Supreme Court of India
Harbans Pershad Jaiswal(D) By Lrs vs Urmila Devi Jaiswal (Dead) By Lrs on 21 April, 1947
Author: .....J.
Bench: Surinder Singh Nijjar, A.K. Sikri

[REPORTABLE]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.4656/2014
(arising out of S.L.P.(Civil) No.5875/2007)

Harbans Pershad Jaiswal (D) By Lrs. .....Appellants

Vs.

Urmila Devi Jaiswal (D) By Lrs. .....Respondents

WITH

C.A. No.4657/2014 @ SLP(Civil) No.5874/2007
C.A.No.4658/2014 @ SLP(Civil) No.18141/2009
C.A.No.4659/2014 @ SLP(Civil) No.18142/2009

J U D G M E N T

A.K.SIKRI,J.

1. Leave granted.

2. In all these appeals identical question of law is raised, which has arisen for consideration in the same background facts in these cases, which are between the same parties. There is thus, a commonality of parties, the dispute as well as question of law in all these cases and for this reason these appeals were heard analogously and are being disposed of by this common judgment.

3. The factual details giving rise to the filing of these appeals do not need a large canvass, and our purpose would be served in drawing the picture with the following relevant facts:

4. One Late Shiv Pershad Jaiswal was the owner and possessor of House No.11-2-378, Habeed Nagar, Hyderabad as well as House No.4-114 to 117 with appurtenant land admeasuring about Ac.2.05 guntas at Madchal, R.R. District. After his death, the respondent herein (daughter of Shiv Pershad Jaiswal) filed the Suit, being O.S.1287 of 1985, in City Civil Court, Hyderabad claiming1/3rd share in the aforesaid properties which were described in Schedule A and B to the plaint. In the said Suit, she impleaded her brother and mother as the defendants. During the pendency of the Suit, the mother died which led to the amendment in the Suit filed by the respondent claiming ½ share in the

aforesaid properties. Additional relief of rendition of accounts was also prayed for, as the brother (appellant No.1) was collecting the rent from the tenants from certain portion of the Suit properties. By way of amendment, appellant No.2 herein (wife of appellant No.1) was also impleaded in whose favour her mother had bequeathed property by executing a Will dated 6.7.1983. The Suit was contested by the defendants by filing written statement. Number of issues and additional issues were framed and both the parties led their evidence in support of their respective cases. After hearing the arguments, the learned City Civil Court passed the preliminary decree dated 5.8.1993 holding that the respondent as well as appellant No.1 (herein brother) were entitled to half share each in respect of property at Madchal, R.R. District (Schedule A property). Suit qua Habeeb Nagar (Schedule B property) was dismissed. The Trial Court also directed the respondent to proceed against the appellants for rendition of accounts at the time of passing of final decree for the rent realized by appellant No.1 after the death of their mother respondent on 25.9.1985.

5. The respondent was not satisfied with the aforesaid preliminary decree vide which she was held not entitled to any share in the Schedule A property. She, accordingly, filed the appeal against the said portion of the preliminary decree, before the High Court of Andhra Pradesh. Likewise, the appellant also filed appeal against other portion of the preliminary decree whereby the respondent was held entitled to half share in the Schedule B property. These appeals were listed for final hearing on 29.9.2005. However, counsel for the appellants Ms. Shalini Saxena did not appear in the Court on that day. The High Court heard the counsel for the respondent on the merits of the appeal and rendered judgment dated 29.9.2005 whereby appeal of the respondent was allowed and that of the appellants was dismissed.

6. As per the appellants, they came to know about the said ex-parte judgment and order dated 29.9.2005 sometime in the year 2006. Accordingly, the appellants moved four applications with following description:

(i) C.C.C.A. M.P. No.294/2006 for the leave of the High Court to engage their counsel to represent their case,

(ii) C.C.A. M.P. SR No.4416/2006 with the prayer to dispense with the filing of the certified copies of decree and judgment and also typed copies of judgment and decree in C.C.C.A. No.4 of 1994 dated 29.9.2005.

(iii) C.C.C.A.M.P. (SR) No.4417 of 2006 praying the High Court to condone the delay of 158 days in filing the application for setting aside the ex-parte decree and judgment dated 29.9.2005 in C.C.C.A. No.4 of 1994.

(iv) C.C.C.A.M.P.(SR) No.4419 of 2006 for setting aside the exparte decree and judgment dated 29.9.2005 in C.C.C.A.No.4 of 1994.

7. The plea of the appellants was that in the absence of their counsel, appeal filed by them could not have been decided on merits and the only course open to the Court was to dismiss the appeal in default, as that is the only permissible course of action provider in Order XLI Rule 17 of the Code of

Civil Procedure in such an eventuality. This argument, however, did not impress the High Court. A perusal of the order of the High Court would also demonstrate that the High Court was not impressed with the argument that non-appearance of the counsel for the appellants was bonafide or there was sufficient cause shown for the counsel's absence. In fact, a perusal of docket proceeding in appeal of the respondents indicated that another Single Judge had heard common arguments in both appeals on an earlier occasion and even the judgment was reserved. However, owing to the fact that he was subsequently appointed as Chairman, Andhra Pradesh Administrative Tribunal and could not deliver the judgment, the appeals were directed to be listed for hearing afresh. The record was not showing as to who was represented appellants at that time and advanced the arguments. Therefore, the appellants could not feign absence of their earlier counsel Ms. B.Shalini Saxena. In any case, as pointed out above, the High Court found that there was no sufficient cause shown for non- appearance of Ms. B.Shalini Saxena.

8. It is, further, pointed out by the High Court that the respondent herein was the appellant in one of the appeals C.C.A.No.4/94 and the appellants herein were the respondents in that appeal. In so far as that appeal filed by respondent herein is concerned, same could be heard in the absence of the appellants (respondents in that appeal), in view of the provision contained in Order 41 Rule 17(2) of the CPC which reads as under:

> "Hearing appeal ex parte: Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte." Since another appeal was heard along with this appeal, that was the reason for hearing both the appeals together. Giving these reasons, the applications filed by the appellants were dismissed and present appeals are filed challenging the dismissal order dated 31st July 2006.

9. As mentioned above, the sole contention of the appellant is that the appeal filed by the appellants could not have been dismissed on merits when the appellants remained unrepresented and at the most it could be dismissed only in default. In support of this contention, Mr. Sanyal, learned senior counsel appearing for the appellants referred to explanation appended to Order XLI Rule 17 of the CPC. Mr. Sanyal also relied upon the judgment of this Court in the case of Abdur Rahman & Ors. v. Athifa Begum & Ors. (1996) 6 SCC 62.

10. Mr. Anup George Chowdhuri, learned senior counsel who appeared for the respondents argued on the same line which are the reasons adopted by the High Court in passing the impugned order. Additionally, he sought to draw sustenance from the judgment in the case of Ajit Kumar Singh & Ors. v. Chiranjibi Lal & Ors. (2002) 3 SCC 609.

11. It is a common case that the appeals filed by both the parties were governed by the procedure contained in Order XLI of the CPC. As per Rule 12, in case the appellate court does not proced to dismiss the appeal in limine under Rule 11, it shall fix a day for hearing the appeal. Rule 14 prescribes that notice of the day fixed under Rule 12 is to be given in the appellate court-house. Rule 16 gives the appellants a right to begin the arguments at the time of hearing of the appeal. As per Rule 17, the appeal can be dismissed in case of appellant's default in appearance. Since the arguments hinges around this rule, we reproduce the said rule hereunder:

> "17. Dismissal of appeal for appellant's default –(1)Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called for hearing, the Court may make an order that the appeal be dismissed.
>
> [Explanation.- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.] (2) Hearing appeal ex parte. –Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte."

12. Where the appeal is dismissed in default under Rule 17, remedy is provided to the appellant under Rule 19 for re-admission of the appeal on moving an application and showing that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing. Likewise, Rule 21 gives an opportunity to the respondent to move similar application for rehearing of the appeal by demonstrating sufficient cause for non- appearance, if the appeal was heard in his absence and ex-parte decree passed.

13. It is clear from the above that whereas appeal can be heard on merits if the respondent does not appear, in case the appellant fails to appear it is to be dismissed in default. Explanation makes it clear that the court is not empowered to dismiss the appeal on the merits of the case. As different consequences are provided, in case the appellant does not appear, in contradistinction to a situation where the respondent fails to appear, as a fortiori, Rule 19 and Rule 21 are also differently worded. Rule 19 deals with re-admission of appeal "dismissed for default", where the appellant does not appear at the time of hearing, Rule 21 talks of "re- hearing of the appeal" when the matter is heard in the absence of the respondent and ex-parte decree made. In Abdur Rahman case (supra), this Court made it clear that because of non-appearance of the appellants before the High Court, High Court could not have gone into the merits of the case in view of specific course of action that could be chartered (viz. dismissal of the appeal in default above) continued in the explanation to Order XLI Rule 17, CPC and by deciding the appeal of the appellants on merits, in his absence. It was held that the High Court had transgressed its limits in taking into account all the relevant aspects of the matter and dismissing the said appeal on merits, holding that there was no ground to interfere with the decision of the trial court.

14. In Ajit Kumar Singh case (supra) as well, same legal position is reiterated as is clear from para 8 of the said judgment which is reproduced below:

> "There can be no doubt that the High Court erroneously interpreted Rule 11(1) of Order 41 CPC. The only course open to the High Court was to dismiss the appeal for non-prosecution in the absence of the advocate for the appellants. The High Court ought not to have considered the merits of the case to dismiss the second appeal.(See: Rafiq v. Munshilal (1981) 2 SCC 788). The same view was reiterated in Abdur Rahman v. Athifa Begum (1996) 6 SCC 62."

15. However, after taking note of the aforesaid legal position, the Court went further with a poser as to whether the case should be remanded to the High Court for fresh disposal in accordance with the law. In the facts of that case where the findings of the first appellate court was recordedthat there existed a relationship of landlord and tenant between the parties and since possession was taken as long back as in the year 1986 i.e. long before the filing of the appeal, the court refused to exercise discretion under Art.136 of the Constitution to remand of the case to the High Court for fresh disposal. Thus, on the issue of law this judgment supports the case of the appellants herein. The Court, however, deemed it proper not to exercise its discretion and entertain the petition under Art. 136 for the aforesaid reasons.

16. Reverting to the facts of the present case, as already pointed out above, the respondent had filed the Suit seeking partition of two properties claiming half share each in both these properties mentioned in Schedules A and B. The trial court had decreed the Suit in respect of Schedule B property but dismissed the same qua Schedule A property. Both the parties had gone in appeal. In so far as appeal of the respondent is concerned, the same has been allowed exparte as nobody appeared on behalf of the appellants. This course of action was available to the High Court as sub-rule (2) of Order XLI Rule 17 categorically permits it. Though the appellants moved application for setting aside this order, the same was dismissed on the ground that no reasonable or sufficient cause for non- appearance was shown. Therefore, this part of the order of the High Court is without blemish and is not to be interfered with. Appeal their against is dismissed.

17. In so far as appeal of the appellants against grant of preliminary decree in respect of Schedule B is concerned, it could not have been heard on merits in the absence of the appellant. The Court could only dismiss it in default.

18. Having said so, the question that arises is that even if the appeal was to be dismissed in default, whether that order warranted to be recalled on application made by the appellants. As is clear from the reading of Rule 19 of Order XLI, the appellants were supposed to show sufficient cause for their non-appearance. The High Court has given categorical finding that no such cause is shown. The learned senior counsel for the appellants did not even address on this aspect or argued that the reason given by the appellant in the application filed before the High Court for non-appearance amounted to sufficient cause and the order of the High Court is erroneous on this aspect. As a result, even if we treat the order of the High Court deciding the appeal of the appellants on merits was not proper and proceed further by substituting it with the order dismissing the said appeal in default, we do not find any reason to recall the order dismissing the appeal in default.

19. As a consequence, these appeals fail and are hereby dismissed.

.....J.

(Surinder Singh Nijjar) .....J.

(A.K.Sikri) New Delhi, April 21, 2014