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Court : Chennai

Decided On : Apr-05-1929

Reported in : AIR1930Mad105

Appellant : Rasan Chettiar

Respondent : Rangayan Chettiar

Judgement :

Walsh, J.

1. The facts out of which this appeal arises are as follows: The plaintiff obtained a preliminary decree in a mortgage suit on 23rd March 1928. Three months' time was given for the payment of the mortgage debt. An application was put in by the plaintiff on 28th June 1928 and a final decree was passed. Notice of this application was not sent to defendant 2 in the suit. The appellant who is defendant 2 put in a petition on 19th October 1928 to have the ex parte final decree set aside and to stay execution of the proceedings on the ground of an adjustment made between himself and the plaintiff some time during April 1928,. The Court passed an order as follows:

I think therefore that the grounds for setting aside the final decree are not strong. But I think I may in the interest of justice give the petitioner a chance of proving the so called adjustment, if he shows his bona fides to satisfy the decree by paying half the decree amount in two weeks.

2. Defendant 2 not having paid the amount on the date fixed, his petition was dismissed. Against this order of dismissal, he has appealed.

3. The learned advocate for the appellant takes as his main ground that notice is required for the passing of the final decree and that if such a notice is not given, the application to set aside the final decree falls under Order 9, Rule 13, Civil P. C, and the Court has no option in such a case but to set aside the decree. He also urges that an adjustment out of Court can be pleaded against the passing of the final decree in a suit for sale. The rulings as to whether a notice is or is not necessary have been conflicting mainly due to a difference of opinion as to whether an application for a final decree is a proceeding in execution or not. Turning to the Code itself in Order 34, Rule 5 we find nothing which directs a notice to the other side on an application for final decree. The following cases have been relied on to show that notice is required: Bibi Tasliman v. Harihar Mahto [1905] 32 Cal. 253, Kanakasundaram Pillai v. Somasundaram Pillai : (1918)35MLJ375 , Rajendra Lal Sur v. Atal Bihari Sur [1917] 44 Cal. 454 Bachu Singh v. Bicharam Sahu [1909] 10 C.L.J. 91 and Maruthiswamiyar v. Subramania Ayyar : AIR1929 Mad393 . The other side quotes Krishna Ayyar v. Muthuswami Ayyar [1902] 25 Mad. 506, Pandu Prabhu v. Juje Lobo [1904] 27 Mad. 46 and Mahomed Taki Raza v. W.A. Thomas [1906] 4 C.L.J. 317, and Mahadeo Pandey v. Somnath Pandey : AIR1926 All757 . There is a similar conflict of decisions as to whether Order 9, Rule 13, applies to an application made to set aside a final decree in a suit of this sort. Turning to the authorities quoted for the appellant, it may be observed that Bibi Tasliman v. Harihar Mahto [1905] 32 Cal. 253 merely lays down:

that a Court has inherent power to deal with the application to set aside the order made ex parte and can set it aside upon a proper case being substantiated.

4. This ruling as pointed out in Mahomed Taki Raza v. W.A. Thomas [1906] 4 C.L.J. 317 does not support the contention that a notice is required. In Kanakasundaram Pillai v. Somasundaram Pillai : (1918)35MLJ375 , it was held that O.9, Rule 13 applied and that it made no difference that the rule talks of a summons and not of a notice. Rule 32 of the Civil Rules of Practice says that

notice of an interlocutory application shall be given to the other parties to the suit or matter or their pleader not less than three days before the date appointed for the hearing of the application. But it cannot be maintained that the non-observance of the Civil Rules of Practice is an illegality unless such a rule can be found in the Code. The learned Judges in Kanaka sundaram Pillai v. Somasundaram : (1918)35MLJ375 no doubt remarked:

the Code provides certain procedure to be followed in the proceedings for a final decree; an application has to be made by the preliminary decree-holder and notice has to be given to the judgment-debtor to show cause why such a decree should not be passed.

5. But the learned Counsel for the appellant has not been able to show us anything in the Code which requires such a notice. In Maruthi Swamiyar v. Subramania Ayyar : AIR1929 Mad393 the learned Judges following the decision in Bibi Tasliman v. Harihar Mahto [1905] 32 Cal. 253 and Kanakasundaram Pillai v. Somasundaram Pillai : (1918)35MLJ375 state: 'we think that notice has to be given.' As pointed out Bibi Tasliman v. Harihar Mahto [1905] 32 Cal. 253 is not an authority for that contention. As regards Rajendra Lal Sur v. Atel Bihari Sur [1917] 44 Cal. 454 all it decided was that the Court could interfere. Emphasis is laid upon an observation in that case quoted from Ajant Singh v. Sundarmall [1913] 17 C.W.N. 862:

It is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard.

6. This clearly cannot be taken to mean that such an order is inherently illegal from the start and that all that a party wishing to set aside such an order has to show is that he had no notice. For instance, in the case of a temporary injunction passed in cases of emergency without hearing the parties under Order 39, Rule 3 such an order is certainly one which can be made and it is not sufficient for the party wishing to set it aside merely to show that it was made ex parte and without notice. Bachu Singh v. Bicharam Sahu, [1909] 10 C.L.J. 91 only lays down that a notice should ordinarily issue and the most recent decision of the Madras High Court Sri

Maruthi Swamiar v. Subramania Ayyar : AIR1929 Mad393 does not state more, than that a notice should go. While therefore it may be true that a notice should issue on an application for final decree I cannot find any authority which goes the length of holding that the failure to issue such a notice is an illegality which ipso facto renders the decree void and by itself necessitates the setting aside of the decree. In this connexion I may notice an argument attempted for the respondent that the Court put the appellant upon terms and that as the terms were not complied with the petition had to be dismissed but it appears from a reading of the order that what the Court put the appellants on terms about was not the setting aside of the decree but the hearing of his petition at all.

7. Finally it is argued that even if it may be held that the suit is not pending after the preliminary decree in such a sense as to make Order 23, Rule 3 applicable, yet Section 141, Civil P, C, has to be applied, and the procedure to be followed should be the same as in suits wherein notice is necessary. Section 141 merely lays down that:

the procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction.

8. Here we have got the procedure actually laid down which applies to this particular matter under Order 34, Rule 5. and it makes no mention of notice. Under the circumstances it cannot be held that Section 141, Civil P.C. makes want of notice an illegality. It is doubtful if it applies to a matter were a clear procedure is laid down.

9. The second question which arises is whether an adjustment made out of Court between the dates of the preliminary decree and the final decree can be pleaded against the passing of the final decree. Under the old Code a payment could be made either into Court or to the mortgagee under Sections 88 and 89, T.P. Act, but the new Code has deliberately done away with that option of making payment to the mortgagee out of Court. The provisions of Order 34, Rule 3, show that the money must be paid into Court. The only case which the learned advocate for the appellant has been able to quote suggesting that adjustment out of Court can be pleaded is Jogendra Prasad Narain Singh v. Gouri Shankar Prasad Sahu [1905]

32 Cal. 253. The facts of that case are not fully set out in that judgment nor the actual arrangement made and it is not certain from the language whether the agreement between the parties was before or after the preliminary decree. It states that the appellants put in a petition to the effect that the decree had been satisfied in part by an arrangement out of Court this arrangement being that the value of an elephant taken by the decree-holders from the judgment-debtors before the making of the decree absolute should be credited to the accounts to be taken on the mortgage. It is just possible to read this sentence to mean that the agreement was made before the preliminary decree with a stipulation that it should not be recognized till the account was taken. In any case it is difficult to understand without further details what happened in that case. There appears to have been a preliminary decree for the taking of accounts but what exactly happened then is not clear. The learned Judges then go on to state:

it is true that under Order 34 Rule 5 it is contemplated that all payments made upon a preliminary decree should be paid into Court. There is nothing in the rule to justify the view that Order 23, Rule 3 does not apply to adjustments of account made between the date of the preliminary decree and the date on which the accounts between the parties are finally settled.

10. An entirely contrary view is taken in Linga Raja v. Pethu Raja [1918] 42 Mad. 61 which follows Piran Bibi v. Jitendra Mohan [1917] 25 C.L.J. 553. The learned Judges make a cautious reference to Jogendra Prasad Narain Sing v. Gouri Shankar Prasad Sahu [1917] 2 Pat. L.J. 533 as follows:

it may be that if between the passing of the preliminary decree and the passing of a final decree for sale the defendant obtains a certificate under the provisions of Order 21 Rule 2, he can take advantage of that to reduce the amount for which the property is to be sold.

11. But they do not state that he can obtain a certificate under Order 21, Rule 2 or how he is to do it. The general trend of the decisions under the present Code is that an application for final decree is not a proceeding in execution and therefore Order 21, Rule 2 will not apply at all. It is unnecessary to discuss whether if in an execution proceeding the judgment-debtor had by some means obtained a

certificate between the date of the preliminary decree and the final decree he could claim a deduction on the amount of the final decree. In Banarsi Das v. Nattu Mal [1913] 12 P.R. 1913, the Punjab Chief Court lays down that the Court has no option under Order 34 Rule 5, except to pass a final decree for sale of the property if the money has not been paid into Court. In Rama Goundan v. Vellappa Goundan : AIR1926 Mad1069 , the Court held that even where money has been deposited under Order 9, Rule 13 and the ex parte decree set aside this was not to be regarded as money paid into Court under the preliminary decree, that the decree-holder was guilty of no fraud in not bringing it to the notice of the Court and that the Court was bound on his application to pass a final decree for the full amount.

12. One other argument may be noticed, that Order 23, Rule 3, applies and the Court is bound to recognise such adjustment out of Court. But Order 23 Rule 3, relates to the satisfaction of a suit, not to the satisfaction of a decree, and to hold that parties can adjust a preliminary decree between themselves out of Court and get such adjustment enforced under Order 23, R.3 would render the whole scheme of Order 34 Rule 3 nugatory. As stated above this procedure of paying into Court the amount due under the preliminary decree in a mortgage suit for sale was a deliberate restriction of the previous privilege of paying the mortgagee out of Court under the Transfer of Property Act. The orders under the code must be construed reasonably with reference to each other. I hold that Order 2, Rule 3 is not applicable.

13. In the result it appears to me that mere want of notice does not per se render the decree liable to be set aside. Even assuming that it does, as the adjustment sought to be pleaded is not one which the Court can recognise even if we were to hold that the Court should have passed an order setting aside the ex parte decree the result would be exactly the same, namely, that we would have to dismiss the petition on the ground that the adjustment pleaded was not one which the Court can recognise even if true. The decree would then have to be restored. In these circumstances, the appellant would gain nothing by a decision in his favour as regards the necessity for setting aside the decree and the relief granted would be nothing but a form of words. The ultimate result would be the dismissal of the

appellant's petition which is exactly the final order appealed against.

14. In the result therefore the appeal fails and is dismissed with costs.

Wallace, J.

15. I agree generally.

16. With reference to the question whether notice must, as a matter of law, go before a final decree can be passed in a mortgage suit for sale, all that can be said in the present state of the law and the authorities is that, while such a notice is not prescribed by law, it is in practice advisable, and that, if it is not issued, it is open to the party aggrieved, if he can show that he has been aggrieved, to come up under Order 9, Rule 13 and have it set aside. This is the effect of the Full Bench decision in Bibi Tasliman v. Harihar Mahto [1905] 32 Cal. 253, and the ruling in Sri Maruthi Swamiar v. Subramania Ayyar : AIR1929 Mad393 , to which I was a party, does not go further than that. The appellant therefore has to show, in the words of the Bibi Tasliman's case [1905] 32 Cal. 253, that he has substantiated a proper case. This does not in my view mean merely that he substantiated a proper case by showing that he had no notice but he must also show that he has a prima facie case on the merits, which makes it worthwhile for the Court to spend further time on issuing a notice and hearing him. If he does so, then the Court will take it as a point of law that a notice ought to have been issued to him, the absence of which will bring Order 9, Rule 13 into operation.

17. That raises the second question whether it is worthwhile to interfere in this case. The only contention which the appellant wants to put before the lower Court is the plea of adjustment of the preliminary decree by payment out of Court between the dates of the preliminary and the final decree. I agree with my learned brother for the reasons given by him that such an adjustment cannot be pleaded when the Code distinctly lays down that payment must be into Court. I can see no reasons for allowing adjustment out of Court to be pleaded, a plea which, as often as not, is based on false or flimsy ground and yet requires considerable amount of enquiry before it can be finally settled. It was, I have no doubt, for the purpose of avoiding such enquiries, that the right of payment out of Court, permitted under

Section 89, Transfer of Property Act, was taken away. Order 23 Rule 3 cannot be read to override the clear terms of Order 34, Rules 3 and 4.

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