(1983) 05 AHC CK 0020

Allahabad High Court

Case No: Second Appeal No. 3054 of 1982

Faujdar and Others		APPELLANT
	Vs	
The Prabandh Samiti, Bhartiya Uchattar Madhyamik Vidyalaya and Others		RESPONDENT

Date of Decision: May 25, 1983

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 1, Order 7 Rule 11, 100, 115, 2(2)
- Constitution of India, 1950 - Article 226, 227
- Limitation Act, 1908 - Article 182
- Uttar Pradesh Sales Tax Act, 1948 - Section 9

Hon'ble Judges: N.N. Mithal, J

Bench: Single Bench

Advocate: S.P. Srivastava, for the Appellant;

Judgement

N.N. Mithal, J.

This second appeal, which is directed against the order of 1st Addl. District Judge, Gorakhpur in a Civil Revision arises out of a suit in which certain preliminary issues were raised and were disposed of by the trial Court in favour of Plaintiff, including the question that the plaint was liable to be rejected under Order VII, Rule 11, Code of Civil Procedure. Being unsuccessful in the trial Court the Defendant filed a revision which was allowed by order under appeal.

The Court of Revision disagreed with the findings of the trial Court and held that the plaint was liable to be rejected under Order VII, Rule 11, Code of Civil Procedure. Against this order passed in the revision, the present appeal has been filed.

2. There can be no dispute, that under the definition of the term decree in Section 2(2) of the Code of Civil Procedure. an order rejecting the plaint under Order VII, Rule 11, CPC amounts to a decree. However, s second appeal u/s 100 would lie to

the High Court "from a decree passed in appeal" by any Court subordinate to the High Court. The question that crops up for decision here is whether an order passed in revision could be said to be "a decree passed in appeal" within the meaning of Section 100, Code of Civil Procedure.

3. Learned Counsel for the Appellant has tried to urge that while exercising revisional powers the Court also exercises the appellate jurisdiction and therefore any order passed by the Revisional Court would amount to a decree passed in appeal. I cannot countenance an argument of this nature.

4. Reliance has been placed on Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, which was a case arising under Bombay Rent, Hotel and Lodging House Rates Control Order 1947. After decision of the appeal under the provisions of that Act revisional jurisdiction of the High Court was invoked. On its dismissal a writ petition was filed challenging the order passed in appeal against which the revision had already been disposed of by the High Court. In such set of circumstances the appellate order under the said Act had merged with the order passed in the revision by the High Court and, therefore, it was not open for the same Petitioner to invoke jurisdiction of the High Court once again under Articles 226 and 227 of the Constitution. While elaborating the scope of revisional jurisdiction exercised by High Court it was observed as under:

When the aid of the High Court is invoked on the revisional side it is done because it is the superior court and it can interfere for the purposes of rectifying the error of the Court below.

It was also observed:

Section 115 of the CPC prescribes the limit of that jurisdiction but the jurisdiction which is being exercised is a part of general appellate jurisdiction of the High Court as the Superior Court. It is only one of the modes of exercising powers conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense.

5. This case is however distinguishable. In U.P. there is a local amendment in Section 115 of the Code under which in cases having a valuation of less than Rs. 20,000/- the revision lies to the District Judge, who exercises the same powers as the High Court in that matter. Apart from this what the Supreme Court had said in the case was that the jurisdiction exercised u/s 115 of the Code was part of general appellate jurisdiction of the High Court. However, even if that be so, u/s 115, CPC the Court merely passes an order and not a decree. An order passed in exercise of revisional jurisdiction therefore, cannot be said to be a "decree in appeal". Passing a decree in an appeal is one thing but it is quite another thing to say that while deciding a revision the Court exercises jurisdiction which is part of the general appellate jurisdiction of the Court. Nature of jurisdiction which the revisional Court exercises may certainly be that of Appellate Court but it is only a fraction of its overall

appellate authority and the nature of the order is entirely different which cannot be termed as a decree.

6. The learned Counsel laid emphasis on the Privy Council decision, AIR 1932 165 (Privy Council) where it had the occasion to decide as to what is an "appeal". It was observed "the CPC does not give any definition of appeal but there was no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent." In that ease the question before the Privy Council was entirely different. When execution of the decree was launched the J.D. took the plea "that the same was barred under Article 182 of the Limitation Act, 1908 which provides three years'' period of limitation from the date of the decree or where an appeal had been filed, the date of the final decree or order of the Appellate Court", In that, case the J.D. had filed an appeal but it was ultimately found to be defective and was dismissed. The execution application was made within three years from this date. It was urged for the judgment-debtor that since that appeal itself was not competent, the period of limitation should be reckoned from the date of the decree passed by the lower Court and not from the date of dismissal of their defective appeal. It was in this context that the question regarding the meaning of the word "appeal" arose. The Court held that even a defective appeal would be an appeal for the purposes of Article 182 of the Limitation Act. In that case, there was another significant feature which should not be lost sight of. The defective appeal filed by the J.D. had been admitted and the same was also heard in due course and a decree was made upon it, In view of all these circumstances it was held that an appeal had been filed. These principles obviously, cannot be taken advantage of by the counsel in this case.

7. The last case referred was Lakshmiratan Engineering Works Ltd. v. Asstt. Commr. (Judicial) I Sales Tax, Kanpur (AIR 1963 SC 488) but it cannot be of any help to the Appellant. In that case the language of Section 9 of the U.P. Sales Tax Act had to be interpreted as to when an appeal can be said to have been entertained. Under the provisions of Section 9 no appeal could be entertained unless the same was accompanied by satisfactory proof of payment of the amount due from the Assessee. Before filing of that appeal the entire amount due had in fact been paid but the Appellant failed to attach any proof of such payment with the memo of appeal and the appeal was dismissed on this ground alone. The Supreme Court held that the word ''entertain'' is not the same as ''filed'' or ''received''. Entertainment of an appeal was distinguished from the memorandum of appeal. The question of entertaining an appeal arises only when the appeal comes up for judicial consideration. Since in that case the Appellant had already complied with all the pre-conditions the Supreme Court took the view that the appeal was competent and ought to have been entertained.

8. Therefore, even though every appeal may involve judicial examination of a case but in every case where judicial examination takes place may not necessarily fall within the ambit of the word ''appeal''. According to the Code an appeal comes into being under the provisions of Order 41, Rule 1 when it is preferred by filing a memo of appeal drawn up in the manner prescribed and is ac companied by copies of the judgment and decree applied against after payment of requisite court-fee. It only after complying with all the above conditions within the period of limitation that the memorandum of appeal becomes an "appeal" within the meaning of Section 100 read with Order 41, Rule 1, Code of Civil Procedure. Any order passed on a petition for revision of an order u/s 115, CPC therefore cannot be said to be a decree passed in appeal.

9. In this view of the matter I have no hesitation in holding that the order rejecting the plaint under Order VII, Rule 11, CPC when passed in exercise of revisional jurisdiction, is not a decree "passed in appeal" as contemplated u/s 100, Code of Civil Procedure. In the circumstances the instant appeal is not legally competent.

10. The learned Counsel however, made an oral request that he may be permitted to convert the second appeal into a writ petition under Article 226 of the Constitution. He is permitted to do so provided deficiency, if any, in the court-fee is made good. This would, however, be without any prejudice to the rights of the other side to raise any legal objection in this behalf.

11. On conversion of the appeal into a writ petition the same will be laid before an appropriate Bench for admission.