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Court : Patna

Decided On : Apr-06-1995

Judge : B.L. Yadav, A.C.J. and N. Roy, J.

Appeal No. : Letters Patent Appeal No. 166 of 1991 (R)

Appellant : Bhaskar Ganguly @ Vaskar Ganguly and anr.

Respondent : Sujit Kumar Gupta

Disposition : Appeal Dismissed

Prior history : B.L. Yadav, A.C.J. 1. This is a defendants' Letters Patent Appeal preferred under Clause X (ten) of the Patna High Court Rules in a suit filed by plaintiff-respondent, a building contractor, for recovery of a sum of Rs. 54, 414.77 paise plus interest @ 11% per annum from the defendants-appellants. 2. The factual matrix of the case is that on the request of defendant Nos. 1 and 2, plaintiff-respondent completed a work of repairs and reconstruction of Ratan Talkies under the supervision of Mr. M

Judgement :

B.L. Yadav, A.C.J.

1. This is a defendants' Letters Patent Appeal preferred under Clause X (ten) of the Patna High Court Rules in a suit filed by plaintiff-respondent, a building contractor, for recovery of a sum of Rs. 54, 414.77 paise plus interest @ 11% per

annum from the defendants-appellants.

2. The factual matrix of the case is that on the request of defendant Nos. 1 and 2, plaintiff-respondent completed a work of repairs and reconstruction of Ratan Talkies under the supervision of Mr. M.D. Birnawe (Architect). There was an agreement that the work was to be done regarding drawing and designing and plan supplied by the defendants. The plaintiff, a contractor of repute has his business in the town of Ranchi. Even after completion of the work the amount was not paid to the plaintiff, hence the suit aforesaid giving rise to present Appeal was filed.

3. The suit was contested by defendant Nos. 1 and 2, the appellants, who denied the averments in the plaint and pleaded that it was a lump-sum contract for a sum of Rs. 1,40,000/-. The plaintiff himself committed a breach of contract, inasmuch as he neither completed the work within time rather took unreasonable time and failed to comply with the specifications given to him, as a result of which defendants suffered substantial loss. To the extent the work was completed it reflected poor workmen ship. The plaintiff was entitled to no relief rather he was liable to pay Rs. 22067.73 paise to defendant Nos. 2 and 3, as set off. The suit was liable to fail.

4. The trial court framed four issues. First was, whether the suit, as framed, was maintainable and second was whether there was cause of action for the suit, Third was whether plaintiff was entitled to decree and Fourth was whether relief, as claimed, could be granted.

5. Issue No. 1 was not pressed before the trial court. Issue Nos. 2, 3 and 4 were, pressed before the Trial Court. The suit, however, was decreed. The trial court noticed that either of the defendants did not come in the witness box. It was held that it was not an oral contract and not lump-sum. This was also considered in First Appeal by the learned Single-Judge. The learned single Judge dismissed the First Appeal of the defendants holding that the plaintiff was entitled to a sum of Rs. 54,414.77 paise along with interest.

6. The defendants preferred the First Appeal before this Court and the learned Single Judge after hearing the arguments of both the sides dismissed the appeal.

This Present L.P.A. has been filed against the judgment and decree of the learned single Judge of this Court.

7. Learned Counsel for the appellants urged that correct issues were not framed. The entire evidence on the record has not been correctly appreciated and unnecessarily much emphasis was given on the fact that the defendant himself did not enter the witness box. The learned Counsel urged that the judgments of the learned single Judge and of trial court deserve to be set aside.

8. The learned Counsel for the appellants indicated that as issue must have been framed as to whether the defendants or plaintiff was to be blamed for unsatisfactory work. Leaned counsel for the respondents, on the other hand, urged that correct issues have been framed and in case the defendants-appellants have any grievance they could get correct issue framed while the case was pending before the trial court. In any case no prejudice has been caused by improper framing of issues. The presumption has correctly been drawn under Section 114 of the Evidence Act. The parties knew the case set up by the otherside and led evidence to prove the same, hence there was no error even if proper issues were not framed. The trial court and the first appellate court have correctly appreciated the evidence on record. The findings are findings of fact and no interference is called in this appeal.

9. Having given our attentions to the submission of respective parties the moot questions for our determination are as to whether issues were correctly framed and if not in the absence of proper and correct issues whether appellate could be said to be prejudiced and if so its effect, the next question is whether the trial court and the learned single Judge were justified in drawing an inference against the defendants-appellants, simply because either of the defendants failed to enter the witness-box to support their case.

10. As regards the first question, as to whether proper and correct issues were framed, if not its effect and whether any prejudice has been caused to the appellants and its result on the trial of the suit. There could be no two opinions about the fact that issues are framed in view of Order 14 Rule 1 of the Code of Civil Procedure, 1908 (compendiously 'the Code'). Issues are framed only in

respect of those material facts which have been alleged by one party and either denied or not admitted by the other party. In this regard it may be stated that the statements of parties or their counsel recorded under Order 10 Rule 2 of the Code or under any other provisions with a view to clarify the points in dispute are as much part of the pleadings as the plaint or written statement.

11. Normally issues are framed for a right decision of the controversy between the parties. This is with a view to pinpoint the real and substantial points of difference. The materials from which issues have to be framed are indicated under Order 14 Rule 3 of the Code. These materials are three fold, i.e., allegations made on oath by the parties, made by the pleaders of parties and the allegations made in pleadings and contents of documents produced by either party. While framing, the court has to bear in mind that the determination in a case should be founded on an averment made in pleadings. The duty to frame correct issues rests on the Court. Therefore, four issues framed, i.e., is the suit as framed maintainable, if the plaintiff has any cause of action, is the plaintiff entitled to get decree and if the plaintiff was entitled to a relief as claimed. We have perused the pleadings of the parties and in our opinion the issues were correctly framed. In case the defendants felt that issues were not correctly framed, it would have reframed under the provisions of Rule 5 of Order 14 of the Code. But the defendants did not do so.

12. The issues framed, in our opinion, were sufficient for the correct disposal of the suit, even if as suggested by the defendants-appellants an additional issue to the effect whether the plaintiff or the defendant was responsible for the incomplete repair and reconstruction of the work, was to be framed, in that event the defendant if feels aggrieved from the issues already framed, could have made an application or suggested the court under Order XIV Rule 5 of the Code to amend of to frame an additional issue. But the defendant-appellants failed to do so. In this way our considered opinion is that the trial court correctly framed the issues and by those issues the defendants-appellants could not be said to be prejudiced.

13. The other questions emanates from the first one as to whether assuming that improper issues were framed, would that be said fatal to the case or that would be said that there was a mistrial. In such matters the broad principles is that both the

parties went to the trial on understanding the case set up by the opposite parties and led the complete evidence in reply to the same, even if there was omission to frame an issue that can not be said to be fatal to the case. On that account of omission to frame an issue the defendants-appellants cannot be said to be prejudiced. There can be only one conception whether on examination of the record or the evidence led the court is satisfied that on a particular issue framed no evidence was adduced or on account of improper framing of the issue the party can not lead sufficient evidence. That is such matter when substantial justice has been done between the parties whether omission to settle an issue would not prejudice either of the parties. See *Kameshwarama v. Subba Roy* : [1963]2SCR208 and *Kunju Kesavan v. M.M. Philip and Ors.* : [1964]3SCR634 .

14. What is to be emphasised that Section 99 of the Code provides that no decree shall be reversed or substantially varied nor any case shall be remanded in appeal on account of mis-joinder or non-joinder of the parties or cause of action or any error, defect or irregularity in any proceeding in the suit not affecting the merit of the case or jurisdiction of the court. In this view of the matter a decree can not be reversed or varied or a judgment can not be set aside or modified simply because even some defects or irregularity is assumed unless the same, of course affects the merit of the case or the jurisdiction of the court. In case defect or irregularity was of some importance as to affect the merit of the case or the jurisdiction of the court only in that event it becomes a material irregularity justified inference by the court.

15. As a matter of fact framing of the issues pertains to the domain of the procedure and the elementary rules of interpretation in respect of the procedure are that these are not an end in themselves but there means to achieve justice. Rules of procedure are tools forged to achieve justice and are not hurdles to obstruct the pathway to justice. Construction of a rule of procedure which promotes justice and prevents its miscarriage by enabling the court to do justice in myriad situations, all of which can not be envisaged, acting within the limits of the permissible construction, must be preferred to that which is rigid and negatives the cause of justice. The reason is obvious. Procedure is meant to serve and not to rule the cause of justice. See *Owners and Parties interested in M.V. Vall Pro v.*

Fernendeo Lopez and Ors. Judgments Today 1989 (4) S.C. 10, per J.S. Verma. J. (Paras 18 & 19). : AIR 1989 SC2206 . Similarly in Desh Bandhu Gupta v. N.L. Anand 1993 (5) Judgments Today 313 on page 318 it has been held by the Apex Court that procedure is the hand-maid justice. Applying these principles to the framing of the issues or the insufficient issue it can very well be said that the rules of procedure require that if justice has been done and no party is prejudiced, in that event the issues framed must be permitted to remain. But, in case the court feels that some prejudice is caused or some party could not lead sufficient evidence as the issues were not properly framed, in that event the court can direct the proper issues to be framed. In such matters the provisions of Section 99 of the Code have to be kept in mind.

16. Reverting to the last question as to whether by non-appearance of the defendant-appellant inference could have been made by the trial court as well as by the learned Single Judge that as the defendant did not come in the witness box, hence if he would have appeared, he would not have supported his own case. In such matters the Legislature in its wisdom enacted Section 114 of the Indian Evidence Act wherein it has been provided that a Court can draw inference in case a person did not enter the witness box or if somebody withholds evidence to be led in the Court, in that event the Court can draw inference that the defendant did not appear as in case he would have entered the witness box, he would have deposed against himself. Quite consistent with this principle the Court has drawn inference that as the defendant-appellant did not come in the witness box to support his case, hence inference was that in case he would have entered the witness box he would not have supported his own case. In our opinion, neither the trial court nor the learned Single Judge could be said to have committed any error in drawing inference against the appellants.

17. In view of the premises aforesaid the Letters Patent Appeal fails and the same is dismissed without any order as to costs.