
(1965) 12 KL CK 0020

In the High Court Of Kerala

Case No : Criminal Revision Petition No. 72 of 1964

K.P. Bhargavi Amma

APPELLANT

Vs

C.R. Kuttikrishnan

RESPONDENT

Date of Decision : 17-12-1965

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 489, 489(2)

Citation : AIR 1967 Ker 54 : (1967) CriLJ 199

Hon'ble Judges : P. Govinda Menon, J

Bench : Single Bench

Advocate : K.P. Ramunni Menon and K. Ramakumaran, for the Appellant; P.K. Shamsuddin and E. Ebrahimkutty, for the Respondent

Final Decision : Dismissed

Judgement

P. Govinda Menon, J.—The petitioner had filed a petition M. C. 102 of 1961 before the Sub-Divisional Magistrate, Malappuram for maintenance for herself and her child from the respondent. Though the respondent was served with summons he remained ex parte and an order of maintenance was passed against him. He paid the maintenance amount awarded for some months and then defaulted. Subsequently, he obtained a decree from the civil Court at Jal-gaon declaring that the marriage between him self and the petitioner had been dissolved by customary divorce and on the foot of that decree filed a petition M. C. 89 of 1963 u/s 489 Cr. P C.. for cancellation of the maintenance allowed to the petitioner. The Sub-Divisional Magistrate after hearing the parties passed orders disallowing maintenance to the petitioner and fixing Rs. 12 it month as maintenance for the child. Aggrieved with the order this revision petition has been filed.

2. It is contended by the learned counsel for the petitioner that" section 489 Cr. P. C., cannot apply In this case as there is no proof of any change of circumstances after the passing of the order for maintenance. But what we are concerned here is clause 2 of section 489 Cr. P. C. That clause reads :

" (2) where it appears to the Magistrate that, in consequence of any decision of a competent civil Court, any order made u/s 488 should be cancelled or varied, he shall cancel the order or, as the case may be. vary the same accordingly."

On an application filed u/s 489 (2), it is the duty of the Court to consider whether a decision of the civil court leads to the consequence that the order passed by the Criminal Court u/s 488, should be cancelled or varied. If the consequence is that it should be varied or cancelled, effect must be given to it by cancelling the order or varying it accordingly. The discretion of the criminal Court is only for this purpose.

8. The next ground of attack is that the petitioner and the respondent last resided at Paruthur Amson in Tirur Taluk and as such the Civil Judge, Jalgaon had no jurisdiction to entertain the petition under the Hindu Marriage Act or later to convert it into a suit and pass a decree declaring that there was a divorce.

Section 21, CPC is a complete answer to this objection. Section 21 reads:

" No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the "Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice. "

4. Learned counsel then argued that the decree produced before the Sub-Divisional Magistrate is not a decree by a competent civil Court. What is contended is that the Court having found that the petition under the Hindu Marriage Act to be not maintainable ought not to have allowed the petition to be converted into an original suit and ought not to have passed a decree whatever even is- suing summons to the petitioner who is the defendant in the suit. The fact that after converting the petition into a suit fresh summons was not ordered and summons was not served on the petitioner cannot be disputed. Such a decree, it is" contended by the learned counsel for the petitioner, is a nullity and could well have been ignored by the learned Magistrate.

5. It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity and its invalidity could be set up whenever and wherever it is sought to be enforced, or relied upon even at the stage of execution and even in collateral proceedings. A defect of jurisdiction strikes at the very authority of the Court to pass a decree and such a defect cannot be cured even by consent. But the petitioner's contention that an ex parte decree passed without issuing summons and in contravention of the provisions of the CPC is an absolute nullity cannot be accepted. It is only an irregular exercise of jurisdiction to have passed a decree in violation of the rules, but all the same the Court had inherent jurisdiction to pass a decree in the suit. A decree passed by a competent authority irregularly is only avoidable and unless and until It is duly annulled it would have all the force of a valid decree.

6. The question, therefore, is whether the civil Judge of Jalgaon had jurisdiction to pass the decree. If the Court had inherent jurisdiction, in other words, if it had jurisdiction over the parties and the subject-matter, any error committed by the Court in disposing of the suit will not matter and the decree passed will not be a nullity and proper steps would have to be taken as prescribed under the Code to have the decree set aside. If as proved by the respondent, himself and the petitioner were last residing as husband and wife within the jurisdiction of the Jalgaon Court, the Jalgaon Court would have jurisdiction over the parties. It has also jurisdiction to hear and decide the petition under the Hindu Marriage Act and the suit for declaration that the marriage between them is not subsisting and pass a decree that divorce had been effected. If that is so, then there is no inherent lack of jurisdiction.

It may be, that the petitioner was really unaware of the suit and the decree was obtained behind her back and without her knowledge. But she cannot get rid of the effect of the decree by merely saying that she was not served with summons. As soon as she came to know of the decree she was bound to seek the assistance of the Court in the only manner in which the solemn act of Court may be impeached. She ought to have applied to have the decree set aside if she complained only of non-service of summons or to have applied for review on the ground of fraud or brought a regular suit on the ground of fraud if she alleged any. She had done nothing of the kind and she is therefore, not entitled to impeach the decree obtained against her on the ground of non-service of summons in time proceedings.

7. A similar question arose for consideration before the Full Bench of this High Court in *Madhavan Pillai Somanatha Pillai and Another Vs. State of Kerala and Others*, , where Raman Nayar, J., speaking for the Bench has elaborately discussed the question as to when a decree could be said to be absolutely void and a nullity and it was stated :

" The question really is not so much whether, as some decisions put it, the provisions of Order XXXVIII, Rule 6 (1) are mandatory or merely directory--even the breach of a mandatory provision does not necessarily make an order or judgment void though it would make it illegal-- See *Ittavira Mathai Vs. Varkey Varkey and Another*, where the breach was of the mandatory provisions of Section 3 of the Limitation Act--but whether compliance with those provisions is a condition precedent for the assumption of jurisdiction or whether, on the other hand, the provisions merely lay down the manner in which the jurisdiction is to be exercised. If it is the former, non-compliance would make the order void; but, if the latter, non-compliance would only make the order voidable. The order would be liable to be set aside, but, until that is done, it would be opera-live and cannot be ignored or collaterally attacked. " The learned Judge further stated :

" On this question we do not think that we can do better than repeat what was said in *Dhian Singh v. Secy, of State* AIR 1946 Nag 97 : " Rule 5 of Order 38, Civil P. C., is intended for the protection of the person whose property is sought

to be attached before judgment. If he did not receive notice required by law and was consequently denied the privilege of staying off the attachment by the offer of security the- injury would no doubt accrue to him but the law gives him a remedy by way of appeal under Order 43, Rule 1 (q) from such an irregular order to get it set aside. XX XX XX In *Jang Bahadur v. Bank of Upper India Ltd.* AIR 1928 PC 162 their Lordships pointed out the difference between a matter of procedure and one of jurisdiction in these words :

"This is a matter of procedure and not of jurisdiction. The jurisdiction over the subject-matter continues as before but a certain procedure prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect might be waived, and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings. "

Reference was there made to a recent decision of the Supreme Court in *Itavira Mathai Vs. Varkey Varkey and Another*, . In that case, it was contended that a particular decree was a nullity as the suit was barred by time and passed in contravention of Section 3 of the Limitation Act. The plea was negatived and it was held that where a Court having jurisdiction over the subject-matter and the party passes a decree it cannot be treated as a nullity and ignored in subsequent litigation even if the suit was one barred by time. If the suit was barred by time and yet, the Court decreed it, the Court would be committing an illegality and therefore, the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. Their Lordships further observed :

" It is true that Section 3 of the Limitation Act is peremptory and that it is the duty of the Court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. Even so it cannot be said that where the Court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity."

8. The decisions referred to by the learned counsel for the petitioner were all cases where there was initial lack of jurisdiction. One of the decisions referred to by the learned counsel was the Full Bench decision of the Madras High Court in *Kanchamalai Pathar Vs. Ry. Shahaji Rajah Sahib (deceased) and Others*, . In that case the impugned sale was held in execution of a money decree after the death of the sole judgment-debtor. The decree-holder though aware of his death proceeded with the execution without making any application u/s 50 for leave to execute the decree against his legal representative and without taking out any notice on the legal representatives under Order 21, Rule 22. The question that was debated was whether the sale was void or merely voidable and it was held that the sale was void.

Relying on the decision of the Privy Council in *Raghunath Das v. Sundar Das Khetri*. AIR 1914 PC 129 Cornish, J., said :

"On this authority, I think, there can be no doubt that, where there has been no application u/s 50 and consequently no Issue of notice under Order 21, Rule 22 (1), the foundations of the Court's jurisdiction to execute a decree against the legal representatives are entirely wanting. And a sale held without this jurisdiction would be void."

As to the effect of the judgment-debtor's death on a pending execution proceeding his Lordship said "On the death of a judgment-debtor the decree cannot be executed against him for there is no such thing as execution against a dead man." Varadachariar. J., said : " The Court has no jurisdiction to sell a dead man's estate." Venkataramana Rao., J., said : "Therefore, as soon as a man dies, he disappears from the record and there is no party over whom the Court can exercise jurisdiction and it loses jurisdiction in one of its essentials (9) The Patna High Court following the above cited decisions in *Mahadeo Prasad Jayaswal Vs. Emperor*, took the same view. But these decisions cannot help the petitioner. They were all cases of total lack of jurisdiction and as such the order passed would certainly be a nullity.

10. The argument of the learned counsel that the Jalgaon Court had become functus office as soon as the "petition was dismissed and no further orders could legally have been passed cannot be accepted. In the same order dismissing the petition the Court has held that the respondent was entitled to a declaration that a customary divorce had been effected and directed the decree to be drawn up in respect of the declaration provided necessary court-fee for the declaration was paid. Accordingly court-fee was paid and the amended decree was passed dismissing the petition for. divorce and passing a declaratory decree. It may be that after the petition was converted into a regular suit fresh summons would be necessary and the procedure adopted may not be in accordance with law but still the order is not void strict sensu and, therefore, cannot be considered as non est.

11. Therefore, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction; for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. Since, jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision however wrong, cannot be disturbed. The view that jurisdiction is

entirely independent of the manner of its exercise, and involves the power to decide either way upon the facts presented to the Court, is manifestly well founded on principle and has been well recognised. It is therefore, not open to the petitioner to contend that the decree in this case is a nullity

12. The only question that remains is whether the learned Magistrate was right in cancelling the order of maintenance with retrospective effect or whether it could take effect only from the date of the order of the Sub-Divisional Magistrate. The declaratory decree was obtained by the respondent only on 4-4-63 and on 30-9-63 he applied u/s 489 (2) Cr P. C.. and the learned Magistrate passed the order on 30-12-63. Section 489 (2) enjoin that where after an order for maintenance passed in favour of the wife u/s 488 the husband obtains a decree neccs- sitating the cancellation of the order the Court shall cancel or vary the order. The legislature u/s 488 (2) has Riven power to the Magistrate to date back the order of maintenance in the first instance to the date of the application, hut does not give any such power u/s 489 (2) Cri. P. C. We cannot read a power into the Code which is not there. Support for this view may be had in the decision of the Calcutta High Court in Amroon v. Sassoon, AIR 1949 Cal 584. In the case in Satteyya v. Malsoor, AIR 1954 Hyd 53 also it was held that the order of cancellation of maintenance always operates prospectively and not retrospectively. I regret, I am unable to subscribe to the view taken in the decision in 1962 (1) Cr. L. J. 681 (All) which has been followed by the learned Magistrate. So the order of cancellation will take effect only with effect from 30-12-1963.

13. I cannot interfere with the quantum of maintenance awarded to the child which has been fixed by the learned Magistrate on the available materials. If proper date was not furnished by the petitioner it is her own fault.

The revision petition is dismissed.