
(1978) 07 MAD CK 0013

In the Madras High Court

Case No : L.P.A. No 121 of 1976

International Cotton Traders, Tatabad, Coimbatore

APPELLANT

Vs

P. Narayanaswami

RESPONDENT

Date of Decision : 06-07-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Limitation Act, 1963 — Article 123

Citation : AIR 1979 Mad 36 : (1979) ILR (Mad) 16 : (1978) 91 LW 575

Hon'ble Judges : Nainar Sundaram, J;Ismail, J

Bench : Division Bench

Judgement

Ismail, J.—This and appeal against the order of Ramanujam J. dated 15-10-1976. The matter lies in a very narrow compass.

The respondent herein was the third defendant in O. S. No. 733 of 1972, on the file of the Court of the Subordinate Judge, Coimbatore. After a

preliminary decree was passed therein, the final decree proceedings has taken place. Notice was served on the respondent herein and he was

represented by counsel. His counsel was taking time for filing counter affidavit on behalf of the respondent and at a particular stage, the counsel

reported no instructions. Thereafter, the ex parte final decree was passed on 26-11-1974. Subsequently, on 24-1-1975, the respondent herein

filed I. A. No. 63 of 1975 under Order 9 , Rule 13 C . P. C. to set aside the ex parte final decree on the ground that his non-appearance before

court on the day of the hearing of the final decree proceedings was due to the fact that the plaintiff represented to him that he would not proceed

against the mortgaged properties, that he would exonerate the respondent and that he would have recourse only to the subsequent purchaser of the

Mills. The learned Judge did not accept the explanation offered by the respondent herein and held that the respondent should be taken to be aware

of the ex parte final decree even on 26-11-1974, and therefore, the application filed on 24-1-1975 should be rejected as being out of time. It is

against that Order A. A. O. No. 591 of 1975 was preferred to this court which was disposed of by Ramanujam J. by the impugned order.

2. The learned Judge took the view that the application for setting aside the ex parte decree had to be considered on merits and should not have

been dismissed on the ground of limitation. The learned Judge pointed out that it was true that the ex parte decree came to be passed on 26-11-

1974, after the respondent's counsel reported no instructions, but unless it was shown that the counsel informed about the passing of the final

decree to the respondent, knowledge could not be attributed to the respondent, with the result, the learned Judge allowed the appeal and directed

the lower court to dispose of I. A. No. 63 of 1975 on merits. It is against the order of Ramanujam J. that the present appeal under Cl. 15 of the

Letters Patent has been filed.

3. As we pointed out already, the matter lies in a very narrow compass. Art. 123 of the Schedule to the Limitation act of 1963, reads as follows-

Description of application 123. To set aside a decree passed ex parte or to rehear an appeal decreed or heard ex parte. Period of limitation Thirty

days Time from which period begins to run The date of the decree or where the summons or notice was not Duly served, when the applicant had

knowledge of the decree.

4. Thus, the starting points of limitation are two. One is the date of the decree and the other is the date of the knowledge of the decree. With

reference to the second, the condition to be satisfied is that no summons or notice should have been duly served. Thus, a person applying for

setting aside an ex parte decree can claim that the period of limitation should commence from his knowledge of the decree only in a case where the

summons or notice was not duly served. In other cases, limitation commences from the date of the decree itself. In this particular case, as we

pointed out already, in the final decree proceedings the respondent herein was represented by counsel who took time for filing counter more than

once and finally reported no instructions. Therefore, the present is a case which

falls under the first alternative in the third column to Art. 123 of the Schedule to the Limitation Act, 1963, and not under the second alternative where alone the date of knowledge of the decree is irrelevant. In view of this crucial feature, we allow the appeal and set aside the order of Ramanujam J. and restore that of the lower court dismissing I. A. No. 63 of 1975. No order as to costs.

5. Appeal allowed.