BOMBAY HIGH COURT

Sarupsing Mangatsing

Vs.

Nilkant Bhaskar

O.C.J. Appeal No. 80 of 1951

(Chagla, C.J. and Bhagwati, J.)

18.03.1952

JUDGMENT

Chagla, C.J.

1. This is an appeal from an order of Mr. Justice Tendolkar who refused to set aside an ex-parte decree passed against the defendant. The decree was passed in a running down action. The suit was filed on October 14, 1947, and the summons was served upon the defendant by substituted service on December 6, 1947. Messrs. Mulla and Mulla filed their appearance on behalf of the defendant, but no written statement was filed, and the suit appeared before the learned Judge for hearing on June 27, 1951, and as the defendant was absent, an ex-parte decree was passed. A motion was taken out by the defendant on July 26, 1951, to set aside this ex-parte decree, and as mentioned before the learned Judge dismissed the motion.

2. Now, dealing first with the narrow question as to whether there was any sufficient cause for the non-appearance of the defendant on June 27, 1951, we entirely agree with the view taken by the learned Judge below that there was not sufficient cause. Although Messrs. Mulla and Mulla were on the record, no written statement was filed and no proceedings were taken in the action by the defendant. Messrs. Mulla and Mulla were not even instructed to apply for an adjournment on June 27, 1951. The defendant has suggested that he was a displaced person, that he had to go from India to Pakistan from time to time in order to liquidate certain of his properties, and that thereafter he was in Nandurbar plying a motor lorry. But, as the learned Judge has pointed out, all this did not prevent him from keeping in touch with the suit of which he had notice and with regard to which he had actually instructed solicitors who were to act for him in that suit. The position might have been different if the defendant was unrepresented, but as he was represented, the failure on the part of the defendant to give proper instructions to his solicitors cannot possibly constitute a sufficient cause for his absence on June 27, 1951.

3. But a more important and more interesting question has been raised by Mr. Maneksha. In this case an Insurance Co. by the name of the Unique Motor and General Insurance Co. is concerned. The Motor Vehicles Act casts a liability upon an Insurance Co. which insures a motor vehicle and issues a certificate of insurance to the owner of the motor vehicle. The liability is cast under Section 96(1) of the Motor Vehicles Act and the liability is that the insurer shall pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. Now, before this liability can be imposed upon the Insurance Co., a condition precedent has got to be satisfied, and that condition precedent is referred to in sub-S.(2) of Section 96, and the condition precedent is :

> "No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings...."

This notice was served by the plaintiff upon the Insurance Co. on June 21, 1951. Mr. Maneksha's contention is that although the defendant might not have been able to show sufficient cause for his absence on June 27, 1951, there is sufficient cause as far as the Insurance Co. is concerned why it was not in a position to defend the action through the defendant on June 27, 1951. Mr. Maneksha says that the notice was served only on June 21, 1951, and the Insurance Co. had only six days' time to prepare for the defence, and according to Mr. Maneksha this was not reasonable notice given to the Insurance Co. and therefore the ex-parte decree should be set aside in order to give an opportunity to the Insurance Co. to defend the suit through the defendant.

4. Now, on this submission various interesting questions arise. The first is whether it is open to the Insurance Co., on a motion taken out by the defendant to set aside an ex-parte decree, to plead sufficient cause in itself why it did not defend the action through the defendant, or must the notice of motion be disposed of only on the plea of the defendant that he had sufficient cause for not appearing when the suit reached hearing. Ordinarily, under Order 9, Rule 13, it is the party who applies to set aside an ex-parte decree who has got to show sufficient cause for setting aside the ex-parte decree. But Mr. Maneksha is right that apart from Order 9, Rule 13, this Court has inherent jurisdiction to set aside an ex-parte decree. See - *'Bilasrai Laxminarayan v. Curson-das Damodardas[1]',* But even so the question arises whether in the exercise of its inherent jurisdiction the Court can consider a cause put forward by a person who is not a party to the suit. Now, Section 96 was recently enacted and it casts a sort of vicarious liability upon an Insurance Co., and although the statute makes it obligatory upon the plaintiff to serve a notice through the Court upon the Insurance Co., if he wants to hold the Insurance Co. liable as if it were a judgment-debtor under the decree which he might obtain, the statute does not confer any right upon the Insurance Co. to defend the action on the same points in issue which the defendant would be entitled to defend. The right of the Insurance Co. to defend is restricted to the various matters set

out in Section 96(2), and obviously the right of the Insurance Co. to be made a party to the suit is also restricted to those matters where it could put forward a defense. It is not disputed that the matters which were in issue in this suit did not entitle the Insurance Co. either to be made a party or to. defend the suit as provided by Section 96(2), and. the question that has to be considered is whether independently of Section 96(2) the Insurance Co. could have been made a party to the suit under Order 1, Rule 10, and could have defended the action. The jurisdiction of the Court

[1]44 Bom 82

to-add parties to the suit is restricted to Order 1, Rule 10, and a person can only be added a party in two cases: one is when he ought to have been joined as plaintiff or defendant and is not so-joined, and the other is when without his presence the questions in the suit cannot be completely decided. Now, it is clear that there was no obligation upon the plaintiff to join the Insurance Co. as a party defendant, there was no privity between the plaintiff and the Insurance Co., and the plaintiff was seeking no relief against the Insurance Co. Can it be said that the case of the Insurance Co. would fall in the second category, or, in other words, can it be said that although the Insurance Co. was not a necessary party it was a proper party. There again it is difficult to see how it could possibly be urged that the question in the suit could not be completely decided in the absence of the Insurance Co. No issue arose as between the plaintiff and the Insurance Co. As we said before, the plaintiff was not seeking any relief against the Insurance. Co. and the liability which the Insurance Co. would incur would not arise from any decree that the Court would pass but would arise by reason of the statute. The decree that the Court would pass would not be directed against the Insurance Co. at all; the decree would be against the defendant; and it was not by reason of any order of the Court that the defendant would become liable to satisfy the decree; his liability would arise by reason of the statute intervening and casting that liability upon him.

5. If, therefore, the Insurance Co. could not be made a party under Order 1, Rule 10, the question is whether it could agitate the question, in an application made by the defendant to set aside an ex-parte decree, whether the Insurance Co. had reasonable notice to defend the suit. We agree with Mr. Maneksha that it is indeed curious that although the Legislature has enjoined upon the plaintiff to serve a notice upon the Insurance Co. through the Court and although the Legislature has cast a liability upon the Insurance Co., the Legislature has not given any right to the Insurance Co. to defend the action in its own name. The object of giving the notice obviously is to enable the Insurance Co. to defend the action through the defendant, but no right has been given to the Insurance Co. to defend the action in all cases in its own right or in its own name. But even so we have to consider a case where sufficient or reasonable notice was not given to the Insurance Co. to defend the action. If such reasonable and adequate notice was not given and an ex-parte decree was passed against the defendant, could it be said that the Court would have no power to intervene and in the interest of justice set aside the ex-parte decree? There is a case very much in point reported in - *'Windsor v. Chalcraft[2]',* In that case a judgment was passed against the defendant in a running down action in default, and the Insurance Co. applied to set aside the judgment. The Master made an order in favor of the Insurance Co. The judge at chambers set

aside the order of the Master and the matter came before the Court of appeal, and the two learned Lord Justices Greer and Mackinnon, Lord Justice Slesser dissenting, took the view that the Insurance Co. was aggrieved by the judgment and so was entitled to an order setting aside the judgment and leave was given to the Insurance Co. to enter an appearance in the action in the name of the defendant and to deliver a defence. Now, it is true that the corresponding English rule of the Supreme Court, Order 27, Rule 15, is wider than Order 9, Rule 13, and it is also true that if our jurisdiction was confined to Order 9, Rule 13, this decision would not be of much assistance. But if we have inherent jurisdiction apart from our jurisdiction under Order 9, Rule 13, to set aside an ex-parte decree, the question is whether we should not set aside an ex-parte decree at the instance of an Insurance Co. which is affected by the judgment

[2](1939) 1 KB 279

in the sense that the statute casts a liability upon it in respect of that judgment to set aside the decree if we are of the opinion that the Insurance Co. had not reasonable notice to defend the action.

6. In our opinion, the only proper construction to give to Section 96 would be that when the Legislature required a notice to be served through Court, the notice must be of a reasonable duration, and if the ex-parte decree was passed against the defendant and if the Insurance Co. through the defendant satisfied the Court that the Insurance Co. did not have reasonable opportunity to defend the action, then the Court acting under its inherent jurisdiction would set aside the ex-parte decree, because although the defendant might have had sufficient cause to defend the action, if the defense was being conducted by the Insurance Co. and the defendant was only a nominal defendant, then it is not sufficient that the defendant should have had ample opportunity to defend the action, but the Insurance Co. should also be given ample opportunity to defend the action. In the view that we take of the law, if we are satisfied on the facts of this case that the Insurance Co. did not have a proper opportunity to defend the action, we would certainly have, under our inherent jurisdiction, set aside the decree, because the view we would then have taken would be that in the interest of justice the Insurance Co. should be given an opportunity to defend an action, the result of which would cast a liability upon it under the Motor Vehicles Act.

7. Now, turning to the facts of this case, it is not as if the Insurance Co. for the first time had notice of the suit filed by the plaintiff on June 21, 1951. It is true that the statutory notice was served for the first time on June 21, 1951, but as far back as October 2, 1947, the plaintiff's attorneys informed the Insurance Co. that a suit had been filed against the defendant. What is more, the Insurance Co. acted upon this notice and took the defendant in December 1947 to Messrs. Mulla and Mulla so that Messrs. Mulla and Mulla should appear for the defendant and defend the suit. But having done so, the Insurance Co. lost all interest in the litigation. It did nothing from December 1947 till June 21, 1951, and even on June 21, 1951, all that the Insurance Co. did was according to them to try to find out the whereabouts of the defendant. It is difficult for us to understand what was there to prevent the Insurance Co. from instructing Messrs. Mulla and Mulla on June 27, 1951, to apply for an adjournment of the suit. No attempt

was made by the Insurance Co. to avoid the possibility of an ex-parte decree being passed on June 27, 1951. The position would have been, entirely different if the Insurance Co. had come to know of the proceedings for the first time on June 21, 1951. Then there would have been considerable force in Mr. Maneksha's comment that the Court could hardly expect the Insurance Co. to defend the action within six days. But as we said before, they had knowledge in October 1947 and they had taken action in December 1947 to bring solicitors on record so-that the suit should be properly defended. But, the matter does not end there. The subsequent-conduct of the Insurance Co. wholly disentitles it to any relief at the hands of this Court. The plaintiff's attorneys on July 2, 1951, informed the Insurance Co. that a decree had been passed against the defendant and called upon the Insurance Co. to pay the amount due under the decree, and the reply sent by the Insurance Co. on July 16, 1951, is very significant. The Insurance Co. informs the plaintiff's attorneys that no certificate of Insurance was ever issued by the Co. in respect of the particular motor vehicle and under the circumstances the notice purported to have been taken out under Section 96 of the Motor Vehicles Act was bad and ineffective and whatever proceedings that transpired thereafter were equally bad and ineffective in so far as the Insurance Co. was concerned. They further intimate to the plaintiff's solicitors that the demand made against the Insurance Co. for the sum payable under the judgment was illegal and the plaintiff was not entitled to recover any amount from the Insurance Co. To this letter the plaintiff's attorneys replied on July 21, 1951,.and they pointed out that the plaintiff had taken search of the records of the R.T.O. and from the records he had satisfied himself: that an insurance certificate had been issued by the Insurance Co. in respect of the motor vehicle belonging to the defendant. It was only when the Insurance Co. discovered that its dishonest and false contention would not prevail and that it would have to pay the amount of the decree passed against the defendant, that on July 26, 1951, it got the defendant to take out a notice of motion for setting aside the ex-parte decree. We cannot but strongly condemn the conduct of the Insurance Co. in trying to evade its statutory liability by making a false statement to the plaintiff's attorneys. If the plaintiff had not been vigilant and if he had not taken inspection of the records of the R.T.O., very likely the dishonest attitude of the Insurance Co. would have succeeded and the plaintiff would have had to content himself with executing the decree against the defendant. It is on behalf of such a company that Mr. Maneksha has asked us to do justice and to give the Insurance Co. an opportunity of defending the action on its merits. It is said that when a party wants equity it must come to Court with clean hands. It is true that the relief that Mr. Maneksha is seeking is not an equitable relief,, but it is still an application to exercise our inherent jurisdiction, and we do not think that the Court should exercise its inherent jurisdiction in order to do justice when it finds that the party who applies for that relief has come to Court with unclean hands and after having taken up a thoroughly dishonest and false attitude.

8. The result, therefore, is that the appeal fails and must be dismissed with costs.
Appeal dismissed.