

(1981) 10 SHI CK 0001
In the High Court Of Himachal Pradesh
Case No : F.A.O. No's. 53 and 54 of 1981

Narinder Kumar

APPELLANT

Vs

Mani Devi and Others

RESPONDENT

Date of Decision : 21-10-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 1(3), Order 41 Rule 10, Order 41 Rule 10(2), Order 41 Rule 3
Motor Vehicles Act, 1988 — Section 110A

Citation : (1983) ACJ 225 : (1981) 10 ILR HP 423

Hon'ble Judges : V.D. Misra, C.J

Bench : Single Bench

Advocate : Kedarishwar, for the Appellant;

Judgement

V.D. Misra, C.J.—An important point has been raised in this case. The Appellant says that he is not going to deposit the amount as directed by this Court under Sub-rule (3) of Rule 1 of Order 41. He further contends that the Court cannot do anything if Sub-rule (3) is not complied with. In other words, Sub-rule (3), which has been added by the Parliament to rule, is of no consequence and an Appellant can flout the orders of the Court with impunity.

2. The facts are simple. The Appellant was owner of truck No. HIM-9585. This truck was involved in an accident on 13th October, 1976 in which Tulsi Ram and Moti Ram, two real brothers, died. Applications u/s 110-A of the Motor Vehicles Act for compensation were filed. The Motor Accident Claims Tribunal has awarded 46,000/- and 24,000/- respectively in the two petitions alongwith interest. This amount has been awarded against the owner of the truck as well as against its driver. The present Appellant in the two appeals -F.A.O. Nos. 53 and 54 of 1981 is the owner of the truck.

3. The appeals came up for admission before me on 16th July, 1981. I found that the Appellant has not deposited the amount in question. I directed the Appellant to deposit the amount within one month in terms of Sub-rule (3) of

Rule 1 of Order 41. The appeals thereafter came up before me on 27th August, 1981. On that day the Appellant moved an application praying that he should be permitted to furnish security instead of depositing the amount. It was admitted that the truck in question had since been sold away by the Appellant. It was stated that the Appellant is a contractor and is working with the Himachal Pradesh Public Works Department. Looking into the circumstances disclosed to me, I refused to change my previous order and dismissed the application. I had come to the conclusion that the application was merely a device by the Appellant to disobey the direction given to him to deposit this amount. However, the Appellant was given three weeks more time to deposit the amount and the matter was adjourned to 30th September, 1981.

4. On 30th September, 1981, Mr. Kedarishwar, the learned Counsel for the Appellant, stated that "though the Appellant did promise to deposit the amount in question but he has not yet sent any information about the fact whether it has been actually deposited or not". The matter was, therefore, adjourned to 21st October, 1981, that is, today. Mr. Kedarishwar states that the Appellant is not in a position to deposit the amount.

5. To begin with, I must straightaway point out that the Appellant's stand that he is not in a position to deposit the amount is no more than a device. He had the truck and he sold it away. He has not explained what has happened to the money which he has received as the price of the truck. He is a contractor working with the Public Works Department. Nothing has been disclosed about his financial affairs. To me he appears a clever person who wants to deprive the claimants-Respondents of the compensation already awarded to them. It is notorious that it becomes very difficult to realise the money awarded as compensation in cases of motor accidents. It was for this reason that every motor vehicle was required to be insured so that at least insurance company could pay the amount awarded. In the instant case, an insurance company was made a Respondent in the claim petition, but the Tribunal has come to the conclusion that the insurance does not cover the present liability.

6. Now to the legal question. Order 41 relates to the appeals. Rule 1 relates to the form of appeal and as to what should accompany the memorandum of appeal. Sub-rule (3) was inserted by Act 104 of 1976 with effect from 1st February, 1977. It reads:

(3) Where the appeal is against a decree for payment of money, the Appellant shall, within such time as the the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.

(emphasis supplied).

The sub-rule is imperative. It is the bounden duty of the Appellant to deposit the amount and carry out orders of the Court. It is not left to the Appellant to disobey the orders passed under this sub-rule and to claim that his appeal should

be heard and decided.

7. Mr. Kedarishwar contends that failure of the Appellant to carry out the orders of the Court will not entitle the Court to reject the appeal. He submits that in a case where the Appellant indeed is not in a position to pay the amount, the result would be that he would be deprived of the right of appeal. Now the right of appeal which has been conferred by Order 41 is not an unfettered right. Various conditions have been imposed by this Order. For example let us look at Rule 10. This rule gives a discretion to the Appellate Court to demand from the Appellant security for the costs of the appeal or of the original suit or of both. It enjoins upon the Appellate Court to demand such security in all cases in which the Appellant is residing out of India and is not possessed of any sufficient immovable property within India other than the property (if any) to which the appeal relates. The consequences of the Appellant not obeying the orders of the Court to give the security for costs, have been given in Sub-rule (2) of Rule 10 which reads:

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

In other words, it is the duty of the Court to reject the appeal. This sub-rule takes care to ensure that in certain circumstances if the Appellant fails to carry out the orders of the Court, the result would be that he would not have a right to have his appeal heard and decided.

8. My attention has been drawn by Mr. Kedarishwar to Sub-rule (5) of Rule 5. It is contended on this basis that the only consequence of the Appellant not obeying the orders of the Court to deposit the decretal amount or to give security would be that the Court shall not make an order staying the execution of the decree. In my opinion, this Sub-rule (5) has no relevance to the question with which I am concerned. Rule 5 relates to stay of proceedings and of executions. It lays down the circumstances under which the execution of a decree may be stayed. Sub-rule (4) and Sub-rule (5) have been added to Rule 5 by the amending Act 104 of 1976 which came into operation with effect from 1st February, 1977. Sub-rule 5 reads:

(5) Notwithstanding anything contained in the forgoing sub-rules, where the Appellant fails to make the deposit or furnish the security specified, in Sub-rule (3) of Rule 1, the Court shall not make an order staying the execution of the decree.

Now, this provision has been inserted in order to ensure that where an Appellant fails to obey the order made under Sub-rule (3) of Rule 1, the Court does not stay the execution of the decree 1 of the other sub-rules of Rule 5.

9. I would add that the question whether an Appellant should deposit the amount of the decree or furnish such security in respect thereof, has been left to the discretion of the Court. It is presumed that the Court, after looking into the

circumstances of each case, will order whether the Appellant should be directed to deposit the amount or be permitted to furnish the security only. This was a sufficient guarantee that justice would be done to the Appellant. But if the Appellant refuses to comply with the provisions of Sub-rule (3) the result is that there is no proper appeal before the Court. Only that appeal can be said to be a proper appeal before the Court which complies with the provisions of Rule 1. I will take an example. Along with the memorandum of appeal an Appellant is required to file a copy of the decree and of the judgment. If the Appellant refuses to file a copy of the decree and of the judgment, obviously there is no proper appeal before the Court. It cannot then be contended that though the Appellant has not complied with the provisions of Rule 1, he is still entitled to be heard in respect of the appeal filed by him. In the circumstances of the present case I am constrained to hold that the failure of the Appellant to deposit the amount within the time allowed by the Court has resulted into no proper appeal being before this Court.

10. Mr. Kedarishwar insists that I should make a reference to the Joint Select Committee Report relating to the introduction of Sub-rule (5) in Rule 5. This Committee Report is to be found in Sanjiva Row's-Code of Civil Procedure, 1908, 4th Edition, Volume II, published in 1978. The Report appears on page 1655. It shows that in the original Bill a new Sub-rule (1-A) to Rule 3 of Order 41 was proposed. It appears that the proposed amendment was that if the Appellant failed to deposit the amount in dispute in the appeal or to furnish security for such amount, the memorandum of appeal was to be rejected. The Joint Committee of the Parliament felt that such a provision will deprive a judgment-debtor having a good case to pursue the appeal on account of his inability to deposit the disputed amount or to furnish security for such amount. It was, therefore, recommended by the Committee that this proposed rule should be amended to provide that a stay of the execution should not be granted unless the deposit is made or security is furnished. The result was the present Sub-rule (5) of Rule 5.

11. Now, under Rule 3 provision has been made for "rejection or amendment of memorandum" of appeal. It is provided that if the memorandum of appeal is not drawn up in the manner prescribed, it may be rejected or be returned to the Appellant for the purpose of being amended within the time fixed by the Court or be amended then and there. The Court is required to record the reasons wherever the Court rejects any memorandum of appeal. Perhaps the proposed amendment which is not reproduced in this book, added one more ground for rejection. In any view of the matter, the Court has not been empowered to reject any memorandum of appeal under Rule 3 where the Appellant refuses to comply with Rule 1(3). And I do not propose rejecting the memorandum of appeal. I have come to the conclusion that there is no proper appeal before me. Under the circumstances, I have no option but to direct that the cases be consigned to the record room.

12. Order accordingly.