IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.384 OF 2019
WITH CA/7726/2019 IN SA/384/2019
WITH CA/10224/019 IN SA/384/2019

VINAY S/O GENDMAL BATIYA
VERSUS
PRAKASH S/O SHEKUJI PATIL AND OTHERS

…
Mr. Arvind Deshmukh, Advocate for appellant.
Mr. S. K. Chavan, Advocate for respondent No.1.
Mr. S. V. Chandole, Advocate for respondent Nos.2, 3 and 4.
…

CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 09.08.2021
Pronounced on : 14.10.2021

ORDER :-

. Present appeal has been filed by original defendant No.1 challenging the concurrent findings and decree passed by the Courts below. Present respondent No.1 – original plaintiff had filed Special Civil Suit No.21 of 2009 before the learned Civil Judge Senior Division, Parbhani for recovery of amount of Rs.21,25,387/- with interest at the rate of 12% per annum till realisation of the entire amount. The said suit came to be decreed on 06.05.2017. The present appellant challenged the said judgment and decree in Regular Civil Appeal No.118 of 2017. It was heard by learned District Judge-4, Parbhani and it came to be dismissed on 29.04.2019. Hence, this second appeal.

2. Heard learned Advocate Mr. Arvind Deshmukh for the appellant, learned Advocate Mr. S. K. Chavan for respondent No.1 and learned Advocate Mr. S. V. Chandole for respondent Nos.2, 3 and 4.

3. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the facts and the circumstances as well as law points involved in the case properly. The present case is the unique example of non application of mind by both the Courts below and, therefore, the findings rendered are perverse. Another suit was filed before Debts Recovery Tribunal and, therefore, present suit was barred under Section 11 of the Code of Civil Procedure. Another fact that was not considered is that the appellant is a partnership firm, yet the suit has been filed in the name of individual person and not against the partnership firm. Therefore, it is barred under Order XXX of the Code of Civil Procedure. The substantial question of law, therefore, arises as no proper and sufficient opportunity to lead evidence was given by the Courts below to prove that, in fact, the transaction was with the partnership firm and not with the individual partner. In fact, the present appellant had preferred an application to allow him to examine the Registrar of Firms, however,

that application was rejected. He had preferred Writ Petition No.6955 of 2017, however, during the pendency of that writ petition, the suit came to be hurriedly disposed off and, therefore, this Court had granted liberty to raise the issue before the first Appellate Court under Section 105 of the Code of Civil Procedure. When the appellant wanted to lead evidence, the said evidence could not have been rejected by the Trial Court on some flimsy grounds. Principles of natural justice are violated by the Courts below. Further, the suit also suffered for misjoinder of cause of action. Defendant No.4 had nothing to do with the main transaction that was arrived at in respect of installation of machinery, however, the plaintiff added the alleged transaction in respect of purchase of car belonging to defendant No.4 with the cause of action in the suit. In fact, the plaintiff has filed claim before the Debts Recovery Tribunal on 24.05.2007 claiming amount of Rs.12,00,000/- which was given by the plaintiff by way of blank cheque to the appellant - defendant, which was deposited and encashed by the defendant. It has been further vehemently submitted that what was supplied to the defendant was substandard material and, therefore, the defendants were not liable to pay the amount of installation to the plaintiff. Both the Courts below have wrongly considered that there was separate transaction in respect of sell of old Ford car belonging to defendant No.4

when admittedly there was no direct transaction between defendant No.4 and the plaintiff. He, therefore, prayed for admission of the second appeal on the ground that substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case.

4. Per contra, the learned Advocate appearing for respondent No.1 - original plaintiff supported the reasons given by both the Courts below and submitted that no substantial questions of law are involved in this case. Learned Advocate for respondent Nos.3 to 4 supported the submissions on behalf of the appellant.

5. At the outset, it is to be noted that certain facts are admitted to the parties. Plaintiff is proprietor firm running the business of small scale industries of automatic bricks. Plaintiff used to provide machinery for installation of automatic bricks known as “Clay Bricks Industries”. It was agreed that the machinery would be installed by the plaintiff for amount of Rs.24,00,000/-. The said payment was to be made in installment. The ultimate installment of the payment was to be made after the production of one lakh bricks. Certain duties were cast on the defendants also. Plaintiff had given blank cheque drawn on State Bank of India as security to the defendants.

6. What are the disputed facts are that the plaintiff had supplied machinery, however, according to the defendants, they were not of good quality and were of substandard material. Defendants had paid Rs.15,77,000/- first and thereafter, additional amount of Rs.6,00,000/- was paid by way of cheque and Rs.8,000/- by way of cash. According to the plaintiff, amount of Rs.21,60,000/- was due from defendants. Out of which, he had received amount of Rs.12,00,000/- by cheque as a security. Further, the plaintiff contends that defendant Nos.2 and 3 had requested him to purchase the old car lying in the suit premises. It was unused and under repair condition. The consideration was fixed at Rs.1,75,000/-. According to the plaintiff, he had spent much amount for the repairs of the car, however, then defendant Nos.1 to 3 filed a false complaint about theft of the said car. Therefore, the plaintiff filed the suit for recovery of the amount.

7. The defence was that the alleged transaction in respect of old car is false. No such agreement was entered into in respect of the said car between them and the plaintiff. Though they agreed that there was transaction in respect of machinery, yet, the machinery which was supplied by the plaintiff was of substandard quality. They were required to shutdown their business due to such substandard quality of the machinery.

8. Defendant No.4 – the owner of the car submitted that he had not entered into the agreement with the plaintiff in respect of sell of his car.

9. Taking into consideration the rival contentions, issues came to be framed and parties have led evidence. If we peruse the written statement, it can be seen that there was no point raised by them regarding bar under Section 11 of the Code of Civil Procedure in view of some proceedings before the Debts Recovery Tribunal. Copy of the judgment before the learned Presiding Officer, Debts Recovery Tribunal, in Original Application No.31 of 2007 decided on 27.09.2007 would show that the applicant therein was State Bank of India. The plaintiff as well as present appellant – defendant No.1 and one M/s. Gurudeo Bricks Industries, to which the appellant has been shown as proprietor, was defendants in the said application which was filed for recovery of amount of Rs.12,12,427/-. The said application was allowed against all the three defendants. All the three defendants were directed to pay jointly and severally amount of Rs.12,12,427/- together with interest at the rate of 12% per annum till realisation of the entire amount. Thus, it is to be noted that the present plaintiff had not filed that suit for recovery, but it was filed by the State Bank of India. The transaction involving bank was different than the transaction contemplated in the present suit. Parties were not litigating to the said litigation under the

same title as they were litigating in Special Civil Suit No.21 of 2009 and, therefore, the suit for recovery of amount by present respondent No.1 was definitely not barred by the principle of *res judicata.* No substantial questions of law on the said point is arising.

10. As regards the oral transaction in respect of sell of car is concerned, according to the plaintiff, the said car was lying in unused condition at the said premises and defendant Nos.1 and 2 had then requested the plaintiff to purchase the said car. He was given an idea that the car is standing in the name of defendant No.4 and he being the father of defendant Nos.1 and 2, definitely, plaintiff would have been under the impression that the father would have asked defendant Nos.1 and 2 to sell his movable property. In view of the fact that the plaintiff had paid amount towards the sell of the car and incurring repairs to make that car roadworthy, then definitely he is entitled to recover the said amount and inclusion of that transaction in the present suit does not amount to misjoinder of cause of action.

11. Turning towards the main transaction, it appears that voluminous documents were produced by the plaintiff and he examined in all three witnesses. Present appellant had examined himself. Both the Courts below have scanned the evidence and arrived at the conclusion that the evidence led by the plaintiff is not shaken at all in the cross-examination

on material points. Perusal of the said evidence by this Court also will definitely conclude that the defendants have failed to bring material admissions, which will non suit the plaintiff. Installation of machinery by the plaintiff is admitted by the defendants, but then the defendants have come with the case that they were of substandard quality. No conclusive evidence to support this defence has been led by the defendants. Though defendant No.1 had tried to contend that the machinery was not delivered within the stipulated period as per agreement, yet his admission disproved his said statement. In fact, he has received subsidy for several months from DIC, Parbhani which contemplated that the machinery was installed and then only the subsidy would be provided. When he has received the subsidy, now he cannot come with the case that the installation of the machinery was beyond the stipulated period. If there would have been dispute regarding quantity of machinery, duration of the machinery or installation thereof, it could have been taken up by the defendants immediately with the plaintiff, however, no such communication between them has been produced on behalf of defendants. Thus, when the installation of the machinery has been done as per the agreement, then definitely the plaintiff was entitled to get the amount which was then due. It had come on record that total amount of Rs.24,00,000/-

was due from defendants and out of that they had paid amount of Rs.15,77,000/- till 31.01.2007. That means, amount of Rs.8,23,000/- was due against them on the date of the suit. Though the defendants had contended that they had made further payment of Rs.2,16,000/-, they could not support it by documentary evidence. Same is the case in respect of payment of Rs.6,00,000/- on 21.12.2006 by cheque and Rs.8,000/- in cash. The learned Trial Judge has rightly observed that this fact of payment could have been definitely supported by the defendants by filing their bank record or examining the bank employee. Both the Courts below have, therefore, rightly come to the conclusion that amount of Rs.8,23,000/- was outstanding from defendant Nos.1 to 3.

12. The conduct of defendants was also considered by the Courts below. They have not disputed that the disputed car was in the suit premises in unused condition. They have also not explained as to why the plaintiff had incurred the expenditure on the repairs of the car from 06.11.2006 to 19.04.2007. They failed to give explanation as to how the car went in possession of the plaintiff just before carrying out the repairs. They have not come with the case that they had got the car repaired with their own money. It is to be noted that the defendants had made complaint with the police that the plaintiff has stolen the said car.

Then the said car was taken from his custody by the police and the said car is in possession of the defendants. This shows that it was only because of the police complaint made by them, the appellant had intervened and took the possession of the car. The present appellant has not explained as to why there was delay in lodging the complaint regarding alleged theft of the car. Under this circumstance, whatever amount has been paid by the plaintiff towards the transaction of the car will have to be made good to the plaintiff.

13. Reference to all the abovesaid facts is taken by this Court just to consider whether there is any substance in the point raised by the appellant that the facts have not been considered by the Courts below in proper perspective and it has rendered the finding perverse. As aforesaid, after scanning the evidence, it can be concluded that there is absolutely no perversity in the findings of both the Courts below.

14. The point has also been said that there was a partnership firm and application was filed to examine the Registrar of Firms, which came to be rejected by the learned Trial Court and in the writ petition, this Court had given liberty to the appellant to raise the said point before the first Appellate Court. No doubt, there appears to be an application to that effect, however, it is to be noted that before the Debts Recovery Tribunal, the said firm has been shown to be the proprietor and there is no

whisper about the same in the present appeal memo as to whether such/ similar contention was raised to challenge the order passed by the Debts Recovery Tribunal, Aurangabad. Further, in order to establish the fact of a registered firm, the certificate issued by competent authority regarding the registration of the firm would be sufficient proof. Unless that document would have been produced, there was no necessity for the Trial Court to allow defendant No.1 to call the Registrar of Firms for evidence. That application appears to have been filed just to protract the litigation. No fault can be found with the rejection of that application by the learned Trial Court.

15. From all the angles, if the points raised by the appellants were considered, then it can be concluded that no substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case requiring admission of the second appeal and, therefore, second appeal deserves to be dismissed at the threshold.

16. Civil Application No.7726 of 2019 was filed for stay to the execution and operation of the decree passed by the Courts below. It is to be noted that this Court by order dated 10.07.2019 had granted interim protection subject to deposit of amount of Rs.5,00,000/- by the appellant in this Court. It appears that such amount was deposited on 13.08.2019. Now, in view of dismissal of second appeal, the application

for stay deserves to be rejected/disposed of. Accordingly, it is disposed of.

17. Civil Application No.10224 of 2019 was filed by original plaintiff for modification of order passed by this Court on 10.07.2019 in the stay application, however, in view of dismissal of second appeal as well as disposal of the application for stay, this application does not survives and accordingly, it stands disposed of.

18. Before parting, when the amount has been deposited by the appellant in this Court, which was towards the decreetal amount, then the original plaintiff is at liberty to withdraw the said amount which is pending before this Court along with the interest accrued thereon, if any. This amount deserves to be adjusted from the decreetal amount. Accordingly, the execution Court should take note of the deposit of the amount before this Court and its distribution to the original plaintiff as per the decree.

19. With these observations, the second appeal stands dismissed.

[SMT. VIBHA KANKANWADI, J.]

scm