HIGH COURT OF KERALA

Hon'ble Justice V R Krishna Iyer

C.R.P. 694 of 1968

Decided On, 21 March 1969

C.K. Thomas v/s Bhavani Amma

Reported in 1969 KLT 729

JUDGMENT

1. A few points of some interest and importance have been raised in this revision petition.

2. The plaintiff sued for a declaration of his right to 5 out of 24 shares in the plaint properties and for partition and separate possession of such share. The other sharers are the defendants in the suit. All but one remained ex parte in the suit and a preliminary decree was passed after considering the contentions raised by the 3rd defendant. It has been mentioned at the bar that the preliminary decree was challenged in appeal and in second appeal and eventually confirmed. In the meanwhile, a final decree appears to have been passed, and the 2nd defendant, claiming to be aggrieved by the final decree, applied for an order under 0.9 R.13 CPC. to set it aside. He alleged that no notice had been served on him of the application for passing the final decree and that he came to know about the specific final decree that had been passed only on 2 81966 i. e. the day previous to his application under 0.9 R.13 CPC. His application was dismissed by both the Courts below and so he has come up in revision.

3. Admittedly, notice was not issued on the application for passing the final decree and so we have to take it that no notice was served on the 2nd defendant in the final decree proceedings although he had been served with summons when the suit was instituted and had chosen to remain ex parte allowing a preliminary decree to be passed. Obviously, he cannot be heard to challenge any thing that has been decided in the preliminary decree and, indeed, the revision petitioner agrees that he is bound by the preliminary decree. His grievance is that he should have been given notice when an application for the passing of a final decree was made and that not having been done the decree passed thereon was violative of the rules of natural justice and it must be deemed as if he had not been duly served with summons for purposes of Art.123 (old Art.164) of the Limitation Act.

4. The contentions of the respondent on the other hand are that summons had already been duly served on the 2nd defendant and that he had chosen to remain ex

parte and so he could not get the ex parte decree set aside on an application filed more than 30 days after the passing of the decree. She also contests the ground that notice is necessary at the final decree stage to defendants who have been ex parte in the suit. Even assuming such notice were necessary, counsel for the respondent contends that the language of Art.164 of the Limitation Act (Art. 123 of the present Act) does not admit of a different terminus a quo in the case of a final decree in a partition suit and so for the purpose of limitation we have to reckon 30 days from the date of the decree and since the present application is long after that, the petition is barred by limitation.

5. A contention has been taken by the petitioner that in any view if 0.9 R.13 cannot save him, S.151 CPC. must be invoked in his favour and if that were permissible no question of limitation can possibly arise. Where the Code does not expressly provide for a situation the Court can give redress if the ends of justice demand it by exercising its inherent powers under S.151 CPC. Counsel for the respondent, however, contends that since there is provision in 0.9 R.13 CPC. for setting aside ex parte decrees, S.151 CPC. cannot come into pay at all. A further point which has also been debated at the bar must be mentioned here If it was the duty of the Court to issue notice to parties at the final decree stage the omission to do so is a default of the Court and no party should be prejudiced by an act of the Court. If there is such injury inflicted, the Court has the power and, indeed, the duty to remedy the wrong and on this basis also the ex parte final decree must be set aside. Counsel for the respondent, of course, pleads that the proposition that an act of Court cannot be allowed to harm a party may be good, but does not apply to the facts of the present case.

6. Let us examine these various contentions one by one. To begin with, I agree that the rules of natural justice must be observed by the Court in all its proceedings, particularly when rights of parties may be adversely affected. A final decree proceeding certainly will affect the interests of the sharers and so it is only proper to imply an obligation on the part of the Court to issue notice to all the sharers and others who will be affected by the decree. Some rulings have been brought to my notice to persuade me to the conclusion that notice is obligatory at the final decree stage independently of the summons issued when the suit is filed. Rajakishore Das v. Nilamani Das (AIR. 1968 Orissa 140) (a case relating to a partition suit) supports the revision-petitioner in this contention. It is observed therein that:

"Notice of the final decree proceedings is mandatory as the same cannot be passed behind the back of a party. That would offend the fundamental principle of Audi alteram Partem. There was divergence of opinion on this matter and it has been held by the Patna High Court that notice of final decree proceedings is not mandatory, but a recent decision of this court reported in Swarnamayee Dasi v. Devendranath Koran (ILR.1964

Cuttack 45) has after an elaborate discussion of different views holding the field dissented from the Patna decision Surendra Kumar Singh v. Mukund Lal Sahu (AIR. 1949 Pat. 68) that final decree can be passed behind the back of the defendant. It has my respectful concurrence".

The other rulings which speak in the same strain are those reported in Hirekhan Motikhan v. Mt. Narbada Bai (AIR. 1952 Nag. 177) and Suresh Chandra Banerjee v. United Bank of India Ltd. (AIR. 1961 Cal. 534). Undoubtedly, in a mortgage suit, after a preliminary decree is passed, notice has to be given to the defendant at the final decree stage. In principle, the position may not be different even in a partition suit. After all, at the pre-preliminary decree stage the points in controversy are the substantive rights of parties, such as their shares, the reservations to be made, debts and alienations to be set aside etc. In the post-preliminary decree stage, of course, these rights, declared in the preliminary decree, are to be worked out, and actual division and allotment of properties made, having due regard to such factors as the equities between the parties and the discharge of debts to be provided for. It is not difficult to visualise a party having no quarrel with the rights agitated at the pre-preliminary decree stage but being vitally concerned with the final decree to be passed. If that be so, he could legitimately remain ex parte in the suit till the preliminary decree is passed; and, if his rights are to be affected at the final decree stage, it is but fair that notice is given to him. Even where a statute is silent as to notice in a proceeding which affects rights of parties, the canons of natural justice should be read into it. On these principles I hold that notice should have been issued to the parties, in the final decree proceedings. It is correct law that in a suit for partition, after the passing of a preliminary decree it is the duty of the Court to pass a final decree and what is called an application for final decree is but a reminder to the Court of its duty. If so, it is the Court's duty to give notice to the parties.

7. But then the next question is as to whether a final decree, passed without notice, can be set aside under 0.9 R.13 CPC. and if so, whether in this case it has been filed within the time specified in Art.123, Limitation Act. Alternatively, if the petitioner has missed the bus under 0.9 R.13 CPC. can he invoke the aid of S.151 CPC? In the present case, the revision-petitioner conveniently claims to have had knowledge of the decree only the day before he applied under 0.9 R.13 CPC. Assuming that the said provision applies which I will examine later which part of Art.123 applies to fix the terminus a quo? The date of the decree or the date of knowledge of the decree? Assuming, again, that the date of knowledge of the decree is the relevant date a question which needs close scrutiny the burden of showing that the petitioner came to know about the decree only within 30 days of his application lies initially upon the party who applies. The Supreme Court has, in Panna Lal v. Murari Lal (AIR. 1967 SC.

1384), explained the legal position relating to Art.164 (now Art.123) of the Limitation Act. Their Lordships observe:

> "*If the summons is not duly served, the defendant suffers an injury and he is entitled to ex debito justitiao to an order setting aside the exparte decree provided he applies to the court within the prescribed period of Limitation The onus is on the defendant to show that the application is within time and that he had knowledge of the decree within 30 days of the application. If the defendant produces some evidence to show that the application is within time, it is for the plaintiff to rebut this evidence and to establish satisfactorily that the defendant had knowledge of the decree more than 30 days before the date of the application.*"

Interpreting the expression "knowledge of the decree" in Art.164 their Lordships approve of the ruling in Bapurao Sitaram Karmarkar v. Sadhu Bhiva Gholap (ILR. 47 Bom. 485 AIR. 1923 Bom.193) wherein Macleod, C. J. said:

"*We think the words of the Article mean something more than mere knowledge that a decree had been passed in some suit in some Court against the applicant. We think it means that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him in a particular Court in favour of a particular person for a particular sum. A judgment-debtor is not in such a favourable position as he used to be when he had thirty days from the time when execution was levied against him. But we do not think that the legislature meant to go to the other extreme by laying down that time began to run from the time the judgment-debtor might have received some vague information that a decree had been passed against him.*"

Their Lordships continue,

"When the summons was not duly served, limitation under Art.164 does not start running against the defendant because he has received some vague information that some decree has been passed against him. It is a question of fact in each case"

In Sohan Lal v. Poonam Chand (MR. 1961 Rajasthan 32) a single judge of that Court observed as follows:

"*There is no doubt that it is for the defendant petitioner to say when he got information of the decree. Since, however, it is his information, he can only prove it by affidavit or statement on oath. In order that affidavit or statement should be disbelieved, there must be positive evidence on the other side. The burden of proof is initially, no doubt, on the defendant, but how, that burden is to be taken to be discharged or when it can be said to be discharged or when the contrary stands proved, is a matter which can only be decided on particular facts in each case.*"

A decision of Justice Govinda Menon, reported in Joseph v. Kunjan (1961 KLT. 876) has also been cited before me. The learned judge has taken the view that the rules regarding proper service of summon are ordinarily mandatory and non-compliance will prove fatal. His Lordship proceeds further to hold that' in a case where there is no proper service the defendant can rely, upon knowledge of the decree for filing the application " In a case where the service of summons has been improper very slight evidence on the part of the applicant that he had no knowledge of the decree must be held to be sufficient". Unfortunately the Courts below have equated the possibility or the likelihood of knowledge of the decree as equal to actual knowledge of the specific decree and the discussion in the judgments challenged before me, on this aspect, is faulty. Nor is there an appreciation of the correct approach to the onus of proof regarding knowledge of the decree.

8. They have proceeded on the footing that the revision-petitioner has not discharged the burden which lay on him to show that the application was within time without appreciating the legal nuances in regard to onus of proof. Initially, the onus is upon the applicant, but when slight but reliable evidence is adduced, the burden shifts. It is not as if the burden always rests only and heavily on the applicant, as the Courts below appear to have assumed. If so, they have committed a material irregularity which has prejudiced the party. If the Court acts upon an erroneous assumption regarding onus of proof or makes a wrong approach, placing the onus on the wrong party, and its finding of fact has been substantially affected that way, there is a defect in procedure which may justify interference in revision. Reading the rulings in Keshardeo Chamria v. Radha Kissen Chamria (AIR. 1953 SC. 23) and Jagadamba Prasad v. Brighu Nath Dixit and others (1969 (1) SCWR. 48) one reaches this conclusion.

9. Now let us examine whether 0.9 R.13 CPC. and Art.164 (or Art.123) Limitation Act apply? Art.164 of the Indian Limitation Act 1908, which corresponds to Art.123 of Act 36 of 1963, speaks of summons being duly served. If it has been, the terminus a quo is the date of the decree and not the date of knowledge of the decree. In the present case, summons was duly served when the suit was first instituted. The complaint is that notice at the final decree stage was not taken out at all nor served. That is not the same thing as saying that summons was not served, for, the word 'summons' really refers to summons to be served on the defendant for the first hearing of the suit. The CPC. makes a distinction between a summons and a notice, and where the summons for the first hearing has been duly served on the defendant, the fact that notices at subsequent stages were not served cannot attract the second part of column 3 of Art.1.4. It was argued before me that the word 'summons' should not be narrowly construed and that in substance there is very little distinction between a

summon? and a notice in the CPC. After all, the object of a summons is to apprise the defendant of the institution of a suit against him and of a notice is also to alert him of a proceeding against him. Viewed from the angle of natural justice and even of the substance of the matter, there is considerable force in this argument, but there is no precedent in support of such a larger or more liberal meaning being given to the word 'summons'. On the other hand, a few decisions contra have been cited before me. Art.123 of the new Limitation Act really compresses into one, Art.164 and 169 of the old Limitation Act. But, as it reads at present, it seems to help the construction of the appellant that where a decree is passed without due service of summons or of notice, the date of knowledge of the decree fixes the point of commencement of limitation. If we split up summons and notice and relate them to a decree passed ex parte and an appeal decreed or heard ex parte, probably the argument of the appellant becomes weaker. I am myself inclined to make a liberal approach, if T may say so, and hold that where a decree is passed without due summons or without due service of notice as in the case of a final decree, the period of limitation has to be computed from the date of knowledge of the decree. In this view, the petition may be within time provided it has been filed at least within thirty days of the knowledge of the decree. A finding on this has to be recorded afresh in the light of my earlier observations.

10. If it is the duty of the Court to issue notice to the parties, of the final decree proceedings, as I think it is, the failure to do so and the consequent injury caused by the passing of the final decree cannot but be remedied by the Court itself. Actus curiae neminem gravabit. (see also Themmalapuram Bus Transport v. Regional Transport Authority (1967 K. L T. 122 F. B.). If the act of the Court is the cause of the grievance, the inherent power of the Court under S.151 C. P. C. can be invoked to redress the grievance of the party. The ruling reported in Manoharlal Chopra v. Rai Bahadur Rao Raja Seth Hiralal (AIR. 1962 S. C. 527) was relied on by counsel to support his argument that to prevent injustice S.151 C. P. C. could be invoked, but counsel for the respondent cited Raja Soap Factory v. Shantharaj (AIR. 1965 S. C. 1449) to substantiate his contention that where there is a specific provision in the Code (Order 9 R.13 C. P. C. in this case) S.15! is not available. It is true that the undefined and inherent powers of a Court to prevent abuse and injustice cannot corrode, override or subvert the other provisions of the Code and must prevail only where the topic is uncovered by other specific provisions. Even so, can it be said that there is any provision for setting aside a final decree passed without notice to the affected parties since 0.9 R.13 CPC. applies only to cases where decrees have been passed after summons in the suit and does not cover cases of decrees preceded by notice? Moreover, if the default which has led to the decree is traceable to the Court itself, there is power, indeed the duty, for the Court to set right matters. I am, therefore, of the view that S.151 C. P. C. is not repelled by 0.9 R.13 C. P. C. in special

situations uncovered by it and it is obvious that there is no period of limitation as such for the exercise by the Court of its powers under S.151 C. P. C. (See Kakki Thoma v. Sankaran Parameswara Panicker (1955 KLT. 870). Nor is it obligatory however desirable it might be that S.151 CPC. should be specifically invoked by the party; but in a case where relief is sought by a party on the ground that the inherent power of the Court should be exercised in his favour, the circumstances, including the conduct of the parties, must be looked into; for instance, if a party lies by for many years, after knowing that by default of the Court a certain order to his prejudice has been passed and takes other steps indicative of his acceptance of the order, it docs not lie in his mouth to say long later, that he has been injured by the order of the Court and that S.151 CPC. should be used to restore him to the original position. In this case, counsel for the respondent has a contention that the petitioner has forfeited, by his own conduct, the right to invoke the inherent powers of the Court or to complain of injury by act of Court. It is true that a mere technical defect or default will not persuade the Court to use S.151 CPC. There must be some substantial injustice done and, in this context, the plea of the petitioner that he has been prejudiced by the final decree may well be evaluated prima Jade. In this view, the trial Court must be directed to study the circumstances of the case before deciding to set aside the final decree under S.151 C.P.C. There is another argument urged before me by the respondent's counsel. He would have it that all the circumstances put forward before me by the petitioner, such as the absence of notice of the final decree proceedings etc. can be used for the condonation of the delay and for such condonation an application under S.5 of the Limitation Act is the appropriate remedy. Certainly, that may be away out of the difficulty, if S.151 CPC. is not attracted. No such application has yet been made and I am not impressed by the submission of the petitioner's counsel that an application in writing under S.5 of the Limitation Act, is unnecessary if the circumstances of the case otherwise justify its application. It is open to the petitioner to fall back upon S 5, Limitation Act, read with 0.9 R.13 CPC., if he is so advised, when the matter goes back. But the decree, to be set aside, will be the final decree only.

11. I, therefore, set aside the order of the Court below and direct a fresh enquiry by the trial court. If the party chooses to file an application under S.5 of the Limitation Act that will also be considered along with the present petition. The Court will give the petitioner an opportunity to file a supplementary statement, within a reasonable time, setting out the circumstances under which he seeks to invoke the jurisdiction of the Court under S.151 CPC. and give a similar opportunity to the respondent to controvert those facts. Thereafter, evidence will be taken, if any is offered and the petition disposed of in the light of the observations in this judgment and according to law. It is open to the Court to exercise powers under S.151 CPC. if circumstances justify it and consider the application under O.9 R.13 CPC. on its merits, if a petition is

made and case made out under S.5, Limitation Act. The ground covered will largely overlap.

12. In case the Court decides to set aside the final decree already passed, the fresh proceedings will be subject to what has already been decided in the preliminary decree. Even so, if the final decree is being set aside as against the revision petitioner i.e. the 2nd defendant, certain other complications may arise. The other defendants, who were *ex parte*, are now bound by the final decree passed by the Court, although they also have not been given notice of the passing of the final decree, except the 3rd defendant. If the decree is set aside only against the present applicant the fresh final decree may adversely affect the other defendants. It may, therefore, be appropriate, in case the Court sets aside the decree as against the petitioner, to set it aside in toto, under the proviso to O.9 R.13 CPC. But I leave it to the discretion of the lower Court. I do not see any reason why even under S.151 CPC. the Court cannot reopen the decree as against all the parties so as to avoid anomalous and unjust consequences to them. This is a matter which the lower Court will bear in mind when passing final orders.

13. A commissioner has made a report already and the revision petitioner agrees that if the final decree is being set aside, that report may stand, and need not be set aside on the ground that the report was submitted without notice to him. However, objections to the Commissioner's report may be filed by all affected parties and heard by the Court and the same commissioner may be directed to submit a revised report in the light of such objections. This will reduce the delay in passing the final decree and work justice. The revision petition will be allowed, subject to the above 'directions but on terms. The revision petitioner will pay costs Rs. 50/- to the respondent within one week of the reopening of the Court, after summer recess, failing which the CRP. will stand dismissed with costs.