

(2012) 02 BOM CK 0145
In the Bombay High Court
Case No : Second Appeal No. 164 of 2011

Mr. William Rosario Fernandes

APPELLANT

Vs

Mr. Pascoal Fernandes and Another

RESPONDENT

Date of Decision : 02-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 32

Citation : (2012) 3 ALLMR 818

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : Sudesh Usgaonkar, for the Appellant; A.F. Diniz, for the Respondent

Judgement

F.M. Reis, J.—Heard Shri Sudesh Usgaonkar, learned Counsel appearing for the appellant and Shri A.F. Diniz, learned Counsel appearing for the respondents. Admit on the following substantial question of law:

Whether the Lower Appellate Court was justified to award interest at the rate of 12% per annum from the date of filing of the suit up to the actual payment and modifying the rate of interest awarded by the learned Trial Judge at the rate of 6% per annum without any cross objection or appeal preferred by the respondents ?

2. Heard forthwith by the consent of the learned Counsels.

3. Learned Counsel appearing for the respondents waives service.

4. The above appeal challenges the judgment passed by the Courts below whereby the Lower Appellate Court has partly allowed the appeal preferred by the appellant and directed that the respondents are entitled to the sum of Rs. 1,34,000/- together with interest accrued thereon at the rate of 12% per annum from the date of the filing of the suit till the actual payment.

5. Shri Sudesh Usgaonkar, learned Counsel appearing for the appellant has

assailed the impugned judgment essentially on the ground that the Courts below have erroneously come to the conclusion that the appellant is liable to pay the said amount when there was no evidence adduced by the respondents to establish that the cost of work done by the respondents was to the tune of Rs. 4,84,000/- as claimed by them. The learned Counsel pointed out that the Courts below have erroneously discarded the report of Shri Bhende who had categorically stated that the value of the work done by the respondents was to the tune of Rs. 3,73,848.30. The learned Counsel further pointed out that the question of discarding his report merely because he was not available for recording his evidence as he had expired does not justify the Court not to consider the said evidence in view of the provisions of Section 32 of the Evidence Act. The learned Counsel further pointed out that the signature on the report has been identified by the assistant of said Shri Bhende and as such, the said document ought to have been considered by the Courts below. The learned Counsel further pointed out that the learned Trial Judge whilst disposing of the suit filed by the respondents had awarded interest at the rate of 6% per annum and the Lower Appellate Court had enhanced the said interest at the rate of 12% per annum without any cross objection filed by the respondents nor any submissions having been raised by the respondents on that count. The learned Counsel further pointed out that grave prejudice has occasioned to the appellant as he was not heard on that aspect by the Lower Appellate Court whilst awarding the interest at the rate of 12% per annum. The learned Counsel as such submitted that the substantial questions of law arise in the present appeal to be considered by this Court.

6. Shri A.F. Diniz, learned Counsel appearing for the respondents has supported the impugned judgment. The learned Counsel has pointed out that the contentions raised by the appellant are substantial questions of facts which cannot be re-appreciated by this Court in exercise of jurisdiction u/s 100 of Civil Procedure Code. The learned Counsel has taken me through the judgment of the Trial Court and pointed out the findings at paras 37 and 38 thereof and submitted that the evidence of PW3 who was a neutral witness has been accepted by the Court below whilst disposing of the suit filed by the respondents. The learned Counsel has also taken me through the findings of the Lower Appellate Court and pointed out that the Lower Appellate Court has also given concurrent findings after re-appreciating the evidence in respect of the evidence of PW3. The learned Counsel has also taken me through the judgment passed by the Lower Appellate Court and pointed out that the learned Judge after appreciating the evidence on record has considered the evidence of PW1 and PW3 as well as the documents produced by the respondents together with the bills submitted by the respondents and has come to the conclusion that the respondents have established that the appellant is liable to pay the amount as decreed by the Lower Appellate Court.

7. With regard to modification by the Lower Appellate Court with regard to the rate of interest, Shri Diniz, learned Counsel appearing for the respondents fairly

conceded that no cross objection were filed by the respondents challenging the rate of interest nor there were any submissions to that effect advanced at the time of the hearing of the appeal nor the impugned judgment of the Lower Appellate Court reflect that any such submissions were advanced by the learned Counsel appearing on behalf of the respondents.

8. Having heard the learned Counsel appearing for the respective parties and on perusal of the records, with regard to the contention of the learned Counsel appearing for the appellant to the effect that the Courts below have erroneously come to the conclusion that the appellant is liable to pay the said sum of Rs. 1,34,000/- together with interest, I find that both the Courts below after appreciating the evidence on record have come to the conclusion that the appellant is liable to pay the said amount. The report of Shri Bhende has been rightly rejected by the Courts below essentially on the ground that there is no corroborative evidence adduced by the appellant to support the report of the said Shri Bhende. It is well settled that merely because the document is marked as an exhibit does not by itself prove the contents of such document and as such it was incumbent upon the appellant to adduce corroborative evidence to substantiate the disclosures made in such report. On perusal of the judgment passed by the Courts below, I find that the appellant has failed to adduce such evidence in support of his claim that the value of the total work done by the respondents was not to the tune of Rs. 4,84,000/-. In any event, both the Courts below on the basis of evidence on record as well as the documents produced by the parties accepted the document at Exhibit PW1/A Colly and appreciating such evidence have concurrently come to the conclusion that the appellant is liable to pay the said sum of Rs. 1,34,000/- to the respondents in respect of the work of the construction carried out to the bungalow. The claim of the respondent No. 1 with regard to the flat has been rejected by the Lower Appellate Court nor any appeal preferred against the said portion of the judgment. Hence, the first contention of the learned Counsel appearing for the appellant deserves to be rejected, as no substantial question of law arises in this appeal on such count.

9. With regard to the rate of interest awarded by the Lower Appellate Court at the rate of 12% per annum, it is admitted fact that there is no contractual rate fixed with regard to the payment of any such interest to the respondents. Apart from that, the respondents have not filed any cross objection assailing the rate of interest awarded by the Trial Court. The judgment of the Lower Appellate Court also does not reflect any such submission was advanced by the respondents for modifying the rate of interest. Hence, it was not open to the Lower Appellate Court to enhance the rate of interest at the rate of 12% per annum without giving any opportunity to the appellant to be heard on that aspect. Hence, the rate of interest awarded by the Lower Appellate Court at the rate of 12% per annum cannot be sustained and the rate of interest as awarded by the Trial Court at the rate of 6% per annum is to be accepted. The substantial question of law is answered accordingly. In view of the above, I pass the following:

ORDER

(i) The appeal is partly allowed.

(ii) The impugned judgment dated 18.01.2011 passed by the Lower Appellate Court is modified and the appellant is directed to pay the said sum of Rs. 1,34,000/- together with interest at the rate of 6% per annum from the date of filing of the suit up to the actual payment to the respondent No. 1.

(iii) The appeal stands disposed of accordingly with no order as to costs.