

(2010) 03 MP CK 0090

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2390 of 2010 (I)

Anandi Prasad Dwivedi and Another

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 15-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 47 Rule 1(1), Order 47 Rule 4, Order 47 Rule 7, Order 47 Rule 7(1)
Constitution of India, 1950 — Article 227

Citation : (2010) ILR (MP) 1904 : (2010) 2 MPJR 5

Hon'ble Judges : U.C Maheshwari, J; Ramesh Surajmal Garg, J

Bench : Division Bench

Final Decision : Allowed

Judgement

The facts are leading to a impossible situation. The Petitioner herein filed a suit which was dismissed and thereafter, the regular first appeal was filed before the first appellate Court. The First Appellate Court allowed the appeal, set aside the judgment and decree passed by the trial Court and remanded back the matter to the trial Court to proceed in accordance with the directions of the appellate Court. It appears that thereafter the Plaintiff/Appellant filed an application before the appellate Court under Order 47 Rule 1 CPC for review of the judgment and decree. The Appellate Court took up the application for review and after hearing both the parties without making any observation or recording a finding that the earlier order of remand was right or wrong, set aside the earlier order and dismissed the regular first appeal which was earlier allowed. After disposal of the application for review and dismissal of the appeal, the first appellate Court did not issue a direction for framing a decree.

The Plaintiff is before this Court under Article 227 of the Constitution of India with a submission that the learned first appellate Court while taking up the application for review was not entitled to set aside the judgment and decree under which the matter was remanded to the trial Court but at best could dismiss

the application for review or if it was of the opinion that the earlier judgment remanding the matter was bad then the appellate Court was required to recall the earlier judgment and decree and rehear the parties on merits of the appeal.

After hearing learned Counsel for the Petitioner, we are of the opinion that if we hold that the review petition was allowed because earlier judgment and decree remanding the matter was set aside then the impugned order will have to be challenged under Order 43 Rule (1)(w) of the Code of Civil Procedure. In the alternative, if we hold that after granting the review the appellate Court has dismissed the appeal without issuing a direction for framing the decree then the order passed by the learned Court below would be deemed to be a judgment u/s 96 of CPC and a regular second appeal would lie. In any case, the petition under Article 227 of the Constitution of India would not be maintainable.

It is to be remembered and observed by all the Courts that whenever an application for review is filed then after hearing the parties the Court hearing the application, if is of the opinion that the review application has to be allowed then, it has to allow the application, set aside the impugned order and, relegate the parties back to the position where they were before the order impugned was passed. If the order is recalled/reviewed then the parties would be asked to submit their arguments and after hearing afresh, the Court will have to pass a fresh order on the merits.

Order 47 of the CPC relates to review. Sub-rule (1) of Rule 1 of Order 47 would show that a party desirous 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. A fair understanding of Sub-rule (1) of Rule 1 of Order 47 would clearly provide that a party may make an application for review of the judgment and the order. The question is whether while granting the application for review, a Court is entitled to set aside the earlier judgment and decree and pass a fresh judgment and decree/order.

Rule 4 of Order 47 clearly provides that where the Court is of the opinion that the application should be granted, it shall grant the same provided that no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for and... (b)

After hearing both the parties, when a Court is of the opinion that the earlier judgment (review of which is sought) is wrong or bad or there is a mistake or error apparent on the face of record then it shall recall its earlier judgment and decree or order and pass an order to rehear the original case.

Rule 7 of Order 47 of the CPC reads as under-

7. Order of rejection not appealable-Objection to order granting application. (1) An order of the Court rejecting the application shall not be appealable, but an order granting an application may be objected to at once by an appeal from the

order granting the application or in an appeal from the decree or order finally passed or made in the suit.

When a Court hearing the review application rejects the same then the order shall not be appealable but if an order granting review application is allowed then the party aggrieved may object to it at once by an appeal from the order granting the application. Such an appeal is to be filed under Order 43 Rule 1(w) of the Code of Civil Procedure.

Rule 7(1) further provides that the order passed by the Court can also be challenged by filing an appeal from the decree or order finally passed or made in the suit (in our opinion, the word "suit" shall include an appeal or such other proceedings). Sub-rule (1) of Rule 7 contemplates two situations. The first situation contemplated under Sub-rule (1) of Rule 7 of Order 47 is to challenge the order granting review by filing an appeal which in our opinion would lie under Order 43 Rule 1(w) of the CPC while the order can also be challenged after a final judgment/decreed or order is passed in the main proceedings.

An application for review if is allowed then in our opinion proceedings Under Rule 8 of Order 47 are to be drawn. Rule 8 provides that when an application for review is granted, a note thereof shall be made in the register and the Court may at once rehear the case or make such order in regard to rehearing as it thinks fit. When a Judge decides to grant an application for review, he should record an order to that effect and a note thereof should be made in the register under Rule 8 of Order 47. Decree which is passed subsequent to grant of review, is a new decree superseding the original one. We have to understand a distinction between grant of a review application and passing of a fresh decree or order after the review is granted. Granting of an application for review merely amounts to a decision to rehear the case.

In the present matter, the Court below, we will again reiterate, has created an impossible situation because it decided the review application and at the same time under the same order set aside the earlier judgment and decree and dismissed the appeal of the Plaintiff which was earlier allowed.

Of late, we are finding that most of the Courts while granting the review application are changing the final judgment/order earlier delivered and are thereby creating impossible situation.

Learned Counsel for the Petitioner, at this stage, submits that the Petitioner be allowed to withdraw the petition with liberty to file appropriate proceedings before the High Court.

The petition is allowed to be withdrawn with the observations aforesaid.