

V. Haritha and anr. Vs. Kapil Chit Funds Private Limited and ors.

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Court : Andhra Pradesh

Decided On : Feb-03-2004

Reported in : 2004(2)ALD817; III(2004)BC430

Judge : T. Ch. Surya Rao, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13; [Limitation Act, 1963](#) - Sections 5

Appeal No. : CRP No. 5994 of 2003

Appellant : V. Haritha and anr.

Respondent : Kapil Chit Funds Private Limited and ors.

Advocate for Def. : Vinod Kumar Deshpande, Adv. for Respondent No. 1

Advocate for Pet/Ap. : V.V.N. Narayana Rao, Adv.

Disposition : Revision allowed

Judgement :

ORDER

T. Ch. Surya Rao, J.

1. The civil revision petition is directed against the order dated 3.11.2003 passed by the learned II Additional Senior Civil Judge, Warangal, in I.A. No. 604 of 2003 in

O.S. No. 860 of 2001.

2. The Defendants 1 and 10 in the said suit are the revision petitioners. The first respondent herein is the plaintiff and the Respondents 2 to 11 herein are the Defendants 2 to 9 and 11. The said suit was laid for recovery of an amount of Rs. 3,87,471.75 ps. It was resisted on the premise that the first defendant paid an amount of Rs. 1,32,000/- on 13.9.2001; Rs. 31,618/- on 12.1.2002; and Rs. 46,760/- on 19.4.2002 but the plaintiff did not deduct the same from out of the total amount; and that the first defendant was not liable to pay the amount as claimed in the plaint. During the course of trial one witness was examined on the side of the plaintiff in chief and the suit stood adjourned to 13.6.2003 for cross-examination of P.W.1. For the default on the part of the defendants on that day, an ex parte decree was passed. An application under Order 9, Rule 13 of the Code of Civil Procedure ('the Code' for brevity) was sought to be filed accompanied by an application in I.A. No. 604 of 2003 for condoning the delay of 10 days occasioned in filing the said application. The case of the petitioners/ defendants 1 and 10 was that the first defendant could not contact his Advocate on 13.6.2003 and instruct him to cross-examine P.W.1 and due to his absence on that day, the suit was decreed ex parte; and that his absence on that day was not wilful and he had good grounds to win the case. The plaintiff resisted the same on the premise that since the decree passed on 13.6.2003 was not an ex parte decree but on merits an appeal would lay and there had been no valid reasons to condone the delay.

3. The Court below refused to condone the delay of 10 days. As aforesaid, the defendants 1 and 10 are now assailing the said order.

4. The impugned order was passed in LA. No. 604 of 2003. The main petition accompanied it was filed under Order 9, Rule 13 of the Code. That was not registered in view of the delay in filing the said application. In ordinary course, that application would be in an inchoate stage till such time the petition annexed thereto seeking condonation of delay is allowed. If for any reason, the delay is condoned, having been satisfied with the sufficient cause, the application filed under Order 9, Rule 13 of the Code would be registered and eventually it would be heard and disposed of on merits. In the event, the delay is not condoned, as has

been done in the instant case, the main petition filed under Order 9, Rule 13 of the Code stands automatically rejected in consequence thereof. But, for all practical purposes, there will be two orders - one passed refusing to condone the delay and the other passed, although in consequence of the former order, rejecting the main application filed under Order 9, Rule 13 of the Code. No appeal is provided for as against the former order and hence a revision lies. However, a right of appeal is conferred qua the later order under Order 43, Rule 1 Clause (d) of the Code notwithstanding the fact that it is only a consequential order or an order having been passed on merits.

5. If the party were to pursue two remedies, one against the order refusing to condone delay and the other against the consequential order rejecting the petition filed under Order 9, Rule 13 of the Code invariably and if for any reason he omits to file the appeal the inevitable consequence would be that the order passed in the revision petition allowing it become infructuous. Is it necessary for the unsuccessful party; who failed to convince the Court that he had sufficient cause to condone the delay; to pursue invariably the two remedies is the moot question. The problem although appears to be simple but, in my considered view, would arise time, and again before the Subordinate Courts and, therefore, assumes every significance.

6. Having due regard to the significance attached to the point, Order 43, Rule 1 Clause (d) need be noticed at the outset and it reads as under:

'1. Appeals from Orders:

An appeal shall lie from the following orders under the provisions of Section 104, namely:

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte.'

7. A mere perusal of the said provision shows that an order rejecting the application is appealable in view of the fact that the decree passed in the suit is an appealable decree, regardless of the fact the said order is a consequential or an

order passed on merits. Nothing is discernible from the said provision for an effective adjudication of the ticklish problem. There remains, therefore, to be seen as to what would be the fate of the consequential order when the order refusing to condone the delay in consequence whereof the other order has been passed, is set aside. At that stage of passing the consequential order, nothing remains for the Court to consider except to reject the application in sequel to the order refusing to condone the delay. Obviously no adjudicatory process is involved in such cases and it is, only a mechanical order to be passed in consequence of the other order. If an adjudicatory process is involved and the application filed under Order 9, Rule 13 is decided independently, invariably such an order can be set aside only by pursuing the remedy as provided under the Code. In that view of the matter, the consequential order should go along with the order passed by the Court in the delay condonation petition and the aggrieved party cannot be compelled to file an appeal to get the consequential order set aside for the simple reason that there cannot be any separate reason than the one that had been considered by the revisional Court to be considered in the appeal when filed as against the order passed in the main petition filed under Order 9, Rule 13 of the Code, be it a consequential order or an order on merits. I am reinforced in my above view by a short noted judgment of this Court in *G. Visveswarudu v. State Bank of India*, 1985 (2) APLJ (NRC) 476. Having regard to the same, as discussed hereinabove, the party may not be driven invariably to pursue the remedy of filing an appeal only for the purpose of keeping that application alive. Inasmuch as no adjudicatory process is involved and the order passed being purely a consequential order without there being any application of mind by the Court, in my considered view such an order should go once the very order is set aside by the revisional Court. The above view of mine is buttressed by a judgment of the Privy Council in *Shama Purshad Roy Chowdery and Ors. v. Hurro Purshad Roy Chowdery and Anr.*, 10 Moo.Ind App. 203 (PC). The Privy Council held thus:

'.....appeal, therefore, were mere subordinate and dependent decrees, and their Lordships do not think that these decrees can be held to have remained in force when the decree on which they were dependent had been reversed.'

8. Following the said judgment, a learned Single Judge of this Court in *Rangaiah v. Peddireddi*, AIR 1957 AP 330, in para 9 held thus:

'It is a well-settled principle of law that certain orders and decrees which are subordinate and dependent upon earlier orders and decrees could only remain in force so long as the order or decree on which they were dependent are not reversed or superseded.'

That was a case where a suit on the foot of a mortgage was filed and the preliminary decree was obtained for foreclosure and a sum of Rs. 1,321.3 annas was directed to be paid on or before 31.7.1951. The respondent did not pay the money within the prescribed time but applied for extension of time. Even within the extended time, he did not pay the amount but applied for further extension. The learned District Munsif refused to extend the time and made a final decree for foreclosure. The respondent preferred an appeal against the order of the Court refusing to give further extension of time but he did not prefer any appeal against the final decree. The question arose before the High Court was as to whether the final decree made is dependent for its validity on the order refusing to extend time. It was answered thus:

'If the learned District Munsif did not refuse to extend the time he could not have made the final decree. If the order refusing to extend the time was set aside in appeal, the final decree could not obviously stand, for it was made on the basis of the order which was subsequently set aside. In this view, when the District Court set aside the order fusing to extend the time under Order 34, Rule 2, Civil P.C., the final decree, which has been made on the basis of the wrong order, being a dependent one, fell with it.'

9. In *Kantipudi Lalitha Lakshmi Manohar Saraswathi v. Kantipudi Ramakrishna*, 1981 (2) APLJ 412 (HC), a learned Single Judge of this Court relied upon the two judgments referred to above.

10. That was a case where a suit was filed on the foot of promissory note invoking the summary procedure under Order 37 of the Code. The defendant when sought the leave of the Court to contest the suit, it was granted on the condition of

depositing half of the suit costs. He filed another application to review the said order on the premise that the Court had no jurisdiction to impose terms when there had been a triable issue and inasmuch as he denied the execution of the promissory note. That application was dismissed. As against that order, the defendant carried the matter in revision. In the meanwhile, consequent upon the order passed refusing to review and as the defendant has not complied with the conditional order passed in the leave petition, the suit was decreed. Before this Court, the maintainability of the review petition was challenged on the ground that a decree had already been followed in the suit for the non-compliance of the conditional order passed by the Small Causes Court and, therefore, the revision petition had become infructuous. Repelling the said contention, it was held that the revision petition was maintainable. The Court further held that when the order revisioned against was set aside, the decree passed in the suit consequently could not survive.

11. In *Poornima Enterprises v. Nagarjuna Finance Limited*, 1997 (4) ALD 539, an identical question had arisen for adjudication. This Court while referring to its earlier judgment in *Lakshmi Manohar Saraswathi's case* (supra) had reiterated the same principle.

12. It is obvious from a conspectus of the above judgments that the orders or decrees which are passed consequent upon the earlier orders would remain in force so long as the former orders are in force and are not reversed or superseded. Once the former order is set aside, the consequential order or decree will not survive and will fall through.

13. In view of this clear position of law, if for any reason, in the instant case, this Court comes to a conclusion that there is sufficient cause to condone the delay and the application filed in regard thereto shall have to be allowed, the consequential rejection order passed in the other application filed under Order 9, Rule 13 of the Code will not survive and will stand automatically cancelled notwithstanding the fact that no appeal has been filed as against that order.

14. For the foregoing reasons, the revision petition can be maintained although the order rejecting the application filed under Order 9, Rule 13 of the Code has

become final having not been assailed.

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