Kshitish Chandra Purkait vs Santosh Kumar Purkait & Ors on 7 May, 1997

Equivalent citations: AIR 1997 SUPREME COURT 2517, 1997 (5) SCC 438, 1997 AIR SCW 2459, (1997) 5 JT 202 (SC), 1997 (4) SCALE 125, 1997 (2) UJ (SC) 49, 1997 UJ(SC) 2 49, (1998) 1 MAD LJ 50, (1997) 1 GUJ LH 1022, (1997) 3 MAD LW 220, (1997) 2 RAJ LW 341, (1997) 3 SCJ 276, (1997) 5 SUPREME 22, (1997) 3 RECCIVR 197, (1997) 2 ICC 607, (1997) 4 SCALE 125, (1997) 2 CURCC 255, (1997) 2 LANDLR 252, (1998) 1 ALL WC 413, (1998) 1 CIVLJ 124

Bench: S. P. Bharucha, K. S. Paripoornan

PETITIONER:
KSHITISH CHANDRA PURKAIT

Vs.

RESPONDENT:
SANTOSH KUMAR PURKAIT & ORS.

DATE OF JUDGMENT: 07/05/1997

BENCH:
A. S. ANAND, S. P. BHARUCHA, K. S. PARIPOORNAN

ACT:

HEADNOTE:

JUDGMENT:

Present:

Hon'ble Dr. Justice A.S. Anand Hon'ble Mr. Justice S.P. Bharucha Hon'ble Mr. Justice K.S. Paripoornan P.K. Chatterjee, Dr. Shankar Ghosh, Sr. Advs., Abhijeet Chatterjee, Ranjan Mukherjee, Sukumar Ghose, Girish Chandra, Rathin Das, D.P. Mukherjee, Advs. with them for the appearing parties.

J U D G M E N T The following Judgment of the Court was delivered:

PARIPOORNAN, J.

The plaintiff in title suit No. 89 of 1958, Munsif 1st Court, Diamond Harbour, is the appellant. The defendants in the suit are the respondents. The suit was filed for declaration of plaintiff's title and recovery of possession of the suit land (1.80 acre of land of Mouja Durganagar P.S. Diamond Harbour). Incidentally, there was a prayer for declaration that the entries in the R.S. record are erroneous. The Plaint-property originally belonged to Haran Chandra Halader and Barada Prasad Halder, and by various gifts or other documents, Kshirodamani Dasi Became the full owner of the suit property. The plaintiff purchased the suit property from Kshirodamani Dasi by registered Deed dated 12 Baisakh, 1365. The plaintiff's vendor had sole occupancy right in 1.80 acres of land in Mauja Durganagar. She possessed such land during the material period through the 4th defendant with whom the land was settled annually on advance rent. On 30th June, 1954, the principle defendants (defendants Nos. 1 and 2) trespassed into the suit land and dispossessed the 4th defendant. Subsequently, the trespassers got their names recorded as Korfa tenants of the suit land at different fictitious jamas under Kshirodamani, the plaintiff's vendor, in the R.S. record. The Plaintiff's vendor Kshirodamani never settled the suit land by granting Patta to or accepting any Kabuliyat from such trespassers. On these and other averments the suit was filed for declaration of plaintiff's title to the suit property and for recovery of the same from the defendants.

2. The main contesting defendants are defendant Nos. 1 and

2. They put forward the plea that the suit was not maintainable, that they were cultivating tenants as thika tenants, under the plaintiff's vender on payment of advance rent and the land was settled with them on a permanent basis. The third defendant is the State of West Bengal. The State pleaded that the suit was not maintainable and they have been unnecessarily impleaded. The trial court decreed the suit. It was found that the plaintiff has title to the suit land and the defendants have no tenancy right in the property. The plaintiff was held entitled to recover possession with mesne profits. The suit was decreed on 28.2.1961. In the appeal filed by defendant No. 1 in Title Appeal No. 362 of 1961 before the Sub-ordinate Judge, 8th Court, Alipore, the judgment and decree of the Munsif was set aside and the suit was dismissed. The plaintiff filed S.A. 993/62 and assailed the judgment and decree of the Sub- ordinate Judge rendered in Title Appeal No. 362/61. By judgment and decree dated 26.2.1976, the appeal was allowed and the matter was remitted to the lower appellate court for a fresh disposal, in accordance with law. After remit, Title Appeal No. 362/61 was disposed of by Sub-Ordinate Judge, 8th Court, Alipore on 12.2.1977 . The appeal was dismissed, affirming the judgment and decree of the trial court dated 28.2.1961 except regarding the grant of declaration that the R.S. record of raiyat is incorrect. The defendants assailed the concurrent judgments and decrees of the courts below by filing Second Appeal No. 871/81 before the High Court of Calcutta. The plaintiff filed a memoranda of cross- objections in the said Second Appeal against the deletion of the declaration that the R.S. record regarding the suit land is incorrect. The Second Appeal and the Memoranda of Cross objection were disposed of by a learned single Judge of the Calcutta High Court by his judgment dated 30.11.1982. The High Court allowed the Second Appeal filed by the

contesting defendants and held that the suit for recovery of possession of the disputed land, i.e, the suit land, is not maintainable and the suit obtained and the suit was dismissed. It is thereafter, the plaintiff in the suit obtained special leave in S.L.P.(Civil) No. 10083/83 by order passed by this Court dated 4.11.1986 and the consequent Civil Appeal is before us.

3. We heard counsel. It is evident from the judgment of the High Court impugned herein, that the High Court set aside the concurrent judgments and decrees of the lower courts on the basis of a new plea raised before it. Appellant's counsel submitted that the High Court acted illegally and committed an error of jurisdiction in entertaining a new plea in Second Appeal, without complying with the provisions of Section 100 C.P.C. as amended. Counsel for the respondents submitted that the new plea raised before the High Court was a question of law and the Court acted within its jurisdiction in entertaining the said question of law and in disposing of the Second Appeal on that basis.

4. In order to appreciate the rival pleas urged before us regarding the legality and propriety of the disposal of the Second appeal by the High Court, few broad facts of the case should be borne in mind. As stated, the suit was one for declaration of title and for recovery of possession of the suit property. The plaintiff in the suit possessed the land through the 4th defendant with whom the land was settled annually. The contesting (principle) defendants trespassed into the suit land and dispossessed the 4th defendant on 30.6.1954. The West Bengal Estates Acquisition Act. 1953, hereinafter referred to as `the Act' came into force on 10.4.1956. The trial court decreed the plaintiff suit. It was also found that the defendants failed to establish their case, that they took settlement of the land in the suit from the plaintiff's vendor, Kshirodamani. Kshirodamani was found to be in possession of the suit land. The decree so passed by the trial court was affirmed in appeal by the learned Sub-ordinate Judge who also held that the defendants failed to prove their tenancy raiyats in the suit land and the first defendant never possessed the suit land in the previous years, as alleged. The Courts concurrently found that the suit is not maintainable and the State is an unnecessary party to the suit. But, in Second Appeal the contesting defendants raised a new plea. It was to the effect that the Act came into force on 10.4.1956. on that day, the right and interest of the plaintiff which was only as and occupancy raiyat, vested in the State. On the date of vesting neither the plaintiff's vendor nor the plaintiff was in possession of the suit land. Since the plaintiff's vendor, as occupancy raiyat, was a deemed intermediary under Section 52 of the Act and she was not n possession of the suit land. Since the plaintiff's vendor nor the plaintiff was in possession of the suit land. Since the plaintiff's vendor, as occupancy raiyat, was a deemed intermediary under Section 52 of the Act and she was not in possession of the suit land on the date of vesting, i.e., 10.4.1956, her interest in the suit property vested in the State of West Bengal. So, neither the plaintiff's vendor nor the plaintiff was entitle to retain the property under Section 6(1)(d) of the Act and, therefore, the suit for recovery of possession of such land is not maintainable. Admittedly, this was a new plea which was never raised by the defendants at any stage of the suit. It should be remembered that the State of West Bengal, the 3rd defendant in the suit, never urged a plea that the interest of Kshirodamani in the suit land (plaintiff's vendor) vested in the State Government under the provisions of the Act.

5. Before the High Court the only point urged on behalf of the defendant (appellant) was, since the plaintiff's vender, an occupancy raiyat and deemed intermediary under section 52 of the Act, was not in possession of the suit land on the date of vesting, her interest in the suit land vested in the State and the plaintiff was not entitled to maintain the suit. it appears that the plaintiff, respondent in the Second appeal, submitted before the Court that this new plea raised on behalf of the defendants, was never raised in the pleadings or at any prior stage of the proceedings and the Second Appeal was the 5th hearing of the suit and such a plea raised only at the time of hearing, cannot be permitted to be raised. The learned Judge of the Calcutta High Court adverted to the above aspect and has opined thus:-

> "..... the plea of non- maintainability of the suit is essentially a legal plea and if the suit on the face of it is not maintainable, the fact that no specific plea was taken or no precise issues were framed is of little consequence. In the present case the suit on the face of it appears to be not maintainable in law and therefore, the point raised on behalf of the appellants although it was not agitated in any of the two court below should in my view, be entertained. I am unable to accept the submissions made on behalf of the respondent that the said point of law cannot be canvassed for the first time before this Court by the appellants."

(emphasis supplied) Holding that on the date of vesting the plaintiff's vendor was not in possession of the suit land and the defendants trespassed in the suit land and dispossessed the fourth defendant much earlier on 30th June, 1954 and so, Section 6(1)(d) of the Act does not apply, the learned single Judge held that the present suit for recovery of possession of the suit land is not maintainable and dismissed the suit. it is not discernible from the records, whether the High Court, at any stage, formulated any "substantial question of law" involved in the appeal; nor does it appear that the opposite side had any notice thereof or otherwise aware of it.

6. We are of that view that the learned Judge of the Calcutta High Court totally overlooked the mandatory provisions of Section 100 C.P.C as amended by Act 104 of 1976.

Prior to the amendment a second appeal could lie to the High Court on the grounds set out in Clauses (a) to (c) of Section 100(1), namely:

> (a) the decision being contrary to law or to some usage having the force of law;
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> (b) the decision having failed to determine some material issue of law or usage having the force of law;
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> (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

However, by the amendment Act of 1976, vital change was introduced by the legislature in Section 100 C.P.C. The amended Section (100 C.P.C.) reads thus;

"100 (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court from every decree passed in appeal by any Court subordinate to the High Court, if the High court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from and appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section 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 questions."

(emphasis supplied) The Amendment Act of 1976 has drastically restricted the scope of second appeals and the jurisdiction of the Court to entertain second appeals is hedged in by limitations.

7. Delivering the judgment of a two member Bench in Panchugopal Barua & ors. Vs. Umesh Chandra Goswami & Ors. (Civil Appeal No. 3631/930 one of us (Dr. Anand, J.) in his judgment dated 12.2.1997 has lucidly explained the scope of Section 100 C.P.C. as amended, thus:-

"A bare look at Section 100 C.P.C. shows that the jurisdiction of the High Court to entertain a second appeal after the 1976 amendment is confined is confined only to such appeals as involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the High Court. Of course, the proviso to the Section shows that 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 the Court is satisfied that the case involves such a question. The proviso presupposes that the court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated by it. The existence of a "substantial question of law" is thus, the sine- qua-non for the exercise of the jurisdiction under the amended provisions of Section 100 C.P.C.

> Generally speaking, an appellant is not to be allowed to set up a new case in second appeal or raise a new issue (otherwise than a jurisdictional one), not supported by the pleadings or evidence on the record and unless the appeal involves a substantial question of law, a second appeal shall not lie to the High Court under the amended provisions. In the present case, no such question of law was formulated in the memorandum of appeal in the High Court and grounds (6) and (7) in the memorandum of the second appeal only which reliance is placed did not formulate any substantial question of law. The learned single Judge of the High Court also, as it transpires from a perusal of the judgment under appeal, did not formulate any substantial question of law in the appeal and dealt with the second appeal, not on any substantial question of law, but treating it as if it was a first appeal, as of right, against the judgment and decree of the subordinate Court. The intendment of the legislature in amending Section 100 C.P.C. was, thus, respected in its breach. Both the trial court and the lower appellate court had decided the cases only on questions of fact, on the basis of the pleading and the evidence led by the parties before the Trial Court. No pure question of law nor even a mixed question of law and fact was urged before the Trial Court or the First Appellate Court by the respondent. The High Court was, therefore, not justified in entertaining the second appeal on an altogether new point, neither pleaded nor canvassed in the subordinate courts and that too by overlooking the changes brought about in Section 100 C.P.C. by the Amendment Act of 1976 without even indicating that substantial question of law was required to be resolved in they second appeal. To say the least, the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendments legislature and not for frustrate it by ignoring the same. "

(emphasis supplied) The above statement of law has our respectful concurrence.

We would only add that (a) it is the duty cast upon the High Court to formulate the substantial question of law involved in the case even at the initial stage; and (b) that in (exceptional) cases, at a later point of time, when the Court exercised its jurisdiction under the proviso to sub- section (5) of Section 100 C.P.C in formulating the substantial question of law, the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet the point. Proceeding to hear the appeal without formulating the substantial question of law involved in the appeal is illegal and is an abnegation of abdication of the duty cast on Court and even after the formulation of the substantial question of law, if a fair or proper opportunity is not afforded to the opposite side, it will amount to denial of natural justice. The above parameters within which the High Court has exercise its jurisdiction under Section 100 C.P.C should always be borne in mind. We are sorry to state that the above aspect are seldom borne in mind in may case and second appeals are entertained and/or disposed of without conforming to the above discipline.

The guidelines to determine as to what is a "substantial question of law" within the meaning of Section 100 C.P.C., have been laid down by this Court in a Constitution Bench decision in Sir Chunilal V. Mehta and sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd., [AIR 1962 SC 1314 = (1962) Supp. (3) SCR 549]. There is also a later decision of this Court in Mahindra and

Mahindra Ltd Vs. The Union of India and another. (AIR 1979 SC 798). It is unnecessary to deal at length with that aspect any further.

8. In the light of the legal position stated above we are of the view that the High Court acted illegally and in excess of jurisdiction in entertaining the new plea, as it did, and consequently in allowing the Second Appeal. Even according to the High Court the point urged on behalf of the appellant was only a "legal plea" thought no specific plea was taken or no precise issue were framed in that behalf. The High Court failed to bear in mind that it is not every question of law that could be permitted to be raised in second appeal. The parameters within which a new legal plea could be permitted to be raised are specifically stated in sub-section (5) of Section 100 C.P.C Under the proviso, the Court should be "satisfied" that the case involves a "substantial question of law" and not mere "question of law". The reason for permitted the substantial question of law to be raised, should be "recorded" by the Court. It is implicit therefrom, that on compliance of the above, the opposite party should be afforded a fair or properly opportunity to meet the same. It is not any legal plea that could be raised at the stage of second appeal. It should be a substantial question of law. The reasons for permitting the plea to be raised should also be recorded. Thereafter, the opposite party should be given a fair or proper opportunity to meet the same. In the present case, as the extracts from the judgment quoted hereinabove would show, the High Court has totally ignored the mandatory provisions of Section 100 C.P.C. The High Court proceeded to entertain the new plea and rendered it decision without following the mandatory provision of Section 100 C.P.C. On this short ground we are of the view that judgment and decree of the High Court dated 30th November, 1982 are illegal and in excess of jurisdiction and so unsustainable and deserve to be set aside. We hereby do so. The appeal is allowed with cost, including advocates fee which we estimate at Rs. 10,000/-.