
(1960) 07 AP CK 0005

In the Andhra Pradesh High Court

Case No : S.C. Civil Miscellaneous Petition No. 8924 of 1958

Velchata Rajeswara Rao

APPELLANT

Vs

Kalvakota Venkataramarao and Others

RESPONDENT

Date of Decision : 29-07-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 9 Rule 9
Constitution of India, 1950 — Article 133, 133(1)

Citation : AIR 1961 AP 310

Hon'ble Judges : Kumarayya, J;Jaganmohan Reddy, J

Bench : Division Bench

Advocate : K. Madhava Reddy, for the Appellant; Sadhasiva Rao, for the Respondent

Final Decision : Dismissed

Judgement

Jaganmohan Reddy, J.—This is an application for leave to appeal to the Supreme Court under Article 133 of the Constitution of India. The question is whether the order against which leave is sought is a final order within the meaning of that Article. By a judgment of this Court (to which one of us was a party) an appeal was allowed and the lower court was directed to entertain an application filed under Order 9, Rule 9 C. P. C., treating it as one under Order 47, Rule 1 and to collect court fees. This is what the order slated:--

"... We would therefore allow the appeal and remand the case to the lower court, on payment of proper court fee on the review petition, to dispose it of on the merits and according to law. The party it allowed to add a ground to the review application that he was not hound to appear because the order adjourning the case was not that of the Court."

It appears from the facts as stated in the appeal that the suit was dismissed for default on April, 28, 1951 as the plaintiff was absent. It may be stated that on February 9, 1951 the case was adjourned and posted to March 9, for the plaintiff's evidence. On 9th March, the presiding officer was absent and hence

the suit was adjourned to April 6, 1951 by the clerk.

On that date also the presiding officer was absent on leave and consequently the clerk posted the case to April 20, 1951, on which date the plaintiffs and their advocate were absent whereupon the suit was dismissed for default. On 20th June, 1951, an application was made to restore the claim, but the lower court disallowed the same on the ground that it was beyond the period fixed for restoring the suit, as by that time Section 5 of the Limitation Act had not been made applicable to applications for restoration of suits.

To meet this objection, the plaintiffs applied to the Court to treat the application as one for restoration under Order 47 Rule 1 and offered to pay the court fees, but the lower court rejected that petition also. Against that order an appeal was filed and in that appeal it was held that the adjournments by the clerk were not authorised and consequently the dates fixed were not in law such as would require the plaintiff to be present. In that view the above order was made remanding this case to the lower court.

2. Learned Advocate for the petitioners, Shri Madhava Reddy, now urges that this is a final order inasmuch as we have practically determined the rights of the parties and there is nothing left for the lower court to do, except to set aside the order of dismissal for default and restore the petition. The question is whether this order is a final order which can be entertained under Article 133 of the Constitution which is in the following terms:

133(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a Civil proceeding of a High Court in the territory of India if the High Court certifies-

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by parliament by law; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) that the case is a fit one for appeal to the Supreme Court;

(2) *****

(3)*****

It will be observed that apart from the application for leave being from any judgment, decree or final Order in a civil proceeding, the conditions set out in clauses (a), (b) and (c) must also be satisfied. In this case, we called for a report and there is no doubt from that report, which is not challenged by the respondents, that the subject-matter of dispute is of the value of over Rs.

20,000-on the date of the suit and appeal and that the order is one which is at variance with that of the lower court.

If the appellate order is a judgment, decree Or final order, then there will be no impediment in the grant of a certificate. The only question is whether it is a final order and we think it is not. In our view, it is an incidental order which does not finally dispose of the rights of the parties, nor does it determine the suit. In fact, even if the contention of the learned advocate that in substance it is a final disposal of the proceedings initiated in the trial court under Order 9, Rule 9 is accepted, the suit, at the most, would be restored and hence it would come to life requiring the rights of the parties to be determined according to law.

3. The test for the purposes of Section 109 C. P. C. whether a suit or appeal is alive and that the rights of the parties have still to be determined, is laid down by the Privy Council in AIR 1933 58 (Privy Council) In that case a person brought a suit for damages, but became insolvent during the pendency of the suit, and the Official Assignee did not furnish the necessary security and for his failure to do so, the suit was dismissed on the assumption that the plaintiff's rights had vested in him.

The appellate court, however, held that the claim being one for damages did not vest in the Official Assignee and remanded the case for trial on merits. Against that an appeal for leave to the Privy Council was presented u/s 109 C. P. C. and leave was granted on the ground that the order went to the root of the suit, viz., to the jurisdiction of the court to entertain it and hence it was a final order.

The Privy Council held that the order of remand did no doubt decide an important and even a vital issue in the case, but it left the suit alive, and provided for its trial in the Ordinary way and hence no appeal lay against it u/s 109(a). Sir George Lowndes, speaking for their Lordships of the Privy Council, observed at page 60, after referring to the case of *Firm Ramchand Manjimal v. Firm Goverdhandas Vishandas Ratanchand* AIR 1020 PC 86:

".....Lord Cave in delivering the judgment of the Board laid down, as a result of an examination of certain cases decided in English Courts, that the test of finality is whether the order "finally disposes of the rights of the parties", and he held that the order then under appeal did not finally dispose of those rights, hut left them "to be determined by the Courts in, the ordinary way." It should be noted that the appellate court in India was of opinion that the order it had made "went to the root of the suit, namely, the jurisdiction of the Court to entertain it", and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit, if, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it u/s 109(a) of the Code." Their Lordships of the Supreme Court in *Saifuddin Saheb v. State of Bombay*, 1958 SCJ 403: (AIR 1953 SC 253) while dealing with an application under Articles 132 and 133 of the Constitution of India observed with reference

to the argument that it should be considered to be one under Article 133 under which a certificate was given, that under that article also an appeal lies only against a judgment, decree or final order and no certificate could be granted in respect of an interlocutory finding.

In that case, a preliminary issue questioning the vires of the Bombay prevention of Excommunication Act as contravening Articles 25 and 26 of the Constitution was raised and it was held by Shah J. that the Act was not invalid. In appeal, pending the hearing, the plaintiff died and since the claim was grounded on a personal action the suit was held to have abated. On an application under Articles 132 and 133 a certificate was given by the High Court, but the Supreme Court held that no appeal lay to the Supreme Court as there was no question of an appeal in relation to an action which has abated.

4. A bench of the Andhra High Court consisting of Subba Rao C. J. (as he then was) and Satyanarayana Raju, J. in *Venkayya v. Venkatarama Rao*, AIR 1956 Andhra 126, while holding on the particular facts of the case that the order was a final order in substance as it determined the rights of the parties, referred to the observations of the Privy Council in AIR 1933 58 (Privy Council) and observed at page 128:

".....What matters is not the form but the substance. If, in substance, no rights of the parties are outstanding to be decided in the suit, it cannot be said that a mere pendency of a suit on the file of a court deprives the otherwise final adjudication of the rights of the parties by the High Court of its finality."

5. In the instant case none of the rights of the parties have been determined and in fact the suit had not yet matured to the stage of a trial. It was only at the stage when the application for restoration of the suit, has been disposed of in the manner stated above that this application is filed. We are clearly of the view that in the circumstances of the case, this application does not come within the purview of Article 133 of the Constitution.

6. We reject the petition with costs.