
(1955) 10 AP CK 0020

Andhra Pradesh High Court

Case No: Appeal No. 39/1 of 1955

Uppala Subbaiah

APPELLANT

Vs

Chitrala Narsimloo

RESPONDENT

Date of Decision: Oct. 11, 1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 9 Rule 13, 97#Limitation Act, 1908 " Section 14, 14(2), 15, 5

Citation: (1955) 10 AP CK 0020

Hon'ble Judges: Srinivasachari, J; Siadat Ali Khan, J

Bench: Division Bench

Advocate: Raja Ram Iyer and Deshmukh, for the Appellant; Rangachari, for the Respondent

Final Decision: Dismissed

Judgement

Srinivasachari, J.

In an appeal preferred against the final decree passed by the Dist. Judge, Secunderabad on 27-2-1953 in a suit brought

on the basis of a mortgage, a preliminary objection is raised on behalf of the Respondent that this appeal is incompetent for the reason that no

appeal was filed by the Appellant against the preliminary decree and as such Section 97, CPC acted as a bar to his proceeding with this appeal.

2. The preliminary decree in this case was passed on 19-11-1952. This decree was an ex parte decree. The Defendant-mortgagor applied to set

aside the ex parte decree on 17-12-1952. Evidence was recorded by the court with regard to the application for setting aside the ex parte decree

and finally on 24-3-1953 the Court rejected the application holding that there were not sufficient grounds for setting aside the decree. Against, this

order rejecting the application the Defendant filed a miscellaneous appeal in the High Court which was dismissed on 3-3-1955.

3. The decree-holder in whose favour a preliminary decree was passed on 19-11-1952, as stated above, filed an application for making the

preliminary decree final. This application was filed on 15-6-1953 and the final decree was passed on 27-7- 1953. It may be noted that during the

period when the Defendant's application for setting aside the ex parte decree was under consideration in appeal by the High Court the decree was

made final.

After this date the judgment-debtor filed the present appeal on 27-10-1953 and at one of the hearings when this appeal came before the bench for

orders with regard to some miscellaneous matter, an objection was raised as to the maintain- ability of this appeal and a date was fixed for

arguments. It may be stated that after the dismissal of the Misc. Appeal in the High Court preferred by the judgment-debtor against the order

rejecting his application to set aside the ex parte decree, the judgment-debtor filed an appeal against the preliminary decree that was passed on

19-11-1952 by the lower court.

4. The two-fold argument of the learned advocate for the Respondent is that the appeal that has been filed does not bear proper Court-fee and as

such is liable to be dismissed in limine; that the Appellant not having filed an appeal against the preliminary decree the present appeal against the

final decree should be dismissed.

As against this the learned advocate for the Appellant argues that it is not necessary to pay court-fee twice over; where the appeal against the

preliminary decree has not been disposed of and is still pending and an appeal against the final decree is also pending it is not necessary that the

Appellant should pay ad valorem court-fee on this appeal separately. The other argument is that the period taken by the Appellant in prosecuting

the proceedings with reference to the application for setting aside the ex parte decree from 17-12-1952 to 3-3-1955 should be excluded and the

delay in filing the appeal against the preliminary decree should be condoned.

A further argument is advanced that in any event even if Section 97, CPC acted as a bar it would only prevent the Appellant from questioning any

of the matters disposed of and adjudicated upon in the preliminary decree and it could have no more effect.

5. Taking the argument relating to the court-fee payable, it may be observed that it is well recognised that where an appeal is not filed against a

preliminary decree none of the matters which have been dealt with in the preliminary decree by the Court could be reopened or reagitated in an

appeal against the final decree. It is the final decree that determines the liability of the Defendant Appellant against whom a decree has been

passed. The court-fee payable will be according to the amount at which the relief sought is valued in the memorandum of appeal. It is the final

decree that the party attacks.

The consensus of opinion has been that if an appeal against the preliminary decree as well as an appeal against the final decree are pending before

the court and court-fee has been paid on one, there is no necessity to pay fresh court-fee in the appeal against the final decree, that is to say, where

a party has paid court-fee on the appeal against the preliminary decree credit would be given for the court-fee payable on the memorandum of

appeal against the final decree.

This is based on the principle that in a suit for accounts or in a suit based upon a mortgage the preliminary decree and final decree are only two

stages of the same proceedings and though for the purposes of appealing two successive stages are provided the suit or the appeal as the case may

be, is not fully decided till both the stages are completed. Therefore, where a Plaintiff or the Appellant has already paid the court-fee at the first

stage provided by the Court-fees Act he could not be called upon to pay the court-fee over again at the second stage.

It would make a difference where the appeal against the final decree is filed after the appeal against the preliminary decree has been disposed of. In

that case it would not be open to the Appellant to claim credit for the amount of court fee paid by him on the memo of appeal against the

preliminary decree, for that appeal had been disposed of.

In the case now before us both the appeals preferred against the preliminary and final decrees are pending in the High Court and therefore in such

a case the Appellant could not be compelled to pay court-fee twice over. This objection therefore that the court-fee has not been paid on the

memo, of appeal in one of the appeals although paid in the other appeal, cannot be sustained. It would be useful to refer in this connection to the

decision of the Madras High Court in "Re; In Re: Supputhayammal and Others,

6. The learned advocate for the Respondent argued that the appeal against the preliminary decree should be dismissed having regard to the

provisions of Section 97, Code of Civil Procedure. This argument can not be sustained. The passing of the final decree does not affect the

continuance of the appeal against the preliminary decree, for the effect (sic) not filing an appeal against the preliminary decree and choosing to file

an appeal against the final decree is, as we have observed above only this, that none of the matters which were adjudicated upon in the preliminary

decree could be reopened in the appeal against the final decree.

We may also state that an appeal from a preliminary decree is not incompetent if a final decree has been passed before the filing of the appeal. In

this connection we might refer to the Pull Bench decision of the Calcutta High Court In *Taleb Ali v. Abdul Aziz* AIR 1929 Cal 389 V 16 (PB) (B).

7. The next argument of the learned advocate for the Respondent is that the Appellant is not entitled to the condoning of the delay and neither

Section 5 nor Section 14, Limitation Act could apply to the present case. As has been observed above, the Appellant before the High Court filed

an appeal against the preliminary decree on 23-10-1953. Although the preliminary decree was passed on 19-11-1952 no appeal was preferred

against the preliminary decree till October 1953.

The Appellant chose to move the court for setting aside the ex parte decree and when he failed in the trial court he came up to the High Court and

finally his appeal was dismissed on 3-3-1955. It would, therefore, appear that on the date that the appeal against the final decree was filed there

was no appeal against the preliminary decree and it had become final and conclusive.

No doubt he sought to get the preliminary decree set aside by an application under Order 9, Rule 13, of the CPC and when an objection was

raised on the part of the Respondent that the appeal against the final decree was incompetent because no appeal against the preliminary decree

was filed, he thought fit to file an appeal against the preliminary decree as well, on 21-3-1955. This appeal is clearly barred by limitation having

been filed nearly 2-1/2 years after the date of the preliminary decree.

The Appellant seeks the power of this Court to condone the delay u/s 5, Limitation Act.

The allegation in the application asking for condonation

of delay is that he was pursuing the remedy to set aside the ex parte decree under Order 9, Rule 13; there having been unsuccessful he went up to

the High Court and after the decision of the High Court on 3-3-1955 he applied for a copy of the preliminary decree and as soon as he got the

copy of the decree he filed the present appeal.

All this time, the Appellant says, he was pursuing the remedy in good faith and he did not adopt both the remedies viz. filing the appeal and seeking

to set aside the ex parte decree simultaneously because a conflict of decision was apprehended.

8. The question, therefore, arises as to whether in a case like this the Appellant would be entitled to an exclusion of the period and condonation of

the delay as prayed for. It was argued that all this period could be excluded, and reliance was placed upon Section 14, Limitation Act. It is

doubtful whether in a case like this the party could invoke Section 14, Limitation Act, for Section 14 Sub-Section 2 is to the following effect:

Sub-Section 2 ""In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with

due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall

be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is

unable to entertain it.

The principle underlying Section 14, Limitation Act is to protect against the bar of limitation a person honestly doing his best to get his case tried on

the merits but failing through the court being unable to give him such trial.

Section 14 would have no application to a case where the former proceedings failed not for defect of jurisdiction or a like cause, for instance

because they were misconceived. It may also be observed that u/s 14 the court is not given discretion as in the case of Section 15 but the litigant is

entitled as of right to exclude the period spent in infructuous proceedings. We are, therefore, of the opinion that Section 14 can have no application

to the facts or this case.

9. The question then will be whether the Appellant has made out a case for the exercise of our discretion in his favour u/s 5, Limitation Act. It need

not be emphasised that if on account of laches on his part a party seeks the power of the court exercisable u/s 5, Limitation Act, the burden lies

heavily upon him of adducing evidence of sufficient cause for the delay and in proof of sufficient cause the question of bona fides also would be

taken into consideration.

In this connection the learned advocate for the Appellant referred us to the cases reported in Brij Indar Singh v. Lala Kanshi Ram AIR 1917 PC

156 V 4 (C); Sunderbai v. Collector of Belgaum (AIR 1918 PC 135 V 5)(D)) and Hirubai Kanji v. Darji Girdhar Keshav AIR 1952 Sau 20 V

39 (E). In the first mentioned case, viz. AIR1917 PC 156 V 4 (C) the question before their Lordships was that if a party presents an application

for review of a judgment within the ordinary period, limited for appealing the time occupied by the court in disposing of such application would be

added to the days limited for appealing and memorandum of appeal presented within such extended time would be regarded as an appeal filed

within time. Their Lordships adverted to the practice in vogue in the various High Courts in India and they said:

To interfere with a rule, which after all is only a rule of procedure which has been laid down as a general rule by Full Benches in all the courts of

India and acted on for many years, would cause great inconvenience and their Lordships do not propose to interfere.

Thus this was a case where the Privy Council did not want to interfere with a long established practice prevalent in the various High Courts in

India. This case cannot help the Appellant.

The case reported in (AIR 1918 PC 135 V 5) (D) was a case where the appeal was presented to a wrong court and in that case the period that

elapsed in bona fide prosecuting the appeal before the wrong court was excluded.

In the Saurashtra case referred to, it was held that there was an honest mistake on the part of the Appellant to which court the appeal lay whether

to Junnagad or to Rajkot High Court. The Appellant in that case thought that it lay to Junnagad Court but subsequently she was told that the

appeal would lie to the Sigh Court at Rajkot. Under those circumstances being under a misapprehension as regards the forum of appeal it was

regarded as an honest mistake on the part of the Appellant and therefore the period that elapsed in the prosecution of the appeal before the wrong

appellate court was excluded. Such is not the case before us.

10. Where a party elects to choose one of the two remedies open to him and having failed therein wants to fall back upon the other remedy he

cannot be allowed to invoke Section 5, Limitation Act and claim to exclude the period spent in pursuing the remedy that he elected to pursue first.

Clearly the dismissal of the application to set aside the ex parte decree was not for want of jurisdiction.

(sic) may also observe that in this case the record would show that the Appellant did not think it necessary to file an appeal against the preliminary

decree but appears to have done it only as a matter of form probably by way of "ex abundanti cautela" after objection was raised to the

maintainability of the appeal against the final decree. Under such circumstances no question of bona fides of the Appellant arises and much less of

due diligence on his part. For these reasons we are of the opinion that the Appellant is not entitled to the benefit of Section 5, Limitation Act.

11. The result is that the appeal against the preliminary decree, fails and is dismissed. The appeal against the final decree will now be posted for

arguments.