

Ramayya Vs. Lakshmayya

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Court : Chennai

Decided On : Mar-02-1944

Reported in : AIR1944Mad383

Appellant : Ramayya

Respondent : Lakshmayya

Judgement :

Mockett, J.

1. In this appeal Mr. Satyanarayana Rao has raised a preliminary point that no appeal lies. The facts are as follows : The appellants were defendants 2 to 14 in three suits-O. S. Nos. 58, 82 and 83 of 1943. There is no appeal by defendant 1. Before suits, attachments before judgment of substantially all the debtors' properties were effected. On 21st March 1943, the defendants' vakil left hurriedly for Benares to be present with his son, who was stated to be sick with small-pox. On 22nd March, it is said that an oral request was made by defendant 3 for an adjournment. On 25th March, I.A. No. 528 of 1943 was filed-an application to adjourn the case to 5th April which was dismissed; and on that day, ex parte decrees were passed in the three suits. On 2nd April 1943, I.A. Nos. 568, 569 and 570 were filed praying to set aside the three ex parte decrees. On 5th July 1943, an order was passed and in the judgment, the learned Judge said:

On the whole, I should think that the suits should be restored and sufficient costs should be awarded to the respondents as a panacea as was done by his Lordship in the ease quoted above, Venkateswara v. Subramaniam A.I.R. 1939 Mad. 974. I therefore order the petitioner to pay Rs. 100 for costs of the respondents irrespective of the result in the suits within 15 days from this date. They shall also deposit costs of the suits as a condition precedent before the trial of the suits which are hereby restored to file and posted peremptorily to 26th July 1943. In default, the petitions will stand dismissed with costs.

The decretal order on that judgment was:

It is ordered that the petition be and the same is hereby allowed. It is further ordered that the petitioners do deposit into Court a sum of Rs. 100 towards their costs in this petition and also in I.A. Nos. 569, 570 and 625 to 627 of 1943 irrespective of the result of the suits and do also deposit the costs decreed on or before 26th July 1943. It is further ordered that in default of payment the petitions do stand dismissed with costs.' I.A. Nos. 625 to 627 of 1943 related to defendant 1 and we are not concerned with them in any way. There were certain further proceedings by the appellants with which we are not concerned. It is enough to say that they claim that they were quite unable to comply with the order of 5th July and had made attempts in the High Court to improve their position. An order for stay passed by the High Court reached the lower Court after the order of 26th July was passed. On 26th July, that is to say, some days after the expiration of 15 days from 5th July, and to which day the suits had been posted peremptorily by the learned Judge on 5th July 1943 the following order was passed: Defendants are called and they are absent. The plaintiffs are ready. The defendants have not deposited the amount ordered to be paid into Court by this date in I.A. Nos. 568 and 625 of 1943. As the direction given in the order on the said petitions is not obeyed, the order operates and the decrees passed already stand.' Mr. Satyanarayana Rao has argued that this is not within Order 43, Rule 1 (d). The appeals before us, he contends, are not against orders under Rule 13 or Rule 15 of Order 9, rejecting an application for an order to set aside a decree or order passed ex parte. He contends that an order of 5th July 1943 so far from being an order rejecting an application is an order allowing the application and he contends

that if the appellants desire to appeal at all, they should have appealed not against the order of 5th July, but against the order of 26th July, which was the order dismissing the application to set aside the ex parte decree. It has been contended by learned Counsel for the appellants that this argument is fallacious, that the order of 5th July was complete in itself and that the order of 26th July was not an order in relation to these applications, and did nothing more than recall what had happened with regard to the order of 5th July viz., that it had worked itself out and that, therefore, the decrees in the suit automatically were restored to life. His words were 'The decrees passed already stand.' There is no doubt that if it appears that in these applications to set aside ex parte decrees an order implies that a further order is required to dispose of the applications, it is that last order, if it rejects the application, which should be attacked in appeal.

2. The cases seem to us to be entirely clear. There are two decisions of the Madras High Court and one decision of a Full Bench of the Bombay High Court on the topic. The earliest case is of no great assistance. It is Venkatasami v. Shanmugham A.I.R. 1918 Mad. 257. The precise terms of the order passed in the lower Court are unfortunately not set out; but the learned Judges Oldfield and Bakewell JJ. held that 'the expression 'rejecting an application' under Order 43, Rule 1 (d) signifies an immediate rejection and not a conditional or prospective rejection.' They went on to lay down what they thought to be the appropriate procedure. In the absence of the exact terms of the order, that case is of little assistance. It must presumably have been in terms which required a second order. Madhavan Nair J. (as he then was) sitting alone in Rajagopalachari v. Narasimha : AIR1925 Mad1182 had to deal with this position. In that case, the order was that the ex parte decree will be set aside if in two weeks petitioner pays to plaintiff all costs of suit so far incurred unconditionally and further he puts the suit amount and interest decreed into Court in 14 days. If he does not pay, petition will stand dismissed with costs.' The learned Munsif noted that the petition was to be called for final disposal on 13th September 1923. The matter came before the Court again and an order was passed finally dismissing the application to set aside the ex parte decree. It is clear that the I. As. concerned in that case were treated as open and were expressly posted for further consideration; and it appears that when they were heard, there was some discussion as to the terms. Madhavan

Nair J., rightly observes that all the parties as well as the Court treated the prior order as a conditional one. The last order was 'money not put into Court. Application rejected.' The learned Judge held that it was this last order which should be made the subject of an appeal.

3. The order, however, before us seems to be all comprehensive. What happened is this: The petitioners had to do certain things, viz., deposit costs into Court. If they did not do so, their petition was to stand dismissed with costs. I think that that order is exactly the type of order which is passed on the original side of the Bombay High Court and to which reference is made by the Chief Justice when delivering the judgment in the Full Bench decision of five Judges in *Narayan v. Vaikunt* : AIR1927 Bom1 , who dealt with this very subject. The learned Chief Justice says at p. 75: 'My brothers Shah and Fawcett tell me that in the mofussil it is usual to make two orders: viz., (a) a preliminary conditional order like that of 30th May, and (b) a final order like that of 18th July. That indeed is the practice pointed out in *Jagarnath v. Kamta Prasad* A.I.R. 1914 All. 55. On the original side the usual order provides that if the applicant does not comply with the conditions therein stated, then his application is to be dismissed, and the original ex parte decree to stand. In other words, on the original side we usually have one order and not two as is the case here. But whichever course is adopted, in my opinion, it makes no difference in principle.' On 30th May 1925, the first order in that case was: 'Suit to be restored to file on the applicants or any of them furnishing adequate security for Rs. 3000 only within one month. Applicants to bear costs of this application,' and then followed on 18th July the following order : 'As security is not furnished in spite of ample opportunity given, the application fails and suit cannot be restored to file. Application is rejected with costs.' The learned Judges held that an appeal lay against the second order. It seems to us that, as already indicated, that the form of the order in this is what the learned Chief Justice described as the 'single order.' When 15 days had expired and the appellants had not complied with the terms imposed, automatically their petition was dismissed with costs and automatically the suits were restored to the file and were ready for hearing by the trial Judge.

4. To return for a moment to the judgment, that is 'exactly how the learned Judge appreciated the situation. He points out that the defendants are not there, that the plaintiffs are ready, that the defendants have not complied with the condition and that as the directions have not been obeyed, the order operates and the decrees passed already stand. It seems to be nothing more than the recording of the legal position, which had arisen from the non-fulfilment of a condition precedent by the appellants. We have perused the interlocutory applications and there was merely a reference to this judgment, which seems to be nothing more than an intimation to the clerical staff as to what had happened then. But, in my view, no further order was passed at all and the reason, as I have indicated, is that no further order was required. It must naturally be a matter of difficulty to construe such orders as this, whether they are final or whether they require a second order to complete them. I personally am glad to give a liberal construction to these matters and not by extreme technicality to shut out an appellant from being heard; for after all that is all that he asks for. It certainly seems to me that the order of 5th July concluded the matter and I do not suppose that either the Court or the parties had any other idea in their minds. I therefore hold that as the order of 5th July was the one and only order in this case and as an appeal has been filed against it, the preliminary objection must fail. I will now deal with the suit on the merits. This case is similar to another which has recently come before us for the grant of leave, where the rights to have a suit restored have been accompanied by conditions that would appear to be unreasonable, because they are impossible of achievement. The land of the defendants had been attached before judgment and they claim that by ordering the costs of the suit to be deposited as a condition precedent, which amount to a very large sum, they have been put on terms which they cannot possibly carry out. I therefore propose to substitute what I consider to be a reasonable order for the order which has been passed. The lower Court's order is set aside and instead the following order is passed: The appellants will pay to the respondents the sum of Rs. 425 altogether, which sum is made up of Rs. 100 in each of the suits and the costs of these appeals which have been estimated at Rs. 125. The amount will be paid within 14 days of today, 2nd March. If the amount is not paid within that time then without any further order being passed, this appeal will stand dismissed, with the result that the application to restore the suits will be taken to have been

dismissed and the decrees passed already will stand.

Bell, J.

5. I agree and would only add a word on the preliminary objection raised by the respondents. Where any further direction of the Court is required with regard to the matters in issue between the parties it cannot be said that finality in any shape or form has been reached. What more on 5th July 1943 was required from the Subordinate Judge's Court? If the last sentence of the decretal order be left out, clearly there would be something lacking, that is to say, a ruling as to the effect of any default on the part of the petitioners. But this the order provided for by saying : 'It is further ordered that in default of payment the petitions do stand dismissed with costs.' Nothing further was left to be said as to the final result of the petition. The petitions were not, in fact, considered on 26th July 1943. They were never even mentioned. The Subordinate Judge refers to his previous order with regard to the suits which had been posted for trial on that date. As the defendants were absent, the ex parte decree already made was declared to be revived and stood. *Rajagopalachari v. Narasimha* : AIR1925 Mad1182 , a decision of Madhavan Nair J. (as he then was), is distinguishable on several grounds amongst which is the fact that both parties throughout treated the matter as relating to two orders. The words of the order were in that case : 'the ex parte decree will be set aside if in two weeks petitioner pays If he does not pay, petition will stand dismissed with costs.' Then it was added that the petition was to be called for final disposal on a later date. There were thus a conditional order and a final order. In the present case, there was one order which was final on 5th July 1943.

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