(2011) 01 BOM CK 0026

In the Bombay High Court

Case No : Second Appeal No. 18 of 2002

Shri Atchut Shirodkar APPELLANT

Vs

Dias Luis and Associates and Others RESPONDENT

Date of Decision : 19-01-2011

Acts Referred:
Contract Act, 1872 — Section 29
Partnership Act, 1932 — Section 69

Citation : (2011) 113 BOMLR 273

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

Bench : Single Bench

Advocate : A.D. Bhobe, for the Appellant; C. Dias, for Respondent Nos. 1, legal representatives of Respondent No. 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

A.P. Lavande, J.—Heard Mr. Bhobe, learned Counsel appointed under Legal Aid Scheme for the Appellant. Mr. C. Dias, learned Counsel for Respondent No. 1, legal representatives of Respondent Nos. 2 and 3, is absent. Respondent No. 4 though served, is absent.

2. By this Second Appeal, the Appellant takes exception to the judgment and decree dated 31st August, 2001 passed by Additional District Judge, South Goa, Margao in Regular Civil Appeal No. 187/2000 allowing the appeal preferred against the judgment and decree dated 19th October, 2000 passed by the II Ird Additional Civil Judge, Senior Division, Margao in Special Civil Suit No. 115/1994/ III.

3. The Appellant filed the above suit against the Respondents/ Defendants seeking recovery of an amount of Rs. 42,150/- - Rs. 30,000/- being principal amount and Rs. 12,150/- being the interest at the rate of 18 % p.a. till the date of filing of the appeal and further interest at the rate of 18 % p.a. from the date of filing of the suit till payment.

4. The Plaintiff filed the above suit on the ground that by declaration-cum-receipt dated 10th December, 1991, the Defendants had acknowledged receipt of Rs. 30,000/- by the Defendants. According to the declaration-cum-receipt, an amount of Rs. 30,000/- was paid to the Defendants out of which Rs. 10,000/- was paid to the Plaintiff on 5th December, 1991. The said declaration-cum-receipt was executed before the Notary at Margao.

5. The suit was contested by the Defendants by filing written statement. According to the Defendants they did not owe any amount to the Plaintiff. According to the Defendants, the Plaintiff represented to the Defendants that there was property belonging to one Manuel Alemao bearing Survey No. 108/1 and said Alemao was his friend and was interested in selling the property.

6. The Plaintiff represented to them that he would negotiate with said Alemao to sell the said property to the Defendants and ask them to pay a sum of Rs. 30,000/- for the said transaction. The Defendants agreed and out of the said amount, they paid Rs. 10,000/- in advance and balance amount of Rs. 20,000/- was to be paid after sale deed was finalised. It was further the case of the Defendants that declaration was typed at the instance of the Plaintiff and the same was signed by the Defendants. The Defendants further contended that the transaction of sale of the property did not materialize and as such, not only the Plaintiff was not entitled to any amount, but he was bound to refund the amount of Rs. 10,000/-.

7. On the basis of the pleadings of the parties, the trial Court framed the following issues:

(i) Whether the Plaintiff proves that he is entitled to recover Rs. 42,150=00 from the Defendants ?

(ii) What relief, what order ?

(iii) Whether the present suit is bad in law as the suit is filed against the unregistered partnership firm ?

(iv) Whether the Defendants prove that the suit filed by the Plaintiff is barred by limitation ?

8. In Special Civil Suit No. 115/1994/III, the Plaintiff examined himself and produced declaration-cum-receipt Exh.14. On behalf of the Defendants, Gonsalo Luis- Defendant No. 3-DW1 and Antonio D''Souza-DW2 were examined.

9. The trial Court upon appreciation of evidence partly decreed the suit and ordered the Defendants to pay an amount of Rs. 20,000/- with interest at the rate of 18 % p.a. from the date of the suit i.e. 4th April, 1994 till payment.

10. The Defendants filed Regular Civil Appeal No. 187/2000 to the District Judge, South Goa, Margao, which was made over to Additional District Judge, South Goa, Margao, who by judgment and decree dated 31st August, 2001 allowed the appeal. The lower appellate Court held that the suit was not maintainable in

terms of Section 69 of the Indian Partnership Act, 1932 (''The Act'' for short). It was further held that the document dated 10th December, 1991 - exhibit 14 was vague and since the contract was void being uncertain, the same could not be enforced.

11. This appeal was admitted on the following substantial questions of law:

(i) Whether Section 69 of the Indian Partnership Act was at all applicable to the case when it was clear from the material on record that the Appellant/ original Plaintiff was neither a partner/ nor he claimed to be a partner of the Respondent/ original Defendant ?

(ii) Whether when the Appellant/ original Plaintiff had approached the Court with the pleading that the Respondent had borrowed the money from him for the purpose of development of the property and had produced the declaration-cum-receipt at exhibit 14, the appellate Court could hold that the said document was vague and/or hit by Section 29 of the Indian Contract Act ?

12. Mr. Bhobe, learned Counsel appearing for the Appellant submitted that the lower appellate Court has erred in invoking Section 69 of the Act which is not clearly attracted since the suit was not filed by the partner of the firm and, therefore, the finding of the lower appellate Court that the suit was not maintainable is clearly unsustainable in law. He further submitted that the document dated 10th December, 1991- exhibit 14 cannot be termed as uncertain or void and the said document clearly discloses that the Defendants had received an amount of Rs. 30,000/- from the Plaintiff out of which an amount of Rs. 10,000/- was paid to the Plaintiff and as such, the trial Court was justified in partly decreeing the suit. According to Mr. Bhobe, the trial Court had correctly appreciated the evidence on record and partly decreed the suit.

13. As stated above, the trial Court upon appreciation of the evidence led by the parties held that the declaration-cum-receipt - exhibit 14 dated 10th December, 1991 which was executed before the Notary clearly established that the Defendants had taken Rs. 30,000/- from the Plaintiff out of which an amount of Rs. 10,000/- was already paid to the Plaintiff on 5th December, 1991. The learned Judge further held that the version of the Plaintiff that the Defendants owe Rs. 30,000/- could not be accepted. However the document clearly established that the balance amount of Rs. 20,000/was due and payable by the Defendants to the Plaintiff. The trial Court did not accept the version of the two defence witnesses on the ground that it was contrary to the documentary evidence i.e. exhibit 14.

14. As stated above, the lower appellate Court allowed the appeal primarily on the two grounds that the suit was not maintainable u/s 69 of the Act and secondly on the ground that the document exhibit 14 was vague and/ or hit by Section 29 of the Indian Contract Act.

15. In so far as the first finding given by the lower appellate Court is concerned,

bare perusal of Section 69 of the Act discloses that the learned Judge has clearly fallen into error in holding that Section 69 of the Act was attracted in the present case. Subsections (1) and (2) of Section 69 of the Act which are relevant for deciding the issue read thus:

69. Effect of non-registration - (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

16. From the plain reading of the Section 69(1) and (2), it is clear that both subsections of Section 69 are not attracted in as much as the suit was not filed by the Plaintiff claiming to be partner of Defendant No. 1- firm. Therefore, the finding recorded by the lower appellate Court that the suit was not maintainable in view of Section 69 of the Act is patently unsustainable in law and deserves to be set aside and is hereby set aside.

17. In so far as the finding given by the lower appellate Court that the document exhibit 14 was vague and/ or hit by Section 29 of the Indian Contract Act is concerned, I find that the lower appellate Court has also fallen into error in holding so. From plain reading of the said document, it is clear that by the said document, the Defendants had acknowledged that an amount of Rs. 30,000/- was paid by the Plaintiff to the Defendants out of which an amount of Rs. 10,000/- was repaid to the Plaintiff on 5th December, 1991. It is also pertinent to note that the Defendants did not dispute that they had executed this agreement. In this factual background, in my opinion, the trial Court was perfectly justified in placing reliance upon the same and holding that in terms of the said document, an amount of Rs. 20,000/- was due to the Plaintiff from the Defendants. The said document exhibit 14 can neither be termed as vague and/ or hit by Section 29 of the Indian Contract Act. Terms therein are quite certain and establish the liability of the Defendants to pay an amount of Rs. 20,000/- to the Plaintiff. Therefore, in my considered opinion, the lower appellate Court was not justified in reversing the finding of the trial Court that an amount of Rs. 20,000/- was due and payable to the Plaintiff. I, therefore, hold that the lower appellate Court was not justified in reversing the decree passed by the trial Court ordering payment of Rs. 20,000/- in favour of the Plaintiff.

18. The next question which arises for consideration is whether the trial Court was justified in awarding interest at the rate of 18 % p.a.. No doubt, an amount of Rs. 30,000/- was advanced by the Plaintiff to the Defendants by way of loan

and the agreement stipulated that interest payable would be 18 ; p.a. But this fact by itself would not entitle the Plaintiff to claim the interest at the rate of 18 % p.a. since in my opinion, the interest mentioned in the agreement dated 10th December, 1991 is highly excessive and the transaction between the Plaintiff and the Defendants was not commercial so as to justify awarding of interest at the rate of 18 % p.a. In my opinion, it would be just and proper to award the interest at the rate of 9 % p.a.

19. In view of the above discussion, the substantial questions of law are answered in favour of the Appellant. The decree of the trial Court in so far it directs payment of Rs. 20,000/- to the Plaintiff is maintained. However, the interest rate of 18 % p.a. awarded by the trial Court, is reduced to 9 % p.a. The Plaintiff shall be entitled to interest at the rate of 9 % p.a. from the date of filing of the suit till payment.

20. The appeal stands allowed in aforesaid terms. Considering that the Respondents have not chosen to appear, the parties are directed to bear their own costs.

21. The fees of Mr. Bhobe, who is appointed under Legal Aid Scheme to appear on behalf of the Appellant, are quantified at Rs. 1,500/- (Rupees one thousand and five hundred only).