

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

S.A.No.609 of 1997
and
C.M.P.No.6741 of 1997

1.Sreedharan (Deceased)
2.Krishna Kumari Sridharan
3.Aishwaraya Lakshmi
4.S.Jayendran ...Appellants

(Appellants 2 to 4 are brought on record as legal heirs of the deceased sole appellant (Sreedharan) in order dated 20.01.2006 in C.M.P.Nos.9145 to 9147/2005)

Vs.

1.Thiru.A.G.Jayabalan
2.The Director, Port Department,
Government of Pondicherry,
Pondicherry.
3.Union of India, rep., by the
Chief Secretary, Union territory,
Government of Pondicherry,
Chief Secretariat, Beach Road,
Pondicherry. ..Respondents

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree of the Court of the Additional Sub Judge, Pondicherry in A.S.No.131 of 1996 dated 09.12.96 in reversing the well considered Judgment and decree of the Court of the I Additional District Munisif, Pondicherry in O.S.No.558 of 1992 dated 23.12.1993.

For Appellants : M/s.V.Srimathi
For Respondents : Mr.D.Ravichander,
AGP (Pondicherry)

JUDGMENT

The present Second Appeal on hand is preferred against the judgment and decree passed by the Additional Sub Judge, Pondicherry in A.S.No.131 of 1996, partly confirming the judgment and decree dated 23.12.1993 passed in O.S.No.558 of

1992 on the file of the I Additional District Munsif, Pondicherry.

2.The parties are referred as per the ranking in the Trial Court.

3.The plaintiff is the owner of the Cargo Boat bearing No.PY-245, which had been engaged by the Pondicherry Port Department in connection with the transportation of rice from M.V. Gachav on 01.11.1988. At the time of loading, the wire of the crane operated by the 1st defendant's Department snapped off accidentally, as a result of which, 30 bags of rice fell down on the plaintiff's Boat and caused extensive damages. The plaintiff has to spent nearly a sum of Rs.10,000/-(Rupees Ten Thousand only) to remake the Boat fit and the Boat was out of use for about three months. Thus, the plaintiff suffered a loss of damages to the tune of Rs.30,000/-(Rupees Thirty Thousand only). In total, the plaintiff has suffered the damages for an extent of Rs.40,000/-(Rupees Forty Thousand only).

4.It was contended that the accident occurred due to the negligence on the part of the 1st and 2nd defendants and due to the improper maintenance of the said crane. After making several requests to the concerned department for making goods the loss, the plaintiff finally issued a lawyer's notice, which was received by the defendant and they have sent reply with false contentions.

5.The written statements filed by the defendants 1 & 2 states that there is no cause of action as against the defendants 1 & 2. No notice as contemplated under Section 80 of the Code of Civil Procedure had been issued as mandated under law. It was contended that the suit itself was barred by limitation and there is no privity of contract between the plaintiff and the defendants 1 & 2. The defendants 1 & 2 had been leasing out the cranes and other equipments on hire basis for loading and unloading at Pondicherry. In the same way, the cranes had been hired from Sree Ship Chandiliers, owned by M.V.Gachav as per the Indian Ports (Pondicherry Rules 1972). Thus, the defendants 1 & 2 are not liable to pay any damages caused to the Boat by the accident, snapping of the wires of the cranes. As per Rule 11 (1) of the lease and Sub Clause 5 of the said Rule states that the Port authority shall not be responsible for the hirer for any loss or injury to life or property arising directly or indirectly from the use of the cranes during the period of hire. Further, the plaintiff cannot claim that he has lost his business for a period of three months since subsequent to the alleged accident, there was no steamer activity at Pondicherry. The other contentions raised by the plaintiff had been rebutted in the written statement filed by

the defendants 1 & 2.

6.The Trial Court formulated the following issues:

1. Whether the suit is barred by limitation or not?
2. Whether the suit is bad for want of notice under Section 80 of the Civil Procedure Code?
3. Whether the plaintiff has suffered damage and if so, to what is the quantum?
4. To what relief the parties are entitled to?

7.The Trial Court in respect of the limitation made a finding that the plaintiff has filed the present lis for recovery of damages due to the alleged incident that had been taken on 01.11.1988. The claim of the plaintiff for recovery of money towards damages suffered by him was filed only during the year 1992. However, the Trial Court arrived a conclusion that such a claim is one covered under Article 2262 of the French Civil Code and therefore, it is well within the period of limitation. Accordingly, the issue of limitation was decided in favour of the plaintiff.

8.In respect of the notice to be issued under Section 80 of the Code of Civil Procedure, the Trial Court concluded that the issuance of the notice under Ex.A4 was admitted by D.W.1 himself. Thus, after issuance of the notice, the suit was filed by the plaintiff in August 1992. Therefore, the mandatory provisions of the Code of Civil Procedure were complied with by the plaintiff at the time of institution of the suit and accordingly, the said issue was also held in favour of the plaintiff. In respect of the third issue in relation to the damages, the Trial Court came to the conclusion that the overloading of the rice bags in the crane caused the accident. Thus, the officials of the 1st respondent's office were also to be held responsible for the accident. The officials are bound to verify the quantum of loading and proper operational procedures to be carried out by the 3rd defendant, while operating the cranes. In view of the fact that the officials of the defendants 1 & 2 failed to monitor the operational procedures performed by the 3rd defendant, the Trial Court came to the conclusion that all the defendants are jointly liable to pay damages to the plaintiff. Answering all the issues in favour of the plaintiffs, the Trial Court decreed the suit in entirety and ordered for payment of damages as sought for in the plaint.

9.The defendants 1 & 2 filed First Appeal in A.S.No.131 of 1996, wherein the First respondent was the plaintiff and the 2nd respondent was the 3rd defendant in the original suit. The First Appellate Court also raised all the issues dealt with by the Trial Court. The First Appellate Court agreed in respect of the findings concluded by the Trial Court regarding the limitation

and further, admitted the lapses and the negligence committed by the 3rd defendant, while operating the crane at the time of causing the accident. However, the First Appellate Court exonerated the defendants 1 & 2 on the ground that they cannot be held responsible for the commissions and omissions of the 3rd defendant, who was the operator of crane and the 3rd defendant was allowed to operate the crane in the Port by way of a separate agreement and as per the said agreement, if any accident or damages caused, the operator alone is to be held responsible for the losses and not defendants 1 & 2, who is the Union of India and the Director of Port Department.

10. The First Appellate Court, while concurring with the findings made by the Trial Court in respect of grant of compensation and also the limitation, arrived at a conclusion that the 3rd defendant alone is liable to pay compensation to the plaintiff and the defendants 1 & 2 cannot be held liable on account of the fact that the 3rd defendant was authorized to operate the crane by way of a separate agreement and there is a clause in the agreement that the loss or accident, if any causes, the Department is not liable.

11. The Second Appeal was not admitted and no question of law was framed. When the matter is taken up for final hearing, after a lapse of about 21 years, this Court has to consider the substantial questions of law raised by the appellants in the grounds of appeal. The Substantial Questions of law are extracted hereunder:-

1. Whether the lower appellate Court is right in placing the burden of proof on the plaintiff as regard the snapping of the crane wire?
2. Whether the lower appellate Court should not have held that it is the duty of the respondents 2 and 3 to have maintained the Crane in a proper and sound condition and damage occasioned on account of their negligence should have entailed in compensating the victim?
3. Whether the lower appellate Court is right in not appreciating that the Crane and its operator and the entire operation of unloading is under the Control of the respondents 2 and under such circumstances, the failure to act with reasonable diligence and care would compel them to compensate the wrong done to third party, the plaintiff?
4. Whether the Courts below are right in decreeing the suit as against the appellate and should it not have held that mere hiring of the vehicle will not attract payment of damage, in the event of the same occasioning at the instance of third parties?
5. Whether the order of the Courts below are not illegal, incompetent, contrary to law and it is in any event liable to be set aside on such other substantial questions of law

as this Hon'ble Court deem fit to frame and decide?

12.The first question of law raised by the appellant in the present Second Appeal is that whether the lower appellate Court is right in placing the burden of proof on the plaintiff as regards the snapping of the crane wire. The question was answered both by the Trial Court as well as by the First Appellate Court in favour of the plaintiff. The other question of law raised in the Second Appeal by the appellant are more connected with the facts established both before the Trial Court as well as before the First Appellate Court. Such factual disputes concluded concurrently both by the Trial Court as well as by the First Appellate Court cannot be reopened in the Second Appeal, more specifically, under Section 100 of the Code of Civil Procedure. It is a established principle of law that the concluded facts recorded by the Trial Court as well as the First Appellate Court cannot be reopened unless such recordings are patently perverse or contrary to the facts raised by the respective parties before the Trial Court as well as before the First Appellate Court. The scope of appreciating the concluded facts in the Second Appeal is limited. The very substantial question of law is to be dealt with in the Second Appeal with reference to the concluded facts recorded both by the Trial Court as well as by the First Appellate Court. This being the principles to be followed, while dealing with the Second Appeal under Section 100 of the Code of Civil Procedure, this Court is of an opinion that all such substantial questions of law raised with reference to the concluded facts cannot be considered by this Court in the present Second Appeal.

13.However, vital question of law to be dealt with in the present Second Appeal is the law of limitation. The issue was raised before the Trial Court as well as before the First Appellate Court regarding the point of limitation. The Trial Court answered the point of limitation in favour of the plaintiff on the ground that the French Civil Code will be applicable in respect of the law of limitation for institution of Civil suits within the territorial jurisdiction of Pondicherry. Accordingly, the suit was entertained by the Trial Court. The Trial Court was under the impression that the Indian Limitation Act cannot be applied within the territorial jurisdiction of Pondicherry in view of the French Civil Code.

14.The Appellate Court also concurred that the findings of the Trial Court in this regard is right and therefore, this Court has to examine the substantial question of law raised in relation to the point of limitation.

15.Both the learned counsel for the appellant as well as the respondents, have not disputed the fact that the Hon'ble

Supreme Court of India has dealt with the application of the French Civil Code in the case of Gothamchand Jain v. Arumugam, reported in (2013) 10 SCC 472 and the relevant paragraphs 9,10,11 and 12 are extracted hereunder:

"9. The Government of Union Territories Act, 1963 (20 of 1963) was enacted to provide for Legislative Assemblies and Ministries for the Union Territories. It received the assent of the President on 10-5-1963. The Limitation Act, 1963 was passed by Parliament on 5-10-1963. By that time, the Union Territory of Pondicherry had become part of India. Sub-section (2) of Section 1 of the Limitation Act, 1963 says that it extends to the whole of India except the State of Jammu and Kashmir. Since the Union Territory of Pondicherry having become part of India, the Limitation Act automatically extended to the then Pondicherry. The Limitation Act, 1963, consequently, came into force in the Union Territory of Pondicherry on 1-1-1964.

10. The question that we have to consider is whether, by virtue of the Limitation Act, 1963, the French Law of Limitation which had been in force till 1-1-1964, was in any manner repealed or modified by the Limitation Act, 1963. We can draw considerable sustenance from the ratio laid down by this Court in Syndicate Bank [(2001) 4 SCC 713], wherein, we have already indicated, this Court considered the interaction between the provisions of the Limitation Act, 1963 vis-à-vis Article 535 of the Portuguese Civil Code. In that case, this Court held as follows: (SCC p. 727, para 20)

"20. ... In any event, as noticed above, the Portuguese Civil Code, in our view, could not be read to be providing a distinct and separate period of limitation for a cause of action arising under the Indian Contract Act or under the Negotiable Instruments Act since the Civil Code ought to be read as one instrument and cause of action arising therefrom ought only to be governed thereunder and not otherwise. The entire Civil Code ought to be treated as a local law or special law including the provisions pertaining to the question of limitation for enforcement of the right arising under that particular Civil Code and not dehors the same and in this respect the observations of the High Court in Cadar Constructions [Cadar Constructions v. Tara Tiles, AIR 1984 Bom 258 : 1984 Mah LJ 603] that the Portuguese Civil Code could not provide for a period of limitation for a cause of action which arose outside the provisions of that Code, stands approved. A contra

approach to the issue will not only yield to an absurdity but render the law of the land wholly inappropriate. There would also be repugnancy insofar as application of the Limitation Act in various States of the country is concerned: whereas in Goa, Daman and Diu, the period of limitation will be for a much larger period than the State of Maharashtra—the situation even conceptually cannot be sustained having due regard to the rule of law and the jurisprudential aspect of the Limitation Act.”

11. This Court also held in Syndicate Bank case [(2001) 4 SCC 713] that it cannot but hold that in the wake of the factum of the Limitation Act coming into existence from 1-1-1964, Article 535 of the Portuguese Civil Code cannot but be termed to be impliedly repealed and it is on this score that the decision of this Court in Justiniano Augusto De Piedade Barreto v. Antonio Vicente Da Fonseca [(1979) 3 SCC 47] stood overruled. This Court also held that there is one general law of limitation for the entire country, being the 1963 Act, and the Portuguese Civil law cannot be termed to be a local law or a special law applicable to the State of Goa, Daman and Diu, prescribing a different period of limitation within the meaning of Section 29(2) of the Limitation Act and the question of saving of local law under the Limitation Act, 1963 does not and cannot arise.

12. We may, in this case, refer to the Pondicherry (Laws) Regulation, 1963 (7 of 1963) which deals with the regulation to extend certain laws to the Union Territory of Pondicherry. Reference may also be made to the Pondicherry (Extension of Laws) Act, 1968. By virtue of those legislations, the Contract Act, 1872, the Transfer of Property Act, 1882 and various other enactments were brought into force in Pondicherry. It is, therefore, to be seen as to whether specific legislations containing the subjects under which the cause of action had arisen, would govern the field or the procedural law assuming it would have its due application in replacement of the governing statute. This question was also pointedly considered by this Court in Syndicate Bank [(2001) 4 SCC 713] and the Court took the view that the cause of action of the suit, namely, money lent and advanced in terms of the agreement stands squarely governed by the Contract Act read with the Negotiable Instruments Act by reason of the admitted execution of the promissory note and, as such, cannot be said to be governed by

the Portuguese Civil Code. The Court held that the Portuguese Civil Code cannot be read to be providing a distinct and separate period of limitation for cause of action arising under the Contract Act and other related laws."

16.Though the substantial question of law in relation to the Indian Limitation Act has not been raised in the present Second Appeal, this Court has to formulate such a question of law in view of the fact that the Trial Court as well as the First Appellate Court has not considered the settled legal principles in the matter of application of the Indian Limitation Act within the territorial jurisdiction of Pondicherry. Accordingly, this Court is of an opinion that the Hon'ble Supreme Court of India has concluded this legal issue by stating that the Indian Limitation Act alone will be applicable for the suits instituted in the Civil Courts within the jurisdiction of Pondicherry. Undisputedly, the alleged accident took place on 01.11.1988. The suit was instituted by the plaintiff in O.S.No.558 of 1992 and the suit was filed in February 1992. Therefore, the suit was filed beyond the period of limitation as contemplated under the Indian Limitation Act.

17.This being the factum of the case, this Court is of an opinion that both the Trial Court as well as the First Appellate Court has erroneously decided the point of limitation for entertaining a suit filed by the plaintiff in O.S.No.558 of 1992. Since the suit is liable to be rejected on the ground of limitation, this Court is not inclined to consider all other merits raised in respect of the factual disputes.

18.Accordingly, the judgment and decree passed by the I Additional District Munsif, Pondicherry dated 23.12.1993 in O.S.No.558 of 1992 and the judgment and decree dated 9.12.1996 passed by the Additional Sub Judge, Pondicherry in A.S.No.131 of 1996 are set aside and the Second Appeal stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Additional Sub Judge,
Pondicherry.

2.The I Additional District Munsif,
Pondicherry.

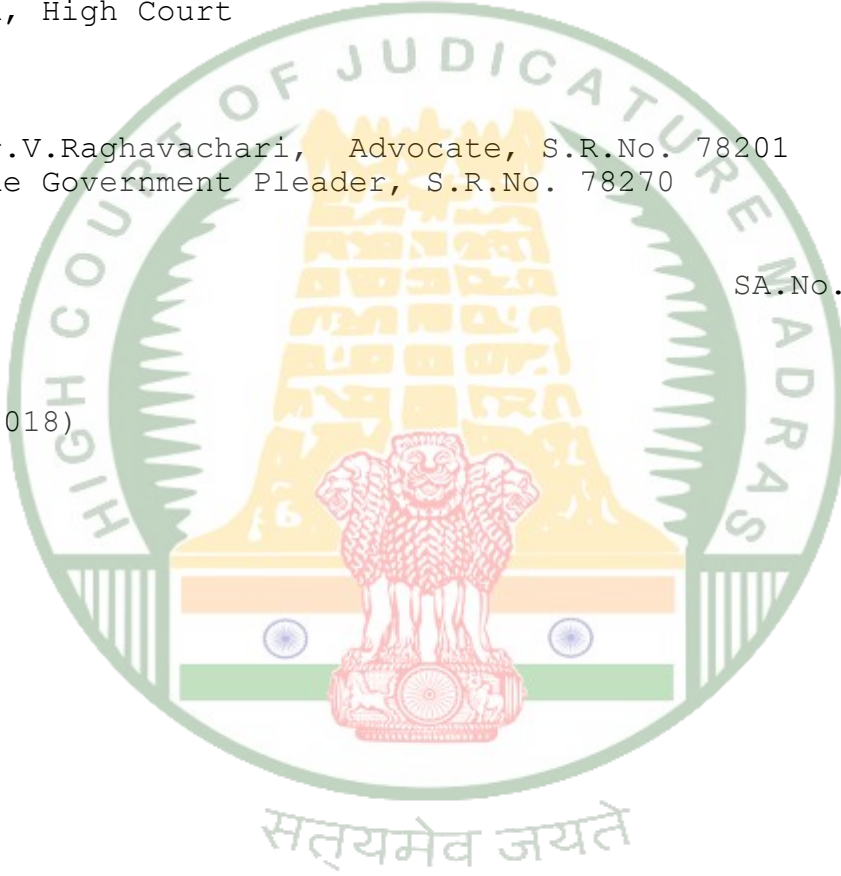
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The Section Officer
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Madras.

+lcc to Mr.V.Raghavachari, Advocate, S.R.No. 78201
+lcc to the Government Pleader, S.R.No. 78270

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