
(1994) 08 KL CK 0019
In the High Court Of Kerala
Case No : C.R.P. No. 215 of 1953

Varki Thomas

APPELLANT

Vs

Forward Bank Ltd.

RESPONDENT

Date of Decision : 16-08-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 6, 104, 96
Cochin Civil Rules of Practice, 1935 — Rule 237
County Court Rules, 1875 — Order 8 Rule 7
Travancore Limitation Act, 1100 — Article 149

Citation : (1994) 08 KL CK 0019

Hon'ble Judges : K.T. Koshi, C.J;V.S. Subramanya Iyer, J;G. Kumara Pillai, J

Bench : Full Bench

Advocate : M. Ramanatha Pillai, for the Appellant; K.T. Ninan, for the Respondent

Final Decision : Dismissed

Judgement

1. This revision is directed against the concurrent orders of two Courts below, dismissing the Petitioner's application to set aside the "ex parte" decree against him, in O. S. 105 of 1124 on the file of the Meenachil District Munsiff's Court, as barred by time. The said decree was passed "ex parte" on 27-12-1948, but the application under Order 9, Rule 13, CPC to set aside the decree was made only on 30-6-50. The Petitioner alleged that he came to have knowledge of the passing of the decree just three days before the presentation of the application. The Courts below have concurrently found that the suit summons has personally been served on the applicant (the Defendant). The date of the knowledge of the passing of the decree had, therefore, no relevance for the disposal of the application. Where the summons is personally served on the Defendant column 3 of Article 149 of the Travancore Limitation Act (Act 6 of 1100) makes the date of the decree the "terminus a quo" for an application for an order to set aside the decree passed "ex parte". The petition has, therefore, rightly been dismissed by the Courts below.

2. When this revision came up for disposal before one of us, it was referred to a Pull Bench .for decision in view of a conflict of opinion regarding the true construction of Article 482 of the Civil Courts" Guide (Travancore). One of the grounds the Petitioner urged to re-open the suit was that in contravention of note (i) of the said Article the decree was passed before twenty clear days expired after the service of the summons. It is common ground that on 27-12-1948 when the decree was passed seventeen days alone had elapsed after the service of the summons on the Defendant, the revision Petitioner. It is not clear from the two orders before us whether the view that the Petitioner's application was barred by time was on the basis that the "terminus a quo" for it was the date of the decree or the date when the Petitioner got knowledge of the passing the decree. Be that as it may, both the lower Courts have expressed the view that the provision in note (i) of Article 482 of the Civil Courts" Guide is only directory and not mandatory. This is opposed to the view taken in - "Ahmed Ummal v. Abdul Khanni Lebba" AIR 1953 Trav-C 126 (A). This decision was, however, not followed by a Division Bench in - "C.M.A. No. 223 of 1953 (T. C.) (unreported) (B)". It is on account of this conflict that the revision was referred for decision by a Pull Bench.

3. The decision in - " AIR 1953 Trav-C 126 (A)" has reviewed practically all the decisions of the Travancore High Court bearing on the point and also referred to the Cochin decisions upon the analogous provision in R. 237 of the Cochin Civil Rules of Practice. The purport of the decision in-" AIR 1953 Trav-C 126 (A)" is that what the rule making authorities in the two States did In enacting these provisions was to prescribe in terms of days what would constitute "sufficient time" within the meaning of Order 9, Rule 6, CPC to enable a Defendant to appear and answer to the suit on the day fixed in the summons so that the Court may postpone the hearing of the suit to a future date and direct notice of "such posting to be given to the Defendant without waiting in every case to enquire and decide whether the Defendant had sufficient time to enter appearance after the summons was served on him. Note (iii) to Article 482 of the Civil Courts" Guide makes it amply clear that the purpose of the provision in note (i) is what has been explained in the above decision. Note (iii) states:

The Bench Clerk should note in the day"s cause list whether the time allowed in note (i)has elapsed so that the case may not be proceeded with in contravention thereof.

When the purpose of the rule is what it has been explained to be in - " 1952 Ker LT 665 AIR 1953 Trav-C 126 (A) : " we cannot agree with the view taken in the cases followed in - "; - "Lekshmi Amma v. Velayudhan" 25 Trav LJ 1217 (C) and - "Krishna Kurup Govinda Kurup v. Geevarghese Oommen Vydian" 29 Trav LJ 1201 (D) that when there is contravention of the rule, to have the decree set aside, the Defendant must satisfy that after the service of the summons on him there was not sufficient time to enable him to enter appearance in Court and make his answer to the suit. There is no independent discussion of the question

in the decision in - "C. M. A. 223 of 1953 (T. C.) (BV and that decision would seem to have misunderstood the - "1952 KLT" decision to have held that the decree passed in contravention of the Article would be invalid or void. All that the - "1952 KLT" decision says is that the contravention would in itself constitute "sufficient cause" for non-appearance when the suit was called on for hearing.

4. It has been brought to our notice that the two decisions of the Travancore High Court cited above were followed in a later case not referred, to in - "AIR 1953 Trav-C 126 (A)". That is a decision by a learned single Judge and is reported in - "Kolappan tohettiyav (sic) v. Muttayy(sic) Trav LJ 61 (E)". The two Cochin cases " 8 Cochin 317 (F) and - " 11 Cochin 23 (G)) referred to in - " AIR 1953 Trav-C 126 (A)" were followed in - " 27 Cochin 626 (H)" and there it has been explained that the ground of the decision in the two earlier case"s was that when there was a contravention of the rule the Defendant should be taken to have been prevented by sufficient cause from appearing when the suit was called on for hearing. Sahasranama Ayyar J. (as he 1 then was) who delivered the leading judgment in the case observed:

But then the substantial ground of the decision in - "8 Cochin" and - "9 Cochin" would appear to have been not so much that the service of the summons in those cases was not due service as that the Defendant should be taken to have been prevented by sufficient cause from appearing when the suit was called on for hearing. That, in our opinion, is a position which is unassailable, in view of Section 96 (c) (Order 9, Rule 6) which enacts that:

If it is proved that the summons was served on the Defendant but not in sufficient time to enable him to appear and answer on the day fixed in summons, the Court shall postpone the hearing of the suit to a future day, to be fixed by the Court, and shall direct notice of such day to be given to the Defendant.

It will be useful in this connection to turn to Section 104 (Order 9, Rule 13). There are two facts mentioned therein, the existence of either at which entitles the Defendant to have the ex parte decree passed against him, set aside. They are (1) that the summons was not duly served and (2) that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. Both these facts are put upon the same footing and the section enacts "that the Court shall pass an order to set aside the decree." The lower Court's view must, therefore, be upheld, viz., that the Petitioner is entitled to have the ex parte decree passed against him, set aside.

When the Code enjoins that when on the date fixed for the appearance of the Defendant if sufficient time had not elapsed after the summons was served on him, the Court "shall" postpone the date of the hearing and "shall" direct notice of such adjourned hearing to be given to the Defendant and the rule making authority has chosen to fix "sufficient time" in terms of days, in our view, non-compliance with the rule, without more, would entitle the Defendant to have the "ex parte" decree against him set aside.

Note (i) of Article 482 is as follows:

The date of first hearing shall be so fixed as to allow the Defendant Respondent or counter Petitioner in original suits, small causes, appeals and original petitions in the District Court, not less than 30 clear days from the date of service or summons or notice, and the Defendant or counter-Petitioner in the Munsiff's Court to original suits and original petitions, not less than 20 clear days and in small causes not less than 10 clear days from the-date of service of summons or notice.

The words of the note are peremptory and they give no discretion to the Court. "The rule is, that provisions with respect to time are always obligatory unless a power of extending the time is given to the Court....." per Grove, J "in - "Barger v. Palmer" (1881) 8 QBD 9 (I) It is instructive to quote here the relevant portion of the head note to that case.

By Order 8, Rule 7 of the County Court Rules, 1875, "the summons in an action brought to recover lands shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof". The Plaintiff in an action in the county court to recover lands delivered the summons to the bailiff thirty-nine clear days, and the bailiff served it upon the Defendant thirty- eight clear days, before the return day. At the hearing the county court judge ruled that the service was good, and tried the case, giving judgment for the Plaintiff:

Held: that the provision in Rule 7 with respect to the time of delivering the summons to the bailiff was obligatory and not merely directory, and therefore that the Judge ought not to have tried the case.

A passage from Black on judgments (Vol. I) may be quoted here with advantage. At page 120 (Second Edition) paragraph 85 on Premature. Entry of Default opens thus:

A judgment rendered by default before the expiration of the time allowed to him (Defendant) for filing a plea or answer, is irregular and voidable at his instance. He has the whole of the last day in which to plead, and cannot be said to be in default until that day has fully expired; and if the last day falls upon a Sunday or a holiday, he is entitled to the whole of the next succeeding day. But a judgment thus prematurely entered is not absolutely void; if the Defendant takes no steps to correct the error, | he is presumed to have waived it.

we are pronouncedly of the opinion that the decision in - ? AIR 1953 Trav. C 126 (A)" con- (sic)ues Article 482 of the Civil Courts" Guide correctly (sic) that the decision in - "C. M. A. 223 of 1953,(sic) (T.C)(B)" and the cases followed there do not (sic)e a true construction to the said Article.

5. Thie view, however, is of no avail to the petitioner as his application under Order 9, Rule13 CPC fails on the ground of limitation. The (sic)tioner's contention that an "ex parte" decree (sic)ssed in contravention of the Article 482

is absolute (sic)ty, is thoroughly unacceptable to us. It was (sic)irregular exercise of jurisdiction to have passed,(sic) decree in violation of the provisions of the (sic)cle, but all the same the Court had inherent (sic)diction to pass a decree in the suit. A decree (sic)ssed by a competent Court irregularly is only (sic)able liable to be made void when a person (sic)has a right to proceed in the matter takes(sic) proper steps to have invalidity declared. A (sic)tble decree carried with it the means of its (sic)overthrow, but unless and until it is duly (sic)ulled it would have all the force of a valid (sic)ee. The passage quoted above from Black on (sic)ments makes the point clear. The application to get the ex parte decree vacated not having been made within the time prescribed by Article 149 of the Limitation Act (Travancore) it was rightly dismissed by the Courts below and we affirm their decision.

6. The Revision is dismissed and the Petitioner will pay the counter-Petitioner-Bank their costs before this Court.