

Umashanker Pandey

Vs

B. K. Uppal and Others

Special Leave Petition No. 5416 of 1990

(, S. R. Pandian, K. Jayachandra Reddy JJ)

06.03.1991

ORDER

RATNAVEL PANDIAN, J. –

1. This SLP is directed against the judgment and order dated November 9, 1989 of the High Court of Delhi in FAO (OS) 171/89 in limine dismissing the appeal preferred as against the order of a learned Single Judge dated July 25, 1989 sitting on the original side of the High Court. The petitioner/plaintiff filed Suit No. 128 of 1983 for damages. The respondents herein were the defendants in the suit of whom the defendants 1 and 2 filed I.A. No. 5253 of 1989 seeking permission of the court to inspect the property in dispute by defendant 1 and his counsel and to take photographs, if necessary, of the said property for the cross-examination of the plaintiff. This plea of the defendants 1 and 2 was stoutly opposed by the petitioner/plaintiff. The learned Single Judge passed an order dated July 25, 1989 allowing IA, the relevant portion of which reads thus :

"The only prayer is for inspection of the property by advocate and for taking of photographs of the property by the advocate and not by any professional photographer, which according to defendants, will facilitate the cross-examination of the plaintiff. I can see no possible prejudice to the plaintiff in case such a permission is granted to the defendants. Mr. Arun Mohan, learned counsel for defendants 1 and 2 states that he will use the photographs, if permissible in law, only for the purpose of cross-examination of the plaintiff and will not lead any defence evidence to prove such photographs. He further submits that he will not examine any witness on the basis of the inspection which may be permitted to the counsel. In view of the above, I can see no objection to the prayer being allowed.

Accordingly, I allow the advocates of the defendants 1 and 2 namely, Mr. Arun Mohan and Mr. B. P. Aggarwal to inspect the property. Learned advocates may take photographs of such portions of the building as they may think proper on the site. The inspection will be carried out on the date and time jointly agreed to by the learned counsel."

2. This order was challenged before a Division Bench of the High Court which passed the impugned order in limine on November 9, 1989 reading "Dismissed". Hence this SLP.

3. The learned counsel appearing on behalf of the petitioner challenged the impugned order on several ground - firstly, a Senior Advocate could not be permitted to visit the spot and take the photographs of the site, in support of which argument he drew our attention to Chapter I of Part VI

of the Bar Council of India Rules under the caption "Restrictions on Senior Advocates". Secondly, the production of the photographs sought to be taken by the advocate would embarrass the court hearing the matter and prejudice the petitioner-plaintiff. Thirdly, as the respondent-defendants have not produced at or before the settlement of issues the documentary evidence which they now seek to produce, they should not be permitted to file those documents and the impugned order passed by the learned Single Judge as confirmed by the Division Bench is in violation of Rule 21(1) of Order XIII. Fourthly, the documents which the respondent seek to produce are not in existence but they have to be created on the permission of the court. Fifthly, relying on the decision of the full Bench of the Andhra Pradesh High Court in Nadella Satyanarayana v. Yamanoori Venkata Subbiah (AIR 1957 AP 172 : 1957 Andh LT 369 : (1957) 1 Andh WR 318), it has been contended that the counsel cannot create and present a document on behalf of his client unless he is authorised in this behalf.

4. Mr. Parekh, the learned counsel appearing on behalf of the defendants vehemently opposes the above plea on the following grounds, namely,

(1) As the order impugned is an interlocutory order, this Court does not, as a matter of rule, interfere with such order, save under very exceptional circumstances.

(2) Secondly, the grounds now newly urged were not raised by the petitioner-plaintiff either before the learned Single Judge or in the Memorandum of Appeal or before the Division Bench.

(3) Thirdly, though these new grounds have been raised in the review application (R.A. No. 47 of 1989) which application was dismissed by an order of the Division Bench on December 15, 1989, that order is not challenged in this special leave petition and as such that order of review rejecting the grounds now urged have reached the finality as not being challenged.

(4) Fourthly, that Rule 2(2) of Order XIII is an exception to the applicability of Rule 2(1) of the said order to documents to be produced for the cross-examination of the witnesses of the other parties.

5. We may straightway state that the first submission of the learned counsel urged on behalf of the petitioner need not be gone into as respondent 1 in his counter-affidavit has stated on oath "that the senior counsel (Shri Arun Mohan) is not interested in inspecting/photographing the property." As this SLP, in our opinion, is liable to be dismissed on some other ground which we will be presently dealing with, we feel that it is not necessary to examine the various respective contentions raised by the learned counsel appearing for the petitioner and the respondent.

6. Admittedly, the fresh grounds now urged before us have not been advanced before the learned Single Judge or averred in the Memorandum of Appeal filed before the High Court or raised before the Division Bench. Hence the petitioner cannot be permitted to advance these new contentions which he has not raised before the High Court except in his review application.

7. As rightly submitted by Mr. Parekh, this present special leave petition is directed only against the order dated November 9, 1989 made in F.A.O. (S) No. 171 of 1989. The order dismissing the review application in which these new grounds have been raised is not challenged before us. It is pertinent to note that in the preamble of the SLP as well as in para 10 and in the prayer portion of the SLP, it is specifically mentioned that only the order dated November 9, 1989 is questioned. Even

in the 'list of dates', it is mentioned that the order impugned is the one passed on November 9, 1989. Thus it is unequivocally and unmistakably clear that the petitioner is questioning only the legality of the order of the Division Bench dated November 9, 1989 but not the order passed in the review application dated December 15, 1989. Therefore, when the review order is not under challenge, the impugned order of the Division Bench dated November 9, 1989 confirming the order of the learned Single Judge cannot be successfully assailed by raising fresh grounds which grounds admittedly have not been urged before the High Court. At this stage, the learned counsel for the petitioner drawing Rule 7 of Order XLVII to our attention contends that as the review application has been rejected, no appeal would lie. We think that it not necessary for us to exhaustively deal with this submission since we are disposing of this case on different ground as mentioned above.

8. For all the reasons stated above, we hold that the petitioner would not be justified in assailing the impugned order on entirely fresh grounds which he has not raised before the High Court except in the review petition, the order of which is not challenged.

9. In result this special leave petition is dismissed with costs. The interim stay granted by this Court on October 30, 1990 is vacated.

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