

(1992) 08 BOM CK 0060
In the Bombay High Court
Case No : C.R.A. No. 873 of 1992

Shobha Dinesh Supare and another

APPELLANT

Vs

Dinesh Namdeorao Supare

RESPONDENT

Date of Decision : 27-08-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 104, 104(2), 105, 115, 35A

Citation : (1993) MhLj 910

Hon'ble Judges : G.D. Patil, J

Bench : Single Bench

Advocate : M.W. Harsulkar, for the Appellant; B.M. Kasat and V.S. Goutal, for the Respondent

Judgement

G.D. Patil, J.—This appeal against order purported to be filed under Order XLIII, Rule I(r) of the Civil Procedure Code, is directed against the order dated 12-8-1991 passed below Ex. 2 3 by the learned Additional District Judge, Amravati in Misc. Civil Appeal No. 101 of 1990.

2. The respondent/plaintiff filed regular Civil Suit No. 903/1990 praying for declaration and permanent injunction against the present appellants/original defendants. In the civil suit the plaintiff also filed an application under Order 39, Rules 1 and 2 of the CPC praying for temporary injunction restraining the defendants not to interfere, disturb or obstruct or remove in any manner the structure and fittings and machinery and the peaceful possession of the premises and the property held and also not to interfere the business and transaction of the plaintiff and further prayed for prohibitory and mandatory order restraining the defendants and their men from demolishing or removing or damaging in any manner the property and partition. This application Ex.5 was decided by an order dated 4th September 1990 whereby the trial Court has rejected the request.

3. Being aggrieved, plaintiff filed Misc. Civil Appeal No. 101/1990 before the Additional District Judge, Amravati. This appeal has been filed under Order XLIII(1) of the CPC and in substance u/s 104 of the Civil Procedure Code. In this

appeal he also filed an application Ex. 5 praying for temporary injunction under Order 39, Rules I and 2 of the Code of Civil Procedure. The temporary injunction sought for was granted by the learned Additional District Judge on 18-9-1990 and it is still operative. It appears that since in the submission of the plaintiff this ad interim injunction order dated 18-9-1990 was not being obeyed by the defendants/present appellants, contempt proceedings came to be filed by the plaintiff on 9-10-1990 and further the plaintiff also filed an application Ex. 23 before the Additional District Judge praying for giving necessary directions to the respondents in the appeal i.e. present appellants. What has happened further in the contempt proceeding, has not been brought on record of the present appeal. Plaintiff's application Ex. 23 was decided by the order dated 12th August 1991, whereby the learned Additional District Judge held that by virtue of the ad interim injunction order passed in the appeal on 18-9-1990, the appellant/plaintiff was at liberty to remove all the machinery and other things from the premises of the respondent No. 1 i.e. present appellant No. 2 to any place of his choice. By this order, the learned Additional District Judge also provided police protection to respondent/plaintiff in the matter of removal of Ata Flour Mill, crushing machine and other associate articles and tins of the tin-shed from the premises of appellant No. 2 to any other place at the choice of the plaintiff. It is this order dated 12-8-1991 passed below Ex. 23 during the pendency of the Misc. Civil Appeal No. 101/1990 filed u/s 104 read with Order XLIII, Rule 1 (r) of the Civil Procedure Code, which is under challenge in the instant appeal.

4. Heard Mr. Harsulkar, learned counsel for the appellants and Mr. Kasat, Adv.. for the respondent.

5. Mr. Kasat, learned counsel for the respondent raised the preliminary objection as regards maintainability of the instant appeal against order. In his submission what is challenged in the instant appeal is the order passed below Ex. 23 which came to be filed in Misc. Civil Appeal No. 101/1990 which itself was filed u/s 104 read with Order XLIII, Rule I(r) of the Civil Procedure Code. In his submission having regard to the provisions of section 104(2) of the CPC the instant A.O. is not maintainable. Mr. Harsulkar, on the other hand, tried to canvass that the A.O. as filed was tenable and further urged that in any case this can be treated as a revision as against the order under challenge. Order XLIII provides for appeals from the orders. Rule 1 provides that an appeal shall lie from the following orders under the provisions of section 104 namely.... (r) an order under Rule 1. Rule 2. Rule 4, Rule 10 or Rule 11 of Order XXXIX. The provision thus makes it clear that an order passed under Order 39, Rules 1 and 2 is appealable u/s 104 read with Order XLIII, Rule 1 (r) of the Civil Procedure Code. It is in fact under this provision Misc. Civil Appeal No. 101/1990 was filed by the respondent /plaintiff before the Additional District Judge challenging the order dated 4-9-1990 passed by the trial Court on his application Ex. 5 filed under Order 39, Rules 1 and 2 of the Civil Procedure Code. The question is. as to whether as against the interlocutory order passed by the appellate Court in such an appeal which is itself filed u/s 104 of Order 39, Rule I (r) an appeal lies to this Court--Provisions of

section 104, Civil Procedure Code, are as under:-

104.(1) 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

(ff) an order u/s 35-A;

(ffa) an order u/s 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92 as the case may be;

(g) an order u/s 95;

(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;

(i) any order made under rules from which an appeal is expressly allowed by rules :

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section."

Section 105 further makes it clear that : Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction. The provisions of sub-section (2) of section 104 and those of section 105 make it clear that no appeal shall lie from any order passed in appeal under this section. The order challenged in the instant A.O. is apparently an order passed in Misc. Civil Appeal No. 101/1990 which itself was filed u/s 104 read with Order XLIII, Rule 1 as aforesaid. The present A.O. thus is not maintainable having regard to the bar created by sub-section 2 of section 104 and by section 105 of the Civil Procedure Code. This Court had an occasion to deal with this aspect in the case of Krishna Yeshwant Shirodkar Vs. Subhash Krishna Patil and Others, . The question before the Court in this case was as to whether letters patent appeal lies against the order passed by the single judge in an appeal u/s 104 of the CPC and the Court came to the conclusion that the letters patent appeal against such an order of the single judge passed in an appeal u/s 104 of the CPC was barred by section 104(2) of the Civil Procedure Code. This Court also held in this decision that the order contemplated by section 104(2) need not necessarily be one finally disposing of appeal. The ratio of the decision is clearly applicable in the instant case.

I accordingly hold that the instant A.O. is not maintainable.

6. Mr. Harsulkar, learned counsel for the appellants, however, submitted that in any case the instant matter can be treated as a revision and he may be permitted to convert the instant appeal into a revision application. Having regard

to the fact that if the revision had been filed on the date on which A. O. was filed, it would have been within limitation, he is permitted to do so. I accordingly treat this A. O. as a revision application u/s 115 of the Code of Civil Procedure.

7. Mr. Harsulkar contended that when the entitlement of the plaintiff to have an interim injunction in his favour was yet to be decided finally by the Additional District Judge in Misc. Civil Appeal No. 101/1990, the direction issued by the impugned order and the finding that he was at liberty to remove all the machinery and other things from the premises of the appellant No. 2 to any place of his choice is unwarranted and improper and that the impugned order is therefore, liable to be set aside. Mr. Kasat, on the other hand, tried to support the order on merits.

8. On hearing the parties and having gone through the order it appears that though, no doubt the ad interim injunction was granted by the learned Additional District Judge on 18-9-1990 and further assuming that the said injunction was not being obeyed by the defendants, grant of Police protection to the plaintiff for the purpose of removing of the machinery and other things from the premises in question at this stage cannot be said to be justifiable. In any case, since this Court by its order dated 26-8-1991 has stayed this order nothing of the sort could be done by the respondent/plaintiff and it is an admitted position that machinery and other things are at the same place, where those originally were. The Misc. Civil Appeal is of the year 1990 and in fact, it ought to have been decided by now. For one or the other reasons, it appears that it has not been decided finally. I, therefore, feel that in order to save both the parties from the prejudice likely to be caused, it would be in the fitness of things to set aside the order under challenge and to direct the Additional District Judge to dispose of the Misc. Civil Appeal itself at the earliest. It is only on the disposal of the Misc. Civil Appeal finally, the plaintiff can ultimately be said to be entitled, if the decision favours him. to have the injunction sought by him before the Court below, and thereupon only the further consequences will follow.

9. In these circumstances the impugned order dated 12-8-1991 is hereby set aside allowing the present A.O. and the learned Additional District Judge is directed to dispose of the Misc. Civil Appeal No. 101/1990 at the earliest and within an outer limit of one month from today. Parties are directed to remain present before the Additional District Judge, Amravati on 7th September 1992. Instant revision is thus allowed in the above terms. There will however, be no order as to costs.