

(1994) 02 AP CK 0043

Andhra Pradesh High Court

Case No: Civil Revision Petition No. 4099 of 1993

H.E.H. the Nizam VIII of
Hyderabad, Prince
Mukarram Jah
Bahadur, represented
by Constituted General
Power of Attorney, Sri
Mohd. Asadullah Khan

APPELLANT

Vs

Banque Indosuez Bank

RESPONDENT

Date of Decision: Feb. 18, 1994

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 4, Order 9 Rule 13

Citation: (1994) 2 ALT 567

Hon'ble Judges: S.V. Maruthi, J

Bench: Single Bench

Advocate: M. Papa Reddy and Vilas V. Afzulourkar, for the Appellant; R. Vijayanandan Reddy, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S.V. Maruthi, J.

This revision is directed against the order of the learned 1v Additional Judge, City Civil Court, Hyderabad, in I. A. No. 1526 of 1993 in LA. No. 2453 of 1992 in O.S. No. 1754 of 1989.

2. Defendant is the petitioner herein. The respondent filed a suit O.S. No. 1754 of 1989 for recovery of principal loan amount of Rs. 9,82,05,600/- and interest of Rs. 24,55,140/- stated to be due from the Nizam at the relevant time. The suit amount represented the conversion value of 10,455,000 Swiss France claimed to have been lent to the Nizam - petitioner herein. The suit was filed under Order XXXVII of the Code of Civil Procedure.

The summons of the original suit were served in the office of the General Power-of-Attorney on 7-10-89 M/s I.V.S. Rao and N.P. Rao, Advocates, filed appearance on 16-10-1989. On the vakalat, address for service of summons was mentioned as that of the counsel. However, the summons were served on a clerk in the Office of the General Power-of-Attorney on 20-11-1989. Since the vakalat was already executed in favour of the two advocates above, the clerk in the Office of the General Power-of-Attorney thought that appropriate action would be taken by the advocates and no further action was required to be taken. Therefore, the summons were not brought to the notice of the General Power-of-Attorney of the Nizam. The two advocates as well as the General Power-of-Attorney were under the impression that no summons were served under Order XXXVII Rule 3 of the Code of Civil Procedure. Therefore, no steps were taken to file a petition for grant of leave to defend the suit within the period of ten days from the date of service of summons, statutorily fixed. In view of the magnitude and complex nature of the case, Sri Vedula Jagannadha Rao, a Senior Advocate and former Advocate-General of the state of Sikkim was appointed along with his son Sri Venkata Ramana, as advocates on behalf of the Nizam. After entering appearance the matter regarding service of summons under Order XXXVII Rule 3 came to the notice of late Sri Jagannadha Rao. Immediately LA. No. 567 of 1990 was filed on 4-3-90 on behalf of the Nizam seeking permission of the Court to defend the suit. Since there was delay in filing the petition for leave to defend the suit, another application LA. No. 582 of 1990 was also filed for condonation of the delay in filing the petition for leave to defend the suit. On 6-3-1990 another LA. No. 581 of 1990 was filed seeking permission of the Court for representation of the defendant by the General Power-of-Attorney. These three applications were dismissed on 29-10-1990 on the ground that the counsel for the Nizam was not present. Thereafter, another advocate Sri Mohan Rao was appointed in November, 1990. Sri Mohan Rao advised that applications could be filed for restoration of LA. Nos. 567, 581 and 582 of 1990 which were dismissed for default on 29-10-1990. Accordingly, LA. Nos. 1637, 2638 and 1639 of 1990 were filed in November, 1990 for setting aside the order dismissing LA. nos. 567, 582 and 181 of 1990. The Nizam also filed a Writ Petition No. 4406 of 1991 under Article 226 of the Constitution of India, on the file of this Court, on the ground that since the agreement between the parties was executed in Geneva (Switzerland), the cause of action arose in Geneva and as per mutual agreement, the jurisdiction to entertain any dispute in regard to the loan transaction is governed by the Swiss Law and not by the Indian Law, On 25-8-92 this Court dismissed the writ petition holding that the question as to the jurisdiction to entertain the suit can be raised in the proceedings before the Civil Court. After the disposal of the writ petition, the matter before the Civil Court was posted on 2-11-1992 which was adjourned to 11-11-1992. As the Presiding Officer was transferred, the matter was adjourned to 25-11-1992 and thereafter posted to 1-12-1992. On 1-12-1992 since the counsel for the petitioner did not appear, an ex parte decree was passed against the Nizam. Simultaneously, the injunction granted in LA. No. 3104 of 1989 was made absolute. LA. Nos. 1637, 1638 and 1639 filed for setting aside the orders dismissing LA. Nos. 567, 582 and 581 of 1990 were also dismissed. Thereafter, petitioner filed LA. No. 2453 of 1992 to set aside ex parte decree passed on

1-12-1992, LA. No. 2454 of 1992 to set aside the order of making injunction absolute in LA. No. 3104 of 1989 and LA. No. 2455 of 1992 to restore the LA. No. 1637 of 1990 in LA. No. 581 of 1990 and similarly LA. Nos. 2456 of 1992 and 2457 of 1992 to set aside the orders dated 1-12-1992 in LA. Nos. 1638 of 1990 and 1639 of 1990 respectively and to restore the same to the original position. The above applications were filed on 30-12-1992. At that stage, the respondent filed E.P. No. 66 of 1993 and obtained orders of attachment. Therefore, in these circumstances, pending disposal of the Interlocutory Applications Nos. 2453,2454,2455,2456 and 2457 of 1992, the petitioner filed LA. No. 1526 of 1993 before the lower Court, requesting to stay the execution of the decree, pending disposal of the applications. The learned IV Additional Judge heard the matter on 9-11-1993 and granted interim stay on condition of petitioner depositing the suit costs on or before 1-12-1993, failing which, the petition shall stand dismissed, against which, the present revision is filed.

3. The main contention of the learned Counsel for the petitioner is that the costs in the ex parte decree would come to Rs. 20.00 lakhs. The Interlocutory Applications Nos. 2453 to 2457 of 1992 filed to set aside the ex parte decree dated 1-12-1992, to set aside the ex parte order of making injunction absolute in LA. No. 3104 of 1989, to set aside the ex parte orders in LA. Nos. 1637 etc., and to restore the same to its original position are still pending before the Court and, as such, the Court has no power to impose conditions while granting interim stay of execution of the decree under Order XXXVII Rule 4 of the CPC read with Order IX Rule 13 of Code of Civil Procedure. The learned counsel submits further that the Court can impose conditions only when the ex parte decree is set aside and it has no power-to impose conditions at the time of entertaining the petition, i.e., even before going into the merits of the application filed under Order XXXVII Rule 3 or Order IX Rule 13. In support of his contention, the learned counsel (sic) upon a judgment of this Court in [Rajeswara Industries, a Partnersip Firm, D4 Unit and Others Vs. State Bank of Hyderabad, Karimnagar Branch](#), wherein it was held thus:

"From a reading of the aforesaid provision of Order IX Rule 13 C.P.C., it is clear that the court shall make an order setting aside the decree if sufficient cause is established, upon such terms as to costs, payment into the Court or otherwise as it thinks fit. But the Court cannot, even before going into the merits of the application filed under Order IX Rule 13, CP.C. impose conditions upon the defendants for depositing the costs or part or whole of the suit amount as a condition precedent for entertaining the said LA....."

4. Counsel for petitioner submits that the language used under Order XXXVII Rule 4 C.P.C. is similar to the language used in Order IX Rule 13 C.P.C. and therefore the ratio laid down in the above decision is applicable to the facts of the present case and as such at the stage of entertaining the application the Court cannot impose any conditions. He also submitted that the application filed by the petitioner to set aside the ex parte decree is still pending before the Court.

5. Learned counsel for the respondent submitted that the language used in Order IX Rule 13 C.P.C. is different from the language used in Order XXXVII Rule 4 C.P.C. Therefore, the decision relied on by the petitioner has no application to a case where the interpretation of Order XXXVII Rule 4 is in question. He also submits that the facts narrated in the affidavit filed seeking stay of execution of the decree indicate that there was gross negligence on the part of the petitioner and therefore there was no error of jurisdiction in the order impugned for interference by this Court u/s 115 C.P.C.

6. The question, therefore, is whether the principle laid down in Rajeswara Industries case (1 supra) is applicable to the facts of the present case.

7. In order to decide the issue it may be relevant to refer to Order XXXVII Rule 4 Order IX Rule 13 C.P.C which reads as follows: "

"O. IX-R. 13:- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it 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: xxxxx xxxxx xxxx

O.XXXVII. R.4:- After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit".

8. The language used in Order IX Rule 13 is "... the Court shall make an order setting aside the decree upon such terms as to costs, payment into Court or otherwise as it thinks fit..." The language used in Order XXXVII Rule 4 is" the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit,... and on such terms as the Court thinks fit". Under Order IX, Rule 13 the Court while setting aside the ex parte decree has power to impose terms as to costs, payment into Court or otherwise as it thinks fit. In other words, a conditional order can be made under Order IX Rule 13 C.P.C. when setting aside the ex parte decree.

9. The language used in Order XXXVII, Rule 4 is that the Court may set aside the decree, and if necessary, stay or set aside execution, and may give leave to the defendant to defend. It contemplates three situations, namely, setting aside the decree, grant of stay of execution of the decree and setting aside execution of decree. While setting aside the decree or staying execution of the decree or setting aside the execution, the Court can impose terms, namely, it can pass a conditional order. The language in Order 9, Rule 13. C.P.C. is different from the language used in Order XXXVII Rule 4 C.P.C. Under Order

IX, Rule 13 the Court is empowered to set aside the ex parte decree subject to such terms, whereas under Order XXXVII, Rule 4 the Court is empowered not only to set aside the ex parte decree, but also stay of execution of decree and set aside execution of decree. In other words, the power can be exercised even after the decree has become final, as if the decree is set aside, the question of granting stay of execution of the decree or setting aside execution does not arise. The question of granting stay of execution of the decree or setting aside the execution arises only if the decree is not set aside by the Court. In other words, the stay contemplated under Order XXXVII Rule 4 is in a case where stay of execution of the decree is sought for, where the decree has become final. If the decree is an ex parte decree and only pending disposal of the application to set aside the ex parte decree, if stay is sought for, no conditions can be imposed, as the situation provided under Rule 4 of Order XXXVII is stay of execution of a decree which has become final and not in a case where an application for setting aside the ex parte decree is pending. In other words, the Court may on such terms as it thinks fit grant stay of the execution of the decree or set aside the execution of the decree, which had become final. Stay of execution of the decree "on such terms as the Court thinks fit" under Rule 4 of Order XXXVII C.P.C. does not contemplate a case, where an application to set aside the ex parte decree is pending before the Court. Therefore, I am of the view that the imposition of condition under the impugned order is without jurisdiction, the reason being that the ex parte decree is not on merits and the defendant may have a valid defence like discharge or partial discharge, inherent lack of jurisdiction of the Court to try the suit, dispute the genuineness of the document, on the basis of which the suit was filed, or any other similar situation and if the defence of the defendant is accepted, the defendant may not suffer any decree and costs, and the ex parte decree is liable to be set aside. Therefore, though the language used in Order XXXVII Rule 4 C.P.C. is different from the language used in Order IX, Rule 13 C.P.C. the principle laid down in *Rajeswara Industries* case (1 supra) squarely applies to the interpretation of Order XXXVII, Rule 4 C.P.C. It is true the conduct of the petitioner throughout indicates lack of diligence and he has; changed advocates many times. However, he is also disputing the jurisdiction of the Court to try the suit. Therefore, the Court cannot impose terms directing to deposit costs of the suit. For the lack or diligence of the party in prosecuting the proceedings, the Court may impose costs, but not costs of the suit. I am, therefore, of the view that the power to grant stay on such terms can be exercised only when the decree has become final and not when an application to set aside ex parte decree is pending. However, in view of the conduct of the petitioner, it is a fit case that he should be directed to pay Rs. 10,000/- (Rupees ten thousand only) as costs. The amount should be paid within a week from to-day, failing which the above order stands vacated.

10. The C.R.P. is allowed subject to the above condition. There will be no order as to costs.

Order passed on 25-2-1994.

11. This CRP is posted before me "For being mentioned", to-day.

12. The petitioner is directed to deposit the costs to the credit of suit O.S. No. 1754 of 1989 on the file of the IV Additional Judge, City Civil Court, Hyderabad.

13. The learned Counsel for the petitioner submitted that the costs were already deposited on 24-2-1994 to the credit of the above mentioned suit. The respondents are at liberty to withdraw the amount so deposited.