
(2003) 03 MP CK 0057
In the Madhya Pradesh High Court
Case No : L.P.A. No. 613 of 2002

Dharamsi Bhai

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 03-03-2003

Acts Referred:

Madhya Pradesh Land Revenue Code, 1959 — Section 248, 35

Citation : (2004) 1 MPLJ 108

Hon'ble Judges : Bhawani Singh, C.J.; S.L. Jain, J

Bench : Division Bench

Advocate : Girish Shrivastava, for the Appellant;

Final Decision : Dismissed

Judgement

S.L. Jain, J.

Being aggrieved by the order dated 5-2-2002 passed by the learned Single Judge in Writ Petition No. 6606/2001, the appellant has filed this Letters Patent Appeal under Clause 10 of the Letters Patent.

The facts shorn of details and necessary for disposal of this appeal are that certain government land at Itarsi was allotted by the State Government to Radhaswami Satsang Society (hereinafter to be referred as "Society") on lease. The plot in dispute out of this land was sub-let by the Society to Matadeen Agrawal, who, to the knowledge of the Society, further sub-let the same to the appellant. The appellant raised a permanent construction on the suit plot after obtaining necessary sanction from the Municipal Corporation. The appellant also obtained necessary licence from Municipal Corporation, Itarsi, for running a saw mill on the plot in the name and style of M/s Kanhaiya Saw Mill. In support of his claim regarding possession the appellant relied on sales tax registration, electric bills and other documents.

The Society wanted to evict certain persons from the land leased out to them. They also wanted to remove the constructions made by the occupants. According

to the appellant, the Society could not do so because many of the occupants perfected their title and attained the status of permanent licensee, therefore, by way of settlement with the State Government, almost half of the land allotted to the Society including the disputed land, was surrendered by the Society in favour of the State Government. The appellant claims that he is in possession of the disputed plot as a tenant of the Society.

After the surrender of the land by the Society in favour of the State Government, Nazul Officer initiated a proceeding u/s 248 of the Madhya Pradesh Land Revenue Code (hereinafter referred to as the "L.R. Code") and a notice dated 1-5-1970 was served on the appellant. The reply to this notice was submitted by the appellant on 3-7-1970. Thereafter, the matter remained in abeyance for 7 years. It was on 20-1-1977 only when the authorities woke up from a long slumber and another notice dated 20-1-1977 was issued by the Nazul Officer to the appellant. The appellant submitted reply to that notice on 24-4-1977. A case No. 60-A/76-77 was registered by the Naib Tahsildar. Vide order dated 25-2-1982 (Annexure P-6) Additional Tahsildar, Itarsi ordered eviction of the appellant from the suit plot and also imposed fine. The appellant preferred an appeal against the said order before the Sub Divisional Officer, who maintained the order of Additional Tahsildar as per order Annexure P-7. Against this order of Sub Divisional Officer, the appellant preferred Second Appeal No. 4/86-87 before the Additional Commissioner. On 15-4-1988 this second appeal was fixed for hearing before the Additional Commissioner. On that date, the counsel for appellant Shri Diwanji could not appear before the Additional Commissioner as he was engaged in some marriage and could not return in time, therefore, the Additional Commissioner dismissed the appeal on merits.

An application u/s 35 of the Code was filed by the appellant for the restoration of appeal. This application was allowed by the Additional Commissioner vide order dated 15-1-1989 and the order dismissing the second appeal in default was set aside. However, subsequently, on 9-2-1989 Additional Commissioner reviewed the order stating that the second appeal was not simply dismissed for default but was decided on merits, therefore, it could not have been restored and as such dismissed the application u/s 35 of the L.R. Code.

Being aggrieved by the order passed in review, the appellant filed a revision before the Board of Revenue. This revision petition was dismissed by the Board, therefore, the appellant approached this Court by filing Writ Petition No. 6606/2001.

In the aforesaid writ petition, the learned single Judge held that the Additional Commissioner decided the appeal on merits and it was not dismissed in default. The order for restoration of the appeal could not have been passed u/s 35 of the L.R. Code and the order of restoration was rightly recalled in review. Learned single Judge also held that the alternative remedy of filing the civil suit for establishing his right is available to the appellant and dismissed the writ petition. Hence this appeal.

We have heard Shri Girish Shrivastava, learned Counsel for appellant. The main thrust of the contention raised by Shri Shrivastava is that under Order 41, Rule 17 of the CPC Courts do not possess the power to dismiss the appeal on merit if the appellant does not appear when the case is called on for hearing, therefore, even if the appeal is dismissed by the Court on merits, appellant shall have a right to invoke the provision of Order 41, Rule 19 treating the impugned order to be an order passed in default. He submits that this being settled position of law that a right conferred on the litigant by the legislature cannot be taken away by the orders of the Court nor such right can be made dependent upon the nature of the order passed, the learned Judge committed an error in holding that since the appeal was dismissed on merits, it could not have been restored even on being shown sufficient cause for nonappearance.

For appreciating the contentions raised by the learned counsel for the appellant we would like to refer Rules 17 and 19 of Order 41 of the CPC and section 35 of the L. R. Code, which read thus:

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 on 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.

Hearing in absence of party. -- (1) If on the date fixed for hearing a case or proceeding, a Revenue Officer finds that a summons or notice was not served on any party due to the failure of the opposite party to pay the requisite process fees for such service, the case or proceeding may be dismissed in default of payment of such process fees.

(2) If any party to a case or proceeding before a Revenue Officer does not appear on the date fixed for hearing after due service of a notice or summons on him the case may be heard and determined in his absence or may be dismissed in default, as the case may be.

(3) The party against whom any order is passed under sub-section (1) or (2) may apply within thirty days from the date of such order or knowledge of the order in case the notice or summons was not duly served, to have it set aside on the ground that he was prevented by any sufficient cause from paying the requisite process fees for service of a summons or notice on the opposite party or from appearing at the hearing and the Revenue Officer may, after notice to the opposite party which was present on the date on which such order was passed and after making such inquiry as he considers necessary, set aside the order passed.

(4) Where an application filed under sub-section (3) is rejected, the party aggrieved may file an appeal to the authority to whom an appeal lies from an original order passed by such Officer.

(5) Except as provided in sub-section (4) or except where a case or proceeding before any Revenue Officer has been decided on merits, no appeal shall lie from an order passed under this section.

(emphasis supplied)

In support of his contention that even if the appeal was decided on merits the appellant had a right to invoke the provisions of Order 41, Rule 19 treating the impugned order to be an order passed in default, learned counsel for the appellant has relied on Explanation to sub-rule (1) of Rule 17 of Order 41 of the Civil Procedure Code, (quoted above) and on the Division Bench decision of this Court in the case of Shrinath Buliyar Refinery vs. Commissioner of Income Tax, (2002) 175 CTR (MP) 367. In that case an income tax appeal preferred u/s 268A of the Income Tax Act, 1961 was dismissed in limine. According to provision of section 268A (supra), the provisions of the CPC relating to appeal before the High Court have been made applicable to the Income Tax appeal but same is not the position regarding appeal before revenue officers or Board of Revenue.

A perusal of sub-section (2) of section 35 of the L.R. Code would reveal that if any party to a case or proceeding before the revenue officer does not appear on the date for hearing, the case may be heard and determined in his absence or may be dismissed in default. Thus, if on the date fixed for hearing appellant does not appear, the revenue officer has two options, i.e. either to hear and determine the appeal in the absence of the party or dismiss the same in default. A perusal of sub-section (4) of section 35 further reveals that where an application for restoration of the appeal dismissed in default is rejected, the party aggrieved may file an appeal to the authority to whom an appeal lies from an original order passed by such officer. Further perusal of sub-section (5) of section 35 indicates that except as provided in sub-section (4) or except where a case or proceeding before any revenue officer has been decided on merits, no appeal shall lie from an order passed under this section. Thus, application for restoration of an appeal can lie only when the appeal is dismissed in default. Where the appellate Court exercises option of hearing and determining the appeal on merits in the absence of appellant, the remedy of the appellant lies in filing an appeal against that order and an application for restoration is not maintainable.

When section 35 of the L.R. Code makes provision for appeal if the matter is decided on merits and the provisions for making an application for restoration if the appeal is dismissed in default, without deciding the same on merits, the legislative intent is clear that the remedy lies in filing the appeal and not in filing an application for restoration. Therefore, the learned single Judge has rightly held that since the appeal was decided on merits, the learned Addl. Commissioner could not have restored the appeal and no fault can be found in

the order passed by the Addl. Commissioner in review petition.

The learned single Judge dismissed the writ petition also on the ground that alternative remedy of filing civil suit is available to the appellant. Remedy under Article 226 being discretionary, High Court may refuse to grant it where an alternative, equally efficacious and adequate remedy exists. Learned counsel for the appellant could not show that alternative remedy is not equally efficacious or adequate. Article 226 of the Constitution is not intended to circumvent the remedy of civil suit. Where a civil suit is maintainable, a petition under Article 226 should not be entertained, unless remedy of civil suit is ill-suited for the demands of extra ordinary situation. (See V. Vellaswamy Vs. Inspector General of Police, Tamil Nadu, Madras and Another,). Hence, where appellant could get adequate remedy in civil suit, writ under Article 226 has rightly been refused by the learned Single Judge.

Even otherwise, in the facts and circumstances of the case, we do not find it necessary to exercise our discretion to issue a writ, even if it might have been lawful to do so.

For the foregoing reasons, no interference in the order impugned is called for and the appeal is liable to be dismissed and is hereby dismissed in limine.