

(1952) 09 KL CK 0001
In the High Court Of Kerala
Case No : C.R.P. No. 383 of 1952

Ahmed Ummal Sulaiha Ummal	Vs	APPELLANT
Abdul Khanni Lebba Noohookannulebba		RESPONDENT

Date of Decision : 25-09-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 6

Citation : AIR 1952 Ker 40

Hon'ble Judges : Subramania Iyer, J

Bench : Single Bench

Advocate : S. Boothalinga Iyer, for the Appellant; K.P. Alikunju, for the Respondent

Final Decision : Allowed

Judgement

Subramania Iyer, J.—The defendant in O. S. 395 of 1950 on the file of the Kottareakara Munsiffs Court is the petitioner in this revision. There was a decree passed ex parte in that suit against her on 28-7-50 which was the date to which the case was first posted. The summons was served upon the defendant on 10-7-1950. There was, therefore, an interval of only 17 clear days between the date of the service of summons and the date of hearing. Rule 482, Travancore Civil Courts" Guide of the year 1120 provides as follows:

482. On receipt of the plaints, appeal memoranda and original petitions (from the Pile book Clerk) the Bench Clerk shall ascertain from the Presiding Officer the dates to which they should be posted for first hearing and have the dates noted by the Presiding Officer himself on the top of the back of the plaints, etc., just below the entry made by the File book Clerk.

Note, (i) The date of first hearing shall be so fixed as to allow the defendant, respondent or counter-petitioner in original suits small causes, appeals and original petitions in the District Court, not less than 30 clear days from the date of service of summons or notice, and the defendant or counter-petitioner in the

Munsiff's Court in original suits and original petitions, not less than 20 clear days and in small causes, not less than 10 clear days from the date of service of summons or notice.

According to that rule, there should have been 20 clear days between the date of service of summons and the date posted for hearing the case. The term "clear days" has been defined in the Civil Courts' Guide itself in S. 3. cl. (3); thus:

"Clear days" means exclusive of both the first and the last day.

Order IX, R. 6, Travancore Civil P. C. provides in cl. (c) that -

If it is proved that the summons was served, on the defendant but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

Sufficient time contemplated by this rule shall be sufficient time as provided in the Civil Courts' Guide. If, therefore, there was not, as in this case, sufficient time to enable the defendant to appear and answer on the day fixed in the summons, it was obligatory upon the Court to postpone the hearing of the suit to a future day and give notice thereon to the defendant. This was not done and the case was disposed of against the defendant and the decree was passed "ex parte" on 28-7-1950 which was the date noted in the summons for the appearance of the defendant. There is thus a clear violation of the provisions of law.

2. The petitioner did not take this objection before the Munsiff nor did he take it in the memorandum of appeal presented before the District Judge. He, however, raised it before the Judge at the hearing and the objection was considered by the Judge who was of the opinion that the provision contained in the Civil Courts' Guide as regards the interval of certain number of clear days between the date of service of summons and the date fixed for hearing the case is not mandatory and as such the violation of the rule would not result in enabling the defendant, for that reason, to have the "ex parte" decree set aside. The learned Judge followed the decision in 25 Trav. LJ 1217 followed in - "Krishna Kurup Govinda Kurup v. Geevarghese Oommen Vydian," 29 Trav: LJ 1201. The earlier decision relates to a case of the year 1105 and the Civil Courts' Guide then in force was the one prior to that of the year 1120. Note 3 to R. 482 which forbids cases being decided in contravention of the rule was enacted by Circular No. 1 of 1109. That circular had not been issued at the time of the event that led to 25 Trav. LJ 1217 case nor was that circular which had been issued by the time of the decision read or dealt with by the Judges. They proceed on the basis that such a circular did not exist. Even if it was brought to their notice, it may not have been applied because, as already stated, the event related to a period before the circular was issued. 29 Trav LJ 1201 merely follows the earlier decision. The suit in that case was in the year 1107 and the application by the defendant was in the year 1109.

Whether the application was before or after the circular of that year does not appear. In 29 Trav LJ 1201 also the circular is not referred to or considered. There was a dissenting view taken in the Travancore High Court in the case reported in 19 Trav LJ 690 which held that even apart from the circular, the provision in the Civil Courts" Guide fixing certain interval as sufficient time for the defendant to appear is mandatory whose violation would be fatal to the decree passed. 25 Trav LJ 1217 refers to O. 9 R. 6 but takes the view that the onus is upon the defendant to prove that he had no sufficient time. With great respect to the learned Judges it appears to me that a true construction of O. 9 R. 6, cl. (c) would not cast any such burden of proof upon the defendant. Though there is no comma in that clause after the word "defendant" to understand it properly, the first part of the clause "if it is proved that the summons was served on the defendant" must be read with a pause after the word "defendant"" and the subsequent portion "but not sufficient time..... day fixed in the summons" must be regarded as a separate portion regarding which there is no burden of proof cast on the defendant. It is on this construction of the second part of the clause that the Civil Courts" Guide fixes particular number of clear days that should intervene between the date of service of summons and the date of hearing, ten days for small cause, 20 days for original suits in the Munsiff's Court and 30 days for original suits in the District Court.

3. In the Cochin High Court, the view taken has always been that the rule fixing the number of clear days as the interval between the date of service of summons and the date fixed for the appearance of the defendant is mandatory. Rule 237 in the Civil Rules of Practice is the relevant provision which is similar to that contained in R. 482. Travancore Civil Courts" Guide, except that the number of days is less namely 7 and it is uniform for all types of cases and in all Courts. 8 Cochin 317 and 11 Cochin 23 are the decisions which have taken the above said view. In my judgment the provision in the Travancore Civil Courts" Guide and the Cochin Civil Rules of Practice fixing a certain number of clear days as the interval between the date of service of summons and the date of hearing of the case is mandatory. The number of days are the statutorily fixed sufficient time" which the defendant is entitled to, to enable him to appear and answer the claim made against him. It is only in the event of this number of days intervening that the defendant is under an obligation to appear on the day fixed in the summons for the hearing of the case. If the number of clear days do not intervene between the said two dates, the defendant is not under an obligation to appear and no consequence adverse to him would ensue on account of his non-appearance. Rule 6 of O. 9 directs the Court to postpone the hearing of the case in such an event to a future day and to give notice thereof to the defendant.

4. Learned counsel for the respondent-plaintiff raised an objection that this point not having been taken in writing by the petitioner in the trial or the appellate Courts, should not have been heard or decided by the District Judge. The District Judge, however, in his discretion permitted the point to be raised and he considered and decided it. It is a question of law and the facts necessary to apply

that rule of law are only those that will appear on the face of the records of the proceeding about which there will and can be no controversy. The default of the petitioner in raising the point before the Munsiff and in his memorandum of appeal to the Judge is not therefore material. The learned Judge acted rightly in hearing the point though his decision happened to be wrong.

5. In the result the orders passed by the Courts below cannot be supported. They are set aside and the revision is allowed. The application filed by the petitioner to set aside the decree passed "ex parte" against him is allowed. The Court below will fix a day for the defendant to file, his written statement, receive it and proceed with the case in accordance with law. The respondent will pay the costs of the petitioner in this revision.