
(2004) 12 AP CK 0102

In the Andhra Pradesh High Court

Case No : Civil Miscellaneous Appeal No. 1787 of 1998

Kommineni Thirupathamma

APPELLANT

Vs

Koritala Veeraiah and Others

RESPONDENT

Date of Decision : 14-12-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 14, Order 41 Rule 19, Order 41 Rule 21, Order 9 Rule 13

Citation : (2005) 2 ALD 425 : (2005) 2 ALT 783

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : G. Jhansi, for the Appellant; G. Pedda Babu, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—The appellant herein filed a suit being O.S.No.41 of 1990 on the file of the Court of the District Munsiff, Parchur in Prakasam District for permanent injunction. The suit was decreed. The defendants filed an appeal before the Court of the Subordinate Judge, Chirala, which was subsequently transferred to the Court of the Subordinate Judge, Parchur. The said appeal being A.S.No.16 of 1995 was allowed ex parte on 10.3.1997. Having come to know this, the appellant herein filed I.A.No.796 of 1997 under Order IX Rule 13 of the Code of Civil Procedure, 1908 (CPC), to set aside the ex parte orders of the appellate Court dated 10.3.1997. The learned appellate Judge rejected the said application. Aggrieved by the same, the present Civil Miscellaneous Appeal is preferred.

2. Learned Counsel for the appellant, Ms.G.Jhansi, submits that in the affidavit filed accompanying the interlocutory application, the appellant has shown sufficient cause for not being able to prosecute the appeal, that the appellant was not negligent in pursuing the matter and that during the relevant time the appellant along with his son had been to Karnataka for taking up agriculture and, therefore, the lower appellate Court ought to have allowed the application.

Secondly, she would contend that even if the order was passed by the appellate Court on 10.3.1997 after hearing the defendants, who filed the said appeal, still the appellate Court cannot reject an application by the respondents in the appeal to recall the order and re-hear the appeal. Lastly, she would contend that the learned Counsel engaged by the appellant reported no instructions on 05.3.1997 in such an event, a duty was cast on the lower appellate Court to issue notice to the parties.

3. Per Contra, learned Counsel for the respondents (defendants in the suit), Sri G.Pedda Babu, submits that when once the order was passed by the lower appellate Court on merits, Order XLI Rule 17 (2) CPC is not applicable. Unless and until the respondents in the appeal are able to show that there was no proper notice to them and also show sufficient cause, which prevented them from appearing on the date of hearing, the Court cannot pass any orders recalling the earlier orders passed after hearing the appellant.

4. The appellant herein filed an application under Order IX Rule 13 CPC presumably under the impression that on 10.3.1997 the lower appellate Court allowed the appeal of the defendants in the suit, ex parte. It was not correct. The learned Senior Civil Judge, Parchur was well within his powers to hear the appellant in the appeal ex parte and pass appropriate orders in the appeal. Here, a reference may be made to Rules 17, 19 and 21 of Order XLI. Dismissal of appeal for appellant's default.

5. Rule 17 (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

6. Hearing appeal ex parte - (2) Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte.

7. Re-admission of appeal dismissed for default.

8. Rule 19 Where an appeal is dismissed under rule 11, sub-rule (2), or rule 17, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

9. Re-hearing on application of respondent against whom ex parte decree made.

10. Rule 21 Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

11. For the purpose of Order IX when the plaintiff appear and defendants failed to appear, the lower Court can pass a decree ex parte in which event alone, an application under Order IX Rule 13 CPC would be applicable. The said provision reads as under:

Setting aside decree ex parte against defendant.

12. Order IX Rule 13 In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

13. Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

However, in the case of Order XLI Rule 17 read with Rule 21 CPC, the appellate Court is entitled to hear the appeal ex parte and dispose of the same, and as and when an application is moved by the contesting respondents under Rule 21 of Order XLI CPC, even if the earlier order was passed on merits, the appellate Court is vested with the power to recall the order and re-hear the appeal. The distinction under Order IX Rule 13 CPC and under Order XLI Rule 21 CPC is apparent, presumably for the reason that at the appellate stage the entire evidence let in during the trial is before the lower appellate Court and ordinarily nothing is required except to hear the rival contentions of the plaintiff and defendants.

14. While exercising the power under Order XLI Rule 21 CPC, the appellate Court has to consider two aspects. If a notice was not duly served on the contesting respondents in the appeal, it is a case to recall the ex parte judgment in the appeal and re-hear the appeal. In the other situation, the respondent, who seeks re-hearing of the appeal after setting aside the ex parte judgment, such party (respondent in appeal) has to show sufficient cause. To my mind the phrase "sufficient cause" appearing in Order IX Rule 13 as well as Order XLI Rule 21 CPC conveys the same meaning. What would be the sufficient cause, it is well settled cannot be explained in straight way. It depends on facts of each case and if a party comes to the Court alleging that he had sufficient cause by reason of which he was prevented from appearing when the case was called, such party has to properly plead and prove such sufficient cause. Mere allegation that he had been away or he had been sick and the like would not amount to satisfying requirement of law. In this case, except stating in the affidavit accompanying Interlocutory Application that the appellant herein and his son had been away in Karnataka, nothing substantial is produced either before the lower appellate Court or this Court. Further, it is very much doubtful whether in the appeal stage

where the contesting respondents or appellants engaged lawyers a party can take such pleas especially when at the appellate stage the presence of the contesting appellant or respondents is not ordinarily required. In this case, the Counsel engaged by respondents reported no instructions and, therefore, it cannot be said that the appellant was not properly represented.

15. Though the learned Senior Civil Judge dismissed the application of the appellant on the ground that the order passed on 10.3.1997 is the order on merits and that the application made by the appellant does not come within the purview of Order IX Rule 13 CPC, this Court has considered the appeal based on the material before this Court and finds no merit in the plea made by the learned Counsel for the appellant.

16. The C.M.A., for the above reasons, is dismissed.