
(1979) 07 AP CK 0004
In the Andhra Pradesh High Court
Case No : C.R.P. 1642 of 1979

Tadikonda Sree Ramulu

APPELLANT

Vs

M. Venkata Narasimha and Others

RESPONDENT

Date of Decision : 13-07-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (1979) 07 AP CK 0004

Hon'ble Judges : Punneya, J

Bench : Single Bench

Advocate : A.L. Narayana Rao, for the Appellant; S. Govindarajulu, for the Respondent

Final Decision : Allowed

Judgement

Punneya

1. Sri A.L. Narayana Rao, the Learned counsel for the petitioner contends that the lower court failed to exercise its jurisdiction in as much as he has not followed the mandatory provisions of Order 9 Rule 13 of the Code of Civil Procedure. The petitioner herein is the plaintiff in O.S. No. 75 of 1972. The suit was posted to 5-3-1976 finally and from that date to 20-3-76 peremptorily. On 20-3-1976 the defendant was absent. The learned subordinate Judge set the defendant exparte and passed an exparte decree on that date. The defendant filed an I.A. No. 287 of 1976 for setting aside the exparte decree. In the affidavit filed along with the I.A., he contended that on 20-3-1976 he was suffering from influenza fever and he was not able to attend the Court and he had treatment from P.W. 2, a senior physician. Homeopathic Hospital, Gudivada. In the enquiry held by the learned Sub-ordinate Judge the defendant examined the doctor as P.W. 2 to prove that he had taken treatment from P.W. 2 for his fever. P.W. 2 gave evidence stating that the defendant was suffering from fever on 20-3-1976 and he treated him and he also issued a certificate and the hospital records would show that he treated the petitioner-defendant on that date. The learned Sub-

ordinate Judge accepted the evidence of P.W. 2 since in his view it was above reproach He, therefore, came to the conclusion the there was sufficient cause for the defendant's inability to attend the Court. He allowed the I.A. No. 287 of 1976 and set aside the exparte decree. The plaintiff was aggrieved with the order setting aside the exparte decree even without imposing any condition as to costs at least if not the suit amount. Hence he preferred the revision. Sri A.L. Narayana Rao, the learned counsel for the petitioner contends that the provisions of Order 9 Rule 13 C.P.C., abundantly made it clear that the imposition of terms by way of costs or the suit amount is mandatory and since the learned Sub-ordinate Judge while allowing the I.A., and setting aside the exparte decree passed in O.S. No. 75 of 1972 did not impose even costs and as such he failed to exercise his jurisdiction conferred on him by the mandatory provisions of Order 9 Rule 13 C.P.C.

2. Sri S. Govindarajulu the learned counsel for the respondent defendant, on the other hand contends that when there is sufficient cause the learned sub-ordinate Judge felt it not necessary to impose costs and hence the order passed by the learned Sub-ordinate Judge without imposing any terms is in accordance with the provisions of Order 9 Rule 13 C.P.C.,

3. From the facts narrated above it is clear that as the respondent-defendant was suffering from influenza--fever, fee look treatment from P.W. 2 on 20-3-1976 when the matter was posted peremptorily for trial. The learned Subordinate Judge came to the conclusion that there was sufficient cause that prevented the defendant from attending the Court and be, therefore, set aside the exparte decree but he did not impose any terms even as to costs.

4. The point that requires consideration is whether the provisions of Order 9 Rule 13 C.P.C., require the Court to impose costs as condition precedent for setting aside the exparte decree?

Order 9 Rule 13 C.P.C. reads as follows:--

In any case in which a decree is passed exparte 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 satisfied 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 made an order setting aside the decree as against him upon such terms as to cost, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

5. Thus Rule 13 of Order 9 C.P.C., lays down the two grounds on which the Court can set aside an exparte decree passed against the defendant consequent upon his failure to attend the Court on the day to which the trial or hearing of the suit was posted. The grounds are stated in the second paragraph of the rule which are (a) non-service of summons and (2) nonappearance for sufficient cause. Tee defendant is, therefore, required under this role to prove to the satisfaction of the Court of that either summons were not duly served on him or that he was

prevented by any sufficient cause from appearing when the suit was called on for hearing. If it is proved that in spite of service of summons the defendant failed to attend the Court on the relevant date of hearing without sufficient cause, his request for setting aside the *ex parte* decree cannot be acceded to even if the defendant is prepared to comply with, whatever be the terms. On the other hand if the defendant is able to satisfy the Court that he was prevented by sufficient cause, the Court has no other option than to set aside the *ex parte* decree upon such terms as to costs, as the Court thinks fit. The expression "upon such terms as to costs, payment into court or otherwise as the Court thinks fit" enjoins a legal obligation on the Court to impose terms for setting aside the *ex parte* decree even on being satisfied with the sufficiency of cause. The argument that the imposition of the terms is unwarranted, when once the Court is satisfied that the defendant was prevented by sufficient cause, cannot be countenanced in view of the plain language employed by the Legislature in its wisdom in this expression. While conferring the power on the Court to set aside an *ex parte* decree on the ground of sufficiency of cause, the Legislature mandates the Court in unambiguous terms to impose such terms as to costs, payment into court or otherwise as it thinks fit. The imposition of terms as to costs at least is a condition precedent for setting aside the *ex parte* decree. If the Court fails to impose such terms as to costs it amounts to failure to exercise jurisdiction conferred on it.

6. Chandra Reddy, J., (as he then was) had to examine in *Surayya vs. Thayaramma* AIR 1950 Mad. 618 the scope and effect of the words "upon such terms as to costs etc.," in Rule 13 of Order 9 C.P.C. The learned Judge held that he was of the Opinion that the intendment of Order 9 Rule 13 is to confer power upon the Court to impose conditions for setting aside, on *ex parte* Decree as to costs, as to payment of the decretal amount whole or in part or as to such other conditions as the Court thinks fit Under the provisions of law, the Court as ample jurisdiction to impose any of the three conditions mentioned above. In that case the District Munsif allowed the application for setting aside the *ex parte* decree subject only to the condition that the costs of the suit and the mesne profits decreed were deposited into Court. The Defendant who was aggrieved by that order, preferred an appeal to the District Judge complaining that the conditions imposed were onerous. The District Judge dismissed the appeal and confirmed the order of the trial Court. Hence a Civil Revision Petition was filed by the defendant in the High Court. Before the learned Judge it has been urged that under Order 9 Rule 13 C.P.C., the Court has no power to direct the defendant to deposit the decretal amount. It has been argued that the expression "such terms" in the rule relates only to payment of costs and that the words "payment into or otherwise" refers only to "Costs" immediately preceding that expression. Rejecting this contention, the learned Judge observed as follows:

It looks to me that the rule does not restrict the power of the Court to impose-conditions for setting aside an *ex parte* decree to payment of costs only. The wording of the Rule is comprehensive enough to include conditions as to

payment into court of decretal amount or such other conditions as the Court thinks fit. Ordinarily the Court will not impose onerous conditions upon the defendant such as the payment into Court of the whole or part of the decretal amount or as to furnishing security therefore etc. The condition as to deposit of decretal amount or such similar terms are imposed only under special circumstances. It is one thing to say that it is either inequitable or unjust to put the defendant to such onerous terms but it is quite a different thing to say that the Court has no jurisdiction at all to impose such terms under any circumstances.

7. In *Nalabala Chalamiah Vs. Nalabala Rubiah and Another*, Govinda Menon, J., held that Order 9 Rule 13 gives ample discretion to the Court in setting aside an *ex parte* decree to impose such reasonable terms as the Court deems fit. In that case the Court while setting aside the *ex parte* decree imposed the condition that the costs of the suit should be deposited before 1-10-1951. It was argued that the condition imposed is onerous as the defendant had sufficient ground for his not appearing on the day on which the suit was disposed of. The learned Judge held that the direction to deposit costs of the suit is not reasonable or punitive. So holding the learned Judge dismissed the petition.

8. Panchapakesa Aiyar, J (as be then was) in *Kotaiah vs. Narsimham* AIR 1949 Mad. 469 took the same view. In that case the *ex parte* decree was set aside on condition of the petitioner depositing the costs of the suit on or before 2nd August. 1946 and also paying Rs. 10/- as day costs to the plaintiff's *vakil* and that on default of one or other of the two conditions the petition stands dismissed. The learned Judge held that the Order is right in law. It was urged that this would cause hardship to the party as the parties could not both try to fulfil the conditions within the time fixed. But the learned Judge held that the mere hardship to parties is no valid reason to deviate from settled law: that is a matter for the legislature and not for the Court.

9. The Patna High Court had an occasion to examine in *Shyam Lal Sahai vs. Ram Narain Lal Sei* AIR 1920 Pan. 660 the scope and effect of Rule 13 of Order 9, in that case the learned Subordinate Judge allowed the petition for setting aside the *ex parte* decree on the condition that the defendant should deposit a sum of Rs. 500/- from out of the decretal amount within a week into Court. But the defendant failed to deposit the said amount in compliance with the order passed by the learned Subordinate Judge. The learned Subordinate Judge, therefore, dismissed the petition. Then the defendant preferred an appeal against that order to the Judicial Commissioner. The Judicial Commissioner also refused to interfere with the discretion of the learned Sub-ordinate Judge. Against that order the defendant preferred a revision before the Patna High Court. It was contended before the Division Bench that under Order 9 rule 13 the learned Judge has no power to order the defendant to pay anything into the court except costs and it is contended that the wording of that rule should be read as relating to the payment of costs only. Speaking for the Bench the learned Chief Justice

observed" it seems to me that the terms which the Court has power to impose as a condition for restoring the case for rehearing are of a three fold nature. The Court may, first of all impose conditions as to the payment of costs, it may, secondly, impose condition as to payment into Court and, this covers the payment into Court of the decretal amount or some portion thereof or payment into court of costs; and thirdly, it may impose other conditions as it may think fit and whilst at the same time in cases where there is no default on the part of the party asking for a re-hearing, such as for instance where he has not been duly served, it would not be equitable for the court impose any condition at all, nevertheless in other cases such as the present.

10. The Division Bench thus makes it abundantly clear that the Court has power to impose, as a condition precedent for restoring the case for hearing, the terms, which are of three fold as enunciated above. The Allahabad High Court also upheld, the imposition of the terms as a condition precedent for setting aside the ex parte decree in *Gulab Dei Vs. G.I.P. Railway*, In that case the learned Subordinate Judge set aside the ex parte decree on condition of the defendant paying the plaintiff Rs. 40/- as costs by 28th of July. The defendant did not deposit the amount as directed by the court but applied for ten days further time. But the learned Subordinate Judge refused to grant extension of time. An appeal was preferred to the District Judge. But it was dismissed. Against that order a revision petition was filed in the High court. The Division Bench held that an order restoring a case dismissed for default on condition of payment of a reasonable amount of costs to the opposite party within a time fixed by the order is not an illegal order. But on the contrary is an order contemplated by Order 9 Rule 13 C.P.C. So holding their hardships dismissed the revision. This decision was followed in *Gaya Din Vs. Lalta Prasad and Others*,

In *Gaya Din Vs. Lalta Prasad and Others*, the plaintiff's suit was dismissed for default on 12th April, 1934 to which date the suit was posted for trial. On 13th April the plaintiff filed an application for restoration of the suit. The court allowed the petition on 15th September, 1934 on the condition of payment of costs of Rs. 8/- to the opposite party on or before 27th October, 1934, in case of default the application was to stand as dismissed. Rupees four was paid in 15th September, 1934 to the opposite party and the balance was not paid upto 27th October, 1934. On 29th October, 1934 an application was made on behalf of the plaintiff for permission to pay the balance and for direction to the opposite party's counsel to receive it. The learned Munsif dismissed the application on the ground he had no power to extend the time for payment of costs. The first point that arose for consideration that case was whether a conditional order such as passed in this case could have been validly passed under Order 9 Rule 13. The learned Judges taking into consideration the provisions of Order 9 Rule 13 felt that the rule makes a clear provision for the passing of a conditional order. A doubt was expressed about the validity of such an order in 36 All 77 (A.I.R. 1914 All 55). Then the learned Judges observed" it seems to me that the provisions of Order 9 Rule 13 do not contemplate the passing of a conditional order such as to have an

effect analogous to that of a preliminary decree in a suit for presumption or on a mortgage". This doubt was cleared by a decision in *Gulab Dei Vs. G.I.P. Railway*, 146 There it was held that an order restoring a case dismissed for default on a condition of payment of a reasonable amount of costs to the opposite party within a time fixed by the order was not an illegal order but on the contrary was an order contemplated by Order 9 Rule 13 C.P.C. The order being legal and valid the next question is what was the effect of the order on the expiry of time fixed for the payment of the costs. The effect of the order was that as soon as the time fixed in the order expired the application stood as dismissed and the Court no longer remained seized of the application.

In *Nanak Chand Vs. Goswami Preetam Lal*, the trial Court passed order allowing the petition for setting aside the *ex parte* decree passed the following Order:"

Allowed on payment of Rs. 10 as costs subject to the condition that the applicant should deposit Rs. 394.15 as rent of the period from 18-8-1965 to 12-8-1968 and alleged monthly damages of Rs. 11/- commencing, from 17-8-1968 up to date by 30-5-1969 failing which the application shall stand automatically rejected.

In that case the applicant did not make the necessary payment of the amount but moved an application praying that the time for payment should be extend by 31-5-1969. The applicant made another application in which he stated that he was depositing Rs. 394.15 p.a. and prayed for two months time for depositing the balance of Rs. 104.50 ps. Both the aforesaid applications were dismissed by the trial Court. The trial Court said that it had no jurisdiction to grant further extension of time. The learned single Judge followed the decisions in *Gulab Dei Vs. G.I.P. Railway*, and *Gaya Din Vs. Lalta Prasad and Others*, mentioned and held that the decision of the Court below was correct.

Now the legal position is thus well settled. The Court should set aside an *ex parte* decree on being satisfied with the sufficiency of cause and it should necessarily impose such terms as to costs, payment into court or otherwise as it thinks fit. Merely because the defendant satisfied the Court that he was prevented by sufficient cause from attending the Court, it cannot be said that no terms as to costs need be awarded. Because sufficient cause has prevented the defendant from attending the Court, the rule permits the Court to set aside the *ex parte* decree but on terms.

In the case on hand the lower Court while setting aside the *ex parte* decree on being satisfied with the sufficiency of cause did not impose any terms as to costs. This amounts to failure of exercising jurisdiction manifestly conferred on it. Hence the order is vitiated with error of jurisdiction.

Thus I accept the contentions raised by Sri A. L. Narayana Rao, the learned counsel for the petitioner and reject the contentions raised by Sri S. Govindarajulu, the learned counsel for the respondent.

The respondent-defendant herein is, therefore, directed to deposit Rs. 50/- in the

lower court towards cost within one month from the receipt of this order. The order of the lower Court is modified as follows :--

The exparte decree passed by the lower Court will be set aside on the respondent-defendant depositing a sum of Rs. 50/- (rupees fifty only) into the lower Court towards costs within one month from the receipt of the order, failing which the petition filed by the respondent-defendant for setting aside the exparte decree shall stand dismissed.

In the result, the Civil Revision Petition Is allowed but in the circumstances no costs.