(1979) 03 P&H CK 0003

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Regular Second Appeal No. 10 of 1978

Garib Chand		APPELLANT
	Vs	
Municipal Committee Budhlada		RESPONDENT

Date of Decision: March 30, 1979

Acts Referred:

- Punjab Municipal Act, 1911 - Section 172

Citation: (1979) 03 P&H CK 0003

Hon'ble Judges: G.C. Mittal, J

Bench: Single Bench

Advocate: Amarjeet Markan, for the Appellant; K.C. Puri with Mr. R.C. Puri, for the Respondent

Final Decision: Allowed

Judgement

G.C. Mittal, J.

In this Second Appeal, the counsel for the plaintiff-appellant hat raised a point that the first appeal filed by respondent Municipal Committee, before the lower appellate court against the decree of the trial court, decreeing plaintiff''s suit was not competent in as much as no resolution was filed with the first appeal, either taking a decision for filing an appeal against the judgment and decree of the trial court or authorising a person to sign and file appeal on behalf of the Municipal Committee and therefore, he submits that an this short ground alone, this second appeal should be allowed and the appeal before the lower appellate court should be incompetent thus setting aside judgment and decree of the lower appellate court and restoring those of the trial court

2. The plaintiff-appellant filed a suit challenging the validity of Notice Ex. P/1 dated May 31, 1974 issued by respondent-Municipal Committee u/s 172 of the Punjab Municipal Act under which the plaintiff was directed to remove the encroachment within a period of three days, failing which the same was to be removed at his expense, by the Municipal Committee. Prayer in the suit is for declaring the impugned Notice Ex P/1 as illegal and

void and for permanent injunction restraining the Municipal Committee from demolishing the chappar raised by the plaintiff, on the site in dispute.

3. The Municipal Committee contested the suit on the ground that notice was valid in-as-much as the structure was raised on public street and could be ordered to be removed u/s 172 of the Punjab Municipal Act. The following issues were framed in the case:ï¿½

1) Whether the plaint is properly valued for the purposes of court-fee and jurisdiction ?

2) Whether the impugned Notice is void, illegal, capricious and ineffective ?

3) Whether the plaintiff is entitled to the injunction prayed for ?

4. The trial Court, by its judgment and decaee dated June 1, 1979 decreed the suit holding the impugned Notice to be illegal and not binding on the plaintiff and ordered the issue of injunction as prayed for. With regard to issue No. 1, the plaintiff was directed to make up the court fee which was done. Against the judgment and decree of the trial court, the Municipal Committee took an appeal before the District Court, which was heard by the Additional District Judge. The learned Additional District Judge, by its judgment and decree dated November 24, 1977 allowed the appeal, set aside the decree of the trial court and dismissed the suit with costs throughout, holding that the plaintiff had encroached upon part of public street and as such the Notice is legal and valid.

5. Before me, counsel for the plaintiff appellant has raised the first point that no competent appeal was presented by a competent person before the District Court, as no resolution, taking a decision to file an appeal against the judgment and decree of the trial court, was filed with the appeal not any resolution authorising tat Executive Officer who gave a vakalatnama to the Advocate, who presented the appeal, was attached to the appeal and therefore the filing and presentation of were unauthorised and in the absence of the resolutions, there was no proper appeal before the lower appellate court and as such the judgment and decree of the trial court could not be interferred with on the basis of the incompetent and improperly presented appeal which deserves to be dismissed. In support of his argument, he relied on AIR 1943 318 (Lahore) , Punjab Agricultural University & Others, v. Messrs Walia Brothers (1969) 71 P.L.R. 257. The Municipal Committee Ludhiana v. Surinder Kumar 1970 Cur. L.J. 631. The Municipal Committee Ludhiana v. Surinder Kumar ILR (1974) P&H 420, and contended that two things had to be done by the Municipal Committee before filing the appeal:ï¿½

i) There should have been a resolution of the Municipal Committee taking a decition to file an appeal against the judgment and decree of the trial court, and;

ii) a resolution giving authority on behalf of the Municipal Committee to a person who could file the appeal himself or could authorise signing and tiling of appeal by an authorised advocate. None of the two things were done in this case and therefore, in view

of the aforesaid decisions there was no competent appeal which should have been dismissed as incompetent. On thy lust date of hearing, this matter was put to the counsel for the respondent Municipal Committee so that in the interest of justice, he could show the Court, whether the Municipal Committee had taken a decision for filing an appeal or had raised the filing of appeal and had authorised the Executive Officer to file the appeal so that he could tile himself or could authorise an advocate to file the same and the case was adjourned for this purpose.

6. Today Mr. K.C. Puri, the learned counsel for the Municipal Committee had produced a copy of resolution No 22 dated July 13, 1976 under which the Municipal Committee had authorised the spending of Rs. 230/ as the expenses for filing of appeal and engagement of the counsel against the judgment and decree of the trial court It is admitted by the counsel that besides the above, there is no other resolution of the Municipal Committee and relying on the same, it ii urged by him that there was due authority with the Executive Officer on the basis of the aforesaid resolution and as such the appeal was properly presented by the Advocate under the authority of the Executive Officer.

7. The other argument raised by the counsel for the Municipal Committee is that no such point about competency of the appeal was raised by the counsel for the plaintiff before the lower appellate court and as such, should not be allowed to be raised here in second appeal. He further submits the point should be deemed to have been waived and in any event this Court should not interfere with the decision, on merits by the lower appellate court on this technical objection by virtue of Section 99 of the Code of Civil Procedure.

8. After hearing the learned counsel for the parties, I am of the view that the objection raised by the counsel for the plaintiff-appellant should be allowed to be raised, as the lower appellate court is to decide the appeal on merits only if there was a properly constituted and presented appeal before it For this, burden lay on the Municipal Committee itself to show that the appeal was filed by an authorised person and as such was properly constituted for being heard and decided on merits. If objection had been raised before the lower appellate court, all that the Municipal Committee had to to show was a resolution or resolutions showing that a decision was taken by the Municipal Committee to file appeal against the judgment and decree of the trial court and about authorising a person to sign and file the appeal. The same thing can be shown by the Municipal Committee here in Second Appeal and as such, there is no prejudice caused to it. If the objection was not raised before the first appellate court, as I have granted full opportunity to the Municipal Committee to produce the resolutions, if there are any. As already pointed out the only resolution produced before me is to the effect that the Municipal Committee sanctioned the expenditure for filing of appeal against the judgment and decree of the trial court There is no specific decision of the Municipal Committee for filing an appeal against the judgment and decree of the trial court. But, from the above resolution, one may infer that a decision was taken and that is how the expenditure for filing an appeal has been sanctioned, This point as a matter of law need not be decided in this appeal as no resolution has been produced by the Municipal Committee authorising

the Executive Officer to file appeal as the Executive Officer gave the authority to the advocate for filing the appeal. Therefore, the question which arises for consideration is whether an appeal which has been filed by an advocate on authorisation of the Executive Officer on behalf of the Municipal Committee without the resolution of the Municipal Committee authorising the Executive Officer to file the appeal is competent or not ?

9. The counsel for the Plaintiff appellant has invited my attention to the Municipal Committee Ludhiana v. Surinder Kumar (supra), wherein, it was held by Single Judge of this Court that an Executive Officer has no power u/s 35 of the Punjab Municipal Act. No ex post facto approval to the filing of the appeal could be granted beyond the period of limitation for filing the appeal, and that, a decision for filing the appeal has to be taken by the Municipal Committee itself and by none else It was also held that resolution passed after the expiration of the period of Limitation for filing the appeal could net cure an irregularity and the appeal filed by the Municipality was held to be incompetent. This very decision was subject-matter of the Letters Patent Appeal and the Letters Patent Bench upheld the aforesaid decision. In the case of The Municipal Committee Ludhiana (supra). The same is the ratio in the cases of Bawe Bhagwan Dass and Punjab Agricultural University and others (supra). On the ratio of the decision given in the aforesaid cases the counsel for the plaintiff appellant has argued that the failure to raise objection before the lower appellate Court is not fatal nor is the matter covered by Section 99 of the CPC as the objection goes to the very root of the matter about the filing of a competent appeal before the lower appellate Court Moreover he urges that so prejudice has been caused to the Municipal Committee as due opportunity could be granted by this Court and having been granted they could show that there was resolution or resolutions taking decision for filing of appeal and authorising Executive Officer to file the appeal or get it filed through an Advocate. According to him, since no resolution giving authority to the Executive Officer for filing appeal on behalf of the Municipal Committee has been produced before this Court and none was attached with the appeal before the lower appellate Court hence there was no proper appeal and this appeal deserves to be allowed and the judgment and decree of the trial Court deserve to be restored.

10. In reply to the argument of the counsel for the Municipal Committee about Section 99 of the Code of Civil Procedure, the counsel for the appellant has relied on Order 41, Rule 1 of the CPC that an appeal must be signed and presented by a duly authorised agent and if this is not done then in view of Pat Ram etc. v. Hukam Singh etc 1971 Cur. L.J. 294, it is only the memoranda of appeal which has to be signed by the appellant or his Advocate but the presentation of appeal has also to be either by the appellant or by his Advocate, The Advocate, according to the learned counsel could sign and present the appeal only if he held the authority from the Municipal Committee and since it is shown that the Advocate had no authority from the Municipal Committee and the Executive Officer had no authority on behalf of the Municipal Committee to further give authority to the Advocate, therefore, the signing and filing of appeal were both without authority and as such in the eyes of law there was no properly constituted appeal before the lower

appellate Court which could be heard on merits.

11. After hearing the learned counsel for the parties, I am of the view that there is merit in the argument of the counsel for the plaintiff-appellant that there was no properly constituted appeal before the lower appellate court According to the decision of this court in the case of Bawa Bhagwan Dass and others (Supra), the Municipal Committee had to pass the resolution giving authority to file appeal on its behalf against the judgment and decree of the trial Court Local Bodies Corporate Bodies or Registered Bodies of Associations are Independent legal entitles and are capable of holding property and of suing and to be sued Loqal Bodies likes the one in question, can only act through resolution and unless by a resolution it authorises somebody to file an appeal on its behalf no appeal could be presented on behalf of the Municipal Committee. According to Pat Ram"s case (Supra) the provisions of Order XLI Rule 1 of the Code of Civil Procedure, are manadatory and if there is no authority with an Advocate on behalf of the Municipal Committee, then in the eyes of law there would be no appeal on behalf of the Municipal Committee before the lower appellate Court. For the failure to raise the aforesaid objection before the lower appeal a to Court, the Municipal Committee could only urges at if such an objection had been raised before the lower appellate Court it would have shown that there was resolution authorising the Executive Officer to file the appeal him self or to appoint an Advocate for the Committee. This matter would not cause any prejudice to the Municipal Committee as the same opportunity has been granted to than in this Court and it is fairly admitted by the counsel for the Municipal Committee that no resolution was passed by the Municipal Committee authorising the Executive Officer to file appeal Hence no prejudice has been caused to the Municipal Committee in this regard.

12. As regards. Section 99 of the Code of Civil Procedure, the case in hand is not covered by the provisions of this Section. Section 99 refers to matter like mis joinder of parties or cause of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. Proviso to this very section goes to show that if something substantial is locking, then this section cannot be brought in aid inasmuch as if a necessary party is not joined then the appellate Court can reverse the decision of the Court below on this technical objection. Here the objection is again of vexatious nature where the very presentation of appeal is contrary to the provisions of Order XLI Rule 1 of the Code of Civil Procedure. If the presentation of the appeal is contrary to the provisions of law then it would be deemed that there is no appeal and the first appellate Court will have no jurisdiction to decide the appeal on merits. There fore, I am not convinced that because of Section 99 of the CPC the objection should not have been allowed to be raised. The authorities which have been relied upon by Shri K.C. Puri, u/s 99, Civil Procedure Code, are clearly distinguishable. He has not been able to show any authority to me where Section 99, Civil Procedure Code, was held applicable on the facts of the present case. So far as the plea of waiver is concerned, waiver is always a conscious act and no such conscious act has been shown which may persuade

me to hold that such a plea was waived by the Plaintiff.

13. Consequently, I hold that there was no properly constituted appeal before the lower appellate Court which deserves to be dismissed as incompetent.

14. For the reasons recorded above, 1 allow this appeal, set aside the judgment and decree of the lower appellate Court and restore those of the trial Court. Since objection about the incompetency of the appeal before the first appellate Court was raised in this Court, I leave the parties to bear their own costs.