Kantilal Khodabhai Patel Vs Chiba Bava Bhandari

Court: Bombay High Court

Date of Decision: Oct. 20, 1965

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 11, Order 9 Rule 13, 151

Citation: AIR 1967 Bom 310 : (1966) 68 BOMLR 461

Hon'ble Judges: Patel, J

Bench: Single Bench

Advocate: K.A. Shah, for N.A. Shah, for the Appellant; B.R. Ketkar, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

(1) This application arises out of ejectment suit filed by the respondent against the petitioner, who was his tenant. The suit was decreed ex parte.

Against this judgment the petitioner filed an appeal to the District Court on December 16, 1961 and also made aside the ex parte decree two days

later on the 18th. The appeal in the District Court was summarily rejected under O. 41, R. 11 on July 6, 1962. Thereafter the application for

setting aside the ex parte decree was heard by the trial Court who allowed it on July 16, 1962, without the knowledge that the petitioner''s appeal

was summarily dismissed. The plaintiff came to know about the dismissal of the appeal and he then made an application under S. 151 of the C. P.

Code for setting aside the order on the ground that the petitioner had concealed material facts from the trial Court when he obtained the order

setting aside the ex parte decree. The trial Court set aside its order on the ground that fraud was played on the Court in obtaining the orders by the

petitioner. The petitioner''s appeal against this judgment has failed and the petitioner now challenges this decision.

(2) The question is whether the application for setting aside of an ex parte decree can be entertained by the trial Court after an appeal against the

ex parte decree is dismissed by the appellate Court. There seems to be some difference of opinion on the question, but majority of High Courts are

of the view, that as the decree of the trial Court merges with the decree of dismissal of the appeal, the trial Court can have no jurisdiction to deal

with the decree. This view has been taken by the High Court of Calcutta in Bhonai v. Taraknath 12 C LJ 53; Kalimuddin v. Esabakuddin ILR 51

Cal 715; AIR 1924 Cal 8300, by the Allahabad High Court in Mathura v Ram Charan ILR 37 All 208: AIR 1915 All 2 and Girdharilal v. Deputy

Commissioner ILR 4 Luc 201; AIR 1929 Oudh 35 ; by the Madhya Bharat High Court in Balbhim Rao v. Alkh Murarilal ILR (1953) MB 62;

AIR 1954 M B 4 and by the Kerala High Court in P. Aliamma v. E. Ouseph 1954 KLT 322. Sir Dinshaw Mulla at page 652 in his C. P. Code

state that Madras and Lahore High Courts have taken a different view, in Abdul Kadi Rowther and Another Vs. Uthumansa Rowther, .

(3) Mr. Shah has very emphatically urged that there can be no question of merger where an appeal is dismissed summarily and in support he had

relied upon the decision of the Supreme Court in the The State of Uttar Pradesh Vs. Mohammad Nooh, . The relevant observations are at p. 611.

Their Lordships were considering the question of retrospective operation of Articles 226 and 227 of the Constitution the question being whether

the High Court had jurisdiction to interfere with the order of dismissal of a Government servant made prior to January 26, 1950. It was contended

before the Supreme Court, that the order of dismissal dated April 20, 1948, merged in the order in Appeal dated Mary 7, 1949, and the two

orders merged in the order in the revision to the Government dated April, 22, 1950. Their Lordships rejected this contention holding that there was

nothing in the Indian Law to warrant the suggestion that the decree or order of the Court or tribunal of the first instance becomes final only on the

termination of all proceedings by way of appeal or revision. The filing of the appeal or revision may put the decree or order in jeopardy but until it

is reversed or modified it remains effective. On this ground the jurisdiction of the High Court was denied. It is true that in passing their Lordships

observed; ""In the next place, while it is true that a decree of a Court of first instance may be said to merge in the decree passed on appeal

therefrom or even in the order passed in revision, it does so only for certain purposes, namely, for the purpose of computing the period of limitation

for execution of the decree as held in Batuk Nath v. Munni AIR 1914 PC 65 or for computing the period of limitation for an application for final

decree in a mortgage suit as held in Jawad Hussain v. Gendan Singh AIR 1926 PC 93.

(4) In my view this judgment cannot be read as laying down that the decree of the trial Court does not merge in the decree of the appellate Court

even for the purposes of review of the judgment of the trial Court and if the decree of the trial Court merges in that of the appellate Court for the

purposes of a review, I do not see why it should not be so for setting aside the ex parte decree.

(5) Reliance is placed then on the decisions in Ram Rakhan and Another Vs. Mahant Govind Das and Another, , Ratan Mala Mondal and Another

Vs. Gopal Lal Daga and Others, ; Palaniappa Chetty v. Subramania Chetty AIR 1922 Mad 33. However, none of these cases had any application

whatsoever. In the first case appeal against the ex parte decree was dismissed for default. There was no trial of the appeal on merits and,

therefore, the learned Judges held that the application to the trial Court for setting aside the ex parte decree would be competent. In the second

case the Court confirmed the principle that the theory of merger would be applicable in two classes of cases only, i.e. for the purpose of

determining when the limitation would run and for the purpose of amending the decree. In my view in point of substance there is not difference in

the amendment of the decree and in setting aside of the same, which is still worse. The third case, which, refers to the earlier decision does support

the contention of Mr. Shah. The learned Judge felt himself bound by the decision of the Division Bench in AIR 1922 Mad 33 and held that the

application for setting aside of the decree after the appeal was dismissed was maintainable in the trial Court. In Palaniappa Chetty''s case the suit

was decided on merits as against one of the defendants but ex parte as against the two other defendants. Only the defendant against whom the suit

was decided on merits filed the appeal. In the appeal he impleaded the two defendants, who were ex parte as respondents. During the pendency

of the appeal defendant No. 2 made application to the appellate Court to set aside the ex parte decree as against them which application the

appellate Court rejected. The appeal thereafter was disposed of on merits and defendant No. 2. renewed his application to the appellate Court for

setting aside the decree as against him. Mr. Justice Ramesam, who delivered the main judgment considered three classes of cases on the facts of

the case (1) when the ex parte defendant was not made party in appeal, (2) where he was made a party and he made the application for setting

aside the ex parte saying it would not be maintainable, (3) where he was made a party he makes the application after the appeal is disposed of.

While dealing with the third class the learned Judge said that the language of O. 9, R. 13 would point to the first Court as the proper court for

making the application. The decision can cover only cases such as those which the Court was considering and cannot be extended to apply to a

case like the present one where the defendant himself has appealed to the District Court against the ex parte decree and his appeal has been

summarily dismissed on merits. While dealing with a possible conclusions that it is anomalous that the first Court has jurisdiction to set aside an ex

parte decree after it is affirmed by the appellate Court. The learned Judge says, in such a case, 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 to first Court to set aside the ex parte

decree. It is apparent from the facts of the case that the two defendants not having appealed against the decree it could not be urged that the

decree of the trial Court against them merged in the appellate decree. I, therefore, with respect cannot accept the ratio of the decision in Air 1927

Mad 722.

(6) The conclusion that I have reached, follows from the principle that an appeal is always treated as rehearing of the suit and for this there is

abundant authority I may only refer to the decision in Lachmeshwar Prasad Shukul v. Keshwar Lal AIR 1941 PC 5 , to (Sulaiman, J. at p. 9 and

to Varadachariar, J. at p. 13). It cannot make any difference whether the appeal was heard and dismissed under O. 41, R. 11 or after issuing

notice to the respondent.

(7) In my view there is no doubt that the decree of the trial Court merged in the decree of the appellate Court and the application was not

competent.

(8) It was then argued that the learned Judge ought not to have set aside the order under S. 151 of C. P. Code, which he made earlier. There is no

substance in this contention. I am satisfied that the learned Judge under circumstances was fully right in reviewing his order.

(9) In the result the revisional application is dismissed. As the other side is absent there will be no order as to costs.

(10) Petition dismissed.