Jagat Dhish Bhargava

Vs

Jawahar Lal Bhargava & Others

Civil Appeal No. 222 of 1960

(P.B. Gajendragadkar, K.N. Wanchoo, K.C. Das Gupta)

05.12.1960

JUDGMENT

GAJENDRAGADKAR, J. -

The short question of law which arises for decision in the present appeal by special leave is whether the appeal preferred against the appellant and respondents 8 and 9 in the High Court of Punjab by respondents 2 to 7 was competent in law or not. This question arises under somewhat unusual circumstances. It appears that an agreement of sale of one third of the one-fourth share in the property covered by the document was entered into between Gokal Dhish Bhargava and the appellant Jagat Dhish Bhargava. Gokal Dhish Bhargava sued the appellant and pro forma respondents 8 and 9 for specific performance of the said agreement of sale in the Court of the Senior Civil Judge, New Delhi (Civil Suit No. 684/128 of 1949/50). This suit was dismissed on March 12, 1954. Pending decision in the trial court Gokal Dhish Bhargava died and his son Jawahar Lal Bhargava, respondent 1 and Chunni Lal Bhargava were brought on the record as legal representatives. After the suit was dismissed and before the appeal in question was preferred in the High Court Chunni Lal Bhargava died; thereupon respondents 2 to 7, as his legal representatives, joined respondent 1 in preferring an appeal against the said decree in the High Court of Punjab. The memo of appeal along with the judgment dismissing the suit and the taxed bill of costs endorsed on the back of the last page of the judgment was filed in the High Court on July 29, 1954. It is the competence of this appeal that was questioned before the High Court and is in dispute before us in the present appeal.

The record shows that on March 24, 1954, an application was made by respondents 2 to 7 (who will be called the respondents hereafter) for a certified copy of the judgment and decree passed in the said suit for specific performance. A certified copy of the judgment and the bill of costs was supplied to them but the decree had not been drawn up and no copy of the decree was therefore supplied do them. In the result the appeal was filed without the certified copy of the decree and only with the certified copy of the judgment and the bill of costs. On August 2, 1954, the Assistant Registrar of the High Court returned the memo of appeal filed by the respondents to their counsel and pointed out to him that since no copy of the decree had been filed the presentation of the appeal was defective and the defeat needed to be rectified. Thereafter, on August 16, 1954, the respondents' counsel re-filed the appeal with an endorsement that a memo of costs alone had been prepared by the trial court and no decree had been drawn up, and so the appeal should be held to be properly filed. Apparently this explanation was treated as satisfactory by the office of the High Court and the appeal was registered as No. 77-D of 1954.

In due course the appeal was placed for preliminary hearing under O. 41, r. 11 of the Code of Civil

Procedure before Dulat, J. who admitted it on August 30, 1954. Notice of the appeal was accordingly served on the appellant and the pro forma respondents. Ultimately when the appeal became ready for hearing it was put up on the Board of the Circuit Bench of the High Court to be heard on December 26, 1958. Meanwhile on December 23, 1958, the appellant served a notice on the respondents' counsel intimating to him that he proposed to raise a preliminary objection against the competence of the appeal on the ground that the decree under appeal had not been filed as required under O. 41, r. 1 along with the memo of appeal and the certified copy of the judgment. Next day, that is to say on December 24, 1958, the respondents moved the trial Court for drawing up of the decree, but since the record had in the meantime been sent by the trial Court to the High Court no decree could be drawn up by the trial Court, and so the motion became infructuous. The appeal, however, did not reach hearing on December 26, 1958. On December 29, 1958, the respondents moved the Court that the appeal should be declared to be maintainable as the memo of costs which alone had been prepared by the trial Court read along with the concluding paragraph of the judgment may be held to satisfy the requirements of he decree; in the alternative they prayed that the record of the suit in the trial Court should be sent for to enable them to get a decree prepared with a view to file the same in the High Court along with their appeal. Bishan Narain, J., before whom this application was taken out for orders, direction that it may be heard by the Bench which would hear the appeal.

Eventually the appeal came on for hearing before Falshaw and Chopra, JJ. on December 8, 1959. At the said hearing the appellant raised a preliminary objection that the appeal was not competent having regard to the mandatory provisions of O. 41, r. 1, and urged that the appeal should be dismissed as incompetent. This preliminary objection was, however, not upheld by the High Court, and it was held that "the proper course to follow was to allow the respondents a month's time for the purpose of getting a decree drawn up in the proper form by the lower Court and obtaining a copy thereof". Accordingly the record which had in the meanwhile been received by the High Court after the appeal was admitted under O. 41, r. 11 was ordered to be sent back to the lower Court without delay. It is against this order which was passed by the High Court on December 15, 1959, that the present appeal by special leave has been filed. On behalf of the appellant Mr. Pathak contends that the appeal filed before the High Court was plainly and manifestly incompetent, and so the High Court was in error in not dismissing it on that ground.

The position of law under O. 41, r. 1 is absolutely clear. Under the said rule every appeal has to 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 that behalf, and has to be accompanied by a copy of the decree appealed from, and of the judgment on which it is founded. Rule 1 empowers the appellate Court to dispense with the filing of the judgment but there is no jurisdiction in the appellate Court to dispense with the filing of the decree. Where the decree consists of different distinct and severable directions enforceable against the same or several defendants the Court may permit the filing of such portions of the decree as are the subject matter of the appeal but that is a problem with which we are not concerned in the present case. In law the appeal is not so much against the judgment as against the decree; that is why Article 156 of the Limitation Act prescribes a period of 90 days for such appeals and provides that the period commences to run from the date of the decree under appeal. Therefore there is no doubt that the requirements that the decree should be filed along with the memorandum of appeal is mandatory, and in the absence of the decree the filing of the appeal would be incomplete, defective and incompetent.

That, however, cannot finally dispose of the point raised by the appellant before us. In the present case the respondents had applied for a certified copy the judgment as well as the decree in the trial

Court on March 24, 1954, and they were not given a copy of the decree for the simple reason that no decree was drawn up; what they were given was a copy of the judgment and taxed bill of costs endorsed on the back of the last page of the judgment. These documents they filed along with their memo of appeal; but that would not affect the mandatory requirement of O. 41, r. 1. In considering the effect of this defect in the presentation of the appeal we must bear in mind the rules of procedure in regard to the drawing up of the decree. The position in that behalf is absolutely clear. Section 33 of the Code of Civil Procedure requires that the Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow. Order 20, r. 3 provides, inter alia, that the judgment shall be dated and signed by the judge in the open Court at the time of pronouncing it and under r. 4, sub-r. (2) a judgment has to contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 6 of the same Order prescribes the contents of the decree. It provides that the decree shall agree with the judgment and shall contain the particulars therein specified. Under r. 7 it is provmded that the decree shall bear the date, the day on which the judgment was pronounced, and it directs that when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree. It is, therefore, clear that the drawing up of the decree in the present case was the function and the duty of the office, and it was obligatory in the judge to examine the decree when drawn up, and if satisfied that it has been properly drawn up to sign it. Except in places where the dual system prevails the litigant or his lawyer does not play any material or important part in the drawing up of the decree. In fact the process of drawing up of the decree is beyond the litigant's control. Therefore, there is no doubt whatever that in failing to draw up a decree in the present suit the office of the trial Court was negligent in the discharge of its duties, and the said negligence was not even noticed by the learned trial judge himself.

Unfortunately, when the appeal was presented in the High Court, even the officer of the High Court was not as careful in examining the appeal as it should have been, and as we have already indicated the appeal passed through the stage of admission under O. 41, r. 11 without the defect in the appeal being brought to the notice of the learned judge who admitted it. Thus it is quite clear on the record that the respondents had applied for a certified copy of the judgment and the decree, and when they were given only a certified copy of the judgment and the bill of costs they filed the same along with the memo of appeal in the bona fide belief that the said documents would meet the requirements of O. 41, r. 1. It is true that before the appeal came on for actual hearing before the High Court the appellant gave notice to the respondents about his intention to raise a preliminary objection that the appeal had not been properly filed; but, as we have already pointed out, the attempt made by the respondents to move the trial Court to draw up the decree proved infructuous and ultimately the High Court thought that in fairness to the respondents they ought to be allowed time to obtain the certified copy of the decree and file it before it; and so the High Court passed the order under appeal. The appellant contends that this order is manifestly erroneous in law; according to him the only order which could and should have been passed was to dismiss the appeal as incompetent under O. 41, r. 1.

The problem thus posed by the appellant for our decision has now become academic because subsequent to the decision of the High Court under appeal the respondents have in fact obtained a certified copy of the decree on December 23, 1959, and have filed it in the High Court on the same day. This fact immediately raised the question as to whether the appeal which has admittedly been completely and properly filed on December 23, 1959, was in time or not. If it appears that on the date when the decree was thus filed the presentation of the appeal was in time then the objection raised by the appellant against the propriety or the correctness of the High Court's order under appeal would be purely technical and academic.

The answer to the question as to whether the presentation of the appeal on December 23, 1959, is in time or not would depend upon the construction of section 12, sub-section (2) of the Limitation Act. We have already noticed that the period prescribed for filing the present appeal is 90 days from the date of the decree. Section 12, sub-section (2) provides, inter alia, that in computing the period of limitation "the time requisite for obtaining a copy of the decree shall be excluded." What then is the time which can be legitimately deemed to have been taken for obtaining the copy of the decree in the present case ? Where a decree is not drawn up immediately or soon after a judgment is pronounced, two types of cases may arise. A litigant feeling aggrieved by the decision may apply for the certified copy of the judgment and decree before the decree is drawn up, or he may apply for the said decree after it is drawn up. In the former case, where the litigant has done all that he could and has made a proper application for obtaining the necessary copies, the time requisite for obtaining the copies must necessarily include not only the time taken for the actual supply of the certified copy of the decree but also for the drawing up of the decree itself. In other words, the time taken by the office or the Court in drawing up a decree after a litigant has applied for its certified copy on judgment being pronounced, would be treated as a part of the time taken for obtaining the certified copy of the said decree. Mr. Pathak has fairly conceded that on this point there is a consensus of judicial opinion, and in view of the formidable and imposing array of authorities against him he did not raise any contention about the validity of the view take in all those cases. (Vide : Tarabati Koer v. Lala Jagdeo Narain ((1911) 15 C.W.N. 787.); Bani Madhub Mitter v. Mathungini Dassi & Ors. (Full Bench) ((1886) I.L.R. 13 Cal. 104.); Gabriel Christian v. Chandra Mohan Missir (Full Bench) ((1936) I.L.R. 15 Pat. 284.); Jayashankar Mulshankar Mehta v. Mayabhai Lalbhai Shah (Full Bench) ((1951) 54 B.L.R. 11.); Gokal Prasad v. Kunwar Bahadur & Ors. ((1935) I.L.R. 10 Lucknow 250.); and Umda v. Rupchand & Ors. (Nagpur Full Bench) ((1926) 98 I.C. 1057.).

There is, however, a sharp difference of opinion in regard to cases where an application for a certified copy of the decree is made after the said decree is drawn up. In dealing with such cases Courts have differed as to what would be the period requisite for obtaining the certified copy of the decree. The Bombay, Calcutta and Patna High Courts, appear to have held that the period taken in drawing up of the decree would be part of the requisite period, while other High Courts have taken a contrary view. It is significant that though the High Courts have thus differed on this point, in every case an attempt is judicially made to do justice between the parties. With that aspect of the problem, however, we are not concerned in the present appeal.

The position, therefore, is that when the certified copy of the decree was filed by the respondents in the High Court on December 23, 1959, the whole of the period between the date of the application for the certified copy and the date when the decree was actually signed would have to be excluded under section 12, sub-section (2). Inevitably the presentation of the appeal on December 23, 1959 would be in time. It is true that more than five years have thus elapsed after the pronouncement of the judgment but for this long delay and lapse of time the respondents are not much to blame. The failure of the trial Court to drawn up the decree as well as the failure of the relevant department in the High Court to examine the defect in the presentation of the appeal at the initial stage have contributed substantially to the present unfortunate position. In such a case there can be no doubt that the litigant deserves to be protected against the default committed or negligence shown by the Court or its officers in the discharge of their duties. As observed by Cairnes, L. C. in Rodger v. Comptoir d' Escompte de Paris ((1871) L.R. 3 P.C. 465,475.) as early as 1871 "one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors"; that is why we think that in view of the subsequent event which has happened in this case, namely, the filing of the certified copy of the decree in the High Court, the question raised by the

appellant has become technical and academic.

Faced with this position Mr. Pathak attempted to argue that the application made by the respondents on March 24, 1954, was not really an application for a certified copy of the decree; he contended that it was an application for the certified copy of the judgment and the bill of costs. This argument is wholly untenable. The words used in the application clearly show that it was an application for a certified copy of the judgment as well as the decretal order, and as subsequent events have shown, a certified copy of the decree was ultimately supply to the respondents in pursuance of this application.

Then it was argued that the respondents should have moved the trial Court for the drawing up of a decree as soon as they found that no decree had been drawn up. It may be assumed that the respondents might have adopted this course; but where the dual system does not exist it would be idle to contend that it is a part of the duty of a litigant to remind the Court or its office about its obligation to drawn up a decree after the judgment is pronounced in any suit. It may be that decrees when drawn up are shown to the lawyers of the parties; but essentially drawing up of the decree is the function of the Court and its office, and it would be unreasonable to penalise a party for the default of the office by suggesting that it was necessary that the party should have moved the Court for the drawing up of the decree. Therefore, we are not satisfied that the appellant is justified in attributing to the respondents any default for which the penalty of dismissing their appeal can be legitimately imposed on them. The result is that the appeal preferred by the respondents on December 23, 1959, is proper and in time and it can now be dealt with in accordance with law. It is true that in that circumstances over which the respondents had no control the appeal in question has already been admitted under O. 41, r. 11, and as a result of the decision under appeal it may not have to go through that process again. Dulat, J. who heard the appeal for admission was satisfied that it deserved to be admitted and we do not think it necessary to require that the present appeal should go through the formality of the procedure prescribed by O. 41, r. 11 once again. This position is no doubt unusual, but in the circumstances of the case it is impossible to say that the order passed by the High Court is not fair and just.

Let us then consider the technical point raised by the appellant challenging the validity or the propriety of the order under appeal. The argument is that O. 41, r. 1 is mandatory, and as soon as it is shown that an appeal has been filed with a memorandum of appeal accompanied only with a certified copy of the judgment the appeal must be dismissed as being incompetent, the relevant provisions of O. 41 with regard to the filing of the decree being of a mandatory character. It would be difficult to accede to the proposition thus advanced in a broad and general form. If at the time when the appeal is preferred a decree has already been drawn up by the trial Court and the appellant has not applied for it in time it would be a clear case where the appeal would be incompetent and a penalty of dismissal would be justified. The position would, however, be substantially different if at the time when the appeal is presented before the appellate Court a decree in fact had not been drawn up by the trial Court; in such a case if an application has been made by the appellant for a certified copy of the decree, then all that can be said against the appeal preferred by him is that the appeal is premature since a decree has not been drawn up, and it is the decree against which an appeal lies. In such a case, if the office of the High Court examines the appeal carefully and discovers the defect the appeal may be returned to the appellant for presentation with the certified copy of the decree after it is obtained. In the case like the present, if the appeal has passed through the stage of admission through oversight of the office, then the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. In such a case it would be open to the High

Court, and we apprehend it would be its duty, to direct the subordinate Court to draw up the decree forthwith without any delay. On the other hand, if a decree has been drawn up and an application for its certified copy has been made by the appellant after the decree was drawn up, the office of the appellate Court should return the appeal to the appellant as defective, and when the decree is filed by him the question of limitation may be examined on the merits. It is obvious that the complications in the present case have arisen as a result of two factors; the failure of the trial Court to drawn up the decree as required by the Code, and the failure of the office in the High Court to notice the defect and to take appropriate action at the initial stage before the appeal was placed for admission under O. 41, r. 11. It would thus be clear that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under O. 41, r. 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinised at the initial stage soon after they are filed and the appellant required to remedy the defects. Therefore, in our opinion, the appellant is not justified in challenging the propriety or the validity of the order passed by the High Court because in the circumstances to which we have already adverted the said order is obviously fair and just. The High Court realised that it would be very unfair to penalise the party for the mistake committed by the trial Court and its own office, and so it has given time to the respondents to apply for a certified copy of the decree and then proceed with the appeal.

In this connection our attention has been drawn to the fact that in the Punjab High Court two conflicting and inconsistent views appear to have been taken in its reported decisions. Dealing with appeals filed without a certified copy of the decree some decisions have dismissed the appeals as defective, and have given effect to the mandatory words in O. 41, r. 1, without presumably examining the question as to whether the failure of the trial Court to drawn up the decree would have any bearing or relevance on the point or not (Vide : Gela Ram v. Ganga Ram (A.I.R. (1920) 1 Lah. 223); Municipal Committee, Chiniot v. Bashi Ram (A.I.R. (1922) Lah. 170.); Mubarak Ali Shah v. Secretary of State (A.I.R. (1925) Lah. 438.); Nur Din v. Secretary of State (A.I.R. (1927) Lah. 49.) Hakam Beg v. Rahim Shah (A.I.R. (1927) Lah. 912.); Fazal Karim v. Des Raj (35 Punj. L.R. 471.); and Banwari Lal Varma v. Amrit Sagar Gupta (A.I.R. (1949) East Punj. 4002.). On the other hand it has in some cases been held that it would be fair and just that the hearing of the appeal should be adjourned to enable the appellant to obtain a certified copy of the decree and produce it before the appellate Court (Vide : Manoharlal v. Nanak Chand (A.I.R. (1919) Lah. 53.); Mt. Jeewani v. Mt. Misri (A.I.R. (1919) Lah. 125.); and, Sher Muhammad v. Muhammad Khan (A.I.R. (1924) Lah. 352.). It would obviously have been better if this conflict of judicial opinion in the reported decisions of the High Court had been resolved by a Full Bench of the said High Court but that does not appear to have been done so far. However, as we have indicated, the question about the competence of the appeal has to be judged in each case on its own facts and appropriate orders must be passed at the initial stage soon after the appeal is presented in the appellate Court. If any disputed question of limitation arises it may have to go before the Court for judicial decision.

In the result the order passed by the High Court is right. Having regard to the fact that the decree under appeal has already been filed by the respondents before the High Court on December 23, 1959, the High Court should now proceed to hear the appeal on the merits and deal with it in accordance with law. In the circumstances of this case we make no order as to costs.

Appeal dismissed.

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