

(1996) 08 KAR CK 0013
In the Karnataka High Court
Case No : MFA. 1054 of 1996

M. Narasimhamurthy and Others

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 20-08-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 47 Rule 4, 114, 151

Citation : (1996) ILR (Kar) 3403 : (1996) 7 KarLJ 496

Hon'ble Judges : S. Venkataraman, J

Bench : Single Bench

Advocate : P.K. Ponnappa, for the Appellant; H.B. Datar for A.Y.N. Gupta, for R-2, for the Respondent

Judgement

S. Venkataraman, J.—The short point that has arisen for consideration is as to whether an appeal against an order Under Rule 4 of Order 47 CPC granting an application for review can be maintained even after the disposal of the original suit in which that order was passed.

2. In a suit filed by the plaintiffs/appellants a question regarding the valuation of the suit for purposes of Court fee and about the sufficiency of the Court fee paid by the plaintiffs had arisen for consideration. The plaintiffs amended the prayer column and the lower Court passed an order on 31.7.95 to the effect that the valuation was proper and the Court fee paid was sufficient. Subsequently, the 2nd defendant filed an application for review of that order under Order 47 Rule 1 read with Section 114 and 151 CPC. The Court allowed that application on 30.9.1995 and reviewing the earlier order passed by it called upon the plaintiffs to furnish the correct market value of the suit property and to pay the Court fee afresh after adducing additional evidence, if any. Against that order the appellants initially filed CRP.3563/95 in this Court. As there was objection regarding the maintainability of the revision petition the plaintiffs withdrew that revision petition and filed this appeal on 6.3.1996. In the meanwhile on 19.12.1995 the Lower Court after noting that the plaintiffs had not brought any

stay order from the High Court and had not paid the deficit Court fee rejected the plaint under Order 7 Rule 11 CPC.

3. It is now contended by the learned Counsel for the respondents that as the plaint has already been rejected, this appeal cannot be maintained and that it is open to the appellants to question the validity of the impugned order in a regular appeal against the order of rejection of the plaint by virtue of Section 105 CPC. He relied on a decision in *ANANDRAO BALIRAM AND ORS. v. PARVATIBAI* AIR 1941 Nag 308 in support of his contention that even in the regular appeal against the order of rejection, the appellants could question the validity of the order now impugned in this appeal.

4. The learned Counsel for the appellants contended that though the validity of the impugned order could be questioned in the regular appeal to be filed against the order of rejection of the plaint that does not mean that the appellant right to file the appeal under Order 43 Rule 1 is taken away. According to him as the order of rejection of plaint is dependent on the impugned order if that order is set aside in this appeal automatically the order rejecting the plaint would fall and the appellants cannot be forced to file a regular appeal against the order of rejection of the plaint which may involve payment of heavy Court fee. He referred to the observations made by this Court in *C.E. Nagarathnamma Vs. Abdul Gafoor Sab*, in this connection.

5. There can be no doubt that the order of rejection of the plaint amounts to a decree and a regular appeal can be filed against that order. u/s 105 CPC where a decree is appealed from any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection. As the order of review is the basis for the final order rejecting the plaint it would be open to the plaintiffs/appellants to question the correctness of this order in the appeal against the order of rejection of the plaint. But the question is merely because the appellants can question the correctness of the impugned order in a regular appeal against the order of rejection, can it be said that this appeal which is permitted under Order 43 Rule 1 Clause(w) cannot be continued.

6. Order 43 Rule 1 gives a right to a party to file an appeal against certain orders which are enumerated therein. There is no provision which indicates that right to file the appeal against the order comes to an end if the original suit in which it is passed has itself been disposed of. There may be some orders which would be in force only during the pendency of the suit and in such cases once the suit itself is disposed of the question of maintaining an Appeal against such order under Order 43 Rule 1 may possibly not arise as the appeal would become infructuous. It is one thing to say that the appeal becomes infructuous as the order has spent itself and another thing to say that the appeal itself is not maintainable.

7. Section 105 CPC gives an alternative remedy to the party to question the correctness of an order against which an appeal is provided under Order 43 Rule 1 CPC. But Section 105 does not by implication take away the right of party to

file an appeal against an order under Order 43 Rule 1 CPC once the suit itself is disposed of.

8. In *ANANDRAO BALIRAM AND ORS. v. PARVATIBAI*, which was cited by the learned Counsel for the respondent, *VIVIAN BOSE, J.*, has very succinctly pointed out the remedies open to the party in a situation like this as hereunder:-

"A more concrete example will illustrate what I mean. A sues B on a loan. The defence is taken that the suit is out of time. B succeeds and the suit is dismissed. (This is what I have termed X). A is aggrieved and applies for review on the ground that he has discovered a document which operates as an acknowledgment and so brings his claim within time. The Court decides that this is now an important matter and entertains the review. (This is the order Y). It thereupon rehears the case and in spite of the defendant's opposition holds that the document is an acknowledgment which saves limitation and then decrees the claim, (This is the final decree which I have termed Z). This time B is aggrieved and he can do one of two things. He can appeal against Y, but if he does so he is limited to the narrow grounds set out in Order 47 Rule 7. He cannot attack either X or Z. If he succeeds in his appeal, then Y is set aside and that means that Z goes too, and that results in a restoration of X without modification. But B is not limited to this position. He can also appeal against the fresh decree Z on all the usual grounds."

The above legal proposition shows that an appeal against the order can be maintained under Order 43 Rule 1 CPC even if the suit itself is disposed of and that if that Order is set aside in an appeal then the consequential order which resulted in disposal of the suit goes.

9. In *Haridas and Another Vs. Banshidhar and Another*, , a Full Bench of the Rajasthan High Court was considering a case where in pursuance of an order of remand a final decree was passed subsequently and a question arose as to whether appeal against the order of remand becomes incompetent. The Full Bench has held as hereunder-

"The law gives to the person aggrieved by the said order of remand a right to appeal and that right cannot be taken away simply because the final decree is passed either before or after the person files an appeal from the said order. So long as his appeal against the order of remand is within the period of limitation, he has a right to be heard and the Courts are also bound to decide that appeal. Such an appeal cannot be dismissed on the mere ground that another appeal is not filed from the final decree which has been passed either before or after the appeal filed against the preliminary decree.

The final decree which is passed by the lower Court after the order of remand is in its nature dependent and subordinate to the order of remand, because it is passed as a result of the proceedings directed or controlled by the remand order. If the remand order is set aside, the final decree would also topple down."

10. VISWANATHA SASTRI, J in Kota Kanakayya and Another Vs. Kamepalli Lakshmayya and Others, , has pointed out that there is no provision anywhere in the Code that takes away the right of a party to appeal from a preliminary decree or an order of remand, if a final decree happens to be passed in the suit before the appeal against the preliminary decree or the order of remand is presented. In that judgment it is pointed out that abrogation of a right of appeal given by statute cannot be imported by Courts for reasons founded on practical convenience and that a right of appeal which is a substantial right conferred by statute, is not to be put in peril merely because the purpose of granting a right of appeal does not appeal to the predilection of the Court, it is also pointed out that it is not permissible for a Court to import into the provisions of Order 43 Rule 1 Clause (u) a limitation which is not there found either in express terms or by necessary implication.

11. In C.E. NAGARATHNAMMA v. ABDUL GAFOOR SAB, an application for permission to sue as an indigent person had been dismissed and thereafter the applicant had filed an application under Order 9 Rule 9 CPC to set aside that dismissal order. As that application was belated an application u/s 5 of the Limitation Act was also filed for condonation of the delay. The Trial Court while rejecting the application u/s 5 of the Limitation Act dismissed the petition also as barred by time. That order dismissing the petition under Order 9 Rule 9 CPC was challenged before this Court. During arguments it was pointed out that while dismissing the application for permission to sue as an indigent person, the Court had also rejected the plaint and it was contended that the rejection of the plaint amounted to a decree which would be challenged only in an appeal and therefore no purpose would be served even if that application is considered on merits. Dealing with this argument this Court has held as hereunder:-

"It is not possible to accede to this argument for the reason that undoubtedly the Court passed the order of rejection of plaint in the same order by which it dismissed the application C. Misc. 131/85 for default. This obviously means that there were no independent orders and the proper course for the Court could have been to fix a date for payment of Court fee in case it found that the appellant was not an indigent person. Rightly or wrongly the order of rejection of the plaint flowed as a consequence of the order of dismissal of C.Misc. 131/85 for default. Therefore in case the dismissal of the application for default were not to survive on considering other grounds it is of little consequence that the Court also rejected the plaint. When the main order gets disturbed consequential order automatically vanished. Therefore, there cannot be an impediment to independently consider the Miscellaneous Case 276/87."

12. Thus, it is seen that where the original suit is disposed of as a consequence of the order against which an appeal under Order 43 Rule 1 CPC is allowed then once that order is set aside in the appeal the order disposing of the main suit falls and the disposal of the main suit cannot be a bar either for the filing of the appeal or continuance of the appeal which is permitted under law.

13. In the present case, the Trial Court had earlier held that the Court fee paid was sufficient. It is only by virtue of the impugned order the earlier order was reviewed and because the plaintiffs failed to pay the deficit Court fee in accordance with the order under appeal, the plaint was rejected. If in this appeal the appellants are able to make out that the Court could not have reviewed the earlier order or that the view taken by the lower Court is not correct then the rejection of the plaint would automatically go. Hence, the contention that because the original suit itself has been disposed, of this appeal is not maintainable cannot be accepted.

14. For the above reasons, it is held that the appeal is maintainable notwithstanding the rejection of the plaint.