

(1932) 05 MAD CK 0010
In the Madras High Court

Somasundaram Pillai and Others

APPELLANT

Vs

Muthumanicka Nadar

RESPONDENT

Date of Decision : 12-05-1932

Acts Referred:

Citation : AIR 1932 Mad 714 : (1932) 36 LW 646

Hon'ble Judges : Anantakrishna Ayyar, J;Anantakrishna Aiyar, J

Bench : Division Bench

Judgement

Anantakrishna Ayyar, J.—This is a civil revision petition filed by the plaintiffs in O.S. No. 855 of 1926 on the file of the District Munsif of

Chidambaram. They filed the suit against the defendants for a declaration that the mortgage bond executed by the plaintiffs on 3rd February 1926

in favour of defendant 1 for Rs. 800 was not supported by consideration to the extent of Rs. 575 alleged to have been advanced in cash at the

time of the mortgage, the remaining Rs. 225 being the amount mentioned in the mortgage deed as due to a prior mortgage which defendant 1

(mortgagee) undertook to discharge himself. The plea of the contesting defendant was that out of Rs. 575 mentioned in the plaint, he did not make

payment to the extent of Rs. 275 and to that extent want of consideration was admitted. But in respect of the remaining amount of Rs. 300, the

defendants pleaded that the plaintiffs' case was false and that the mortgage was supported by consideration. Issues were framed, and the case was

adjourned for trial from time to time. In the meantime, another suit O.S. No. 818 of 1926 on the file of the same Court raised the question as

regards the payment of Rs. 300 out of the Rs. 575 which was really the matter in dispute in O.S. No. 855. After the disposal of the Suit No. 818

of 1926, the following additional issue 9 was framed in Suit No. 855 of 1926:

Is it open to plaintiffs to contend that Rs. 300 have not been paid by defendant 1 to defendant 2 and that it is not binding on them in view of the decision in O.S. No. 818 of 1926 on the file of this Court.

2. The case was adjourned from time to time, even after the decision in O.S. No. 818 of 1926 was passed and after the additional issue was

framed. Finally the plaintiffs applied to the District Munsif for leave to withdraw the suit with liberty to file a fresh suit in respect of the same

subject-matter, Under Order 23, Rule 1. It would appear that the contesting defendant did not raise any objection to the plaintiffs' prayer to

withdraw the suit being allowed. That probably is the reason why the order passed by the learned District Munsif on 5th November 1927 allowing

the plaintiffs to withdraw the suit with liberty to sue again does not contain details as regards the nature of the defect, etc., which necessitated such

an application by the plaintiffs. The District Munsif by the order of that date gave the plaintiffs liberty to withdraw the suit with liberty to sue again.

As regards costs with which alone we are now concerned, this is the order passed by the District Munsif, ""under the circumstances of the case no

order as to costs."" The mortgagee, defendant 1, felt aggrieved by that order in so far as it did not allow him costs. He therefore preferred an

appeal to the District Court, South Arcot, against the order passed by the learned District Munsif regarding costs. On appeal the learned District

Judge came to the conclusion that the plaintiffs really had no sufficient reason for being allowed to withdraw the suit at that stage with liberty to sue

again. But as defendant 1 did not challenge the order of the lower Court in so far as leave to file a fresh suit was concerned, but was content to

attack it only insofar as it did not award him (defendant 1), costs, the learned District Judge held that the first Court was in error in not awarding

costs to defendant 1 in the case. He accordingly modified the order passed by the District Munsif and directed that the order allowing withdrawal

of the suit etc., will be subject to the plaintiffs' paying defendant 1's costs within a month from the date of the District Judge's order. The plaintiffs

have preferred this civil revision petition against the District Judge's order.

3. The first point raised before me by the learned advocate for the petitioners was that no appeal lay to the lower appellate Court against the order

passed by the District Munsif Under Order 23, Rule 1, Civil P.C. He argued that the order passed Under Order 23, Rule 1 is not a decree and

that an appeal would lie against an order only if the same had been specifically provided for either u/s 104 or Under Order 43, Rule 1, Civil P.C.

Seeing that no provision is made for an appeal from such an order as the one passed by the District Munsif in the present case the learned

advocate argued that an appeal to the lower appellate Court was incompetent and that the lower appellate Court's order should be reversed on

that ground. The learned advocate for defendant 1 respondent agreed with the learned advocate for the petitioners, (and I think quite properly),

that no appeal lay in such a case. It is clear that no appeal would lie against a decision relating to costs only when no appeal will lie from the order

passed on the merits in the proceedings in relation to which the question of costs arises. When no appeal is provided for, from an order on the

merits no appeal will lie against that portion of the order which related to the award of costs only. The question was discussed by Sir Richard

Garth, C. J. and Wilson, J., in a very early case reported as *Balkissen Doss v. Lachmeeput Singh* [1882] 8 Cal. 91. The learned Judge observed

as follows:

If an order is itself appealable as affecting the jurisdiction of the Court or the merits of the case, an appeal will lie from that part of the order which

relates to costs; but, as in the case of decrees, in those cases and those cases only where the order is appealable, will an appeal lie against the

direction as to costs, which is ancillary to the order.

4. The reasoning of that judgment was followed by the Bombay High Court in the case reported as *Vasudeo Ramchandra v. Bhavan Jivraj* [1892]

16 Bom. 241 and by the Allahabad High Court in *Shib Kumar v. Sheo Ghulam* AIR 1922 All. 90, though those cases did not themselves raise the

exact point I have to decide here. But the learned advocate for the respondent argued that the trial Court was in this particular case in error in not

having awarded the costs of defendant 1 as a condition precedent to the plaintiffs being allowed to withdraw the suit with liberty to file a fresh suit.

Turning to the District Munsif's order, as I already remarked, the only reason given why the plaintiffs should have that indulgence granted to them

at that stage of the litigation was that under the circumstances no order as to

costs will be made." I think the order of the learned District Munsif is unsustainable. A defendant who had been dragged into Court and made to spend money and time in taking part in proceedings which the plaintiffs subsequently admit to be unnecessary, and in respect of which the plaintiffs ask for liberty to file a fresh suit, should ordinarily be allowed his costs and the plaintiff should be directed to pay costs which were incurred by the defendant owing to the plaintiffs useless litigation. There may be circumstances in which a Court might pass a different order as to costs; but ordinarily, an order giving an indulgence to the plaintiff Under Order 23, Rule 1, should prima facie and in the absence of special circumstances, make it a condition that the plaintiff should pay the defendant's costs. I was anxious to see whether there was in fact any reason available in this case why defendant 1 should be deprived of his costs, and after discussion with both the learned advocates who appeared before me, I was unable to discover any reason whatsoever.

5. Now the position comes to this. The learned District Munsif passed an order with reference to costs which, as I have said, is, in the circumstances, clearly unsustainable. The lower appellate Court entertained an appeal on a matter in which an appeal did not lie to it. But the result of the lower appellate Court's order is to bring about a just order as to costs, and implement the first Court's order in that respect. What the High Court would do in such circumstances is discussed in *Mulambath Kunhammad v. Parkat Kathusi Kutti* [1917] 38 I.C. 373 and *Chengalraya Chetti v. Raghava Ramanuja Dass* [1910] 52 I.C. 569. Now the question arises what is my duty sitting here as a Court of revision, in these circumstances. As already remarked, the plaintiffs petitioners before me are technically right in their contention that no appeal lay to the lower appellate Court and it is therefore proper that I should quash the lower appellate Court's order directing the plaintiffs to pay the costs of defendant 1 the appellant, in that Court; but in so far as the defect in the order of the District Munsif was remedied by the lower appellate Court, I think that I must regularize the whole proceedings by my exercising my powers of revision directly against the order passed by the learned District Munsif on 5th November 1927. It is clear the High Court is entitled--in a proper case--to interfere in revision even without an application to it by the party

interested. That was made clear is early as Andrew Anthony v. Dupant [1882] 4 Mad. 217 in a decision passed by Sir Charles Turner, C. J. and

Kindersley, J. The learned Judges observed as follows:

The High Court can interfere u/s 622 of the Code without an application made to it by a party to the suit: see also Batcha Saheb v. Abdul Gany

AIR 1914 Mad. 675; Bai Kanta Nath v. Sita Nath [1911] 38 Cal. 421 and Fisher v, Kanakasabapathy [1910] 5 I.C. 742 (under Small Cause

Courts Act) Debi Das v. Ejaz Hussain [1905] 28 All. 72 and Puran Mal v. Janaki Pershad Singh [1901] 28 Cal. 680.

6. Having regard to the proceedings of the learned District Munsif dated 5th November 1927, and having heard the parties interested in the matter,

I direct that that order be modified by adding a proviso to the following effect; (in lieu of the order as to costs contained therein):

Provided the plaintiffs pay defendant 1's costs incurred in the trial Court within two weeks after the re-opening of the District Munsifs Court of

Chidambaram. On failure by the plaintiffs to comply with this order, O.S. No. 855 of 1926 will stand dismissed with costs.

7. Now there is the incidental question relating to costs of the lower appellate Court and costs of the civil revision petition. As I remarked already,

defendant 1 who preferred an appeal to the lower appellate Court in a matter in which no appeal lay to it; should not be given his costs of those

proceedings which are ultra vires. I therefore direct that defendant 1 should not have any costs of his appeal to the lower appellate Court. In fact I

have reversed the order passed by the tower appellate Court on the ground that no appeal lay to it, and with the reversal of that order, the

direction which it contains relating to costs also goes. As regards costs of the civil revision petition, though I think the plaintiffs were technically right

in their contention that no appeal lay to the lower appellate Court, defendant 1 had succeeded on the merits on the question of costs. In the

circumstances I think the proper order should be to direct each party to bear his own costs in the High Court.