

(1931) 08 MAD CK 0001
In the Madras High Court

A.E. Venkatarama Chettiar and Another	APPELLANT
Vs	
Marudachala Goundan and Others	RESPONDENT

Date of Decision : 06-08-1931

Acts Referred:

Citation : AIR 1931 Mad 795

Hon'ble Judges : Curgenvan, J

Bench : Division Bench

Judgement

Curgenvan, J.—The facts of this case have been sufficiently set out by the learned District Munsif of Udamalpet. There was a preliminary

decree passed in a mortgage suit and an application I. A. No. 777 of 1925, was put in by the decree-holder for a final decree. Upon this the Court

ordered notice to the judgment-debtor. On several occasions notices were issued and a number of them served, but eventually when an order was

passed for substituted service to be applied for against defendant 2 and for a guardian to be proposed for defendant I's legal representative the

decree-holder defaulted and the application was dismissed. The date of the dismissal was 15th September 1926 and on 3rd August 1928 the

application out of which this petition arose, I. A. No. 686 of 1928, was filed praying the Court to revoke the previous order on the ground that it

was invalid. The learned District Munsif after considering certain rulings has come to the conclusion that there is no necessity to issue notice to the

defendants on an application to pass a final decree in a mortgage suit and further that even if on such an application the Court thinks fit to order

notice and a decree-holder neglects to take steps the Court has not the power to dismiss the application as it has done in the present case.

2. As authority for the former proposition the learned District Munsif has referred to the case short notes in Nemichand Sowar v. Kesari Mull AIR

1929 Mad. This case has since been reported as Rasan Chettiar Vs. Rangayan Chettiar, and a perusal of it makes it clear I think that, while it is

not obligatory upon a Court to issue notice, it is nevertheless a practice advisable, and the case is certainly not an authority for the position that the

Court would be acting ultra vires in adopting such a course. There is in fact a considerable body of case-law in favour of the view that notice

should issue, as in the generality of interlocutory applications. The mere circumstance that the Court can dispense with notice and can direct that a

final decree be passed under Order 34, Rule 5 (2), Civil P.O., does not therefore invalidate the orders passed by the Court in the present case.

Whether or not in directing the issue of notice the learned District Munsif who passed the order did so with his eyes open as to the discretion

vested in him to abstain from such a course is no doubt another matter. But I must take it that the action which he took was taken in the exercise of

his judicial discretion since he undoubtedly had power to take it.

3. The question then arises whether he was equally justified in dismissing the application as a whole upon the failure of the decree-holder to persist

in taking out notice until each and every one of the defendants had been served. Reference has been made to Timmaraju v. Narasimha Raju

A.I.R.1928 Mad.522. where it has been held by Jackson, J., in somewhat similar circumstances that, if a Court is going to act u/s 151, Civil P.C.,

it must satisfy itself and, I presume, record something to satisfy an appellate or revising Court, how the ends of justice or its own process needed to

be safeguarded by such a course. In other words, Section 151 will not allow a Court as a matter of course to dismiss an application for default

either in taking out notice or in any other manner. I do not think it necessary for me to express either concurrence or disagreement with that

decision, because I am not satisfied that recourse must be had to Section 151 in the circumstances which arise here. I am unable to see why by

force of Section 141 of the Code the provisions of Order 9 and of Order 17 should not become applicable to a proceeding of the class now under

consideration. It has no doubt been held by the Privy Council in Thakur Prasad v. Fakirullah [1195] 17 All 106 that this portion of the Code will

not apply to proceedings in execution. But whatever else an application of this kind may be, it is certainly not an application in execution and I think

it can hardly be contested that it is an integral part of the mortgage suit. No authority has been shown me why the provisions I have mentioned

should not be extended to cover a proceeding of this nature, and it seems to me somewhat improper that the Court should possess more

unqualified power by resort to Section 151 of the Code in dealing with an application of this kind than it possesses in the case of a suit. If this view

be correct, it appears to me that before dismissing the application the Court should have satisfied itself that the terms of Order 9, Rule 5 were

complied) with,

4. We have been at some trouble to elucidate the course taken for securing service in this case and it appears that by 18th August 1926 all the

defendants had been served except the first, who was dead, and the second. As already remarked the Court passed an order for an application

for the guardianship of the legal representative of the first and for substituted service on the second. It may be remarked incidentally that this order

for substituted service was passed after this defendant had received service by affixure no less than six times. It would appear from that

circumstance that had the Court applied its mind to the matter, it would especially in a proceeding of this nature have found service to be sufficient.

Nevertheless on 18th August it did in fact pass these orders and when the case came up again on 15th September, no steps having been taken the

petition as a whole was dismissed. It is unnecessary to trouble ourselves with the case of defendant 1's legal representative because the original

order has not been revoked in the case of this party. As regards defendant 2, if we are to apply Rule 5, Order 9 the decree-holder had a period of

three months from the date of return made on the prior summons within which to apply for the issue of a fresh summons. It is quite clear that no

such period as three months was allowed before the dismissal order was passed. The conclusion I draw accordingly is that the Court was not at

liberty to dismiss the application in respect of any of those defendants who had been in fact served and that even in the case of defendant 2 who

was not served it did not allow sufficient time for a further application to be made before passing the order of dismissal.

5. It appears to me accordingly that the order was in fact ultra vires and it only remains to say that the revision petition in the present case is preferred by defendants 11 and 12 who were themselves served at an earlier stage of the proceedings. In these circumstances it is very difficult to see how they can themselves support the earlier order, since it seems clear that so far at least as they were concerned the order of dismissal cannot be maintained. An argument has been addressed to me in order to meet the position that the Court may dismiss an application of this sort piecemeal that it would not be fair to pass a decree against some of the defendants; and that the only proper course would be to pass it against all or none. I can only say as regards this argument that I have not been sufficiently put into possession of the facts in order to see whether in the present case it has any substance. It scarcely needs remark that, if an injustice would ensue in circumstances such as the present, it would be likely to ensue in similar circumstances under Order 9, Rule 5 where a suit is partly decreed and partly dismissed by virtue of partial default in service. My conclusion accordingly is, although it is arrived at on somewhat different grounds from those which influenced the learned District Munsif, that the order dismissing the application for a final decree was not justified by law and in fact was ultra vires. Mr. T. M. Krishnaswami Iyer has conceded what I think is unquestionable that if so it was a nullity and the Court could have proceeded to pass further orders as if the original application was still pending. That in substance is what it has done and I cannot find there are sufficient grounds to interfere now in revision with that order. The civil revision petition is dismissed with the costs.