
(1954) 02 KL CK 0008

In the High Court Of Kerala

Case No : Second Appeal No. 292 of 1124

Umayamma Marthandaveera Lekshmi

APPELLANT

Vs

Muthukaruppa Pillai Siva Pillai and Others

RESPONDENT

Date of Decision : 16-02-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 11(2), Order 20 Rule 12(1), Order 20 Rule 5, Order 41 Rule 33, 107
Limitation Act, 1963 — Article 175, 182
Travancore Debt Relief Act, 1115 — Section 11, 14, 15, 17, 8
Travancore Limitation Act, 1908 — Article 166

Citation : (1954) 02 KL CK 0008

Hon'ble Judges : Koshi, C.J;Subramonia Iyer, J;Joseph, J

Bench : Full Bench

Advocate : V.V. Subramonia Iyer and T.N. Subramonia Iyer, for the Appellant; M. Madhavan Nair, for the Respondent

Judgement

Joseph, J.—The decree-holder in O.S. 1185/03 on the file of the District Munsiff's Court of Nagercoil has preferred this Second Appeal. The sole question for decision relates to the interpretation of the words "the date of the decree" in Section 11, Travancore Debt Relief Act (2 of 1116). The facts relevant for the purpose of this second appeal may be briefly stated as follows:

2. The District Munsiff's Court of Nagercoil passed a decree on 27-4-1110/12-12-34 allowing the decree-holder to recover from the Defendant 107 Kottahs, 3 marakkals and 6 padies of paddy or its value in money. On appeal to the District Court the decree of the trial court was modified, allowing recovery of a higher amount viz., 4911 fanams. The decree of the District Court was passed on 19-11-1111/2-7-36. The Defendant's second appeal against the decree was dismissed by the High Court of Travancore on 9-7-1115/21-2-40. The judgment-debtor applied under Sections 8, 9 and 15 of Act 2 of 1116 for fixing the amount of the debt and allowing payment of the same in instalments.

The amount had to be fixed according to the provisions of Section 11 of the Act

which is extracted below:

In determining the amount of a decree debt for purposes of payment under Sections 8 and 9, notwithstanding anything contained in Section 31 of the Code of Civil Procedure, 1100, or any other law, contract, decree, or order of Court to the contrary, not more than one-half of the principal in the case of money debts and not more than the principal in the case of paddy debts shall be deemed payable towards interest up to the date of the decree and not more than a like amount towards interest from the date of the decree.

The decree-holder contended that the date of the decree contemplated in Section 11 was to be taken as the date on which the trial court passed the decree, while according to the judgment-debtor it was the date of the decree passed in second appeal. The courts below upheld the contention of the judgment-debtor. The decree-holder has therefore preferred this second appeal. In view of the absence of any decision of this Court on this question and as it was likely to arise in other cases, the second appeal was referred to a Full Bench for decision.

3. The question for decision is whether the words "the date of the decree" in Section 11 means the date of the trial court's decree or of the decree passed by the appellate or second appellate court. In respect of decree debts to which the Debt Relief Act applies Section 11 effected a change in the pre-existing law which was contained in Section 31, Travancore Code of Civil Procedure.

Section 31 was in these terms:

(1) In suits for money, no Court shall, in respect of the period antecedent to the institution of the suit, allow in its decree a higher rate of interest than twelve per cent, per annum and the amount adjudged as interest for such period shall not exceed one-half of the principal amount sued for.

(2) Notwithstanding anything contained in Regulation I of 1010, where the decree is for payment of money, the Court may, in addition to the interest awarded under Sub-section (1), decree payment of interest on the principal sum adjudged of such amount as may accrue at a rate not exceeding twelve per cent. from the date of suit to the date of decree.

(3) Notwithstanding anything contained in Regulation IV of 1010, where the decree is for payment of money, the Court may, in addition to the interest decreed under Sub-sections (1) and (2), decree future interest at a rate not higher than nine per cent on the aggregate sum adjudged from the date of decree to the date of payment or to such earlier date as the Court thinks fit, provided, however, that the amount of interest accruing from the date of the decree shall not exceed the aggregate sum adjudged.

(4) Where such a decree is silent with respect to the payment of future interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie.

Section 11 ought to be construed so as to apply to all debts covered by decrees, whether passed by a Court of first instance or the Court of appeal. A suit may be decreed by the trial Court and the decree may be confirmed by the appellate Courts or it may be dismissed by the trial Court and the first appellate Court and decreed for the first time by High Court in second appeal. The amount decreed by the trial Court may in certain cases be modified by the appellate Courts. The construction of the words "the date of the decree" must be such as would apply to all such cases.

4. A proper interpretation of these words has to depend on what the decree in a suit is. It may now be taken as settled law that the "lis" continues until it is decided by the Court of appeal, in cases in which the decree is appealed against. In England, an appeal is considered to be a rehearing of the suit. In - "Quilter v. Mapleson" (1882) 9 QBD 672 (A), the Court of Appeal held that a tenant was entitled as against his landlord to the benefits of a statute which was enacted after the latter obtained a decree for possession but before the appeal was decided, as the appeal was a re-hearing of the suit.

This came up for consideration in - AIR 1941 16 (Federal Court) Sulaiman, J. observed:

In - "Quilter v. Mapleson (A)", a new Act had come into force, Section 14 of which made the section applicable to old leases as well, and which clearly deprived the land-lord of a right to claim forfeiture. In that case, the landlord had not till then re-entered. The Court of Appeal applied the new Act on the ground that appeals had the character of re-hearing and the appellate Court could make such order as ought to be made according to the state of things at that time.

In - AIR 1941 5 (Federal Court) Varadachariar, J. held:

The contention that the power of a Court of appeal is so limited was distinctly negatived in - "Attorney-General v. Birmingham etc. Drainage Board" 1912 ACC 788 (D) and - "Quilter v. Mapleson (A)", which was referred to in the judgment in - AIR 1939 1 (Federal Court) . As stated in - "Shyamakant's case (E)", there is no reason to suppose that the powers of this Court when acting as a Court of appeal are less extensive than those of the High Courts when hearing an appeal and it has been a principle of legislation in British India at least from 1861 that Court of appeal shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the CPC on Courts of original jurisdiction. (See Act No. 23 of 1861, Section 37; Act No. 10 of 1877, Section 582; Act No. 14 of 1882, Section 582; Act No. 5 of 1908, Section 107 (2)).

The very words of Order Rule 5 of the Rules of the Supreme Court, on which Bowen, L.J. laid stress in - "Quilter v. Mapleson (A)" at p. 678 and Lord Corell in - "Attorney- General v. Birmingham etc., Drainage Board (D)" at p. 801, namely that the Court of appeal has power to make such further or other order as the case may require, have been reproduced in Order 41, Rule 33. Code of Civil

Procedure, 1908; and even before the enactment of that Code, the position was explained by Bhashyam Iyengar, J., in - "Kristnama Chariar v. Mangammal" 26 Mad 91 (FB) (F) in language which makes it clear that the hearing of an appeal is under the processual law of this country in the nature of a re-hearing.

The Indian Codes have from 1859 conferred upon a Court of appeal the power given by Order 58, Rule 4, R.S.C., to allow further evidence to be adduced; and though the English rule does not in terms impose the same limitations on this power as the Indian Codes do, these limitations are implied in the reference to "Special grounds" in the English rule and have in effect been insisted on even in England as a matter of practice. See - Nash v. Rochford R.D.C." (1917) 1 KB 384 (G).

In view of these provisions, it seems to me to make no difference that it is not explicitly stated in the Indian statutes (as in Order 58, R.S.C.) that an appeal is by way of re-hearing. It is also on the theory of an appeal being in the nature of a re-hearing that the Courts in this country have in numerous cases recognised that in moulding the relief to be granted in a case on appeal, the Court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against. I may also refer to - "Kanakaiyya v. Janardhana Padhai" 36 Mad 439 (H), where the law on the point is fully discussed.

The decision of Bashyam Iyengar J. in - "26 Mad 91 (F)" was in these terms:

When an appeal is preferred from a decree of a Court of first instance, the suit is continued in the Court of appeal and re-heard either in whole or in part, according as the whole suit is litigated again in the Court of appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of first instance. The mere fact that a matter is litigated both in the Court of first instance and again though only in part, in the Court of appeal cannot convert or split the suit into two and there can be only one final decree in the suit viz. the decree of the Court of appeal.

Sundara Iyer J., cited this decision with approval in - "Vuppuluri Atchayya v. Seetharamachandra Rao" 24 Mad L J 112 (I) and observed:

It is quite clear that the CPC has accepted and carried out the well established principle that an appeal is the continuation of the proceedings in the original Court, that these proceedings are removed to the court of appeal and that the proceedings in the appellate Court are in the nature of a re-hearing.

In dealing with this question, Sadasiva Iyer J., held in - C.V. Venugopal Mudali Vs. C. Venkatasubbiah Chetty and Others,

I think that except to the extent to which the statute law treats the judgment of the first court as existing for certain purposes, the appellate Court's judgment, on general principles of jurisprudence supersedes the judgment of the first Court,

even when the appellate judgment is a judgment confirming the lower Court's decision.

The High Court of Travancore accepted this view in - "Pyli Varkki v. Damodaran Namboori" 23 KER LJ 734 (K); - "Kesavan Namboori v. Avira Mathar 24 KER L J 320 (FB) (L); - "Mathen Kora v. Sankaran Namboori" 25 KER L J 1 (FB) (M); - "Joseph Katanar Abraham Kaseesa v. Uzhithiraru Uzhithiraru" 27 KER L J 1170 (N) and - "Ouseph Ouseph v. Venkataraman Empran" 57 KER L R 88 (FB) (O). This principle has been so well established that it is unnecessary to cite the innumerable decisions of other High Courts on the point.

Even though the provision relating to appeals in the Indian CPC does not contain the expression "re-hearing", an appeal is only a continuation of the proceedings in the original Court and the decree in the suit is the one passed in appeal. As such "the date of the decree" in Section 11 can refer only to the date of the decree passed in Second Appeal.

5. It may be useful to refer to similar provisions in the CPC and the Indian Limitation Act. The words "the date of the decree" are used in Order 20, Rule 12(1)(c)(iii) regarding the award of mesne profits. This runs as follows:

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree-

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an enquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until.

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from "the date of the decree", whichever event first occurs.

The words "three years from the date of the decree" have been interpreted to mean three years from the date of the appellate decree. The following passage from Mulla's commentary on the Code of Civil Procedure (12th Edn. p. 735) may with advantage be extracted:

Three years from the date of the decree."- "Decree" means a decree capable of execution. Thus, if an appeal is preferred from a decree for mesne profits and the decree is confirmed in appeal, the period of three years is to be computed from the date of the appellate decree. Similarly, if a decree for mesne profits is taken to the Privy Council and is confirmed, the period of three years is to be counted

from the date of the King's Order in Council.

This passage is based on the decisions in - Radha Nath v. Chandicharan" 30 Cal 660 (FB) (P) and - "Bhupindar v. Bijai Bahadur" 23 All 152 (Q). Again there is the provision in Order 20, Rule 11(2) which enabled a judgment-debtor to apply for payment of the amount decreed in instalments. Article 175, Limitation Act prescribes a period of 6 months from the date of the decree for making such an application. The word decree to this Article includes the appellate decree also. In such a case, time will run from the date of the appellate decree whether it merely confirms the original Court's decree or modifies or reverses it, as held in - C.V. Venugopal Mudali Vs. C. Venkatasubbiah Chetty and Others, " and - "Abdul Karim v. Maung San Kyan" AIR 1932 Ran 54 (R).

6. Our attention was drawn to a decision of the Travancore High Court in - "Valia, Potti Rama Raja v. Parvathi Amma Kalyani Amma" 1943 KER L R 244 (S). In that case it was held that the reference to "the date of the decree" in Section 11 was to the date of the trial Court's decree and not to the appellate decree. The learned Judges relied on the fact that in defining the starting point of limitation for execution of decree a distinction was drawn between the date of the decree of the trial court and the date of the final decree of the appellate court. This is not a distinction between two classes of decrees.

Two starting points of limitation for execution of decrees are given in the Limitation Act because in cases in which there has been an appeal, the only decree is the one passed by the Appellate Court. It was therefore necessary to make it clear that in a case in which the appellate Court had passed a decree the period of limitation would commence only from the date of the appellate decree, that being the only decree in the case.

The legislature in order to remove all doubts and with abundant caution has specifically made provision in some cases for the contingency of an appeal, namely that the decree passed in the appeal was to be the starting point in those cases. This is not a sufficient reason for not construing the word "decree" in accordance with recognised principles of jurisprudence. Two earlier decisions of the Travancore High Court viz., - "Ittan Varkey v. Kuruvilla Verghese" 18 KER L J 68 (T) and "Kunju Meethian Kunju v. Krishnan Gopalan" 22 KER L J 1166 (U) were also relied on in that case.

These decisions were based on the construction of the words "the date of the decree" in Act 1 of 1010 (Travancore) which was a "Regulation for extending the powers vested in the "Munsiffs" and for defining their jurisdiction". Relying mainly on Section 17 of Act 1 of 1010 relating to the period for which and the extent to which interest was to be allowed by "Munsiffs", it was held that the decree that was to be taken into account in computing interest was the decree of the munsiff. These decisions do not refer to the aspect we have discussed above and are not helpful in deciding the question raised in this case.

We are unable to follow the view laid down in "1948 Trav L R 244 (S)". We hold

that the expression "the date of the decree" in Section 11. Travancore Debt Relief Act means "the date of the decree" passed in appeal or Second Appeal as the case may be and not the date of the trial Court's decree, where there has been an appeal or second appeal against the same.

In the result, we confirm the order of the Court below and dismiss the Second Appeal with costs.

Subramonia Iyer J.

7. I agree that the second appeal fails and should be dismissed with costs.

8. The solitary question that arises in this case is as regards the true interpretation of the expression "the decree" in Section 11, Travancore Debt Relief Act, 2 of 1116, which enacts:

In determining the amount of a decree debt for purposes of payment under Sections 8 and 9, notwithstanding anything contained in Section 31 of the Code of Civil Procedure, 1100, or any other law, contract, decree or order of Court to the contrary, not more than one-half of the principal in the case of money debts and not more than the principal in the case of paddy debts shall be deemed payable towards interest up to the date of the decree and not more than a like amount towards interest from the date of the decree.

Section 31 of the Travancore CPC is as follows:

(1) In suits for money, no Court shall, in respect of the period antecedent to the institution of the suit, allow in its decree a higher rate of interest than twelve per cent. per annum and the amount adjudged as interest for such period shall not exceed one-half of the principal amount sued for.

(2) Notwithstanding anything contained in Act I of 1010 where the decree is for the payment of money, the Court may, in addition to the interest awarded u/s (1), decree payment of interest on the principal sum adjudged of such amount as may accrue at a rate not exceeding twelve per cent. from the date of suit to the date of decree.

(3) Notwithstanding anything contained in Act IV of 1010 where the decree is for the payment of money, the Court may, in addition to the interest decreed under Sub-sections 1 and 2, decree future interest at a rate not higher than nine per cent, on the aggregate sum adjudged from the date of decree to the date of payment or to such earlier date as the Court thinks fit, provided however that the amount of interest accruing from the date of the decree shall not exceed the aggregate sum adjudged.

(4) Where such a decree is silent with respect to the payment of future interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie.

Section 11 of the Debt Relief Act imposes a quantitative restriction for purposes of payment under Sections 8 and 9 of the Act on the liability for interest determined by Court in the decree. This is the limited operation of that section. If the judgment-debtor does not propose to pay under the provisions of the Debt Relief Act the liability under the decree would remain intact and will be enforceable in the manner permitted by law. The expression "the decree" in the Debt Relief Act should therefore have the same meaning as it has under the CPC and the particular aspect that is pertinent is its enforceability, i.e., executability.

In a case where there is a decree passed by the Court of first instance alone which has not been subjected to an appeal no question can arise. There would be scope for one only in a case where there has been an appeal and the question will then be whether the decree contemplated in the section is that of the trial or of the appellate court.

The question might be raised also when besides a first, there has been a second appeal, and the possible plurality of questions which could be posed in this instance would itself afford a solution to the problem because then there are three courts and three decrees and the question must be framed as regards each of them whether the decree u/s 11 is that of the first or that of the appellate court or of the High Court in second appeal, though the question as raised in this case relates only to the decrees of the first and last and not of the intermediate court as well.

The decree on whose enforcement a restriction is imposed by Section 11 must obviously be the effective or executable decree. When there has been a decree in appeal, that decree and if there has been a decree in second appeal then the decree in second appeal is "the decree" that is executable. This is a proposition which cannot be and has not been questioned. In my view, it is clear that "the decree" in Section 11, Travancore Debt Relief Act for the purpose of this case is that of the High Court in second appeal.

9. Learned Counsel for the Appellant relied upon the 1st and 2nd clauses of the 3rd column to Article 166, Travancore Limitation Act corresponding to Article 182 of the Indian Act which read:

1. The date of the decree or order, or
2. (Where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal.

These do not render any assistance to him. The application of the first clause is confined to a case where there has been but one decree i.e. of the court of first instance. The 2nd clause refers to a case where the decree of the court of first instance has been subjected to an appeal and provides that whether there has been a decree in appeal or only an order of the appellate court terminating the appeal or even if there has been merely a withdrawal of the appeal the starting point of limitation for execution would be the date of the decree or the order or

of the withdrawal as the case may be.

A case where there has been a decree in appeal is one which need not have been separately provided and the 1st clause may be taken to be sufficient to comprise it because "the decree" for execution when there has been an appellate decree is that decree and the period of limitation for execution starts from its date but the 2nd and 3rd classes of cases provided for in the 2nd clause are not ones where there is a decree of the appellate Court. The final order terminating the appeal need not be executable.

For instance, when an appeal abates there will be no decree of the appellate court but only the order of abatement, which will be an order within the meaning of the second clause - AIR 1933 68 (Privy Council) . The period of limitation for execution of the decree of the court below will start from the date of the said order of the appellate court though the decree to be executed is not of that court. Even so in the case of withdrawal of the appeal.

It is because legislature wanted to make special provision for starting points of limitation in cases where there has been an appeal but no appellate decree in the manner seen enacted in the 2nd clause, that that clause was made and in making it it was but appropriate to add the date of the appellate decree in cases where there has been one, in that clause to make it exhaustive of cases where there has been an appeal.

10. The debate at the Bar having revolved around the nature of the appellate jurisdiction it is as well to advert to the main points that were discussed. It was urged that the appellate court is a different court and that the decree in Section 11 refers to the first determination of the rights parties.

"It is quite clear that the CPC has accepted and carried out the well established principle that an appeal is the continuation of the proceedings in the original court, that those proceedings are removed to the court of appeal and that the proceedings in the appellate court are in the nature of a re-hearing. The theory of an appeal is that the suit is continued in the court of appeal and re-heard there. It is a hearing of the same subject before Anr. tribunal, and is only a stage in the suit; it is not a fresh suit, and the decree passed by the appellate court is a decree in the suit." (Nandlal, the Law of Civil Appeals in British India, pp. 2-3).

This is the view expressed by the Federal Court in - AIR 1939 74 (Federal Court) " and - AIR 1941 16 (Federal Court) "

11. Under the old practice the Court of Chancery, i.e. the Judges of the Court of Chancery, the Lord Chancellor, the Master of the Rolls, and the Vice-Chancellor, could re-hear not only their own decrees but the decrees of their predecessors, i.e. those whom they succeeded. "In re St. Nazairl Co." (1879) 12 Ch D 88 at p. 97 (W). That practice was stooped by and did not continue alter the Judicature Act (1373) which did not like the Indian CPC provide for a review by the court making the decision but enacted by Order 58, Rule 1 (R.S.C.) that the matter

could be re-heard in the Court of Appeal on motion.

"If by mistake or otherwise an order has been drawn up which does not express the intention of the Court the Court must always have jurisdiction to correct it." (Per Lord Halsbury in - "Prestel Banking Co. v. William Alisup and Sons." (1894) 1 Chn 141 at 143 (X) (See Order 28, Rule 11, Rules of Supreme Court (England)).

Such jurisdiction is recognised by Section 152 of the Indian Code of Civil Procedure. Though the technical provisions contained in Order 58, Rule 1, Rules of the Supreme Court (England) do not obtain in the Indian Code of Civil Procedure, Section 107 enacts:

(1) Subject to such conditions and limitations as may be prescribed an Appellate Court shall have power-

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(e) to take additional evidence or to require such evidence to be taken;

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

Under this section a court of appeal has jurisdiction to function not merely as a court of error to see whether the decision of the lower court was right having regard to the time when and the material whereon, it was rendered, but is entitled to take note of any supervening fact or law and adjudge the rights of parties accordingly. "Venkateswara Kamathi Balakrishna Kamathi v. Anantha Pai" AIR 1954 KER 209 (FB) (Y) p. 211, para. 3. AIR 1941 16 (Federal Court)

This was the position even before the enactment of the Rule 33 in Order 41 in the Code, Act V of 1908, which provides that

the appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents or parties, though such Respondents or parties may not have filed any appeal or objection.

Provided that the Appellate Court shall not make any order u/s 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

The contention urged on behalf of the Appellant has, therefore, to be repelled.

Koshi C.J.

12. In this Second Appeal I have had the opportunity of reading the judgments which are about to be delivered by my learned brOrs. and I concur both in their reasoning and their conclusions. In these circumstances I do not think it necessary to deliver a separate judgment of my own.