

(2017) 06 BOM CK 0045
In the Bombay High Court
Case No : 327 of 2003

The Chief Officer, Nagar Parishad, Morshi	APPELLANT
Vs	
Laxminarayan S/o Jainarayan Jaiswal	RESPONDENT

Date of Decision : 30-06-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 100](#)/
[Section 100\(5\)](#) - Second appeal - Second appeal
[Limitation Act, 1963](#), [Section 3](#) - Bar of
limitation

Citation : (2017) 06 BOM CK 0045

Hon'ble Judges : A.S. Chandurkar

Bench : SINGLE BENCH

Advocate : A. B. Patil, A. J. Gilda

Final Decision : Allowed

Judgement

1. This appeal filed under Section 100 of the Code of Civil Procedure, 1908 takes exception to the judgment dated 2032003 in Regular Civil Appeal No.215/1999 thereby partly modifying the decree passed by the trial Court in Regular Civil Suit No.122/1996 and directing the appellants herein to pay to the respondent a sum of Rs.70,000/with 6% interest thereon.

2. The respondent is the original plaintiff who claims to have purchased the plot no.71 within the limits of Gram Panchayat Drugwada on 16-12-1985. The plaintiff also claims to have purchased plot no.72. These plots were beyond the limits of appellant - Municipal Council. On account of extension of the territorial limits of the Municipal Council, these plots came within its jurisdiction. The Municipal Council issued a notice to the plaintiff on 1-6-1995 in which it was informed that these plots were reserved for a Primary School and as the plaintiff had put barbed wire fencing without permission of the Municipal Council, the same should be removed. Prior to receipt of this notice, the Municipal Council illegally removed the fencing. Hence, after issuing notice under provisions of

Section 304 of the Maharashtra Municipal Council Nagar Panchayats and Industrial Township Act, 1965 (for short, the said Act), the plaintiff filed suit for recovery of Rs.70,000/being the loss caused by the Municipal Council on account of its illegal action.

3. In the written statement filed by the defendant, it was pleaded that the Plot Nos.71 & 72 vested with the Municipal Council and were reserved for public use. It was denied that the Municipal Council committed any illegal act of removing the fencing. Reference was made to a notice dated 26/5/1995 calling upon the plaintiff to remove the fencing within three days and as the same was not done, the Municipal Council had taken action. It was further pleaded that the suit as filed was not within limitation as prescribed by the said Act.

4. The trial Court framed various issues after which the parties led evidence. It was held that the defendant in a wrongful manner removed the barbed wire fencing and, therefore, the plaintiff was entitled for damages. The trial Court decreed the suit and directed payment of aforesaid amount with future interest @18% per annum. In the appeal preferred by the Municipal Council, the appellate Court reaffirmed the aforesaid findings. It, however, reduced the rate of future interest @6% per annum while partly allowing the appeal.

5. The following substantial questions of law were framed while admitting the appeal:

(1) Whether the suit filed by the plaintiff is maintainable when there is a bar to file the suit against the Municipal Council under Section 303 of the Maharashtra Municipalities Act, 1965?

(2) Whether the judgment and decree of both the Courts are sustainable which is passed without considering important admission of the plaintiff which goes to the root of the case and whether the Courts below are justified in passing the judgments and decree in favour of the plaintiff when there is evidence contrary to the pleadings by the plaintiff?

6. After hearing the learned Counsel for the parties, on 25-6-2017 substantial question No.3 was framed under provisions of Section 100 (5) of the Code and hearing was adjourned so as to grant an opportunity to the respondent to answer the aforesaid substantial question. Question No.3 reads thus :

The plaintiff having issued notice under Section 304 of the Maharashtra Municipal Councils, Nagar Panchayats & Industrial Townships Act, 1965 on 1st July, 1995 (Exh.52), whether the suit filed on 6th April, 1996 was within limitation prescribed by Section 304(1) (a) of the said Act?

The learned Counsel for the parties were thereafter heard on all the substantial questions of law.

7. Shri A. B. Patil, learned Counsel for the appellant submitted that both the Courts erred in coming to the conclusion that the action of the Municipal Council

in removing the barbed wire fencing was illegal so as to grant a decree in favour of the plaintiff. It was submitted that after issuing notice on 26-5-1995 (Exhibit67) and after preparing panchanama (Exhibit68), the plaintiff had given an undertaking (Exhibit69) of removing the barbed wire fencing. As the notice dated 26-5-1995 was not complied with, the Municipal Council on 2-6-1995 removed the same. This act was done in good faith and, therefore, in terms of Section 303 of the said Act, the suit itself was not maintainable. In that regard, he referred to the decision of the Hon"ble Supreme Court in General Officer Commanding Rashtriya Rifles vs. Central Bureau of Investigation and another (2012) 6 SCC 228. It was then submitted that the suit was barred by limitation as prescribed by Section 304 of the said Act. Under said provisions, the suit was required to be filed within a period of six months from the accrual of the cause of action. In the plaint, it was pleaded that the cause of action accrued on 2-6-1995. Notice under Section 304 of the said Act was issued on 1-7-1995 while the suit was filed on 6-4-1996. A specific plea in that regard was taken in the written statement. Hence, on the basis of the pleadings in the plaint and the notice issued by the plaintiff, it was clear that the suit was barred by limitation. It was submitted that though this plea was not raised before the first appellate Court, the same being a question of law going to the root of the matter, the same could be urged in the second appeal. For said purpose, the learned Counsel placed reliance on the decisions in Union of India and another vs. British India Corporation Ltd. And others (2003) 9 SCC 505 and State of Gujarat Vs. Kothari and Associates (2016)14 SCC 761. It was, therefore, submitted that the suit was liable to be dismissed on said count.

8. On the other hand, Shri A. J. Gilda, learned Counsel for the respondent supported the impugned judgment. He submitted that the Municipal Council acted in an illegal manner and removed the barbed wire fencing without giving due notice to the plaintiff. The notice dated 10-5-1995 (Exhibit57) given by the defendant was only with regard to removal of fodder and not the fencing. The notice dated 26-5-1995 (Exhibit67) was not proved to be duly served on the plaintiff and there was no acknowledgement of the same. Similarly, an undertaking dated 2-6-1995 (Exhibit69) was not given by the plaintiff himself. He, therefore, submitted that on 2-6-1995, the barbed wire fencing was illegally removed by the Municipal Council. The action not being in good faith and without following the prescribed procedure, both the Courts were justified in holding against the defendant. It was then vehemently urged that substantial question of law No.3 would not arise for consideration on the ground that the plea with regard to bar of limitation was not raised earlier. Though a stand in that regard was taken in the written statement, it was not seriously pursued. According to him, the question of limitation was a mixed question of law and fact and the same was not permissible to be raised for the first time in the second appeal. He further submitted that the conduct of the defendant was such that it should not be permitted to raise this plea at this stage of the proceedings. In support of his submissions, the learned Counsel placed reliance on the following decisions:

- (1) Chandrashekhar Vs. R.S.P. Mandal, 2007(2) Mh.L.J.296.
- (2) Gauri Shankar vs. M/s Hindustan Trust (Pvt.) Ltd. & others (1973) 2 Supreme Court Cases 127.
- (3) Ittyavira Mathai Vs. Varkey Varkey and another (1964) 1 SCR 495.
- (4) State of Punjab vs. Darshan Singh (2004) 1 Supreme Court Cases 328.
- (5) Maharaja Manindra Chandra Nandi vs. Raja Sri Sri Durga Prashad Singh AIR 1917 PC 23.

9. Since substantial question No.3 deals with the aspect of limitation, the same is taken up for consideration.

10. In the plaint, it has been pleaded in para 3 that the plaintiff had issued notice to the defendant under Section 304 of the said Act. This notice was served on the Municipal Council. In the written statement, it was pleaded in para 3 that the suit was not filed within limitation as prescribed. The plaintiff in his deposition referred to issuance of notice under Section 304 of the said Act dated 1-7-1995 which notice came to be exhibited as Exhibit-52. At Exhibit-53 is the acknowledgement of its service on the Chief Officer of the Municipal Council on 2-7-1995.

11. It would first be necessary to consider whether the defendant can be permitted to urge the bar of limitation in the second appeal. It is well settled that if the question of limitation is a mixed question of law and fact, the same should normally not be permitted to be raised for the first time in second appeal - Ittyavira Mathai (supra). However, at the same time, if such question is a pure question of law based on admitted documents and such question goes to the root of the matter, it can be permitted to be raised in an appropriate case - Gauri Shankar (supra). In Kothari and Associates (supra), the Hon'ble Supreme Court found that the issue with regard to limitation had not been pleaded before the trial Court or the High court. It was raised for the first time during the course of oral arguments before the High Court. The Hon'ble Supreme Court observed that in the light of provisions of Section 3 of the Limitation Act, 1963 it was irrelevant that the appellant therein had not raised the issue of limitation before the trial Court. A duty was cast on the trial Court on its own initiative and as the same was not done the appellant therein was competent to raise said legal question in further proceedings. Referring to the decision of the Privy Council in Lachhmi Sewak Sahu v. Ram Rup Sahu AIR 1944 PC 24, it was observed that the point of limitation was available to be urged even in the Court of last resort. This plea was thereafter examined on the basis of the admitted position on record. In British India Corporation Ltd. (supra), it was observed that the question of limitation is a mandate to the forum concerned and in absence of any dispute on facts, the same has to be considered even if it was not raised.

12. In the light of the aforesaid position, I do not find any impediment in not considering the plea of limitation on the basis of admitted facts though it was not

specifically raised in the courts below. Under Section 304 of the said Act, limitation of six months from the date of service of the notice under Section 304 of the said Act has been prescribed for filing a suit against the Municipal Council. Section 304(1) of the said Act reads thus :

304. Limitation of suits against Council, its committees, officers and servants for acts done in pursuance or executing of this Act.

(1) No suit shall lie against a Council or against any committee constituted under this Act, or against any officer or servant of a Council a respect of any act done in pursuance or executing or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act

(a) unless it is commenced within six months next after the accrual of the cause of action; and

(b) until the expiration of one month after notice in writing has been, in the case of a Council or its committee, delivered or left at the municipal office and, in the case of an officer or servant of a Council, delivered to him or left at his office or place of abode; and all such notices shall state with reasonable particularity the causes of action and the name and place of abode of the intending plaintiff and of his advocate, pleader or agent, if any, for the purpose of the suit.

Admittedly, the plaintiff on 1-7-1995 issued such notice under Section 304 of the said Act (Exhibit52). This notice was served on the Municipal Council on 2-7-1995 (Exhibit-53). The suit has been filed on 6-4-1996. It is only notice at Exhibit-52 issued by the plaintiff and the date of the filing of the suit by the plaintiff that is required to be taken into consideration for determining the question as regards limitation. In that backdrop, the issue of limitation cannot be said to be a mixed question of law and fact and it is a pure question of law as to whether the suit has been filed within a period of six months from the issuance of notice under Section 304(1) of the said Act. As this question is being considered on the basis of notice issued by the plaintiff himself and the date on which the suit was filed, I do not find any reason not to consider the same in the second appeal especially when it goes to the root of the matter.

According to the plaintiff himself, he had issued notice under Section 304 of the said Act (Exhibit52) on 1-7-1995. This fact was pleaded in the plaint and the notice was also brought on record. Therefore, the only aspect that remains to be considered is whether the suit as filed on 641996 was within the prescribed period of limitation. The statutory period of limitation under Section 304(1) of the said Act being six months from the date of receipt of notice, it is clear that the suit has been filed beyond the period of statutory limitation. It will, therefore, have to be held that the suit was barred by limitation that was prescribed under Section 304(1) of the said Act. Substantial question of law No.3 therefore stands answered accordingly.

13. In the light of the answer given to question No.3, it is not necessary to

answer substantial question Nos.1 and 2 in as much as those questions would require consideration only if the suit is found to have been filed within limitation. As the suit has been found to have been filed after the statutory period of limitation, question Nos.1 & 2 do not arise for consideration.

14. In the result, the following order is passed:

ORDER

(1) The judgment dated 20-3-2003 in Regular Civil Appeal No.215/1999 is quashed and set aside.

(2) Special Civil Suit No.122 of 1996 stands dismissed.

(3) The second appeal is allowed with no order as to costs.