Supreme Court of India
Panchugopal Barua & Ors vs Umesh Chandra Goswami & Ors on 12 February, 1997
Author: D Anand.
Bench: A.S. Anand, S.B. Majmudar

PETITIONER:
PANCHUGOPAL BARUA & ORS.

Vs.

RESPONDENT:
UMESH CHANDRA GOSWAMI & ORS.

DATE OF JUDGMENT: 12/02/1997

BENCH:
A.S. ANAND, S.B. MAJMUDAR

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T DR. ANAND. J.

This appeal by special leave is directed against the judgment and order of the High Court of Gauhati dated 12.8.88 in Second Appeal No. 85/79 and has arisen in the following circumstances:

Shri Durga Charan Barua, predecessor in interest of the appellant, allowed respondent No. 1 Umesh Chandra Goswami, to make permissive use of a plot of land in Jorahat town for a period of two years commencing from 1.6.63 and to raise temporary structure thereon for the said period for the purpose of his residence. There was an understanding between them that the respondent would remove the structure and deliver khas possession of the suit land after the expiry of the period of two years. On the failure of the respondent to handover the vacant possession of the suit land to the predecessor-in- interest of the appellants, a registered notice was served on the respondent to deliver the possession by 31st March, 1966. The respondent did not deliver possession and the predecessor in interest of the appellant thereupon, in 1966, filed a suit in the Court of Munsif, Jorahat, for a decree of khas possession and compensation. It was registered as title suit No. 65/66. After survey commission, it was found that the value of the suit land exceeded the pecuniary jurisdiction of the Munsif's court and therefore the suit was brought to the court of Assistant District Judge, Jorahat and registered there as title suit No. 36/67. The case set up in the plaint by the

plaintiff was that he had allowed the defendant to make permissive use of the suit land by raising temporary structure thereon for a period of two years with effect from 1st of June, 1963 but inspite of a clear understanding between the plaintiff and the defendant that the latter would vacate and deliver khas possession of the suit land by removing his temporary structures from the land at his own cost at the end of the period of two years, he had failed to hand back the possession of the suit land. The defendant resisted the suit and in the written statement inter-alia pleaded that "the defendant did not occupy any land as a permissive user under the plaintiff ..... the defendant has occupied the land under the contract of purchase and never gave any understanding to the plaintiff to remove his structures." While title suit No. 36/67 filed by the predecessor-in-interest of the appellants was pending, the defendant-respondent also filed a suit in the Court of Assistant District Judge, Jorahat, being title suit No. 23/69 for a decree of specific performance of an oral agreement to sell the suit land against the predecessor-in- interest of the appellant.. It was pleaded by the defendant (respondent No. 1 herein) that he had entered into an oral agreement with Shri Durga Charan Barua for sale of the disputed plot of land and had been delivered possession of the same in pursuance of the aforesaid agreement by him after receiving Rs. 7860.00 as sale price. That after being handed over the possession of the suit land, as the prospective purchaser, he had constructed a house over it and since Shri Durga Charan Barua had failed to execute the sale deed, a decree for specific performance of the oral agreement by calling upon Shri Barua to execute the sale deed be passed in his favour. Both the suits i.e. Suit No. 36/67 and Suit No. 23/69 were clubbed and tried together.

During the pendency of the suit, Shri Durga Charan Barua died and his legal representatives were brought on the record. The trial court by a common judgment and order decreed suit No. 36/67 filed by late Shri Durga Charan Barua directing khas possession to be given to the plaintiff by the defendant and dismissed suit No. 23/69 filed by respondent No. 1 by returning a finding that there was no evidence to show that respondent No. 1 had entered into any agreement to purchase the suit land with late Shri Durga Charan Barua nor was there any evidence to show that he had paid the sum of Rs. 7860/- to Durga Charan Barua. The trial court held that the story of an oral agreement to sell the suit land was a concocted one. Aggrieved by the judgment and decree of the trial court, respondent No. 1 preferred two separate appeals before the District Judge, Jorahat. Vide judgment dated 21.8.78 the District Judge dismissed both the appeals and confirmed the judgment and decree passed by the Trial Court in both cases. The respondent No. 1 thereupon preferred two second appeals before the High Court being SA No. 77/79 arising out of suit No. 23/69 and SA No. 85/78 arising out of judgment and decree in suit No. 36/67. The High Court vide judgment and order dated 4.8.88 dismissed second appeal No. 77/79 and upheld the concurrent findings of the two courts to the effect that the story put forward by respondent No. 1 regarding the existence of an oral agreement to sell, had no truth in it. The plea put forward by respondent No. 1 of his occupying the suit land pursuant to the oral agreement to sell was rejected. It was found that respondent No. 1 had been given possession of the suit land as a licencee by the plaintiff as alleged in the 12.8.88 allowed second appeal No. 85/79 arising out of suit No. 36/67 and by the said judgment granted benefit of the provisions of Section 60(b) of the Indian Easement Act, 1882 (hereinafter called the `Easement Act') holding the licence to be irrevocable on the principles of "justice, equity and good conscience". The High Court relying on the report of the local commissioner of 1975 came to the conclusion that the structure raised by respondent No. 1 was of a permanent nature and therefore the protection

under Section 60(b) of the Easement Act was available to him and he could not be evicted from the suit land. The preliminary objection raised by the appellants, that no plea on the basis of which the benefit of the provisions of the Easement Act was now being sought for the first time in the second appeal had been raised in the written statement; that no issue had been framed and no evidence was led by the parties before the trial court regarding the availability of the benefit of Section 60(b) of the Act and that even in the First Appellate Court, no such plea had been raised and, therefore, the same could not be allowed to be raised for the first time in the High Court in the Second Appeal, was rejected and the second appeal, was allowed setting aside the concurrent findings of fact.

While the appellant filed SLP against the judgment and order of the High Court in second appeal No. 85/79 (arising out of SLP 2567/89), respondent No. 1 filed a SLP against the dismissal of the second appeal No. 77/79 (arising out of SLP 14313/88). Vide order dated 3.8.93 special leave was granted in SLP No. 2567/89 but SLP No. 14313/88 filed by the respondent No. 1 was dismissed.

Mr. Hansaria, learned counsel, appearing for the appellant submitted that not only was the second appeal filed by respondent No. 1 not maintainable as no substantial question of law was involved in the appeal but even otherwise no relief could have been granted to respondent No. 1 on the basis of Section 60(b) of the Easement Act, as that Act does not apply to the State of Assam. Learned counsel for the respondent, however, supported the judgment on the same reasoning as given by the learned Single Judge.

Both the trial court and the First Appellate Court have concurrently found that the plea of respondent No. 1 that he had entered into an oral agreement to purchase the suit land with late Shri Durga Charan Barua and had occupied the same after being put in possession by Shri Barua, as a prospective purchaser, and had raised construction thereon as a prospective purchaser was not borne out from the record and that the story was false and not based on truth. Both the courts also found, concurrently, that Shri Barua, the predecessor-in-interest of the appellant had allowed the respondent to make permissive use of the suit land for a period of two years and had permitted him to raise temporary structures on the said plot of land for the purpose of his residence. Against these concurrent findings of fact, the learned Single Judge admitted two second appeals and subsequently allowed one by setting aside the concurrent findings of fact and on the basis of a plea, claiming benefit of Section 60(B) of the Easement Act, raised before the High Court for the first time in the second appeal granted relief to respondent No. 1 and non-suited the plaintiff-appellant. We shall deal with that aspect a little later.

It appears to us that the learned Single Judge of the High Court overlooked the change brought about in Section 100 C.P.C. by the Amendment Act of 1976 which has drastically restricted the scope of second appeals. 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;
>
> (b) the decision having failed to determine some material issue of law or usage having the force of law;

(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 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 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 an 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 question."

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 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 ate 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 on 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 pleadings 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 a substantial question of law was required to be resolved in the 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 intendment of the legislature and not to frustrate it by ignoring the same.

In the case of Chevalier I.I. Iyyappan and another vs. The Dharmodayam Co., Trichur, [AIR 1966 SC 1017], Kapoor, J. speaking for a three Judges bench considered the case of a party, which had tried to change its stand at the appellate stage by raising a plea of licence and its irrevocability, a plea not raised at the Trial Court nor adjudicated upon at any stage. It was noticed:

> "The appellant in this Court has mainly relied on the plea that he had been granted a executed a work of a permanent character and incurred expenses in the execution thereof and therefore under Section 60(b) of the Indian Easements Act, 1882 (5 of 1882), hereinafter referred to as the `Act', which was applicable to the area where the property is situate and therefore the license was irrevocable. Now in the trial court no plea of license or its irrevocability was raised but what was pleaded was the validity of the trust in Exhibit X. In the judgment of the trial court no such question was discussed. In the grounds of appeal in his appeal to the High Court which the appellant took against the decree of the trial court the relevant grounds are 9 to 13.

The Court on the basis of the above facts and circumstances observed that it was not open to the party to change his case at the appellate stage and since the plea of licence or its irrevocability had not been raised before the Trial Court, the same could not have been raised in the High Court and upheld the judgment of the High Court refusing the permission to raise such a plea at the appellate stage for the first time. That judgment clearly applies to the facts of the present case. The learned Single Judge noticed this judgment but opined that the decision could not prevent the appellant in the High Court from taking the plea regarding the protection of Section 60(b) of the Act "inasmuch as the granting of licence and raising of structure is the case of the plaintiff himself". Even after noticing that the appellant had specifically raised the defence both in the Trial Court and in the First Appellate Court that he had raised the construction as a prospective owner, the learned Single Judge went on to say that since the plaintiff's case in the plaint was that a licence had been granted to the appellant to raise the structure, relief could be granted to the defendant on the plea raised by the plaintiff himself ignoring the stand of the defendant as the plaintiff had to succeed or fail on the strength of his own case and not on the weakness of the defence. There may not be any quarrel with the abstract proposition of law that a plaintiff can succeed on the strength of his own case and not

on the weakness of the defence but what the High Court seems to have completely overlooked is that the plaintiff's case specifically was that he had allowed the defendant to make permissive use of the suit land as a licencee and had permitted the raising of temporary structure thereon for a period of two years beginning 1st June, 1963 and that the defendant acting on the licence had raised a temporary structure on the suit land and contrary to the understanding had refused to hand back the possession of the suit land after the expiry of two years. This plea of the plaintiff had to be taken as a whole and could not be dissected for the purpose of granting relief to the respondent by accepting a part of it. On the plaintiff's plea, taken as a whole, the question of irrevocability of the licence could not at all arise because for granting relief on the principles contained in Section 60(b) of the Easements Act, a licence becomes irrevocable provided the following three conditions are satisfied:

(1) that the occupier must be a licensee;

(2) that he should have acted upon the licence; (3) and executed a work of permanent character and incurred expenses for the execution of the work.

The learned Single Judge of the High Court relied upon the report of the Advocate Commissioner to opine that the structure raised by the defendant on the suit property was of a permanent character. In doing so he ignored not only the other evidence on the record but also that the report of the Advocate Commissioner was submitted in 1975, while the question of raising construction was to be considered in relation to the period of the licence i.e. 1.6.1963 and 1.6.1965. According to the plaintiff-appellant only temporary construction had been permitted and raised at the site and when request was made by the appellant to the licencee to vacate and handover khas possession the same did not evoke any response. On the strength of the plaintiff- appellant's case, as noticed above, the High Court fell in error in holding that the licence could not be revoked because of the raising of permanent structure by the licencee, a case totally inconsistent with the defence raised in the Trial Court and the First Appellate Court by respondent No. 1. Such a plea ought not to have been allowed to be raised at the stage of the second appeal in the High Court for the first time in the second appeal. However, since the High Court has interfered with concurrent findings of fact recorded by the two courts below, we do not propose to rest our judgment only on the ground of non-maintainability of the second appeal and proceed to examine the merits of the judgment under appeal also.

The main submission made by learned counsel for the appellant-defendant (respondent herein) in the High Court was that the defendant could not have been asked to vacate the premises in as much as the licence granted to him had become irrevocable in view of the provisions of Section 60(b) of the Easements Act because the appellant acting upon the licence had constructed structures of a permanent character on the suit land by spending money on it, thereby satisfying all the requirements of the said Section. The preliminary objection of the plaintiff-respondents (appellants herein) that no new plea regarding the irrevocability of the licence, could be allowed to be raised for the first time in the High Court as such a plea had not been urged either in the pleadings or during the arguments before the Trial Court or before the First Appellate Court and no evidence had been led in support of the new plea was rejected. It was observed:

> "Before the submission advanced by Shri Goswami is examined, it would be apposite to state at the threshold that the aforesaid point was not urged in the way it has been advanced in this Court either before the Trial Court or before the learned District Judge. Shri Barua appearing for the respondent, therefore, raised an objection that this new plea may not be allowed to be raised for the first time in this Court. In this connection, he referred to C. Iyyappan V. Dharmodayam Co, AIR 1966 SC 1017, in para 8 of which this aspect of the matter has been dealt with. In that case also a plea was sought to be taken that the appellant before the Court was protected by Section 60(b) of the Act. The plea, however, was not allowed to be raised because in the trial court no plea of licence or its irrevocability was raised; the defence taken was entirely different. This decision taken was entirely different. This decision cannot prevent the appellant from taking the plea of protection under Section 60(b) of the Act in the present case inasmuch as the granting of licence and raising of the structure is the case of the plaintiff himself. It is no doubt true that the defence taken by the defendant in the trial court was not one which had been advanced by Shri Goswami. It was relating to agreement to purchase the suit land following which the defendant had come to occupy the suit land; but this is not enough. In my view to disallow the appellant to raise the point urged by Shri Goswami inasmuch as the same is a question of law and is based on the pleading of the plaintiff," is not proper.

The learned Single Judge noticed that the Easement Act had no application to the State of Assam, but went on to opine that the defendant was protected by Section 60(b) of the Act which `operates' in this case relying upon the view expressed by Tek Chand, J. in Jagat Singh V. District Board, [AIR 1940 Lahore, 409] which had relied upon the opinion of Suleman, CJ in Mathuri Vs. Bhola Nath. [AIR 1934 All. 517].

The approach of the learned Single Judge in our opinion was erroneous. Once it was found that the Easement Act had no application to the State of Assam, the question of "clearing the way for Section 60(b) of the Act to operate" cannot at all arise. Of course, the principles of "justice, equity and good conscience" on which Section 60(b) of the Easement Act rests may apply in the facts and circumstances of a given case but that is not to say that though the Easement Act does not apply, provisions of Section 60(b) of the Easement Act still "operate". Since, the legislature did not intend the Act to apply to Assam, the learned Single Judge could not have defeated that intendment by holding that "the defendant of the present case was protected by Section 60(b) of the Act." It is not permissible to extend the provisions of an Act, made not applicable by the legislature to a State, by a judicial order as it amounts to enacting legislation by the High Court, a power not vested in the judiciary.

Even otherwise, the grant of relief to the respondent even on the principles of "justice, equity and good conscience" which doctrine appears to have been pressed into aid, was on the facts and circumstances of the case, not permissible. A court of equity, it should be remembered, must so act as to prevent perpetration of a legal fraud. It is expected to do justice by promotion of honesty and good faith, as far as it lies within its power. A party seeking relief in equity must come to the court with clean hands. In the present case, the respondent herein denied that he was a licencee of the

appellant or had been given permissive use to raise temporary structures on the suit land for a period of two years. He set up a `title' to the suit land as a `prospective purchaser' on the basis of an `oral agreement to sell in himself claiming to have occupied the suit land in his capacity as a "prospective purchaser". All the three courts, including the High Court, found that plea of the respondent to be `false' in the suit for specific performance filed by the respondent. S.L.P. against the judgment and decree, was also dismissed by this Court. How then could the respondent be found entitled to any relief in equity, when his defence was based on falsehood? We have noticed the conduct of the respondent in denying the title of the appellant herein and putting forward a plea which has been concurrently found by all the courts to be false. He, therefore, certainly did not come to the Court with clean hands. Thus, even if it be assumed for the sake of argument, that the principles of `justice, equity and good conscience' underlying the provisions of Section 60(b) of the Easements Act, could be attracted in a given case in the State of Assam where the Easements Act had not been extended, the conduct of the respondent disentitled him to any relief on the basis of `equity, justice and good conscience'. The reliance placed by the High Court on the Division Bench judgment of the Lahore High Court in the case of Jagat Singh and others vs. District Board (supra) is misplaced. Indeed in the Province of Punjab, the Easements Act was not in force and Tekchand, J. speaking for the Curt invoked the common law doctrine of `equity, justice and good conscience', which the learned Judge found to be substantially the same as that contained in Section 60 of the Easements Act, to decide the Letters Patent Appeal. On facts, it was found that the land in dispute was being actually used by the District Board for the purpose for which it had been given to it on licence. It was also established on facts that more than 10 years ago, the defendant had erected a boundary wall and a pucca gate at a considerable cost and that those works were of a permanent character. It was in this fact situation that Tekchand, J. held that even if the Easements Act was not applicable to the Province of Punjab, it was not open to the appellant to revoke the licence, on their option and resume the land, since construction of permanent character had been build by the defendant acting upon the licence granted by the appellant to him on principles of `justice, equity and good conscience'. The fact situation in Jagat Singh's case (supra) was, thus, totally different. The licencee therein had raised a permanent construction acting upon the licence after incurring expenditure for raising the permanent construction and it was for that reason that the court held that the licence could not be revoked at the sweet will of the licensor. In the present case, the respondent has categorically denied to be a licencee of the appellant or that he had raised any construction acting on the licence. He was, thus, not entitled to any relief in the second appeal. The judgment of the High Court under the circumstances cannot be sustained. This appeal succeeds and is allowed. The judgment and order of the High Court are hereby set aside and the judgment and decree of the Trial Court, as confirmed by the First Appellate Court, are restored. We, however, make no order as to costs.