behalf of the respondents. He contends that it was open to the appellants to apply for leave to file a Letters Patent appeal against the judgment of the learned Single Judge and since the appellants have not adopted that course, it is not open to them to come to this Court by special leave. He has, therefore, argued that either the leave granted by this Court to the appellants should be revoked, or the appeal should be dismissed on the ground that this was not a matter in which this Court will interfere having regard to the fact that a remedy available to the appellant under the Letters Patent of the Madras High Court has not been availed of by them.

In resisting this preliminary objection, Mr. M. S. K. Sastri for the appellants has relied on the decision of this Court in Raruha Singh v. Achal Singh and Others [A.I.R. 1961 S.C. 1097]. In that case, this Court allowed an appeal preferred against a second appellate decision of the Madhya Pradesh High Court on the ground that the said impugned decision had interfered with a finding of fact contrary to the provisions of section 100 of the Civil Procedure Code. It appears that a preliminary objection had been raised in that case by the respondents similar to the one which is raised in the present appeal, and in rejecting that preliminary objection, this Court observed that "since leave has been granted, we do not think we can or should virtually revoke the leave by accepting the preliminary objection". It is because of this observation that this appeal has been referred to a larger Bench. It is true that the statement on which Mr. M. S. K. Sastri relies does seem to support his contention; but we are satisfied that the said statement should not be interpreted as laying down a general proposition that if special leave is granted in a given case, it can never be revoked. On several occasions, this Court has revoked special leave when facts were brought to its notice to justify the adoption of that course, and so we do not think Mr. M. S. K. Sastri is justified in contending that leave granted to the appellants under Art. 136, as in the present case, can never be revoked. The true position is that in a given case, if the respondent brings to the notice of this Court facts which would justify the Court in revoking the leave already granted, this Court would, in the interests of justice, not hesitate to adopt that course. Therefore, the question which falls to be considered is whether the present appeal should be dismissed solely on the ground that the appellants did not apply for leave under the relevant clause of the Letters Patent of the Madras High Court.

There is no doubt that if a party wants to avail himself of the remedy provided by Art. 136 in cases where the decree of the High Court under appeal has been passed under s. 100 C.P.C., it is necessary that the party must apply for leave under the Letters Patent, if the relevant clause of the Letters Patent provides for an appeal to a Division Bench against the decision of a single Judge. Normally, an application for special leave against a second appellate decision would not be granted unless the remedy of a Letters Patent Appeal has been availed of. In fact, no appeal against second appellate decisions appears to be contemplated by the Constitution as is evident from the fact that Art. 133(3) expressly provides that normally an appeal will not lie to this Court from the judgment, decree, or final order of one Judge of the High Court. It is only where an application for special leave against a second appellate judgment raises issues of law of general importance that the Court would grant the application and proceed to deal with the merits of the contentions raised by the appellant. But even

in such cases, it is necessary that the remedy by way of a Letters Patent Appeal must be resorted to before a party comes to this Court. Even so, we do not think it would be possible to lay down an unqualified rule that leave should not be granted if the party has not moved for leave under the Letters Patent and it cannot be so granted, nor is it possible to lay down an inflexible rule that if in such a case leave has been granted it must always and necessarily be revoked. Having regard to the wide scope of the powers conferred on this Court under Art. 136, it is not possible and, indeed, it would not be expedient, to lay down any general rule which would govern all cases. The question as to whether the jurisdiction of this Court under Art. 136 should be exercised or not, any if yes, on what terms and conditions, is a matter which this Court has to decide on the facts of each case.

In dealing with the respondents' contention that the special leave granted to the appellant against a second appellate decision should be revoked on the ground that the appellant had not applied for leave under the relevant clause of the Letters Patent it is necessary to bear in mind one relevant fact. If at the stage when special leave is granted, the respondent caveator appears and resists the grant of special leave on the ground that the appellant has not moved for Letters Patent Appeal, and it appears that the said ground is argued and rejected on the merits and consequently special leave is granted, then it would not be open to the respondent to raise the same point over again at the time of the final hearing of the appeal. If, however, the caveator does not appear, or having appeared, does not raise this point, or even if he raises the point the Court does not decide it before granting special leave, the same point can be raised at the time of final hearing. In such a case, there would be no technical bar of res judicata, and the decision on the point will depend upon a proper consideration of all the relevant facts.

Reverting then to the main point raised by the appellants in this appeal, we do not think we would be justified in refusing to deal with the merits of the appeal solely on the ground that the appellants did not move the learned single Judge for leave to prefer an appeal before a Division Bench of the Madras High Court. The infirmity in the judgment under appeal is so glaring that the ends of justice require that we should set aside the decree and send the matter back to the Madras High Court for disposal in accordance with law. The limitations placed by s. 100, C.P.C., on the jurisdiction and powers of the High Courts in dealing with second appeals are well-known and the procedure which has to be followed by the High Courts in dealing with such appeals is also well-established. In the present case, the learned Judge has passed an order which reads more like an award made by an arbitrator who, by terms of his reference, is not under an obligation to give reasons for his conclusions embodies in the award. When such a course is adopted by the High Court in dealing with second appeals, it must obviously be corrected and the High Court must be asked to deal with the matter in a normal way in accordance with law. That is why we think we cannot uphold the preliminary objection raised by Mr. Rajagopal Sastri, even though we disapprove of the conduct of the appellants in coming to this Court without attempting to obtain the leave of the learned single Judge of file a Letters Patent Appeal before a Division Bench of the Madras High Court. Therefore, without expressing any opinion on the merits of the decree passed in second appeal, we set it aside on the ground that the judgment delivered by the learned judge does not satisfy the basic and legitimate requirements of a judgment under the Code of Civil Procedure.

The result is, the appeal is allowed, the decree passed by the High Court is set aside and second appeal No. 91 of 1955 is sent back to the Madras High Court with a direction that it should be dealt with in accordance with law. The costs of this appeal would be costs in the second appeal.

Appeal allowed.

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