

(1995) 07 MP CK 0043

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 95 of 1995

Ashok Kohli

APPELLANT

Vs

Prakash Chand and Others

RESPONDENT

Date of Decision : 10-07-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Motor Vehicles Act, 1988 — Section 173

Citation : (1996) ACJ 416 : AIR 1996 MP 50 : (1995) ILR (MP) 586 : (1995) 40 MPLJ 838 : (1995) MPLJ 838

Hon'ble Judges : Shacheendra Dwivedi, J

Bench : Single Bench

Advocate : Pawan Vijay, for the Appellant; J.P. Shrivastava, A.K. Shrivastava and B.N. Malhotra, for the Respondent

Final Decision : Dismissed

Judgement

Shacheendra Dwivedi, J.

This appeal is filed u/s 173 of M. V. Act, 1988. A preliminary objection is raised by Shri B. N. Malhotra, counsel for respondent No. 4 that the appeal is incompetent and cannot be entertained as the appellant with the appeal did not deposit the half of the awarded amount. The award being for Rs. 50,000/-.

On the other hand, the appellant submits that he wants to "withdraw" the appeal, and therefore, prays that the appeal be allowed to be "withdrawn".

The claimants' counsel Shri J. P. Shrivastava appearing for respondents 1 and 2 submits that since the respondents have filed cross-objections in the appeal, therefore, even if the appeal is allowed to be withdrawn, the cross-objections are still required to be heard and determined. The contention of Shri Shrivastava is based, on the provisions of Sub-rule (4) of R.22 of O.41, C.P.C., which provides that --

"Rule 22 --

(I) to (3) xxx xxx xxx

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit."

The contention as advanced by Shri J. P. Shrivastava appears to be attractive at the threshold thought, but it has no substance when considered in the situation of the appeal itself being not maintainable.

Under Section 173 of the Motor Vehicles Act, if an appeal by a person, who is required to make payment of any amount under the award, is preferred against the award, the same shall not be competent and would not be entertainable if 50% of the awarded amount or Rs. 25,000/-, whichever is less, is not deposited in the Court. It would be relevant to reproduce Section 173 of the Motor Vehicles Act, 1988 :--

"173. Appeals.

(1) Subject to the provisions of Sub-section (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty five thousand rupees or fifty per cent, of the amount so awarded, whichever is less, in the manner directed by the High Court:

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal, if the amount in dispute in the appeal is less than ten thousand rupees."

Construing a similar clause, Supreme Court in Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, , observed that (para 9) :--

"9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant."

It was further observed that (para 13) :--

"..... If the Statute gives a right to appeal upon certain conditions, it is upon fulfilment of these conditions that the right becomes vested and exercisable to the appellant....."

Further the first proviso to Sub-section (1) of Section 173 of the Motor Vehicles Act, puts an embargo on the Courts' jurisdiction to entertain the appeal, when the condition provided therein is not fulfilled. The failure in this regard would make the appeal not maintainable.

Shri J. P. Shrivastava, appearing for respondents 1 and 2 has tried to link the word "entertain" with "receive" to contend that once an appeal is received by the Court and the cross-objections are also filed, the Court even on the dismissal of appeal is still required to determine the cross-objections. But in my view the two situations are different.

For the word "entertain" or its similar cognate expressions, assistance is sought by the counsel from the authorities of Allahabad and Rajasthan High Courts, in *Dhoom Chand Jain Vs. Chaman Lal Gupta and Another*, and *Rajasthan State Road Transport Corporation Vs. Smt. Santosh and Others*, , respectively, but both the authorities have consistently held that in a situation where word "entertain" is used, the Court cannot refuse to receive the appeal, but it would not "deal with" nor would "admit the appeal for consideration". If an appeal is not entertain-able the cross-objections can neither be heard nor decided.

The right to prefer cross-objections is a contingent right. Contingency would occur when appeal is filed by the other side after fulfilling all the statutory conditions. Such as it is filed in time without being barred by limitation and the other conditions if imposed by law are also fulfilled.

The cross-objections can only be pressed when the Court assumes jurisdiction to decide the appeal, after it is admitted for hearing. The plain language of Order 41, Rule 22 itself makes the proposition clear. The stage at which the cross-objection may be preferred is provided in the rule and it clearly envisages that cross-objections ought to be preferred within one month after the service of notice of the day fixed for "hearing of appeal". It would be useful to reproduce Rule 22 of Order 41, C.P.C.:

"R. 22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.--

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to "allow.

(2) to (5) xxx xxx xxx

For the cross-objections to survive (there must be an appeal, which is admitted by the Court for hearing and survives for decision. If appeal is to be dismissed

or is dismissed not being competent or maintainable for the failure of the appellant, in complying with the statutory conditions or, in filing the appeal within limitation. The cross-objections would survive the appeal either when it is withdrawn or is dismissed for default. The two situations should arise when the appeal is maintainable or entertainable. If appeal itself is not maintainable, the "default" will have no role to play and the "withdrawal" would also not be of any avail as the appeal would then be dismissed for not being maintainable. There must be an appeal in the eye of law for the hearing by the Court. A time barred appeal, not being maintainable is no appeal, which can be heard by the Court.

When a party having right to appeal, does not prefer the same and waits for the adversary to file appeal and then to take a cross-objection, runs the risk of availing the qualified alternative remedy on the adversary preferring a maintainable appeal. Therefore, the mere filing of cross-objections does not ipso facto invest in the respondent an independent right of being heard on cross-objections. If a party has deliberately waived his right to file an appeal and has opted to avail the qualified alternative remedy of cross-objections, he cannot urge that his contingent right was not of a qualified remedy, but of an absolute remedy. For my this view, I am fortified by the Division Bench authority of Charity Commissioner Vs. Padmavati and Others, , wherein, the appeal was time-barred and having refused to condone the delay, their Lordships held that as the appeal itself was not maintainable and was being dismissed, the cross-objections also did not survive for consideration. Hon'ble Chagla, C. J. speaking for the Court observed in paragraph 9, when counsel wanted to urge those cross-objections before the Court, that "in our view, the cross-objections cannot survive" as the Court was of the opinion that the appeal being barred by limitation, was not maintainable.

Reverting back to the position of the present appeal, the appellant did not comply with the legal requirement of the deposit of half of the awarded amount, as is the requirement of Section 173 of the Motor Vehicles Act. Full Bench of this Court in Gaya Prasad v. Suresh Kumar, 1992 J LJ 143, held that the non-compliance with the condition of deposit would render the appeal liable to be dismissed as not maintainable.

For the foregoing discussion, as the appeal itself is not maintainable, the prayer of its being withdrawn is of no assistance to the respondents 1 and 2, who had preferred the cross-objections. The appeal is to be dismissed as not maintainable and cross-objections having not been preferred within the period of limitation can also not be treated as a regular/separate appeal. Consequently, the appeal is dismissed and with that fate of appeal, the cross-objections would also not survive. However, in the facts and circumstances of the case, there shall be no order as to the costs.