isac Osman and ors. Vs. Valimohmad Isac

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Court : Gujarat

Decided On : Apr-26-1967

Reported in : AIR1968Guj301; (1969)GLR61

Judge : N.G. Shelat, J.

Acts : Code of Civil Procedure (CPC), 1908 - Sections 2(2), 96(3) and 108

Appeal No. : Appeal No. 13 of 1961

Appellant : isac Osman and ors.

Respondent : Valimohmad Isac

Advocate for Def. : I.R. Patel, Adv. for; V.N. Gajendragadkar and; J.S. Shah

Advocate for Pet/Ap. : M.M. Patel, Adv.

Judgement :

1. This appeal arises out of an order passed on 18th August 1960 by Mr. M. D. Manek, District Judge at Amreli in Civil Appeal No. 70 of 1959, whereby the order passed by the Civil Judge (J.D.) Kodinar, in Darkhast No. 40 of 1957 came to be set aside and the case sent back to the trial Court for disposal according to law with a direction that the trial Court should proceed to decide the question as directed in the decision of the District Court in the prior Civil Appeal No. 28 of 1957 of which a certified copy is at Ex. 91 in the proceeding, and directing the parties to bear the own costs in the appeal.

2. A preliminary point came to be raised Mr. I. R. Patel, the learned advocate for the respondent, saying that the appeal is not competent inasmuch as the decree passed by the first appellate Court is based on consent of parties in view of section 96(3) read with section 108 of the Civil Procedure Code. It is unnecessary to set out the facts leading to this appeal for the reason, that, in my view, this appeal is not competent. Part VII of the Civil Procedure Code relates to appeals. Section 96 of that relates to appeals from original decrees. Clause (3) thereof then says that no appeal shall life from a decree passed by the Court with the consent of parties. In the same Part VII of the Civil Procedure Code we find section 108, and as provided therein, the provisions of this Part relating to appeals from original decrees shall so far as peals be, apply to appeals -

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a

different procedure is not provided.

It would follow therefrom that the provisions contained in section 96 would govern and appeals from appellate decrees and also from orders made under this Code. That being so, no second appeal would lie from a decree passed by the appellate Court if that has been passed with the consent of the parties. In the case of Baqridan v. Bashir Ahmad Khan : AIR1956All94 , it has peen held that section 96(3) would apply to appeals from consent decrees passed in appeal by virtue of section 108, and furthermore, the principle of estoppel upon which section 96(3), is based applies equally to appellate decrees which have been passed on consent of the parties. It is, therefore, clear that if the decree passed by the first appellate Court was in pursuance of the consent of parties, this appeal would not lie against any such decree.

3. It is no doubt true, as pointed out by Mr. Patel, the learned advocate for the appellants, that there was no compromise purshis put in by the parties on which any order was passed by the Court and that, therefore, anything stated in the judgment about the learned advocates of the parties having agreed to certain order being passed cannot be said to be a decree passed in pursuance of consent of parties in that appeal. Besides, it was at the most a concession on the part of the advocate, and cannot, therefore, be the basis of a decree, so as to bar any appeal from such a decision. Now section 96(3) of the Code does not say that the consent of parties shall be in writing. It merely requires that it should be a decree passed by Court with the consent of parties. In that event, no appeal can lie. It is therefore clear that the consent of parties maybe expressed in writing put in by them or their advocates or orally made by them or their advocates before the Court. What is necessary, is that the decree must appear to have been passed on such basis viz., on consent terms stated before the Court. If that is clear either from the last order, or from the judgment passed by the Court, it can be easily said that the order or a decree came to be passed in pursuance of the consent of parties as contemplated under Section 96(3) of the Code.

4. In this connection I was referred to a decision in the case of Zahirul-Said Alvi v. Lachhmi Naryan, . That case came up for hearing first before the Privy Council on 8th February 1931 and the decision arrived at that time is reported in . At the time of hearing of that appeal, it was found that the final judgment delivered by the judicial Commissioner of Nagpur before whom the case came in appeal what a judgment by the consent of the parties and their Lordships enquired of counsel appearing for the appellants, how in fact of that fact he could ask the Board to interfere. The counsel did not then contest the consent but later on when the case was set down for hearing an application was made to their Lordships in connection with this point supported by an affidavit of the appellant which had been sent from India. In that application it was alleged that there had in fact been no consent to the judgment above referred to, and the statements to that effect by the Judicial Commissioner was a mistake. Then after reciting the judgment and having regard to the contention raised, their Lordships thought that it was impossible for them to accept without further questions the affirmation by the judgment of the Judicial Commissioner that the decree they were about to pass was a decree by consent of parties. If it was so in fact, it clearly could not be challenged by way of appeal, and the certificate should have been refused, if however, the recital of consent was in some way erroneous as the appellant alleged, it was equally clear that no judgment upon the merits has been pronounced by the Court of the Judicial Commissioner, and the appeal must be reconsidered by them and

dealt with in the ordinary way. Under those circumstances, lest some injustice may unwittingly be done by them, their Lordships felt constrained to remit the appeal to the Court of the Judicial Commissioner with a copy of affidavit of the appellant, for consideration of the matter then raised and a report thereon. A report was obtained and the matter again came up before their Lordships on 15th July 1932. That report showed that the judgment and the decree appealed from, following thereon, were professedly made with the consent of the parties that is to say, the decree was consensual and did not, except so far as authorised by consent, embody any judicial finding by the Court itself. The Privy Council, therefore, held that the decree was one from which no appeal can be entertained as it proceeded entirely upon the consent of parties in making the decree appealed from. On that consideration alone, they held that the appeal was entirely incompetent and it came to be dismissed with costs. It would, thus, follow that there need not be any written terms of agreement between the parties placed before the Court and it is enough if the judgment disclose that the decree or order that came to be passed in that appeal was on the basis of the consent of parties. Now if we turn to the latter part of the judgment of the learned District Judge in appeal, it appears abundantly clear that the final order that he happened to pass was on the basis of the learned advocates appearing for the parties before him having agreed to the same. After stating that what the learned trial Judge has tried to do is to arrogate upon himself the function of an appellate authority over the superior Court and has acted in disregard of the recognised principle that a subordinate Court is bound by decision given by the appellate Court in the same proceeding, he has observed as under:-

'The learned advocates of the parties agree that the order under appeal must be reversed, and the case should be sent back to the trial Court for proceeding afresh in view of the specific directions given by my learned predecessor in his appellate judgment, dated 9th January 1959 in the prior appeal, Civil Appeal No. 28 of 1957, of which a copy is on the record in the trial Court at exhibit 91. The learned advocates of the parties agree that no order should be made as regards costs in the present appeal, and the case should be thus remanded to the trial Court.'

On that basis, the final order came to be passed and the relevant order runs thus:-

'The appeal is allowed. The order appealed from is reversed, and the case is sent back to the trail Court for fresh disposal according to law, with a specific direction . . . . . The parties are directed to bear their own costs in the present appeal.'

From the observations set out here above, it is clear that the decree passed on the consent of the learned advocates for the parties appearing before him, and it was thus consensual, and did not, except so far as authorised by consent, embody any judicial finding by the Court itself.

It is nowhere suggested much less said that the learned advocates appearing for the appellants had no authority to agree to any such terms in pursuance of which the decree came to be passed by the Court. It is not in the nature of concession on any point raised in appeal, and in my opinion, it was a statement made at the bar by the learned advocates of both the parties who were obviously authorised agents for the parties in appeal, and when they invite the Court to Act upon it, and when it does Act and pass an order or decree accordingly, it amounts to a decree or order passed by the Court on consent of parties. That would certainly bind the parties. That party is estopped from resiling therefrom in appeal by saying that it is not a decree passed

under section 96(3) of the Code.

5. In this connection , Mr. M. M. Patel, the learned advocate for the appellants, invited a reference to some observations made in the case of Kameswaramma v. Subba Rao : [1963]2SCR208 to say that a concession made by an advocate cannot be the basis of a decree. Those observations are as under:-

'Much cannot be made of a concession by counsel that this was a Dharmila inam, in the trial Court, because it was a concession on a point of law, and it was withdrawn. Indeed, the Central point in the dispute was thus, and the concession appears to us to be due to some mistake or possibly ignorance not binding on the client.'

These observations are hardly of any help to him, for the simple reasons that it was not a matter of concession, much less on a point of law, and at no stage it is sought to be even withdrawn. No point is made out even in the memo of appeal in that direction. Nor do we find that the concession in the present case was due to some mistake or possibly ignorance so as to say that it cannot bind the appellants as it was in the case referred to above. As I said above, it was not a concession but in fact an agreement between the parties' advocates on which decree was sought for by the learned advocate for the appellants as also the respondents from the Court, and it accepted the same and passed decree accordingly.

6. It was next urged Mr. Patel that this cannot be called a decree as defined in section 2(2) of the Civil Procedure code and that the order is for remanding the case to the trial Court for fresh disposal according to law. Such an order of remand, according to him, is not a decree as held in Jethanand and Sons v. State of Uttar Pradesh : [1961]3SCR754 . It was held in that case that an order remanding a case without deciding any question relating to the rights of the parties is not a judgment, decree or final order within the meaning of Art. 133 of the Constitution. An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the civil proceeding. Now, if we turn to the order, it is based on the consent given by the learned advocates appearing for the parties in the Court below. It was for setting aside the order passed by the trial Court. The first part of the order is, therefore, to set aside the order passed by the trial Court by allowing the appeal. Sending back the case to the trial Court is ancillary when the decision of the trial Court is reversed and the appeal is allowed. A decree drawn up on that basis would fall within the definition of the term 'decree' as contemplated under section 2(2) of the Civil Procedure Code inasmuch as it is the formal expression of an adjudication which conclusively determines the rights of the parties arising in that appeal. Any decision whereby the decree of the trial Court is set aside would, thus, amount to a decree and is not merely an order of remand so as to call for some finding or the like from the trial Court regarding some point etc. so as to say that the matter had not been finally decided by the Court. The Supreme Court decision relied upon by the learned advocate for the appellants would have no application whatever. It is, thus, clear that the decree in appeal was passed by the learned District Judge on the basis of the learned advocates of the parties in appeal appearing before him having agreed to do so viz., to reverse the order of the trial Court as also to direct the parties to bear their own costs and to send back the proceedings for disposal in accordance with law keeping in mind the specific direction given in the judgment Ex. 91 in Civil Appeal No. 28 of 1957. It is, thus, clear, no appeal against any such decree passed on the basis of the consent of the parties is competent under section 108 read with section 96(3) of the Civil Procedure Code. That being so, it is unnecessary to go into the

merits of the case.

7. The appeal is dismissed. The appellants shall pay the costs of the respondent and bear their own.

8. Appeal dismissed.