

(2012) 04 BOM CK 0042
In the Bombay High Court
Case No : Second Appeal No. 118 of 2011

Smt. Asha Arun Karande

APPELLANT

Vs

Shri Ankush Rajaram Naik (since deceased) through legal heirs (Smt. Smita Ankush Naik and others), Shri Shivanand Vasudev Kamat, Smt. Sudha Pandurang Shetye, Mayem, Bicholim, Goa and Shri Jeevappa Lumana Cholekar (deceased), through his legal representative Smt. Jayashree Ashok Astekar

RESPONDENT

Date of Decision : 12-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (2012) 04 BOM CK 0042

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

Bench : Single Bench

Advocate : S.S. Kakodkar, for the Appellant; A. Dessai, Advocate and Shri J. Vaz, for the Respondent

Judgement

F.M. Reis, J.—Heard Shri S.S. Kakodkar, the learned Counsel appearing for the appellant and Ms. A. Dessai, the learned Counsel appearing for respondents no.1(a) to 1(g) and Shri J. Vaz, the learned Counsel appearing for respondents no.2 & 3. Admit on the following substantial questions of law:

(i) Whether the judgment passed by the learned lower Appellate Court stands vitiated for non-consideration of an application filed by the appellants under Order 41 Rule 27 of the CPC wherein an order came to be passed dated 9/08/2007 in Miscellaneous Civil Application No.220/2007.

Heard finally with the consent of the learned Counsel. Learned Counsel for the respondents waive service.

2. Shri S.S. Kakodkar, the learned Counsel appearing for the appellant has assailed the impugned order essentially on the ground that according to the learned Counsel the claim put forward by the plaintiff/respondent no.1 herein is

for a specific sum of money and according to him such claim is barred by law of limitation. The learned Counsel further pointed out that the lower Appellate Court has not at all considered the said aspect whilst disposing of the appeal preferred by the appellant. The learned Counsel further pointed out that according to the appellant, they had supplied the material to the respondent no.1 for the purpose of carrying out work and that the appellant had filed an application to produce some receipts with regard to the payments on such account being Miscellaneous Civil Application No.220/2007 under Order 41 Rule 27 of the Civil Procedure Code. The learned Counsel further pointed out that whilst considering the said application, this Court by an order dated 9/08/2007 had directed that the application would be considered at the time of the final hearing of the appeal preferred by the appellant. The learned Counsel further pointed out that as the said documents have not been considered the judgment passed by the lower Appellate Court stands vitiated. The learned Counsel further pointed out that even on merits the appellant is not liable to pay any amount to respondent no.1.

3. On the other hand, Ms. Asha Dessai, the learned Counsel appearing for respondent no.1/original plaintiff submits that the said respondents are entitled to recover the amount as directed by the impugned judgment. The learned Counsel further pointed out that the learned trial Judge whilst deciding the issue on limitation has considered the matter and has come to the conclusion that the suit filed by the respondent no.1 was not barred by limitation. The learned Counsel further pointed out that the evidence on record suggests that the cause of action which forced the respondent no.1 to file the suit arose somewhere in the year 1990 and the suit came to be filed immediately thereafter. The learned Counsel further submitted that the contention of the appellant to the effect that the suit is barred by limitation is misplaced and cannot be accepted. The learned Counsel fairly concedes that the order passed by this Court in Miscellaneous Civil Application No.220/2007 has not been considered by the lower Appellate Court whilst passing the impugned judgment and, consequently, the documents which were sought to be produced by the appellant were not considered by the lower Appellate Court whilst passing the impugned judgment. The learned Counsel further pointed out that considering the facts and circumstances of the case no case is made out for any interference in the impugned judgment as the said documents are irrelevant for the purpose of deciding the matter in controversy.

4. Shri J. Vaz, the learned Counsel appearing for respondents no.2 and 3 has supported the submission of the learned Counsel appearing for the appellant. The learned Counsel further pointed out that the respondents have also produced other material in support of their contention that respondent no.1 is not entitled to claim the amount as decreed by the Courts below.

5. Having heard the learned Counsel and on perusal of the record and considering that the documents sought to be relied upon by the appellant under Order 41 Rule 27 of the CPC have not been considered by the lower Appellate Court whilst passing the impugned judgment, I find it appropriate that the

learned Judge be directed to decide the appeal preferred by the appellant afresh after hearing the parties in accordance with law. The rival contentions of the learned Counsel with regard to the point of limitation and on merits are matters which the learned Judge will have to decide afresh after hearing the parties in accordance with law. At this stage, considering that the application filed by the appellant under Order 41 Rule 27 of the CPC has not been considered by the lower Appellate Court by itself would vitiate the impugned judgment passed by the lower Appellate Court. Apart from that, I find no substantial reasons given by the lower Appellate Court whilst deciding the point of limitation.

6. Be that as it may, taking note of what has been stated herein above and without giving any findings on merits about the rival contentions, I find it appropriate that the impugned judgment passed by the lower Appellate Court dated 17/12/2010 deserves to be quashed and set aside and the appeal preferred by the appellants be remanded to the lower Appellate Court to decide the Regular Civil Appeal No.96/2010 afresh after hearing the parties in accordance with law. The substantial question of law is answered accordingly. In view of the above, I pass the following order:

O R D E R

(i) The appeal is partly allowed.

(ii) The impugned judgment dated 17/12/2010 and the decree dated 20/12/2010 passed in Regular Civil Appeal No.96/2010 is quashed and set aside.

(iii) Regular Civil Appeal No.96/2010 is restored to the file of the learned Additional District Judge, Panaji.

(iv) The learned Additional District Judge is directed to decide the appeal afresh after hearing the parties in the light of what has been stated herein above, in accordance with law.

(v) All the contentions of the parties on merits are left open.

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

(vii) The parties are directed to appear before the learned Judge on 2/07/2012 at 10.00 a.m.