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Hari Singh Vs. S. Seth

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Court : Delhi

Decided On : Feb-01-1995

Reported in : AIR1996Delhi21; 58(1995)DLT651; 1995(32)DRJ425; (1995)110PLR60

Judge : M.J. Rao and; D.K. Jain, JJ.

Acts : Code of Civil Procedure (CPC), 1908 - Orders 41 and 47, Rules 1 and 2

Appeal No. : Letters Patent Appeal No. 2 of 1995

Appellant : Hari Singh

Respondent : S. Seth

Judgement :

M.J. Rao, J.

(1) No orders are necessary on C.M.No. 140/94 filed under Section 5 of the Limitation Act in this case.

(2) This Letters Patent Appeal is filed against the order of the learned Single Judge dated 10.8.94 refusing to review the judgment dated 8.1.87 passed in the suit by the trial Judge holding the suit to be not maintainable. Review application was rejected on the ground that the first appeal preferred by the plaintiff against the judgment dated 8.1.87 in the suit was dismissed by a Division Bench of this

Court on 18.8.87 before this Review application - though filed before the first appeal was preferred - is taken up for disposal. In other words, the review of the judgment in suit was refused because the regular appeal preferred against the judgment was itself dismissed on 18.8.87 before the review application came up for disposal 1994. It was held that the fact that the review was preferred earlier than the first appeal made no difference. The learned trial Judge followed the decision of the Supreme Court in Thungabhadra Industries vs . Government ofA.P. : [1964]5SCR174 and in particular on the following observations therein:

'....THATif before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end.'

(3) The plaintiff in the suit whose suit has been held to be not maintainable and whose appeal and review applications have also been dismissed, has now filed this appeal against the order rejecting the review application.

(4) The appellant,appearing in person, has contended before us that in view of Section 153A of the Code of Civil Procedure,1908 (as amended in 1976), the review is maintainable. He contended that the judgment of the appellate Court dated 18.8.87 is a brief unreasoned one, reading: 'The suit was misconceived and so is the appeal. Dismissed.' 427 and is no judgment at all and it is permissible to invoke Section 152 or even Section 151 to correct the judgment of the trial Court dated 8.1.87 holding the suit as not maintainable. Counsel relied upon Kyi Oh and Another vs. Ma Thet Pon AIR 1926 P.C 29 to explain what is meant by 'omission' mentioned in Section 152 CPC.

(5) We are of the view that, even assuming that an Lpa is maintainable against the order of the learned Single Judge refusing to review the judgment in suit, there are no grounds made out by the appellant for taking a different view than the one taken by the learned Single Judge.

(6) Under Order 47 Rule I (a) Cpc, an application for review of a judgment lies by any person aggrieved by a decree or order 'from which an appeal is allowed but from which no appeal has been preferred.' The propositions have been laid down

by the Supreme Court in Thungabhadra Industries' case, firstly that if before the making of an application for review, an appeal from the judgment sought to be reviewed has already been filed and is pending, then the Court has no jurisdiction to entertain the review application, secondly where the application for review is first made and thereafter an appeal is preferred (as done in this case), the review application can be disposed of provided the appellate Court has not disposed of the appeal before the review application is taken up for disposal. The present case falls within the second principle and the learned trial Judge rightly refused to hear the review application.

(7) So far as the contention that the first appeal was dismissed in liming under Order 41 Rule 11(1) Civil Procedure Code and that too without giving reasons, and thereforee it is no disposal in the eyes of law, is concerned, we are of the view that the Supreme Court, in Thungabhadra Industries' case, has made no distinction between the disposal in liming or after notice or between a dismissal of the appeal with reason's and one without reasons. Nor is there any such specific provision in Order 47 Rule I Civil Procedure Code stating that a disposal in liming under Order 41 Rule Ii Civil Procedure Code or without reasons is to be ignored or that such a disposal will not come in the way of the disposal of the review application even it be after the disposal of the appeal.

(8) Two other principles are also equally well- settled. The dismissal of an appeal under Order 41 Rule Ii (1) Civil Procedure Code in liming precludes the Court from which the appeal is preferred, from entertaining an application for review of the decree because it cannot be said in such a case that no appeal has been 'preferred' within the meaning of Section 114 and Order 47 Rule (1) CPC. (See Ramappa Bin Dareppa and another vs. Bharma Bin Rama (1906) 30 Bom 625; Shivappa famendmeht Savade vs. Ramachandra 428 Narasinha Deshpande AIR 1922 Bom 130. There is no difference between an appeal disposed of on merits or under Order 41 Rule 11(1) CPC. The second principle is that a review application filed before an appeal is preferred, cannot be taken up for consideration in case the appeal against the judgment or order sought to be reviewed, has been disposed of in liming under Order 41 Rule 11(1) Civil Procedure Code before the review is disposed of.

(9) Learned counsel for the appellant sought to rely on Section 153A which deals the power of the Court to amend the decree or order where an appeal is summarily dismissed under Order 41 Rule 11(1) CPC. The provision says that an application for amendment can be entertained by the Court which passed the decree or order even after the dismissal of the appeal there from under Order 41 Rule Ii (1) CPC. It is argued that the same principle must apply in cases falling under Order 47 Rule I for review. In our opinion the submission is not correct firstly because the provisions for amendment in Sections 152 and 153A Civil Procedure Code are different from the provisions for Review contained in Section 114 and Order 47 Rule I CPC. They deal with different powers. Section 153A is intended to resolve a conflict of opinion in the High Courts as to the power of the Court to take up an amendment application under Section 152 where an appeal against the decree/order has been disposed of in liming under Order 41 Rule 11(1) and has no bearing whatsoever on the power of review.

(10) In fact, a review under Order 47 Rule land amendment under Section 152 are totally different concepts. In the case of a review, the correctness of the judgment decree or order is in question, while in the case of an amendment of decree, the correctness of the judgment is assumed and the jurisdiction is for bringing the decree in conformity with the judgment. Again where a review is allowed, the case has to be reheard on merits but not if an amendment is allowed. In the case of review, a fresh decree is passed while in the case of an amendment the same decree is to be amended.

(11) The contention that the judgment of the High Court dismissing the appeal in liming without reasons is no judgment is also incorrect. Order 41 Rule 11(4) says that the High Court while dismissing an appeal in liming need not give reasons. The Sub-clause says: ' 'Where an Appellate Court, not being the High Gourt, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment.' 429 This is in contrast with Order 41 Rule 31 which deals with a judgment after notice to respondents and that judgment is required to give reasons. So far as Order 41 Rule 11(1) is concerned, it is now statutorily made clear that while disposing of an appeal under Order 41 Rule 11(1) Cpc, so far as

the High Court is concerned, there is no requirement for giving reasons. While it might be very desirable to give reasons, the fact that the High Court, while acting under Order 41 Rule Ii has not given reasons, does not vitiate the judgment nor can an appellant whose appeal is so dismissed claim that it is is no judgment.

(12) So far as the decision in Kyi Oh vs. Ma Thet Pon AIR 1926 P.C. 29 relied upon by the appellant is concerned, that deals with the question as to what is an omission in a judgment and has no relevance to the question of maintainability of the review application after the appeal is disposed of. Nor is there any need to deal with the alternative prayer (at p. 78 of the paper book) contained in the amended memorandum of grounds. The point raised is that a decree must be directed to be drawn up in respect of the appellate judgment where the appeal is disposed of under Order 41 Rule 11(1). it is true that Order 41 Rule 11(1) requires a decree to be drawn up but even if it is drawn up, the review application cannot become one maintainable in law, on the facts of the present case.

(13) For the aforesaid reasons, this appeal is dismissed.

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