

Municipal Board, Lucknow

Vs

Pannalal Bhargava and Others

Municipal Board, Lucknow

Vs

Sunderlal Gupta and Others

Civil Appeals Nos. 1868 and 1867 of 1967

(P.K. Goswami, P.N. Shinghal JJ)

25.02.1976

JUDGMENT

GOSWAMI J. -

1. This is an appeal by certificate of the Allahabad High Court under Article 133(1)(a) of the Constitution. The appellant is the plaintiff, the Municipal Board, Lucknow (hereafter briefly the Board). The Board instituted a civil suit being numbered 25 of 1953 in the Court of Civil Judge, Lucknow, on March 4, 1953, against seven defendants. The Board prayed for a decree for accounts to be passed against the defendants after their rendering of accounts, a decree for such amount as may be found due or in the alternative a decree for the sum of Rs. 69,642/6/6 against the defendants. The written statements were filed on behalf of defendants Nos. 1 to 3, 5 and 7. Defendants Nos. 4 and 6 admittedly migrated to Pakistan and their property was declared evacuee property by the Custodian under the Administration of Evacuee Property Act, who was impleaded as defendant No. 7. Fourteen issues were framed and only the following two issues were taken up for preliminary hearing :

Issue No. 6 :

Is the suit not maintainable as alleged in paragraph 22(?) of the written statement of defendant No. 1 ?

Issue No. 9 :

Is the suit on the ground of negligence barred by limitation ?

2. The Civil Judge answered both the issues against the Board. The High Court, in appeal, decided issue No. 6 in favour of the Board and we are not concerned with the same in this appeal. With regard to issue No. 9 the High Court set aside the judgment of the Civil Judge relating to defendants Nos. 1 to 3 and held that the suit was not barred by limitation against those three defendants under Section 326 of the U.P. Municipalities Act, 1916. The High Court, however, affirmed the decree of the Civil Judge in respect of defendant No. 5 - Mohd. Yusuf - and held that the suit was barred by limitation as against him under Section 326 of the aforesaid Act.

3. The Board had also made an application for review before the High Court with regard to the observations made in the judgment. The High Court accepted the review application with regard to the first observation complained of but declined to review the second observation. Mr. Dikshit, the learned Counsel for the appellant how does not press his claim with regard to the second observation before us.

4. Mr. Andley, the learned Counsel for the respondents Nos. 1 to 3, has raised a preliminary objection on the ground that the appeal has abated on account of the fact that Mohd. Yusuf, respondent No. 5, died more than six years back and the application of the appellant for setting aside abatement of the appeal with regard to respondent No. 5 which was made on March 21, 1974, was dismissed by this Court on December 3, 1975. The learned Counsel, therefore, submits that the whole appeal has abated on account of the above position.

5. We are, however, unable to agree that the question of abatement in this case would arise in view of the fact that even if the suit had been dismissed against defendant No. 5, the defendants Nos. 1 to 3 could individually be sued for rendering accounts and for recovery of the amount due from them. Whether they would be ultimately found by the court to be liable for the plaintiff's claim, is a different matter and will be decided in the suit. There is, therefore, no substance in the plea that the appeal as a whole has abated on account of the death of Mohd. Yusuf.

6. Mr. Dikshit has drawn our attention to a factual inaccuracy in the judgment of the High Court in the following observation while dealing with issue No. 9 :

As regards defendants Nos. 1, 4, 5 and 6, there is no dispute that they were servants.

7. Mr. Dikshit submits that there was dispute with regard to the fact of defendant No. 1 being a servant of the Board as will appear from issue No. 1 itself which is in the following terms :

Issue No. 1 :

Was the defendant No. 1 a servant or an agent of the plaintiff and was liable to render accounts ?

8. Mr. Andley appreciated the point and does not controvert the inaccuracy of the statement in the judgment. We, therefore, find that the question of defendant No. 1 being a servant of the Board remains a live issue for trial in the suit and the High Court's observation to the effect that there was no dispute is per incuriam.

9. In view of the concession made by Mr. Dikshit that he is not pressing his point with regard to the second observation in the judgment which was earlier the subject-matter of review before the High Court, we are of opinion that nothing survives in the appeal for decision.

10. Even so, Mr. Dikshit submits that so far as the decision of the High Court with regard to the dismissal of the suit on the ground of limitation under Section 326 of the U.P. Act against defendant No. 5 is concerned that will have a great bearing in the trial of the suit after remand even with regard to defendants Nos. 1 to 3. The learned Counsel submits that Section 326 is not applicable in a suit of this description instituted by the Board and the action is only intended as shield of protection in the hands of the Board, its members, officers or servants when sued as defendants. Although we see the force in this contention, we are unable to decide this point in this appeal. Such a point would have been open to be canvassed if the appeal against respondent Nos. 5 had not been dismissed on

the ground of abatement. The appeal against respondent No. 5 Mohd. Yusuf having been dismissed by this Court and the High Court having held that the suit was not barred under Section 326 of the U.P. Act against respondents Nos. 1 to 3, it is not open to the appellant to raise this legal issue in the absence of respondent No. 5. It is true that the High Court has held that Section 326 of the U.P. Act is not applicable on grounds different from what is now sought to be urged by the learned Counsel. That, however, will not affect the legal position. We, therefore, refrain from adjudicating upon the applicability of Section 326 of the U.P. Act on the ground urged. In the result the appeal is dismissed subject to the observation with regard to inaccurate recital in the judgment. We will, however, make no order as to costs.

Civil Appeal No. 1867 of 1967

11. We have just delivered the judgment in Civil Appeal No. 1868 of 1967 which was heard along with the above civil appeal. Mr. G. P. Lal appearing on behalf of the legal representatives adopted the arguments advanced by Mr. Andley in Civil Appeal No. 1868 of 1967. The learned Counsel, however, pointed out that respondent No. 1 Sunderlal Gupta died on December 6, 1970, respondent No. 2 Sumer Chand died on January 1, 1968 and respondent No. 3 Sidhnath Gupta died on December 12, 1971. We are not required to consider in this appeal the effect of the death of these respondents and leave the matter open. This appeal is governed by the decision in Civil Appeal No. 1868 of 1967 and is dismissed. We will, however, make no order as to costs.

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