The Commissioner Mysore Urban ... vs S.S. Sarvesh on 5 February, 2019

Equivalent citations: AIRONLINE 2019 SC 2503

Author: Abhay Manohar Sapre

Bench: Abhay Manohar Sapre, Dinesh Maheshwari

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 1463 OF 2019
(Arising out of S.L.P.(C) No.23718 of 2018)

The Commissioner,
Mysore Urban Development
Authority ….Appellant(s)

VERSUS

S.S. Sarvesh ….Respondent(s)

JUDGMENT

Abhay Manohar Sapre, J.

1. Leave granted.

2. This appeal is filed against the final judgment and order dated 19.02.2018 passed by the High Court of Karnataka at Bengaluru in Writ Petition No.34313 of 2017 whereby the High Court dismissed the writ petition filed by the appellant herein.

3. In order to appreciate the short controversy involved in this appeal, it is necessary to set out a few relevant facts.

4. The appellant□Mysore Development Authority(in short, "the Authority") is the defendant whereas the respondent is the plaintiff in the suit out of which this appeal arises.

5. The respondent filed a civil suit (O.S. No.685/2006) against the appellant□Authority in the Court of Principal Senior Civil Judge and Small Causes Court, Mysuru. The suit was for declaration of title and permanent injunction in relation to the land bearing No. 2442 situated in Vijaynagara, 2nd stage, Devaraja Mohalla, Mysuru (hereinafter referred to as 'suit land').

6. The appellant□Authority, on being served filed their written statement. The parties adduced their evidence. By judgment/decree dated 20.03.2012, the Trial Court decreed the respondent's suit and passed a decree against the appellant□Authority in relation to the suit land.

7. The appellant□Authority felt aggrieved and filed first appeal (R.A.No.370/2012) under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") in the Court of Principal District and Sessions Judge, Mysuru. This appeal was listed for hearing on 25.04.2014. On that day, the appellant's counsel did not appear when the appeal was called on for hearing and, therefore, the Appellate Court dismissed the appeal in default.

8. The appellant□Authority, therefore, filed an application before the Appellate Court praying for recall of the order dated 25.04.2014 and sought restoration of their appeal for its hearing on the merits. By order dated 29.06.2016, the Appellate Court dismissed the application, which gave rise to filing of the writ petition by the appellant□Authority under Article 227 of the Constitution of India before the High Court of Karnataka at Bengaluru. By impugned order, the High Court dismissed the writ petition and affirmed the order of the Appellate Court, which has given rise to filing of this appeal by way of special leave by the defendant in this Court.

9. So, the short question, which arises for consideration in this appeal, is whether the Appellate Court and the High Court were justified in dismissing the application (M.A.No.77/2014) filed by the appellant□Authority(defendant) and were, therefore, justified in refusing to restore their first appeal.

10. Heard Mr. Mahesh Thakur, learned counsel for the appellant□Authority and Mr. Anand Sanjay M. Nuli, learned counsel for the respondent.

11. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal, set aside the impugned order and also the order dated 29.06.2016 passed by the Principal District and Sessions Judge in M.A. No.77 of 2014 and, in consequence, allow the application filed by the appellant□Authority(defendant) and recall the order dated 25.04.2014 passed by the Appellate Court.

12. At the outset we consider it apposite to clarify one legal position, which was rightly brought to our notice by the learned counsel for the appellant□Authority.

13. The first appeal (R.A. No.370/2012) filed by the appellant-Authority suffered dismissal in default on 25.04.2014 because on that day none appeared for them when the appeal was called on for hearing.

14. Such dismissal attracted the provisions of Order 41 Rule 19 of the Code and, therefore, the appeal could be re-admitted for hearing at the instance of the appellant-Authority only by taking recourse to the provisions of Order 41 Rule 19 and subject to their making out a sufficient cause which prevented them from appearing on 25.04.2014 when the appeal was called on for hearing.

15. An order of refusal to re-admit the appeal passed by the Appellate Court under Order 41 Rule 19 of the Code is made expressly appealable under Order 43 Rule 1(t) of the Code to the High Court. In this case, since the Appellate Court refused to re-admit the appeal and dismissed the application filed by the appellant-Authority, the remedy of the appellant-Authority was to file an appeal in the High Court against the order dated 29.06.2016 under Order 43 Rule 1 (t) of the Code.

16. The appellant-Authority instead of filing the appeal under Order 43 Rule 1(t) of the Code filed the writ petition under Article 227 of the Constitution against the order dated 29.06.2016. It was an error on the part of the appellant-Authority and the High Court should have declined to entertain the writ petition and instead either converted the writ petition into the appeal under Order 43 Rule 1(t) of the Code or permitted the appellant-Authority to withdraw the writ petition with a liberty to file an appeal under Order 43 Rule 1(t) of the Code, as the case may be, in its discretion. It was, however, not noticed and the High Court dismissed the writ petition on merits.

17. We, therefore, clarify the legal position that the appeal lies under Order 43 Rule 1(t) of the Code to the High Court against the order dated 29.06.2016 passed by the Appellate Court which dismissed the application made under Order 41 Rule 19 of the Code.

18. Be that as it may, in our considered opinion, the High Court erred in dismissing the writ petition. The High Court should have allowed the writ petition and the appellant-Authority should have been given the indulgence of hearing of their appeal on merits.

19. Indeed, this case reminds us of the subtle observations of the learned Judge-Vivian Bose, J., which His Lordship made in one of the leading cases of this Court in Sangram Singh vs. Election Tribunal, Kotah, AIR 1955 SC 425.

20. Vivian Bose J., speaking for the Bench, in his distinctive style of writing made the following observations while dealing with the case arising out of Order 9 and reminded the Courts of their duty while deciding the case. The observations are apt and read as under:

> "A code of procedure must be regarded as such. It is procedure something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest

> the very means designed for the furtherance of justice be used to frustrate it. Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

21. Keeping the aforementioned statement of law in consideration and applying the same to the facts of this case, we have no hesitation in allowing this appeal and set aside the impugned order.

22. In our view, the Courts below should have seen that the first appeal is a valuable right of the appellant and, therefore, the appellant□Authority was entitled for an opportunity to prosecute their appeal on merits. If the appellant's advocate did not appear may be for myriad reasons, the Court could have imposed some cost on them for restoration of their appeal to compensate the respondent(plaintiff) instead of depriving them of their valuable right to prosecute the appeal on merits. This is what Justice Vivian Bose has reminded to the Courts while dealing with the cases of this nature in Sangram Singh (supra) to do substantial justice to both the parties to the lis. Indeed, dismissal of the appeal in default and dismissal of the appeal on merits makes a difference. The former dismissal is behind the back of the litigant and latter dismissal is after hearing the litigant. The latter is always preferred than the former.

23. We have perused the application made by the appellant□Authority for recalling of the order and we find that it constitutes a sufficient cause within the meaning of Order 41 Rule 19 of the Code. The application, therefore, deserves to be allowed. However, it is subject to payment of cost of Rs.10,000/□payable by the appellant□Authority to the respondent(plaintiff). Let the cost be paid before hearing of the appeal.

24. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside. As a consequence, the application filed by the appellant (MA No.77/2014) is allowed. The R.A. 370/2012 is accordingly restored to its original number for its hearing on merits in accordance with law.

25. Parties are directed to appear before the concerned Appellate Court on 05.03.2019 to enable the Appellate Court to fix a date for hearing of the appeal on merits uninfluenced by any of our observations on the merits because we have not applied our mind to the merits of the controversy involved in the appeal. Let the appeal be heard and disposed of as expeditiously as possible preferably within six months from the date of this order.

.....J. [ABHAY MANOHAR SAPRE] .....J. [DINESH MAHEHSWARI] New Delhi;

February 05, 2019