Prabhakar Vs. Vinayakrao

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Court : Mumbai

Decided On : Jan-20-1983

Reported in : AIR1983Bom301; (1983)85BOMLR295

Judge : Ginwala, J.

Acts : Code of Civil Procedure (CPC), 1908 - Order 4, Rules 1(3) and 5(5)

Appeal No. : Civil Revn. Appln. No. 617 of 1980

Appellant : Prabhakar

Respondent : Vinayakrao

Advocate for Def. : B.N. Mohta, Adv.

Advocate for Pet/Ap. : M.G. Ghangde, Adv.

Judgement :
ORDER

1. The non-applicant obtained a decree against the applicant for an amount of Rs. 1,840/- against which the applicant preferred an appeal in the Court of the District Judge, Akola, on 8-9-1980. On 10-9-1980 the Appellate Court called upon the applicant-appellant to state whether he had complied with Court. 41, R. 1 (3) of the Civil P. C. (hereinafter referred to as 'the Code') by crediting decretal amount in Court. On 22-9-1980 the counsel for the applicant made an endorsement on the

appeal memo to the effect that the amount ahd not been deposited. Thereafter on 24-9-1980 the Appellate Court passed the following order :

'It is money decree and unless the decretal amount is paid the appeal is not tenable under O. 41, R. 1 (3), C. P. C. Hence, appellant to credit the decretal amount with costs within 7 days. C. F. 1-10-1979 (sic).'

Since the applicant did not deposit the amount till 1-10-1980 as directed by the Appellate Court, his counsel sought for further time to do so and the Appellate Court granted him time till 17-10-1980. It is at this stage that the applicant presented this revision application in this Court on 14-10-1980 disputing the validity of the order passed on 24-9-1980.

2. The question which arises for consideration in this revision application is whether compliance with the provisions contained in sub-r. (3) of R. 1 of O. 41 of the Code is condition precedent to filing an appeal against a decree for payment of money. Sub-rules (1) and (2) of R. 1 of O. 41 prescribe the mode of preferring an appeal. Sub-rule (3) which has been inserted by the Code of Civil Procedure (Amendment) Act 1976 is in the following terms :

'(3). Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.'

Since sub-rule (3) has been placed in R. 1 of O. 41 of the Code which prescribes the mode in which an appeal can be preferred, it may appear as if this sub-rule lays down the requirement for preferring an appeal against a decree for money. In other words, it may look as if an appeal against a decree for payment of money would not be tenable unless and until the appellant deposits the amount disputed in the appeal or furnishes such security in respect thereof as the Appellate Court may allow. It is because of this that the Appellate Court in the present case appears to have suo motu passed the impugned order.

3. If the legislative history in enacting this sub-rule is looked to, it will be clear that it was never the intention of the Legislature to make compliance with sub-rule (3) as a condition precedent for preferring an appeal against a decree for payment of money. The Code of Civil Procedure (Amendment) Bill 1976 (Bill No. XXIV of 1976) proposed insertion of the said sub-rule in the form in which it has been enacted. However, at the same time the bill also proposed to insert sub-rule (1A) in R. 3 of O. 41 to the following effect:

'(1A). Where the appellant fails to make deposit or furnish security specified in sub-rule (3) of R. 1, the Court shall reject the memorandum of appeal.'

This bill was referred to a Joint Committee of both the Houses of Parliament which submitted its report on 1-4-1976. Paragraph 65 of the report dealt with the clause of the Bill under which the abovesaid two sub-rules were sought to be inserted in R. 3 of O. 41. The observations of the Committee which are relevant for our purpose are in the following terms '

'(1). The Committee note that under the proposed new sub-rule (1A) of R. 3 in O. XLI, if the appellant fails either to deposit the amount disputed in the appeal or to furnish security for such amount, the memorandum of appeal shall be rejected. The committee feel that such a provision will deprive a judgment-debtor having a good case, to pursue the appeal on account of his inability to deposit the disputed amount or to furnish security for such amount.

The Committee are, therefore, of the opinion that in order to see that justice is done to both the parties, the proposed sub-rule might be amended in such a way that neither the judgment-debtor is deprived of his right to pursue the appeal nor the decree holder is deprived of the remedy. Proposed sub-rule (1A) has been amended to provide that stay of execution of the decree will not be granted unless the deposit is made or security is furnished and has been transposed as sub-rule (5) of R. 5.'

Ultimately when the said Bill went through both the Houses of the Parliament and emerged as the Code of Civil Procedure (Amendment) Act, 1976, the insertion of sub-rule (1A) in R. 3 was modified as recommended by the Joint Committee and

enacted as sub-rule (5) of R. 5 which is in the following terms.

'(5). Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit the furnish the security specified in sub-rule (3) of R. 1, the Court shall not make an order staying the execution of the decree.'

The result was that though sub-rule (3) was inserted in R. 1 of O. 41 making a provision for the appellant in the case of an appeal against a decree for money to deposit the disputed amount or to furnish security in respect thereof as the Appellate Court may allow, the consequence of failure on the part of the appellant to comply with this provision, which was proposed in the shape of insertion of sub-rule (1A) in R. 3 of O. 41, was given up at the stage of legislation and the only consequence which was enacted is contained in the sub-rule (5) of R. 5 of O. 41. The upshot of this whole legislative history is that the Parliament never intended that a person who intends to prefer an appeal against the decree for payment of money has, as of necessity, to comply with the provision contained in the said sub-rule as a condition precedent for the tenability of the appeal.

4. As said above the Appellate Court on its own motion passed the impugned order on the assumption that the appeal would not be tenable unless and until the appellant complied with the provisions of sub-rule (3) of R. 1 of O. 41. This is quite apparent from the language in which the impugned order has been couched. As said above the assumption of the Appellate Court that the appeal would not be tenable unless the decretal amount is paid is not correct and valid. Hence if the foundation on which the order dated 24-9-1980 has been based is knocked out, the order itself would fall to the ground. Since it cannot be said as to whether the Appellate Court would have passed the impugned order on its own motion if it was aware of the correct legal position that the provision contained in sub-rule (3) of R. 1 of O. 41 of the Code does not impinge on the tenability of the appeal, the impugned order has to be set aside. It may, however, be made clear that it would be open for the Appellate Court to pass an order under O. 41, R. 1 (3) again if it is called upon to do so and if it thinks necessary to do so otherwise than as a condition precedent for the tenability of the appeal.

5. In the result, the revision application is allowed and the order passed by the Appellate Court on 24-9-1980 on the memorandum of appeal is hereby set aside. In the circumstances of the case, there shall be no order as to costs.

6. Petition allowed.