

SUPREME COURT OF INDIA

Ghanshyam Narayan Behere

Vs.

Keshav Mahadeo Karandikar

C.A.No.1204 of 1966

(A. Alagiriswami, I. D. Dua and C. A. Vaidialingam, JJ.)

09.12.1972

JUDGEMENT

VAIDIALINGAM, J.:-

1. This appeal by the plaintiff, on certificate, is against the judgment and decree of the Bombay High Court in First Appeal No. 111 of 1956. Though the litigation leading upto this appeal has commenced as early as 1953, it is rather regrettable, in the state of the present records, that we are not able to give a quietus to the controversy between the parties and that we have to remand the proceedings to the High Court for further adjudication.

2. The defendant, Keshav Mahadeo Karandikar, was doing business as a forest contractor for which purpose he opened an account with the plaintiff-appellant, Ghanshyam Narayan Behere. As per arrangement between the parties from time to time the defendant borrowed amounts from the plaintiff agreeing to pay interest at 9 per cent. per annum on the amounts so borrowed. The plaintiff maintained an account in the personal name of the defendant. In or about September, 1950, one Somnath B. Shroff, acting on behalf of the defendant, approached the plaintiff for further financial

assistance to enable the defendant to purchase the Barvad Pada Jungle. As per their agreement, the plaintiff expressed his willingness to advance loans. The terms of the agreement are to be found in the appeal records. The amounts advanced by the plaintiff relating to this transaction are to be found in the account opened by the plaintiff in the name of K. M. Karandikar and Company.

3. According to the plaintiff, he advanced in the name of K. M. Karandikar and Company, between 23rd December, 1950 and 31st May, 1951, a sum of Rupees 3,94,547/10/. The defendant made repayment towards this liability between 25-12-1950 and 16-9-1951, a sum of Rupees 3,53,000/10/, thus leaving a balance of Rupees 42,547/- (?) outstanding as against him. In the personal account of the defendant the plaintiff claimed to have advanced between 19-8-1949 and 1-8-1951 a sum of Rs. 1,83,555/- and a further sum of Rs. 3,000/- on October 23, 1951. That is, according to the plaintiff he had advanced a total sum of Rs. 1,86,555/-. Towards this account, the defendant is stated to have paid between April 8, 1950 and November 17, 1951, a sum of Rupees 1,95,848/-. Thus the defendant had paid an excess amount of Rs. 9,293/-. The plaintiff claimed that on September 16, 1951, at the request of the defendant, he transferred the entire liability of Rupees 42,547/-, outstanding in the account of K. M. Karandikar and Company, to the personal account of the defendant. After giving credit to the sum of Rs. 9,293/- paid in excess by the defendant in respect of his personal account, the plaintiff claimed that Rs. 33,254/- remained due to him. The plaintiff also claimed a sum of Rs. 15,000/- from the defendant under clause 6 of the agreement stated to have been entered into by him and the defendant in September 1950. But it is not necessary to consider this claim for Rupees 15,000/- as the same had been rejected by both the Trial Court and the High Court. Further it was not pressed on behalf of the plaintiff in this court on September 29, 1969, when the appeal was heard on a former occasion. The plaintiff also claimed a sum of Rs. 13,990/6/ being interest at 9 per cent on the various loans advanced by him from time to time. The plaintiff accordingly filed Original Special Suit No. 47 of 1953 claiming the above amounts.

4. The defendant contested the claim on various grounds. While admitting that he was borrowing amounts from the plaintiff from time to time and also further admitting that he was liable to pay interest at 9 per cent. on the amounts borrowed, he denied the plaintiff's claim that a sum of Rs. 42,547/- was due by him. On the other hand, the defendant claimed that he had to get from the plaintiff a sum of Rs. 2,730/- in respect of the dealings in the name of K. M. Karandikar and Company. He admitted that there were some meetings between him and the plaintiff on 9-9-1951 and 16-9-1951, but no agreement was arrived at. Finally, the defendant claimed that the plaintiff was indebted to him in the sum of Rupees 54,293/15/9. For recovery of this amount, the defendant in turn instituted Suit No. 9 of 1954.

5. Both the suits were tried together by the Trial Court and they were dismissed. The defendant filed First Appeal No. 152 of 1956 before the High Court challenging the dismissal of Suit No. 9 of 1954 instituted by him. The said First Appeal was dismissed by the High Court and there has been no further challenge at the instance of the defendant. Therefore, we will not be referring to those proceedings any longer.

6. The plaintiff's Original Special Suit No. 47 of 1953 was dismissed by the Trial Court on the ground that he had failed to prove that Rs. 42,547/- were due to him from the defendant in the account kept in the name of K. M. Karandikar and Company. The plaintiff carried the matter to the High Court in First Appeal No. 111 of 1956. The High Court finally passed a decree in favour of the plaintiff in the sum of Rs.601/92/- against which decision this appeal has been brought to this court by the plaintiff-appellant.

7. During the hearing of the appeal in the High Court, the learned Judges framed the following two issues :-

"1. Whether Exhibits 34 and 35 comprise the adjustment both of the personal account of the defendant and account in the name of Messrs. K. M. Karandikar and Co.?"

2. If not, whether on 16th September, 1951, the plaintiff was entitled to a sum of Rs. 42,547/- at the foot of Messrs. K. M. Karandikar and Company's account?"

and directed the Trial Court to record its findings after permitting the parties to adduce such evidence as they desired. The Trial Court submitted findings to the High Court to the effect that Exts. 34 and 35 represented a settlement of account in the name of K. M. Karandikar and Company as well as in the personal name of the defendant and that the settlement was only in respect of the account for Samvat year 2007 i. e. November, 1950 to October, 1951. In view of the findings on the first issue above mentioned, the Trial Court did not record any finding on the second issue.

8. After receipt of the findings, the High Court found that Exts. 34 and 35 represented the adjustment of both the accounts between the parties both for Samvat Year 2006 and Samvat Year 2007. The High Court finally found that the defendant was entitled to Rs. 43,288/- and that the plaintiff was entitled to a sum of Rs. 33,995/- and interest. Though a representation was made on behalf of the plaintiff that the High Court's view that there has been an adjustment of accounts between the plaintiff and the defendant, even for Samvat Year 2006, is not justified in view of the definite findings submitted by the Trial Court, the High Court did not accept this contention of the plaintiff. Ultimately, the High Court passed a decree in favour of the plaintiff for a sum of Rs. 601/92/-.

9. When the appeal came up before this Court on a former occasion, a view has been expressed that, in the absence of reliable evidence about what transpired at the time when Exts. 34 and 35 were executed, it is not possible to accept the defendant's contention that the accounts had been finally settled on September 16, 1951. This court has also expressed the view that from the findings submitted by the Trial Court on the issues framed by the High Court, it is clear that the settlement of accounts related only to Samvat Year 2007 and not to Samvat Year 2006. After a reference to certain other matters, this court has further held that there was no substantial difference between the

parties with regard to the entries in Schedule 'B' of the plaint and that the main dispute was regarding the entries in Schedule 'A' of the plaint. Inasmuch as neither party relied on Exts. 34 and 35 as representing a final settlement of the accounts, it was felt that to resolve the dispute it is necessary to have an account taken to ascertain what was due at the foot of the two accounts between the plaintiff and the defendant. It was also recorded that there was no dispute raised by the defendant about his liability to pay the amounts due in the personal account and in the account of K. M. Karandikar and Company. On September 29, 1969, by consent of parties, this court appointed an advocate of the Bombay High Court, Mr. C. R. Dalvi, as Commissioner for determining the amount due at the foot of the accounts and to determine the liability of the defendant to the plaintiff. In this regard, certain directions had also been given.

10. The Commissioner has now submitted his findings dated June 17, 1972. He has ultimately held that the plaintiff has failed to prove the transactions and that it is not possible to ascertain the amount due at the foot of the accounts and to determine the liability of the defendant to the plaintiff. He has further found that the liability of the defendant can be determined only on the basis of Exts. 34 and 35.

11. Mr. V. S. Desai, learned counsel for the plaintiff-appellant, very strenuously attacked the findings of the Commissioner. In view of the approach made by the Commissioner, the learned counsel for the defendant-respondent, Mr. Navnit A. Shah, found considerable difficulty in supporting the report of the Commissioner. After going through the report, we are constrained to observe that the Commissioner does not appear to have borne in mind the clear directions given by this court. Nor has he come into close grip with the points to which his attention had been focussed by this court. As we are satisfied that the Commissioner's report cannot be accepted, we do not propose to deal with the various matters referred to in the said report.

12. The only other alternative would be for us either to go into the various items and decide the controversy or send the appeal back to the High Court. The order dated September 29, 1969, of this court appointing Mr. C. R. Dalvi as Commissioner, clearly shows that the decree of the High Court allowing the plaintiff only a sum of Rs. 601/92/- cannot be sustained. As that order contains full reasons for not accepting the judgment and decree of the High Court in First Appeal No. 111 of 1956, we are not reiterating the same and we fully agree with those reasons. We have considered it better, in the circumstances, to set aside the Commissioner's report dated June 17, 1972, as also the decree and judgment of the High Court in First Appeal No. 111 of 1956. The said appeal, No. 111 of 1956, is remanded to the High Court for fresh adjudication, having due regard to the various observations and directions contained in the order of this court dated September 29, 1969, as also in the present order.

13. Counsel appearing for both the parties have agreed to treat the evidence adduced before the Commissioner, Mr. C. R. Dalvi, as evidence in the appeal subject only to any objections that any of them may have regarding their admissibility or otherwise in law. The report of Mr. Dalvi has not to

be taken into account. All points arising for decision and the controversy between the plaintiff and the defendant in First Appeal No. 111 of 1956, except the plaintiff's claim for Rs. 15,000/- as remuneration, will be adjudicated afresh by the High Court taking into account also the evidence that was let in by the parties before the Commissioner, Mr. Dalvi, and which is not objected to, as aforesaid, by any party. The High Court is at liberty to appoint a fresh Commissioner and give suitable directions, bearing in mind the aim and purpose for which Mr. Dalvi was appointed by this court by its order dated September 29, 1969. It is needless to state that the claim of the plaintiff and the defence of the defendant have to be gone into and adjudicated upon item by item. The claim originally made by the plaintiff for recovery from the defendant of Rs. 15,000/-, as remuneration for helping him and for giving guarantee, need not be considered by the High Court. It has been stated earlier by us that the said claim was not pressed in this court and it has been so recorded in this Court's order dated September 29, 1969. The parties will be at liberty to produce additional evidence both before the High Court, as well as before the Commissioner that may be appointed by the High Court. After a full and fair consideration, the High Court will pass suitable decree. The costs of this appeal, together with the expenses incurred by the parties before the Commissioner, Mr. Dalvi, as also the costs of the hearing of the First Appeal No. 111 of 1956 before the High Court on a former occasion and now, will abide and are to be provided for in the fresh decree that is to be passed.

14. In the result the report of Mr. Dalvi of June 17, 1972, is set aside in all respects. This appeal is allowed and the decree and the judgment of the High Court in First Appeal No. 111 of 1956 are set aside and the said appeal remanded for fresh disposal in accordance with the directions given in this judgment. We dare say that this matter being an old one, the learned Judges of the High Court will expedite the proceedings at all stages.

15. It is reported that the plaintiff-appellant has not paid to the Commissioner, Mr. Dalvi, the balance remuneration of Rs. 4,263.50. The counsel appearing for the plaintiff has assured us that this amount will be paid to the Commissioner within a month. Before further proceedings are commenced, the High Court will require the plaintiff to furnish proof for payment of the amount due to the Commissioner, Mr. Dalvi.

Appeal remanded.