

(1961) 12 AP CK 0014

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1250 of 1957

Sri Krishna Rajendra Mills Ltd., Mysore

APPELLANT

Vs

Majety Seshagiri Rao and Others

RESPONDENT

Date of Decision : 22-12-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, Order 47 Rule 1, Order 9 Rule 13, 108, 151

Citation : AIR 1962 AP 508

Hon'ble Judges : Satyanarayana Raju, J;Kumarayya, J

Bench : Division Bench

Advocate : N. Bala Surya Rao, for the Appellant; N.C.V. Ramanujachari and K. Krishna Murty, for the Respondent

Final Decision : Allowed

Judgement

Kumarayya, J.—This Revision petition is directed against the order of the District Munsif, Eluru, dated 23-4-1957, whereby, in consequence of his prior order setting aside the ex parte decree as against defendant No. 1 he re-opened the suit as against defendants 2 and 3 also even though it was dismissed as against them. The suit was for damages for non-delivery of goods consigned by defendant No. 2. The plaintiff in his suit prayed for a decree primarily against the 1st defendant and in the alternative against the 2nd defendant and his agent 3rd defendant. All the defendants resisted the claim of the plaintiff, but eventually the 1st defendant was set ex parte on 21-8-1956. The plaintiff then examined himself as a witness. He stated in his deposition that if a decree be given against the Railway, he would not desire to have a decree against defendants 2 and 3. Defendants 2 and 3 were represented by their counsel. A decree was passed against the 1st defendant for a sum of Rs. 2,062-9-0 with proportionate costs and the suit was dismissed against defendants 2 and 3.

2. On 6-9-1956, the 1st defendant filed I. A. No. 1853 of 1956 under Order 9, Rule 13, C. P. C. for setting aside the ex parte decree. The plaintiff resisted the

petition and requested at the same time, that if for any reason, the ex parte decree is set aside against the 1st defendant, the order of dismissal of suit passed against defendants 2 and 3 may also be set aside so that Status quo ante may be restored against all the defendants and the suit be tried and disposed of on merits. Defendants 2 and 3 claimed that the dismissal was on merits in that the plaintiff did not establish any case against them. The learned District Munsif allowed the petition under Order 9, Rule 13, C. P. C. and set aside the ex parte decree on 4-2-1957 but did not grant the request of the plaintiff that the suit should be restored against defendants 2 and 3. He however observed that if there is any appropriate provision to bring them on record or proceed against them otherwise independently, the plaintiff may have recourse to the same. This led to another application I. A. No. 247 of 1957 which was made by the plaintiff on 4-3-1957 u/s 151, C. P. C. for setting aside the order of dismissal of the suit against defendants 2 and 3 and restoring the suit to its original state. This was opposed by defendants 2 and 3 but the learned District Munsif set aside the order of dismissal of suit against defendants 2 and 3 holding that he had power to do so u/s 151 C. P. C. The present revision petition is directed against this order.

3. This matter originally came before Chandrasekhara Sastry, J. who referred the same to the Bench.

4. It is manifest that the decree in the suit was an ex parte, decree as against defendant No. 1 but the same cannot be said as regards the dismissal of the suit against defendants 2 and 3. The said defendants had contested the suit till the end. The plaintiff, of course, would have desired to have the suit decreed against defendants, 2 and 3 in case a decree could be passed against defendant No. 1. The learned Judge found that defendant No. 1 was liable for the suit amount. He accordingly decreed the suit against defendant No. 1. He then dismissed the Suit as against defendants 2 and 3 as per the request of the plaintiff. Though there may be thus only one decree passed in the suit as a whole, in substance, there were two decrees. One against defendant No. 1 and the other in favour of defendants 2 and 3. One was ex parte and the other was otherwise. An ex parte decree may be set aside like any other decree on review or appeal. But there is also a further remedy of getting the ex parte decree set aside and that is by way of an application under order 9, rule 13, C. P. C.

Order 9, rule 13, C. P. C. reads thus:

(1) 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;

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;

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim.

2. The provisions of section 5 of the Indian limitation Act, 1908, shall apply to applications under such rule (1).

It may be noticed that the first proviso affords ample scope for extending the relief even to non-applying defendants. As a matter of fact, the proviso is attracted only when the decree is against more than one and by its nature cannot be set aside as against the defendant petitioner alone. There is no scope for its application to a case where the decree passed is not against but in favour of the other defendants.

The language of the proviso in this regard is too clear to give room for doubt or controversy. Beside, there is sufficient judicial authority in support of this view. Mudholkar, J. in *Bhimrao Tanbaji v. Girdharilal Ramrakh*, AIR 1954 Nag 125, dealing with this provision observed that what the substantive provision as well as the proviso contemplate is the setting aside of a decree "against" a defendant, not one in favour of a defendant. So, when the suit has been dismissed against one of the defendants, the proviso does not empower the court to set aside the dismissal. Learned Judge further observed that the expression "the decree" in the proviso to order 9, rule 13 according to the rules of construction, ought to be confined to an ex parte decree to which alone the substantive provision expressly relates, if there are two decrees one ex parte and the other after contest, passed in one suit, the proviso to order 9, rule 13 will not cover the case of the defendants against whom the decree has been passed on contest. The same was view of the Full Bench of the Assam High Court in *Khagesh Chandra v. Chandra Kanta*, AIR 1954 Ass 183 at p. 185 (FB). Therein it was observed that:

The rule is subject to the proviso which enlarges the power of the Court to set aside the decree even against all or any of the other defendants where the decree is of such a nature that it cannot be set aside as against the applying defendants only..... But the rule or the proviso, in my opinion, does not confer any jurisdiction upon the Court to reverse a decree dismissing the suit of the plaintiff as against some of the defendants imperiling thereby the interest of those defendants also by re-opening the whole suit.

In *Manaku Kom Pedru v. Sitaram Atmaram Vagh*, ILR 18 Bom 142, the question referred for decision was, whether an application by a co-defendant praying for setting aside an ex parte decree in a small cause suit, if granted, would re-open the case also against the defendant or defendants who were present and had conducted the defence in the original trials assuming that there was a common

cause of action against all the defendants in the case. The question was answered in the negative having regard to the clear language of the proviso. The exact scope of section 108 of the CPC corresponding to order 9 rule 13 of the present Code was considered in a Full Bench case *Bhura Mal v. Harkishan Das*, ILR 24 All 383 (FB). The learned Judges observed that that section primarily applies to the case of a defendant who seeks to get an ex parte decree against him set aside and that if there are more than one defendants in the case under certain circumstances, it may become necessary in the interests of justice, to re-open the whole decree; but that if the decree is one and indivisible it can only be set aside as whole or not at all, although the application to set aside the: decree may be the application by only one of the defendants. The learned judges further observed that the said section related to cases where the decree was passed against the defendants and not in their favour. That with respect is the true position under order 9, rule 13, C. P. C. It is manifest that the decree in the instant case so far as it relates to defendants 2 and 3 does not come within the ambit of order 9, rule 13, C. P. C. read with its provisos because firstly it was not an ex parte decree, and, secondly, it was a decree in favour of and not against defendants 2 and 3. Therefore, the court below had rightly refused to interfere in exercise of its powers under order 9 rule 13, C. P. C. But, whether its subsequent interference in purported exercise of its powers u/s 151, C. P. C. can be in order is now a matter for consideration.

5. Indisputably, section 151, C. P. C. would have no application had order 9, rule 13, C. P. C. governed the case. But it cannot be gainsaid at the same time that the plaintiff had a substantive right of appeal which is an effective remedy to get the order vacated. He could resort to this remedy as soon as he saw his ex parte decree is threatened with extinction or even when it has been actually vacated. The question now is, whether the trial court could legitimately recall its decree passed in the presence of the contesting defendants even though that could be called in question by way of appeal expressly provided by law. Section 151, C. P. C. reads thus:

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

This section preserves intact the inherent powers of the court exercisable for advancing the cause of justice and preventing the abuse of the process of the court. This is because the courts in India are both courts of law (and?) equity. However wide these powers may be, they are intended to be exercised only on principles of equity, justice and good conscience and in appropriate cases. This exercise must be cautious and with judicious discrimination lest in the attempt to do justice to one, prejudice may be caused to others. The code has provided for a procedure calculated to further the cause of justice but it cannot be possibly exhaustive. The legislature cannot define and make express provision against all possible inconveniences. Besides, it is possible that even the prescribed rules of

procedure be so misused as to obstruct the smooth course of administration of justice.

An express provision u/s 151, C. P. C. has been enacted therefore to remove all doubts as to the powers are not however wholly unfettered as they are to be exercised with sound judicious discrimination and only in appropriate cases. Certainly they cannot be exercised to override the express provisions or general principles or law. Where a party has an effective remedy open and does not adopt or negligently fails to pursue it, as a rule it is not proper to grant him relief in exercise of inherent powers save in special and peculiar circumstances. Equity abhors laches. It will not be sound principle of justice to assist a party guilty of laches in consequence of which new rights have arisen against him. It may not be proper to permit the exercise of inherent powers to interfere with the rights of the third parties or cause them prejudice. These are some of the well settled principles which must be kept in view in exercise of powers u/s 151. it follows therefore that mistake or fraud apart, there may not be many cases where it is legitimate, just and proper to exercise these powers.

In the instant case, we are concerned with the limited question as to whether the court below, in the ends of justice, could come to the succour of the plaintiff who had a remedy open to him in law but has failed to avail of the same and instead has invoked the inherent powers of the trial court. The trial court as soon as a final order has been passed, and the rights of parties have been determined, save in vitiating circumstances or where the order ought to be reviewed, will be very slow to interfere with its own order. As a matter of fact, when an appeal is open, it is only fair and just that the matter should be left for the determination of the appellate court concerned. It will not be justice if a court, time and again, unsettles what has been settled by it and thus creates a state of suspended animation. Certainly the inherent powers referred to in section cannot be exercised therefor.

6. It is not disputed that the order passed could have been directly challenged by way of an appeal. Where the case does not fall within the ambit of order 47, rule 1, C. P. C., that is the only remedy open to the party. It is apt to recall at this stage the observations of the Privy Council in AIR 1924 198 (Privy Council) , which are to the effect that the parties, on the making of the decree, acquire rights or incur liabilities which are fixed unless or until the decree is varied or set aside on appeal or in accordance with law. It Is contended that since the plaintiff prayed for an alternative decree and got an ex parte decree against defendant No. 1 he could make no grievance of the order passed in favour of defendants 2 and 3 in the main suit and therefore it was not open for him to go in appeal so long as that ex parte decree was in force. It was further urged that since the case against the 2nd defendant according to the frame of the suit could be considered only in case no decree could be passed against the 1st defendant as soon as the ex parte decree was set aside, the case against the 2nd or 3rd defendant was also at large and therefore the trial court was bound to re-open

the case even as against defendants 2 and 3 so that the claim of the plaintiff may be completely and finally adjudicated upon.

It cannot be seriously contested that the suit even as framed could not be lawfully decided piecemeal. It is not correct to say that having regard to the frame of the suit, the enquiry could be confined only in respect of the 1st defendant at the first instance and then only if no liability is established as against defendant No. 1 the right as against defendants 2 and 3 would be gone into. When all the three are defendants in the suit in connection with a single or the same transaction, the case cannot be judged against each of the defendants in isolation. It has to be judged as against all, though on liabilities being established the decree may be confined only against one as prayed. The court had to fully enquire into the right of the plaintiff as against all the defendants and completely adjudicate upon all matters in issue between the parties finally and conclusively.

As already stated, it is quite a different thing that having regard to the prayer contained in the plaint, the suit may be decreed only against one or other and not all the defendants in case the right of the plaintiff is established. It is obvious that the inquiry in the suit was directed against all the defendants. Only that since the suit could be decreed ex parte against the 1st defendant on the basis of the evidence adduced, the court at the request of the plaintiff dismissed the suit as against defendants 2 and 3. So far as the trial court was concerned, the disposal of the suit as against defendants 2 and 3 was final. Rectification of mistakes and defects apart which are curable under sections 152 and 153, C. P. C. the decree favourable to defendants 2 and 3 could not be meddled or interfered with by the trial court itself. The grounds for review there were none and the order was appealable one. It could therefore be set aside only in appeal. No doubt the decree against defendant No. 1 was ex parte and it could be set aside by the trial court itself under order 9, rule 13, C. P. C. The plaintiff was fully aware of the same and nevertheless made his request unqualified enough without forethought of the nature of ultimate fate of the decree to be passed against 1st defendant and got his suit thus dismissed as against defendants 2 and 3. The order was indeed final so far as that court was concerned. It can therefore be set aside in appeal in view of the subsequent events which result in the setting aside the ex parte decree. But the question is, whether the trial court itself in exercise of its inherent power u/s 151, C. P. C, similarly vacate that decree and re-open the case as it has done. The contention of the plaintiff is that that is permitted by law as the powers u/s 151 are very wide and extend to vacating such decrees.

7. Reliance has been placed on Annasami Mudaliar Ekambari Aamal; 1951 Mad LJ 488 : (AIR 1953 Mad 696). There a compromise decree was set aside by the court passing the exercise of its powers u/s 151, C. P. C. But that was a case covered by section 153 C. P. C. as the compromise entered did not relate to all the parties but only to a few of them and yet a decree by mistake was passed in

terms thereof, the other defendants being ex parte in the case. On the ex parte decree being set aside and the defect in procedure in relation to the compromise petition having been cured u/s 153 the whole suit stood re-opened. We are then referred to Kalyan Singh v. Ramgolan Singh, AIR 1920 Cal 399, but the facts there have no parallel in the instant case. There the appeal was not heard at all as the Court had suggested that the matters in dispute should be investigated in a separate suit and this suggestion was accepted by both parties. It transpired later on such investigation could not be possibly made with the result that the appeal had to be heard on merits. For this purpose, the court in exercise of its powers restored the appeal and heard the same applying the maxim *Actus curiae minimum gravabit* (an act of the court shall prejudice no man). So, even though the appeal was dismissed, the dismissal being not in accordance with law, this defect in procedure could be cured u/s 153, C. P. C. and since the court, as court of justice, had to adjudicate upon the dispute between the parties the court could exercise its inherent powers u/s 151, C. P. C. to advance the cause of justice.

The next case cited is Mohammed Shafi and Others Vs. Chedu and Others, , where as a result of the dismissal of a suit, the aggrieved party applied for restoration to the trial court, and at the same time went in appeal. His restoration petition was ordered by the trial Court. Consequently the appeal was dismissed on the ground that there was no subsisting decree. But the restoration order then was challenged in revision and the High Court set aside the order. It became necessary that the appeal be heard and disposed of on merits. The appellate court in view of the subsequent circumstances, set aside the order of dismissal in exercise of its powers u/s 151, C. P. C. and heard the appeal. The High Court held that the appellate court had ample powers to do so. The next case cited is AIR 1944 148 (Nagpur) . It is a case where the small cause court in exercise of its powers u/s 151, C. P. C. reopened the suit dismissed. There it appears during the pendency of the suit, one of the defendants had applied, to the Debt Relief court and was absolved from all liability under the debt. The other defendant did not get any such relief from the said special forum. The result was that after inquiry the small cause suit was decreed against him alone. Thereafter it so happened that on revision, the order of discharge obtained by the 1st defendant from the Debt Relief Court was set aside. Thereupon the plaintiff applied for re-opening the suit as against him. In these circumstances, the High Court held that the lower court had the power to act u/s 151, C. P. C. and ordered the reopening of the suit against the 1st defendant.

The next case referred to is Taraprasanna Sarkar and Another Vs. Kalikamohan Sarkar and Others, There the preliminary decree was based on a compromise entered into between the plaintiffs and only some of the defendants. As against the others, the decree was ex parte but the terms of the ex parte decree were identical with the terms in the petition of compromise between the plaintiffs and two of the defendants. Evidently, the other two defendants against whom the decree was ex parte could not be bound by the terms of the compromise to which they are not consenting parties. It was held that the preliminary decree as

it stood was definite and could not be carried out. Since the preliminary decree was incapable of enforcement, final decree passed thereunder was vacated. Since defendants 3 and 4 requested that the preliminary decree be vacated and it was also in the interests of the plaintiff that it should be vacated having regard to the circumstances of the case, the preliminary judgment (decree) was set aside and the case was remanded for re-trial in accordance with law. This case does not lend any assistance to the petitioner as the order was passed in appeal presumably in exercise of the powers under order 41, rule 33, C. P. C. It is therefore obvious that when there is a right of appeal, and the party can obtain relief in the court of appeal, ordinarily it is not open to the trial court to set aside its own order unless it is permissible under order 47, rule 1, C. P. C. or the case falls within sections 152 and 153, C. P. C.

8. It is then argued that, the decree in favour of 2nd defendant is a decree dependent on the ex parte decree and as soon as the ex parte decree was vacated, automatically the whole case was at large. The argument proceeds on the basis that the plaintiff had prayed for the decree in the alternative. But a dependent decree is not synonymous with a decree in the alternative. The order of dismissal was made after contest, it cannot be successfully argued that the decree against defendants 2 and 3 was a dependent decree in the sense that it stands or falls on any decree passed in favour of defendant No. 1. The decree against defendants 2 and 3 may not be passed in spite of proof of liability merely because the decree as against the 1st defendant to the satisfaction of the plaintiff has been passed, but if no decree is passed against the 1st defendant, a decree will not follow as against them even though their liability is not established. Thus the dismissal of the suit against defendant No. 1 could not necessarily result in a decree against defendant No. 2. The suit may be dismissed against both or may be decreed against any. It all depends upon how the plaintiff establishes his case. Of course, having regard, to the prayer which has been set out in the plaint and reiterated in his oral testimony, the plaintiff would not get a decree against 2nd defendant even if proved in case a decree is passed against defendant No. 1.

The plaintiff had to establish his case against the defendants in order to render them liable for his claim. Defendants 2 and 3 has been contesting the claim of the plaintiff. The liability of defendant No. 1 was found established. Plaintiff did not wish to have any decree against 2nd defendant nor did he seek to adduce any evidence against them. He had right to lead evidence and require the court to give a finding with regard to 2nd defendant also but he requested that the decree be passed only against the 1st defendant, if such a decree could be passed against him. As the plaintiff did not leave the determination of the matter to the court and he himself requested that if a decree be given against 1st defendant, no decree may be passed against defendants 2 and 3 and the suit may be dismissed as against them, the court had no other choice but to dismiss the same. Having made this request, the plaintiff cannot withdraw the same when the order of dismissal had become final. He could move the appellate court

and the appellate court could have given relief having regard to the subsequent circumstances under O. 41, R. 33, C. P. C. and re-opened the matter. When after the decree the power is thus vested only in the appellate court and it was open to the plaintiff to file an appeal when his right was threatened by an application for setting aside the ex parte decree which was made when there was sufficient time to file an appeal, and when it was also open to him after the ex parte decree was set aside, to move, the appellate court by resorting to section 5 of the Limitation Act, it was not open to the trial court to set aside, the order of dismissal of the suit after it had become final. The order of the trial court therefore cannot be up held. The Revision Petition is allowed with costs and the order of the court below is set aside.