Ganga Bishan and Others

Vs

Jai Narain

Civil Appeal No. 627(N) of 1971

(E. S. Venkataramiah, R. B. Misra JJ)

19.11.1985

JUDGMENT

VENKATARAMIAH, J. -

1. This appeal by certificate is filed against the judgment and decree passed by the High Court of Rajasthan in Regular First Appeal 43 of 1962, dismissing the appeal filed by the appellants against the judgment and decree passed in Civil Suit 5 of 1960 on the file of the District Judge, Balotra and allowing in part the cross-objections filed by the respondent. The appellants were the defendants in the suit and the respondent was the plaintiff. The parties are referred to hereinafter in accordance with their position in the trial court.

2. The parties belong to Barmer town in the State of Rajasthan. The case of the plaintiff was that on December 25, 1957 the defendants received from him gold weighting 250 tolas as a trust deposit (amanat), that they had agreed to carry that gold to Bombay at their own risk and to deliver it to the plaintiff against the payment of a sum of Rs 300 as their remuneration for the work. The plaintiff produced along with the plaint a tehrir (amanati chithi) said to have been executed by the defendants under which they had acknowledged the receipt of the quality of gold which was of 99.45 fineness. The plaintiff alleged that after receiving the above gold the defendants neither carried it to Bombay nor returned it to him at Barmer. He further alleged that on July 27, 1960 he had sent a registered notice calling upon the defendants to return the gold and as they had failed to comply with his demand, he had instituted the above suit. This suit was filed on October 5, 1960 for recovery of the gold or its value which he estimated at Rs 34,000. The defendants are brothers. They were all employees of the Government. The first defendant Ganga Bishan was working as the Head Constable in the Police Department since 1940 at Barmer. The second defendant Ram Pratap was then working in the Railway Police. The third defendant Bhanwar Lal was also working in the Police Department since October 1, 1951 and at the time of the suit he was working as a Head Constable at Barmer. The fourth defendant Ram Chandra was working as a teacher. All the defendants filed a common written statement. They denied having received any gold from the plaintiff and also the execution of tehrir, i.e., amanati chithi. They denied having undertaken the work of carrying the gold from Barmer of Bombay and to hand it over to the plaintiff at Bombay. They alleged that the plaintiff was indulging in the smuggling of gold from Pakistan. They also pleaded that the suit was barred by time. On the basis of the pleadings the court framed a number of issues and at the conclusion of the trial the trial court decreed the suit directing the defendants to hand over to the plaintiff 250 tolas of gold of the fineness of 99.45 and in default a sum of Rs 34,000. The defendants were directed to pay the costs also. Aggrieved by the decree of the trial court, the defendants filed the appeal referred to above, before the High Court of Rajasthan. The plaintiff also questioned the decree by way of cross-objections contending that the price of the gold

fixed by the trial court at Rs 136 per tola was not correct and that it should have been fixed at Rs 146 per tola since the price of gold had gone up by the date of the decree. He also contended that the decree of the trial court should be modified by directing payment of interest from the date of the suit on the value of the gold. The High Court dismissed the appeal of the plaintiff, as mentioned above, but allowed the cross-objections of the plaintiff in part, by directing the defendants to pay interest on Rs 34,000 at the rate of 6 per cent per annum from the date of suit, i.e., October 5, 1960 till realisation, in addition to the sum of Rs 34,000 in the event of the defendants not returning the gold bar to the plaintiff. This appeal is filed against the judgment and decree of the High Court.

3. It is no doubt true that in this case both the trial court and the High Court have recorded concurrent findings on the question of entrustment of gold to the defendants. But since we found that there were some serious infirmities which had been overlooked by the High Court and the trial court, we requested the learned counsel to take us through the evidence on record and to make their submissions on the said question of fact also.

4. Before proceeding further we propose to deal with the contention of the learned counsel for the plaintiff regarding the scope of the power of this Court to interfere with the concurrent findings of fact of the High Court and of the trial court under Article 136 of the Constitution. He relied upon Govind Prasad v. Kunwarani Bala Kunwar (AIR 1934 PC 12 : 1934 All LR 143 : 36 BLR 232 : 59 CLJ 93), Smt. Bibhabati Devi v. Kumar Ramendra Narayan Roy ((1945-46) 73 IA 246 : AIR 1947 PC 19), Dinabandhu Sahu v. Jadumoni Mangaraj ((1955) 1 SCR 140 : AIR 1954 SC 411), and some other decisions in support of his contention that this Court should not interfere with the findings of facts recorded concurrently by the trial court and the High Court. We have duly considered the said decisions. It is true that ordinarily this Court is averse to interfere under Article 136 of the Constitution with the concurrent findings of fact recorded by the High Court and the trial court. But where there are material irregularities affecting the said findings or where the court feels that justice has failed and the findings are likely to result in unduly excessive hardship, this Court cannot decline to interfere merely on the ground that the findings in question are findings of fact.

5. It is relevant to refer here to the observations of the Judicial Committee of the Privy Council in Smt. Bibhabati Devi v. Kumar Ramendra Narayan Roy ((1945-46) 73 IA 246 : AIR 1947 PC 19) at page 259 that the practice of the Board not to interfere with the concurrent findings of two courts was not a cast-iron one and the statements contained earlier in its opinion as to reasons which could justify departure were illustrative only and that there might still occur cases of such an unusual nature as would constrain the Board to depart from the practice. We cannot also fail to take note of the other constitutional provision, namely, Article 142 which says that the Supreme Court in the exercise of its jurisdiction may pass such decree or such order as is necessary for doing complete justice in any case pending before it. The Constitution has left it to the judicial discretion of this Court to decide for itself the scope and limits of its jurisdiction in order to render substantial justice in matters coming before it. It is neither possible nor desirable to lay down any rigid rule capable of covering all conceivable cases, while it is however clear that Article 136 does not confer an unrestricted right of appeal on any party of claim the reopening of all questions of fact and law where none exists otherwise. (See Liyakat Mian v. State of Bihar ((1973) 4 SCC 39).) We may add that in some cases having extraordinary or unusual features this Court has interfered with the concurrent decisions of the High Court and of the trial court, particularly where the decision turned on the probabilities and the surrounding circumstances material to the case, which had been unjustifiably disregarded by the High Court and the trial court (e.g. Bimal Kumar Chatterjee v. Smt. Nihar Bala Devi (Civil Appeal 3 of 1965, decided on February 18, 1965)).

6. The evidence adduced in this case can be divided into three parts : (1) the evidence relating to the acquisition of the gold in question by the plaintiff; (2) the evidence relating to the entrustment of the gold to the defendants; and (3) the conduct of the parties subsequent to the date of the alleged entrustment.

7. On the question of the acquisition of the gold bar in question by the plaintiff we have the oral evidence of the plaintiff only. The plaintiff claimed that he was a dealer in forward contracts in gold, silver and cotton and that he had business transactions with some merchants such as Amolak Amichand of Bombay and Loknath Tibra of Bombay, but he had not maintained any account books relating to his transactions. He did not also remember how much income he used to derive from that business. He was not an assessee under the Indian Income Tax Act. As regards the gold in question, his oral evidence was that he had purchased the said gold from a firm called Motilal Brij Bhusan & Co. of Bombay and he did not remember how much amount he had actually paid for it. But he said that it was a little more than Rs 25,000 but less than Rs 26,000. He further stated that he had also purchased on that same date gold weighing about 100 tolas from one Maganlal Manakmal of Bombay. He stated that he had carried from Barmer to Bombay a sum of Rs 40,000 when he went to purchase the gold in question and the said Rs 40,000 was a part of the amount lying in his house. The said amount, according to him, comprised of the earnings of his father, his uncle and of himself and there was some more money still left in the house. The entire amount was lying in his house for about 15 years. He further stated that he had taken along with him his sister's son Ram Bhajan when he purchased the gold at Bombay and that one Bhuralalji Sha of Bhilwara who lived in Bombay had assisted him in purchasing it. He stated that he had brought to Barmer the entire quantity of gold, i.e., 250 tolas purchased from Motilal Brij Bhusan & Co. which was the subject matter of the suit and also 100 tolas gold which he had purchased from Maganlal Manakmal of Bombay. He had, however, to admit in his cross-examination that his house had been mortgaged by his father to secure a loan from one Mukandass Khoobchand and that mortgage had not been discharged for several years. The creditor had filed a suit for recovery of the mortgaged money and that the suit had been decreed. He further admitted that the cash bill under which gold had been purchased by him from Maganlal Manakmal of Bombay was still lying with him, but he had not produced it into the court. He also admitted that he had heard that in or about 1957 gold used to be smuggled into Barmer from outside India and was being sent to Bombay.

8. The next part of evidence relates to the case of entrustment of gold to the defendants. The plaintiff stated that he thought that it was feasible to engage the defendants to carry the gold to Bombay because in those days the Customs authorities were in the habit of searching persons who were going from Barmer to Bombay and that they did not allow even gold which was lawfully held to be carried by any person. But it would appear that the Customs authorities were not in the habit of searching Government officials and, therefore, he thought of entrusting the gold in question to the defendants, who were Government officials, so that it could be carried safely to Bombay. It is the further case of plaintiff that on the morning of December 25, 1957 he went to the house of defendants and it was settled that one of them should accompany the plaintiff to Bombay that evening along with the gold and he should deliver the gold to the plaintiff at the shop of Gulabchand Kashiram at Kalba Devi Road, Bombay. On the same day in the evening, the plaintiff stated, that he took the defendants to his house and entrusted the gold to them. Although he had stated that it had been settled in the morning that the gold would be weighed before its entrustment its weight was ascertained only by the markings on it as can be seen from the evidence adduced by the plaintiff. It was not weighed. In support of his case relating to the entrustment, the plaintiff has relied upon the document Ex. I which is styled as the tehrir, stated to have been executed by the defendants on December 25, 1957 acknowledging the receipt of the gold. Ram Jiwan, PW 2, is stated to be the

writer of the tehrir. Govind Ram, PW 3 and Bhagwan Das, PW 5, claim to be the attestors of the tehrir. All of them say that the tehrir had been signed by the defendants. Ram Jiwan says that the plaintiff handed over 250 tolas of gold to the four defendants and that it bore the mark of 99.45. He further says that he had handled the gold bar by his hand and that it did not bear the name of any company or firm. Govind Ram, PW 3, also says that the plaintiff entrusted 250 tolas of gold to the defendants, which was of 99.45 fineness. He denies having seen any mark on the gold. The evidence of Bhagwan Das, PW 5, also is to the same effect but he adds that the words '250 tolas' had been written in English on it. He said that it was agreed that it should be carried on the same day. He stated that he did not enquire why the gold was being sent through the defendants instead of being carried by the plaintiff himself. As regards the subsequent events and his own conduct the plaintiff stated that when he arrived at the railway station for leaving for Bombay on that very day after the gold was entrusted. Ganga Bishan, defendant 1, came there and said that they might leave on the next day. Therefore, he did not go to Bombay. When the defendants also failed to return the gold, he did not report the matter to the police, since the defendants were telling that they would be returning it. He, however, stated that he told the Sub-Inspector about this fact but he asked him to see the Superintendent and that when he met the Superintendent he told him that he would admonish the defendants and 'get his work done'. It is not known what actually happened thereafter. However, no record of these things is before the Court. These police officers also have not given evidence in the case. It is admitted that the plaintiff did not file any criminal complaint against the defendants and that the only legal action that was taken by him was the suit which was filed nearly two years and ten months after the alleged entrustment. Even the notice of demand was issued nearly two and half years after the alleged entrustment and the defendants had promptly denied the case of entrustment in their reply. This inordinate delay has not been explained except saying that the plaintiff had approached the police officers, as stated above, about which we have no other evidence.

9. All the defendants have given the evidence in the case. They have denied the entrustment of the gold and also the execution of the tehrir. There is the evidence of an handwriting expert who has been examined as DW 8, whose opinion was that the document did not contain the signatures which were comparable with the admitted signatures of the defendants.

10. On going through the evidence of this case we find it difficult to hold that the plaintiff was actually in possession of 250 tolas gold which he had purchased at Bombay some time earlier. The plaintiff has not chosen to examine the person who had sold the gold to him. It is difficult to believe the story that a sum of Rs 40,000 which was taken by him to Bombay to purchase the gold in question, which according to him had been earned by his father, his uncle and by himself was lying with him for nearly 15 years. There is no reliable evidence about the means of the plaintiff. It has already been shown that the father of the plaintiff had to mortgage his house for a loan which was outstanding for a long time and the mortgages had obtained a decree for nearly Rs 20,000 against the plaintiff on the foot of the said mortgage. This fact belies the story that a large sum was lying in the house of the plaintiff. Although the plaintiff claims to be a dealer in forward contracts in gold, silver and cotton he has not maintained any account books. The plaintiff has also not examined his sister's son who had accompanied him to Bombay when he purchased the gold in question, nor Bhuralalji Sha who assisted him in purchasing it. It is strange that the plaintiff who claimed to have brought the gold in question from Bombay to Barmer about fifteen months earlier was afraid of carrying it himself from Barmer to Bombay back on account of the fear of a possible search by the Customs authorities and that he had thought of entrusting it to the defendants who were government officials, who were not being searched by the Customs authorities. If in fact he possessed the cash bill under which he had purchased the gold there was no need to resort to this mode of carriage of gold. Curiously the tehrir recites that the cash bill also had been handed over to the defendants. It is

difficult to believe that the Customs authorities were seizing gold from persons who were lawfully holding it. All the four defendants were employees of the government and there was no suggestion that they were carrying on jointly the business of carrying goods from one place to another for consideration. It is not easily understandable why all of them signed the tehrir together since there was no suggestion that they were either jointly carrying on the business of carrying goods or that three of them had agreed to be the sureties for one of them who had undertaken to carry the gold. The tehrir which is written in a very formal fashion appears to be quite an unusual one. It is surprising that the plaintiff had not complained to the police even though the defendants had failed to carry the gold to Bombay or to return it to him.

11. On a consideration of the entire evidence, we are of the view that the story of the plaintiff that he had entrusted 250 tolas of gold to the defendants, as alleged by him, is baseless and appears to be wholly artificial. In the circumstances no value can be attached to the alleged tehrir said to have been executed by the defendants, the execution of which is denied by them. Admittedly, the parties were living in an area where smuggling operations were going on on a large scale. Since we do not believe the evidence regarding the purchase of the gold by the plaintiff at Bombay which according to him was later on entrusted to the defendants, no liability would arise from the document in question even if it is held that such a document had been brought into existence in the peculiar circumstances of the case. The genuineness of the transaction referred to in that document cannot be believed. Neither the trial court nor the High Court has given due consideration to the material aspects, referred to above by us and the judgments therefore stand vitiated.

12. In view of the above conclusion, it is not necessary for us to consider the question of the bar of limitation pleaded by the defendants on the basis of Articles 30 and 31 of the Indian Limitation Act. 1908. We, therefore, allow this appeal, set aside the judgment and decree passed by the High Court of Rajasthan as well as the judgment and decree passed by the trial court and dismiss the suit. The parties shall however bear their own costs throughout.

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