

Mathai Vs. Thressiamma

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Court : Kerala

Decided On : Dec-01-2009

Reported in : 2010(1)KLT37

Judge : P.R. Raman and; P.R. Ramachandra Menon, JJ.

Acts : Kerala Court Fees and Suits Valuation Act - Sections 22, 41 and 66(1);
;Arbitration Act - Section 39(1); ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section
561 - Order 41, Rules 1, 22 and 22(4)

Appeal No. : C.O. No. 24 of 2009 in R.F.A. No. 868 of 2008

Appellant : Mathai

Respondent : Thressiamma

Advocate for Def. : S. Shanavas Khan, Adv.

Advocate for Pet/Ap. : S. Subhash Chand, Adv.

Disposition : Appeal dismissed

Judgement :

ORDER

P.R. Raman, J.

1. The cross appellant is the plaintiff in the suit, and the respondent herein is the defendant. The suit was one for breach of contract and damages, which was decreed with cost, and the counter claim filed by the defendant was also dismissed. The plaintiff was allowed to realise a sum of Rs. 8 lakhs with interest at the rate of 9% per annum, from the date of the suit till the date of decree, and thereafter, at the rate of 6% till its realisation. The advance amount paid by the defendant was held as forfeitable, and so the counter claim was dismissed.

2. After paying one-third of the court fee, as contemplated under Section 22 of the Kerala Court Fees and Suits Valuation Act, (hereinafter referred to as 'the Court Fees Act' for short), defendant preferred an appeal, R.F.A. No. 868 of 2008. The appeal was admitted on 19.12.2008. Notice was sent on 6.1.2009 with hearing date on 27.1.2009. The respondent-plaintiff, on being served with the notice, filed Cross Objection No. 24 of 2009. While the matter was pending before this Court, attempts were made to settle the claim through mediators, which however failed. Though the appeal was admitted as early as in December, 2008, the appellant did not pay the balance court fee, despite time being granted (enabling him to pay such court fee, with a petition to condone the delay of paying the court fee, if remitted). Consequently, the appeal was rejected for non-payment of the balance court fee, by our Order, dated 7.8.2009. The court fee already paid was ordered to be refunded, as provided under Section 66(1) of the Court Fees Act.

3. In the meanwhile, cross objection was admitted on 10.7.2009 and directed the cross appellant to serve a copy of the cross appeal to the respondent. As may be noticed, it was after admitting the cross appeal that the appeal happened to be rejected for nonpayment of the balance court fee. However, at the time when the appeal was rejected, the pendency of the cross appeal was not noticed, and hence it was separately posted.

4. The first question that arise for consideration is as to whether in the factual background, as stated above, the cross appeal is still maintainable or survive for consideration on merit.

5. The learned Counsel, Sri. Subash Chand, appearing for the cross appellant, fairly placed decisions on the point, both for and against. We have perused the

said judgments. He also prayed that the court fee paid on the cross appeal be ordered to be refunded, if the cross appeal is liable to be rejected.

6. Now we will consider the question as to whether the cross appeal is still maintainable or survive for consideration on merit. The relevant provision is Order XLI Rule 22(4) of Code of Civil Procedure, as per which, where in any case in which any respondent has under this rule filed a memorandum of objection and the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

7. From a plain reading of the provision, it can be seen that if the original appeal is withdrawn or dismissed for default, that will not affect the fate of the cross appeal and such cross appeal has to be heard and determined, despite the appeal being withdrawn or dismissed for default.

8. The word 'default' occurring in Order XLI Rule 22(4) of C.P.C. has been the subject matter of interpretation by different Courts.

9. In *Kashiram Senu Chaudhuri v. Ranglal Motilalshet Marwadi* AIR 1942 Bom. 242, a Division Bench of Bombay High Court held that where a memorandum of appeal is rejected for non-payment of court fee, the appeal cannot be said to be withdrawn or dismissed for default under Order XLI Rule 22(4), and therefore, the cross objection must fail with the appeal.

10. A different view was taken by a learned Single Judge of Madras High Court, in *Ayilu Beddi v. Venkata Reddi and Ors.* AIR 1931 Mad. 133, which held that, the word 'default' in the rule includes any default made by the appellant which would amount to non-prosecution of the appeal, viz., non-paying of deficit court fee.

11. In *Ramji and Ors. v. Rambhusan Das and Ors.* : AIR 1960 Pat. 242, it was held that where before the admission of the appeal, the memorandum of appeal is rejected for non payment of deficit Court fee in time, it cannot be said that the steps taken till then are steps taken in connection with or relating to dismissal of the appeal. Therefore, when the memorandum of appeal has thus been rejected,

there is no appellant and no respondent and as such, there is no occasion for filing any cross objection. Hence, a cross objection filed in such a case is liable to be rejected.

12. *Karora Singh v. Kartar Singh* AIR 1951 Simla 170, was a case where the appeal was presented after the period of limitation and the affidavit filed in support thereof was considered and delay was not condoned. Consequently, the appeal was also dismissed. The question that was considered was, in such circumstances, whether the cross appeal is maintainable. The Court held that, it is settled law that appeal must be properly presented before the Court in order that cross objection may be heard. The Court also referred to the decision of the Allahabad Court in *Bamjiwan Mal v. Chand Mal* 10 All. 587 wherein it was held as follows:

I take the effect of these various cases to be that entertainment of objections such as Section 561, Civil P.C., contemplates, is contingent and dependant upon the hearing of the appeal in which such objections are raised, and that when the appeal itself fails or is rejected or dismissed without being disposed of upon the merits, the objections follow its fate and cannot be entertained either.

As the appeal in question was admittedly barred by time, neither the appeal nor the cross objection were proper before the Court, and accordingly, the court rejected the appeal and the cross appeal.

13. In *Sonibai and Anr. v. Bhavarsingh* : AIR 1963 M.P. 161, it was held that the word 'Default' in Order 41 Rule 22(4) includes default either of appearance or in doing something which would be necessary for enabling the Court to hear the appeal. Order 41 Rule 22(4) casts a duty upon the Appellate Court to hear the cross objection to the decree appealed against, when the appeal itself is dismissed for the appellant's default in paying paper book charges. Therefore, the dismissal of the appeal for payment of paper book charges was held as default, inviting the provision to apply. Accordingly, the cross objection was liable to be heard on merits.

14. *Ram Sewak v. Subhash Chandra Misra* : AIR 1996 All. 257 was a case of specific performance which was declined by the trial court, but a decree for refund of the earnest money was passed against the defendant. He filed an appeal and plaintiff also filed a cross objection claiming specific performance. The appeal by defendant had been filed within limitation and was maintainable according to law and necessary court fee was paid. But in spite of extension of time granted repeatedly for depositing the decretal amount and even after expiry of that period, the appellant did not deposit the decretal amount and consequently the appeal was dismissed. The cross objection, in such circumstances, was held cannot be rejected, on the ground that the appeal has been dismissed and that the cross objection needs to be heard on merits.

15. In *Municipal Corporation of Delhi and Ors. v. Intl. Security and Intelligence Agency Ltd.* : AIR 2003 SC 1515, it was held that cross objection can be preferred if applicant could have sought for same relief by filing appeal in conformity with provisions of Section 39(1) of Arbitration Act. Turning to Order XLI Rule 22 of C.P.C., it was held that the right to take a cross objection is the exercise of substantive right of appeal conferred by a statute. Available grounds of challenge against the judgment, decree or order impugned remained the same, whether it is an appeal or a cross objection. The difference lies in the form and manner of exercising the right; the terminus a quo (the starting point) of limitation also differs. The form of cross objection is procedural and is only a manner of exercising right of appeal which is substantive. In that case, however, the appeal was held as incompetent. The question was, in such circumstances, the cross objection would be maintained. It was held that if the Appellate Court forms an opinion that the original appeal itself was not maintainable and it was filed against Clauses (i) to (vi) of Section 39(1) of the Arbitration Act, the cross objection shall also fail on that ground and cannot be adjudicated on merits.

16. In *Hari Shankar Rastogi v. Sham Mahohar and Ors.* : 2005 (2) KLT 342 (SC) : (2005) 3 SCC 761, the Apex Court held that when the appeal is withdrawn, since cross objections are like an appeal, it can still be heard and determined. For that, the Apex Court formulated the following principles emanating from Order XLI Rule 22 which reads as follows:

4. The question whether the cross-objection are maintainable, even when the appeal has been withdrawn was considered by this Court in *Superintending Engineer v. B. Subba Reddy*. After considering various judgments, it was held as follows: (SCC pp.433-34, para 23)

23. From the examination of these judgments and the provisions of Section 41 of the Court Fees Act and Order XLI Rule 22 of the Code, in our view, the following principles emerge:

(1) Appeal is a substantive right. It is a creation of the statute. Right to appeal does not exist unless it is specifically conferred.

(2) Cross-objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of memorandum and the provisions of Rule 1 of Order XLI of the Code, so far as these relate to the form and contents of the memorandum of appeal apply to cross-objection as well.

(3) Court fee is payable on cross-objection like that on the memorandum of appeal. Provisions relating to appeals by an indigent person also apply to cross - objection.

(4) Even where the appeal is withdrawn or is dismissed for default, cross-objection may nevertheless be heard and determined.

(5) The respondent even though he has not appealed may support the decree on any other ground but if he wants to modify it, he has to file cross-objection to the decree which objections he could have taken earlier by filing an appeal. Time for filing objection which is in the nature of appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time could also be extended by the court like in appeal.

(6) Cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give a quietus to the whole litigation by his accepting the judgment and decree or order even if it was partly against his interest. When, however, the other party challenged the same by filing an appeal the statute gave the respondent a second chance to file an appeal by way of cross-objection if he

still felt aggrieved by the judgment and decree or order.

It was also held that cross-objection is like an appeal and it has all the trappings of an appeal. Even if the appeal is withdrawn or is dismissed, cross-objection can still be heard and determined.

17. In *Nanoo Gopinathan v. Neelakantan Balakrishnan* : 1989 (2) KLT 930 : AIR 1990 Ker. 197, a learned Single Judge of this Court held that where an appeal is dismissed for default or withdrawn, the fate of the cross objection is not sealed thereby.

18. It is true that the right to file a cross objection is conferred on the respondent from the moment he receives notice on the appeal, and the period of limitation starts from the period he receives notice. The cross appeal is just like an appeal and have all the trappings of the appeal. But the Legislature, in its wisdom, thought fit to incorporate a specific provision as contained in Order XLI Rule 22(4) of C.P.C., saving the cross appeals meeting with the same fate of an appeal, only on two eventualities, viz., when the appeal is withdrawn or dismissed for default. No doubt, if the appeal is to be dismissed on merits, it will not affect the fate of the cross appeal. Therefore, when the appeal is decided otherwise than on merits, two contingencies on which still the cross appeal has to be heard and determined on merits, are those specifically mentioned in Order XLI Rule 22(4) of C.P.C., viz., when the appeal is withdrawn or dismissed for default.

19. The default can occur in several ways, either when the appellant fails to comply with the order of the Court or fails to prosecute the appeal by paying proper process and to complete service of notice or when the appellant fails to turn up, when the appeal is taken up for hearing etc. But in the case of deficiency of court fee, it is actually not dismissed for default, but only rejected. The court fee paid on such appeal is liable to be refunded as per Section 66(1) of the Court Fees Act. But when the appeal is rejected for non payment of court fee, no doubt it bars a fresh appeal. Therefore, when the Legislature has thought it fit to prescribe the twin conditions and reasons upon which the cross appeal has to be heard on merits, viz., when the appeal is 'withdrawn' or 'dismissed for default', the Court cannot enlarge and give an extended meaning to the word 'default', so as to merit

consideration of the cross objection. In other words, if the contingency made mention of in Order XLI Rule 22(4) is not attracted and if the appeal is not decided on merits, necessarily, it will have to face with the same fate as the original appeal. We are in respectful agreement with the view expressed by the Bombay and Patna High Courts in *Kashiram Senu Chaudhuri v. Ranglal Motilalshet Marwadi* AIR 1942 Bom. 242 and *Ramji and Ors. v. Rambhusan Das and Ors.* : AIR 1960 Pat. 242 respectively. Even though in this case, cross appeal was admitted, actually in the view we are taking, the question of admission of a cross appeal really can be Considered only after entire court fee is paid on the appeal memorandum.

Therefore, we suo motu review the order admitting the cross appeal as consented to by both sides. Since, we have already rejected the appeal for non payment of court fee, the cross appeal is also rejected. The entire court fee paid on the cross objection shall be refunded.

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