SUPREME COURT OF INDIA

Shakuntala Devi Jain

Vs.

Kuntal Kumari

C.A.No.970 of 1968

(S. M. Sikri, R. S. Bachawat and K. S. Hegde, JJ.)

05.09.1968

JUDGEMENT

BACHAWAT, J.:-

1. The respondent Sumat Prashad filed an application for execution of a final decree in a partition suit. The appellant filed objections under Section 47 of the Code of Civil Procedure. By an order dated January 20, 1967 the Subordinate Judge, Delhi, dismissed the objections. It is common case before us that under the relevant Civil Rules and Orders the Subordinate Judge, Delhi, was not required to draw up a formal expression of the decision under Section 47 as a decree, On March 17, 1967 the appellant filed an appeal against this order in the Delhi High Court. Along with the memorandum of appeal she filed a plain copy of the order and an application praying that the appeal be entertained without a certified copy of the order. In the application she stated that she had applied for a certified copy of the order but the same was not ready and that she would file the certified copy as soon as it would be ready and available to her. She added that she wanted urgent interim relief and would be seriously prejudiced if she waited for a certified copy. She also filed an application for stay of execution. On the same date a Bench of the High Court admitted the appeal, granted an interim stay and directed issue of notice to the respondents. The attention of the Court was not drawn to the fact that a certified copy of the order had not been filed nor was the

application for dispensing with the certified copy moved and an order obtained thereon. The appeal was registered as Execution First Appeal No. 86 of 1967. The appellant diligently prosecuted the appeal. On October 25, 1967 the respondents raised an objection that the appeal was incompetent as a certified copy of the order under appeal had not been filed. On November 3, she filed an application for condonation of the delay in filing the copy under Section 5 of the imitation Act. On November 6, she obtained a certified copy and on the same day she filed it in Court. On December 22, 1957, the High Court held that as the memorandum of appeal was not accompanied by a certified copy of the order, the appeal was incompetent, and that there was no sufficient ground for condoning the delay in filing the copy. Accordingly the High Court dismissed the appeal and the application under Section 5 of the Limitation Act. The present appeal has been referred after obtaining special leave from this Court.

2. Two questions arise in this appeal. First, was the appeal from the order disposing the objections under Section 47 incompetent in view of the fact that the memorandum of appeal was not accompanied by certified copy of the order appealed from? Second, whether the delay in filing the appeal should be condoned under Section 5 of the Limitation Act?

3. Section 2 (2) of the Code of the Civil Procedure defines "decree". Unless there is anything repugnant in the subject or context "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 with Sec. 47 or Sec. 144.,.." It is because the determination of any question within Section 47 is a decree that the appellant could file an appeal from the order under Section 96 of the Code. Order 41, Rule 1 of the Code provides that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader "and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded". Under Order 41, Rule 1 the appellate Court can dispense with the filing of the copy of the judgment but it has no power to dispense with the filing of the copy the decree. A decree and a judgment are public documents and under Sec. 77 of the Evidence Act only a certified copy may be produced in proof of their contents. The memorandum of appeal is not validly presented, unless it is accompanied by certified copies of the decree and the judgment.

4. The contention of Mr. Misra is that a decree is the formal expression of the adjudication and that where, is in this case, no formal decree is drawn up, the determination under Section 47 is a judgment and the Court having admitted the appeal must be presumed to have dispensed with the filing of the copy of the judgment. In this connection he drew our attention to Sections 2 (2), 33 and Order 20, Rules 1,4,6. We are unable to accept these contentions. We are not satisfied that the High Court dispensed with the filing of the copy of the order under Section 47. Admittedly, the High Court did not pass any express order to that effect. It may be that in a proper case such an order may be implied from the fact that the High court admitted the appeal after its attention was drawn to the defect. (See G. I. P. Railway Co. V. Radhakrissen Jaikissen AIR 1926 Nag 57). But in the present case the High Court was not aware of the defect and did not intend to dispense with the filing of the

copy.

5. Moreover an order under Sec. 47 is a decree, and the High Court had no power to dispense with the filing of a copy of the decree. Ordinarily a decree means the formal expression of an adjudication in a suit. The decree follows the judgment and must be drawn up separately. But under Section 2 (2), the term "decree " is deemed to include the determination of any question within Sec. 47. This inclusive definition of decree applies to Order 41, Rule 1. In some Courts, the decision under Section 47 is required to be formally drawn up as a decree and in that case the memorandum of appeal must be accompanied by a copy of the decree as well as the judgment. But in some other Courts no separate decree is drawn up embodying the adjudication under Section 47. In such a case, the decision under Section 47 is the decree and also the judgment, and the filing of a certified copy of the decision is sufficient compliance with Order 41, Rule 1. As the decision is the decree, the appeal is incompetent unless the memorandum of appeal is accompanied by a certified copy of the decision. Our attention was drawn to the decision in Bodh Narain Mahto v. Mahavir Prasad, AIR 1940 Pat 176 where Agarwala, J., seems to have held that where no formal decree was prepared in the case of a decision under Section 47 the appellant was not required to file a copy of the order with the memorandum of appeal. We are unable to agree with this ruling. The correct practice was laid down in a Kamala Dasi v. Tarapada Mukherjee, (1912) 15 Cal LJ 498 where Mookerjee, J., observed:-

"Now it frequently happens that in cases of execution proceedings, though there is a judgment, an order, that is, the formal expression of the decision is not drawn up. In such cases the concluding portion of the judgment which embodies the order may be treated as the order against which the appeal is preferred. In such a case it would be sufficient for the appellant to attach to his memorandum appeal a copy of the judgment alone, and time should run from the date of the judgment. Where, however, as in the case before us, there is a judgment stating the grounds of the decision and a separate order is also drawn up embodying the formal expression of the decision, copies of both the documents must be attached to the memorandum, and the appellant is entitled to a deduction of the time taken up in obtaining copies thereof."

6. We hold that the memorandum of appeal from the order dated January 20, 1967 should have been accompanied by a certified copy of the order and in the absence of the requisite copy the appeal was defective and incompetent.

7. The next question is whether the delay in filing the certified copy or, to put it differently, the delay in re-filing the appeal with the certified copy should be condoned under Section 5 of the Limitation Act. If the appellant makes out sufficient cause for the delay the Court may in its discretion condone the delay. As laid down in Krishna v. Chathappan, (1890) ILR 13 Mad 269, 271. "Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words "sufficient cause" receiving a liberal construction so as to advance

substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant."

8. The record discloses that the appellant made repeated attempts to obtain a certified copy of the order. She is a pardanashin lady and her affairs were managed by her husband Ajit Prasad and sometimes by her son Virendra. On March 2, 1967 she applied for a certified copy of the order under appeal. The application distinctly stated that she wanted a copy of the order dated January 20, 1967, dismissing her objections. The application bore the serial number 17542. The copying department supplied to her a copy of another order passed by the Court on the same date dismissing Sumat Prasad's objections to the appellant's application for execution. The mistake is solely attributable to the negligence of the Copying department In her affidavit the appellant stated that the application for a copy dated February 17, 1967 was in respect of the order dismissing Sumat Prasad 's objections. This statement is not correct but it may well be that having got a certified copy of the order dismissing Sumat Prasad's objections she believed that she had applied for a copy of that order.

9. On March 2,1967 the appellant's son Virendra made another application for a certified copy of the order. He got the certified copy on March 10. In paragraph 6 of the petition for condonation of delay the appellant stated that Virendra did not give her the copy and this statement was corroborated by Virendra in his supporting affidavit. In paragraph 9 she stated that Virendra had misplaced the copy and due to fear of reprimand he did not inform her or her husband. Virendra's affidavit is silent on this point. But the affidavits sufficiently establish that the appellant did not receive the certified copy from Virendra. Had she received the copy there is no reason why she would not have filed it along with the memorandum of appeal on March 17, 1967.

10. On March 20, 1967, the appellant filed another urgent application for a certified copy of the order dated January 20, 1967 and also copies of two other orders dated February 17, 1967 and May 13, 1966. On this application bearing serial number 19461 the copying department made a note on March 23,1967, that the orders dated February 17, 1967 and May 13, 1966, were not found and the applicant should be asked to indicate the file whereon the orders were. It is surprising that the copying department should have asked the appellant to give this clarification. If the department found difficulty in finding the orders, it should have contacted the officer-in-charge of the records who would have secured the orders for them. The note did not indicate why a copy of the order dated January 20, 1967, was not being supplied. The next note on the application dated March 27, indicates that the application was returned to the appellant. From the next note dated April 11, it appears that the clerk-in-charge, copying department, directed that the application be filed. We may safely presume that before April 11, the application was re-submitted by the appellant to the copying department. There is nothing to show that the clarification asked for was not supplied by the appellant. The department took no further action on the application and made no effort to supply the certified copies to the appellant. No ground was given by the department for not supplying a certified copy of the order dated January 20, 1967. The time for filing the appeal expired on April 20, 1967. On October 25, 1967, the respondents took the objection for the first time that the appeal was incompetent. Before that date, the record of the Executing Court including the Original order

appealed from had been received by the High Court. On October 27, 1967, the appellant made another application for a certified copy and on November 6, 1967 as soon as she received the copy she filed it in Court. The appellant made repeated attempts to procure a certified copy. The failure of the copying department to supply the copy in spite of those applications contributed largely to the unfortunate delay in filing it. The appellant cannot be held responsible for the laches of the copying department. Once her son actually got the copy but she never received it. The appellant could have filed another copy before November 6, 1967, had it been supplied to her by the copying department. We are inclined to accept the statement that she was under the bona fide impression that the certified copy was not ready, and, that is why it was not supplied to her by the copying department. It is not a case where it is possible to impute to the appellant want of bona fides or such inaction or negligence as would deprive her of the protection of Section 5 of the Limitation Act. We are therefore inclined to allow her application under Section 5 and to condone the delay in re-filing the appeal with a certified copy of the order.

11. In the result, we allow the appeal. The application filed by the appellant under Section 5 of the Limitation Act is allowed and the order of the High Court dismissing Execution First Appeal No. 86 of 1967 is set aside. The appeal is remanded to the High Court so that it may deal with and dispose of the appeal on the merits. There will be no order as to the costs of the appeal in this Court.

Appeal allowed.