(1995) 11 KL CK 0041

High Court Of Kerala

Case No: C.R.P. No''s. 2270 and 2271 of 1995

The Manganam Service Co-Operative Bank Ltd.		APPELLANT
	Vs	
Zachariah Joseph		RESPONDENT

Date of Decision: Nov. 29, 1995

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1, Order 23 Rule 1(4), Order 39 Rule 1, Order 39 Rule 2

Hon'ble Judges: K. Sreedharan, J

Bench: Single Bench

Advocate: Mathew Zachariah, for the Appellant; Bechu Kurian Thomas, for the Respondent

Final Decision: Allowed

Judgement

K. Sreedharan, J.

Plaintiff in O.S. 387/95 on the file of the Principal Munsiff''s Court, Kottayam is the Petitioner in these revision petitions. Respondent in both the revision petitions is the Defendant in the said suit. The suit was one to restrain the Defendant or anybody under him from forcibly trespassing into the plaint schedule rooms or putting anybody else in possession or alienating the same in any manner to anybody. Along with the suit, Plaintiff filed I.A. 1423/95 for a temporary injunction on the lines prayed for in the plaint. Ex parte temporary injunction was granted by the trial Court. Defendant filed his objection to that interlocutory application and prayed for vacating the order of injunction. He also filed I.A. 1512/95 for the relief of mandatory injunction to direct the Petitioner-Plaintiff to open the schedule rooms and to permit him to continue there. The trial Court heard both interlocutory applications i.e. I.A. 1423/95 and I.A. 1512/95 and passed common order dated 29th July 1995. By that order I.A 1423/95 was allowed to the limited extent of restraining the Defendant from transferring the lease-hold right to strangers and from inducting strangers

into possession of the plaint schedule premises till the disposal of the suit. On I.A. 1512/95 filed by the Defendant-Respondent, he was allowed to open the plaint schedule premises after obtaining key from the two sets of keys produced in Court under memo and to continue in possession of the premises till the disposal of the suit. Aggrieved by that common order Plaintiff preferred one appeal C.M.A. 91/95 on 8th August 1995. When it was realised that the common order passed by the trial Court on two different interlocutory applications cannot be challenged by preferring one appeal, Appellant filed a memo asking for return of the appeal. That memo was filed on 10th August 1995. Pursuant to that memo, the order of the trial Court was returned on 11th August, 1995. When C.M.A. 91/95 came up before Court on 14th August 1995, the Court dismissed that appeal as not pressed. On the same day, i.e. 14th August 1995, Petitioner, Plaintiff in the suit, filed C.M. Appeals 94/95 and 95/95 questioning the correctness of the decision of the trial Court in I.A. 1423/95 and I.A. 1512/95. The maintainability of these appeals was questioned by the Respondent. His argument was that C.M.A. 91/95 was dismissed without reserving any right to the Appellant to file fresh appeals. Such a dismissal bars the filing of fresh appeals under Order 23 Rule 1(4) of the Code of Civil Procedure. The learned District Judge was impressed with the above argument and consequently by the common judgment dated 2nd November 1995 he dismissed both appeals as barred under Order 23 Rule 1(4)(b) of the CPC Hence these revision petitions.

2. As stated earlier, Plaintiff filed I.A. 1423/95 praying for a temporary injunction restraining the Defendant and Ors. by an order of injunction from trespassing into the plaint schedule rooms or repossessing the rooms or alienating the rooms in any manner to anybody else till the disposal of the suit. Defendant, Respondent herein, filed I.A. 1512/95 to direct the Plaintiff to remove the locks put up on the front rolling shutter and the back side doors and in case of non-compliance to have it removed through Court and also restraining the Plaintiff from doing anything tending to obstruct the Defendants business in the scheduled buildings till the disposal of the suit. These two applications were disposed of by the trial Court by a common order. That order was against the Plaintiff Petitioner herein. He challenged both orders by preferring one appeal as C.M.A. 91/95. The prayer in the memorandum of that appeal was:

For these and other reasons to be urged at the time of hearing, it is humbly prayed that this Honourable Court may be pleased to set aside that part of the order of the lower Court in I.A. No. 1423/1995 disallowing the Appellant/Plaintiff''s prayer for temporary injunction restraining the Respondent/Defendant or anybody under him from trespassing into the scheduled rooms and to set aside the mandatory injunction and prohibitory injunction order in I.A. 1512/95 and to allow this appeal granting injunction as prayed for in I.A. No. 1423/95 and dismissing I.A. No. 1512/95 or to remand the case to the lower Court for disposing the said interlocutory applications after taking detailed evidence with the costs of the Appellant in both Courts:

The above prayer makes it crystal clear that the Plaintiff wanted to have the orders passed in I.A. 1423/95 and 1512/95 varied. Now it is conceded before me that for varying the orders passed in two different I.As, two different appeals ought to have been filed. This mistake was realised and consequently the Appellant filed a memo. In that memo dated 10th August 1995, it was stated that by mistake one appeal has been preferred questioning the correct/less of the orders passed by the trial Court in I.A. 1423/95 and I.A. 1512/95. On account of that mistake, that C.M.A. is not pressed and it has to be returned.

3. Memo dated 10th August 1995 was not one praying for dismissal of C.M.A. 91 /95. It was stated therein that appeal happened to be filed on a wrong understanding of the law and that appeal has to be returned. Pursuant to that memo, records were returned on 11th August 1995. But the appeal came up for orders on 14th August 1995. On 14th August 1995, the appellate Court dismissed it as not pressed. Even though the Court has dismissed the appeal as not pressed, according to me, that dismissal was not on account of the abandonment of the appeal or on account of the Appellant withdrawing from the appeal. The prayer made by the Appellant was only to return the appeal C.M.A. 91/95. Pursuant to that prayer, when the Court happens to dismiss the appeal, I am not in a position to hold that the dismissal was on account of the Appellant abandoning the claim or withdrawing from the appeal.

4. On 14th August 1995 itself Appellant filed C.M. appeals 94 and 95 of 1995. In these appeals, he challenged correctness of the orders in I.A. 1423/95 and 1512/95.

5. On going through the prayers in the memorandum of appeal in C.M.A. 91/95, it is evident that the Appellant challenges the orders on I.A. 1423/95 and I.A. 1512/95. For challenging the two orders, one appeal is not sufficient. Actually such a memorandum of appeal is defective because it is not in conformity to the procedure or practice. When such a memorandum of appeal is filed and it is established that, that appeal is not one in conformity with the procedure or practice, then as per Rule 32 of the Civil Rules of Practice, the Court should have returned the same for re-presentation after curing the defects. In the memo, dated 10th August 1995, the Appellant infact asked for return of the memorandum of appeal. Instead of granting the prayer in the memo, the Court dismissed the appeal.

6. The attitude of the Court must always be to do justice to the person who approach it. If there is a curable mistake and the party wanted to have that mistake cured, that party should be given an opportunity for that purpose. Due to many reasons, known or unknown, defects may creep in, in filing the pleadings before Court. Those defects are to be allowed to be cured because Courts are existing for dispensation of justice. Both the prayers in the memorandum of appeal in C.M.A. 91/95 could not have been granted by the Court because a common appeal could not have been entertained against orders passed in two interlocutory applications though those applications were disposed of by a common order. The Appellant was not even given an option to state whether he is restricting the appeal to challenge

the order in one of the interlocutory applications. The Court dismissed C.M.A. 91/95 only on the basis of the memo dated 10th August 1995. In that memo, Appellant did not state that the appeal may be dismissed as not pressed; but he stated that, the memorandum of appeal is to be returned because the common appeal against the orders in two interlocutory applications is not maintainable and so not pressed.

7. Learned Counsel representing the Respondent brought to my notice the decision of the Supreme Court in Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, in support of his argument that dismissal of C.M.A. 91/95 will be a bar to the subsequent appeal under Order 23 Rule 1. In that decision, what their Lordships stated is that the principle underlying Order 23 Rule 1 is that when the Plaintiff institutes a suit and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same matter again after abandoning the earlier suit or by withdrawing it without permission of the Court to file fresh suit. According to me, that principle will not be applicable to the instant case because the Appellant before the Court below had never availed of any remedy in C.M.A. 91/95 nor he abandoned the appeal. He only prayed for return of the appeal on account of the defect made mention of in the memo. The return of that memorandum alone was prayed for. The Court infact returned the records filed along with the memorandum of appeal on 11th August 1995. After its return, there was no proper appeal even. It was under such a situation that the appeal was dismissed on 14th August 1995. The dismissal of that was not of a proper appeal but it was of a memorandum of appeal only. The CPC contemplates appeal and memorandum of appeal. They are two distinct terms having different connotations. This has been recognised by the Supreme Court in L.E. Works v. Assistant Commissioner, Sales Tax AIR 1968 S.C. 468. Their Lordships observed:
Even under Order 41 of the CPC the expressions ''appeal'' and ''memorandum of appeal'' are used to denote two distinct things. In Wharton''s Law Lexicon, the word ''appeal'' is defined as the judicial examination of the decision by a higher Court of the decision of an inferior Court. The appeal is the judicial examination; the memorandum of appeal contains the grounds on which the judicial examination is invited.

When the Memorandum of appeal in C.M.A. 91/95 came up for orders, it was only a memorandum of appeal and not an appeal because the documents like order passed by the trial Court were not present along with it. So the dismissal dated 14th August 1995 was not of appeal C.M.A. 91/95; but it wasadismissal of memorandum of appeal only. That dismissal of the memorandum of appeal will not in any way fall within the purview of Order 23 Rule 1(4) of the Code of Civil Procedure.

8. Learned District Judge was too hypertechnical in dismissing C.M. Appeals 94/95 and 95/95. In dismissing the appeals, he is seen to have relied on the decisions of the Delhi High Court in Aftab Ahmad and Another Vs. Nasiruddin and Another, and

Naresh Kumar Gupta Vs. The 3rd Addl. District Judge, Bulandshahar and others, . Those decisions, according to me, are not applicable to the facts of this case. They must be understood with reference to the facts in those cases. Before this Court learned Counsel representing the Respondent sought reliance on the decision in S. Narain Singh v. Ram Gopal Madan Lal AIR 1981 Del 88 to contend that the subsequent appeals namely appeals 94 and 95 of 1995 are not maintainable. The learned Single Judge of the Delhi High Court was dealing with a case where a petition filed by the Plaintiff under Order 39 Rule 1 and 2, for a temporary injunction restraining the Defendant from proceeding with the arbitration was got dismissed as not pressed when it was contested by the Defendant and on the same cause of action he filed a fresh application for injuction at a later stage. On that facts, His Lordships held that if the Plaintiff files an application for grant of a temporary injunction and after notice to the opposite party who has filed a reply and during the course of arguments the Plaintiff withdraws the application, it appears that the Plaintiff is debarred from instituting a fresh application unless there has been change of circumstances since the date of dismissal of the previous injunction application. The law stated by the learned Judge cannot be objected to. But that has no relevance to the facts before me as stated herein before.

In view of what has been stated above, I allow these revision petitions, set aside the common order passed by the learned District Judge in C.M.A. 94/95 and 95/95 and direct the learned Judge to take the appeals back to his file and to dispose of the same on merits after affording the parties a reasonable opportunity to putforth their contentions. Since both sides are present in Court, I direct them to appear before the District Court, Kottayam on 6th December 1995.