

(1913) 08 MAD CK 0009
In the Madras High Court

T. Ruthna Gramany and Another

APPELLANT

Vs

N. Veerabudra Aiyar and Others

RESPONDENT

Date of Decision : 04-08-1913

Acts Referred:

Citation : (1913) 25 MLJ 281

Hon'ble Judges : Oldfield, J;Arnold White, J

Bench : Full Bench

Judgement

Arnold White, J.—In this case an appeal from a decree of a Judge sitting on the original side of this Court was preferred 10 days after the

prescribed period of limitation. An explanation was called for, and an affidavit was filed explaining the cause of delay. The case was then posted

before the admission Court "" for orders."" In the Admission Court the learned Judge ordered that notice should go to the respondents to show

cause why the delay should not be excused. The appellants' Vakil served the respondents with a formal notice of this order. The respondents

other than the fifth appeared before another Judge, sitting in the "" Admission Court"" and shewed cause why the delay should not be excused. The

judge excused the delay and admitted the appeal.

2. When the appeal was called on for hearing before an appellate Bench, Mr. V.V. Srinivasa Aiyangar on behalf of the 5th Respondent took the

preliminary objection that the appeal was out of time. He contended that it was open to him to take this objection notwithstanding the adjudication

in the matter by the judge of the "" Admission Court."" His points were, first, that the order of the Judge directing notice to show cause before a

Single Judge, and the order of the judge excusing the delay after cause had been

shewn, were made without Jurisdiction; and, secondly, that the procedure in connection with the service of the notice was not in accordance with the Rules and that on that ground the final order was bad.

3. First as regards the question of Jurisdiction: It was contended that the dercee, against which the party desired to appeal, being that of a Judge sitting on the Original Side of this Court, the matter was governed by "the Rules of the High Court in its Original Jurisdiction and on appeal therefrom" and that the "Rules of the High Court in its appellate Jurisdiction" had no application. (The Rules may conveniently be referred to as the Original Side Rules and the Appellate Side Rules). The procedure in connection with obtaining an extension of time for an appeal from the original side might no doubt be regulated by rules framed under the powers under which the Original Side Rules are made. But I am not dealing now with the question of procedure but with the question of Jurisdiction. The Appellate Side Rules are made in pursuance of the powers conferred by, inter alia, Sections 13 and 14 of the High Courts Act (24 and 25 Vic. Ch. 104). Rule 1 provides for the exercise of the jurisdiction vested in the Court, and It says in so many words that an application for the admission of an appeal presented after the expiry of the period allowed by the law of limitation should ordinarily be heard and determined by one judge. It seems to me that on an application of this nature the Judge is not asked as an appellate tribunal, to deal with an order which has been made by another tribunal. He is asked to exercise the power given him by Section 5 of the Limitation Act and to say that an appeal may be admitted after the period of limitation prescribed there for. This is a power which Rule (1) of the Appellate Side says may be exercised by one judge. Whether the power is invoked with reference to an appeal from a decree of a judge sitting on the Original Side of this Court or from a decree of a Mofussil Court, so far as any question of jurisdiction is concerned seems to me to be wholly immaterial. A judge who makes an order for the admission of an appeal after the period of limitation prescribed, is not adjudicating on the appeal.

See the judgment of Edge C. J. in *Husaini Begum v. The Collector of Mazzafarnagar* ILR (1889) A. 176. He is exercising a power given to the Court by the Limitation Act in pursuance of a rule validly made, that the power may be exercised by a single judge. It scarcely seems necessary to

consider, so far as the question of jurisdiction is concerned, whether, when a judge exercises this power in connection with an application to extend

the time for appeal from a decree on the original side, he is exercising original or appellate jurisdiction. I am of opinion that the objection that the

orders were made without jurisdiction fails. "

4. Then as to the suggested irregularity of procedure in connection with the notice: As I have said, the Rules of the Original Side would be

applicable if there were any rules on the point. The question is, are there ? The judge directed notice to go and a formal notice was served on the

respondents by the appellants' vakil. It was contended that this notice was bad, since the requirements of Rule 355 read with Rule 155 of the

Original Side Rules had not been complied with. There are no express words in Rule 355 limiting its operation as in Rule 354, to applications made

after the admission of an appeal and the words in Rule 355 "" any matter relating to the appeal"" are no doubt very wide. Nevertheless it seems to

me that Rule 355 applies to applications made after an appeal has been admitted. In other words, when a question of admitting an appeal after the

period of limitation has expired comes before the court, there is no ""appeal"" within the meaning of that rule. There is only a request by the appellant

that the bar to his exercising his right of appeal should be removed. I do not find any provision in the Original Side Rules regulating the procedure

when the Court is asked to exercise the powers confined by Section 5 of the Limitation Act. As it seems to me, the learned judge directed the

notice to go not in pursuance of any express rule of procedure, but in accordance with the general principle that an order should not be made

affecting a man's right (in this case the right to say the appeal was time-barred) without his being heard. In the absence of express rules as to the

procedure in original side appeals, the practice would seem to be to post the original side appeals which are out of time "" for orders"" in the same

way as mofussil appeals are posted under Rule 37 of the Appellate Side Rules.

5. We are not now considering whether a more convenient practice would not be to require a party who desires to get the benefit of the Section of

the Limitation Act to apply by notice of motion on his own initiative the appeal being dismissed automatically if he does not apply. We are

considering whether the order of the learned judge admitting the appeal is bad.

6. On behalf of the Respondents Mr. V.V. Srinivasa Aiyangar contended, in the alternative, that if the Appellate Side Rules applied those rules had not been complied with, and that consequently the order was bad. He referred to Rule 76, but it is clear to my mind that this rule only applies after the admission of an appeal.

7. Assuming there was jurisdiction to make the order complained of, as I think there clearly was, even if there had been irregularity in procedure

the irregularity was waived so far as the Respondents other than the fifth are concerned. They received the notice, they appeared by their Vakils in

pursuance of the notice, and their Vakils showed cause against the order being made. They cannot now be heard to say the notice was irregular.

Mr. V.V. Srinivasa Aiyangar who represented the 5th Respondent admitted that his client was served with the notice and he admitted that he knew

his client had been served. He did not appear because he considered the notice irregular and because he was of opinion that any order which might

be made would be made subject to objection at the hearing. He does not come before us by way of appeal from the order of the learned judge. (I

express no opinion as to whether there is any right of appeal) and he does not come before us on notice of motion under Rule 354 of the Original

Civil Rules. I do not think it is necessary to consider whether in the events which have happened Mr. V.V. Srinivasa Aiyangar on his own

admissions can claim the right to be heard at this stage on the question whether the appeal should be admitted. Assuming he can I think his

objection fails and I would overrule it on the ground that the question which he asks us to deal with has already been adjudicated on by a

competent tribunal.

Oldfield, J.

8. I deal first with the question whether the learned judge's order admitting the appeal in spite of its presentation out of time was passed with

jurisdiction, and I adopt the statement of the facts contained in the judgment of the learned Chief Justice. The point in issue is of some substance,

because a decision against the respondents will entail that they were entitled to have this part of the case dealt with finally by one judge only, sitting

in the admission court, not by two sitting as a Bench for final disposal.

9. It seemed to me at first doubtful, whether the powers of one judge under

Appellate side Rules No. 1 were not limited to the admission of appeals, which were out of time in cases, in which no issue of process to the Respondent or witnesses was required since those rules made no provision for such issue and it is doubtful whether the CPC authorises at the stage in question. But the rules are made under Sections 13 and 14 High Courts Act which do not refer to the Code, and Clause 37 of the Letters Patent which directs only that in the making of Rules it is to be the guide "" as far as possible."" It is therefore possible to hold that the grant of substantive power to a single judge by the Rules to admit appeals implies the grant of all subsidiary powers necessary to their effective exercise, and the procedure of the learned judge, who ordered process to the Respondents and witnesses in this case, was therefore not open to objection. I accordingly agree with the learned Chief Justice that the learned judge's order was passed with jurisdiction in so far as it was against Respondents Nos. 1 to 4 who were parties to his proceedings and therefore must be held to have waived his objection to them based in the absence of valid notice, which I next consider.

10. As stated in the judgment of the learned Chief Justice, the learned judge ordered notice to the Respondents, and it was given by the pleader for the Appellants to the 5th respondent and the other over his own signature. The fifth Respondent disregarded it, abstaining from taking any part in the proceedings on the ground that he had no notice of them from any authority competent to give it. It is also objected to the notice that it specified no date for the hearing and contained nothing, by which the proceedings could have been identified on the notice boards. It is true that it did neither. But the absence of any signature by a competent authority and of the seal of the Court afford in my opinion sufficient ground for the decision of the case. It is not necessary to go through the various provisions of the Rules and Code, which have been cited, or to decide by which this case is covered, because none provides for the bringing of a party before the Court at the beginning of proceedings or for his being informed of such beginning otherwise than by a communication, bearing the signature of the Court or its officer and the Court's seal. The notice issued to the fifth respondent did not fulfil these requirements and was therefore useless. It is not material that it was stated to be issued under the orders of a

learned judge, when its authority was not vouched in the method, which the law explicitly directs. Nor can it improve the appellants' position that

their pleader, as he explained himself issued the notice, because being ignorant of any precedent, he doubted whether the Registrar would sign one;

he failed to comply with the law at his risk, and should in case of doubt or the Registrar's refusal have applied to the learned judge for, explicit

instructions. The notice, given by no competent authority, could impose no obligation on the 5th Respondent and the adjudication made in his

absence and when he was under no duty to be present, was in my opinion a nullity as against him.

11. It is urged that the 5th Respondent has been dilatory in advancing his objections to the learned Judge's order and Bishendut Tewari v. Nandan

Pershad Duba (1907) 12 C.W.N. 25, has been cited to show that if he was not bound by it originally, his acquiescence in it and failure to take

steps to have it set aside have made it binding on him. His pleader has no doubt admitted that the notice above referred to was served and that the

proceedings were within his personal knowledge. But there is nothing before us to show that the 5th Respondent knew of their result, until he

received notice of the admission of the appeal and date of hearing. The case cited decided, in my opinion, only that, when the delay to be excused

was short and due to bona fide mistake, the respondents' failure to take action, prolonged for the inordinate period of two years could be taken

into account in deciding whether that delay should be excused. So far in the present case the question whether there was sufficient cause for the

delay has not been argued on its merits. But it can at once be said that there is no question of a similar "delay on the 5th respondent's part in taking

action. For the hearing of the appeal, for which he reserved his objections, was likely to take and has taken place within a much shorter time, seven

months, of which two were vacation, and it is doubtful whether an application for review of the order admitting the appeal (the expedient

apparently indicated in the authority under discussion would have been heard sooner, if one had been made. But whether or not, the scope of that

authority must be limited in the manner suggested the proposal to consider the 5th respondent's delay (if any) as barring his present objection,

would be unacceptable. An adjudication, originally a nullity against a person only nominally a party to it, cannot be validated against him by his

mere inaction, unaccompanied by positive conduct which amounts to an estoppel. *Baswantappa v. Ranu* (1884) ILR 89. And no such conduct is

in question here. This principle cannot be affected by the special character of the adjudication as one excusing delay in the presentation of the

appeal and not confirming or dissenting from any conclusion of the Court of first instance. For its possession of that character cannot affect the

necessity (which is in fact conceded) for a valid notice to the 5th Respondent, or the reasons, for which the notice given has been held invalid. If, as

I hold the learned Judge's order was void against the 5th Respondent he was under no obligation to displace it and cannot be prejudiced by not

having done so.

12. I request that for these reasons I am constrained to differ from the learned Chief Justice and to hold that the 5th Respondent is entitled to re-

open and to contest on the merits the question whether the appeal is in time as against him.

Arnold White, J.

13. The result is that under Article 36 of the Letters Patent the opinion of the Chief Justice prevails.

[Then their Lordships heard the case on the merits and delivered the following judgment].

Arnold White, J.

14. On behalf of the appellants it has been contended that the burden of proof was on the defendants and that the learned judge was wrong in

dismissing the suit without calling upon them.

15. Two points have been taken on behalf of the Respondents. (1) That the appellants having accepted the issues in the form in which they were

framed, which shewed the burden of proof to lie on them were not entitled to set up the case in the Appellate Court that the burden was on the

Respondents; and (2) that the burden of proof was on the appellants and they had failed to discharge it.

16. There seem to be some conflict of authority as to the question on whom does the burden of proof lie when sons impeach an alienation of family

property made by their father on the ground that it is not binding on them. The case of *Subramania v. Sadasiva* ILR (1884) M. 75 to which Mr.

Subramania Aiyar on behalf of the appellants has called our attention no doubt

supports the view for which he contended. But this case would seem to have been questioned at least on one occasion (our attention was called to an Allahabad case), and it is not easy to reconcile it with the later decisions. We have also been referred to the Full Bench decision in Venkatramanayya Pantulu v. Venkatramana Das Pantulu ILR (1905) M.

200. The only point which was considered by the Court in that case was where a debt is incurred at the time of sale or mortgage is it an antecedent debt within the meaning of the words "antecedent debt" as used in the judgment of the Privy Council in Suraj Bansi Koer v. Sheo Pershad Singh I.L.R. (1878) C. 148. No question of onus of proof arose in that case, and no such question was considered.

17. Then we have the case of Malayandi Gounder v. Subbaraya Vanavaraya Gounder (1911) M.W.N. 50. It is there observed that the trend of authority in this Presidency was in accordance with the view of the authority of the Full Bench in Chandra Deo Singh v. Mata Prasad ILR (1909)

A. 176. The view to which apparently we were referring is the view indicated by Mr. Justice Banerjee and is to be found in p. 215 of the report.

There he says "where a son comes into Court to assail a mortgage made by his father or a decree passed against his father upon the mortgage or a sale threatened in execution of such decree, the onus is on the son to establish that the debt which he desires to be exempted from paying was of such a character that he would not be under a pious obligation to discharge it." The recent decision of the Privy Council, so far as one can judge from the short report in Sri Narain v. Lala Raghubans Rai (1912) 25 M.L.J. 27 would seem to be in support of the contention which has been put forward by the respondents in this case. There Lord Macnaghten said, "In this case their Lordships entirely agree with the High Court that the Appellants have failed to prove their case. "In that case the appellants were the sons. The case which they set up was that the alienations on which the respondents relied did not bind the family property. If as would seem to be the case, so far as we can judge from the report, the Privy Council there were of opinion that the onus in that case was on the sons who were defendants, it would seem that a fortiori the onus would be on them when, as here, they are plaintiffs. I do not want to lay too much stress on this judgment of the Privy Council, which is very short, because we have

not had the opportunity of looking into the proceedings in the Courts below, and without doing that, we might possibly be under some misapprehension as to the effect of the judgment.

18. The proposition put forward on behalf of the appellants was that, where an antecedent debt is established, the onus was on the son who

impeaches the alienation to show that the debt was tainted by immorality and that, in all other cases the onus was on the parties who relied on the

alienation. I do not think it necessary for us to consider this question further, because I think we ought to dismiss this appeal on the first ground

taken by Mr. Parthasarathi Aiyangar. It is perfectly clear from the form of the issues in this case that the plaintiffs accepted the onus. The second

issue is "" Were the mortgage of items 1 to 10 and the sales of items 2, 3, 7, 8 and 9 not binding on the Plaintiffs""? If there were any doubt about

that it would be set at rest by the terms of the second ground of appeal. It is stated thus: ""The learned judge ought to have held that the plaintiffs

have discharged the onus which lay upon them of proving that the debts in question were contracted by their father for illegal and immoral

purposes."" I do not desire to say anything which is not necessary for the purposes of this case. In this case it seems to me that the plaintiffs are not

entitled having accepted the onus and having a finding against them to turn round in a Court of appeal and, in the teeth of their own grounds of

appeal, say that the onus is on the other side and that they have not discharged it. If such latitude is allowed to litigants it seems to me all sorts of

inconvenient results might ensure.

19. With regard to the 6th defendant all I need say is that on the evidence it seems to be reasonably clear that the suggested immorality is not of a

nature which would affect the title of the 6th defendant.

20. One other point was taken. That was that the learned Judge ought to have dismissed the suit as he did, but that he should have insisted upon

the defendants going into the box. I cannot possibly accept that contention. If the plaintiff sets up a case and fails to prove his case when he calls

his witnesses, it is of course open to the Judge to say, "" There is no case for the defendants to answer. I dismiss the plaintiff's suit."" I think we

ought to dismiss this appeal.

21. The appellants will pay three sets of costs to the Respondents in proportion

to their respective interests.

Oldfield, J.

22. I agree.