

(1966) 04 KL CK 0007

In the High Court Of Kerala

Case No : Second Appeal No. 621 of 1962

Thirumangalath Nelliottan Ammu and Others

APPELLANT

Vs

Thirumangalath Nelliottan Govindan Nair and Another

RESPONDENT

Date of Decision : 04-04-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, Order 47 Rule 4(2), 100(1)

Citation : AIR 1966 Ker 294

Hon'ble Judges : T.C. Raghavan, J

Bench : Single Bench

Advocate : V.R. Krishna Iyer and K. Raghavan Nair, for the Appellant; A. Achuthan Nambiar, for the Respondent

Final Decision : Dismissed

Judgement

T.C. Raghavan, J.—An interesting and fairly important question has been raised by Mr. A Achuthan Nambiar, the counsel of the second respondent, as a preliminary objection. A few facts may be stated to appreciate the question.

2. The second appeal came up for admission before Velu Pillai, J. along with a petition for injunction. My learned brother dismissed the second appeal in limine on 27th June 1962 observing that there was no ground for admitting; and he also dismissed the injunction petition. On 29th June a verified petition, C. M. P. No. 4588 of 1962, was filed u/s 151 of the CPC praying that the second appeal might be treated as not requiring admission or that the earlier order might be reviewed under the inherent powers of the High Court. On 2nd July Velu Pillai, J. passed an order on the docket of the injunction petition (C. M. P. No. 4397 of 1962) that since he formed an opinion about the case and some of the averments therein, he did not wish to hear the petition; and directed the petition to be posted on 3rd July before another Judge. However, I find another order by Velu Pillai, J. dated 10th July on the same petition of the effect that since passing the above order, Shri V. R. Krishna Iyer, the counsel of the appellants, represented to the learned Judge that there was a prayer for review also in C. M.

P. No. 4588 of 1962. Consequently, the learned Judge directed the petition to be posted before him when he next sat single. The petition, I mean C. M. P. No. 4588 of 1962, came before Velu Pillai, J. on 17th July; and my learned brother passed the following order :

"I am satisfied that neither of the prayers in this petition can be granted. Treated as a review petition I see no adequate ground for review; the dismissal of the appeal is well within Order 41, Rule 11, C. P. C. This petition is dismissed."

3. Thus ended the second stage; and the third stage commenced when the appellants filed C. M. P. No. 6953 of 1962 and R. P. No. 30 of 1962 on 5th October 1962. The miscellaneous petition was for leave to appeal to a Division Bench against the dismissal of the second appeal; and the review petition was also for reviewing the order dismissing the second appeal in limine. Velu Pillai, J. dismissed the miscellaneous petition, but allowed the review petition on 9th November 1962 observing that when the second appeal came up for admission, the learned Judge thought that there was no ground to admit; that the appellants' counsel moved C. M. P. No. 4588 of 1962 on the ground that the material findings of the Courts below being not concurrent the second appeal need not be posted for admission; that the learned Judge felt that under Order 41, Rule 11 of the CPC the second appeal could be dismissed; and that on considering the matter afresh, the learned Judge felt that the original order dismissing the second appeal in limine was not correct, for there were points on which the findings of the Courts below were not concurrent and a question of law also arose. The learned Judge observed further that no notice was necessary on the review petition, as the matter was "at a very preliminary stage". In the result, Velu Pillai, J. allowed the review petition without notice to the respondents and admitted the second appeal.

4. These facts were not known either to the counsel of the second respondent or to me until the second appeal was heard almost in full, when these facts came out accidentally. The counsel of the second respondent then raised the preliminary objection that the review petition should not have been allowed without notice to the second respondent.

5. The counsel draws my attention to Order 47, Rule 4 (2) (a). The said sub-rule provides that when the Court is of opinion that the application for review should be granted it shall grant the same provided that no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for. From this it is clear that notice to the opposite party is mandatory before a review application is granted. It is also clear that in this case no notice was issued to the respondents, because Velu Pillai, J. thought that no notice was necessary as the matter was "at a very preliminary stage".

6. The counsel then cites some decisions on the question. The first ruling is Abdul Hakim Chowdhury Vs. Hem Chandra Das, , where a Division Bench of the

Calcutta High Court held that under Order 47, Rule 4 the granting of an ex parte application for review was a nullity, as it was prejudicial to the respondent; and that previous notice was necessary. But, it appears that in the Calcutta High Court there were other decisions taking a different view, namely, that where an appeal was summarily dismissed by the High Court and such order was ultimately set aside on review on an ex parte application without notice to the respondent, the order in review was valid even in the absence of such notice (vide *Janaki Nath Hore v. Prabhasini Dasi*, ILR 43 Cal 178: (AIR 1916 Cal 741) and some of the decisions discussed therein). Another Division Bench held in that case that the expression "opposite party" in Order 47, Rule 4 would not apply to a person interested to appear in support of the order of summary dismissal when the only order sought to be substituted therefore was that the appeal be heard in his presence.

In other words, according to this ruling "opposite party" will only be the party who gets notice in the appeal after it is admitted. But, it is interesting that even in this decision an observation of Lord Macnaghten in *Muhammed Zahimddin v. Nuruddin*, (1904) 14 M LJ 7 to the effect that as a general rule no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed, was noted. The Division Bench, after referring to this observation, proceeded to interpret the expression "opposite party" and then came to the conclusion stated above.

7. The next decision cited is the Division Bench ruling of the Madras High Court in *Narayana Chettiar v. P. C. Muthu Chettiar*, ILR 50 Mad 67: (AIR 1926 Mad 980). In this case an application for execution of a decree was dismissed due to the absence of the decree-holder's pleader; and on the same day the application was restored on the application of the pleader without notice to the judgment-debtors, A petition for amendment of the execution application was filed later; and the judgment-debtors, when they came to know of the restoration of the execution application, objected that the order of restoration without notice to them was illegal and it should be set aside. The Madras High Court said that the ex parte order restoring the execution application should not be considered as a valid order; that the said ex parte order should not in its nature be considered a final order; and that the opposite party on coming to know of it could object to it on any ground open to him if he had notice of the application for restoration.

The Madras High Court considered both the decisions of the Calcutta High Court hereinbefore referred to and also referred to the decision of the Privy Council in *Krishnasami Panikondar v. Ramasami Chettiar*, ILR 41 Mad 412: (AIR 1917 PC 179) where Sankaran Nayar, J. excused delay in filing an appeal without notice to the other side, a Division Bench later on dismissed the appeal on the ground that the appeal was barred and the order of Sankaran Nayar, J. without notice to the other side was without jurisdiction and the Privy Council approved the Division Bench. I may add that the Madras High Court followed the decision of the Calcutta High Court in : *Abdul Hakim Chowdhury Vs. Hem Chandra Das*, and

refused to follow the ruling in ILR 43 Cal 178: (AIR 1916 Cal 741).

8. Two other decisions have also been cited before me; and they are of the Patna High Court. The first is Suraj Pal Pandey, v. Uttim Pandey, AIR 1922 Pat 281 and the second is Mathura Singh v. Sm. Sudama Debt, AIR 1954 Pat 170. In the first of these cases Dawson Miller, C. J., who spoke for the Court, observed that an appeal rejected for non-payment of deficient Court-fee might be reviewed at the instance of the appellant; but, though the respondent did not receive any notice of the appeal dismissed before admission, he was entitled to notice of the application for review. The learned Chief Justice also observed that the expression "opposite party" in Order 47, Rule 4 (2) (a) meant the party interested to support the decree or order sought to be set aside or modified in the application for review. In that case the order in review without notice was passed by the District Judge; and objection to that order was taken at the second appellate stage before the High Court. The High Court held that the respondent, if he knew about the order only at the second appellate stage, could object to it even at that stage. In the second ruling of the Patna High Court, which is also a Division Bench ruling, the same opinion was reiterated.

9. The decisions referred to above are clear that a review under Order 47, Rule 4 can not be allowed without notice to the opposite party. The provision is mandatory; and the non-compliance with it will invalidate the review order. The reasoning of the Calcutta High Court in Abdul Hakim Chowdhury's case, : Abdul Hakim Chowdhury Vs. Hem Chandra Das, that the expression "opposite party" will apply only to a party receiving notice after the appeal is admitted does not appear to be correct. That expression can reasonably mean only a party who is interested in supporting the order which is sought to be reviewed, in other words, which was reviewed. Therefore, I am of opinion that the order of Velu Pillai, J. reviewing the order dismissing the second appeal in limine without notice to the respondents on the ground that the matter was "at a very preliminary stage" is not right.

10. The further question is whether that order can be ignored by the second respondent. On that aspect my opinion is, in accordance with the views of the Madras and the Patna High Courts, that the second respondent is entitled to raise his objections to the order in review when he comes to know of it. In this case, as already stated, the existence of the several petitions and the orders thereon came to light only accidentally during the arguments in the second appeal; and the second respondent is entitled to question the order.

11. In the review order Velu Pillai, J. says that "there are points on which the findings are not concurrent and a question of law also arises". With due respect to my learned brother, I am not able to see any question of law, the two questions decided by the lower Courts being whether the deceased Gopalan Nair alias Appu Nair was mentally infirm on the date of the lease and whether the lease was against the interest of the tarwad. On both the questions the lower Courts recorded concurrent findings. They are in the nature of findings on facts;

and there is no question of law arising in the case.

12. The further question is whether there is any conflict in finding on a fact material to the right decision of the case. The case may be brought, if at all, u/s 100(1)(d) of our Code of Civil Procedure, which provides that a second appeal shall lie on the ground that the finding of the lower appellate Court on any question of fact material to the right decision of the case on merits is in conflict with the finding of the Court of first instance on such question. The conflicts, if they are conflicts, in the findings of the lower appellate Court can be summarised in the passage extracted below from the judgment of the lower appellate Court. The lower appellate Court says:

"It is thus seen that the lease deed makes a false recital about the lessee's improvements, the value of the house and the prior oral lease. But none of them by itself or cumulatively is sufficient to make the lease void."

This passage is tell-tale that the findings on the three points are not material for the right decision of the case on merits, because the Subordinate Judge himself says that none of these findings by itself or cumulatively is sufficient to hold that the lease was void.

13. If the trial Court decides a question on one ground and the lower appellate Court decides the same question in the same way on another ground, can it be said that there is a variance in the findings which will entitle admission of a second appeal u/s 100(1)(d) ? Can it also be said that if the trial Court comes to a decision on one question in a particular way on three or four grounds and the lower appellate Court comes to the same conclusion on two grounds alone but disagrees with the trial Court on the other grounds, the variance in those two grounds is sufficient to admit the second appeal? In my opinion, the answer is in the negative. However, since the second appeal has been argued even on merits, I do not propose to decide the case on the preliminary objection alone.

His Lordship then considered the case on merits and dismissed the second appeal.