

(2005) 03 SHI CK 0004
In the High Court Of Himachal Pradesh
Case No : F.A.O. No. 123 of 1993

Kurban Ali and Another

APPELLANT

Vs

Gopalo (Since Deceased) through her L.Rs. Smt. Kashmiri
Devi and Others

RESPONDENT

Date of Decision : 21-03-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 19, Order 20 Rule 6A, Order 41
Rule 18, Order 41 Rule 19, 100

Citation : (2005) 3 ShimLC 208

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Advocate : D.D. Sood and Sunil Awasthi, for the Appellant; Subhash Sharma,
for the Respondent

Final Decision : Allowed

Judgement

Deepak Gupta, J.—The appeal has been filed under Order 41 of the CPC against the order of the learned District Judge, Una, in Civil Misc. Application No. 96 of 1992 whereby he has rejected the application of the present Appellants for readmission of the appeal on the grounds that the said application was not maintainable since the appeal had been decided on merits.

2. An appeal was filed by the present Appellants against the judgment and decree dated 27.6.1991 passed by the learned Sub-Judge, Amb (I), whereby the suit of the applicants for declaration and injunction was dismissed. It appears that the applicants did not take steps for service of the Respondents and thereafter the learned District Judge, Una, passed an order dismissing the appeal on 6.6.1992.

Since the interpretation at this order is very material for the just decision of the present case, the same is being reproduced in its entirety:

The Appellants have not deposited the registered envelopes for issuing the

duplicate summons to the Respondents in spite of giving three adjournments on 15.1.1992, 5.3.1992 and 24.4.1992. This shows that the Appellants have failed to deposit the necessary registered envelopes and to obey the orders of the Court in spite of the repeated requests. Thus the Appellant is not entitled to more opportunity.

I have also perused the judgment as well as the file of the lower Court. Though the Plaintiffs/Appellants have claimed their possession on the suit land as owners but in the revenue record from 1968-69 Amandine, the predecessor-in-interest of the Respondents and thereafter the Respondents have been continuously showing to be in possession of the suit land as tenant-at-will since 1968- 69. Otherwise also the Plaintiff when appeared as PW-1 has admitted the possession of the Respondents over the suit land wherein he has stated that by the present suit he wants to take possession of the suit land from the Respondents. Therefore, it clearly shows that the Plaintiffs/Appellants have not been in possession of the suit land and their main purpose is to get the possession of the suit land from the Respondents but while filing the suit for declaration simplicitor the Plaintiffs have not sought the consequential relief of possession of the suit land. On that ground also the suit is liable to be failed. Therefore, I do not find any substance in the appeal more so when the Appellants have failed to obey the orders of the Court and have not deposited the registered envelop. Thus the appeal is dismissed for non-prosecution and under Order 41 Rule 18 Code of Civil Procedure.

3. An application was thereafter filed by the present Appellants for readmission of the appeal under the provisions of Order 41 Rule 19 Code of Civil Procedure. By that time, the Presiding Officer of the Court had changed. The successor Presiding Officer was of the view that vide the order quoted above, his predecessor had decided the appeal on merits and, therefore, there was no question of Order 41 Rule 19 CPC being applicable. He, accordingly, dismissed this application vide order dated 28th November, 1992. According to him the remedy would be to file an appeal/revision.

4. Mr. D.D. Sood, learned Senior Counsel appearing on behalf of the Appellants has submitted that the previous order could not be treated to be an order on merits since the merits were touched only by way of passing reference. It was essentially an order dismissing the appeal for non-prosecution and therefore the provision of Order 41 Rule 19 CPC was applicable. Mr. Subhash Sharma, learned Counsel for the Respondents has on the other hand contended that the said order decides the appeal on merits even if by a short order. Therefore, the remedy of the Appellants should have been to file an appeal u/s 100 CPC and he could have taken recourse to the provisions of Order 20 Rule 6(A) for non-framing of decree.

5. I have given by careful considerations to the facts of the case. There is no doubt that some reference has been made with regard to the merit of the case. It is also true that this reference has been made without dealing with the appeal

in detail or considering the entire facts and evidence. The District Judge is the first and last Court of appeal with regard to the question of facts. In my considered view it is a duty cast upon him to deal with the entire evidence before giving his findings. Essentially the order dismissing the appeal was an order dismissing it in default. However, the learned District Judge appears to have been swayed by the fact that there may be little merit in the appeal. Last 5 lines of the order are indicative of the mind of the Judge that he was basically dismissing the appeal for non-prosecution because he says that he does not find substance in the appeal more so when the Appellants have not obeyed the order of the Court for depositing the registered envelop. Final line in the order is extremely. According to this, the appeal has been dismissed for non-prosecution under Order 41 Rule 18 Code of Civil Procedure. Further, the learned District Judge did not order that decree sheet be drawn. This also tends to indicate that the appeal was not being decided on merits.

6. When the aforesaid order is perused not only a lay man but also a Counsel is bound to be fixed. Is this an order deciding the appeal on merits or is this an order dismissing the appeal for non-prosecution? The intention of the Judge is clear when he states in the last line of the order that the appeal is dismissed for non-prosecution and under Order 41 Rule 18 Code of Civil Procedure. The remedy in that case would only be an application under Order 41 Rule 19 Code of Civil Procedure. Therefore, taking a cue from the last line of the order it can be inferred that the intention of the District Judge was to dismiss the appeal for non-prosecution. Why should a litigant suffer because of ambiguity in the order of the Court. The order was couched in such words that the litigant and his Counsel could reasonably believe that there was no adjudication on merits and the appeal had been dismissed for non- prosecution only.

7. The learned District Judge should have avoided to make any reference to the merits of the case. It is well settled law that when a case is being dismissed for non-prosecution or for absence of the parties or the counsel, the Court should refrain from giving a decision on merits or making any observations with record to the merits of the case. Therefore, I hold that the observations made on the merits were totally uncalled for. For all intents and purposes, the order dated 6th June, 1992 should be treated to be an order dismissing the appeal for non-prosecution and that the observations made on the merits of the case shall be deemed to be struck off.

8. The appeal is allowed, the order of the learned District Judge, Una dated 28.11.1992 is set aside and the case is remanded to the learned District Judge, Una, to decide the application under Order 11 Rule 19 CPC on merits. It is clarified that the District Judge shall not be swayed by any observations made in this judgment while deciding the application on merits he will only see whether the Appellants have shown just and reasonable cause as provided under Order 41 Rule 19 CPC while considering the application for re-admission of the appeal.

9. The appeal is accordingly disposed of and the parties through their counsel are

directed to appear before the learned District Judge, Una on 25th April, 2005.