(1995) 08 MP CK 0018

In the Madhya Pradesh High Court

Case No : M.P. No. 357 of 1991

M.P. State Co-operative Bank Association APPELLANT

Vs

Board of Revenue and Others RESPONDENT

Date of Decision : 30-08-1995

Acts Referred:

Citation : (1996) 41 MPLJ 792 : (1996) MPLJ 792

Hon'ble Judges : S.K. Dubey, J

Bench : Single Bench

Advocate : V.S. Shroti, for the Appellant; S.N. Khare, for the Respondent

Final Decision : Allowed

Judgement

S.K. Dubey, J.

By this petition under Article 227 of the Constitution of India the petitioner/employer has challenged the order of the Board of Revenue of dismissing the appeal filed u/s 77(2) of the M. P. Co-operative Societies Act, 1960 (for short the Act) for absence of the petitioner and also the application for readmission of the appeal dismissed for default.

Facts giving rise to the appeal are thus :

The respondent No. 4 was working as Clerk-cum-Typist in the office of the petitioner since 1968, who tendered his resignation on 12-4-1976 giving three months'' notice and making it effective after expiry of three months notice period. The management accepted the resignation vide order dated 12-5-1976, but the respondent employee withdrew the resignation vide application dated 17-5-1976 before it became effective. However, as the resignation was accepted, the management did not allow the employee to join his duties. The respondent/employee raised a dispute u/s 55(2) of the Act before the respondent No. 3, who after enquiry awarded three months'' wages to the respondent/employee, while the relief of reinstatement with back wages was refused. The respondent/

employee preferred an appeal before the respondent No. 2 which was allowed, wherein the respondent/employee was ordered to be reinstated with back wages. The petitioner aggrieved of that preferred a second appeal u/s 77(2) of the Act before the Board of Revenue - the respondent No. 1 who stayed the operation of the order of reinstatement and back wages. The petitioner was seeking adjournments from time to time. Lastly, when the appeal was fixed for hearing on 26-3-1991, neither the counsel, nor the petitioner or the petitioner''s authorized officer incharge was present. One Mr. A. S. Yadav, an employee of the petitioner appeared and made a prayer for seeking adjournment on the ground of probable indisposition of petitioner''s counsel. The prayer was opposed by the respondent No. 4. Learned Member, Board of Revenue having found that the petitioner is not represented by any authorized person, and looking to the previous conduct of the petitioner of protracting the heating of the appeal dismissed the appeal for non-appearance and non-prosecution. The petitioner filed application for readmitting the appeal for hearing supported by the two affidavits, one is of the officer incharge, i.e. the Chief Executive Officer of the petitioner and another is of the counsel on the ground that the counsel as well as the officer incharge were indisposed of. In" the application or in the two affidavits the ailment of the two was not stated nor any medical certificate was filed. The R. F. 100 respondent/employee opposed the prayer. Learned Member, Board of Revenue did not find any sufficient cause to re-admit the appeal for hearing, as such, dismissed the application, hence, this petition.

Shri V. S. Shroti, learned counsel for the petitioner contended that it is not that, none appeared on behalf of the petitioner, but, a prayer for adjournment was made, there was no act of gross misconduct on the part of the petitioner and his counsel. The application for restoration was supported by two affidavits of the officer incharge as well as of the Counsel, therefore, the appeal ought to have been readmitted for hearing. A legal contention was also raised that under Rule 59(9) of the M. P. Co-operative Societies Rules, 1962 (for short the ''Rules''), that even if the appellant and or his counsel was absent, the appellate authority according to the mandate of Rule 59(9) ought to have gone through the relevant papers for passing suitable orders on the appeal, therefore, learned Member, Board of Revenue committed a jurisdictional error in dismissing the appeal for non-appearance, reliance was placed on a decision of Division Bench of this Court in case of Rishabh Kumar Jain v. Board of Revenue and anr., 1983 RN 198, and a short noted decision in case of Laxminarain v. Board of Revenue, 1984 MPWN 151.

Shri S. N. Khare, learned counsel for the respondent/employee contended that the employee is fighting for his due since 1976, looking to overall conduct of the petitioner right from the Court of the Dy. Registrar, Co-operative Societies till the dismissal of the appeal of the petitioner by the Board of Revenue, the Board of Revenue found that the petitioner was protracting the litigation by adopting delaying tactics, so that the poor employee may not get his due. The respondent/ employee was forced to face luxurious litigation of the mightier employer for more than 19 years, reducing the employee to penury. Considering all the facts and the vague and casual affidavits filed by the petitioner''s officer incharge and the counsel, learned Member, Board of Revenue did not find sufficient cause for re-admitting the appeal. As regard the legal ground raised Shri Khare submitted that this ground was not taken before the Board of Revenue, and for that, remedy was to file a review of the said order. In any case when an application under Order 9, Rule 9 was filed, in that too the petitioner ought to have drawn the attention of the Board of Revenue to Rule 59(9).

After hearing counsel, I am of the opinion that though it is a very hard case to the employee/respondent No. 4 who has been dragged into the litigation since 1976, but, the fact remains that an appellate authority has no power either under the Act or under the Rules to dismiss the appeal in default. Chapter X of the Act deals with Appeals and Revision. Section 77 speaks of an appeal and the second appeal, Section 77-A speaks of no appeal in certain cases. Section 77-B deals with the power of the appellate authority which is relevant for the purpose of this petition which reads thus :

"77-B. Power of Appellate Authority. - (1) the appellate authority may either admit the appeal or after calling for the record and giving the appellant an opportunity to be heard, may summarily reject it :

Provided that the appellate authority shall not be bound to call for the record where the appeal is time barred or does not lie.

(2) If the appeal is admitted, a date shall be fixed for hearing and notice shall be served on the respondents.

(3) After hearing the parties, if they appear the appellate authority may confirm, vary or reverse the order appealed against, or may direct such further investigation to make or such additional evidence to be taken, as it may think necessary, or may itself take such additional evidence or may remand the case for disposal with such direction as it may deem fit."

From a bare reading of Section 77-B, it is clear that under sub-section (1) of Section 77-B the appellate authority may either admit the appeal or after calling for the record and giving the appellant an opportunity to be heard may summarily reject the same. Proviso to this sub-section lay down that the appellate authority shall not be bound to call for the record when the appeal is time barred or does not lie. Sub-section (2) provides that if the appeal is admitted, the appellate authority shall fix a date for hearing and notice of that shall be served on the respondents. Sub-section (3) provides that on a date so fixed the appellate authority after hearing the parties if they appear may confirm, vary or reverse the order appealed against, or may direct such further investigation to be made or such additional evidence to be taken, as it may think necessary, or may itself take such additional evidence or may remand the case for disposal with such directions as it may deem fit. Therefore, from a bare look to the provisions of Section 77 and 77-B statute has not given any power to appellate authority to dismiss the appeal if the appellant does not appear when the appeal is called on for hearing as like that of Order 41, Rule 17 of the Code of Civil Procedure.

No such provision is also made in the rules, Chapter IX of the Rules deals with the appeal and Revisions, Rule 59 is relevant for the purposes of appeal which is extracted in extenso :

"59. Procedure to be followed in presenting and disposing of appeals. -

(1) An appeal to the State Government or the Registrar shall be presented by the appellant or by his duly appointed agent to the appellate authority either in person during office hours or sent to it by registered post.

(2) When such an appeal is presented by an agent, it shall be accompanied by a letter of authority of the appellant appointing him as such.

(3) Every appeal shall be accompanied by a certified copy of the order against which the appeal is preferred.

(4) Every appeal shall -

(i) be either type-written or hand-written in ink legibly;

(ii) specify the name and the address of the appellant and also the name and address of the opponent, as the case may be;

(iii) state by whom the order against which the appeal is preferred was made;

(iv) clearly state the grounds on which the appeal is made.

(v) state precisely the relief which the appellant claims; and

(vi) give the date of the order appealed against.

(5) On receipt of the appeal, the appellate authority shall endorse on it the date of its receipt by it. The appellate authority shall, as soon as possible, examine it and satisfy itself that -

(i) the person presenting it has the authority to do so;

(ii) that it is made within the prescribed time-limit, and

(iii) that it conforms to all the provisions of the Act and these rules.

(6) If the appellate authority finds that the appeal presented does not conform to any of the said provisions, it shall make a notice on the appeal to that effect and may call upon the appellant or his agent to remedy the defence within a period of seven days of the receipt of the notice to do so or in case the appeal has not been presented within the prescribed time-limit to show cause within the said period of seven days why it should not be dismissed as time-barred by the appellate authority.

(7) If the delect is remedied or the cause-shown by the appellant or his agent satisfies the appellate authority, the appellate authority may proceed to consider the appeal.

(8) If the appellant or his agent fails to remedy the defects or to show cause to the satisfaction of the appellate authority within the said period the appellate authority may, if the appeal is not presented within the time-limit, dismiss the appeal as time-barred. In cases where it is considered necessary to give a hearing, the appellate authority may fix a date for hearing, of which due notice shall be given to the appellant or his agent.

(9) On the date so fixed, the appellate authority shall go through the relevant papers, hear the appellant or his agent, if present, and pass suitable order on the appeal.

(10) The appellate authority may, at its discretion, adjourn to any other day the hearing of appeal at any stage. (11) When the hearing of the appeal is completed, the appellate authority shall announce its judgment forthwith or may fix a date for the same after giving due notice to the appellant or the other parties to the appeal.

(12) Every decision or order of the appellate authority shall be in writing and a copy of the same shall be supplied to the appellant and such other parties as in the opinion of the appellate authority are likely to be affected by the decision or the order."

From a bare look to sub-rule (9), it is clear that if the appeal is not dismissed under sub-rule (8) of Rule 59, on a date fixed for hearing, after giving due notice to appellant or his agent, the appellate authority shall go through the relevant papers, hear the appellant or his agent, if present, and pass suitable order on the appeal. Sub-rule (10), provides that the appellate authority may, at its discretion, adjourn to any other day the hearing of the appeal at any stage. Sub-rule (11) lays down that when the hearing of the appeal is completed, the appellate authority shall announce its judgment forthwith or may fix a date for the same, after giving due notice to the appellant or the other parties to the appeal. Therefore, even the rules do not provide dismissal of the appeal for absence of the appellant, or his agent.

A Division Bench of this Court in case of Rishabh Kumar Jain (supra) while considering the Rule 59(9) and the power of the appellate authority u/s 63 and Section 77 of the Act has observed that on a date of hearing if none appear on behalf of the appellant, appeal cannot be dismissed in default and the appellate authority is bound to pass suitable orders disposing of the appeal. The decision in Rishabh Kumar''s case was followed by a learned Single Judge of this Court in case of Laxmi Narain (supra). From the above discussion it is clear that the law casts a mandatory duty on the appellate authority to go through the papers and pass suitable order in the appeal even when the appellant or his agent is absent on the date of hearing. Hence, I am of the view that the learned Member, Board of Revenue, even though the petitioner laboured in a wrong direction by making an application for readmitting the appeal for hearing and also failed to invite the attention of the Board of Revenue by making an appropriate application for disposing of the appeal after going through the relevant papers, the appeal could not have been dismissed for non-appearance of the petitioner or his agent, the order dismissing the appeal in default without dealing it on merits is illegal and is hereby set aside, as a consequence of that order of dismissing the application for restoration also fails.

As a result of the above, the petition is allowed, the case is sent back to the Board of Revenue to decide the appeal within a period of 30 days from the date of the appearance of the parties, which is fixed as 4-9-1995, of which no notice shall be issued to the parties as they have been noticed here. However, looking to the conduct of the petitioner who has raised the jurisdictional ground for the first time in this petition and the respondent/employee is fighting for his due since 1976,1 direct the petitioner to pay the costs of Rs. 2,500/- and also the costs. Counsel''s fee Rs. 500/-, payment of costs will be the condition precedent of hearing of the appeal on merits by the Board of Revenue. Petitioner to file a copy of this order before the Board of Revenue on or before the date fixed by this Court.

