

Balakrishnan Vs. Kalliyani

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Court : Kerala

Decided On : Feb-01-1957

Reported in : AIR1957Ker51

Judge : Sankaran, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 9, Rule 13 - Order 32, Rule 15

Appeal No. : C.R.P. No. 1613 of 1954 (M)

Appellant : Balakrishnan

Respondent : Kalliyani

Advocate for Def. : K. Kuttikrishna Menon and; V. Balakrishna Eradi, Adv.

Advocate for Pet/Ap. : T.C. Raghavan, Adv.

Judgement :

ORDER

Sankaran, J.

1. This is a petition by the defendant in O. S. 73 of 1948 on the file of the Sub-Court at Palghat. That was a suit for money due under two promissory notes alleged to have been executed by the defendant in favour of the plaintiff. In the suit

the defendant was described as a lunatic and accordingly his younger brother Viswanathan was proposed to be appointed as his guardian. The plaint averment that the defendant was a lunatic was accepted by the trial Judge who thereupon passed an order appointing Viswanathan as the guardian of the defendant. Summons of the suit was issued to the guardian alone who after acceptance of the summons chose to remain ex parte.

He appears to have gone one step further and to have appeared as the plaintiff's first witness and to have proved the plaint promissory note. On the strength of such evidence the suit was decreed against the defendant on 7-10-1948. The defendant filed the present application I. A. 1540 / 51 on 19-10-1951 praying that - the ex parte'decree against him may be set aside under Order IX, Rule 13 of the Code of Civil Procedure and the suit restored to file for fresh disposal after hearing his contentions also. He questioned the validity of the proceedings under which his brother Viswanathan was appointed as guardian without any notice to him.

It was also alleged by him that he came to know of the suit and the decree against him only when notice of execution was taken to him and that the restoration application was filed soon after receipt of notice of execution. The trial Court repelled these contentions and held that Viswanathan's appointment as the defendant's guardian was legal and proper. It was also held that the restoration application was barred by limitation. The lower appellate Court also agreed with these findings of the trial Judge with the result that the Civil Miscellaneous Appeal against the trial Court's order dismissing the restoration application was also dismissed. The defendant has therefore filed this petition seeking a revision of the lower Court's order.

2. It is clear from the records in the case that no attempt was made to have the summons in the suit served on the defendant. The failure to do so is sought to be justified by the fact that the defendant was represented by a guardian appointed by the Court and that the summons to him was served on such guardian. If the appointment of the guardian was not made in strict compliance with the procedure prescribed by law, service of summons on the guardian cannot be deemed as service on the defendant.

Viswanathan, the brother of the defendant, was appointed as his guardian on the basis of the plaintiff's allegation that the defendant was a lunatic at the relevant period. Rule 15 of O. 32 of Civil P. C. prescribes the procedure to be followed in such a situation. The rule states that:

'The provisions contained in Rr. 1 to 14; so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.'

Rules 1 to 14 of Order 32 deal with suits by or against minors. The procedure to be followed in the matter of the appointment of a guardian for the minor defendant is that laid down in Rr. 3 and 4. Sub-rule 1 of Rule 3 states that:

'Where, the defendant is a minor, the Court on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor,'

Sub-rule 2 states:

'An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.'

Sub-rule 3 states that

'Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matter in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed'.

Sub-rule 4 states that

'No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf or, where there is no such guardian, of the minor, or where there is no father or other natural guardian, upon notice to the father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice

under this sub-rule."

The proviso to the sub-rule states that 'if the minor is under 15 years of age no such notice shall be issued to him.' procedure similar to those mentioned above has to be followed before appointing a guardian to a defendant who is, by reason of unsoundness . of mind or mental infirmity, incapable of protecting his interests in the suit. In the present case the plaintiff had filed an application supported by an affidavit praying that Viswanathan the younger brother of the defendant may be appointed as guardian on the ground that the defendant was of unsound mind.

The averments in the affidavit make it clear that the defendant had not been adjudged to be a person of unsound mind and that no guardian had been appointed for him by a competent Court. Thus the first condition contemplated by Rule 15 of Order 32 was not satisfied in the present case. Necessarily, therefore, the Court had to satisfy itself on a proper inquiry, that the defendant, by reason of unsoundness of mind Or mental infirmity, was incapable of protecting his interests in the suit, and then only the Court could exercise its jurisdiction to appoint a proper person as guardian of the defendant.

No such inquiry was conducted in this case and there is nothing on record to show that the Court was satisfied about the unsoundness of mind or mental infirmity of the defendant before it passed an order appointing Viswanathan as guardian for the defendant. The order passed on the plaintiff's application for appointing a guardian for the defendant simply states as follows: 'Brother Viswanathan willing. Appointed'. It Is obvious that the learned Subordinate Judge was of the view that the appointment of a guardian for the defendant was a mere formal matter.

In taking such a view he has failed to grasp the significance of the procedure laid down by R. 15 of O. 32 insisting on a finding to be recorded by the Court after proper inquiry that the defendant by reason of unsoundness of mind or mental infirmity was incapable, of protecting his own interests in the suit. The defendant's objection that no inquiry contemplated by R, 15 was conducted in the present case, is met by the learned Subordinate Judge by stating that

'When the Court appointed Viswathiathan as guardian on the allegation that the petitioner was of unsound mind, it must be deemed to have impliedly adjudicated upon his unsoundness.'

The learned Judge has failed to take note of the fact that the allegation that the defendant was a person of unsound mind remained merely as an allegation without any evidence to support it. Acting on such a mere allegation cannot amount to an adjudication, express or implied, on the question of the alleged unsoundness of mind of the defendant, it has also to be remembered that no notice of such an allegation was given even to the defendant. What the learned Subordinate Judge did was to accept the plaintiff's allegations as true and to proceed on the assumption that the defendant was a person of unsound mind. Such a procedure could hardly be accepted as compliance with the inquiry as contemplated by Rule 15 Of Order 32.

To treat a person as one incapable of protecting his own interests by reason of unsoundness of mind or mental infirmity, is a very serious matter and it is in recognition of the seriousness of the matter that the legislature has insisted on a proper inquiry being made into that matter to enable the Court to come to a conclusion about the mental condition of the person concerned. The inquiry contemplated by Rule 15 is undoubtedly a judicial inquiry with notice to the party concerned or to any other person competent to speak on behalf of such party. It is for the Court to decide upon the manner, in which and to the extent to which such inquiry has to be conducted to enable it to come to a satisfactory conclusion as to the mental condition of the party concerned.

If notice of such inquiry is given to the party, he may himself appear in Court and participate in the inquiry. If he appears or is brought before Court, his presence might enable the Court to form an impression about his mental condition. If it is deemed necessary he may be got examined by a medical expert and a certificate obtained from him as to whether he is mentally fit to protect his own interests. The necessity of conducting such an inquiry so that the Court may be fully satisfied that the defendant, by reason of unsoundness of mind or mental infirmity, is incapable protecting his interests in the suit, has been emphasised in *Mohammed Ibrahim v.*

Mohammed Marakayar, ILB 1949 Mad 343; (AIR 1949 Mad 292) (A) and in Balakrishnan v. Balachandran, 1956-1 Mad LJ 459 (B) where also the scope of Order 32, Rule 15 had come up for consideration.

So far as 'the present case is concerned, it is clear that the learned Subordinate Judge had not at all applied his judicial mind to the question of the alleged insanity of the defendant when such allegation was accepted and the order passed appointing Viswanathan as the guardian of the defendant, it appears that the learned Judge was oblivious of the provision contained in Order 32, Rule 15 requiring that the Court shall conduct an inquiry into the alleged mental infirmity of the defendant and to come to a definite conclusion that the allegation is well-founded, before proceeding to appoint a guardian for the defendant.

The Court having failed to exercise a Jurisdiction vested in it by law, the order appointing Viswanathan as guardian for the defendant cannot be taken to be a legal and proper order. Such an order could not bind the defendant nor could it confer any authority on Viswanathan to represent the defendant. ' The result is that there was no service of summons on the defendant or on anybody else competent to represent him. The defendant was thus prevented by sufficient cause from appearing in Court when the suit came on for hearing and he is therefore entitled to have the ex parte decree set aside and the suit restored to file so as to enable him to raise his defence to the suit. -

3. On the question of limitation also the lower Court have fallen into a serious error because of the failure to direct attention to the true facts as disclosed by the records. Both the lower Courts held that the defendant's restoration application is out of time, the period being calculated from the date of the ex parte decree. In making such a calculation the lower Courts have assumed that the defendant had not stated the date on which he came to know of the decree.

The restoration application filed on 19-10-1951 was followed up by another application, I.A. 308/ 52 dated 8-2-1952 and both these applications were supported by separate affidavits. In the first affidavit by the defendant it was stated that he came to know of the decree only when the execution notice was served on him. In the second affidavit this date was specified as 25-9-1951, The correctness

of this averment was not challenged by the plaintiff and hence the defendant's allegation that he came to know of the suit and the decree only on 25-9-1951 has to be accepted as true and correct. The restoration application was filed within 30 days of this date and hence it is within time;

4. In the result this revision petition is allowed and in reversal of the order of the lower Court the ex parte decree in the suit is set aside and the suit restored to file for fresh disposal after hearing the defendant's contentions also. Since it is the failure of the Court to comply with the provisions of Order 32, Rule 15 of the Code of Civil Procedure that has led to these proceedings I make no order for costs of this petition.

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