
(2007) 03 AP CK 0048
In the Andhra Pradesh High Court
Case No : CMA No. 146 of 2007

Madepalli Madhu	Vs	APPELLANT
Grandhi Ramu and Another		RESPONDENT

Date of Decision : 20-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, Order 41 Rule 13, Order 41 Rule 16, Order 41 Rule 16(2), Order 41 Rule 17

Citation : (2007) 5 ALD 855

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : V.V.N. Narasimham, for the Appellant; M. Lakshmana Sarma, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—The matter is appearing under the caption "Interlocutory". Both the Counsel on record made elaborate submissions and a request also was made for final disposal of the civil miscellaneous appeal. Hence, this civil miscellaneous appeal is being disposed of finally.

2. Sri V.V.N. Narasimham, learned Counsel representing appellant would submit that the learned VIII Additional District Judge, East Godavari, Rajahmundry, had totally erred in dismissing the LA. No. 828 of 2006 in A.S. No. 177 of 2005 for the reason that the matter was posted for arguments and the Counsel representing the appellant argued for sometime and the matter was adjourned for further arguments and without giving further opportunity to make a reply as contemplated by Order XLI Rule 16(2) of the CPC (hereinafter in short referred to as "the Code" for the purpose of convenience) the judgment was made, and hence, the said judgment cannot be said to be a judgment in the eye of law, and hence, the same to be treated as though the appeal was dismissed for default, and hence, the application filed under Order XLI Rule 19 read with Section 151 of the Code is perfectly maintainable. The learned Counsel also had taken this Court

through the language of Order XLI Rules 16, 17, 19 and 30 of the Code and had explained in detail the relevant findings which had been recorded and would maintain that in the facts and circumstances the impugned order to be set side allowing the application and restoring the appeal to be heard on merits. The Counsel also placed reliance on certain decisions.

3. Per contra, Sri Lakshmana Sarma, learned Counsel representing respondents would maintain that on a reading of Order XLI Rule 17 or Rule 19 of the Code it is clear that the said provisions are not applicable since this is not a case where the appeal was dismissed for default to maintain an application for restoration of such appeal. Inasmuch as the appeal was disposed of on merits, the remedy available to the appellant, if any, may be either to prefer second appeal or to move appropriate review application. At any rate, this application filed is not maintainable and it is a misconceived remedy. The Counsel also had pointed out to Order XLI Rules 17 and 19 of the Code and had explained the object of introducing such provisions in the Code.

4. Heard the Counsel.

5. In the light of the rival contentions advanced by both the Counsel on record the following points arise for consideration in this civil miscellaneous appeal.

(1) Whether the order made by the learned VIII Additional District Judge, East Godavari District at Rajahmundry in LA. No.828 of 2006 in A.S. No. 177 of 2005 be sustained or liable to be interfered with in the facts and circumstances of the case?

(2) If so, to what relief the parties would be entitled to?

6. Point No. 1:

(i) The facts in brief are as hereunder:

The appellant herein filed an application LA. No.828 of 2006 in A.S. No. 177 of 2005 on the file of VIII Additional District Judge, East Godavari District at Rajahmundry, under Order XLI Rule 19 and Section 151 of the Code, praying for the relief to set aside the order dated 27-10-2006 and to restore the appeal to file in the interest of justice. The learned Judge by order dated 6-1-2007 dismissed the said application and aggrieved by the same the present civil miscellaneous appeal is filed.

(ii) It is the case of the appellant that the appellant's arguments were heard on 8-9-1996 and the matter was posted for hearing of the respondents' side on 11-9-2006 and thereafter the matter had undergone several adjournments due to various reasons till 13-10-2006. It is also stated that on 13-10-2006 his Counsel could not attend the Court due to personal inconvenience as he was attending the ceremonies of his mother-in-law who passed away then and the respondents had not argued the matter. But however, in view of the fact that the respondents are deemed to be absent instead of exercising the powers under

Order XLI Rule 21 of the Code dismissed the appeal on merits. Thus, specific stand is taken that the learned Judge cannot exercise such power under Order XLI Rule 30 in the light of the provisions of Order 41 Rule 21 and Order 41 Rule 17 of the Code.

(iii) The respondents resisted the said application taking a specific stand that the respondents' Counsel also argued the matter on 13-10-2006 and on merits the learned Judge dismissed the appeal and inasmuch as the judgment was pronounced on merits, it cannot be said that the dismissal of the said appeal was for default. Specific stand was taken that the said Court became functus officio and it cannot any longer entertain such an application since the appeal was disposed of on merits.

(iv) The learned Judge framed the following points for consideration.

(i) Whether the judgment of this Court passed in AS No. 177 of 2005 is on merits or otherwise as contended?

(ii) Whether the judgment dated 27-10-2006 is to be set aside and whether it is to be restored?

(iii) To what relief?

Further discussed points 1 and 2 at paras 1 to 4 and ultimately answered point No.3 dismissing the application on merits.

(v) For the purpose of better appreciation of the present controversy, this Court also had gone through the judgment delivered by the learned Judge in A.S. No. 177 of 2005 dated 27-10-2006. The suit was filed for declaration that the plaintiffs are absolute owners and for recovery of possession of the property in question and the Court of first instance decreed the suit and aggrieved by the same, the present appellant herein, as appellant-defendant preferred the appeal A.S. No. 177 of 2005 referred to supra. The fact that the Counsel representing the appellant-defendant was heard at length on 8-9-2006 is not in controversy and thereafter the matter was posted for respondents-plaintiffs' arguments on 11-9-2006 and 15-9-2006. Thereafter, the Presiding Officer was on leave and ultimately the matter was posted to 13-10-2006 and subsequent thereto the judgment was pronounced on 27-10-2006 on merits.

(vi) Order XLI Rule 21 of the Code deals with rehearing on application of respondent against whom ex parte decree made. Specific stand taken by the Counsel for the appellant is that no arguments had been advanced, but on the contrary the specific stand taken by respondents is that the arguments were heard and the matter was decided on merits. It is needless to say that Order XLI Rule 21 of the Code is not applicable. Strong reliance was placed on Order XLI Rule 16 of the Code, which deals with "right to begin". Order XLI Rule 16(2) of the Code specifies that the Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply,

(vii) Submissions at length were made placing strong reliance on the words "the appellant shall be entitled to reply". It is stated that no opportunity had been given to make submissions in reply and in fact the Counsel for appellant was inclined to make certain submissions along with citations as well and it is to be treated only as default order.

(viii) Order XLI Rule 17 of the Code dealing with "dismissal of appeal for appellant's default" reads as hereunder.

(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.

(Explanation :-Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.)

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

Order XLI Rule 19 of the Code dealing with "Re-admission of appeal dismissed for default" reads" as hereunder.

Re-admission of appeal dismissed for default.-Where an appeal is dismissed under Rule 11, Sub-rule (2) or Rule 17 or Rule 18, 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.

Order XLI Rule 30 of the Code dealing with "judgment when and where pronounced" reads as hereunder.

Judgment when and where pronounced.-

(1) The appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.

(2) Where a written judgment is to be pronounced, it shall be sufficient if the points for determination, the decision thereon and the final order passed in the appeal are read out and it shall not be necessary for the Court to read out the whole judgment, but a copy of the whole judgment shall be made available for the perusal of the parties or their pleaders immediately after the judgment is pronounced.

(ix) Certain submissions were made in relation to the words "The Appellate Court, after hearing the parties or their pleaders" in Order 41 Rule 30(1) of the Code. In the light of the words referred to supra the specific stand taken by the

Counsel for the appellant is that since no opportunity had been given to make a reply, the impugned judgment though on a prima facie reading would go to show as though the same is on merits. In fact, the same is not on merits and the said judgment to be treated as one made by an order of default by the Court and hence restoration application as such is maintainable.

(x) In *Thakur Sukhpal Singh Vs. Thakur Kalyan Singh*, , the apex Court held that the appellate Court is not bound to decide an appeal on merits on the basis of the material on record when the appellant appears at the hearing but does not address the Court. It can dismiss the appeal for default.

In *Rafiq and Another Vs. Munshilal and Another*, , it was held that where an appeal filed by the appellant was disposed of in absence of his Counsel so also his application for recall of order of dismissal was rejected by the High Court, the Supreme Court in appeal set-aside both the orders of dismissal on ground that a party who, as per the present adversary legal system, has selected his advocate, briefed him and paid his fee can remain supremely confident that his lawyer will look after his interest and such a innocent party who has done everything in his power and expected of him, should not suffer for the inaction, deliberate omission or misdemeanour of his Counsel.

(xi) Reliance also was placed on the Full Bench decision of the Patna High Court in *Bajrang Rai and Others Vs. Ismail Mian and Others*, . Learned Judge of this Court in *Kommineni Thirupathamma Vs. Koritala Veeraiah and Others*, , while dealing with Order XLI Rule 17 read with Rule 21 of the Code observed as hereunder.

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 rehear the appeal. In the other situation, the respondent, who seeks rehearing of the appeal after setting aside the ex parte judgment, such party (respondent in appeal) has to show sufficient cause. 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.

On a careful analysis of the factual controversy, this Court is satisfied that the judgment which had been delivered by the learned Judge cannot be said to be a judgment made by virtue of default order and it cannot be said that the appeal was dismissed for default in the facts and circumstances and hence either Order XLI Rule 17 or Rule 19 of the Code cannot be invoked. The remedy of the appellant may be elsewhere definitely not by invoking the provisions referred to supra.

7. Point No. 2:

This Court is not inclined to express any further opinion relating to the other merits or demerits of the matter. It is needless to say that in the light of the finding recorded above the civil miscellaneous appeal being devoid of merit the same shall stand dismissed. It is needless to say that the appellant is at liberty to pursue the other remedies in accordance with law.

8. With the above observation, the civil miscellaneous appeal is hereby dismissed. The parties to the litigation to bear their own costs.