

Date of hearing :- **13-08-2013**

Date of Judgment &
Order :- **13-08-2013**

JUDGMENT AND ORDER (ORAL)

Heard Mr. Michael Zothankhuma, learned senior counsel assisted by. Ms. D. Lalrinchhani appearing for the appellant. I have also heard Mr. A.K. Rokhum, learned Addl. Advocate General, Mizoram appearing on behalf of the respondents.

2. This is an application under Order XLVII, Rule I of the Code of Civil Procedure praying for review of the judgment and decree dated 2.08.2012 passed by this Court in RFA No. 31 of 2012 thereby allowing the appeal and setting aside the judgment and decree of the trial Court at the motion stage without issuing notice to the respondents.

3. The learned trial Court, by judgment and order/decreed dated 7.6.2012, decreed the suit of the plaintiff for a sum of Rs. 468/- lakhs alongwith interest @9% per annum with effect from the date of filing of the suit till realization. According to the plaintiff, there was an agreement on 16.09.2008 between him and the Government of Mizoram thereby appointing him as the sole selling agent of Online Lotteries. But during pendency of

the contract, the Government sought to abruptly remodel the contractual structure to the detriment of the plaintiff. Aggrieved, the plaintiff claimed compensation @Rs. 2.5 lakhs per day, of course, without making statement as to material fact as to how such an exorbitant amount of compensation could be claimed. The State/defendant contested the suit tooth and nail including on the question of maintainability. But the learned trial Court by the judgment and decree dated 7.06.2012 decreed the suit of the plaintiff. Aggrieved thereby, the State of Mizoram preferred an appeal before this Court pointing apparent legalities discernible from the judgment itself. True, the said judgment and decree may not be supported by cogent materials on record yet this Court at the stage of admission of the appeal allowed the same setting aside the judgment and decree of the trial Court and remanding the case for retrial. According to the learned Addl. Advocate General, Mizoram appearing for the respondents herein, the learned trial Court has already started retrying the case on the basis of the earlier order passed by this Court on 2.08.2012.

4. Challenging the said judgment and decree/order dated 2.08.2012 passed by this Court, the plaintiff as petitioner, has preferred this Review Petition alleging that the said judgment of this Court is vitiated by errors apparent on the face of record

inasmuch as the Code of Civil Procedure has not vested any jurisdiction on the First Appellate Court to allow any appeal without issuing notice to the respondent of the appeal. The learned senior counsel appearing for the petitioner has brought my attention to the provision of Rule 11 of Order XLI of the Code of Civil Procedure. The said provision is quoted below :-

“11. Power to dismiss appeal without sending notice to Lower Court.-

⁴[(1) The Appellate Court after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal.]

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

¹[(4) Where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment.]”

5. It would appear from a bare perusal of the said provision that it is open to the First Appellate Court to dismiss the appeal on the first day of hearing and for that purpose it is not obligatory on the First Appellate Court to offer any opportunity of

hearing to the respondent. Order XLI Rule 11 has kept two options to the First Appellate Court open on the first day of hearing, first, to dismiss the appeal without hearing the defendant and secondly, to admit the appeal for hearing and then to issue notice to the respondents under Rule 12 of Order XLI. Rule 12 of the said Order makes it obligatory on the part of the First Appellate Court to fix a date for hearing unless the appeal is dismissed under Rule 11. The provision is quoted below:-

“12. Day of hearing appeal.-

[1] Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

²[2] Such day shall be fixed with reference to the current business of the Court.]”

6. Subsequent Rules, namely, Rule 14 onward lay down the procedure as to how the appeal is to be decided once the same is admitted. Rule 14 of Order XLI requires the appellate Court to cause publication and service of notice of the date for hearing. Once appeal is posted for hearing then the appellant shall have the right to begin and only to be replied by the respondent. Even, independent of the provisions of Order XLI, the fundamental Principles of Judicial Procedure require that an opportunity of hearing should be given to the other side before

giving any decision against him. Howsoever, unhappy the impugned judgment of the trial Court may be, yet it is not open in the eye of law to set aside the said judgment without affording any opportunity of hearing to the winning party, plaintiff herein. Such a mistake in procedure is undoubtedly an error apparent on the face of record and as such, there is merit in the present Review application. This Review Petition is accordingly allowed. The order passed by this Court on 2.08.2012 in RFA No. 31 of 2012 is hereby set aside.

7. At this stage, Mr. A.K. Rokhum, learned Addl. Advocate General, Mizoram submits that once the review petition is allowed, the appeal is to be restored to its original position and it requires admission hearing. It is needless to say that allowing review petition does not result in automatic dismissal of the appeal.

8. Accordingly, let the main RFA be placed for admission hearing.

JUDGE

Sushil