

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 45 OF 2011**

1. The State of Goa,
through the Chief Secretary,
Government of Goa, having his
Office at the Secretariat,
Porvorim, Goa.
 2. The Executive Engineer,
Works Division – IX,
Public Works Department,
Margao, Goa.
 3. The Superintending Engineer,
Circle Office VIII (PHE),
Public Health Engineering, PWD.
Altinho, Panaji, Goa.
- ... Appellants.

Versus

Mr. P. Kumaran,
Contractor, aged 74 years,
resident of House Tripti,
Khadpaband, Ponda, Goa.

... Respondent.

Mr. Deep Shirodkar, Additional Government Advocate for the
Appellants.

Mr. S. D. Lotlikar, Senior Advocate with Mr. J. Karn, Advocate for the
Respondent.

Coram:- M. S. SONAK, J.

Date:- 4th September, 2020

ORAL ORDER :-

This appeal is against the order dated 5th August, 2010, made by the learned District Judge – 2, North Goa, Panaji allowing the Civil Review Application No.7/2010 and partly reviewing the judgment and decree dated 31st March, 2010, by which, the Civil Suit No.10/2008 instituted by the Respondent No.1 herein was decreed and the Respondent No.1 was entitled to an amount of Rs. 2,54,181/- from the Appellant-State.

2. Mr. D. Shirodkar, learned Additional Government Advocate for the Appellants submitted that as against the judgment and decree dated 31st March, 2010, the Respondent No.1 instituted First Appeal No.111/2010 in this Court. In para 3 of the appeal memo, the Respondent No.1 had disclosed the factum of institution of the review petition, but undertaken to withdraw the same. He submits that in such circumstances neither was the Respondent No.1 justified in proceeding with the review petition nor was the learned District Judge justified in entertaining such a review petition. Mr. Shirodkar submits that on this ground alone the impugned order allowing the review petition is liable to be set aside.

3. Mr. Shirodkar submits that in any case there was no error apparent on the face of record demonstrated by the Respondent No.1

and therefore the learned District Judge erred in invoking its review jurisdiction. On this additional ground the impugned order is liable to be set aside.

4. Mr. Lotlikar, learned Senior Advocate appearing for the Respondent No.1 pointed out that since the review petition was instituted prior to the institution of the First Appeal, there was no legal bar to the maintainability of the review petition. Besides he submits that though, the petition was styled as a review petition, the same was in fact an application to correct certain inadvertent error which had cropped into the operative portion of the judgment and decree dated 31st March, 2010. He pointed out that in the substantive portion of the judgment and decree, the learned District Judge had held that the Respondent No.1 was entitled to interest. However, there was an omission to award interest in the operative portion. For these reasons, he submits that this appeal is liable to be dismissed. He submits that at the highest, some liberty can be granted to the Appellants to amend its memo of appeal in First Appeal No.70/2011, instituted by it to question the very same judgment and decree dated 31st March, 2010 and to raise a ground therein that on merits there was no justification for award of any interest.

5. In the memo of First Appeal No.111/2010 instituted by the Respondent No.1, there is following categorical statements in paragraph

3 :-

“3. The impugned judgment and decree was passed on 31.03.2010. The certified copy was applied on 27/05/2010 and the same was delivered on 03/06/2010 and as such the present appeal is filed within the period of limitation. A Review Application has been filed before the Hon'ble District Court on some of the points raised in this Appeal. However, the same is pending adjudication. As the period of limitation to file the present appeal was expiring this Appeal is preferred and the Review Application will be accordingly withdrawn. This Hon'ble Court has jurisdiction to decide this first appeal.”

(Emphasis supplied)

6. In view of the aforesaid, ordinarily, the Respondent No.1, should not have pressed the review petition before the learned District Judge. However, this is not to say that the review petition before the learned District Judge was not maintainable in terms of Order 47 Rule 1 (1) of CPC. This is because the review petition in the present case, was admittedly instituted prior to institution of First Appeal No.111/2010. In such circumstances, the bar under Order 47 Rule 1(1) will not come into play. On the crucial date of the institution of the review petition, there was no First Appeal pending before the Appellate Court.

7. Therefore, though Mr. Shirodkar may be right that the Respondent No.1, consistent with his statement in his own appeal memo should not have proceeded with the review petition, it will not be correct to say that the review petition instituted by the Respondent

No.1 was not at all maintainable before the District Court and therefore should have been dismissed on the ground of maintainability.

8. This position as to maintainability of the review petition has in fact been explained by the Hon'ble Supreme Court in the case of *Thungabhadra Industries Ltd. Vs Government of AP*, AIR 1964 SC 1372.

9. Upon perusal of the impugned order however, there is some substance in the contention of Mr. Lotlikar that in the body of judgment and decree dated 31st March, 2010, there is reference to entitlement of interest at least in so far as some of the decreed amounts are concerned. However, the same is not reflected in the operative portion of the impugned judgment and decree. The impugned order has basically proceeded to correct the operative portion of the judgment and decree though, it may be possible that the learned District Judge has proceeded to award interest in respect of certain items, in respect of which there may have been no reference in the main body and the judgment and decree dated 31st March, 2010.

10. In the aforesaid circumstances, there is really no case made out to set aside the impugned order in this appeal from order. However, merely because the impugned order is not being set aside, it does not mean that the issue of whether the interest was indeed payable or not

stands finally decided in favour of the Respondent No.1 or against the Appellant herein. The ends of justice will in fact be met if alternate course proposed by Mr. Lotlikar is adopted and liberty is granted to the Appellant to amend its memo of appeal in First Appeal No.70/2011 so as to question the award of interest in favour of the Respondent No.1. Mr. Lotlikar has made it clear that in case such amendment is applied for, the same will not be objected to by the Respondent No.1 though, the Respondent No.1, reserves the right to defend the award of interest on merits.

11. For the aforesaid reasons, the impugned order is not interfered with. However, liberty is granted to the Appellants to seek amendment to the memo of appeal in First Appeal No.70/2011, in order to challenge the award of interest in favour of the Respondent No.1 together with other grounds raised in order to challenge the judgment and decree dated 31st March, 2010. The statement of Mr. Lotlikar that the Respondent No.1 will not oppose the grant of such amendment is also noted and accepted. This time, the Respondent No.1 will have to stand by this statement.

12. Appeal from order is disposed of in the aforesaid terms. There shall be no order as to costs.

13. The assignment to take up First Appeal No.111/2010 and

First Appeal No.70/2011 is not with me and therefore, registry to place the First Appeals before the appropriate Bench.

14. All concerned to act on the basis of the authenticated copy of this order.

M. S. Sonak, J

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