CASE NO.:
Special Leave Petition (civil) 4635 of 2001

PETITIONER:
ASHOK NAGAR WELFARE ASSOCIATION & ANR.

Vs.

RESPONDENT:
R.K. SHARMA & ORS.

DATE OF JUDGMENT: 14/12/2001

BENCH:
D.P. Mohapatra & P. Venkatarama Reddi

JUDGMENT:

WITHSPECIAL LEAVE PETITION . No. 4657 OF 2001

J U D G M E N T

P. Venkatarama Reddi, J.

After notice the SLPs have been heard at length.

The common judgment of the Division Bench of the Delhi High Court in RFA (OS) No. 32/2000 and RFA (OS) No. 35/2000 is being assailed in these appeals by the plaintiff who instituted two suits Nos. 544 of 1991 and 597 of 1991 in the High Court. The first suit was filed against 48 defendants and the other suit against 52 defendants who were alleged to be unauthorised occupants of plots/houses located in Khasra No. 393/264 situated in Ashok Nagar (Chilla Village). Inter alia it was alleged in the plaint that the members of the Association (some of whom are the defendants) jointly and severally agreed to relinquish their respective rights in favour of the first plaintiff and further empowered the second plaintiff to institute requisite legal proceedings in order to safeguard the land in dispute. It is also alleged that the defendants were inducted into possession unauthorisedly by certain persons named in the plaint who were said to be the predecessors in title and therefore the defendants were trespassers of the disputed land. It is then alleged that the defendants "forcibly dispossessed the plaintiff-Association from its constructive possession". The suits were purportedly filed under Section 6 of the Specific Relief Act and decree for possession/restoration of possession was sought for.

It is not necessary to deal with the history of the litigation pertaining to the suit land or the other details turning on the merits of the suits. Suffice it to notice that service on the defendants was treated to be complete and the Court directed by an order dated 14.5.1992 that the defendants be proceeded against ex parte. Affidavit evidence was taken on record. Both the suits were decreed on the finding that the defendants had illegally dispossessed the plaintiffs from the suit property and they were in the position of trespassers. Such ex parte judgment and decree was passed on 6.8.1997 in Suit No. 597of 1991 and on 27.1.1997 in Suit No. 544 of 1991 by a learned Single Judge in exercise of original jurisdiction. When defendants were sought to be dispossessed on the strength of the ex parte decrees, appeals were filed on the allegation that the appellants/defendants were not aware of the suits and they came to know for the first time of the decrees passed in the

suits on dt. 8.4.2000 when the police officials came to inspect the area in order to enforce the court warrants. Petitions for condonation of delay in filing the appeal were also filed. The Division Bench of the High Court thoroughly examined the record to ascertain whether the summons were factually served or deemed to have been served in accordance with law and having accepted the case of the defendants, set aside the ex parte judgments and decrees passed by the learned Single Judge and ordered fresh trial of the suits on merits in accordance with law. The learned Judges found sufficient ground to condone the delay. The concluding part of the Judgment reads as under :-

"The appellants, who have put in appearance and who are defendants in the suit will now will be deemed to have been duly served. They will be supplied by the plaintiffs with copies of the plaint and other documents, as are required to be served on them on or before the day when the parties will appear before learned Single Judge. Within a period of six weeks thereafter the said defendants will file their written statements. Steps will also be taken by the plaintiffs thereafter to effect due service on the remaining defendants."

Adverting to the record in Suit No. 597 of 1991, the High Court noticed inter alia that the acknowledgment-due cards were not filed despite a requisition in this behalf; summons were therefore not sent through registered post, but were sent through ordinary process. Even without verifying whether the summons were served to the unserved defendants, the Deputy Registrar directed the suit to be posted on 11.11.1991, on the insistence of the plaintiff. At that stage, application for substituted service for effecting service on unserved defendants through publication in the newspaper was moved. The Division Bench then commented :-

"The proceedings, which had taken place till that date thus would reveal that the summons, which had been issued to the defendants pursuant to the order dated 4.2.1991 for 10.4.1991 had not been received back in the Registry of Court. The Court was not aware whether any or genuine effort had or had not been made to effect service on the so-called unserved defendants. There was no reason available to the Court till that date that why the unserved defendants could not be served personally with the summons. Though the suit had come up on three different dates, namely, on 10.4.1991, 23.9.1991 and 11.11.1991, yet no orders were obtained by the plaintiff for fresh summons to the unserved defendants. Straight-away two separate applications aforementioned under Order 5 Rule 20 of the Code were filed.

The first application (1.A. 12267/91) averred that some of the defendants had not been served till date despite repeated summons issued to them. As such, it is not possible to serve the unserved defendants through ordinary process. On face of it the averments made in the application were false in as much as the application stated 'despite repeated summons issued to them'. Neither the summons, which had been issued had been received back nor any effort was made by the plaintiff to obtain fresh summons. Likewise the averments made in the second application were also false, which also alleged that repeated summons had been issued to the unserved defendants. On these sketchy applications, the Deputy Registrar, who is invested with powers of the Court, proceeded to pass an order recording his satisfaction that it was not possible to serve the unserved defendants in ordinary course. Accordingly, he directed that the said

defendants be served by means of proclamation in newspaper, namely, 'The Statesman'.

From what material on record or otherwise the Deputy Registrar was satisfied with is anybody's guess. Nothing is reflected in the order. Neither the contents of the application nor the previous office reports support such satisfaction. Contents of the application, as noticed by us, on the face of it were false. Office reports also nowhere had stated anything from which it could be inferred that it was not possible to serve the unserved defendants in the ordinary course. It was incumbent for the Deputy Registrar to have at least looked into the provisions of law before directing substituted service, which in terms of Rule 20 of Order 5 could be ordered only on satisfaction that there was reason to believe that the defendant was keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way. Neither any explanation of the process server was sought that why he had not returned the summons, which had been sent for service, nor any report on any of the summons was available to the Court since as per the office reports as reflected in the orders dated 10.4.1991, 23.9.1991 and 19.12.1991, summons which had been ordered to be issued pursuant to the order dated 4.2.1991 were still awaited. Thus, even the order for effecting substituted service by publication on the unserved defendants is bad in law."

The High Court then specifically referred to the endorsements of service on certain summons to demonstrate how the summons were served on unconnected persons.

Adverting to the record in Suit No. 544 of 1991 wherein also the summons were not sent by registered post, the High Court remarked :-

"Looking at the record of Suit No.544 of 1991 and 571 of 1991 it thus appears that 89 summons are purported to have been served by the said Tara Chand, Process Server on 30.3.1991 and the reports on the summons also appears to have been prepared by him on the same day. Instead of serving the summons on the person named therein, he served some unknown persons without taking the trouble of even mentioning their identity and without getting these persons duly identified. He could have even stated on the summons that the persons to whom summons were delivered were personally known to him. It was not so mentioned. Had he been asked to appear in Court definitely he would have stated that personally he was not acquainted with the said defendants.

There are some of the reports on the summons, which have been highlighted by us only to show the manner in which summons are purported to have been duly served by the process-server. The same were tendered to persons other than the one to whom the same were addressed. Another important feature, which we have noticed in both the suits is the manner in which summons were addressed to the defendants. Address of defendants as shown on summons in suit No.544/91 has been noticed by us above. For all defendants in suit No. 597 of 1991, the summons were addressed as follows :-

'Unauthorised occupant of plots/house Nos. 65 to

98, out of khasra No. 393/264 in Adarsh Nagar of village Chilla Saroda Bangar, Delhi 110091."

The High Court then discussed as to how the mandatory provisions of CPC in regard to service of summons, viz. Order 5 Rule 18, Order 5 Rule 15 etc. were not complied with. The High Court concluded:-

"As such we have no hesitation in concluding that the reports on the summons are either fake or purposely made to give a colour of due service. Summons were not served at all. These were not handed over to the defendants named therein, which prevented the defendants from appearing in Court. Not only there is violation of the provisions of law, but the provisions have been defied with impunity."

The above findings/observations of the High Court reveal a pathetic state of affairs and bring to focus the factum of abuse of the process of the Court by manipulating the records to show due service while there was none. Elementary care was not exercised by the concerned officer of the court in checking up whether the summons were duly served and whether there was a case for effecting substituted service and whether mandatory provisions as to the service of summons were complied with. The entire picture was not placed before the Court and the Court readily accepted the report of the Deputy Registrar and proceeded on the basis that service was complete and the defendants failed to respond to the summons.

It is sought to be contended by the learned counsel for the appellants, on the basis of the proceedings of the Dy. Registrar recorded on 10.4.1991, that in suit No. 597 of 1991 most of the defendants were present in person and they sought time to file written statement. The names of the defendants said to be present are found recorded on the order sheet dated 10.4.1991. It is noted in the order that the summons issued to the defendants by ordinary process were awaited, but the said defendants were present in person. Nothing is recorded as to how the Deputy Registrar was able to identify them as the defendants concerned. This is what the High Court very rightly commented. Obviously, the factum of service of summons on them was not checked up by the officer of the Court, more so when their identity was not known to the officer.

We are, therefore, satisfied that the judgment of the Division Bench of the High Court setting aside the ex parte decree is correct, proper and just.

However, faced with the above adverse findings of the High Court which are insurmountable, the appellant's counsel concentrated on the point that no intra-court appeal lies by virtue of the bar enacted in Section 6(3) of the Specific Relief Act. It is contended that the provision in Section 10 of the Delhi High Court Act providing for appeal against the judgment of a Single Judge to a Division court will be of no avail to assume jurisdiction to entertain the appeal in the face of the bar contained in Section 6(3). This very contention was raised before the High Court. The learned Judges relying on the decision of this Court in Vanita M. Khanolkar Vs. Pragna M. Pai and others (AIR 1998 SC 424) held that the prohibition contained in sub-section (3) of Section 6 of Specific Relief Act will not come in the way of the appellant in challenging the judgment and decree of a Single Judge by way of a Letters Patent Appeal. Learned counsel for the appellant put in the best of his endeavour to distinguish that judgment and also to question the correctness of that judgment on the ground that it was decided 'per incuriam', without regard to the dicta laid down in larger Bench decisions. It is submitted with considerable force that the specific bar enacted in Section 6 (3) of the Specific Relief Act cannot be got over by invoking the provision relating to intra-court appeals. It is pointed out that if the view taken by this Court in Vanita's case is given effect to, the bar under Section 6(3) will operate in all cases where

the High Court has no original jurisdiction to try the suits, whereas it does not come into play if the High Court concerned does not have such jurisdiction. This anomalous position is another reason, according to the learned counsel, to conclude that the embargo against the entertainment of appeal incorporated in sub-section (3) of Section 6 of Specific Relief Act is absolute and is not effaced by the provisions of the Letters Patent or the relevant High Court Act. These contentions are not without substance. However, we do not consider it necessary to refer the matter to a larger Bench as we are of the view that this is not a fit case for interference under Article 136 of the Constitution even if we proceed on the basis that the appeal under Section 10 of the Delhi High Court Act was not maintainable.

On a conspectus of the telltale facts of the case and the considerations germane to the exercise of jurisdiction under Article 136, we refrain from exercising the jurisdiction and grant leave to appeal. It is well settled that Article 136 does not confer a right of appeal on any party, but it confers a discretionary power on the Supreme Court to interfere in suitable cases vide State of Bombay Vs. Rusy Mistry (AIR 1960 SC 391). The bar under Article 136 is potential but not compulsive and is undoubtedly meant to advance the cause of justice. In Taherakhatoon (D) by LRs. Vs. Salambin Mohammad (AIR 1999 SC 1104), it was pointed out that even in cases where special leave is granted, the discretionary power vested in the Court continues to remain with the Court even at the stage when the appeal comes up for hearing. In that case, the Court having declared the law that the High Court while dealing with the second appeal erred in not framing a substantial question of law, declined to interfere with the impugned judgment in exercise of discretionary power under Article 136. Half a century back, a Constitution Bench of this Court in Pritam Singh Vs. The State (1950 SCR 453) made pertinent observations on the scope and nature of the power under Article 136. It was observed that the jurisdiction under Article 136 "is to be exercised sparingly and in exceptional cases only, and as far as possible, a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this Article". The Court then observed "the only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant special leave to appeal in those cases where special circumstances are shown to exist." The Constitution Bench further laid down "Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injusitce has been done and that the case in question present features of sufficient gravity to warrant a review of the decision appealed against."

Viewed in this light, we do not think that special leave should be granted and arguments shall be allowed to be advanced on the question whether the Division Bench or the High Court could entertain the appeal under Section 10 of the Delhi High Court Act despite the bar under Section 6(3) of the Specific Relief Act. The High Court, by the impugned order, followed the judgment of this Court in Vanita's case (supra) which prima facie supports its view. That apart, it is pertinent to note that in any case, the High Court, in exercise of another jurisdiction viz. original jurisdiction could have set right the illegality and restored the suits to its file. What the High Court has done is to invalidate the ex parte decrees which were obtained by questionable means fitting into the description of abuse of the process of the court. If such decrees were allowed to remain, it would have resulted in miscarriage of justice. We cannot shut our eyes to the ground realities and the factual events highlighted by the High Court in deciding the question whether we should exercise our discretionary power under Article 136. Incidentally, it may be mentioned that according to the learned counsel for the respondent, the reason for not filing the application for restoration under Rule 13 of Order 9 was the bona fide impression may be a mistaken impression, that the learned Single Judge of the High Court who allowed the execution of the decree to go on will not be able to interfere in the matter. Be that as it may, we are not persuaded in the peculiar facts and circumstances of the case to grant leave as we feel that

affording an opportunity to the defendants to contest the suits on merits is well justified and will have the effect of averting serious injustice. We shall, however, be not understood to have expressed any view on the merits of the suits.

In the result the Special Leave Petitions stand dismissed. There shall be no order as to costs.

.J
(D.P. Mohapatra)

.J
(P.Venkatarama Reddi)

December 14, 2001.

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