Firm Sagarmal Vishnu Bhagwan

Vs

Gauri Shankar and Others

Civil Appeal No. 1327 (N) of 1977

(CJI R. S. Pathak, S. Natarajan JJ)

05.10.1988

JUDGMENT

NATARAJAN, J.-

1. The limited question of law falling for consideration in this appeal by special leave is whether the High Court had travelled beyond its jurisdiction when in spite of accepting the appellant's contention in second appeal, if had filed to allow the appeal and instead dismissed it on a ground which was not in issue in the second appeal.

2. We may first have a look at the facts. The tenant/appellant was granted lease of a nohara (an open space enclosed by a wall) belonging to the respondent in Hanumangarh town in the year 1965. On September 19, 1967, the respondent instituted a suit against the appellant praying for recovery of rent as well as the eviction of the appellant on various grounds, such as, default in payment, bon fide requirement of the nohara by the landlord for starting a factory etc. The appellant raised appropriate defence and contested the suit. On the basis of the pleadings of the parties, the trial court viz, the Munsif Magistrate 1st Class Hanumangarh seven issues and two additional issues. Issue 3, 6 and additional issue 1 which alone are of relevance in this appeal were framed as under :

> Issue 3 : Whether the defendant has raised walls of the said nohara, due to which material alterations have been made by defendants.
>
> Issue 6 : Whether plaintiff is entitled to receive Rs. 771.74 against defendant?
>
> Additional issue 1 : Whether defendant has not paid rent up to Samvat 2022 so what is its effect upon main of the suit?

3. After a detailed consideration of the evidence adduced by the parties, the trial court answered issues 2 to 5 in favour of the appellant. On issues 1 and 7 which related to the tenancy being monthly or yearly and whether there had been a valid termination of the tenancy the trial court held against the appellant. However, on issue 6 and additional issue 1 which pertained to the arrears of rent, the trial court held that there were no arrears and hence no decree for eviction can be passed on the ground of arrears of rent.

4. Since the findings on issues 3 and 6 have relevance, we will advert to them in detail. On issue 3, the trial court held that the appellant had no doubt raised the height of the walls by about 5 to 6 feet but the evidence disclosed that the construction should have been made with the consent of the respondent and furthermore the raising of the height of the walls had not caused any material

alteration to the premises within the meaning of the Act.

5. During the pendency of the suit, the respondent filed an application under Section 13(6) of the Act for having the defence of the appellant struck off. The application was considered along with issue 6 and dismissed in the following manner :

> Plaintiff has also filed an application under Section 13 sub-clause (6) of the said Act for getting defence of the defendant struck off but same has been withdrawn by him in view of the report of office dated August 7, 1971 and payments made by defendant. In such circumstances, we have to say that rents do not stand in arrears with the defendants and it has been paid off to the plaintiff. Therefore, this issue has become redundant and not necessary to be discussed. There are no defaults in payment of rent as plaintiff has paid an advance monthly rent to plaintiff. It has been argued on behalf of plaintiff that rent for the month of July has not been made by defendant up to July 15, 1971 so, defence should get struck out, but this fact has already been considered and decided. It is an advance rent which is being paid by defendant and could have been paid by defendant up to August 15, 1971. In such circumstances, it cannot be inferred that rent has not been paid to plaintiff in time or default has been committed.

6. The appellate court, after re-apprising the evidence affirmed the findings of the trial court on issues 2 to 5 in the following manner :

> As regards issues 2 to 5 I have carefully examined the pleadings of the parties and the evidence on the record and find no hesitation in endorsing the finding of the court below.

Insofar as the finding on issue 3 is concerned, the appellate court held as follows :

> As regards issue 3 the defendant admitted that he has raised the height of walls of the nohara but has pleaded that this has been done with the consent of the plaintiff. On this point the defendant Bhagat Ram has stated in his oral examination that the walls were raised with the consent of the plaintiff. In corroboration of the defendant's testimony, there is no other evidence oral or documentary to support his version that the walls were raised with the consent of the plaintiff. But then the learned trial court has inferred the consent of the plaintiff by referring to the fact that the fresh contract of lease was entered into between the parties after raising of the walls. This could not have been done until the plaintiff had consented expressly or impliedly to the raising of the height of the walls. I have considered this aspect of the case and agree with the learned trial court that the consent of the plaintiff to the raising of the height of the walls can safely be inferred from this circumstances. It is admitted by the plaintiff and is clearly proved on record that the contract of lease leading to the reduction of rent to Rs. 421 p.a. was entered into between the parties after raising of the height of the walls, he would not have entered a fresh contract of lease. Thus the finding of the learned Munsif on issue 3 does not appear to be erroneous.

7. The appellate court in spite of concurring with the finding of the trial court on issues 2 and 5 allowed the appeal on the ground the trial court should have struck off the defence of the appellant because the appellant had failed to apply to the court for deposition the suit viz. October 4, 1967 but

had applied only on November 11, 1967. The appellate court held that even though the respondent had failed to file an independent appeal, which was permitted under the Act against the order of the trial court refusing to strike out the defence of the appellant, the respondent was not precluded from challenging the order of the trial court in the appeal filed by the appellant against the final decree in the suit because the order refusing to strike out the appellant's defence was only an interlocutory order and, as such the correctness of the said order could be challenged in the appeal preferred against the final decree in the suit. In that view of the matter the appellate court struck off the appellant's defence in the suit and granted the respondent a decree for eviction.

8. Aggrieved by the judgment and decree of the appellate court, the appellant herein preferred a second appeal to the High Court. During the pendency of the second appeal, the Act came to be amended by means of Ordinance 26 of 1975 which was later replaced by the Amendment Act 14 of 1976. Availing the benefit of the amendments effected to the Act, the appellant filed an application under Section 13-A (b) and had the arrears of rent, interest thereon and costs of the suit determined by the court and deposited the entire amount within one month. The High Court, therefore, held that since the appellant had complied with the terms of Section 13-A (b) he was entitled to the benefits of the section and as such "the order of the appellate court striking out the defence and decreeing the suit on the ground of default in payment of rent cannot be sustained". Strangely enough the High Court instead of allowing the appeal in view of the above said finding, launched upon an enquiry about the correctness of the finding of the courts below on issue 3 and re-appraised the evidence and concluded that the additional construction must have been made by the appellant without the consent of the respondent and secondly the construction would constitute a material alteration with the meaning of Section 13 (c) of the Act. Thus, by traversing into a matter which was not in issue in the second appeal, the High Court held that "the appeal fails though on a different ground" and dismissed the second appeal preferred by the appellant. It is against that judgment this appeal by special leave has been filed.

9. Mr. Tapas Ray, learned counsel for the appellant contended that the High Court had exceeded its powers as a second appellate court by reopening a concluded issue and re-appraising he evidence and rendering a new finding and dismissing the second appeal on the said finding. The learned counsel stated that he only question of law involved in the second appeal was whether the appellate court was right in taking the view that the order of the trial court refusing to strike off the defence was not a final order, even though it was an appealable order, but only an interlocutory order and as such the correctness of the order could be challenged by the respondent in the appeal preferred by the tenant. This question did not survive for consideration by the High Court because of the amendments effected to the Act during the pendency of the second appeal. The High Court noticed this position and, therefore, rightly held as follows :

> During the pendency of the appeal, the Act was amended by Ordinance 26 of 1975. Later on, the legislature adopted the Ordinance in the form of Amendment Act 14 of 1976. The tenant on the basis of the amendment Act 14 of 1976. The tenant on the basis of the Amendment Act moved an application for determination of rent, interest thereon and costs of the suit under Section 13-A (b). This Court vide its order dated July 9, 1976 determined the amount and directed the tenant to pay the said amount within one month. The tenant deposited the amount within the prescribed time. Section 13-A (b) of the Amended Act provides that on payment of the determined amount within the time fixed by the court the proceeding shall be disposed of as if the tenant had not committed any fault. That being the law as amended during the pendency of the suit the order of the appellate court striking out the defence and

decreeing the suit the ground of default of payment of rent cannot be sustained. So far there is no dispute between the parties.

Having held that the striking out of the defence and the decreeing of the suit by the appellate court on the ground of default of payment of rent cannot be sustained, so the argument of the appellant's counsel ran, the only course left open for the High Court was to allow the second appeal and dismiss the respondent's suit for eviction because no other question arose or survived for consideration in the second appeal. Since the High Court had failed to do so but had launched upon probe about the correctness of the finding of the courts below on issue 3 which had been rendered on appreciation of evidence and were concurrent in nature, the appellant's counsel argued that the High Court had clearly exceeded its jurisdiction in the second appeal and had erred seriously in setting aside a concurrent finding of fact when no cross-objection had been filed by the respondent.

10. The appellant's counsel stated that since the High Court was dealing with a second appeal, it was subjected to the constraints placed by Section 100 of the Code of Civil Procedure. For this contention he relied upon Gyan Chand v. K. B. Lal. It was held in that decision that the right of appeal provided under Section 22 (1) and the revisional powers of the High Court exercisable under the proviso to sub-section (2) of Section 22 would have reference only to those orders passed under Sections 6, 7, 11, 19-A and 19-C of the Act, but insofar as appeals or applications for revision under Section 13-A (c) are concerned, they relate to decrees and suits for eviction based on the ground of non-payment of rent and therefore, the appeals and applications for revision arising under Section 13-A (c) would not be covered by Section 22 and in all such cases the usual rights of appeal and revision will be available to the aggrieved party. Relying upon the abovesaid decision it was urged that since the High Court was dealing only with a second appeal, it should not have entertained the respondent's plea that even though the appeal may succeed insofar as the striking off of the defence is concerned, the second appeal should still be dismissed on another ground. Mr. Puri, learned counsel for the respondent disputed the abovesaid contention and argued that the High Court was not really dealing with a second appeal in exercise of its powers under Section 100 Code of Civil Procedure but was only exercising its revisional jurisdiction which had been preserved by the proviso the Section 22 (2) of the Act, and as such, the High Curt was not bound to confine its scrutiny to substantial questions of law alone and could examine the legality and propriety of the findings of the courts below on issue 3.

11. In the facts and circumstances of this case it is not necessary for us to go into the question whether the appeal heard by the High Court was one under Section 100 Code of Civil Procedure or one in exercise of its revisional powers left intact by the proviso to Section 22 (2). In whichever way the matter is viewed the High Court could not have launched upon a probe into the correctness of the findings on issue 3 by the courts below after it had concluded that the striking off of the defence by the appellate court and the decreeing of the suit on that score could not be sustained. If the second appeal was one preferred under Section 100 Code of Civil Procedure the finding of the courts below on issue 3 did not involve any substantial question of law. Even if the finding was wrong it was only a finding of fact or at best a finding on a mixed question of law and facts and nothing more. The High Court had failed to notice that the respondent had not filed any cross-objection in the second appeal to challenge the correctness of the finding on issue 3 by the courts below. Alternatively if the appeal was only a revision preferred to the High Court by virtue of the proviso to Section 22 (2), the High Court had no jurisdiction to interfere with the concurrent findings of the courts below on issue 3 because the finding did not suffer from any error in the exercise of the jurisdiction vested in the courts below.

12. Mr. Puri, however, argued that even without preferring a cross-objection the respondent was entitled to assail the finding on issue 3 to support the decree of the appellate court. We see no merit in this contention because the respondent sought the eviction of the appellant on several distinct causes of action and the acceptance of any one of those causes of action would have entitled him to a decree for eviction. When all those ground had been rejected by the courts below and the appellate court had decree the suit only striking off of the defence of the appellant, the respondent cannot seek sustainment of the appellate court's decree on a disallowed ground which had nothing to do with the non-deposit of rent or the striking out of the defence on that score. In this context we may only refer to Raghunath v. Kedar Nath. In that case the plaintiff's suit for redemption was decreed by the trial court subject to a payment of Rs. 1709/14/- by him. The first appellate court reversed the judgment and no further appeal the High Court remanded the matter and against the judgment of the lower appellate court passed after remand the plaintiff as well as the defendant filed second appeals to the High Court. The High Court while dismissing the defendant's appeals to the High Court. The High Court while dismissing the defendant's appeal and allowing the plaintiff's appeal remanded the case to the lower appellate court with a direction that the defendants be asked to render accounts before they claim any payment from the plaintiff at the time of redemption of the mortgage. Against the judgment of the High Court there were appeals to this Court. While dismissing the appeals this Curt granted limited relief to the defendants/appellant's insofar as the direction of the High Court for the defendant's liability to render accounts was concerned. In doing so this Court pointed out that since the plaintiff had not filed any appeal against the decree of the trial court directing him to pay Rs. 1709/14/- for redeeming the mortgage, the plaintiff was bound to pay the said sum and he cannot seek adjustment of the same from out of any mesne profits payable by the defendants. The same ratio would apply in this case also because the respondent had accepted the finding on issue 3 by the courts below and had not preferred a memorandum of cross-objection to the High Court.

13. Another error which the High Court has committed is in drawing a conclusion of its own accord that even though no details regarding the length and width of the plot of land or the dimensions of the constructed portion of the nohara wee on record, the raising of the height of the walls from 5 feet to 11 feet would per se amount to material alteration within the meaning of Section 13 (c) of the Act. The High Court has thus rendered a finding without there being any evidence on record for it.

14. Thus from whichever angle the matter is viewed, the judgment of the High Court cannot be sustained because it had transgressed its jurisdiction which has led to the second appeal being dismissed, instead of being allowed, on a ground which was not available to the respondent for supporting the judgment and decree of the appellate court. We, therefore, allow the appeal and set aside the judgment of the High Court and restore the judgment and decree of the trial court dismissing the respondent's suit for eviction. There will, however, be no order as to costs.

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