Vareed Jacob vs Sosamma Geevarghese & Ors on 21 April, 2004

Equivalent citations: AIR 2004 SUPREME COURT 3992, 2004 (6) SCC 378, 2004 AIR SCW 4269, 2004 (5) SCALE 102, 2004 (5) ACE 162, 2004 (2) HRR 415, 2004 (5) SRJ 534, (2004) 2 KHCACJ 230 (SC), (2004) 3 ALLMR 916 (SC), 2004 HRR 2 415, 2004 (2) ALL CJ 2013, (2004) ILR (KANT) (3) 3173, (2004) 2 CIVILCOURTC 365, (2004) 2 KER LT 649, (2004) 3 LANDLR 292, (2005) 2 MAD LW 103, (2004) 3 ALL WC 2033, (2004) 3 BLJ 52, (2004) 4 CIVLJ 265, (2004) 4 ANDHLD 35, (2004) 3 SUPREME 637, (2004) 2 RECCIVR 708, (2004) 5 SCALE 102, (2004) 2 WLC(SC)CVL 321, (2004) 2 UC 939, (2004) 2 KER LJ 641, (2004) 18 INDLD 335, (2005) 1 BOM CR 413

Author: S.B. Sinha

Bench: S.B. Sinha

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           CASE NO.:
Appeal (civil)  2634 of 2004

PETITIONER:
VAREED JACOB

RESPONDENT:
SOSAMMA GEEVARGHESE & ORS.

DATE OF JUDGMENT: 21/04/2004

BENCH:
S.B. Sinha.

JUDGMENT:
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J U D G M E N T (@ S.L.P. (CIVIL) NO. 18699 OF 2001) S.B. SINHA, J :

Leave granted.

The short question involved in this appeal which arises out of a judgment and order dated 27.7.2001 in C.R.P. No. 2003 of 1998-B passed by the High Court of Kerala at Ernakulam is as to whether on restoration of a suit an order of injunction passed is automatically revived or not.

An order of injunction can be passed under Order 39, Rules 1 and 2 of the Code of Civil Procedure. Such an order can also be passed by the Court in exercise of its inherent jurisdiction in the event the prayer for grant of injunction does not fall

within the scope of Section 94 of the Code of Civil Procedure read with Order 39, Rules 1 and 2 thereof.

An order of injunction can be granted by the Court only when there exists any power therefor. In Morgan Stanley Mutual Fund Vs. Kartick Das [(1994) 4 SCC 225] this Court has held that having regard to the scheme of the Consumer Protection Act, the consumer courts do not have any power to issue injunction. The jurisdiction to issue an order of injunction, appointment of a receiver or to pass an order of attachment before attachment would, therefore, depend upon the scheme of the statute and the powers conferred on the Court thereby. This may be one of the factors which is required to be taken into consideration for making a distinction between a supplemental proceedings and incidental proceedings.

A court or a tribunal entitled to adjudicate upon an issue arising in a lis between the parties has the requisite jurisdiction to pass orders which are incidental thereto so as to enable it to effectively adjudicate the same. Such a power of a Court or a Tribunal to do all things necessary to effectively adjudicate upon the lis need not, in other words, be specifically conferred by the statute; such power being ancillary to the power of the court. It is adjunct to the court's/tribunal's power of adjudication.

The Code of Civil Procedure uses different expressions in relation to incidental proceedings and supplemental proceedings. Incidental proceedings are referred to in Part III of the Code of Civil Procedure whereas Supplemental Proceedings are referred to in Part VI thereof.

Is there any difference between the two types of proceedings?

A distinction is to be borne in mind keeping in view the fact that the incidental proceedings are in aid to the final proceedings. In other words an order passed in the incidental proceedings will have a direct bearing on the result of the suit. Such proceedings which are in aid of the final proceedings cannot, thus, be held to be at par with supplemental proceedings which may not have anything to do with the ultimate result of the suit.

Such a supplemental proceeding is initiated with a view to prevent the ends of justice from being defeated. The supplemental proceedings may not be taken recourse to as a routine matter but only when an exigency arises therefor. The orders passed in the supplemental proceedings may some time cause hardships to the other side and, thus, are required to be taken recourse to when a situation arises therefor and not otherwise. There are well-defined parameters laid down by the Court from time to time as regards the applicability of the supplemental proceedings.

Incidental proceedings are, however, taken recourse to in aid of the ultimate decision of the suit which would mean that any order passed in terms thereof, subject to the

rules prescribed therefor, would have a bearing on the merit of the matter. Any order passed in aid of the suit are ancillary powers. Whenever an order is passed by the Court in exercise of its ancillary power or in the incidental proceedings, the same may revive on revival of the suit. But so far as supplemental proceedings are concerned, the Court may have to pass a fresh order.

An order to furnish security to produce any property belonging to a defendant and to place the same at the disposal of the Court or order the attachment of any property as also grant of a temporary injunction or appointment of a receiver are supplemental in nature. The effect of such order may be felt even after decree is passed. An order of attachment passed under Order 38 of the Code of Civil Procedure would be operative even after the decree is passed. Such an order of attachment passed under Order 38 can be taken benefit of by the decree holder even after a decree is passed. An order of temporary injunction passed in a suit either may merge with a decree of permanent injunction or may have an effect even if a decree is passed, as, for example, for the purpose of determination as regard the status of the parties violating the order of injunction or the right of a transferee whom have purchased the property in disobedience of the order of injunction. The orders passed in supplemental proceedings may have to be treated distinctly as opposed to an order which is ancillary in nature or which has been passed in the incidental proceedings.

The question must, therefore, be considered having regard to the aforementioned legal principles in mind. We may at this juncture notice those decisions wherein it has been held that the interlocutory order is automatically revived on restoration of suits.

In Bankim Chandra and Others Vs. Chandi Prasad [AIR 1956 Patna 271] the Court was concerned with the revival of an order of stay. It was held, having regard to the scheme of law laid down in the Code of Civil Procedure that interlocutory orders like one of 'stay' are nothing but ancillary orders and they are all meant to aid and supplement the ultimate decision arrived at in the main suit or appeal. Even in such a situation when there is any other factor on the record or in the order passed to show to the contrary even an order of stay shall not automatically revive. This decision, therefore, is an authority for the proposition that the Code of Civil Procedure lays down two different schemes, one in relation to the ancillary orders which would aid and supplement the decisions arrived at in the main appeal and the one which may not have to do anything therewith.

In Tavvala Veeraswamy Vs. Pulim Ramanna and Others [AIR 1935 Madras 365] a Full Bench of the Madras High Court held that even an order of attachment before judgment would automatically revive on restoration of a suit. In that case, Beesley, CJ speaking for the Full Bench, however, erroneously proceeded on the basis that an order of attachment is also an ancillary order and in that view of the matter held:

> "...It does not seem to me reasonable that the plaintiff in a suit who has got an attachment before judgment should have again, after the restoration of the suit after its dismissal for default, to apply to the Court for a fresh attachment and that having done so the defendant should have to apply to raise the attachment by producing a surety or sureties. The common sense view of the matter is that all ancillary orders should be restored on the suit's restoration without any further orders."

The question as to whether an order of attachment is a supplemental order or not was not at all considered therein.

In Shivaraya and Others Vs. Sharnappa and Others [AIR 1968 Mysore 283], a learned Single Judge followed Bankim Chandra and Others (supra) and Tavvala Veeraswamy (supra) which considered such interlocutory orders to have been passed in exercise of the Court's ancillary powers.

In Ganesh Prasad Sah Kesari and Another Vs. Lakshmi Narayan Gupta [(1985) 3 SCC 53], this Court was concerned with a case as regard the power of the court to extend the time for depositing rent by the defendant. Interpreting Section 11A of Bihar Buildings (lease, Rent and Eviction) Control Act, 1947, it was held that the Court had such power; differing with the view of the High Court as regard interpretation of such a provision as directory in stead and in place of being mandatory.

However, an observation had been made that the Learned Trial Judge did grant relief to the tenant by refusing to strike off the defence on an erroneous view that the direction did not revive after setting aside of the ex parte order. The said observation is obiter in nature and in any event, no detailed discussions as regard the nature of the power of the Court under Section 148 of the Code of Civil Procedure had been made. The jurisdiction of the court under Section 148 of the Code of Civil Procedure is an ancillary power and not a supplementary one.

In Smt. Radhey Bai Vs. Smt. Savitri Sharma [1975 RLR 234], Delhi High Court was concerned with an ancillary power of a court as would appear from the following observations:

> "7...It is, therefore, obvious that on setting the dismissal aside, the court has to appoint a day for proceeding with the suit and not for trying the suit de novo. This indicates that the further proceedings in the suit have to start from the stage and point where they were pending before the suit was dismissed and there is no requirement of law that upon such restoration the entire proceedings must be reached again. Consequently on the restoration of a dismissed suit, all the previous proceedings and the interim orders revive and do not require a fresh order to give them vigour."

In Kishan Lal Vs. Smt. Kamla Devi Sharma [1979 RLW 369], the Court while again dealing with a rent control matter held that when an order has been passed under Sub- Section (3) of Section 13 of the Act as existed at the relevant time, no fresh order is required to be passed.

In Ulahannan Chacko Vs. Mathai [1986 KLT 301] the Court was concerned with an application for amendment of plaint in relation whereto a contention was raised that the said application could not have been brought into life as the appeal was dismissed holding:

> "...When restoration of the suit or appeal is allowed, the parties are to be restored to the same position in which they were situated when the court dismissed the suit or appeal. Then on restoring the appeal dismissed for default, the ancillary matters disposed of in consequence of such dismissal must also get restored and the consequential orders passed on dismissal of the suit or appeal should automatically get vacated."

In Abdul Hamid Vs. Karim Bux and Others [AIR 1973 All 67], a Full Bench of the Allahabad High Court noticing a large number of decisions including some of which have been referred to hereinbefore held:

> "17. The language of Order 38, R.9 no doubt is capable of both the interpretations but the well-recognised rule of interpretation is that where the language is capable of two interpretations and where the section of the Act has received a judicial construction and the said construction has long been acted on without any alteration in the statute, the interpretation so recognised and acted on is to be accepted on the principle of stare decisis because it is the general maxim that even a point of law has been settled by decision it forms a precedent which is not afterwards to be departed from. The latter part of the rule which requires that the attachment shall be removed when the suit is dismissed is either directory or mandatory. If it is directory the attachment is removed automatically in spite of no order of the Court. If it is mandatory, then the duty of the Court is to pass an order and a party cannot be penalised where the consequences for the dismissal appear to be the witdrawal of the attachment before judgment. The Lower appellate Court in these circumstances was right in upholding respondent No. 1's claim based on the transfer in his favour and rejecting the plaintiff- appellant's contentions."

The question before us, however, had received the attention of the Court as would appear from a long line of decisions.

In Chunni Kuar Vs. Dwarka Prasad [1887 All WN 297], it was held:

> "That temporary injunction came to an end on the passing of the decree, and nothing has happened to revive or keep alive the order for the temporary injunction. Dwarka Prasad was not left without his remedy. He might have applied to this Court for an injunction pending the determination of his appeal. No such application has been made to this Court, and therefore, I am of opinion that Musammat Chunni Kuar was and is entitled to have the money paid out of Cour to her and to have this appeal allowed with Costs. The view I take is fortified by the judgment in Sheikh Moheeooddeen Vs. Sheikh Ahmed Hossein (14 W.R. 384)"

As far back in 1887, the Allhabad High Court while considering the provisions of Sections 311 of the Old Code of Civil Procedure which is in pari materia with Order 38 Rule 5 of the Code of Civil Procedure, 1908 and referring to Chunni Kuar Vs. Dwarka Prasad [1887 All WN 297] noticed a contention which is in the following terms:

> "On the other hand, Mr. Colvin relies upon the last part of s.488 to show that an attachment before judgment comes to an end "when the suit is dismissed;"

and the learned counsel also lays stress upon the provisions of s. 490, and argues that the words of that section contemplate that it is only when a decree is given in favour of the plaintiff that re-attachment in execution of such decree is dispensed with, implying that such attachment is necessary where the suit ended in dismissal of the plaintiff's claim. For this contention the learned counsel also relies upon the ruling of the learned Chief Justice in Chunni Kuar Vs. Dwarka Prasad where it was held that a temporary injunction under s. 492, notwithstanding the use of the phrase "till further orders," comes to an end on the termination of the suit in which such injunction was passed, although no express order had been made by the Court withdrawing or setting aside such injunction."

Mahmood, J. agreeing with the said contention observed:

> "I am of opinion that this contention is sound, and that the case last cited, though relating to temporary injunction, proceeds upon a principle analogous to attachments before judgment, both being ad interim proceedings which naturally cease to have any force as soon as the suit itself, in respect of which they were taken, comes to a close. In other words, an attachment before judgment under s.488, like a temporary injunction under s.492, becomes functus officio as soon as the suit terminates."

This decision, therefore, is an authority for two propositions, namely, (i) an order of attachment before judgment does not entail an automatic revival upon restoration of a suit which is dismissed for default; and

(ii) for that purpose an order of injunction would be treated at par with an order of attachment before judgment.

In Gangappa Vs. Boregowda [AIR 1955 Mysore 91], a Full Bench of the Madras High Court by referring such proceeding as a supplemental proceeding required for grant of extraordinary relief as contra-distinguished from an ancillary order which is granted in the aid of a proceeding, held:

> "10. An attachment before judgment is in the nature of an interlocutory order. It is an extra ordinary relief granted to a plaintiff even before his claim is adjudicated upon and found to be true and if a suit is dismissed either for default or on its merits by the trial Court and the attachment before judgment has therefore to cease, he can certainly have not as much grievance as a person who has obtained a decree and attached property of the judgment-debtor whose attach property has been questioned

> and decided in summary proceedings and which are made expressly subject to a decision in a regular suit. Moreover, it cannot also be urged that all interlocutory orders like say those passed on applications for temporary injunction the operation of which would have to cease on the dismissal of a suit, would automatically be revived or can be deemed to be in force without any further orders by an appellate court or by the same Court after the suit is dismissed. To hold so would lead to obvious and real difficulties. It is not also as though the plaintiff in such a case has no remedy. He could always apply to the same Court if a suit which has been dismissed for default is restored to file or to an appellate court which has also ample powers to grant an order of attachment before judgment under the provisions of S. 107(2), Civil P.C. In any event the possibility of hardship cannot warrant the ignoring of the express provisions of O.38, R.9 by which it is specifically laid down that an attachment before judgment shall cease by the dismissal of a suit."

It will, therefore, be seen that the Court has in that case also equated the order of injunction with an order of attachment.

Yet again in Nagar Mahapalika, Lucknow Vs. Ved Prakash [AIR 1976 All 264] it was held:

> "4. As long ago as 1887 a question of similar nature arose for consideration before this Court in Chunni Kuar Vs. Dwarka Prasad (1887 All WN 297). It was observed therein that an attachment before judgment like a temporary injunction becomes functus officio as soon as the suit terminates. Again, a question pertaining to attachment before judgment came up for consideration before this Court in Ram Chand Vs. Pitam Mal (1888) ILR 10 All 506. Relying on Chunni Kuar's case (supra) that principle was reiterated with approval. The other High Courts also considered this question in a number of cases. Finally, the question was raised in Abdul Hamid Vs. Karim Bux before this Court as to whether on the dismissal of a suit in default in atttachment before judgment automatically lapsed and a fresh attachment was necessary on the restoration of the suit, or whether on the restoration of the suit the attachment previously made is revived or is survived. This question was referred to a Full Bench of the Court. The majority view was that on the dismissal of suit in default the attachment before judgment automatically ceases and a fresh attachment is necessary on the restoration of the suit."

In Kanchan Bai Vs. Ketsidas and others [AIR 1991 Raj. 94], it was held:

> "6. The only question for consideration in this application is whether on the setting aside of the order of rejection of the plaint and its remand by the appellate court, the temporary injunction issued by the trial Court stood revived? It is well settled law that interlocutory orders which are meant to aid and supplement the ultimate decision arrived at in the main suit or appeal would be ancillary order and such order would stand revived automatically on the restoration of the suit. Orders granting temporary injunction do not aid and supplement the ultimate decision of the suits. As

> such they cannot be said to be ancillary orders."

In Ranjit Singh Vs. Dr. Sarda Ranjan Prasad Sinha [AIR 1981 Patna 102] following Bankim Chandra (supra), the Patna High Court holding that an order striking off of tenant's defence for non deposit of rent automatically revived, L.M. Sharma, J. (as learned Chief Justice of India then was), however, noticed that by restoration of the suit, the order dated 13.1.1978 whereby an order directing to deposit the arrears of rent did not revive, stated the law thus:

> "The order in regard to striking off the defence is vitally different from the order directing the arrears of rent to be deposited. I, therefore, hold that in the present case, the order dated 6.2.1979 revived automatically on the restoration of the suit and the view taken by the court below is correct."

The Parliament consciously used two different expressions 'incidental proceedings' and 'supplemental proceedings' which obviously would carry two different meanings.

The expression 'ancillary' means aiding, auxiliary; subordinate; attendant upon; that which aids or promotes a proceeding regarded as the principal.

The expression 'supplementary proceeding' on the other hand, would mean a separate proceeding in an original action, in which the court where the action is pending is called upon to exercise its jurisdiction in the interest of justice.

The expression 'incidental' may mean differently in different contexts. While dealing with a procedural law, it may mean proceedings which are procedural in nature but when it is used in relation to an agreement or the delegated legislation, it may mean something more; but the distinction between an incidental proceeding and a supplemental proceeding being obvious cannot be ignored.

Indisputably, the effect of an order passed under different provisions of Section 94 of the Code of Civil Procedure would be different. They have been so legislated keeping in view different exigencies of circumstances but it must not be forgotten that the power thereunder is to be exercised in the interest of justice. The statutory scheme therefor is that supplemental proceeding should be taken recourse to only when the interest of justice is required to be sub-served, although the interlocutory order may not have anything to do with the ultimate decision of the court.

The consequences of an order of attachment before judgment as also, an order of injunction can be grave. By reason of such an order, a right of a party to the lis may be affected or remained under animated suspension. By reason of an interlocutory order whether in terms of Order 38, Order 39 or Order 40, a person's right to transfer a property may remain suspended as a result whereof he may suffer grave injury. When the suit is dismissed for default, he may exercise his right. If it is to be held that on restoration of the suit the order of attachment before judgment or an order, an injunction is automatically revived, as a result whereof the status of the parties would be in the same position as on the date of passing of the initial interlocutory order, they may be proceeded with for violation of

the order of injunction or an order of attachment before judgment. The right of subsequent purchaser may also be affected. By reason of taking recourse to a supplemental proceedings, the rights of the parties and in some cases the right of even a third party cannot be allowed to be taken away.

In this case, this Court is not concerned with the question as to whether substantive changes have been made in Order 38 Rule 5 by Code of Civil Procedure, 1908 vis-`-vis Code of Civil Procedure, 1859. The question is as to whether the power of the court to pass an order of attachment before judgment is an ancillary power or a supplemental power. The provisions of Order 38 and Order 39 have been equated by the court presumably not on the ground that they provide for different interlocutory reliefs but having regard to the nature of the proceedings vis-`-vis the reliefs which can ultimately be granted. It would also not be correct to hold that the attachment proceeding is in effect and substance different from an order of injunction on the ground that the former is a part of execution process.

The provisions of Order 38 Rule 9 of the Code of Civil Procedure, in my considered opinion, are not of much importance. The rule confers an independent and substantive statutory right on a defendant to bring it to the notice of the court that he is in a position to furnish security to meet the claim of the plaintiff and as such an order of attachment need not continue. The order of attachment also comes to an end in terms of the aforementioned provision when the suit is dismissed. The very nature of an order of attachment entails that in the event of dismissal of suit, the order comes to an end. Such a provision has been made by the legislature by way of abundant caution. Although it is of not much importance but we may notice that there exists a conflict of opinion as regard consequences of an order of attachment upon reversal of a judgment of dismissal of suit in appeal, namely, as to whether in the event the suit is decreed by the appellate court, an order of attachment would automatically be restored or not.

It is also of some importance that there exists a view that an order of dismissal of a suit does not render an order of attachment void ab initio as a sale of property under order of attachment would be invalid even after the date of such sale and the attachment is withdrawn.

A converse case may arise when the property is sold after the suit is dismissed for default and before the same is restored. Is it possible to take a view that upon restoration of suit the sale of property under attachment before judgment becomes invalid? The answer to the said question must be rendered in the negative. By taking recourse to the interpretation of the provisions of the statute, the court cannot say that although such a sale shall be valid but the order of attachment shall revive. Such a conclusion by reason of a judge-made law may be an illogical one.

A construction which preserves the rights of the parties pending adjudication must be allowed to operate vis- `-vis the privilege conferred upon a plaintiff to obtain an interlocutory order which loses its force by dismissal of suit and, thus, may not revive, unless expressly directed, on restoration of the suit.

A suit or a proceeding which is barred by limitation would oust the jurisdiction of the court to entertain the same. When a proceeding is barred by limitation, it culminates in a right to the non-suitor. Such a right can be curtailed only by express terms of a statute. A statute may furthermore provide for extension of a period of limitation in certain situation. The Code of Civil Procedure is silent as to the effect of revival of the interlocutory order on restoration of a suit. This case demonstrates as to how a person for no fault on his part would suffer prejudice when such a right is being taken away. Such a provision which would confer jurisdiction of a court to entertain a proceeding which it otherwise would not have in terms of the Limitation Act, 1963, in my opinion, should be strictly construed.

From the decisions rendered by different High Courts, therefore, the law that emerges is that there exists a distinction between ancillary orders which are required to be passed by the court in aid of or supplemental to the ultimate decision of the Court; as contradistinguished to an order passed under Part VI of the Code of Civil Procedure in terms whereof an order is passed in favour of a party to the lis which may not have a bearing on the ultimate result of the suit. An interlocutory order passed in a suit may not also have anything to do with the relief prayed for by the plaintiff. An order for injunction or appointment of receiver can be passed even at the instance of the defendant. An order which has been obtained by the defendant may not revive on restoration of the suit. Supplementary proceedings, thus, envisage that such a power must be specially conferred upon the Court which are required to be passed in the interest of justice irrespective of the fact as to whether the same would ultimately have any bearing with the reliefs claimed in the suit or not. In absence of any statutory provisions such a power cannot be exercised whereas a power which is ancillary or incidental, can always be exercised by the Court in aid of and supplemental to the final order that may be passed. Furthermore, a jurisdiction expressly conferred by a statute and an inherent power, subject to just exceptions, must be treated differently.

I am, therefore, of the opinion that the interim order of injunction did not revive on restoration of the suit. The Courts, however, would be well-advised keeping in view the controversy to specifically pass an order when the suit is dismissed for default stating when interlocutory orders are vacated and on restoration of the suit, if the court intends to revive such interlocutory orders, an express order to that effect should be passed.

I respectfully dissent with the opinion of Hon'ble theChief Justice of India.

I will, therefore, set aside the impugned order and allow the appeal. No costs.