

(1984) 06 GAU CK 0019
In the Gauhati High Court
Case No : M.A. (S) No. 9 of 1979

Arun Chandra Malakar

APPELLANT

Vs

Patilal Roy and Another

RESPONDENT

Date of Decision : 22-06-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 8 Rule 10, Order 9 Rule 13, 96(2)

Citation : AIR 1985 Guw 67

Hon'ble Judges : K. Lahiri, J

Bench : Single Bench

Advocate : S.R. Bhattacharjee, P. Ray and N.Z. Ahmed, for the Appellant; P. Choudhury, S.K. Senapati and A.R. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

K. Lahiri, J.—On 16-9-78 the appellant-plaintiff obtained an ex parte order under Order 8 Rule 10 of the Civil P.C., for short "the Code" and the follow up decree was prepared on 18-9-78. The respondents-defendants filed an application under Order 9 Rule 13 for restoration of the suit upon setting aside the ex parte order which was dismissed on 25-9-78. The said order is extracted below :

"25-9-78 - Under Order 9 Rule 13 of the C.P.C. the petition of the petitioner is rejected as the suit has been decreed Under Order 8 Rule 10 of the CP.C.

Sd/- S. K. Kar"

On 26-9-78 the defendants preferred an appeal against the ex parte decree dt. 18-9-78. The appellate Court held that the trial Court had no jurisdiction to render the order under Order 8 Rule 10 and further held that the trial Court had committed jurisdictional error in rendering the ex parte decree. Accordingly, the appeal was allowed, impugned decree was set aside and the suit was remitted to the trial Court for disposal in accordance with law. Being aggrieved by the order the plaintiff has appealed to this Court.

2. Mr. P. Ray, learned counsel for the appellant has made two pronged attack on the impugned order. It has been contended that the appeal was not maintainable, inasmuch as the right of appeal against an order under Order 8 Rule 10 of the Code had been taken away by deleting Rule 1(b) of Order 43 of "the Code" by the Civil Procedure (Amendment) Act 104 of 1976, "the Amendment Act" for short, which came into force on 1-2-77. The appeal which was preferred before the first appellate Court was against an order under Order 8 Rule 10 and, as such, the first appellate Court had no jurisdiction to entertain the appeal. The second contention, an alternative submission, is that the moment the application under Order 9 Rule 13 of "the Code" projected against the order rendered under Order 8 Rule 10 was dismissed, the first appellate Court lost jurisdiction to dispose the appeal. According to learned counsel, the Explanation added to Order 9 Rule 13 by "the Amendment Act", prohibiting trial Courts to continue with the proceedings under Order 9 Rule 13 on disposal of appeal against the ex parte decree, is squarely applicable in the case of appeal when an application under Order 9 Rule 13 is dismissed. In support of his contention, learned counsel has relied on Rani Choudhury v. Surat Jit Choudhury AIR 1982 SC 1397.

3. At the first blush the first contention appeared to be very attractive, as in fact Order 43 Rule 1(b) has been deleted by "the Amendment Act". Order 43 Rule 1(b) reads as follows :-

"1. An appeal shall lie from the following orders under the provisions of Section 104, namely;

(a)*****

(b) an order under Rule 10 of Order VIII pronouncing judgment against a party;

(c) *****

As such, it appears that an order rendered under Order 8 Rule 10 pronouncing judgment

against a party was an appealable order. But the right of appeal, which had been conferred, was taken away by "the Amendment Act". Mr. Ray contends that against an order under Order 8 Rule 10 pronouncing judgment against a party, the remedy open to the party is to go for revision or alternatively to apply under Order 9 Rule 13 of "the Code".

4. Let me try to ascertain the object and reason of the legislature in deleting Rule 1(b) of Order 43. Rule 1(b) provided that an appeal would lie against an order under Rule 10 of Order 9 pronouncing judgment. As such, an appeal against an "Order" under Rule 10 Order 8 was competent. But an aggrieved party had to file an appeal under Order 43 Rule 1(b) to set aside the said order and also had to file another appeal against the follow up ex parte decree. So, the aggrieved party had to take resort to two successive appeals. In my opinion, the object of deleting Rule 1(b) of Order 43 is to reduce two successive appeals to one,

namely, an appeal against the ultimate decree made in consequence of an order under Order 8 Rule 10. The right to appeal against the decree was there and it is still subsisting. Now, a party can file one appeal and get the requisite relief of setting aside the decree and the order under Order 8 Rule 10. A party aggrieved can, in an appeal from the decree passed as a result of the order, take up the same points as he could take in an appeal under Order 43 Rule 1(b). The view finds support in Law Commission's 54th Report, pp. 304 and 305.

"We are of the view that an appeal against an order under Order VIII, Rule 10, pronouncing judgment against a party, should be abolished. The idea is to reduce the present two successive appeals to one. The defendant can, in an appeal from the decree passed as a result of the order, take the same point as he can take in appeal under Order XLIII, Rule 1(b). *****"

I have no hesitation in reaching the conclusion that notwithstanding the deletion of Order 43 Rule 1(b) of the Code, the right of appeal u/s 96(2) of the Code against the decree passed in consequence of an order under Order 8 Rule 10 still subsists. Section 96(2) of the Code is extracted below:

"96. Appeal from original decree --

(1) *****

(2) An appeal may lie from an original decree passed ex parte. (3) *****

Sub-section (2) has not been deleted. As such, an appeal lies from an original decree passed ex parte.

5. In the instant case, the appeal was taken against the ex parte decree and the appellate Court also considered the points which the appellant could have taken up in an appeal under Or 43 Rule 1(b) (since deleted), which was permissible. In the instant case, the aggrieved party awaited the making of the decree which was prepared on 18-9-78 and preferred the appeal against it on 26-9-78, within the period of limitation. There is no denial that the appeal was from an original decree passed ex parte. The first appellate Court was satisfied that the learned Munsiff was wrong in decreeing the suit and not only set aside the order but also the decree passed ex parte. The relevant part of the order of the first appellate Court is extracted:

"The impugned order and the decree passed thereon are hereby set aside."

It is therefore seen that the appeal was presented to the first appellate Court u/s 96(2) of the Code from the original decree passed ex parte. I hold that the appeal was competent u/s 96(2) of the Code. Further, the explanation added to Order 9 Rule 13 is also a pointer that an appeal u/s 96(2) is competent. The explanation added to O, 9 Rule 13 is extracted below :

"Explanation-- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie

under this rule for setting aside that ex parte decree."

From the explanation itself it appears clear that notwithstanding deletion of Order 43 Rule 1(b) the right of appeal u/s 96(2) still subsists. Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury, (supra) is; an authority for the proposition that even after the deletion of Order 43 Rule 1(b) an appeal from an original decree passed ex parte is competent u/s 96(2) of "the Code". As such, I hold that the appeal preferred to the first appellate Court was competent and the appellate Court had jurisdiction to entertain and dispose of the appeal.

6. Let me now consider the second contention. Learned counsel for the petitioner has strongly contended that upon disposal of the application under Order 9 Rule 13, on any ground other than the ground that the applicant has withdrawn the application no appeal could be entertained u/s 96(2) of the Code for setting aside an ex parte decree. It is seen on perusal of the "Explanation" inserted by the "Amendment Act" and extracted above that the trial Court has been prohibited to dispose an application under Order 9 Rule 13 where the appeal against the ex parte decree has been ruled and disposed of on any ground whatsoever other than the ground that the appellant has withdrawn the appeal. I am of the firm view that the restriction has been imposed by law limiting the jurisdiction of the trial Court and as such it cannot apply to inhibit the jurisdiction of the appellate Court in seisin of an appeal u/s 96(2) of the Code. Secondly, I am of the opinion that the Explanation was inserted with positive object and purpose behind it. If an appeal is allowed or dismissed "on any ground other than the ground of withdrawal of the appeal", the decree of the trial Court merges in the appellate decree. If the appeal is allowed the ex parte decree becomes non-existent. As such, the question of setting aside the ex parte decree by the trial Court does not arise. Similarly if the appeal is dismissed, the decree of the original Court merges in the decree of the appellate Court and an application under Order 9 Rule 13 becomes infructuous, as the trial Court cannot interfere with the original nonexistent decree merged in the appellate decree nor can the trial Court interfere with the appellate decree wherein the original has been merged. These are the reasons why the explanation has been added to Order 9 Rule 13 as an abundant caution. In my opinion, even in the absence of the explanation just added, the position would have been the same. However, the controversies raised in certain quarters were resolved by introducing the explanation. Further, Section 96(2) confers a right of appeal from "an ex parte decree". There is no rider or prohibition introduced in Sub-section (2) of Section 96. It is wellnigh impossible to read the explanation to Order 9 Rule 13 in Section 96(2) of "the Code". The power of the Court and the right of a party conferred by Section 96(2) cannot be limited by transposing the explanation to Section 96(2) when it has not been so done by the legislature, either expressly or by necessary implication. If the legislature thought that the scope and jurisdiction of the appellate Court u/s 96(2) was required to be limited, the legislature would have certainly done it expressly or by necessary implication. To add the explanation and read the prohibition in Section 96(2) restricting the power of the appellate

Court and taking away the vested right of the litigants, would amount to adding something which is not there and would amount to exercise the function of the legislature. In my opinion, this is beyond the jurisdiction of the Court. Further, an order under Order 9 Rule 13 is not a decree and the question of merger of the decree in the order does not arise.

7. I find that in the face of a binding decree rendered in pursuance to an appellate order rendered u/s 96(2) the trial Court cannot supersede the decree. However, when an order under Order 9 Rule 13 is rendered it is not a decree, nor an order binding on the appellate Court. Notwithstanding an order under Order 9 Rule 13 the appellate Court, a superior Court, can set aside the decree or uphold the decree. If the legislature thought to take away the power of the appellate Court it would have structured Section 96(2) in the line of Order 9 Rule 13 with the explanation, limiting the jurisdiction of the appellate Court prohibiting it to dispose the appeal on disposal of an application under Order 9 Rule 13. Further, the principles enunciated in *Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury*, are not at all applicable in the instant case. There, an appeal from an ex parte decree was filed and disposed of by the appellate Court holding that the appeal was barred by limitation. Defendants had also filed an application under Order 9 Rule 13 for setting aside the ex parte decree. Even after the disposal of the appeal against the ex parte decree the trial Court proceeded to consider the application filed by the defendant u/s 5 of the Limitation Act for condoning the delay in filing the application under Order 9 Rule 13. The trial Court dismissed the said application. The defendants appealed to the High Court. The High Court held that sufficient cause had been made out for condonation of the delay in presenting the application under Order 9 Rule 13 beyond the prescribed time. The High Court further held that the explanation added to Order 9 Rule 13 did not prohibit the trial Court to entertain and dispose application under Order 9 Rule 13 because the appeal against the ex parte decree had been dismissed not on merit but on the ground that it was barred by limitation. The matter was taken to the Supreme Court and their Lordships have held that dismissal of an appeal as barred by limitation amounts to disposal of an appeal and the trial Court had no jurisdiction to proceed on with the application under Order 9 Rule 13 in view of the explanation inserted therein. This is the sum and substance of the decision in *Rani Choudhury (supra)*. In my opinion, the Supreme Court considered the question of jurisdiction of the trial Court to entertain and dispose an application under Order 9 Rule 13 when the appeal against the original decree had been disposed by the appellate Court. Their Lordships had no occasion to consider whether an appeal could be maintained if an application under Order 9 Rule 13 was disposed of earlier. As such, the principles enunciated in *Rani Choudhury (supra)* are not applicable in the instant case.

8. For the foregoing reasons, I am of the opinion that even after dismissal of an application under Order 9 Rule 13 the appellate Court can hear and dispose the appeal u/s 96(2) on merits.

9. However, I am of the opinion that in the instant case, the controversy raised does not arise at all. The application under Order 9 Rule 13 was not entertained by the trial Court. It held that it had no jurisdiction to entertain the application, it was a purported application which the trial Court considered as no application under Order 9 Rule 13. As such, there was no disposal of the application. When the application was held to be incompetent the question of decision of the application did not arise at all. In my opinion, when the Court holds that it has no jurisdiction to entertain an application it declares that it has no jurisdiction to receive and take it up for consideration for disposal. It was not even admitted for consideration and as such, the question of disposal of the application under Order 9 Rule 13 did not arise in the instant case. The trial Court neither dealt with it nor admitted it for consideration. It was presented but the trial Court refused to entertain the same holding that it had no jurisdiction to deal with it and/or to admit for consideration. As there was no disposal of the application the question of lack of jurisdiction of the appellate Court to dispose of the appeal does not arise in the instant case. No other point has been raised by the learned counsel for the appellant.

10. For the reasons set forth above, I do not find any merit in the appeal. It is dismissed. However, there will be no order as to costs.