**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO.6185 OF 2009**
**[Arising out of SLP [C] No.20497of 2006]**

Dubaria …Appellant

VERSUS

Har Prasad & Anr. …Respondents

**J U D G M E N T**

**TARUN CHATTERJEE, J.**

1. Delay condoned.

2. Leave granted.

3. Application for substitution is allowed.

4. This is an appeal filed at the instance of the plaintiff-appellant challenging the judgment and decree dated 26th of July, 2006 passed by the High Court of Judicature at Allahabad in Second Appeal No. 956 of 1976, whereby the High Court had dismissed the appeal on the ground that the same was concluded by concurrent findings of fact and, therefore, no substantial question of law was involved in the same.

5. The appellant as plaintiff instituted a suit for permanent injunction restraining the defendants-respondents from interfering with his possession in respect of a building situated in Plot No. 4934 in Village Bhavanipurva Muhal Usufzama in the District of Banda (hereinafter referred to as "suit property") in the Court of Munsif, Banda. He claimed to have purchased the suit property from one Mr. Rajjan by a sale deed dated 27th of December, 1966. When the Zamindar of the suit property objected to the said sale, the plaintiff-appellant by way of an abundant caution, once again purchased the entire building on the suit property from the Zamindar Sekh Anwar-Usufzama and thus became the owner of the entire suit property on 6th of August, 1967. Since the respondents had sought to interfere with the possession of the plaintiff-appellant in respect of the suit property, he was constrained to file the suit for declaration and permanent injunction.

6. The respondents entered appearance and contested the suit by filing a written statement inter alia denying the material allegations made in the plaint. The respondents denied that the suit property was situated on Plot No. 4934 alleged to have been purchased by the plaintiff-appellant. They further pleaded that the suit property was in

village Hardwali under the Zamindari of Pt. Sukhdeo Sahay Dubey. The respondents, however, admitted that the plaintiff-appellant was the rightful owner of only one room in the building on the suit property that belonged to Mr. Rajjan, which the plaintiff-appellant had purchased from him. Accordingly, the defendants-respondents sought dismissal of the suit.

7. Issues were framed and parties went into trial after recording evidence in respect of their respective claims. The learned Munsif, Banda, on consideration of the entire evidence on record, oral and documentary, by a Judgment and decree dated 7th of April, 1973 decreed the suit of the plaintiff-appellant inter alia holding that the suit property had been identified by a Survey Commission as described by the plaintiff-appellant and that the claim of the plaintiff-appellant was supported by the fact that the possession of the plaintiff-appellant in respect of one room of the building on the suit property was not disputed by the defendants-respondents.

8. Feeling aggrieved by the judgment of the trial Court, two sets of appeals namely, Civil Appeal No. 31 of 1973 and Civil Appeal No. 39 of 1973 were preferred before the Court of the Second Additional District Judge, Banda at the instance of the defendants-respondents.

9. The First Appellate Court, after hearing the learned counsel for the parties and after considering the evidence, oral and documentary, on record and also the judgment and decree of the trial Court, allowed both the appeals and set aside the judgment of the trial Court only on the ground that the Survey Report of the Commissioner was not acceptable and believable and the respondent No. 7 Ram Kishore was in possession of the suit property. While setting aside the Judgment of the trial Court, the Appellate Court also held that the plaintiff-appellant was not the owner of the suit property.

10. Feeling aggrieved by the judgment of reversal, the plaintiff-appellant filed a second appeal before the High Court of Allahabad and the High Court, on consideration of the report of the Commissioner as well as the findings of the trial Court and after considering the findings of the Appellate Court also held that the report of the Commissioner would not at all be relied upon as the fixed points relied upon by him were on the basis of maps, which were not correctly traced. The High Court further held that since the evidence on record was entirely in favour of the respondents, the plaintiff-appellant had failed to prove that the suit property alleged to have been purchased by the appellant was the same land for which a

decree for permanent injunction was sought for. Finally, the High Court, by the impugned judgment, dismissed the Second Appeal only on the ground that the judgment of the First Appellate Court was concluded by pure findings of fact and, therefore, the question of interfering with such findings of fact in Second Appeal would not arise at all.

11. Feeling aggrieved by this judgment of the High Court, passed in the Second Appeal, this Special Leave Petition was filed in this Court, which on grant of leave, was heard in presence of the learned counsel for the parties.

12. We have heard the learned counsel for the parties and examined carefully the judgment of the High Court in Appeal, which is impugned before us, and also the judgments of the courts below and other materials on record. Having heard the learned counsel for the parties and after going through the judgments of the High Court as well as of the courts below and the materials on record, we are of the view that the High Court was not justified in holding that the Second Appeal was concluded by the findings of fact without considering the material and documentary evidence already on record. It appears that the trial court, after recording evidence, and

perusal of documents and considering the extract of khewat dated 20th of June, 1968 and dated 8th of February, 1971 and the Report of the Commissioner dated 26th of March, 1970 and other evidences on record, oral and documentary, had decreed the suit of the plaintiff-appellant which was reversed by the first appellate court *inter alia* on the ground that the Report of the Commissioner was not believable and acceptable and that Ram Kishore (respondent No.7) was in possession of the building on the suit property ignoring the documentary evidences and the location of plot No.4934. The High Court in its impugned judgment had affirmed the findings of fact arrived at by the first appellate court, which had reversed the judgment of the trial court and then held that the second appeal was concluded by the findings of fact. Unfortunately, the High Court, while affirming the findings of the Appellate Court, had failed to consider the khatauni and khewat in respect of the suit property at all, which, in our view, were material documents to come to a correct finding on the question of fact in the above-mentioned case. It was the duty of the High Court, while coming to a finding of fact or to accept the findings of first appellate court, to take into consideration the record particularly the extract of khatauni and khewat in respect

of the suit property. At the same time, in our view, the High Court had failed to take into consideration the admission made by the respondents in their evidence that the appellant was living in one room, built by one Rajjan who had executed the sale deed in favour of the plaintiff-appellant. Therefore, in our view, non-consideration of these materials on record would be a ground to set aside the judgment of the High Court because the findings of the High Court must be held to be contrary to the documents already on record. That being the position, we are of the view that the judgment of the High Court passed in the aforesaid second appeal is liable to be set aside because the High Court, while affirming the judgment of the first appellate court, had ignored material, oral and documentary evidence on record, as noted herein earlier, were material documents to arrive at a just decision in the appeal.

13. The learned counsel appearing for the respondent, however, submitted before us that in exercise of jurisdiction under Article 136 of the Constitution, it was not open for this Court to interfere with the concurrent findings of fact which can only be exercised very sparingly and in case of manifest injustice. According to him, so far as this appeal is concerned, there is no such manifest injustice being caused

to the appellant by accepting the concurrent findings of fact arrived at by the High Court. In **Othayath Lekshmy Amma and Another vs.Nellachinkuniyil Govindan Nair & Ors., JT 1990 (3) SC 230**, this Court, while considering the constitutional power under Article 136 of the Constitution, following earlier judgments of this Court, namely, **Basudev Hazra vs.Meutiar Rahaman Mandal, 1971 (3) SCR 378** and **Bhanu Kumar Shastri vs. Mohan Lal Sukhadia and others, 1971 (1) SCC 370**, held that infirmity of excluding, ignoring and overlooking the abundant materials and the evidence, which if considered in the proper perspective would have led to a conclusion contrary to the one taken by both the High Court as well as the First Appellate Court, it would be open to this court to interfere with concurrent findings of fact arrived at by the High Court and the first appellate court. In view of the aforesaid, we are, therefore, of the view that the submission of the learned counsel for the respondents cannot be sustained. That apart, the High Court, while affirming the findings of the first appellate court, had reversed the findings of the trial court which had also considered the materials on record including the aforesaid oral and documentary evidences referred to hereinabove.

14. For the reasons aforesaid, we set aside the impugned judgment of the High Court and remit the case back to the High Court for fresh consideration in the light of the observations made hereinabove. Since the Second Appeal is of the year 1976, we request the High Court to dispose of the same on merits within three months from the date of communication of this Order to it.

15. The appeal is allowed to the extent indicated above. There will be no order as to costs.

.....J.
[TARUN CHATTERJEE]

New Delhi; ..J.
September 10, 2009. [AFTAB ALAM]