

(1994) 11 MP CK 0009
In the Madhya Pradesh High Court
Case No : C.R. No. 490 of 1993

Cooltech Industries and Others

APPELLANT

Vs

Dena Bank and Another

RESPONDENT

Date of Decision : 09-11-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, Order 41 Rule 5(2), Order 9 Rule 13

Citation : (1994) ILR (MP) 472 : (1995) 1 MPJR 253 : (1995) 40 MPLJ 629 : (1995) MPLJ 629

Hon'ble Judges : D.P.S. Chouhan, J

Bench : Single Bench

Advocate : J.P. Sanghi, for the Appellant; Y.K. Munshi, for the Respondent

Final Decision : Dismissed

Judgement

D.P.S. Chouhan, J.

The revision application is directed against the order dated 27-9-1993 passed by the 1st Additional District Judge, Raipur on the application of the applicants moved under Order 41, Rule 5 of the CPC read with Section 151 of the Code of Civil Procedure.

Brief facts are that: The opposite party Dena Bank filed a suit for a claim against the applicants under Order 37, Rules 1 and 2 of the Civil Procedure Code. The procedure is given is Rule 3. According to the procedure, summons were served on the defendants in the suit. Except defendant No. 3 none appeared. The decree was passed. When the decree was put to execution, the applicants moved an application under Order 9, Rule 13 of the CPC for setting aside the decree, which was an ex parte decree so far as they were concerned. The application for setting aside the decree is pending for consideration. When decree was set in motion by means of execution, the applicants moved the trial Court for staying the execution of the decree for the duration the application under Order 9, Rule 13 is decided. The trial Court rejected the application vide order dated 27-9-1993.

Against this order, the applicants have come to this Court by means of present revision.

Learned counsel for the applicants submitted that the decree was a nullity and was not executable and in this sequence it was submitted that though the summons were served on them, they were not obliged to appear before the Court as the Court had no jurisdiction to entertain such a suit and for this reason they did not appear. The submission is sans in substance. If a suit is filed in the Court which has no jurisdiction, then it is for the parties concerned to appear before the Court and argue the question regarding jurisdiction. Even if the Court has wrongly decided its jurisdiction, then the appeal would lie against such a decree as if the decree was passed with jurisdiction.

So far as the application under Order 9, Rule 13, CPC is concerned, that is pending before the appropriate Court. It would not be apt for this Court to express any opinion on the merit either way. It is for the Court concerned to decide the application on merit. The application was filed under Order 41, Rule 5, Civil Procedure Code. Order 41, Rule 5, CPC is not attracted to the proceedings which are not proceedings in appeal. In this connection, learned counsel invited the attention of the Court to sub-clause (2) of Rule 5 of Order 41, CPC which reads as :-

"(2) Stay by Court which passed the decree.- Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed."

This provision would not be attracted as no time was prayed for and no time was granted by the Court for allowing the applicants for filing appeal against the decree. Accordingly, the provisions of Order 41, Rule 5, CPC would not apply.

Learned counsel further submitted that the Order 41 would also apply to the suit proceedings. I find myself in difficulty to swallow the submission made by the learned counsel. The reverse procedure is not permitted under the Code of Civil Procedure. What is appealable to the trial Court and what has to be done by the trial Court could also be done by the appellate Court, but what could be done by the appellate Court cannot be done by the trial Court.

Learned counsel for the respondent Bank submitted that the application was not under Order 9, Rule 13, but was under Order 37, Rule 4, Civil Procedure Code. It is not necessary to go into this question. The application has to be treated under a right provision of law.

The revision application is accordingly sans merit and is dismissed. However, the application for recall of the order under Order 9, Rule 13, CPC is pending before the Court concerned. It is the duty of the Court to dispose of the application quickly. The parties are required to co-operate and the trial Court is directed to decide the application pending before it within a period of two months from the

date of presentation of the certified copy of this order. For a period of two and half months, the execution of the decree shall remain in abeyance. The parties are directed to appear before the trial Court on 28th November, 1994.

Let certified copy of this order may be supplied to the learned counsel for the parties on payment of necessary charges within three days.