

(2010) 07 BOM CK 0146
In the Bombay High Court
Case No : Second Appeal No. 204 of 2009

Deepak Chaturaji Tabhane

APPELLANT

Vs

Smt. Sunanda Tanmane, Shekhar Laxman Tanmane and Smt.
Chhaya Tanmane

RESPONDENT

Date of Decision : 01-07-2010

Acts Referred:

Bombay Civil Courts Act, 1869 — Section 26
Civil Procedure Code, 1908 (CPC) — Section 115, 21, 96, 99
Provincial Small Cause Courts Act, 1887 — Section 25
Suits Valuation Act, 1887 — Section 11

Citation : (2010) 4 BomCR 499 : (2010) 112 BOMLR 3219

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : R.L. Khapre, for the Appellant; A.M. Ghare, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Bhangale, J.—The instant Second Appeal is initiated at the instance of original plaintiff, challenging the judgment and order dated 24.9.2008 passed by learned District Judge-10, Nagpur in Regular Civil Appeal No. 51/2006, whereby the judgment and order passed on 21.10.2009 by learned 3rd Joint Civil Judge, Sr. Dn., Nagpur, in Special Civil Suit No. 941/2003 was set aside. Hereinafter parties will be referred to by their original status as in cause title of the suit.

2. The Appeal is taken up for final hearing by consent of learned Advocates appearing for respective parties and heard forthwith at the stage of admission itself.

3. Facts as briefly mentioned are: The plaintiff is in occupation of shop block situated at Plot No. 162, Ashok Nagar, Nagpur, where he carried on his business of General Stores, selling daily need articles, including cosmetics, etc. The defendants are the landlords. They had disconnected electrical energy to the tenements on 28.2.1997 as sub-meter of the plaintiff was installed in

defendants" premises. Being aggrieved, the plaintiff filed Regular Civil Suit No. 298/1997 which was decreed on 19.12.2002. Due to illegal disconnection of the electric supply by the defendants, the plaintiff claimed that he has sustained colossal loss as customers were not visiting his shop and the plaintiff was required to shut down the shop after 6 o'clock. Furthermore, he was unable to run his business in summer season and for about six years his business suffered extensively, thereby causing loss to the tune of Rs. 6 lakhs. The defendants had denied status of the plaintiff as tenant and denied having disconnected electric supply and also denied contentions of the plaintiff as to staggering loss in business. The defendants contended that suit was barred by limitation and that there was no cause of action to file the suit. According to defendants, the plaintiff had already vacated the suit shop and contended that since last 7-years, the suit premises were locked and alleged that plaintiff is interested in extracting unfair/wrongful gains from the defendants. The defendants demanded rent at the rate of Rs. 200/- p.m. for past three years. It is also contended that the trial Court had no jurisdiction to try and entertain the suit. The defendants counter claimed Rs. 7,200/- towards rent for three years and submitted that the Court has no jurisdiction to entertain and try the suit.

4. The trial Court held that the plaintiff sustained loss due to illegal act on the part of defendants and the plaintiff is entitled to damages and compensation/money decree, and decreed the suit by directing the defendants to jointly and severally pay compensation of Rs. 75,000/- and interest at the rate of 6 per cent per annum, from the date of suit till realization, while dismissing the counter claim.

5. The defendants challenged the judgment and decree in Regular Civil Appeal No. 51/2006 before the District Judge-10 Nagpur, who allowed the appeal by setting aside the judgment and decree passed by the trial Court and directed dismissal of SCS No. 941/2003 with costs. The first Appellate Court though held that the defendants had disconnected electric supply of shop premises, the plaintiff did not sustain any financial loss and, thus, chose to set aside the decree.

6. The learned Counsel for the appellant (original plaintiff) raised the following substantial questions of law:

(i) Whether Appeal u/s 96 of the CPC in Special Suit having valuation to the tune of Rs. 3 lakhs before District Court in view of the provisions of Section 26 of the Bombay Civil Courts Act, 1869 as Appeals up to decrees to the tune of Rs. 2 lakhs are only tenable before the District Court?

(ii) Whether lower Appellate Court failed to see that small businessman like appellant is not expected to file Sales-tax return?

(iii) Whether lower Appellate Court failed to see in view of finding that respondents have illegally cut down the electricity of the shop of appellant and as such he could not carry on with his regular business should have held that by itself entitles appellant to claim damages for wrongful disconnection of electric

supply?

(iv) That, the learned lower Appellate Court committed error in not taking into consideration statement on oath as made by the appellant that he has maintained rough account and has also produced accounts for the period from 1986 to 1993 and has also stated that he is earning profit in his business till disconnection of electric supply. Hence assessment of damages by trial Court is just and proper.

(v) Whether lower Appellate Court failed to see that even if wages of Class-4 employees are calculated he can also easily earn Rs. 3000/- p.m. Which comes to Rs. 36,000/- per year and therefore damages as given by the trial Court to the tune of Rs. 25,000/- per month is just and proper?

(vi) Whether in civil suit damages can be calculated on the preponderance of probability which requires no strict proof ?

(vii) Whether lower Appellate Court which is justified in dismissing the suit in toto without even awarding notional damages and thereby given premium to the defendants of their illegalities?"

7. Mr. R.L. Khapre, learned Counsel for the appellant, in support of appeal, contended that the learned District Judge ought not to have entertained the appeal as it exceeded the pecuniary limits of Rs. 2 lakhs. He relied upon Section 26 of the Bombay Civil Courts Act 1869, which reads thus:

26. In all suits decided by a Civil Judge of which the amount of value of the subject-matter exceeds two lakhs rupees the appeal from his decision shall be directed to the High Court.

Learned Counsel for appellant (original/defendant), therefore, contended that memo of appeal ought to have been returned for presentation to the High Court. Reference is made to the ruling in Nirmal Quality Products Vs. Contey Industries and Another, , in which it was held that pecuniary jurisdiction of the Appellate Court to hear appeals depend upon valuation in the plaint and not on the amount decreed by the Court. In other words, the forum of appeal is determined on the basis of valuation of the suit and not on the basis of valuation of the appeal which would be sometimes lesser than the valuation of the suit if plaintiff's claim is partly decreed. Thus, if the claim made by the plaintiff in suit is exceeding Rs 2 lakhs, the appeal would lie directly to the High Court.

8. Learned Counsel also made reference to another single Judge decision in the case of The Digamber Parshwanath Jain Mandir Vs. Valubai, {Shah, J.} to submit that the plea as to jurisdiction of the court which goes to the root of the matter can well be taken even in the highest court of the land, because it is duty of the higher courts to see that none of the subordinate courts exercises jurisdiction which the legislature has not thought fit to confer upon it.

Learned Counsel for the appellant, then, referred to the ruling in Gurunathappa

Deekappa Vs. The Dharwar Municipality, , in which case when a suit of small cause nature was tried as a regular suit by the Judge who did not have small cause court powers. The suit was decreed in part and the appeal therefrom was dismissed. In Second Appeal, it was found that suit was of small cause nature and no second appeal lay. It was held that the suit having been tried in the ordinary way the High Court could entertain it by converting it as Revision u/s 115 CPC. But that procedure would prejudice the appellant because if the suit had been tried by a small Cause Court Judge the appellant would have had a right to come to the High Court u/s 25 of the Provincial Small Cause Courts Act. In the circumstances, therefore, the suit should be recommended for re-trial by a Judge invested with small cause Court powers.

9. Mr. A.M. Ghare, learned Counsel for the respondents opposed contentions advanced on behalf of appellants and contended that the rulings cited by the appellant are not applicable in the facts and circumstances of the present case as no objection as to his jurisdiction was taken by the appellant before learned District Judge at appellate stage and, furthermore, no prejudice is shown to have occasioned as every point was considered in the suit by the Court below after recording evidence. Since no objection was raised as to jurisdiction of the Court, then the Court must assume that the party has submitted to the jurisdiction of the Court. Learned Counsel for the respondents made a reference to the ruling in National Textile Corporation Ltd. and Another Vs. S.D. Sobharam, . In Para 10, this Court observed that it is well-settled that if a person does not object to the jurisdiction of the Court then the Court must assume that the party has submitted to the jurisdiction of the Court and the Court must proceed on that basis.

Reference is then made to the ruling in Pathumma and Others Vs. Kuntalan Kutty Dead by Lrs. and Others, , more particularly para No. 3 thereof. Learned Counsel submitted that three conditions were essential i.e. (i) the objection as to jurisdiction of the court ought to have been taken in the Court of first instance; (ii) at the earliest possible opportunity at or before settlement of issues; (iii) it ought to be demonstrated that there has been consequent failure of justice. Thus, as observed by the Hon"ble Apex Court unless those conditions co-exists, the objection is not sustainable.

In Smt. Krishnalata Sharma (Bahad) and Others Vs. Shri Anilkumar Dhanwate, , in para No. 4 it is observed thus:

In his written statement, no objection whatsoever was taken to the jurisdiction of the Small Causes Court at Nagpur either because of pecuniary limits or because of territorial limits. Such objection as per Section 21 of the CPC is required to be taken in the court of first instance at the earliest possible opportunity and in no case after the issues are settled.

Section 21 of the CPC reads thus:

21: Objection to jurisdiction:

(1) no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revision Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.

10. In *Shri Basant Kumar Jain Vs. Chief Executive Officer, Maharashtra Industrial Development Corporation, Regional Officer, Maharashtra Industrial Development Corporation and Maharashtra Industrial Development Corporation*, , it is held with reference to settled law that objection to the territorial and pecuniary jurisdiction of the court is "the most technical of technicalities" and that such a technicality can not be allowed to be used to set aside the decree on the technical ground. Even if it is held that because of under-valuation Civil Judge JD had no pecuniary jurisdiction to try the suit, the defendants have to further demonstrate that they have suffered prejudice resulting in consequent failure of justice on merits.

11. In the facts and circumstances of the present case, it is clear that no objection as to jurisdiction of the court was raised in the appellate court (District Court) and the appeal was allowed to be decided on merits. It cannot be said that appellant was not aware of Section 26 of the Bombay Civil Courts Act when appeal was heard. Therefore, Therefore, question of jurisdiction cannot be allowed to be raised at the belated stage of Second Appeal. Plea not taken up in the appellate court cannot be raised at this stage. The right of appeal is neither natural or inherent right attached to the litigation. Being substantive statutory right it has to be regulated according to law in force.

12. It is held in *Kiran Singh and Others Vs. Chaman Paswan and Others*, {(4 Judge Bench}

The policy underlying Sections 21 and 99 of CPC and Section 11 of the Suits Valuation Act is the same, namely that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds unless it had resulted in failure of justice and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been prejudice on merits....

It was held further that mere change of forum is not prejudice within the meaning of Section 11 of the Suits Valuation Act. Legal position is thus clear that unless consequent failure of justice has occasioned, no objection as to jurisdiction both territorial and pecuniary can be entertained in appeal or in Revision. The policy of law is to treat objections as to jurisdiction, both territorial and pecuniary, as technical and not to be entertained by the Appellate or Revisional Court unless there has been prejudice on merits. Such objections are required to be taken in the Court of first instance at earliest opportunity before the case is heard on merits. Thus, all three conditions envisaged in Section 21 of the CPC are required to be satisfied before the jurisdiction of the Court can be ousted.

13. On merits, the first Appellate Court did not find any reliable or convincing material to believe that the tenant had suffered loss or damages as pleaded consequent to disconnection of electricity supply by the landlord. The tenant could not establish his financial profits and loss account during the relevant period when there was no electric supply to the shop premises. Even otherwise, due to advent of modern day electronic gadgetary, such as, battery operated lights and inverters, it cannot be said that for period of three years or more the tenant was dependent upon electricity supply from landlord to carry on his business. The first Appellate Court has correctly appreciated the evidence on record and reached the right conclusion. No fault can be found with impugned judgment and order when the trial Court in the facts and circumstances erred in awarding damages and therefore, the judgment and order of the trial Court was set aside. No substantial questions of law as contended arose. Hence the Appeal fails and is dismissed.