

Kerala High Court

N. Karuppan vs M. Sankaran Nair on 14 July, 1972

Equivalent citations: AIR 1973 Ker 28

Author: K Bhaskaran

Bench: K Bhaskaran

ORDER K. Bhaskaran, J.

1. The revision petitioner is the defendant in the suit O. S. No. 841 of 1968 on the file of the Munsifi's Court, Manjeri. The suit was one for recovery of certain amounts. The suit was originally decreed ex parte, but that decree was set aside on 16-8-1969. Thereafter the suit was posted for filing written statement of the defendant to 12-9-1969. No written statement was filed on that day and the case was adjourned to 26-9-1969. That day also the statement was not filed. Further time was granted till 3-10-1969, and yet the written statement was not filed. Thereafter time was granted upto 21-10-1969. That day not only no written statement was filed, but the defendant was not presented also, and his Advocate reported no instructions. The Court, therefore, again decreed the suit ex parte.

2. On 31-10-1969 the defendant filed I.A. No. 2809/69 under Order IX, Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree stating inter alia that he was laid up, and producing Ex. A-1 medical certificate in support of his contention. This petition was resisted by the plaintiff. Finally, the learned Munsiff passed an order setting aside the ex parte decree on condition that the defendant deposits in Court the entire decree amount including costs within one month from the date of the order. This order was passed on 18-12-1969. The learned Munsiff posted the petition to 19-1-1970 for deposit

3. This order was challenged by the defendant in C.M.A. No. 7 of 1970 on the file of the District Court, Kozhikode, which was subsequently transferred to the file of the Subordinate Judge's Court, Manjeri, at Kozhikode, in which Court it was numbered as C.M.A. No. 30 of 1970. The learned Subordinate Judge dismissed the appeal by his judgment dated 6-11-1970. It is the judgment of the learned Subordinate Judge confirming the order of the learned Munsiff that is under challenge in this revision petition.

4. Various grounds have been taken by the revision petition in the memorandum of civil revision petition filed by him. The main contentions however, seem to be that (1) the revision petitioner was not given adequate opportunity to establish his case, as the ex parte decree was passed on the very same day on which the plaintiff filed his objections to the petitioner's petition for setting aside the ex parte decree; and (2) in any event the condition that the defendant should deposit the entire decree amount including the costs within one month is onerous, not warranted by the provisions of Order 9, Rule 13 of the C. P. C.

5. Before entering the merit of the case it has become necessary to dispose of a preliminary objection taken by the learned counsel appearing for the respondent with respect to the maintainability of the revision petition. It is argued by the learned counsel that this revision is filed from the judgment passed in C.M.A. No. 30 of 1970 which itself was incompetent. The contention is that from the order

dated 18-12-1969, which is in the nature of a preliminary order, no appeal would lie and, if that be so, a revision from the judgment in that appeal also cannot lie.

6. My attention has been drawn to Order 43, Rule 1 (d) of the C.P.C., in terms of which an appeal shall lie from an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree or order passed ex parte. According to the learned counsel, the order dated 18-12-1969 is really an order allowing the petition for setting aside the ex parte decree on condition. It is only by virtue of the second order that was to be passed on or after 19-1-1970, to which date the petition was posted for recording deposit, that a proper order rejecting the application could be made, in case there was failure to deposit the amount in terms of the order dated 18-12-1969. It is also pointed out that in appropriate cases, if moved under Section 148 of the C.P.C., it is open to Court to enlarge the time for the fulfilment of the condition, and that being so, by no stretch of imagination could it be said that the order dated 18-12-1969 was a final order rejecting the petition for setting aside the ex parte decree.

7. Distinction has been drawn between an all comprehensive, single order which contains not only the condition for setting aside the ex parte decree or order but also the consequence that would follow in case the condition is not fulfilled within the time granted or allowed on the one hand, and an order setting aside the ex parte decree on condition that certain things are to be done within a certain period, but without specifying what exactly would follow if the conditions are not fulfilled. In the latter case, it is submitted, a second order rejecting the application for not having fulfilled the condition is contemplated.

8. A Division Bench of the Madras High Court had to consider this question in *Ramayya v. Lakshmayya*, AIR 1944 Mad 383. The order under challenge in that case reads as follows:--

"It is ordered that the petition be and the same is hereby allowed. It is further ordered that the petitioners do deposit into Court a sum of Rs. 100 towards their costs in this petition and also in I. A. Nos. 569, 570 and 625 of 1943 irrespective of the result of the suits and do also deposit the costs decreed on or before 26th July, 1943. It is further ordered that in default of payment the petitions do stand dismissed with costs."

Mockett, J., after holding that the order in question was a final order observed as follows:--

"There is no doubt that if it appears that in these applications to set aside ex parte decrees an order implies that a further order is required to dispose of the applications, it is that last order, if it rejects the application, which should be attacked in appeal."

Bell, J., who concurred with Mockett, J., has observed-

"Where any further direction of the Court is required with regard to the matters in issue between the parties it cannot be said that finality in any shape or form has been reached."

A similar question again came up for consideration before the Madras High Court in Kotaiah v. Narasimham, AIR 1949 Mad 469. Panchapakasa Aiyar, J. held-

"Where upon a petition under Order 9, Rule 13, the Court passes an order that the ex parte decree is set aside on condition of the petitioner depositing the cost 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 the one or the other of the two conditions the petition stands dismissed, the order is right in law and is not a conditional order but a final one, so that the limitation for appeal against it runs from the date of the order and not from 2nd August, 1946, when one of the two conditions is not fulfilled." His Lordship pointed out that in that case there was no further order of the District Munsiff after the final two-headed order passed on 3rd July, 1946. In Balarama v. Subbarama, AIR 1953 Mad 360 Mack, J. has held as follows:

"Where an application is made by the defendant to set aside an 'ex parte' decree passed against him and the Court makes a conditional order directing the decree to be set aside on certain conditions in default of Which the application is to be dismissed, such an order is final for the purpose of an appeal allowed under Order 43, Rule 1 (d). For an appeal from such an order time begins to run from the date the order is made and not from the date when the Court makes a further order dismissing the application on the failure to perform the condition."

9. My attention has been invited to other decisions on the same lines and the Commentary in Mulla's Code of Civil Procedure, Volume I, 13th Edition, pages 823 and 824. What emerges from the foregoing discussion is that in a case like this where on 18-12-1969 an order for setting aside the ex parte decree is passed on condition that certain amounts are deposited within one month from the date of that order without specifying the consequence that would follow in the event of failure to comply with the order, and the petition is posted to 19-1-1970 for deposit, the rejection of the petition comes into effect only after the second order is passed. The appeal as contemplated under Order 43, Rule 1 (d) of the C. P. C. would lie only from such a final order, not from the first (or preliminary) order that was passed on 18-12-1969. In this view, I have no hesitation in holding that C.M.A. No. 30 of 1970 on the file of the Subordinate Judge was filed under a misconception. Both sides do not appear to have taken note of this aspect of the matter until the matter come up for hearing in revision in this Court.

10. The respondent herein realising the drawbacks on his side, by way of abundant caution, has put in C.M.P. 8437 of 1972 praying that this may be treated as a revision from the order in I.A. No. 2809/69 dated 18-12-1969 and that the delay in filing the revision may be condoned. I am of the opinion that in a matter of this nature where due to technical objections the appeal that was filed before the Subordinate Judge is proved to be incompetent, liberal consideration should be given to the prayer for treating the present revision as one filed against the order of the learned Munsiff dated 18-12-1969 and the delay condoned. I, therefore, allow the prayer in C.M.P. 8437/72 and treat this Civil Revision petition to be one against the order dated 18-12-1969 in LA. 2809/69.

11. Now we have to consider the merit of the revision petition. The contention that the revision petitioner was not given adequate opportunity to establish his case need not detain us inasmuch as

the learned Munsiff himself has chosen to set aside the ex parte decree. In this revision we need be concerned only about the terms that have been imposed as condition precedent to the setting aside of the ex parte decree. The learned counsel points out that in terms of Rule 13 of Order 9, the order to deposit the decree amount including the cost is beyond the power of the Court. Rule 13 (1) of Order 9 reads as follows:--

"In any case in which a decree is passed ex parte against the defendant, he may apply to the Court by which the decree was passed for an order to set 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....."

(underlining is mine).

I do not, However, think that the Court is powerless to give a direction to deposit costs of the suit or the decree amount in part or full before an ex parte decree is set aside. The wording "upon such terms as to" in the Rule should be read as applying not only to costs but to "payment into Court or otherwise as it thinks fit" also. This was the view taken in AIR 1950 Mad 618. On a proper construction it has to be held that the wording of the Rule is comprehensive enough to include conditions as payment into Court--decretal amount, or such other conditions as the Court thinks fit

12. However, having regard to the facts and circumstances of the case, I feel that though the Court was competent to impose a condition that the entire decree amount including costs should be deposited as a condition precedent to the setting aside of the ex parte decree, it is so harsh and onerous that it may render it rather impossible for the defendant to fulfil the condition and to get the benefit of having a fair trial on merit. The Courts have to be careful in such circumstances to see that no such harsh and onerous conditions as are incapable of being fulfilled by the defendant normally and within a reasonable time are imposed, as such conditions would virtually render the very order setting aside the ex parte decree nugatory and meaningless.

On a careful and anxious consideration of the whole matter, I think ends of justice would be met if the defendant is directed to pay costs of the respondent which I fix to be Rs. 150/-. I, therefore, direct the revision petitioner to pay a sum of Rs. 150/- within three weeks from this date to the counsel appearing for the respondent in this Court. If the costs is paid, the ex parte decree passed against the revised petitioner shall stand set aside, and if the costs is not paid within the period stipulated, this revision petition shall stand dismissed and the ex parte decree passed against him shall remain in force. The records of this case will be sent to the Court of the learned Munsiff soon after the period stipulated for payment of costs is over.