

Shankar Vs. Sainath

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Court : Mumbai Aurangabad

Decided On : Mar-21-2016

Judge : T.V. Nalawade

Appeal No. : Civil Revision Application No. 107 of 2014

Appellant : Shankar

Respondent : Sainath

Judgement :

1. The proceeding is filed to challenge the judgment and order M.A.R.J.I. No.16/2009 which was pending in the Court of the Civil Judge Junior Division Khultabad, District Aurangabad. The said proceeding was filed under provision of Order 39 Rule 2-A of the Code of Civil Procedure by the plaintiff. The trial Court has held the present petitioner guilty of breach of order of temporary injunction and the trial Court has ordered to send the present petitioner to civil prison for 15 days. Both the sides are heard.

2. The provision of Order 43 Rule 1(r) of the CPC was not made applicable to this State in view of the Bombay Amendment of 1st October 1983. It appears that there are conflicting decisions on the tenability of the revision against the order made under aforesaid provision. It appears that in cases reported as **1993 (1) Bom. C.R. 131 (Dry Chillies Brokers Association v. Dnyaneshwar Chamat)** (Nagpur Bench) and **2002 (3) Bom. C.R. 593 (Vitthal Shriram Kharbadkar v.**

Pandurang Irbhanji Kadu) (Nagpur Bench) it was held by this Court that as the provision of Order 43 Rule 1(2) of the CPC as amended for this State does not provide for filing of appeal, the appeal is not tenable and so revision needs to be filed. As against these two decisions there are three decisions of this Court like (1) **1994(1) Bom. C.R. 366 (Harivilas Madhavprasad Ruia v. Viraf Ardeshir Udwadia)**, (2) **2005(2) Bom. C.R. 43 (Bansidhar Ramratan Upadhyay v. Ramchandra Ramnarayan Totla)**; and (3) **2010 (Supp.) Bom. C.R. 940 (Vasant Raghobaji Talekar v. Natwarlal Rantansi Thakkar)**. In these 3 cases this Court considered other provision of the CPC like provision of section 104(1)(h) of the CPC which runs as under:-

"104. Orders from which appeal lies.-- (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:-

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree."

3) In one of the cases cited supra it was held that the revision is not tenable as the order would not put to an end the suit itself.

4) Learned counsel for the petitioner submitted that there is one more portion in section 104 of the CPC like 104(1)(i). that portion reads as under :

"(i) any order made under rules from which an appeal is expressly allowed by rules."

Learned counsel submitted that in view of this provision and when in Maharashtra, provision of Order 43 Rule 1(r) of the CPC is not applicable the appeal cannot lie and only revision can lie. This proposition is not acceptable. In section 104 of the CPC categories of the cases in which appeal is available are given and section 104(1)(i) is one of those categories. Due to State amendment of some portions of Order 43 Rule 1 of the CPC, the scope of other provision of section 104, the part like 1(h) cannot be reduced. In the present matter it can be said that provision of

section 104(1)(h) is applicable. The provision of remaining portion like (i) of this section was also applicable in the past. By the State amendment care is taken to remove the relevant portion of section 104(1)(i) but due to that it cannot be said that appeal cannot be filed as specifically provided under section 104(1)(h) of the CPC.

5. The proceeding filed for punishment for breach of injunction order is treated as an independent proceeding. Power is given to the civil Court to send the person who is guilty of the breach to civil prison. In view of the nature and scope of the inquiry, it needs to be presumed that higher and more rights are given by the legislature to the person against whom the order of civil imprisonment is made. Scope of revision is limited and for that reason also this Court holds that appeal is available against such order.

6. It appears that the present petitioner had initially filed appeal in District Court but it was withdrawn in view of the aforesaid observations made in the case reported as 1993 (1) Bom. C.R. 131, cited supra.

7. Learned counsel for the petitioner has apprehension that due to the order which this Court is making the petitioner may lose the right of appeal as the order was made by the Civil Court on 26th April 2014. When there are conflicting decisions of this Court like in the present matter there is always liberty to the subordinate judiciary to accept one of the two views of this Court provided that there is no precedent on the point involved from the Supreme Court. In view of this position, this Court holds that the present petitioner will be entitled to take benefit of section 14 of the Indian Limitation Act.

8. With these observations this Court holds that the revision is not tenable. The revision is disposed of as not tenable. However, there is liberty to the present petitioner to file appeal in District Court. Interim relief given by this Court is continued for a period of one month during which period, the proceeding needs to be filed.