
(1994) 10 SHI CK 0017
In the High Court Of Himachal Pradesh
Case No : L.P.A. No. 8 of 1985

New India Assurance Co. Ltd.

APPELLANT

Vs

Pushpa Sharma and Others

RESPONDENT

Date of Decision : 07-10-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1(3), Order 41 Rule 5

Citation : (1995) ACJ 639 : (1995) 1 ILR HP 1

Hon'ble Judges : Gulab C. Gupta, C.J.; S.N. Phukan, J; A.L. Vaidya, J

Bench : Full Bench

Advocate : K.D. Sood, for the Appellant; D.K. Khanna, for the Respondent

Judgement

Gulab C. Gupta, C.J.—This Letters Patent Appeal purports to be under Clause 10 of the Letters Patent and is directed against the order dated 10.5.1985, passed by P.O. Desai, C.J., the then Chief Justice of this Court, in F.A.O. No. 206 of 1984, directing the appellant to deposit the decretal amount in the Registry, as a condition of stay/ execution of the decree with a further direction that failure to deposit the amount, within a period of four weeks, as aforesaid, would result in automatic vacation of the stay order. The appeal aforesaid was directed against the award dated 30.7.1984, passed by the Motor Accidents Claims Tribunal, Solan, directing the appellant to pay to respondents-claimants an amount of Rs. 1,83,000/- together with interest at the rate of 10 per cent per annum and costs. It appears that the appellant sought a stay of the execution of the said award and hence the aforesaid stay order was passed by this Court. The appellant felt aggrieved by the aforesaid stay order and preferred this Letters Patent Appeal against the same. A Division Bench of this Court admitted the appeal for hearing on 31.7.1985. Arguments on the same were heard on 1/9.1.1992 and judgment reserved. The Division Bench instead of deciding the appeal on merits held that the interpretation of Order 41, Rule 1 (3) of the CPC (hereinafter called as "the Code") as done by this Court in Himachal Road Transport Corporation v. Sushila Devi 1986 ACJ 1125 , requires reconsideration and hence recommended the

following question of law for decision by a larger Bench:

When the requirement with regard to making of deposit or furnishing of security under Sub-rule (3) of Rule (1) of Order 41 of the CPC of the amount disputed in appeal is directory, can it be said that while admitting the appeal, the court has no discretion altogether to dispense with the requirement either wholly or partially?

2. The Division Bench has, however, not stated anything in this referral order as to how the aforesaid question arises. It seems to have considered decisions of this Court in the context of decisions of other High Courts and made the reference as aforesaid.

3. In order to appreciate the aforesaid question of law, some facts may be noticed. It appears that one Balram Nath Sharma, the late husband of respondent Pushpa Sharma and father of Ajay Sharma, died in an accident on 26.1.1982. It is alleged that one jeep bearing registration No. YB 36731 and truck bearing registration No. HPS 5517, owned by respondent Mansa Ram Verma, were involved in the said accident. The respondents named above alleged that the accident has taken place because of the rash and negligent driving of the truck and claimed compensation of Rs. 5,00,000/- from the owner of the said truck. It appears that the said truck was insured with the appellant, New India Assurance Co. Ltd. and hence they were also joined as parties to the aforesaid claim. The learned Tribunal on consideration of evidence adduced by the parties held that the accident occurred on account of the rash and negligent driving of the truck HPS 5517 owned by respondent Mansa Ram Verma and hence the said owner and the appellant insurance company were liable to pay compensation. The Tribunal determined a sum of Rs. 1,83,000/- as the total compensation payable and directed the payment of the sum with interest at the rate of 10 per cent per annum from the date of award till payment. The owner of the truck as well as the appellant insurance company filed their separate appeals against the same in this Court and prayed for stay of the execution of the award by filing applications in that behalf.

4. This court on consideration of the facts and circumstances of the case passed the following order:

Having regard to all the material facts and circumstances of the case, it appears to be just and proper to direct as follows:

(1) A sum of Rs. 1,00,000/- with proportionate costs and interest will be deposited by the insurance company within a period of four weeks from today.

(2) A sum of Rs. 83,000/- with proportionate costs and interest will be deposited by the owner of the vehicle within a period of eight weeks from today.

The amounts, if any, already deposited by the insurance company/owner will be adjusted against the deposits ordered to be made as aforesaid by giving credit.

Upon the deposits being made accordingly, the amounts will be invested in fixed deposits as usual for which purpose the matter will be listed before the Registrar for usual orders. The amounts, if any, already deposited will be invested in fixed deposits as usual and the cases be listed before the Registrar for the said purpose in the course of the next week. It is clarified that the non-refundable payment of interest to the claimants will be recoverable by the insurance company from the owner of the vehicle in the event of the insurance company succeeding in its appeal, either wholly or partly, proportionate to its success.

5. In the appeal filed by the appellant insurance company, it was further ordered that:

In case of failure to deposit the amount as directed, the interim relief will stand automatically vacated to the extent that it would be open to the claimants to proceed against the appellant to recover the balance of the awarded amount, that is to say, the awarded amount which is not covered by the deposits made in the Registry.

These orders of the learned Judge are subject-matter of the present appeal. The aforesaid orders would clarify that though the Tribunal has awarded an amount of Rs. 1,83,000/- in favour of the respondents-claimants and made the appellant insurance company and the respondent owner jointly and severally liable to the extent of Rs. 1,50,000/- and respondent owner Mansa Ram Verma for the rest, the said order was modified by this Court, as aforesaid. The order does not clarify if it was passed on an application filed by the appellant under Order 41, Rule 1 (3) of the Code. It, however, appears that application under Order 41, Rule 5 read with Section 151 of the Code was made by the appellant insurance company and the said application forms the basis of the aforesaid order of the learned single Judge of this Court. If the order be referable to Order 41, Rule 5 of the Code, there would be no justification whatsoever for making the reference aforesaid. It can, therefore, be legitimately held that in the absence of any order under Order 41, Rule 1 (3) of the Code, the question, as framed, would not arise.

6. Even then, since the matter has been argued at length at Bar, it deserves consideration. Though the appeal, in the instant case has been filed u/s 110-D of the Motor Vehicles Act, 1939, the procedure for filing the same is admittedly regulated by Order 41 of the Code. Rule 1 of the said Order deals with the form of appeal and prescribes that it will be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the court or to such officer as it appoints in this behalf. Sub-rule (2) deals with the contents of the said memorandum. Sub-rule (3) deals with an appeal against the decree for payment of money and provides that the appellant shall, within such time as the appellate court may allow, deposit the amount disputed in the appeal or furnish security in respect thereof as the court may think fit. After the appeal under this rule has been filed, it is examined under Rule 3. The court acting under this rule may either reject the memorandum, if it is not drawn in accordance with Rule 1 or direct it to be returned to the appellant for amending the same, within the

time fixed by the court for the purpose. The fact that two options are open to the court at this stage itself indicates that a memorandum of appeal not in conformity with Rule 1 can either be rejected or required to be amended. If, however, in this scrutiny the memorandum is found to be in accordance with Rule 1, the same is registered as appeal in the register of appeals under Rule 9. The appeal so registered is thereafter considered by the appellate court under Rule 11. At this stage, the court has the discretion either to send for the record, if it thinks fit to do so and fix a date for hearing of the appeal. The court is empowered even to dismiss the appeal even without sending notice to the court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader. The appeal can even be dismissed in the absence of the appellant or his advocate under Sub-rule (2). This hearing under Rule 11 is required to be done within a period of 60 days from the date on which the memorandum of appeal is filed as is provided under Rule 11-A. If the appeal is not dismissed under Rule 11, a date for its final hearing, after notice to the respondent, is fixed under Rule 12. It should, therefore, be clear that Rule 1 (3) of this Order is a rule applicable at the time of the filing of the memorandum of appeal and before registration of the said memorandum as appeal under Rule 9. Apparently, therefore, it is a requirement of filing of appeal by the appellant. In order to facilitate performance of obligation imposed by this provision on the appellant, the courts have been given power to mitigate the rigour of the rule either by directing deposit of the decretal amount within a period considered just and proper or allowing the appellant to furnish security as may be directed by this Court. In spite of this jurisdiction, the rule imposes an obligation on the appellant to deposit the amount. Several High Courts have amended the aforesaid rule to facilitate presentation of memorandum of appeal by an appellant without any hardship having been caused to him. Be that as it may, the fact is obvious that Rule 1 (3) of the Rules is not applicable at the time of admission of the appeal, which is done under Rule 11. Rule 11 has received attention of the Supreme Court in *Umakant Vishnu Junnarkar Vs. Smt. Pramila Bai and Another*, wherein it has been held that though the rule vests discretion in the court to dismiss the appeal at this stage, the court should not do so if the appeal raises triable issues. To the same effect is the decision in *Mahadev Tukaram Vetale and Others Vs. Smt. Sugandha and Another*. The discretion vested in this Court is the discretion to be exercised judiciously and not arbitrarily and, therefore, any decision on admission or otherwise of the appeal will depend on the facts of the case. The question referred to this Full Bench for its decision deals with the authority or jurisdiction vested under Rule 11. The stage of Rule 11 has not yet reached in the appeal under consideration and hence such a question would not arise. Apparently, the Division Bench making reference has not considered the scheme of Order 41 in detail and has made reference to this Court, which really does not arise. The power of the court to consider whether provisions of Order 41, Rule 1 (3) of the Code have been complied with or not arises while considering the question under Rule 3 of the Code. Rule 3 by its own wording vests discretion in the court either to dismiss

the memorandum of appeal or return the same to the appellant for making necessary amendment. In view of this statutory provision, the Division Bench must be deemed to have unnecessarily made the reference.

7. While on the subject, provisions of Order 41, Rule 5 of the Code may also be noticed. Sub-rule (1) of this rule provides that though appeal shall not operate as a stay of proceedings under a decree, the appellate court may order otherwise. This rule gives the jurisdiction to the appellate court to stay execution of the decree for sufficient cause. The words "sufficient cause" have not been defined in this provision and hence give sufficient discretion to the court to pass an order to promote justice between the parties. Sub-rule (3) of this rule has, however, provided necessary guidelines for the appellate court in the matter. This sub-rule would, therefore, indicate that the court has the power to stay execution of the decree under appeal and require the appellant to give security for its due performance, in case the appeal fails. It would, therefore, appear that the appellate court while considering an application under Order 41, Rule 5 of the Code is not bound to grant time for deposit of the decretal amount or for furnishing security as required under Order 41, Rule 1 (3) of the Code. In spite of it, it must be noticed that failure by the appellant to comply with the requirements of Rule 1 (3) takes away the jurisdiction of the appellate court to grant any stay. This is the effect of Rule 5 (5). It should, therefore, be clear that the power of the appellate court to grant stay under Order 41, Rule 5 becomes available to the court only when the appellant has complied with the requirements of Order 41, Rule 1 (3) and not otherwise. But once the appellant has complied with the requirements of Rule 1 (3), the power of the court to grant stay is not in any way fettered except by the absence of sufficient cause for the purpose. The order under challenge in the appeal, as observed earlier, was passed on an application made under Order 41, Rule 5 of the Code. It is, therefore, reasonable to assume that the learned single Judge while passing the said order did not find any violation of Rule 1 (3). In such a situation, the question, as framed, could not have been framed.

8. Then the Division Bench of this Court in *Himachal Road Transport Corporation v. Sushila Devi* 1986 ACJ 1125, has considered the provisions of Order 41, Rule 1 (3) in detail. Though the rule has been held to be directory, the discretion of the court is limited by the said rule itself. The discretion vested in the court, therefore, extends to grant facility to the appellant to deposit the decretal amount or furnishing security. Grant of any other facility would be contrary to the rule. It is true that the decision of Bombay High Court in *Prabhakar Deshmukh Vs. Vinayakrao Kaushal*, and Andhra Pradesh High Court in *J. J. Lakshmikantham Vs. Uppala Rajamma and Others*, do not adopt the reasoning adopted by this Court in the aforesaid case but these decisions were rendered earlier than the decision of the Division Bench of this Court and must be deemed to have received due consideration. These decisions cannot, therefore, provide justification for doubting the correctness of the decision in *Himachal Road Transport Corporation's* case 1986 ACJ 1125. Indeed, the decision, insofar as it

interprets Order 41, Rule 1 (3) of the Code is just and proper and does not need reconsideration. No subsequent decision of any other High Court or Supreme Court has been brought to our notice, so as to justify its reconsideration. Under the circumstances, it is clear to this Court that in case the appellant has not complied with the requirements of Order 41, Rule 1 (3) of the Code, the memorandum of appeal would not be registered as an appeal under Rule 9 and require rejection or amendment under Rule 3. The office will examine the matter and place the same before the court for appropriate orders in this behalf.

9. In view of the discussion aforesaid we hold the reference incompetent and direct that the matter be placed before the appropriate Division Bench for appropriate orders on the appeal, in accordance with law.