
(1971) 01 RAJ CK 0006
In the Rajasthan High Court
Case No : Second Appeal No. 568 of 1964

State of Rajasthan and Another	Vs	APPELLANT
Chander Singh		RESPONDENT

Date of Decision : 11-01-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 27 Rule 8, 2(2), 96

Citation : AIR 1971 Raj 299 : (1972) RLW 47 : (1971) 4 WLN 18

Hon'ble Judges : C.M. Lodha, J

Bench : Single Bench

Advocate : S.N. Bhargava, for the Appellant; P.C. Mathur, for the Respondent

Final Decision : Dismissed

Judgement

C.M. Lodha, J.—The suit out of which this second appeal arises was instituted by Shri Chander Singh, an Advocate of Bhilwara for Rs. 2000/- on account of damages for wrongful termination of his appointment as a Public Prosecutor on 15-5-1956 before the completion of the term of three years commencing from 1-1-1954 to 31-12-1956 for which he had been appointed. His case is that the defendant No. 2 Shri Purshottam Lal Sukhwai. who was the Collector and District Magistrate, Bhilwara was displeased with him and was favourably disposed towards Shri Dalpat Singh. Advocate, also practising at Bhilwara and wanted to appoint Shri Dalpat Singh as Public Prosecutor in place of the plaintiff. It is alleged that Shri Sukhwai managed to get the plaintiff's appointment terminated by the Law Department, Government of Rajasthan and in pursuance of the orders issued by the latter, Shri Sukhwai directed the plaintiff to hand over the charge of his office as a Public Prosecutor to Shri Dalpat Singh with effect from 11-5-1956. The plaintiff's allegation is that Shri Sukhwai had managed to get his appointment as Public Prosecutor terminated, before the expiry of his term on account of malice and ill-will he bore towards the plaintiff He, therefore, filed the present suit for recovery of damages to the tune of Rs. 2000/-.

2. The suit was resisted both by the State of Rajasthan as well as Shri Sukhwai

who filed separate written statements. The trial court namely the Civil Judge, Bhilwara decreed the plaintiff's suit for Rs. 550/- only. Aggrieved, by the judgment and decree of the trial court both the defendants as well as the plaintiff filed appeals in the Court of the District Judge, Bhilwara. Both the appeals were dismissed by the learned District Judge by his judgment dated 11th August, 1964. The plaintiff has not filed any appeal to this Court as he felt content with the decree for Rs. 550/- granted by the trial court and upheld by the learned District Judge, Bhilwara. But the State of Rajasthan and Shri Sukhwal have filed this second appeal.

3. Two preliminary objections have been raised by Mr. Prakash Chander on behalf of the respondent-plaintiff Chander Sinsh. In the first place it has been urged that no appeal shall be deemed to have been filed on behalf of Shri Sukhwal even though he has been joined in the memo of appeal as appellant No. 2, because Shri Murlimanohar Vyas, the then Government Advocate, who filed this appeal on behalf of the State of Rajasthan had not been engaged to present and prosecute this, appeal on behalf of Shri Sukhwal. He has further argued that since no decree has been passed against the State of Rajasthan by the Court below the State is also not entitled to maintain this appeal, and, therefore, the whole appeal deserves to be dismissed as not maintainable.

4. The other preliminary objection raised by the learned counsel is that so far as Shri Sukhwal is concerned, against whom alone the trial court had decreed the suit, his appeal before the learned District Judge had been dismissed by the order dated 21-1-1964 by which the learned District Judge had held that the appeal filed before him could not be treated as one on behalf of Shri Sukhwal. In other words it is urged that the order of the learned District Judge, Bhilwara dated 21-1-1964 amounted to an order of dismissal of the appeal of Shri Sukhwal and consequently that order came within definition of the term "decree" as defined in the Code of Civil Procedure, and no appeal having been filed from the order of the District Judge dated 21-1-1964 the present appeal preferred from the judgment of the District Judge dated 11-8-1964 whereby the appeal filed by the State and so also the appeal filed by the plaintiff were dismissed is not maintainable, inasmuch as no decree has been passed against the State of Rajasthan and so far as Shri Sukhwal is concerned the order of dismissal of his appeal passed on 21-1-1964 by the District Judge had become final.

5. So far as the first preliminary objection is concerned it may be pointed out that on 7-12-1964 Mr. Vyas the then Government Advocate submitted an application stating that the Government had undertaken the defence of Shri Sukhwal and the Governor had also been pleased to direct him to file appeal on behalf of Shri Sukhwal. It was stated that the provisions of Order 27, Rule 8 C. P. C. would apply to the present appeal which should be treated as a valid appeal not only on behalf of the State of Rajasthan but on behalf of Shri Sukhwal also. A copy of the letter dated 10-11-1964 from the Assistant Secretary to the Government of Rajasthan. (Revenue Department) to the Government Advocate,

Jodhpur has also been submitted along with the application. It has been stated in the letter that the Governor had sanctioned filing of the appeal in this case on behalf of Shri Sukhwal. In this connection it would be relevant to notice the provisions of Order 27, Rule 8, C. P. C. which reads as under:

"Rule 8 (1) Where the Government undertakes the defence of a suit against a public officer, the Government pleader upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

(2)"

6. In view of the aforesaid provision it is amply clear that the Government undertook to file appeal in this court on behalf of Shri Sukhwal in the present case and furnished the Government Pleader with authority to appear and file the appeal on behalf of Shri Sukhwal. This authority is not being challenged. No doubt, no such authority was produced before the trial court and Shri. D. S. Chaudhary was engaged by Shri Sukhwal by a separate Vakalatnama. But that by itself cannot operate as a bar against the Government to resort to the provisions of Order 27. Rule 8. C. P. C at the stage of appeal.

7. In Lutfar Rahaman Laskar Haji Kabadali Naskar Vs. The State of West Bengal and Others, relied upon by the learned counsel for the appellant it was held that if Vakalatnamas, as are required to be filed, are signed by the officers who are sued in their official capacity, there is no objection to the same and the provisions governing ordinary litigants will apply. It has been further observed that if representation on behalf of such Government Officers is to be by the Government Pleader then the undertaking of the defence by the Government is to be reported to the Court as provided by Order 27 of the Code of Civil Procedure. There is, however nothing in this authority to show that once a Government Officer is sued in his official capacity files a Vakalatnama in the trial court, no resort can be had to the provisions of Order 27, Rule 8 C. P. C. at the stage of appeal. I am of opinion that the provisions of Order 27. Rule 8 C. P. C. can apply even at the stage of appeal, though the same may not have been resorted to In the trial court. There is no denying the fact that the Government has undertaken to file appeal in this Court on behalf of Shri Sukhwal and therefore, the appeal filed in this court must be held to be not only on behalf of the State of Rajasthan but also on behalf of Shri Sukhwal. Consequently. I overrule the first preliminary objection.

8. Coming to the next preliminary objection which is more serious, it appears that by his order dated 21-1-1964 the learned District Judge, Bhilwara came to the conclusion that the appeal filed before him could not be presumed in the eye of law to have been filed on behalf of Shri Sukhwal and that the same could not be treated as an appeal by Shri Sukhwal. However, since there was another appellant namely the State of Rajasthan, the learned District Judge directed that

the appeal may be treated as one on behalf of the State of Rajasthan only and be set down for hearing. Thereafter, the Government Pleader Shri D. S. Choudharv, who had filed the appeal made an application on 20-2-1964 that the appeal had been filed on behalf of Shri Sukhwal under the instructions of the Government, and. therefore, Order 27, Rule 8 C. P. C. applied. It was prayed that the appeal may be treated on behalf of Shri Sukhwal as well. This application was dismissed on the ground that it was not maintainable in view of the earlier order dated 21-1-1964 against which no review application had been filed. Thereafter both the appeals filed by the State of Rajasthan as well as by Shri Chander Singh came up for arguments on 6-8-1964 and the learned District Judge dismissed both the appeals. In the judgment under appeal also he has mentioned that so far as Shri Sukhwal is concerned, it had already been decided by the earlier order D/- 21-1-1964 that the appeal would not be treated as one on behalf of Shri Sukhwal and so far as the State of Rajasthan is concerned it was held that since no decree had been passed against it by the trial court, the State of Rajasthan also could not maintain the appeal. In these circumstances the only question that calls for determination is whether the order by the learned District Judge dated 21-1-1964 amounts to a decree and the same having not been appealed from the present appeal must be dismissed as not maintainable? For the determination of this question I am not concerned with the correctness or otherwise of the order dated 21-1-1964, inasmuch as even if the order dated 21-1-1964 is considered to be erroneous yet it would not be open to me to examine its correctness if it is held that, that order had become final on account of having not been appealed from.

9. In support of his contention learned counsel for the respondent has relied upon Nand Kumar Sinha Vs. Rai Bahadur Pashupati Ghosh and Others, Mt. Phool Sundri Vs. Gurbans Singh and Others, and Mayimu alias Bambathi Bibi and Others Vs. Chariya Maliyammal Mayimu and Others,

10. In Nand Kumar Sinha Vs. Rai Bahadur Pashupati Ghosh and Others, It was held that the substance rather than the form of an order should be looked at in determining the provision of law under which it falls. It was further held that an order striking off the names of those defendants against whom the suit is held not to be maintainable is a decree within the meaning of Section 2(2) C. P. C. and is appealable as such even though the Court erroneously refers to the order as being one under Order 1, Rule 10 Civil Procedure Code. In that case it was found that the suit against one of the defendants had been held to be barred, by the Munsiff. who however directed that the suit could proceed against the other defendants. It was observed by Fazal Ali J., that such an order passed by the Munsiff is in effect an order dismissing the suit against that defendant on a preliminary ground, and it was clearly appealable and further that no appeal having been filed from that order, the plaintiff could not be allowed to invoke the special remedy afforded by Section 115 of the Code of Civil Procedure.

11. In Mt. Phool Sundri Vs. Gurbans Singh and Others, it was observed that it is

possible for the court to reject the entire plaint so far as some of the defendants are concerned and that would be a proper order under Order 7. Rule 11(a) or (d) and an appeal would lie in view of the definition of "decree" in Section 2(2). It was further observed that even if this is not possible, an order by which the suit practically fails against some of the defendants amounts to a decree in favour of those defendants against the plaintiffs within the meaning of that word in Section 2(2), C. P. C. and an appeal lies.

12. In *Mayimu alias Bambathi Bibi and Others Vs. Chariya Maliyammal Mayimu and Others*, it was held that the fact that no formal decree has been drawn up is no indication to show that it is not a final order within the meaning of Section 2(2), and that if the order conclusively determines the rights of the parties a decree should be drawn up.

13. It may be observed that none of the cases relied upon by the learned counsel for the respondent is exactly in point. They are all cases where at an interim stage of the trial of the suit the Court having held that the suit could not proceed against certain defendants, proceeded to try it against the rest of the defendants. It is true that absence of a formal decree will not detract from the real nature of the order. The question whether an order is one finally determining the rights of the parties must depend upon the nature of the order and not whether a decree has been prepared or not. Consequently the mere fact that no decree was drawn up in pursuance of the order dated 21-1-1964 will not make any difference and all that is to be seen is whether that order falls within the definition of the word "decree" as defined in Section 2(2) CPC which runs as under:

"2(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, But shall not include--

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default."

14. On a careful read me of the order of the District Judge, Bhilwara dated 21-1-1964 it appears that the learned District Judge virtually dismissed the appeal so far as the appellant Shri Sukhwal was concerned and held that the appeal would be treated as one on behalf of State of Rajasthan only. The law is clear on the point that so far as the defendants are concerned the suit can be decided against them piecemeal and may be dismissed at an interim stage against one of the defendants when there are two or more, and may be proceeded with against the rest. An order striking the names of one or more defendants has been held to amount to a "decree" in case it conclusively determines the rights between the parties. There is no direct case brought to my

notice by either party that where there are two or more plaintiffs the suit on behalf of one of them may be held to have been not maintainable and as such the name of such a plaintiff has been ordered to be struck off. But the possibility of such an order being passed cannot be excluded in view of the provisions of Order 1, Rule 10 C. P. C. which provides for substitution or addition of any person as a plaintiff, and striking out the name of any party improperly joined whether as plaintiff or defendant. Thus on parity of reasoning, an order directing that one of the appellants shall not be treated as an appellant in the case and the appeal be treated as an appeal on behalf of the other appellant or appellants only must be held to amount to a decree qua that appellant as such an order in substance determines the right of that appellant to maintain the appeal, and is, therefore, appealable as such.

15. Learned counsel for the appellant urged that the orders passed by the learned District Judge. Bhilwara dated 21-1-1964 and 25-4-1964 are patently erroneous, inasmuch as, there was material on the record to show that Shri Dalpat Singh Chaudhary had been authorised by Shri Sukhwal in the Vakalatnama filed in the trial court to prosecute the case right upto the District Court, and that orders had also been placed on the file of the learned District Judge showing that the Government had undertaken the defence on behalf of Mr. Sukhwal in the trial court and had also decided to file appeal on his behalf at the Government expense in the Court of District Judge, Bhilwara. I do not consider it necessary to go into the question of correctness or otherwise of the aforesaid orders inasmuch as I have come to the conclusion that the order passed by the learned District Judge dated 21-1-1964 refusing to treat the appeal on behalf of Shri Sukhwal amounted to a decree dismissing Shri Sukhwal's appeal and no appeal having been filed from the said order, the present appeal by Shri Sukhwal from the Judgment of the learned District Judge, dated 11-8-1964 is not maintainable.

16. The result of the foregoing discussion is that this appeal must be treated as one by the State of Rajasthan only. As already stated above no decree has been passed against the State of Rajasthan and the suit must be held to have been dismissed against the State by the trial Court. Consequently, the State of Rajasthan has also no locus standi to file the appeal.

17. The learned Deputy Government Advocate submitted that even though the decree has not been passed against the State of Rajasthan the amount decreed against Shri Sukhwal will have to be paid by the Government, and, therefore the State of Rajasthan can maintain the appeal. I do not see any substance in this argument. That is a matter between the State and Shri Sukhwal and does not concern the plaintiff at all. So far as the plaintiff is concerned, he cannot claim any amount against the State in execution of the decree under appeal. The learned Deputy Government Advocate failed to point out how the State could maintain the appeal from the judgment and decree passed against Shri Sukhwal in his personal capacity?

18. The result is that I allow the second preliminary objection, and dismiss the appeal as not maintainable. In the circumstances of the case the parties are left to bear their own costs.