

D. Peter Francis Vs. P.S.B. Educational Trust Rep. by Its Managing Trustee, Mr. S. Pethaiah and the Director, All India Council for Technical Education, Southern Region

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Court : Chennai

Decided On : Nov-06-2008

Reported in : (2009)2MLJ671

Judge : D. Murugesan and ;V. Periya Karuppiyah, JJ.

Acts : Code of Civil Procedure (CPC) - Order 4, Rule 8 - Order 7, Rules 1 and 2 - Order 38, Rules 5, 6, 9 and 11; Original Side Rules - Order 9, Rules 8 and 9

Appeal No. : Original Side Appeal Nos. 128 and 245 of 2008 and M.P. No. 1 of 2008 in O.S.A. No. 245 of 2008

Appellant : D. Peter Francis;p.S.B. Educational Trust Rep. by Its Managing Trustee, Mr. S. Pethaiah

Respondent : P.S.B. Educational Trust Rep. by Its Managing Trustee, Mr. S. Pethaiah and the Director, All India C

Advocate for Def. : Party-in-Person for 1st Respondent in O.S.A. No. 245 of 2008 and ;Narottam Jain and ;N. Gyanchand Jain, Adv. for 1st Respondent in O.S.A. No. 128 of 2008

Advocate for Pet/Ap. : Party-in-Person in O.S.A. No. 128 of 2008 and ;Narottam Jain and ;N. Gyanchand Jain, Adv. in O.S.A. No. 245 of 2008

Disposition : Appeal allowed

Judgement :

D. Murugesan, J.

1. In O.S.A. No. 128 of 2008, the question placed before this Court is as to whether the Court would be justified while restoring a suit which was dismissed for default to revive the order of restoration of the applications which were filed, pending the suit.

2. In O.S.A. No. 245 of 2008 the issue that arises is as to whether a suit filed in the capacity of Power of Attorney and dismissed for non-prosecution could be restored at the instance of an individual.

3. Both the appeals arise out of common order of the learned Judge made in the Application No. 4494 of 2007 in C.S. No. 804 of 1998 dated 19.12.2007.

4. For disposal of both appeals, the following facts are necessarily be stated:

(i) An agreement of sale was executed at Chennai on 31.01.1997 between Sri D. Peter Francis (Appellant in O.S.A. No. 128 of 2008) and P.S.B. Educational Trust, Represented by its Managing Trustee Sri. S. Pethaiah (Appellant in O.S.A. No. 245 of 2008). For the convenience Mr.D. Peter Francis is referred to as the 'petitioner' and the P.S.B. Educational Trust is referred to as 'respondent' in this appeal.

(ii) The petitioner filed a suit in C.S. No. 804 of 1998 against the respondent and the Director, All India Council for Technical Education, Southern Region, Chennai 6, under Order VII Rule 1 & 2 of C.P.C. r/w O.S. Rules for a Judgement and Decree (1) directing the respondent to pay a sum of Rs. 19,38,000/- being made up of Rs. 17 lakhs towards principle and Rs. 2,38,000/- towards interest till 30.9.1998; (2) directing the respondent to pay interest at 24% p.a. on Rs. 17 lakhs

from 1.10.1998 till decree and realisation; (3) directing the respondent by an Order of interim injunction restraining him in any manner utilising the sold and unsold properties, which is the subject matter of the agreement dated 31.1.1997 till the entire amount due to the petitioner is paid and for payment of costs.

(iii) Pending the suit, the petitioner filed O.A. No. 677 of 1998 seeking for an order of Interim Injunction restraining the respondents from in any manner proceeding with the construction of the properties excluding an extent of 13.60 acres of properties lying at No. 46, Thaiyyur Village, Thiruporur Panchayat Union, Chengalpattu Taluk, Kanchipuram District. That application was ordered and as no counter affidavit was filed, the interim order was extended by subsequent order dated 20.7.2009 with a further direction to call the application along with the suit. The petitioner thereafter filed another Application No. 1990 of 2001 for a direction to the respondent to deposit a sum of Rs. 30 lakhs to the credit of the suit to be invested in any Nationalised Bank and the said application was ordered, after hearing both the petitioner and respondent on 18.12.2001. In fact a Memo was also filed on behalf of the respondent stating that he has no objection for the petitioner to take possession of the unsold land. While that being so, the suit was called and the same was dismissed for non-appearance on 06.06.2007. Hence, the petitioner filed an Application No. 4494 of 2007 under Order IV, Rule 8 C.P.C. read with Order 9, Rule 9 of O.S. Rules for restoration of the suit, which was dismissed for non-appearance. By Order dated 19.12.2007 the learned Judge while allowing the application restored the suit, but did not incline to order restoration of the applications.

(iv) Under these circumstances, the petitioner aggrieved by the Order of the learned Judge in not restoring the applications while the suit itself is restored, has come up before this Court by way of an appeal in O.S.A. No. 128 of 2008. Simultaneously, the respondent aggrieved by the very same order of the learned Judge in restoring the suit, has filed the appeal in O.S.A. No. 245 of 2008.

5. We have heard the learned Counsel appearing for Mr. D. Peter Francis, Party-in-Person/petitioner and Mr. Narottam Jain, learned Counsel appearing for the respondent.

6. Let us first take of the issue concerning O.S.A. No. 245 of 2008. The contention of the learned Counsel appearing for the appellant in the said appeal viz., the respondent is that when the agreement of sale between the petitioner and the respondent was made, the petitioner was shown as only a Power of Attorney of one Smt. Fatima Jaya Mary, Sri Azeez Gani, Sri Abdul Azeez, Sri Arumugam and Sri Elumalai and others. When the suit was filed, though the cause title refers to the individual names of the petitioner, the contents of the plaint would go to show that the suit is filed by the petitioner in the capacity of Power Agent. Therefore, the suit was dismissed for non-appearance, the application to restore the suit should have been made only in the name of the Power Agent. This being a vital issue to be decided while entertaining the application, the learned Judge failed to consider the said aspect and has erroneously ordered the restoration of the suit which was dismissed for non appearance.

7. We have carefully considered the above submissions. The Agreement of Sale dated 31.01.1997 was made in the individual capacity of the petitioner and the body of the agreement it is stated that vendor is the General Power Agent of certain named individuals. The Suit plaint was entertained, numbered and as already stated, some interim orders were also granted. The suit itself is dismissed for non-prosecution, and the application came to filed by the very same plaintiff in his individual name. The cause title in the suit as well as in the application to restore the suit are one and the same and there is no difference. Whether the suit is filed in individual capacity or representing through Power Agent is not a matter to be decided in an application filed for restoration of suit which was dismissed for non-prosecution, as in our considered view it is a matter to be adjudicated in the suit after necessary issues are framed and parties are given opportunities to put forth their case.

8. In view of the above, we are not inclined to accept the contention of the learned Counsel for the appellant in O.S.A. No. 245 of 2008 that the application which was filed in the individual capacity and not representing through Power Agent ought to have been rejected. We find no infirmity in the order of the learned Judge in entertaining the application of the petitioner and ordered for the restoration of suit. Accordingly, O.S.A. No. 245 of 2008 is dismissed. Connected M.P. is also

dismissed.

9. Let us now consider the issue raised in O.S.A. No. 128 of 2008. Mr. D. Peter Francis, Party-in-person would submit that the learned Judge has erred in directing that the applications which were filed and were pending the time when the suit was dismissed for non-prosecution should not be restored. He would in fact submit that pending a suit, an application was filed in O.A. No. 677 of 1998 and the said application was ordered only after hearing both sides on 04.11.1998. Hence, the learned Judge has erred in dismissing the said application also on the ground that the said application is pending and interim orders alone were granted.

10. Similarly, he would draw our attention to an order in Contempt Petition No. 64 of 2005 dated 18.12.2001 directing the parties to appear. The said contempt petition is still pending. On an earlier occasion, the petitioner had approached this Court by way of Contempt Petition No. 941 of 2003 and this Court by final order dated 04.01.2007, directed the respondents to implement the order in terms of the report of the Tahsildar dated 23.02.2007. Hence, these orders cannot be affected while the suit was restored to file.

11. On the other hand, Mr. Narottam Jain, leaned Counsel for respondent would submit that when an application is taken up for restoration of the suit which was dismissed for non-appearance, unless the petitioner files an application specifically seeking a direction to restore all the pending applications, the Court is not bound order restoration of those applications and therefore, the order of the learned Judge in not restoring the applications cannot be interfered with.

12. The issue as to how the applications which were filed and pending at the time when the suit was dismissed for default should be dealt with when the suit is restored again, came up for consideration before the Apex Court in : AIR 2004 SC3992 [Vareed Jacob v. Sosamma Geevarghese and Ors.]. In paragraph 17, the Apex Court has held that if the suit is dismissed for default without any reference to the ancillary orders passed earlier, then the interim orders shall revive as and when the suit is restored. In view of the above judgement of the Apex Court, there is no difficulty to hold that when the suit is dismissed for default without any reference to the ancillary orders passed earlier, the interim orders shall revive as

and when the suit is restored. In : [1971]2SCR405 [Prakash Chand Agarwal and Ors. v. Hindustan Steel Ltd.) where the suit decreed in the absence of defendant and the application filed by the defendant to set aside the decree was rejected, the Apex Court has held that the suit was very much alive and it could not be treated as a final adjournment of the suit itself.

13. In case, when the suit is dismissed for default and when the applications were directed to be closed what would be the legal position? What is the meaning of the word 'closed' came for consideration before the Apex Court in the Judgment reported in : [1964]6SCR251 [Pentapati China Venkanna and Ors. v. Pentapati Bangararaju and Ors.]. In paragraph 6 of the Judgment the Apex Court has observed as follows:

It is true that the courts have condemned the practice of executing courts using expressions like 'closed', 'closed for statistical purposes', 'struck off', 'recorded' etc., and they also pointed out that there was no provision in the Code of Civil Procedure for making such orders; but assuming that the Court has no such power, the passing of such an order cannot tantamount to an order of dismissal, for the intention of the court in making an order 'closed' for statistical purposes is manifest. It is intended not to finally dispose of the application, but to keep it pending. Whether the order was without jurisdiction or whether it was valid, the legal position would be the same; in one case it would be ignored and in the other, it would mean what it stated. In either case the execution petition would be pending on the file of the Court. That apart, it is not the phraseology used by the executing Court that really matters, but it is really the substance of the order that is material. Whatever terminology may be used, it is for the court to ascertain, having regard to the circumstances under which the said order was made whether the court intended to finally terminate the execution proceedings. If it did not intend to do so, it must be held that the execution proceedings were pending on the file of the Court.

In the said Judgement the Apex Court referred the Judgements of this Court reported in AIR 1946 Mad 170 [V. Damodara Rao v. Official Receiver, Kistna] and : AIR1952 Mad51 [Moideen Kutty v. Doraiswami].

14. A similar question came up before a Single Judge of this Court in the Judgment reported in 1983 (96) L.W. 6 [Muthu Pukhraj Ratanjee v. Ganesh Mull Adaji] and it has been held that the closure would not mean the dismissal of the application. The said order of the single Judge has been followed in the Judgment of this Court in 2002 1 CTC 80 [T.S. Ramachandran Marthandan v. R. Basheeruddin]. Keeping the above law in mind the facts of the present case has to be considered.

15. An argument was advanced by the learned Counsel appearing for the respondent with reference to Order XXXVIII Rule 9 and 11 of C.P.C. which reads as under:

9. Removal of attachment when security furnished or suit dismissed

Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the cost of the attachment, or when the suit is dismissed.

11A. Provisions applicable to attachment

(1) The provisions of this Code applicable to an attachment made in execution of a decree shall so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of Rule 11.

(2) An attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored.]

11B. Order of attachment to be communicated to the Registering Officer

Any Order of attachment passed under Rule 5 or 6 of this Order raising the attachment passed under Rule 9 of this order shall be communicated to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such order, is situate.

Placing reliance on the said provision, the learned Counsel would rely upon the Judgment of this Court, reported in AIR 1935 Mad 365 [Tavvala Veeraswami v.

Pulim Ramanna and Ors.] He would submit that by virtue of said provision unless there is specific applications are made the order raising of attachment passed under Order IX Rule 9 the said order shall not revive. We are not inclined to accept the said submissions as the issue raised in the appeal falls squarely under Order 9 Rule 9 which reads as under:

9. Decree against plaintiff by default bars fresh suit

(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit. and shall appoint a day for proceeding with suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

16. By order dated 06.06.2007, this Court while dismissing the suit for default has also ordered the closure of O.A. No. 677 of 1998 and Appln. No. 398 and 399 of 2006. In fact, Appln. No. 677 of 1996 was ordered after hearing both the Counsel on 04.11.1998 and the Appln. Nos. 398 and 399 of 2006 were pending, when the suit was dismissed for default. As closure of the applications were not result in dismissal of the applications, when the suit itself is restored to file, those applications are also restored even in the absence of any specific directions. We may also refer that Appln. No. 677 of 1996 was ordered on 04.11.1998 after hearing the respective Counsel on both sides. The petitioner had taken out another application in Appln. No. 1990 of 2001 seeking direction to the respondent to deposit a sum of Rs. 30,00,000/- and the same was pending. Similarly, when the order of this Court was allegedly disobeyed, the petitioner filed Contempt Petition No. 941 of 2003 which was ordered on 04.01.2007 with a direction to implement the report of the Tahsildar dated 23.02.2007 and the said order was also made after hearing both the Counsel appeared for the respective party. Yet another petition filed by the petitioner in Contempt Petition No. 64 of 2005, is also

pending.

17. In these circumstances, a question that would arise for consideration is whether the directions of the learned single Judge would be made applicable to the earlier final orders passed by this Court. In the given case application in O.A. No. 677 of 1998 and Appln. Nos. 398 and 399 of 2006 were only closed when the suit was dismissed for default on 06.06.2007. As closure of the applications would not ipso facto result in dismissal of the application, when the suit itself is subsequently restored to file and all the applications which were pending at the time of dismissal of the suit for non prosecution, should be deemed to be restored to file. The contention of the learned Counsel appearing for the respondent is that unless the applications were filed seeking for restoration of those applications, mere restoration of the suit would by itself result in restoration of applications as well. We are not in agreement with the above said contention, in view of the judgement of the Apex Court in *Pentapati China Venkanna and Ors. v. Pentapati Bangararaju and Ors.* .

18. Hence, the appeal in O.S.A. No. 128 of 2008 is allowed and all the pending applications are restored to file along with the suit for further hearing. It is also made clear that the final orders passed on the earlier proceedings will not be affected by effecting of the dismissal of the suit for non prosecution.