D.L. MEHTA, J. [JAIPUR BENCH]

M/s Boards & Boards Pvt. Ltd., Jaipur

Versus

M/s Himalya Paper (Machinery) Pvt. Ltd., New Delhi

S.B. Civil Revision Petition No. 451 of 1983*
Decided on 9th November, 1989

Civil Procedure Code—*Appeal and Revision—Expression "suit is liable to be dismissed" implies dismissal of suit—Court not drawing decree—Held, it is final adjudication of rights of parties; (ii) Parties cannot be penalized for mistake of court in not drawing decree; and (iii) it is fit case to treat revision as appeal*

The expression of the words 'liable to be dismissed' by implication means that the suit is dismissed and it may tantamount the formal expression of the suit, though not said in specific words. The judgment should be considered final adjudication of the rights of the parties as for as the suit of the plaintiff is concerned. How ever, a mistake is

*Against order dated 2-6-1983, passed by Shri R.C. Upadhayay, Additional District Judge, No. 2, Jaipur City, Jaipur

there on the part of the court also that the court has not drawn the decree so far. The party cannot be penalised for the mistake of the court. In the facts and circumstances, it is a fit case where the revision filed by the petitioner should be treated as an appeal. (Para 13)

ORDER ACCORDINGLY

R.C. Kasliwal, *for the Petitioner*
C.N. Sharma, *for the Non-Petitioner*

D.L. MEHTA, J.—Petitioner has preferred this revision petition being aggrieved with the order dated 2-6-83 passed by the learned additional District Judge, Jaipur city, Jaipur, in the original suit. Suit was instituted for the recovery of the advances made by the plaintiff against the defendant. Issues were framed on 17-11-79 Issue No. 3 reads as under:

"This issue was decided against the plaintiff vide order dated 2-6-1983 Trial Court passed the order which reads as under :

"On issue No. 3 it is decided that the suit is barred by limitation and is liable to be dismissed and the plaintiffs claim is liable to be dismissed on that court."

This Court, on 6-4-89 suo moto asked the parties whether the trial courts impugned decision dismissing the suit as time barred is appellable, and if so, Whether the revision petition can be entertained ? Time was allowed to the parties to study on this point.

2. Mr. Kasliwal appearing on behalf of the plaintiff submitted that the suit has not been dismissed out the court has held that it is liable to be dismissed. As such, according to Mr. Kasliwal. This is not decree but is an interlocutory order and the revision is maintainable. He further submits that the court has not directed that the suit be dismissed and for this reason formal decree has not been drawn.

3. Mr. Kasliwal has referred before me the Code of Civil Procedure, 2nd Edition, by Dr. Nand Lal and invited my attention to the provisions of Sec. 2, sub-cl. (2) relating to the decree. In the said book it has been mentioned, the words 'formal expression' appear in the definition of a decree. But, the same words 'formal expression' appear in the definition of an order in Sec. 2(14). Therefore, the presence or absence of a formal expression cannot be true criterion of the difference between the decree and an order it be urged that without formal expression there can be no decree, the answer is that the words' appeal dismissed over the signature of the judge is formal expression of the decision.

4. It will not be out of place here to mention that section 2(2) defines decree and section 2(14) defines the order. Real distinction between two definitions seems to allow in the nature of the decision whether it is an adjudication is of a particular kind or not. If the adjudication is of a nature which may determine the rights and liabilities of the parties and may some time, the proceedings then it is a decree.

5. Mr. Kasliwal has also cited before me the Code of Civil Procedure by Mulla, 14th Edition; He has referred page 18 and submitted that the word formal expression has been used in the definition of the decree. He submits that all requirments of form must be complied with. He further submits that accordingly if no decree has been drawn up no appeal will lie from a judgment. He submits that in such circumstances, revision lies because, no decree has

been drawn. It will not be out of place here to mentioned that the expression as used in Section 2(2) implies that decision must be one which is complete and final as regards the court which passed it. The decree may conclusively determine the rights of the parties, although, it does not completely dispose of the suit. Mr. Kasliwal has also referred the Code of Civil Procedure by Chitley, 10th Edition and referred to pages 12 & 13. The distinction between a decree & an order in CPC is obvious. Where as, the decree means the formal expression of adjudication which so far as regards the court if conclusively determines the rights of the parties in all and any of the matters in controversy in the suit, the term 'order' means formal expression of any decision which is not a decree.

6. Before dealing with the provisions of order and does it is necessary to deal with the definition of the judgment as given in Section 2(9) CPC. Section 2(9) defines the judgment means the statement given by the judge of the grounds of a decree or order. Thus, in the definition of the judgment it is not necessary that there should be a formal expression as envisaged in the definition of the decree and order. In the judgment there should be a statement given by the judge and the grounds on the basis of which he is passing the order or the decree. Formal expression has been intentionally avoided by the Legislature to make it a part of the decree and order. A thin distinction can also be drawn in the matter of the definition of the judgment, decree and order. In the order as well as in the decree there will be a formal expression. The difference between the two will be that in the decree there will be a final adjudication which may lead to the conclusion of the case or part of the case. How ever, in the order there may not be final adjudication of the rights and liababilities of the parties. For illustration, if the plaint is rejected under order 7 Rule-11 it will be a decree and it leads to the determination of the points at issue between the parties. How ever, if the suit is not rejected and the prayer for refusal is rejected then it will not be a decree because, it does not lead to the conclusion of the suit and the suit will proceed.

7. Mr. Kasliwal, appearing on behalf of the petitioner, cited before me the case of *Om Singh* v. *Jethumal* AIR 1957 Raj. 173. In the said case their Lordships held that the terms, 'Determination of the rights of the parties 'refers to substantive rights of the parties with regard to the merits of the case and not to other disputes between the parties, which are ancillary to the subject matter of the suit. For instance, the question relating to the jurisdiction of the court or limitation and other preliminary points of the suit if decided in favour of the plaintiff, would not determine the rights of the parties in relation to the suit. The proposition laid down in this case is not in dispute. Their Lordships have rightly said that if the issue relating to the jurisdiction are decided in favour of the plaintiff, them it is not a decree. How ever, the reverse is not true. In a case where the point of limitation is decided against the plaintiff it leads to the determination of the suit, as such, it amounts final determination of the rights and liabilities of the parties and the suit cannot proceed. In a case where the issue of limitation is decided against the plaintiff the decision will be a decree and the judgment cited by Mr. Kasliwal does not apply to the facts and circumstances of the case, as in this case point relating to the issue of limitation has been decided against the plaintiff.

8. Mr. Kasliwal has also cited before me the case of *Baliram Ganpatrao Bhoot* v. *Manohar Damodhar Bhoot* (AIR 1943 Nagpur 204). In this their Lordship held that interlocutory order not finaly, disposing of the suit is not a decree. It was further held that the refusal to draw up a decree wrongly

gives a right of revision. Here it is not the case of refusal to draw the decree. It is a case of not drawing up a decree. It will not be out of place here to mention that the alleged order was passed on 2nd June. Revision petition was preferred before this Court on 21-7-1983 and the record of the lower court was also called. There was summer vacation of the Court Preparation of the decree requires some formalaties to be observed under the rules. Even of it is assumed that the Court under a mis-apprehension has not prepared the decree treating it as an order and not judgment even then Mr. Kasliwal cannot derive any advantate from this lapse who was the duty of the plaintiff to apply for the decree or in any case, to point out the court that the decree should be drawn.

9. Mr. Kasliwal, in the alternative, submitted before me that in case the court is of the view that the revision does not lie then this revision petition should be treated as an appeal. He has cited before me the case of *Jagdish Bhargava* v. *Jawaharlal Bhargava* (AIR 1967 SC 832) and submitted that where a decree is not drawn up and there is failure on the part of the court to draw up a decree even then the appeal can be entertained and heard.

10 Mr. Kasliwal has also cited before me the case of *Phool Chand* v. *Gopal Lal* (AIR 1969 SC 1470). Hon'ble Supreme Court held that in very exceptional cases the appeal can be entertained and heard even in the absence of the copy of the judgment.

11. In reply to these propositions Mr. Sharma submitted that Hon'ble Supreme Court has also held in the case of *Shakuntla Devi* v. *Kunthal Kumari* AIR 1969 (SC) 575 that the production of the copy of decree is neccesary and the appeal is incompetent unless memorandum there of is accompanied by certified copy of judgment. It will not be out of place here to melion that if there are two judgments of Supreme Court then it is left open to the judge to apply the judgment which in the facts and circumstances of the case, appeals to the conscious of rhe court and it is not necessary that later judgment should be followed if the carlier judgment has not been discussed in it. Mr. Sharma has also cited before me the case of *Kanji Hinjibhai* v. *Jivraj Dharamsh* (AIR 1976 Gujarat 1592) Gujarat High Court has held as under :

> "In a composite suit--being a suit for possession and for arrears of rent the suit for possession was held as not competent and maintainable and the suit was directed to proceed only with regard to the claim for monerary relief.
>
> Held, there was final adjudication on the issue of possessions and this determination on amounts to a decree. There is obvious difference between a simple finding and a finding which determines the suit. It a decree is not drawn up, it does not mean that the order of the court by which rights of the parties are finally adjudicated upon is not a decree. There can be more than one final decree in a suit where two or more causes of action are joined together"

12. Mr. Sharma has also cited before me the case of *State of Rajasthan and another* v. *Chander Singh* AIR 1971 Raj 299 in which this Court has held as under :

> "An order holding that the appeal on behalf of one of the appellants is not maintainable amounts to a decree qua that appllant as it determines his right to maintain the appeal and is appealable. That no decree was passed in pursuance of the order makes no difference"

13. I have heard the lumanaries of the Bar in detail on the point raised by them in this revision petition judgment stand on different footing

than the order and the decree. Legislature in its wisdom has avoided the use of word' formal expression 'in the definition of the judgment as used in sec.2 (9) CPC where as, word 'formal expression' has been used in the definition of the decree as defined under section 2 (2) as well as in the definition of the order as defind in section 2(14) of the CPC. Similary, it is not necessary in a decree that there should be a statement given by the judge. Statement is to be given by the Judge only in the judgement and he records the reason for arriving at a particular conclusion in the judgment and decree is the formal expression of the conclusions arrived at by the judge in the judgment. So, it is not necessary that there should be a formal expression of the order in the judgment, though it is desirable to be so. From the perusal of the order itself it is clear that the learned Judge has held that the suit is barred by limitation and is liable to be dismissed. The expression of the words 'liable to be dismissed by implication means that the suit is dismissed and it may tentamount the formal expression of the dismissal of the suit, though not said in specific words. The judgment also leads to conclude in its final adjudication as the judge has held that the suit is barred by limitation, and, as the suit which is barred by limitation cannot be entertained so, it is natural disposal of the suit and final adjudication of the rights & liabilities of the parties. Thus, I am of the view that the judgment should be considered final adjudication of the rights of the parties as for as the suit of the plaintiff is concerned. However, a mistake is there on the part of the court also that the court has not drawn the decree so for. The party cannot be penalised for the mistake of the court. In the facts and circumstances, it is a fit case where the revision filed by the petitioner should be treated as an appeal, court below is directed to prepare the decree within a period of three months from today. Record of the court below should be sent back immediately petitioner who will now be appellant should apply to the court below for the copy of the decree if he so desires and copy of the decree should be submitted by him before the appellant court within a period of six months from now. Petitioner will also value the appeal and pay court fees accordingly.

14. Revision petition is disposed of accordingly and it may be registered as appeal.

15. No order as to costs.
