
(1952) 11 MP CK 0004

Madhya Pradesh High Court (Gwalior Bench)

Case No: Civil Revision No. 8 of 1952

Balbhim Rao Balasahib

APPELLANT

Vs

Alkh Murarilal

RESPONDENT

Date of Decision: Nov. 29, 1952

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Limitation Act, 1963 - Article 164, 169

Hon'ble Judges: Dixit, J

Bench: Single Bench

Advocate: Murlidhar Gupta, for the Appellant; Party-in-Person, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Dixit, J.

The only point that arises for determination in this petition is whether after an appeal against an ex parte decree has been dismissed, it is open to the trial court to pass an order on a petition to set aside the ex parte decree filed 1 before the appeal was heard. In this case an ex parte decree was passed against the non-applicant on 26-10-1950. He then applied on 6-11-1950 for setting aside the ex parte decree. While this application was pending, the Plaintiff-applicant filed an appeal before the Additional District Judge against a portion of the decree of the trial court, rejecting the Plaintiff's claim in so far as it concerned the Plaintiff's right to receive rent at an enhanced rate. In the Plaintiff's appeal the Defendant was made a party and the said appeal was dismissed by the Additional District Judge Gwalior on 26-3-1951 after hearing both the parties.

Thereafter, the learned Civil Judge 1st class Lashkar, before whom the application for setting aside the ex parte decree was pending, dismissed that application on the ground that after the decision of the appellate court in the Plaintiff's appeal, he had no jurisdiction

to set aside the ex parte decree passed by him. The Civil Judge 1st Class, relied on - *Sohansingh v. Mool Singh* AIR 1934 Lah 1016 (A). The Defendant then appealed to the Additional District Judge Gwalior against this order of the trial Judge. In appeal the Additional District Judge following the decision of the Madras High Court in *Subramania Iyer v. Vardarajulu Naidu* AIR 1927 Mad 722 (2)(B), held that the trial Judge had jurisdiction to pass an order on the petition and set aside the ex parte decree. It is against this order of the Additional District Judge that this revision petition has been preferred.

2. Mr. Murlidhar Gupta, learned Counsel for the applicant, contended that as the decision of the trial Court became merged in that passed by the appellate court in the Plaintiff applicant's appeal, the court of first instance had no jurisdiction to dispose of the application to set, aside the decree. He relied on - "*Vatoomal v. Godhumal*" AIR 1948 Sind 10 (C). In reply, the non-applicant placed reliance on the decision of the Madras High Court in [Abdul Kadi Rowther and Another Vs. Uthumansa Rowther](#), (2) (B)".

3. The point raised by this petition is interesting. But it is covered by several decisions of the various High Courts. Quite apart from these authorities, it appears to me that if the principle that an appeal is but a continuation of a suit and that when an appeal is preferred from a decree of a trial Court, the decree passed in the appeal after hearing the parties, is the final decree in the suit, whether the decree be one confirming, varying or reversing the decree of the court of first instance, is accepted-as it must be-then it would logically follow that the trial court which passed the ex parte decree has no longer any powers dispose of an application to set aside the decree even if the application was made before the appeal was filed. The merger of the decree of the lower court in that of the appellate court is, in no way, affected by the fact that the appeal is by the Plaintiff or by the Defendant or by the fact that the appeal is against a portion of the decree only. As pointed out by Bhashyam Ayyangar J. in - "*Kristnama Chariar v. Mangammal*" AIR 26 Mad 91 at p. 96 (FB) (D):

If the appeal be against a portion of the decree only and the appeal be dismissed, the decree will be one confirming as a whole the decree appealed against, including the portion not appealed against and the confirmation is not limited to the portion appealed against. If such appeal is allowed, the decree appealed against will not be reversed by the appellate decree but only varied or modified and confirmed as to the rest, i.e., the portion not appealed against. The portion appealed against and litigated in the Court of appeal is varied or confirmed according as the objection taken, in the court of appeal to such part of the decree prevails or fails. The rest of the decree is confirmed because no objection is raised then to by the party concerned and it is not the function of a Court of appeal as distinguished from the court of revision, to give relief to any party who has not applied to it in the form and within the time prescribed for appeal.

It is this clear that the original Court's decree thus ceased to exist the moment the Appellate Court disposes of an appeal preferred against it, after hearing the parties. It must, therefore, follow by necessary implication that the original Court has no jurisdiction

to consider and allow an application for setting aside the ex parte decree and thus override the decree passed by the superior court in appeal.

4. The view I have taken is supported by the decisions reported by "Mathura Prasad v. Ram Charan Lal" AIR 1915 All 2 (E); "Mt. Ayodhya Kuar v, Durga Prasad" AIR 1923 Pat 331 (F); "Girdhari Lal v. Deputy Commr. Gonda" AIR 1929 Oudh 35 (1) (G); [Mono Mohan Kundu Vs. Nripendra Nath Nandi and Others](#), ; - AIR 1937 381 (Nagpur) ; AIR 1948 Sind 10 (C) and also by the decisions referred to in Note 11 to Order 9, Rule 13 in Chitaley's Code of Civil Procedure, 5th edition at page 1921. There are no doubt some decisions of the Madras High Court in which a contrary view has been taken. In "In re [Devarakondah Venkata Subbaramiah alias Subbaramiah and Others](#), , it was held on the basis Of " AIR 1927 Mad 722 (2) (B)" and "Palaniappa Chetty v. Subramania Chetty" AIR 1922 Mad 33 (K), that it would be within the jurisdiction of the trial Court to pass an order on a petition to set aside the ex-parte decree filed before the appeal was heard and set aside the ex-parte decree. This decision as also the one reported in [Abdul Kadi Rowther and Another Vs. Uthumansa Rowther](#), (B)\\ simply follow the earlier decision of the Madras High Court reported in - " AIR 1922 Mad 33 (K)". It however appears to me that when the Case in - "A.I.R. 1922 Mad 33 (K)" is carefully examined, it does not lend support to the contention that in circumstances such as the one present here the trial court would have jurisdiction to pass (sic) order on an application to set aside the ex parte decree.

On the contrary, when the ratio decidendi is considered it rather looks the other way. In - "AIR 1922 Mad 33 (K)" the question for consideration was whether during the pendency of appeal, an application to set aside the ex parte decree of the first court lies in the appellate court or in the first court. The learned Judges of the Madras High Court rightly held that it ought to be filed in the first court. The observations made by the court in coming to this conclusion are however important. Ramesam J., with whom Oldfield J., agreed, observed as follows:

We must remember that in the discussion of this question it must be assumed that the Defendant who was absent in the first court appeared in the appellate court for if he was absent in the appellate court also under Order XLI, Rule 17(2) an application to set aside the appellate ex. parte decree would lie under Order XLI, Rule 21 and Article 169 (not Article 164) of the Limitation Act would apply. On this" assumption, it is difficult to describe the appellate decree as an ex parte decree of the appellate court except by a straining of language which is not justified; and if it can be so described, the Petitioner would have a second period of limitation under Article 164 starting from the appellate decree an anomalous result which could hardly have been intended by the legislature. It may be urged by the Petitioner that, it is equally anomalous if the first court has jurisdiction to set aside an ex parte decree alter it is affirmed by the appellate court. But, in reply to this apparent anomaly, I would urge two considerations (1) an application after the disposal of the appeal, to set aside the ex parte decree of the 1st court can hardly be in time and can arise very rarely. The legislature might well have been content not to

anticipate and provide for a case which is not unlikely. (2) In such cases, the proper course of the applicant would be not to wait till the disposal of the appeal but to get an adjournment of hearing of the appeal to enable him to apply before the first court to set aside the ex parte decree.

5. It is clear from these observations that the learned Judges of the Madras High Court recognised the fact that it would be anomalous if the first court had jurisdiction to set aside an ex parte decree after it is affirmed by the appellate court, and pointed out that the appropriate course which the party ought to take in such a case as this, is to request to the appellate court to keep the appeal pending until the disposal of the application under Order 9, Rule 13. The learned Judges of the Madras High Court have nowhere said that when the appeal is disposed of the trial court would have jurisdiction to deal with the application to set aside the ex parte decree. The" decision in - "AIR 1922 Mad 33 (K)" does not, in my opinion, support the non-applicant.

6. For these reasons, I am inclined to think that the trial Court was right in holding that it had no jurisdiction to deal with the application for setting aside the ex parte decree. I would, therefore accept this petition, and setting aside the order of the Additional District Judge Gwalior, restore the order of the Civil Judge 1st class Lashkar dismissing the application for setting aside the ex parte decree. In these circumstances of the case, I leave the parties to bear their own costs throughout.