SUPREME COURT OF INDIA Reportable

Arsad Sk.

Vs.

Bani Prosanna Kundu

C.A.No.4805 of 2014

(Chandramauli Kr. Prasad and Pinaki Chandra Ghose JJ.)

23.04.2014

JUDGMENT

PINAKI CHANDRA GHOSE, J.

1. Leave granted.

2. This appeal is directed against the judgment and decree dated March 13, 2008 passed by the High Court of Calcutta in Second Appeal No.490 of 1993 by which the High Court while allowing the second appeal filed by the respondents herein, set aside the concurrent judgments of the Trial Court and the First Appellate Court.

3. The facts revealed in this case are that respondent Nos.1 to 6 herein filed a suit in the Court of First Munsif, District Malda, praying, inter alia, for a permanent injunction against the defendants (who are appellants herein) by declaring the title over 27 decimals of land in R.S. Plot No.95/425 situated in Mouza Mahesh Mati, P.S. Engrej Bazar in District Malda, West Bengal. The Munsif Court, Malda, by its judgment and order dated May 15, 1989 dismissed the said suit with the finding that the plaintiffs did not have any right, title or interest in the schedule property. Aggrieved by the dismissal of their suit, the respondents- plaintiffs preferred first appeal, being O.C. Appeal No. 25 of 1989, before the District Judge, Malda, wherein they specifically pleaded that they owned and possessed the suit land within the boundary through purchase and gifts. Simultaneously, further claimed the title to the

whole area by adverse possession. On July 12,1991, the Assistant District Judge, Malda dismissed the First Appeal and upheld the findings of the Trial Court. Aggrieved thereby the respondents-plaintiffs preferred a second appeal before the Calcutta High Court stating, inter alia, that in a dispute in a conveyance deed between the area and description of boundary, the description of boundary would prevail and also pointed out that the Court below had failed to consider the question of adverse possession.

4. The High Court by its judgment and order dated March 13, 2008 set aside the concurrent judgments of the Trial Court and the First Appellate Court and allowed the second appeal filed by the respondents, holding that where there is a dispute in a conveyance deed between the area and the description of the boundary, the description of the boundary shall prevail. Aggrieved by the said judgment and order passed by the High Court, the appellants have come up before this Court by filing this appeal.

5. Learned counsel appearing on behalf of the appellants submitted that the impugned judgment passed by the High Court in second appeal suffers from patent errors, both in law and in fact. It was submitted that the High Court did not frame the substantial question of law at the time of admission of the second appeal but formulated a question only in the impugned judgment after the arguments had been concluded.

6. Per contra, the case of the respondents is based on the premise that under the proviso to sub-Section (5) of Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as CPC), nothing 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 and the High Court has correctly proceeded to frame the question of law set out in the impugned judgment. It is further submitted that the question of law as set out by the High Court in the impugned judgment is the appropriate and substantial question of law arising in the facts and circumstances of this case and that the appeal should be dismissed as the Second Appellate Court has merely set right the apparent perversity in the judgments of the lower courts. It is submitted that the High Court has correctly decided the matter on the basis of the question of law framed in the impugned judgment by holding, inter alia, that where there is a dispute between the area of the transferred land indicated in the deed and the boundaries mentioned in the deed, boundaries mentioned in the conveyance deed shall prevail.

7. In the present case, it appears from the impugned judgment that no substantial question of law was formulated at the time of admission of appeal and as such the question was understood to be regarding the correctness of judgments of the lower courts. Furthermore, if any such lapse in adhering to the procedure existed at the second appellate stage, the counsel for the parties should have pointed out the same at that stage only but they never did so. Moreover, it is clear that the High Court basically framed the substantial question of law, though at a later stage, and then answered it.

8. The general rule regarding an appeal under Section 100 of CPC is that the jurisdiction of the High Court is limited to the substantial question of law framed at the time of the admission of appeal or at a subsequent later stage, if the High Court is satisfied that such a question of law arises from the facts found by the Courts below. The same has been noted by this Court in Manicka Poosali & Ors. v. Anjalai Ammal & Anr.[1].

9. In light of the well accepted principle that rules of procedure is a handmaiden of justice, the omission of the Court in formulating the substantial question of law (while admitting the appeal) does not preclude the same from being heard as litigants should not be penalized for an omission of the Court.

10. In the present case it is true that the substantial question of law was formulated by the High Court, though not at the admission stage but at a later stage before the hearing, it does not follow that merely because the substantial question of law was formulated by the High Court at a later stage, the judgment of the High Court becomes a nullity, liable to be set aside by this Court on that ground alone and for the same the appellants before us must also show prejudice to them on this account. This Court in the case Kannan & Ors. v. V.S. Pandurangam[2] even went on to hold as under:

> In our opinion, this Court should not take an over-technical view of the matter to declare that every judgment of the High Court in second appeal would be illegal and void, merely because no substantial question of law was formulated by the High Court. Such an over- technical view would only result in remitting the matter to the High Court for a fresh decision, and thereafter the matter may again some up before us in appeal. The judiciary is already over-burdened with

heavy arrears, and we should not take a view which would add to the arrears.

11. In light of the above, we are of the opinion that substantial question of law can be formulated at the initial stage and in some exceptional cases, at a later point of time, even at the time of argument stage such substantial question of law can be formulated provided the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet out the point. Furthermore, the judgment of the High Court should only be set aside on the ground of non-compliance with sub- section (4) of Section 100 of CPC, if some prejudice has been caused to the appellants before us by not formulating such a substantial question of law.

12. In the instant case, we have noticed that substantial question of law was framed by the High Court before the hearing took place and the appellants were put on notice and after giving an opportunity to the appellants to meet the question, second appeal was decided by the High Court. Therefore, in our opinion no prejudice has been caused to the appellants.

13. In view of the discussion in the foregoing paragraphs, we find no merit in this appeal and the same is dismissed accordingly. However, there shall be no order as to costs.

[1] (2005) 10 SCC 38
[2] (2007) 15 SCC 157