

V. Parthasarathi Vs. Chinnappayan and ors.

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Court : Chennai

Decided On : Jun-18-1980

Reported in : (1981)1MLJ123

Appellant : V. Parthasarathi

Respondent : Chinnappayan and ors.

Judgement :

M.M. Ismail, C.J.

1. This is an appeal against the order of Venugopal, J., dated 22nd June, 1979, allowing A. A. O. No. 472 of 1978. The appellant herein was the plaintiff in O. S. No. 855 of 1972 on the file of the City Civil Court, Madras. An ex parte decree was passed against the respondents herein on 25th November, 1975. The respondents thereafter filed I. A. No. 27441 of 1975 to set aside the ex parte decree. On 13th July, 1976, the Court passed the following order;

Petition allowed on condition that the petitioners deposit Rs. 2,000 towards the cost of the suit on or before 27th July, 1976 failing which the petition shall stand dismissed. Call on 28th July, 1976.

Thereafter, on 7th December, 1976 the Court passed the following order:

Condition not complied with. Petition dismissed.

2. Against the order dated 7th December, 1976 the respondents filed the A.A.O. in question. One of the points urged before the learned Judge by the appellant herein was that the appeal was barred by limitation because the appeal should have been preferred against the order dated 13th July, 1976 and not against order dated 7th December, 1976 and if the period of limitation is calculated with reference to the order dated 13th July, 1976, the appeal was barred by limitation.

3. The learned Judge, however, held that it was only the order dated 7th December, 1976 that was the appealable order and not the order dated 13th July, 1976 and consequently the appeal was within time. On merits, the learned Judge found that a direction to deposit an amount of Rs. 2,000 Was too onerous and therefore while setting aside the order without expressing any opinion on merits, remitted the I. A. itself back to the trial Court for fresh consideration and enquiry. It is as against this order, the present appeal has been filed.

4. On the question of limitation, the learned Counsel for the appellant contends that there is a direct Bench decision of this Court holding that it is only the earlier order which is appealable and not the later order. Reliance was placed on a Bench decision of this Court in Chinatakayala Tamayya and twelve Ors. v. Mithinti Lakshmayya ILR (1945) Mad 203 : (1944) 1 MLJ 381 : 57 LW292 : AIR 1944 Mad 383. That was also a case where an ex parte decree was originally passed and subsequently an application was filed to set aside the ex parte decree. The following headnote brings out the point that came to be decided itself in that case:

On three applications to set aside three ex-parte decrees respectively the Court passed an order on 5th July, 1943 stating, inter alia.

The petitioners to pay Rs. 100 for costs of the respondents irrespective of the result in the suits within fifteen 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.

On 26th July, 1.943, the Court further ordered:

As the direction given in the order on the said petitions is not obeyed, the order operates and the decrees passed already stand.'

Held; The order of 5th July, 1943, was final and appealable. The further order of 26th July, 1943 merely recorded the legal position which had arisen from the non-fulfilment of the condition precedent by the petitioners.

Having regard to the terms of the orders in the two cases, we are of the opinion that the said Bench decision will not apply to the facts of the present case.

5. The order passed on 5th July, 1943, in the said Bench decision had set aside the decree and had restored the suit to the file and also posted the suit peremptorily for disposal to a future date, namely, 26th July, 1943. The use of the expression 'before the trial of the suits which are hereby restored to file' occurring in the order dated 5th July, 1943, makes it absolutely and abundantly clear that it is the order dated 5th July, 1943, which was the final and appealable order and not any other order which was passed subsequently. Further, the order of 26th July, 1943, merely recorded the legal consequence of the non-implementation of the conditions imposed by the earlier order and the learned Judges were very careful in not even stating that the petitions were dismissed. Consequently, the facts of that Bench decision have no bearing on the present case.

6. The learned Counsel for the appellant then brought to our notice another judgment of this Court in *Balarama Reddi v. Subbarama Reddi and Anr.* : AIR1953 Mad360 . That was a judgment of Mack, J., who followed the Bench decision referred to above. Here again, the facts as stated in the judgment itself are as follows:

This (the suit) was decreed ex parte on 9th January, 1948. He (the defendant) filed an application to set aside the decree on 23rd January, 1948. On this an order was passed on 19th January, 1949, directing the decree to be set aside on certain conditions, that Rs. 25/- was to be paid by 7th February, 1949, and in default, the application was to be dismissed. The petition was called on 8th February, 1949 and the Court passed a further order 'costs not paid, dismissed'.

Here again, the facts of that case will not apply to the facts of the present case. In the present case, as we pointed out already, there is an additional direction in the order dated 13th July, 1976 to call the petition on 28th July, 1976. This very direction clearly shows that the Court deliberately and consciously kept the petition on file without finally disposing it of. For instance, in the present case, if on 26th July, 1976 or on 27th July, 1976 had the respondents, filed an application for extension of time for the deposit of the amount, certainly the Court had the power to extend the time. On the other hand, if we read the order dated 13th July, 1976 as the final order ultimately disposing of the I.A. itself, the Court would have no such power. We are not resting our conclusion on the ground that the Court should always reserve such a power. However, on the terms of the order dated 13th July, 1976 which uses the expression 'call on 28th July, 1976', we are of the opinion that the Court had not finally disposed of the petition. If the petition had been finally disposed of on 13th July, 1976, itself, the Court would not have passed an order on 7th December, 1976 dismissing the petition. If the order dated 13th July, 1976 is construed to be a final order on the application, it will mean one or the other of the following two things. One is that the application was allowed on 13th July, 1976 itself in which event the respondents herein cannot be said to be aggrieved by the order except to the extent of the condition imposed, enabling them to prefer an appeal. If the application was allowed on 13th July, 1976 itself the same application cannot be subsequently dismissed on 7th December, 1976. The other is that the application was dismissed on 13th July, 1976 itself or automatically got itself dismissed on 27th July, 1976 when the respondents did not pay the amount and in that case, there could not have been a subsequent dismissal of the very same application. If it is so construed, it will mean that the application was dismissed twice by the Court, once on 13th July, 1976 and again on 7th December, 1976, and certainly such a result could not have been contemplated or countenanced. Therefore, we are clearly of the opinion that the final order passed in the present case was the order that was passed on 7th December, 1976 which alone was the appealable order and therefore the appeal to this Court was in time.

7. As far as the opinion of the learned Judge that the direction to pay the sum of Rs. 2,000/ was too onerous is concerned, we do not see any justification to take a

different view particularly in view of the fact that the learned Judge has remitted the entire application back to the trial Court for fresh consideration and enquiry which will necessarily involve that every question which regard to the I. A. on merits will have to be gone into by the trial Court. In view of this, the appeal fails and the same is dismissed.

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