

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petitions Nos.4179 of 2015 and 5788 of 2015

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COMMON ORDER:

The first of the two Civil Revision Petitions viz., the CRP No.4179 of 2015 under Article 227 of the Constitution of India by the petitioner/defendant is directed against the docket orders dated 31.03.2015 of the learned XI Additional Chief Judge, City Civil Court, Hyderabad passed in I.A. No. 68 of 2014 in O.S.no.1138 of 2014. The other CRP No.5788 of 2015 is directed against the *ex parte* decree and judgment dated 25.06.2015 passed by the Court below in the said suit.

2. I have heard the submissions of the learned counsel for the revision petitioner/defendant ('the defendant', for brevity) and the learned counsel for the respondent/plaintiff-party in person ('the plaintiff', for brevity). I have perused the material records in both the revisions.

2.1 Since one revision is directed against a conditional interlocutory order and the other revision is directed against the *ex parte* decree and judgment made in the same suit, and in view of the nexus between the matters, both the revisions are being disposed of by these common orders.

3. The facts necessary for consideration, in brief, are as follows:

The plaintiff had brought a suit against the defendant for recovery of a sum of Rs.37,50,000/- on the basis of a promissory note and also a cheque which was dishonoured and returned with an endorsement "insufficient funds". In the suit, the plaintiff had also sought for grant of interest @ 18% per annum and also subsequent interest and costs. The said suit was filed in terms of Order XXXVII of the Code of Civil Procedure, 1908, i.e., summary procedure. The defendant having received the suit summons had filed, within the time allowed under law, an application in I.A.no.68 of 2014 requesting to grant unconditional leave to defend the suit. The Court below

had granted conditional leave. The orders of the Court below read as under:

“Dated : 24-03-2015

Heard Counsel for Respondent. For petitioner side arguments finally call on 31-03-2015.

Dated : 31-03-2015

Heard Counsel for petitioner. Petition is allowed on a condition of furnishing security to the equivalent to suit claim on or before 07-04-2015. Otherwise petition stands dismissed.”

(Reproduced verbatim)

Obviously, for non-compliance of the said condition, the application of the defendant seeking leave to defend stood dismissed. Later, the trial Court had decreed the suit *ex parte* on 25.06.2015 in favour of the plaintiff. The defendant had filed the other C.R.P.no.5788 of 2015 challenging the said *ex parte* decree and judgment. Be that as it may.

4. Since the application requesting to grant unconditional leave to defend the summary suit stood dismissed for non-compliance of the condition imposed in regard to furnishing security, the trial Court on 25.06.2015 had decreed the suit *ex parte* based on the plaint averments and the documents filed along with the plaint. From the judgment, it appears that the suit was decreed in view of the provision of Order 37 Rule 3 (6) (a). The defendant is aggrieved of the conditional leave that was granted and the consequential order dismissing the petition for non-compliance of the condition and also the *ex parte* decree and judgment passed in the said suit. Hence, he is before this Court.

5. The learned counsel for the defendant would submit as follows:

‘The trial Court in the first instance by a cryptic order dated 31.03.2015 had allowed the application filed seeking unconditional leave subject to a condition of furnishing security of the value equivalent to the suit claim on or before 07.04.2015 and had further held that on failure to furnish such security, the petition shall stand dismissed. The said order is not a speaking order and is unsustainable. Further, by the said order, dated 31.03.2015 a time of hardly one week was granted for furnishing security for a huge amount of

more than Rs.37 lakhs. The said condition is not only onerous but also not valid for not giving sufficient time for compliance of the said onerous condition. The order being a cryptic order unsupported by reasons, much less valid reasons, the consequential order dismissing the petition for non-compliance of the onerous condition within the insufficient time that was granted by the Court below is unsustainable both under facts and in law. The Court below ought to have seen that the defendant in his affidavit filed in support of the petition seeking leave had raised triable issues and therefore, the Court below ought to have granted unconditional leave. Since the said order in the interlocutory application is liable to be set aside, the dependent orders, i.e., the *ex parte* decree and judgment granted in favour of the plaintiff in the suit are also liable to be set aside as a sequel to the setting aside of the orders in I.A.no.68 of 2014 whereby, leave was eventually not granted to defend the suit. The material record discloses that after refusal to grant leave for non-compliance of the conditional orders, the trial Court did not follow the procedure before granting a decree to the plaintiff. Further, on the defendant entering appearance, the plaintiff had failed to serve on the defendant, the summons in Form 4 in Appendix B or in such form as prescribed from time to time. In the case on hand, no summons for judgment were served. In view of the non-service of summons for judgment, the decree and judgment are liable to be set aside. Hence, the orders impugned in both the revisions are liable to be set aside. The petition filed for granting unconditional leave to defend the suit is to be allowed; and, the dependant orders, that is, the *ex parte* decree and judgment made in the suit are also liable to be set aside as a sequel to allowing the petition filed for granting unconditional leave and the suit has to be remitted to the trial Court for giving an opportunity to the defendant to file his written statement and defend the suit and for disposal afresh in accordance with the procedure established by law.

6. On the other hand, the plaintiff/party-in-person would contend as follows:

In view of the ratio laid down in **Ajay Bansal v. Anup Mehta**^[1], when once an application seeking leave to defend was dismissed, the plaintiff is

entitled to a decree forthwith as held by the Court below. Under law, a decree passed subsequent to the refusal of leave to defend could either be under Order 37 Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and also the documents produced or even based on oral evidence formally proving the execution of the promissory note by the defendant and other material facts, which entail the plaintiff to a decree. The petition filed by the defendant to grant leave to defend the suit, stood dismissed for non-compliance of the condition imposed while allowing the said application. After the eventual dismissal of the application filed by the defendant for granting leave to defend the suit, the suit is admittedly decreed *ex parte*. In the facts and circumstances of the case, it may not be proper or necessary to apply the theory of dependant order. Since the suit is decreed *ex parte*, a revision against the decree granted in the suit is not maintainable. The proper remedy is to file an appeal under Section 96 of the Code. Since the suit is decreed *ex parte*, the revision filed challenging the order in the interlocutory application, which is filed for granting leave to defend the suit has become infructuous. Hence, both the revisions are liable for dismissal.

7. I have given earnest consideration to the facts and submissions. On receipt of summons in the summary suit, the defendant had put in appearance and had admittedly filed an interlocutory application seeking unconditional leave to defend and prayed the Court below to grant unconditional leave to defend the suit. However, by a cryptic order, which is extracted supra, the Court below had granted leave subject to condition which the defendant did not comply. By the condition imposed on 31.03.2015, the defendant was required to furnish a security of the value, which is equivalent to the value of the suit claim on or before 07.04.2015. Keeping in view the time granted for furnishing security in respect of a huge sum of more than Rs.37 lakhs, it is reasonable to accept the contention of the defendant that the time granted for compliance of condition is unreasonable being hardly sufficient. However, the defendant did not seek extension of time or challenge the said order before the decree was passed in the suit.

The order in the Interlocutory Application was challenged in C.R.P.no.4179 of 2015 on 29th September, 2015, i.e., after the decree is passed on 25th June 2015.

Be it noted that though the *ex parte* decree was granted in the suit, the defendant contends that his CRP filed challenging the interlocutory order has not become infructuous and that if his said CRP is allowed, and the order refusing to grant leave to defend the suit is set aside, the *ex parte* decree and judgment would also stand set aside being dependant orders. On the other hand, the plaintiff contends that in view of the fact that the suit is already decreed *ex parte*, the CRP assailing the order in the Interlocutory application has become infructuous and that the *ex parte* decree and judgment are not dependant orders and that the other CRP filed assailing the decree and judgment in the suit is not maintainable as the proper remedy available to the defendant is to file an appeal against the decree and judgment in the suit under Section 96 of the Code. Therefore, the first question to be examined is - 'whether the *ex parte* decree and judgment are dependant orders or not? The next question to be examined is – 'Whether the CRP filed assailing the *ex parte* decree and judgment is not maintainable as the proper remedy is an appeal and not a revision?

8. To answer the questions, it is necessary to refer to the legal position obtaining.

I n **Ajay Bansal** (1st supra), the facts are as follows: 'The appellant/plaintiff filed a suit for recovery of money in terms of Order 37 of the Code. The respondent/defendant filed an application under Order 37 Rule 3(5) of the Code praying for grant of leave to defend the suit. By an order dated 27.5.2005 leave was refused and the application was dismissed. On the said date itself, a decree and judgment were passed in the suit for a sum of Rs.2,83,987/- with interest at the rate of 12% thereon. The unsuccessful defendant in the suit had filed a revision under Article 227 of the Constitution of India before the High Court of Delhi against the judgment in the suit and also the order dated 27.05.2005 passed in the application for leave to

defend. The said revision of the defendant was allowed. Therefore, the plaintiff had filed an appeal before the Supreme Court.' In this factual background, it was contended before the Supreme Court on behalf of the plaintiff/appellant that against the judgment and decree granted in the suit in favour of the plaintiff, only an appeal lies under Section 96 of the Code and that revision filed by the defendant under Article 227 of the Constitution of India was not maintainable. Per contra, the defendant had contended before the Supreme Court that a revision under Article 227 of the Constitution of India is maintainable as leave to defend was refused inspite of showing good case to obtain leave to sue. In this background of facts and contentions, the Supreme Court had considered various provisions of the Code like the definitions of 'decree', 'judgment' and also the provisions of Order XXXVII of the Code dealing with summary procedure and had held as follows:

A decree passed subsequent to the refusal of leave to defend could either be under Order XXXVII Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even based on oral evidence formally proving, say, the execution of a promissory note by the defendant. It may not be proper or necessary to apply the theory of "dependent order" in such circumstances. For one, the theory may not apply. Even if this Court were to set aside the order of the court below and give the defendant leave to defend the suit, the decree that is passed may not go automatically. It may have to be set aside. Secondly, the defendant can always go to the court which passed the decree and move under Rule 4 of Order XXXVII of the Code to reopen the decree.

The theory of "dependant order" may not apply in a case of this nature because even if this Court were to set aside the order refusing leave to defend, the decree subsequently passed may not fall by itself. It has still to be set aside either by resort to Order XXXVII Rule 4 or by way of an appeal, or by some other mode known to law. In a given case like the present one as it may not be proper to interfere with the decree merely because in an appeal against an order refusing leave to defend, this Court is inclined to take a different view. [See V.S. Saini v. D.C.M. Ltd. (AIR 2004 Delhi 219)]

The defendant in such a case can also be left to appeal against the decree and therein challenge the order refusing leave to defend in terms of Section [105\(1\)](#) of the Code.

Having regard to the aforementioned situation in that case, the Supreme Court directed the civil revision petition to be converted into a first appeal.

9. From a reading of the judgment of the Supreme Court and the legal position obtaining, it appears that a revision under Article 227 of the Constitution of India assailing the decree and judgment passed in the

summary suit is not maintainable and that the proper remedy is an appeal under Section 96 of the Code. It is also clear from the judgment of the Supreme Court that the theory of dependant order may not apply in a case of this nature because even if this Court were to set aside the order refusing the leave to defend, the decree subsequently passed may not fall by itself. Be it noted that in the instant matter, the decree and judgment are passed by the learned Additional Chief Judge, City Civil Court. Therefore, in the facts and circumstances, this Court is of the opinion that the interests of justice would be met if this Court directs that the revision in CRP no.5788 of 2015 filed against the *ex parte* decree and judgment in the summary suit be converted into a first appeal.

10. Accordingly, the revision petition in CRP no.5788 of 2015 is permitted to be converted into a first appeal and the defendant is further directed to pay deficit court fee, if any, payable within eight weeks from the date of the receipt of a copy of this common order. On such conversion and on compliance of the terms in regard to payment of court fee, the matter be listed again before an appropriate Bench after obtaining necessary orders from the Hon'ble the Acting Chief Justice. It is made clear that indisputably, it would be open to the appellant to raise a contention in the converted appeal that it would be a fit case where the learned Additional Chief Judge could have granted leave to defend the suit and accordingly challenge in the first appeal, the order refusing to grant leave in terms of Section 105(1) of the Code. It is further made clear that all the contentions of the parties shall, however, remain open. As a sequel, CRP 4179 of 2015 shall stands disposed of.

Miscellaneous petitions, if any, pending in the revision in CRP 4179 of 2015 shall stand closed.

M. SEETHARAMA MURTI, J

11th April, 2016
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[\[1\]](#) (2007) 2 Supreme Court Cases 275