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Court : Madhya Pradesh

Decided On : Dec-14-1979

Reported in : AIR1981MP13

Judge : U.N. Bhachawat, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 151 - Order 41, Rules 3A, 3A(2), 11 and 13

Appeal No. : Civil Revn. No. 110 of 1979

Appellant : Chhitu

Respondent : Mathuralal and ors.

Advocate for Def. : S.D. Sanghi, Adv.

Advocate for Pet/Ap. : G.L. Sharma, Adv.

Disposition : Revision dismissed

Judgement :
ORDER

U.N. Bhachawat, J.

1. This is a revision at the instance of defendant in Civil Suit No. 87-A/77 in the Court of Civil Judge, Class II, Kasrawad.

2. The facts leading to the present revision as stated are these :--

The defendant in the present suit had filed a civil suit No. 54A/77 against plaintiffs Nos. 1 to 5 in the present suit in which a compromise decree was pass-ed on 28-4-1977, the plaintiff then filed the present suit for the cancellation of the compromise decree against the defendant; the suit was decreed by the trial Court vide its judgment and decree dated 28-4-1978, the defendant being aggrieved by this, filed an appeal on 16-7-1978 being Civil Regular Appeal No. 40A of 1978 in the lower appellate court in which the defendants were arrayed in the same order as respondent (the appellant in the lower appellate court is referred to hereinafter as defendant and the respondent as plaintiffs); this appeal was barred by time; the defendant, had, therefore, filed an application J. A. No. 1 for condonation of delay under Section 5 of the Limitation Act, 1963 along with the memorandum of appeal; the lower appellate court had issued notice of this application to the plaintiffs; on 14-9-1978 reply of this application was filed on behalf of plaintiff No. 6; the plaintiffs Nos. 2 to 5 were not served, therefore, fresh notices were ordered to be issued and the case was fixed for 6-10-1978 for reply and arguments on I. A. No. 1; on 27-9-1978 on behalf of plaintiffs Nos. 1 to 5, a compromise petition regarding the compromise between defendant and these plaintiffs with permission for compromise on behalf of minor plaintiff No. 3 was filed; but on that date as the Presiding Officer was not there the Reader wrote the order sheet that it shall be placed for court order on 6-10-1978, which was the date already fixed in the appeal; on 4-10-1978, plaintiff No. 1 filed an application for deleting the name of plaintiff No. 6 from the suit as well as the appeal and accepting the compromise, which the lower appellate court directed to be placed for orders on 6-10-1978; again on 5-10-1978, the defendant filed a similar application, whereupon the case was taken up on 5-10-1978, the applications were accepted, plaintiff No. 6's name was ordered to be struck off permission for compromise was granted and in terms of the compromise the appeal was allowed. All this was done without notice to plaintiff No, 6 and in his absence.

3. Thereafter on 6-10-1978 the date on which the appeal was already posted vide order sheet dated 14-9-1978, plaintiff No. 6 appeared and applied for reviving the appeal which was allowed vide the impugned order dated 17-11-1978 of the lower

appellate court and the appeal has been revived. It is against this order that the present revision has been filed.

4. Learned counsel for the defendant had in his argument challenged the validity of the impugned order on two grounds; namely, (i) as the appeal was already disposed of on 5-10-78 the lower appellate court had become functus officio therefore, it had no jurisdiction to pass the impugned order and (ii) that the impugned order is an ex parte order against plaintiffs Nos. 1 to 5, but as plaintiff No. 2 is minor no ex parte order could be passed against him for default in appearance of his G. A. L.

5. The learned counsel for plaintiff No. 6 in his argument in counter submitted, that the defendant and plaintiffs Nos. 1 to 5 practised fraud on the court, by not bringing it to the notice of court that the delay in appeal was not yet condoned and obtained (sic) the court committed a mistake in passing the order dated 5-10-1978 without notice and behind the back of plaintiff No. 6. He further argued that as the delay in appeal was not condoned, there was no appeal before the lower appellate Court which it could dispose of, therefore, the order passed on 5-10-1978 was null and void and non est He argued that the court has the jurisdiction to correct its own mistake in exercise of its inherent powers. It was also argued that this court also is competent to suo motu exercise its revisional jurisdiction and power to set aside the order dated 5-10-1978 which was patently illegal.

6. I shall take up for consideration the contentions of the learned counsel for defendant ad seriatim.

7. At the outset I would like to set out hereinbelow Order 41, Rule 3A as it has material bearing on the point at hand

'3-A. Application for condonation of delay

(1) When appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the court that he has sufficient cause for not preferring the appeal within such period.

2. If the court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be.

3. Where an application has been made under Sub-rule (i), the court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the court does not after hearing under Rule 11, decide to hear the appeal.'

This Rule 3A was added vide Civil Procedure Code (Amendment) Act, 1976 (No. 104 of 1976). The objects and reasons for adding this rule were as under:--

'Clause 90, Sub-clause (iii). Where an appeal is filed after the expiry of limitation, it is the practice to admit the appeal subject to the provisions as to limitation being raised at the time of hearing. This practice has been disapproved by the Privy Council which has stressed the expediency of adopting a procedure for securing the final determination of the question as to limitation even at the stage of admission of the appeal. New Rule 3A is being inserted to give effect to the said recommendation'.

Clause 87 (Original Clause 90) (ii) --The Committee are of the view that the court, should not be empowered to grant ad interim stay of execution of the decree unless the court has, after hearing under Rule 11 of Order 41 decided to hear the appeal. Sub-rule (3) in the proposed Rule 3A of Order 41 has been inserted accordingly.'

8. From the aforesaid object, it is clear that to give way to the practice of admitting the appeal, subject to the decision of question of limitation at the time of hearing, this Rule 3A was added. The rule has to be read bearing in mind this object of the legislature.

9. The governing expression in the Sub-rule (2) 'shall be finally decided by the court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be' makes it imperative for the appellate court first to decide the

question of limitation and puts an embargo on its (Court's) power to proceed further in the appeal. The appeal cannot be heard even on the question of admission much less on merits. In effect there is no appeal before the court unless the delay is condoned. This conclusion gets buttressed from the expression 'the appeal is proposed to be filed'. The use of this expression even in face of the fact that memorandum of appeal along with the application for condonation of delay is on record, clearly bears out the intention of the legislature that till the delay is not condoned, it cannot be treated in law that there is an appeal before the court.

10. In view of the aforesaid legal position, in the instant case as the delay in filing the appeal was not condoned, there was no appeal in the eyes of law before the lower appellate court which it could proceed, to decide. As a sequel to this, it has to he held that the order dated 5-10-1978, was without jurisdiction. This order is without jurisdiction a fortiori that admittedly it was passed without notice and behind the back of plaintiff No. 6. The trial court had decreed the suit of the plaintiff including plaintiff No. 6 against the defendant. It was stated that the plaintiff No. 6 had become a party to the suit as plaintiff No. 6 on the ground that he had an interest in the suit land having purchased it from Totaram for a consideration of Rupees 20,000/- a fact which is stated in the order of the lower appellate court dated 5-10-1978, also. Thus the decree of the trial court was in favour of plaintiff No. 6 also which could not he set aside without hearing him. Audi alturam partem is the well recognised principle of natural justice. No order could be passed without hearing a party especially an order adverse to the party.

11. An order passed without jurisdiction is a nullity. In this respect I would quote with advantage the following extracts from the 'Principles of Statutory Interpretation 2nd Edition 1975, by Shri G. P. Singh, Chief Justice, High Court of Madhya Pradesh:--

'A review of the relevant authorities on the point leads to the following conclusions :

XX XX X2. Cases of nullity may arise when there is lack of jurisdiction at the stage of commencement of inquiry e. g. when (a), authority is assumed under an ultra vires statute; (b) the tribunal is not properly constituted, or is disqualified to act, (c)

the subject matter or the parties are such over which the tribunal has no authority to inquire; and (d) there is want of essential preliminaries prescribed by the law for commencement of the inquiry.

3. Cases of nullity may also arise during the course or at the conclusion of the inquiry. These cases are also cases of want of jurisdiction if the word 'jurisdiction' is understood in a wide sense. Some examples of these cases are : (a) when the tribunal has wrongly determined a jurisdictional question of fact or law (b) when it has failed to follow the fundamental principles of judicial procedure, e. g., has passed the order without giving an opportunity of hearing to the party affected:--XX XX X'

12. The upshot of the foregoing discussion is that the order dated 5-10-1978 of the lower appellate Court was a nullity being without jurisdiction. As a sequel to this the natural corollary is that the order dated 5-10-1978 was non est.

13. When it has been found that the order dated 5-10-1978 of the lower appellate court was non est, it cannot be held that the lower appellate Court was functus officio and could not order the revival of the appeal vide the impugned order. The foundation for the argument that the lower appellate Court was functus officio and had no jurisdiction to pass the impugned order is the existence of the order dated 5-10-1978 and to reiterate when that order is held to be non est the argument of functus officio does not survive.

14. A court has jurisdiction to correct its own mistake in the exercise of its inherent powers especially in the facts and circumstances of the instant case. This view of mine is in line with observation of their Lordships of the Supreme Court in B. V. Patankar v. C. G. Sastry (AIR 1961 SC 272). The relevant observations in this respect are set out here-inbelow.

'See also J. Marret v. Mahomed Kha-leel Shirazi and Sons, AIR 1930 PC 86, where the facts were that an order was made by executing court directing contrary to the terms of the decree the payment of a certain fund to the decree-holder. The Madras High Court in Mahomed Sukri Sahib v. Madhava Kurup, AIR 1949 Mad 809, held that where the executing court was not aware of the amendment of the

Rent Restriction Act by which the execution of a decree was prohibiled and passed an ejectment decree against a tenant, the Executing Court could not execute the decree and any possession given under an ex parte order passed in execution of such a decree, could be set aside under Section 151 of the Code of Civil Procedure. The prohibition is equally puissant in the present case and Section 47 read with Section 151 would be equally effective to sustain the order of redelivery made in favour of the respondent'.

15. It would be pertinent at this stage to point out that plaintiff No. 6 in the facts and circumstances of the instant case, had no other remedy but to apply to the court under Section 151 of the Code of Civil Procedure. His name having been ordered to be deleted from the array of plaintiffs vide order dated 5-10-1978, he did not remain a party to the order/decree dated 5-10-1978, disposing of the appeal before the lower appellate Court. Consequently he could not adopt the remedy of an appeal or review.

16. Further the order dated 5-10-1978 was the result of the mistakes of the court as indicated hereinabove. No suit could be filed for setting aside that order/ decree on the ground that Judge had committed a mistake in passing the order/ decree. This is the view taken by Bombay High Court also in Motilal Shivnarayan v. Vishwanath Waman Thakur AIR 1947 Bom 133, wherein it was held that the decree can be set aside by a suit on the ground of fraud if of the required character, but a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree had made a mistake.

17. It is settled and recognised principle of jurisprudence that a wrong cannot be without a remedy. For every wrong there is a remedy Ubi Jus ioi remedium. There being no other specific provision in the Code of Civil Procedure providing for the redress of the wrong done to plaintiff No. 6 by order dated 5-10-1978 of the lower appellate Court, the lower appellate court had the jurisdiction to exercise its inherent powers and redress the wrong done to the plaintiff No. 6. Here T would also quote with advantage the following observations by Jankins, C. J., in Kusa-dhaj Bhakta v. Broja Mohan Bhakta. AIR 1916 Cal 816.

'If we encourage the idea that the alleged mistake of a Judge is to furnish a disappointed litigant with a fresh starting point for keeping his opponent in court, then the misfortune would be gravely increased to the public deteri-ment..... No instance has been brought to our notice when a suit to set aside or rectify a decree in a previous suit has succeeded on the ground that the Judge was mistaken though his decree accurately expressed his intention'

18. In the light of the foregoing discussion I am of the firm view that the lower appellate court had the jurisdiction to pass the impugned order in exercise of the inherent powers contained in Section 151, of the Code of Civil Procedure.

19. Before parting with the discussion on this point I would like to point out that the learned counsel for the applicant had built up his argument on the basis of a Division Bench decision of this Court in Binodilal v. Virendra Singh, AIR 1958 Madh Pra 391, but this case is quite distinguishable from the facts of the instant case. This would be evident by quoting paragraph 6 of this judgment (Binodilal's case in which brief re'sume' of the facts of this case is contained.

'On 2-5-1956, Binodilal filed the present petition. In this petition he alleged that the appellants (including the petitioner) and the respondents in collusion with each other made an application before the Court under G. 23 Rule 3, C. P. C. by concealing the fact, that the power of attorney conferred by the petitioner upon Mahabirdayal had been cancelled by the petitioner, both from the Court and from the counsel appearing for the appellants'.

20. In the instant case, the Court had committed a mistake being oblivious of the provisions contained in Order 41, Rule 3A of the Code of Civil Procedure and of the fundamental principle that no case should be decided without hearing a party and behind his back; whereas in Binodilal's case (supra) the complaint of a party was that rest of the parties in the case had colluded and committed fraud upon the court and fraud upon his counsel who was his agent. It was in this backdrop of the fact that this court's Division Bench in Binodilal's case (supra) had held that the party had a remedy by way of suit where the matter could be decided. In this respect I would like to set out the following observations from Binodilal's case :

'Now in the present case where the complaint of a party is that the rest of the parties in the case have colluded and committed fraud upon the court and fraud upon his counsel who was his agent -- this is no doubt a case in first place where the remedy by way of suit cannot be denied to him. It is not a case where before the other side is in the picture a party commits fraud upon the court obtained a decision in his favour. In the latter case the court which itself is deceived may be prompted to take an action to undo the wrong brought about by the abuse of process of the court. This is again discretionary and a regular suit to set aside a decision obtained by committing fraud upon the court is not barred.

XX XX XXFor all these reasons we are most reluctant to exercise our power under Section 151, C. P. C. in this case and dismiss the application with costs'.XX XX XX

21. To iterate I have already held that in the instant case, plaintiff No. 5 has no remedy by way of suit. In this view of the matter, the decision in Binodilal's case (AIR 1958 Madh Pra 391) (supra) cannot be pressed into service.

22. I now turn to the second contention. The main contesting party was the defendant who was heard. The impugned order is not, in any way, adverse to the interest of the minor plaintiff No. 3, where guardian ad litem had regained absent despite notice. Therefore, the impugned order cannot be vitiated on the ground that it was passed without affording an opportunity for hearing on behalf of the minor plaintiff No. 3.

23. In the result, the revision does not merit to be allowed; is accordingly dismissed, I, however, make no order as to costs.