
(2008) 07 AP CK 0026
In the Andhra Pradesh High Court
Case No : C.R.P. No. 4226 of 2005

Pulipati Raja Rao

APPELLANT

Vs

Venigandla Radha Krishna

RESPONDENT

Date of Decision : 16-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3, Order 37 Rule 3(2), Order 37 Rule 3(5), Order 37 Rule 7, 105

Citation : (2008) 5 ALD 467

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

Bench : Single Bench

Advocate : P. Thirumala Rao, for the Appellant; G. Vijaya Babu, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Heard Sri P. Thirumala Rao, Counsel representing the petitioner and Sri G. Vijayababu, Counsel representing the respondent.

2. The civil revision petition is filed by the revision petitioner aggrieved by the decree and judgment dated 3.11.2004 in AS No. 46 of 2002 on the file of the XI Additional District Judge (Fast Track Court), Guntur, confirming the decree and judgment dated 18.2.2000 made in OS No. 128 of 1999 on the file of the Principal Junior Civil Judge, Mangalagiri, and the same was instituted under summary procedure for recovery of Rs. 19,066/- being the principal and interest due under a promissory note dated 17.6.1996 said to have been executed by the revision petitioner-defendant in favour of the respondent-plaintiff for Rs. 10,000/- agreeing to repay with interest at 24% with yearly compounding and for costs.

3. The Court of the first instance for non-compliance of the condition imposed while granting leave to deposit 1/3rd of the suit amount, while dismissing the application, came to the conclusion that in the light of Exs. A.1, A.2 and A.3, the suit claim to be taken as proved and accordingly the suit was decreed as prayed

for.

4. Aggrieved by the said decree and judgment, the defendant in the suit OS No. 128 of 1999 aforesaid carried the matter by way of appeal AS No. 46 of 2002 on the file of the XI Additional District and Sessions Judge, Fast Track Court, Guntur, and the appellate Court having framed the point for consideration at Para 4, recorded reasons at Paras 5, 6, 7, 8, 9 and 10 and came to the conclusion that since the appellant had not chosen to challenge the order made by the Court of first instance in IA No. 1299 of 1999 and the same had attained finality, the appeal cannot be allowed and accordingly dismissed the appeal with costs.

5. Aggrieved by the same, the present civil revision petition had been preferred in view of the quantum of amount involved in the suit.

6. Sri P. Thirumala Rao, learned Counsel representing the revision petitioner would maintain that the appellate Court having observed that there is a triable issue came to the conclusion that inasmuch as the conditional order while granting leave had not been complied with and the application was dismissed, in a way as the order had attained finality, was not inclined to allow the appeal. The learned Counsel also would maintain that by virtue of Section 105 of the CPC (hereinafter referred to as "the Code") when appeal had been preferred even though the interlocutory orders had not been challenged, the validity or otherwise of such interlocutory orders also can be made the ground of attack in the appeal. The learned Counsel also further had drawn the attention of this Court to Order 37 Rule 7 of the Code dealing with the procedure in suits and would maintain that the same procedure as is applicable in instituting a suit in ordinary manner would be applicable even to the summary suits and hence in view of the fact that Section 105 of the Code being applicable, the view expressed by the appellate Court cannot be sustained especially in the light of the fact that the appellate Court came to the conclusion that there is a triable issue.

7. However, the learned Counsel representing the respondent-plaintiff would maintain that it may be that adverse interlocutory orders made in a suit though not challenged by way of revisions, such orders may be challenged in an appeal preferred as against the decree and judgment. But, however, in a summary suit when conditional leave had been granted and then for non-compliance of the said condition the said leave application had been dismissed and the same was not challenged, such question cannot be reagitated in the main appeal preferred as against the decree and judgment made in a summary suit.

8. Heard the Counsel on record.

9. The revision petitioner herein is unsuccessful defendant in OS No. 128 of 1999 on the file of the Principal Junior Civil Judge, Mangalagiri and appellant in AS No. 46 of 2002 on the file of the XI Additional District and Sessions Judge, Fast Track Court, Guntur. The parties hereinafter would be referred to as plaintiff and defendant as shown in OS No. 128 of 1999 aforesaid for the purpose of

convenience.

10. The suit was instituted under summary procedure for recovery of Rs. 19,066/- on the strength of a promissory note dated 17.6.1996 alleged to have been executed by the defendant in favour of the plaintiff. After service of summons, the defendant entered appearance before the Court and filed application in LA No. 1299 of 1999 under Order 37 Rule 3(5) of the Code seeking leave of the Court to defend the suit contending that the suit promissory note is a forged document and he does not even know the plaintiff. But, however, the trial Court vide its order dated 18.1.2000 allowed the application granting permission to the defendant to defend the suit subject to condition of deposit of 1/3rd of suit amount on or before 18.2.2000. On 18.2.2000 the defendant did not deposit the 1/3rd of the suit amount as directed by the trial Court.

11. Subsequently the defendant filed IA No. 178 of 2000 for extension of time for two months for deposit of 1/3rd of the suit amount and on 18.2.2000 the said LA No. 178 of 2000 was dismissed and Exs. A.1 to A.3 were marked and the Court of first instance had accordingly decreed the suit in favour of the plaintiff and against the defendant as prayed for.

12. Aggrieved by the same, the matter was carried by way of appeal in AS No. 46 of 2002 as aforesaid and the appellate Court at Para 4 formulated the point for consideration as to whether the judgment of the trial Court is illegal and liable to be set aside. The appellate Court recorded reasons commencing from Paras 5 to 10 and ultimately dismissed the appeal.

13. In the light of the submissions made by the Counsel on record, the following points arise for consideration in this revision petition:

1. Whether the findings recorded by the appellate Court in the facts and circumstances of the case to be sustained or to be disturbed?
2. If so, to what relief the parties would be entitled to?

Points:

14. For the purpose of convenience, both the points can be discussed together.

Section 105 of the Code reads as hereunder:

(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, 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 in the memorandum of appeal.

(2) Notwithstanding anything contained in Sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

15. Order 37 Rule 7 of the Code dealing with the procedure in suits specifies save

as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner. Order 37 Rule 3 of the Code deals with the procedure for the appearance of defendant. It is pertinent to note that Order 37 Rule 7 of the Code dealing with the procedure in suits commences with the words "save as provided by this Order". Strong reliance was placed on the decision of the Apex Court in Achal Misra Vs. Rama Shanker Singh and Others, , wherein the Apex Court while dealing with the interlocutory orders that can be challenged in appeals held that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken, can be challenged in an appeal from a final decree or order. The two exceptions to this rule are found in Sections 97 and 105(2) of the Code.

16. Further, strong reliance was placed on the decision of the Apex Court in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , wherein the Apex Court while dealing with Order 37 Rule 3(2) of the Code and the grant of leave to defend held at Para 8 as under:

8. In S. Kiranmoyee Dassi v. Dr. J. Chatterjee (49 C WN 246 at p.253, Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37, C.P.C. in the form of the following propositions (at p.253):

(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence

to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.

In *Kantipudi Lalitha Lakshmi Manohar Saraswathi v. Kantipudi Ramakrishna* (1982) 1 An.W.R. 242, it was held that where leave to defend is refused or conditionally granted and the conditions are not complied with, the allegations in the plaint are deemed to have been admitted and the suit to be decreed. What is a "Triable issue" and certain pleas relating thereto had been dealt with in the undernoted decisions:

M/s. J.K. Enterprise Vs. Prithviraj Ratanchand Mehta and another, , *Kochrabhai Ishwarbhai Patel Vs. Gopalbahi C. Patal*, , *Firm New Afghan Co. and Anr. v. Firm Sadhu Singh Thakor Singh* AIR 1962 Pun. 168, AIR 1990 2218 (SC) , *A.K. Velan Vs. Narayanan and Co. (P) Ltd.*, , *Jashbhai Motibhai Patel Vs. Hasmukhbhai Ravjibhai Patel*, , *Chandrana Brothers, Bangalore and Ors. v. Mrs. Jalalja Laxmi S. Bhatt, Bangalore and Ors.* AIR 1985 Kar. 33, *Indexim Consultants Pvt. Ltd. Vs. M/s. Vidya International and others*, , *State Bank of India v. Tarlok Singh and Ors.* AIR 1992 Del. 76, *Punjab and Sind Bank v. Seth Roller Flour Mills* AIR 1988 Del. 308. Court may have to exercise judicial discretion while imposing condition in granting leave held in *Essavi India Match Mfg. Co. Vs. Essabhai and Another*, and *Sushil Kumar Bagaria and Another Vs. B.D. Mohta and Others*, . It is no doubt true that when the Court is satisfied that the defence raises a triable issue, leave to defend should ordinarily be granted unconditionally. In *Sannidi Kasi Viswanadham Vs. Gade Annapurnamma and Another*, , it was held that where the defence disclosed by the defendant in his affidavit is denied by the plaintiff in his counter and there is no material on the record that the defence was not bona fide or that it was set up to prolong litigation and evade a speedy trial, the Court should not grant any leave to defend. Where the Court may have to grant unconditional leave had been dealt within *Ramalingam Vs. Basavalingam*, , *Punjab and Sind Bank v. Seth Roller Flour Mills and Ors.* AIR 1988 Del. 308 , *K.S. Meenakshi Ammal and Others Vs. M. Subbalakshmi Ammal*, , *Sunder Industries and Others Vs. General Engineer Works*, . The principles relating to the granting of conditional leave and certain of the circumstances where the judicial discretion to be exercised either to grant conditional leave or unconditional leave had been dealt within the undernoted decisions: *Jetha Singh Vs. Chaman Lal*, , *The Official Assignee, High Court, Madras Vs. Kantiyalal Sharma*, , *Kishan Gopal Jhaver Vs. Ramnarayan Bhattad and Others*, , *Fateh Lal Vs. Sunder Lal*, , *S. L. Luthra Vs. Narender Kumar Puri*, , *The State Industrial and Investment Corporation of Maharashtra Ltd. Vs. Gangaram Agarwal and another*, , *A.C. Traders Vs. Nawal Kishore*, , *Santosh Kumar Vs. Bhai Mool Singh*, , *Milkhiram (India) Private Ltd. and Others Vs. Chamanlal Bros.*, .

17. It is no doubt true that though the interlocutory orders are not challenged, as against the judgment and decree when an appeal had been preferred, the illegality thereof also can be raised as a ground of attack in such appeal.

However, the facts and circumstances of a particular given case may have to be carefully examined.

18. The object of the summary procedure cannot be totally ignored. It may be that a conditional order was made while granting leave to defend the suit, it is no doubt true that the appellate Court also observed that in the light of the specific stand taken there appears to be an existence of triable issue. Here is a case where the application was filed by the present revision petitioner praying for extension of time to make deposit. This aspect also is an essential and crucial aspect to be considered. Having been unsuccessful in both the applications and having not challenged the orders made in both the applications, filing appeal and also further revision and contending that by virtue of Section 105 of the Code such orders can be challenged cannot be sustained, since such questions, if permitted, to be re-agitated, this Court is of the considered opinion that the respondent-plaintiff would be put to serious loss. Hence, this Court is not inclined to interfere with the order impugned in the civil revision petition. Accordingly, the civil revision petition shall stand dismissed. No order as to costs.