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AIR 1980 Bom 231

Bombay High Court (Nagpur Bench)

Case No: Civil Revision Application No. 150 of 1978 in Miscellaneous Civil Application No. 11890 of 1977 in First Appeal No. 139 of 1976

Sukhdeo Motiram Dike	APPELLANT
Vs	
Govinda Hari Mankar and Another	RESPONDENT

Date of Decision: June 25, 1979

Acts Referred:
Bombay Court Fees Act, 1959 â€" Article 1, 8, 9, 5(2)#Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 11, Order 41 Rule 11(1), Order 41 Rule 11(4), Order 41 Rule 31, Order 41 Rule 32

Citation: AIR 1980 Bom 231

Hon'ble Judges: Jamdar, J

Bench: Single Bench

Advocate: C.G. Madkholkar, for the Appellant; B.A. Udhoji and M.P. Badar, Asstt. Govt. Pleader, for the Respondent

Judgement

1. The appellant in First Appeal No. 139 of 1976 has preferred this application for review of the decision of the Taxing Officer u/s 5(2) of the

Bombay Court Fees Act, 1959. The said appeal was filed by the appellant being aggrieved by the Civil Judge (Senior Division) Akola in Special

Civil Suit No. 13 of 1974 on 1-7-1976. The said appeal, after notice, on admission, to the respondents (present N. As.) was dismissed in motion

by an order dated 5th July, 1977. Against that order, the appellant, present applicant, preferred a review application to this Court and affixed a

five rupees stamp thereon. An office objection was raised that the applicant is liable to pay court fee under Schedule I, Article 8 as it is an

application for review of Judgment and decree of this Court. It was contended before the Taxing Officer that in dismissing the appeal in limine, this

Court has not passed any decree and what was sought to be revised was an order and not a judgment resulting in a decree. It was contended that

the case is covered by Schedule 2, Article 1 (f) (iii) which is a residuary article. The Taxing Officer overruled the objection and held that the

applicant will have to pay ad valorem court fee under Article 8, Schedule I of the Court Fees Act. It is this order, which is sought to be revised in

this Civil Revision Application.

2. The order sought to be reviewed was passed under Order 41, Rule 11 (1). No reasons were given and the first appeal was disposed of by the

High Court by a cryptic one worded order ""dismissed"".

3. The application for review is filed under Order 47, Rule 1 (1) which reads as follows :--

Any person considering himself aggrieved --.

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after

the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed on order

made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of

the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order"".

As no appeal is allowed against the order passed by the High Court; dismissing the first appeal in limine, the present review application would be

governed by Clause (b) of Sub-rule (1) of Rule 1 of Order 47.

4. Articles 8 and 9 of Schedule I of the Bombay Court Fees Act, 1959 deal with the court fee payable on an application for review. Article 8

provides that if the application for review of judgment is presented on or after the thirtieth day from the date of the decree, the court fee payable on

such application is the fee leviable on the plaint or memorandum of appeal, as the case may be. Article 9 provides that if the application for review

of judgment is presented before the thirtieth day from the date of the decree, the court-fee payable is one half of the fee leviable on the plaint or

memorandum of appeal. There is no other article which provides court-fee for review application and if such review application is not covered

either by Article 8 or Article 9 of Schedule I, then it would be covered by the residuary provision contained in Sub-clause (iii) of Clause (f) of

Article 1 of Schedule II, which provides a fixed fee of five rupees for an application or petition for review presented to the High Court and not

covered by any other provision.

5. Mr. Madkholkar, for the applicant tried to urge that as no judgment is given by the High Court while passing the order sought to be reviewed,

neither Article 8 nor Article 9 of Schedule I is attracted. The word ""judgment"" is defined in Section 2(9) of the CPC as :--

The statement given by the Judge on the grounds of a decree or order".

It is true that no such judgment was delivered while passing the order sought to be reviewed and as mentioned above, the first appeal was

disposed of by the one worded order ""dismissed"". But if this contention is accepted, then the review application itself would not be maintainable

because Order 47, Rule 1 contemplates application for review of a judgment. Rule 1 of Order 47 provides that if a person desires to obtain a

review of the decree passed or, order made against him, he may apply for a review of judgment, to the Court which passed the decree or made

the order. There is also no force in the contention that unless a decree follows the reasoning, the statement containing the reasoning is not a

judgment but is an order. The very definition of ""judgment"" contemplates that the judgment may result in a decree or an order. Hence when a

review of a decree or an order is sought the petition is always for review of the judgment which results in passing of the decree or making of the

order. It is a settled position that while passing an order under Order 41, Rule 11 (1) the High Court is not expected to give reasons for the order

of dismissal. It cannot, therefore be said that as no judgment was delivered by the High Court while passing an order under Order 41, Rule 11 (1),

Article 8 of Schedule I is not applicable.

6. Mr. Madkholkar next urged that tie order passed by the High Court under Order 41, Rule 11 (1) of the Civil P. C. is not a decree but is an

order and hence Article 8 of Schedule I of the Bombay Court Fees Act is not applicable. It is true that Article 8 will be applicable only when

review of a decree is sought. It would not be applicable when review of a judgment resulting in an order is sought. Article 8 contemplates an

application for review of judgment presented on or after the thirtieth day from the date of the decree. It does not cover an application for review of

judgment which is presented on or after the thirtieth day from the date of the order. Similarly Article 9 contemplates application for review of

judgment presented before the thirtieth day from the date of the decree and not an application for review presented before thirtieth day from the

date of the order. An application for review of an order, therefore, would be covered by the residuary provision contained in Sub-clause (3) of

Clause (f) of Article 1 of Schedule II of the Bombay Court Fees Act, 1959. The material question that arises for consideration in this matter,

therefore, is whether the order passed by the High Court under Order 41, Rule 11 (1) dismissing the first appeal in limine is a decree or an order.

7. Mr. Madkholkar contended that even if the review application is allowed, the decree passed by the Trial Court remains unaffected and hence

the order passed by the High Court dismissing the first appeal in limine does not amount to a decree. It is difficult to accept this submission in view

of the definition of "decree" given in Section 2(2) of the Civil P. C. The said definition reads as follows-

Decree means the formal expression of an adjudication which, so far as regards the Court expressing it. conclusively determines the rights of the

parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the

rejection of a plaint and the determination of any question within Section 144 but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default"". It cannot be disputed that the order ""dismissed"" passed by the High Court in the first appeal is an expression

of an adjudication which conclusively determines the lights of the parties with regard to all or any of the matters in controversy. The order

dismissing the first appeal in limine is, therefore, a decree within the meaning of Section 2(2) of the Civil P. C.

8. In support of the contention that the order rejecting an appeal in limine under Order 41, Rule 11 (1) is not a decree, reliance was sought to be

placed on the decision of this Court in the case Hussain Sab Vs. Sitaram Vighneshwar, In that case question for consideration was, in which Court

an application for amendment of decree should be filed in case the appeal against the decree of the trial Court is dismissed by the appellate court

under Order 41, Rule 11. It was held that when an appeal is summarily dismissed under the provisions of Order 41, the original decree from which

the appeal was preferred remains untouched and hence it is the substantive decree. In that case difference between the provisions of Order 41,

Rule 11 and Order 41, Rule 32 was pointed out and it was held that when an appeal is summarily dismissed, the decree appealed against remains

untouched. Following observations in that ruling made by Chagla, C. J., as he then was, are sought to be relied upon.

Now, turning to that rule, it provides that the appellate Court may dismiss the appeal without sending notice to the Court from whose decree the

appeal is preferred and without serving notice on the respondent or his pleader; and Sub-clause (3) provides that the dismissal of an appeal under

this rule shall be notified to the Court from whose decree the appeal is preferred. It will be immediately noticed that there is considerable difference

between the provisions of Order 41, Rule 11, and the provisions of Order 41, Rule 32.

Under Order 41, Rule 32, when an appeal is heard after notice, the judgment of the appellate Court must be a judgment for confirming, varying or

reversing the decree from which the appeal is preferred, and the decree that is drawn up is a decree of the lower Court. But under Order 41, Rule

11, no such decree is to be drawn up. The only provision in Order 41, Rule 11, is that the lower Court has to be notified of the fact that an appeal

from its decree has been dismissed. Therefore, the view has been taken by this Court--and, in my opinion, rightly -- that when an appeal is

summarily dismissed under the provisions Order 41, Rule 11, the original decree from which the appeal was preferred remains untouched and it is

the original decree which is the substantive decree. Therefore, if an application has got to be made for amending the decree, it must be made, not

to this Court which has exercised its powers under Order 41, Rule 11, but to the Court which passed the substantive decree.

These observations, however, do not support the contention, even impliedly, that an order under Order 41, Rule 11 is not a decree at all. On the

contrary it appears that the learned Judge sought to make a distinction between a substantive decree, which is not affected by an order under

Order 41, Rule 11 and by the decree which follows as a result of such an order. What is observed is that when an appeal is summarily dismissed

under the provisions of Order 41, Rule 11, the original decree from which the appeal was preferred remains untouched and it is the original decree

which is the substantive decree. The learned Judge expressed his agreement with the reasoning of the learned Judges in the case Bapu v. Vajir

((1897) 21 Bom 548) and based his conclusion on the said decision. It is, however, significant to note in this context that in the case Bapu v. Vajir

the position that an order of dismissal of an appeal u/s 551, Civil P. C. 1882 (which is analogous to Order 41 Rule 11) is a decree and is

appealable u/s 584 was accepted. What was observed in that case was that when appeal is dismissed u/s 551, there is no decree of the High

Court which can be executed and that the decree of the appellate Court u/s 551 is clearly not one confirming the decree of the lower Court, which

is left untouched and is neither confirmed nor varied nor reversed,

9. Several decisions of other High Courts are cited on behalf of the respondent in support of the proposition that an order under Order 41, Rule

11 (1) is a decree within the meaning of Section 2(2) of the Civil P. C. 1908. The first decision is of the Patna High Court in Jamuna Prasad Rai v.

Rajballam Rai (AIR 1937 Pat 349). In the said case the distinction between decree and order and the difference between Sub-rule (1) and Sub-

rule (2) of Order 41, Rule 11, Civil P. C. 1908 were considered and it was held that when an appeal is dismissed under Order 41, Rule 11, Sub-

rule (1) such a dismissal, has, so far as the Court pronouncing the decision is concerned, the finality which is an essential ingredient in the definition

of "decree" in Section 2(2) as in substance it expresses an adjudication within that definition to the effect that the appeal is without merit. It was

further held that dismissal of an appeal under Order 41, Rule 11 (1) is appealable as a decree and is, therefore, not an order.

10. In Devalraju Subbamma v. Devalraju Madhavarao AIR 1946 Mad 492 it was held that the order dismissing an appeal in limine under Order

41, Rule 11 is a decree within the meaning of Section 2 (2), and that an application for amendment of the decree lies to the appellate Court and not

to the lower Court. Same view was taken by the Division Bench of the High Court of Andhra Pradesh in Annapu Ramanna v. Ponduri Sreeramulu

AIR 1958 A P 768 , and also by the Division Bench of the Punjab and Haryana High Court in Hakam Singh Vs. Jaswant Singh and Others, In

Khwaja Ajijoddin Khwaja Nizamuddin v. Jaswant Madhao Joglekar AIR 1953 Nag 335 the Nagpur High Court has also held that an order

dismissing an appeal under Sub-rule (1) of Rule 11 of Order 41 amounts to a decree and is appealable as such even when a judgment is not

written in the manner provided by Rule 31 of Order 41.

11. All these decisions proceed on the basis that an order under Order 41, Rule 11 (1) is final adjudication of the matter, so far as the Court

passing the order is concerned. It is true that while dismissing an appeal in limine under Order 41, Rule 11, no judgment in the form contemplated

by Rule 31 and containing directions contemplated by Rule 32, is delivered and the decree does not satisfy requirements of Rule 35. But these

aspects of the matter are not decisive once it is accepted that the order dismissing an appeal in limine is the formal expression of adjudication which

conclusively determines the rights of the parties with regard to all or any of the matters in controversy.

12. Rule 37 of Order 41 enjoins a duty on the Court to send a copy of the Judgment and of the decree to the Court which passed the decree

appealed from. It is pertinent to note that even in case of dismissal of an appeal under Order 41, Rule 11 (1) an intimation of the decision is sent to

the appropriate Court and it is specifically mentioned in the form used for that purpose that the High Court has passed a decree dismissing the

appeal under Order 41, Rule 11 Sub-rule (1).

13. It is an admitted position that an order passed by the first appellate Court dismissing the first appeal in limine is appealable to the High Court. It

is not appealable under Order 43 as an appealable order. It is appealable as a decree.

14. A reference was made to Sub-rule (4) of Rule 11 of Order 41. This provision which has been inserted by the Amendment Act of 1976 reads

as follows:

Where an appellate Court, not being the High Court, 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.

Mr. Madkholkar tried to contend that this provision has been incorporated in order to make it obligatory on the part of the lower appellate Court

to record, in brief, grounds for dismissing the appeal under Sub-rule (1) and to draw a decree in accordance with the judgment. According to him

the provision about drawing of a decree has been specifically incorporated because an order under Order 41, Rule 11 (1) was not considered as a

decree at all. According to him, it is because of this specific provision that an order under Order 41, Rule 11 (1) passed by the lower appellate

Court becomes a decree. He further argued that as no duty is cast on the High Court to deliver judgment while dismissing an appeal under Sub-

rule (1), there is no question of drawing a decree in accordance with the judgment and hence the order of the High Court dismissing an appeal in

limine would not amount to a decree, even after amendment of the Code. It is difficult to accept this submission. The intention of the Legislature in

incorporating Sub-rule (4) is to make it obligatory on the lower appellate Court to deliver a judgment while dismissing appeal under Sub-rule (1). It

follows, therefore, that when a judgment is to be delivered, the decree shall be drawn up in accordance with the said judgment. It is difficult to

accept the submission that only an order of the lower appellate Court dismissing an appeal in limine is to be considered as a decree because it is

expected to be preceded by judgment containing brief grounds for decision. The fact that even now the High Court is not expected to deliver a

judgment while dismissing an appeal under Sub-rule (1) of Order 41, Rule 11, cannot be interpreted to mean that an order passed by the High

Court under Order 41, Rule 11 (1) is not a decree. In my view an order passed by the High Court under Order 41, Rule 11 (1) is a decree and

hence Article 8 or Article 9 of Schedule I of the Bombay Court-fees Act, 1959 would be applicable to an application for review of such an order.

The revision application, therefore, fails. However the applicant is granted two months time to pay the requisite Court-fee.

15. No order as to costs.

16. Revision dismissed.