A SWARN K. JAIN

v.

RAVI MAHAJAN AND ORS.

(Civil Appeal No. 5471 of 2000)

APRIL 2, 2008

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[DR. ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

Transfer of Property:

C *Suit for possession – Omission by plaintiff to give details as to when the cause of action arose – No infirmity in finding of High Court that the omission was deliberate and not inadvertent – Hence, no case for interference by Supreme Court – J & K Transfer of Property Act, 1977 – s.138 – Transfer* D *of Property Act, 1882.*

In a suit for possession, the plaintiff alleged that the defendant had encroached upon his land and bounded the same by a boundary wall. It was alleged that when the plaintiff objected to illegal occupation of suit land by the E **defendants, the latter in turn offered to purchase the land, but negotiations for sale of the suit land did not materialize and illegal occupation by defendants over the suit land is continuing.**

F **The defendants took the stand that the plaintiff by his own act and conduct was estopped from filing the suit in question as he had pocketed the entire sale consideration. They further submitted that the plaintiff purposefully did not mention when the cause of action** G **arose and this omission was not inadvertent but willful.**

When the High Court referred to three money receipts, the plaintiff did not say a word as to how and under what circumstances they were executed. The plaintiff also feigned ignorance as to when construction of boundary

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wall was raised. The High Court ultimately came to a finding that omission by the plaintiff to give details of the cause of action was intentional. The said finding is challenged in the present appeal.

Dismissing the appeal, the Court

HELD:1. It was required of the plaintiff to lead as to how the writing came into existence as regards receipt of money. No detail about cause of action was mentioned and no date was also indicated when the construction was made. [Para 8] [1034-F]

2. The finding of High Court does not suffer from any infirmity. The High Court has elaborately discussed as to why it came to the conclusion that the omission regarding cause of action was deliberate and was not inadvertent omission. This was a case where no interference is called for with the well-reasoned order of the High Court. [Paras 10, 11] [1035-D, E & F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5471 of 2000

From the final Judgment and Order dated 19.07.1999 of the High Court of Jammu & Kashmir at Jammu in L.P.A. (C) No. 8 of 1993.

Naresh Kaushik, Lalita Kaushik, B.S. Methaila, Amita Kalkal, Parag Goyal and Satish D. for the Appellant.

S.R. Singh, Bimal Roy Jad and Sunita Pandit for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment of a Division Bench of the J & K High Court reversing the judgment of learned Single Judge of the High Court.

2. Background facts in a nutshell are as follows:

A 3. Stand of the defendants who were the appellants before the High Court was that the plaintiff by his own act and conduct is estopped from filing the suit in question seeking possession from the defendants as he had pocketed the entire sale consideration and was not entitled to claim relief. It was also B submitted that the cause of action when arose was not purposefully mentioned by the plaintiff and this omission is not inadvertent but is willful. Reference was also made to Section 138 of the J & K Transfer of Property Act, 1977 (1920 AD). Plaintiff's advocate contended that the doctrine of part C performance as embodied in the Transfer of Property Act, 1882 (Central Act), does not find mention in the Act and, therefore, defendants being tress-passers claim of the plaintiff cannot be defeated.

4. The High Court referred to three documents i.e. receipts D dated 30.1.1974, 19.11.1973 and 23.3.1974. While appearing as PW-1, the plaintiff did not say a word as to how and under what circumstances the documents were executed. He also admitted the execution of the documents and construction of boundary wall having been done by the defendants. However, E he feigned ignorance as to when the construction was raised. The height of the wall and the defendants having access to the passage were admitted. In the last line of the statement he admitted that within one or two years after receipt of the money he saw the defendants had constructed the boundary wall. The F Division Bench found that the omission to give details when the cause of action arose to the plaintiff for maintaining the suit against the defendants was purposeful and intentional. Had these facts been specifically pleaded, defendants would have controverted them. Despite this omission, defendants pleaded their case and disputed the claim of the plaintiff. No replication G was filed. High Court referred to Section 138 of the J & K Act which reads as follows:

> '"138. Transfer of immovable property after due registration -

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(1) No transfer of immovable property except in a case governed by any special law to the contrary, shall be valid unless and until it is in writing registered and (the registration thereof has been completed in accordance with Sub-section (3) of Section 61 of the Registration act, 1977).

(2). No Court shall entertain a suit for pre-emption in respect of transfer of any such immovable property unless the transfer complies with the provision of sub-section (I).

(3). No person shall take possession of or commence to build or build on any land in Province of Kashmir which has been transferred or has been contracted to be transferred to him unless and until such transfer becomes valid under the provision of sub-section (1).

(4). No person who has obtained a transfer of immovable property referred to in sub-section (1) shall apply for and obtain from any Revenue or Settlement Officer or Court any alteration in any existing entry in any settlement record of paper, unless such person produces before such officer or court a duly executed registered instrument (the registration whereof has been completed in the manner specified in sub-section (1).

And no such officer or court shall alter or cause to be altered any such entry except upon tide production of an instrument registered in the aforesaid manner:

Provided that nothing in his section applied to a lease of agricultural land for one year or to a lease of any other land for a period not exceeding seven years.

Provided also that nothing in sub-sections (3) and (4) shall be deemed to apply to transfers by will or by any rule of interstate succession or by the operation of the law of survivorship."

5. After referring to sub-section (1) of Section 138 the High

A Court found that the transfer has to be in writing and registration has to be completed in accordance with sub-section (3) of Section 61 of the Registration Act (1977 BK). Sub-section (3) of Section 138 has no application to the province of Jammu and it only applies to province of Kashmir. It was noted that B Section 138 (3) bars taking possession, building etc. only in the province of Kashmir. This omission relating to Jammu province has not at all been adverted to by the learned Single Judge. Plaintiff continued to receive the payments from the defendants till 23rd March, 1974 as is evident from Ex.PW-3.

C 6. Stand of the learned counsel for the appellant was that the suit was filed on 16.9.1982 i.e. 8 years after the alleged date of execution of agreement. Full consideration was not paid and till 1976 Rs.5,000/- was not received. The Division Bench has not dealt with the full payment aspect as was done in detail D by the learned Single Judge. It was submitted that the omission to give details of cause of action was not intentional as held by the Division Bench.

7. In response, learned counsel for the respondents submitted that the learned Single Judge did not refer to Section E 138 of the J & K Act; but the Division Bench has analysed the legal position in detail and, therefore, no interference is called for.

8. It was required of the plaintiff to lead as to how the writing F came into existence as regards receipt of money. No detail about cause of action was mentioned and no date was also indicated when the construction was made.

9. The only averment of any substance in the plaint read as follows:

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> "That defendants No.1 also purchased the adjoining plot of land from the State of Jammu & Kashmir. After purchasing his plot, defendant No.1 has constructed his house for himself in his plot. When the house of defendant No.1 was ready for habitation he started living in the same.

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In the process, however, he encroached upon the plot of land of the plaintiff and in due course of time bounded the same by a boundary wall. He has since been using it as a courtyard. Defendant no.2 to 4 are very close relation of defendant No.1 and are living with him. They are also using the plot of the plaintiff without his permission. Though defendants No. 2 to 4 wife and sons of defendant No.1, yet they are being arrayed as defendants so as to avoid any plea by defendant No.1 about their non-joinder.

That the plaintiff objected to the illegal occupation of the land aforesaid by the defendants. He requested the defendants a number of times to vacate the suit land and hand it over to the plaintiff. The defendants, however, requested the plaintiff to sell the suit land to the defendant No.2. The negotiations for the sale of the suit land, however, did not materialize. The illegal occupation by the defendants over the suit land of the plaintiff, however is continuing."

10. The High Court's finding, as noted above, does not suffer from any infirmity.

11. The Division Bench has elaborately discussed as to why it came to the conclusion that the omission regarding cause of action was deliberate and was not inadvertent omission. This was a case where no interference is called for with the well-reasoned order of the Division Bench.

12. The appeal is dismissed without any order as to costs.

B.B.B. Appeal dismissed.