

(1993) 09 BOM CK 0029

In the Bombay High Court

Case No : Writ Petition No. 3887 of 1993

Harivilas Madhavprasad Ruia

APPELLANT

Vs

Viraf Ardeshir Udwadia and Others

RESPONDENT

Date of Decision : 29-09-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A, 104, 104(1), 105, 106

Citation : AIR 1994 Bom 38 : (1994) 1 BomCR 366 : (1993) 95 BOMLR 592 : (1993) 2 MhLj 1435

Hon'ble Judges : V.P. Tipnis, J

Bench : Single Bench

Advocate : Navin B. Shah, for the Appellant; A.K. Abhyankar and S.N. Shah instructed by . M/s. Haresh Shroff and Co., for the Respondent

Judgement

1. By an order dated 27th February, 1992 the learned Judge of the Court of Small Causes, Bombay, made the notice partly absolute holding the petitioner guilty of flouting the order of injunction and also passed an order directing the petitioner to be detained in civil prison for a period of one month under the provisions of Order 39, Rule 2-A of the Code of Civil Procedure.

2. Being aggrieved by the said order the petitioner preferred an appeal being Appeal No. 180 of 1992 to the Appellate Bench of the Court of Small Causes, Bombay. The Appellate Bench by its judgment and order dated 4th August, 1993 held that the appeal was not maintainable and on that ground summarily dismissed the appeal.

3. The said order of dismissal of the " appeal is impugned in this petition.

4. Shri Shah, learned Counsel appearing for the petitioner contended that under the substantive provisions of Section 104 of the Civil Procedure Code, an appeal is clearly maintainable and the Appellate Bench of the Court of Small Causes was obviously wrong in dismissing the appeal as not maintainable.

5. The Appellate Bench has held that inasmuch as the High Court at Bombay has

amended and substituted clause (r) of 0.43, R. 1 of the Code, appeal is obviously not provided.

6. Undoubtedly so far as the provisions of Order 43 are concerned no appeal is provided under the said provision of the Code in its application to the State of Maharashtra. However, substantive provisions of the Code applicable to the case is Section 104 of the Code. Sections 104, 105 and 106 fall under title "Appeals from Orders". The provisions are as under:

"104-- An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders:

.....

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree.

.....".

7. From the bare reading of the aforesaid Section 104 of the Code there can be no manner of doubt that it provides for appeal where the order directs a detention in civil prison of any person except where the detention is in execution of a decree. Admittedly in the present case the detention is not in execution of a decree, but is an order under the provisions of Order 39, Rule 2-A of the Code. My attention was drawn to the reported decision of the learned single Judge of this Court in the matter of Dry Chillies Brokers Association v. Dnyaneshwar Chamat, 1992 MLJ 1503. Undoubtedly the learned single Judge has held that the order passed under Order 39, Rule 2-A is not appealable. However, after reading the entire judgment carefully it is clear that the learned Judge has considered the provisions only of Order 43, Rule 1(r) of the Code as applicable to the State of Maharashtra. In the entire body of the judgment there is no reference to the substantive provisions of Section 104 of the Code which specifically provides for appeal where the person is directed to be detained in civil prison. This section was not brought to the notice of the learned single Judge.

8. The Division Bench of Allahabad High Court in the matter of Suresh Dutta Singh and Another Vs. Randhir Singh and Another, , has dealt with identical situation. It is appeal from an order under any of the provisions of the Code directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree. The Division Bench has also held that an order of detention of a person in civil prison for breach of an order of injunction passed under Rule 2-A of Order 39 as amended by the Allahabad High Court would therefore be appealable u/s 104(1)(h) and that right would not be affected by any failure to make a consequential amendment in Order 43, Rule 1 after the introduction of new Rule 2-A in Order 39 by the High Court.

9. In view of the clear wording of Section 104 there is no manner of doubt in my

mind that the appeal is clearly provided.

10. In these circumstances the order dated 4th August, 1993 passed by the Appellate Bench of the Court of Small Causes, Bombay in Appeal No. 180 of 1992 is set aside and the appeal is remitted back to the Appellate Bench of the Court of Small Causes, Bombay for decision in accordance with law on merits of the matter.

11. Rule made absolute in the aforesaid terms. There shall be no orders as to costs. Certified copy expedited.

Rule made absolute.