

In the High Court of Judicature at Madras

(reserved on 11.12.2014)

Dated: 13.01.2015

Coram:

The Honourable Mr. Justice R.SUBBIAH

Application No.7620 of 2014

in

C.S.No.121 of 2007

1.Mr.P.Kumaran

2.P.Chakravarthy

... applicants / plaintiffs

Vs.

1.Mr.V.Ramaswami

2.Mrs.Sarojini Ramaswami

3.R.Geetha

4.R.Bhamini

5.R.Bhamini

6.Dr.Uma Ramaswami

.... respondents / defendants

Prayer : This application has been filed under Order XIV Rule VIII of Original Side Rules and under Order 9 Rule 7 of CPC, praying to set aside the order dated 07.11.2014 passed by this Court in C.S.No.121 of 2007 dismissing the suit for default.

Appearance

Mr.V.Selvaraj – for applicants/plaintiffs

Mr.A.Thiagarajan, Senior Counsel for M/s.M.R.Uma Vijayan
for 1st respondent/D1

Mr.V.Raghavachari - for 2nd respondent/D2

Mr.H.Karthik Seshadri – for 3rd respondent/D3

ORDER

This application has been filed by the applicants under Order XIV Rule VIII of Original Side Rules and under Order 9 Rule 7 of CPC, praying to set aside the order dated 07.11.2014 passed by this Court in C.S.No.121 of 2007 dismissing the suit for default.

2.The applicants/plaintiffs have filed the suit for specific performance directing the respondents/defendants to execute the sale deed conveying the plaint schedule property to the applicants/plaintiffs by receiving the balance sale consideration. The prayers made in the plaint are as follows_

(a)to direct the defendants to execute the sale deed conveying the plaint schedule property to the plaintiffs by receiving the balance sale consideration of Rs.5,90,50,000/- (Rs.1,50,000/- per cent for 4.27 acres giving credit to Rs.50,00,000/- received as advance by the defendants) and in the event of the defendants failing to execute the sale deed, the sale deed may be executed by this Court or by any Officer nominated or appointed by this Court and in the event of the decree for specific performance not being granted, to direct the defendants to pay a sum of Rs.1,30,00,000/- (Rs.50,00,000/- paid as advance, Rs.10,00,000/- received by the 1st defendant on 01.01.2006, Rs.25,00,000/-

received by the 1st defendant 29.04.2006 and Rs.45,00,000/- representing the cost of filling up the property with gravel) with 18% interest from the date of suit till payment and to pay a further sum of Rs.1,00,00,000/- as damages for deceit and fraud.

(b)for cost of the suit.

3.The 1st respondent/D1 had filed an application in A.No.3212 of 2008 under Order 7 Rule 11 of CPC seeking to reject the plaint. The said application was dismissed by the learned Single Judge by order dated 08.08.2014. Aggrieved over the same, the 1st respondent/D1 has filed an appeal in O.S.A.No.213 of 2014. The said OSA was also dismissed by the Division Bench of this Court by order dated 27.08.2014. While dismissing the said OSA, the Division Bench of this Court has fixed a time frame for expediting the trial of the suit. The relevant portion in the order of the Division Bench is as follows_

“19.In the result, this Original Side Appeal is dismissed, confirming the order dated 08.08.2014 made in A.No.3212 of 2008 in C.S.No.121 of 2007. No costs. Consequently, the connected miscellaneous Petition is closed.

20.After dismissal of the appeal, the learned Senior Counsel appearing for the

appellant and the respective learned counsel appearing for the respondents prayed for expeditious disposal of the suit within a stipulated time frame.

21. In order to expedite trial, learned counsel for the parties agree as under:

(1) The Suit will be set down before the learned Judge dealing with the Civil Suits for settlement of issues on 10.09.2014.

(2) The parties will file their additional documents if any, within two weeks thereafter;

(3) The plaintiffs will file their affidavits of examination in chief within four weeks thereafter.

(4) The Additional Master will endeavour to take up the case expeditiously for concluding cross-examination of the plaintiffs' witnesses.

(5) On conclusion of the plaintiffs' evidence, the defendants will file their affidavits of examination in chief within four weeks thereafter and then the witnesses will be produced for cross-examination.

(6)On conclusion of trial,
the matter will be posted before
the Court of arguments.”

As per the Division Bench order, the suit ought to have been listed before the Court for settlement of issues on 10.09.2014; the additional documents, if any, ought to have been filed on or before 25.09.2014 ie., within two weeks from the date of settlement of issues; proof affidavits of examination in chief ought to have been filed on or before 22.10.2014 ie., within four weeks from the date of filing additional documents.

4.But, the suit was posted for framing issues only on 17.09.2014 and not on 10.09.2014. On 17.09.2014, when the matter came up before the learned Single Judge, the following order was passed_

“Though Mr.V.Selvaraj, learned counsel appearing for the plaintiffs was present in the morning session and the matter was passed over for filing draft issues on the side of the plaintiff, as the draft issues on the side of the defendants 1 and 2 was already filed. However, in the afternoon session, there was no representation on behalf of the plaintiffs. Therefore, after perusing the pleadings and after hearing the submissions

made on the side of the defendants, the following issues are framed.

1. Whether the suit as framed is maintainable on the facts of the case alleged in the plaint and the reliefs sought for?

2. Whether the plaintiff allegations disclose the cause of action for any of the reliefs sought for?

3. Whether the relief of specific performance as sought for is maintainable in terms of the suit agreement dated 29.04.2006 and the absence of any plea of readiness and willingness in the plaint?

4. Whether the alternative claim for refund sought for is sustainable?

5. Whether the claims made for payment of Rs.1,00,00,000/- as damages for deceit and frauds and of Rs.45,00,000/- for recovery of cost of the filling up are sustainable on the plaint allegations and non-payment of Court fee there for?

6. Is not the payment of balance consideration, the very essence of the contract and the parties specifically agreed and expressed it in the agreement itself?

7. To what relief, if any, are the plaintiffs entitled?

The parties shall file their documents within two weeks from today i.e., on or before 06.10.2014. The plaintiff shall file their affidavit of examination-in-chief within four weeks thereafter, i.e., on or before 27.10.2014.

The Additional Master-IV shall take up the case expeditiously for conclusion of the plaintiffs' evidence within four weeks thereafter. On conclusion of the plaintiffs' evidence, the defendants shall file the affidavit of examination-in-chief within four weeks thereafter and the witness shall be produced for examination.

Registry is directed to send a copy of the order of the First Bench of this Court dated 27.08.2014 to the Additional Master-IV for strict compliance."

5. According to the applicants/plaintiffs, the time schedule fixed by the Division Bench for the disposal of the suit was modified by the learned Single Judge in the above mentioned order. As per the order of the learned Single Judge, the parties shall file their documents on or before 06.10.2014. The plaintiff shall file their affidavit of examination-in-chief on or before 27.10.2014. Since 06.10.2014 was declared as holiday on account of *Moharam*, the case was listed on 07.10.2014 before the learned Master. On 07.10.2014 the

applicants/plaintiffs' counsel made a representation before the Master Court that an application for receiving the additional documents has been filed by the applicants/plaintiffs before the Registry and the said application has to be ordered by the Court and thus, prayed for the adjournment of the case. But, the learned Master informed the applicants/plaintiffs' counsel that he had already been empowered by the order of the learned Single Judge to receive the additional documents and hence, no specific order from the Court is necessary to receive the additional documents in the application filed by the applicants/plaintiffs. Thereafter, the learned Master has sent an Office Assistant to bring the additional documents filed before the Registry. The documents, the application and the Judges Summons were brought from the Registry and the learned Master took the additional documents on file and posted the case for filing proof affidavit of the plaintiffs. When the suit was posted before the learned Master on 27.10.2014 for filing proof affidavit of the plaintiffs, the applicants/plaintiffs have filed two applications in the case. One application was filed for permitting the plaintiffs to file reply statement and another application has been filed for framing additional issues. Since the learned Master cannot pass order in the said applications, the applicants/plaintiffs have filed a Memo before the learned Master

on 27.10.2014 to post the case before the Court to enable the applicants/plaintiffs to get an appropriate order in the said applications. Hence, the learned Master has passed the following order on 27.10.2014_

"Learned counsel for plaintiff, 1st and 3 to 5 defendants appeared. P.W.1 is absent. The Hon'ble Court by order dated 27.10.2014 has directed the plaintiff to file proof affidavit on or before 27.10.2014 but the plaintiff's counsel has filed a memo stating that they had filed 2 applications to file reply statement and for framing additional issues and hence, they are unable to file proof affidavit today and also requested to file the matter before Hon'ble Court.

Hence, this matter may be posted before the Hon'ble Court for orders."

Thereafter, when the matter came up before the learned Single Judge on 07.11.2014, the learned Single Judge has dismissed the suit for default, for non-filing of proof affidavit, as per the direction of the First Bench, within the stipulated time.

6.Hence, the applicants/plaintiffs have filed the present application seeking to set aside the order of dismissal dated 07.11.2014 passed in the suit under Order XIV Rule 8 of O.S. Rules

read with Order 9 Rule 7 of C.P.C., contending that the applicants/plaintiffs can file proof affidavit only after the receipt of the additional documents. But, since no order has been passed in the said application for receiving the additional documents, the applicants were not in a position to file the proof affidavit on 27.10.2014 and the applicants have always been ready and willing to file the proof affidavit and proceed with the case; thus, they sought for setting aside the dismissal order dated 07.11.2014.

7.The 1st respondent/D1 has filed a counter stating that after the dismissal of the OSA on 27.08.2014, the suit was lastly listed before the Court on 17.09.2014 for framing of issues. But, the suit ought to have been listed on 10.09.2014, as per the time framed in the order passed in OSA. On framing issues on 17.09.2014, the learned Single Judge gave some intervening time as given by the Division Bench in the OSA, for filing all the documents and filing of proof of affidavit of examination in chief. The case came up before the learned Master on 07.10.2014 for the first time. After filing certain documents, the case was adjourned to 15.10.2014 for plaintiffs' evidence, at the request of the learned counsel for the plaintiffs. On 15.10.2014 the plaintiffs' counsel has neither filed proof affidavit nor produced any evidence.

Further, the plaintiffs were also not present on that day. Hence, the case was adjourned to 20.10.2014 at the request of the learned counsel for the applicants/plaintiffs. On 20.10.2014, the applicants/plaintiffs' counsel did not produce any evidence and the case was adjourned to 27.10.2014 at the request of the learned counsel for the applicants/plaintiffs. On 27.10.2014 also the applicants/plaintiff's counsel did not produce any evidence or file any proof affidavit. The applicants/plaintiffs' counsel requested the learned Master, by filing a memo, to post the matter before the Court. Hence, the case was listed on 07.11.2014 before the Court. The learned counsel for both the parties were present on 07.11.2014. The learned counsel for the applicants/plaintiffs prayed for adjournment. The learned counsel for the respondents/defendants brought to the notice of the Court that the time schedule agreed upon and fixed by the Division Bench has to be followed for expeditious disposal of the suit. Thereafter, the learned Single Judge decided to proceed with the suit and after hearing both parties, dismissed suit, since the plaintiffs failed to produce evidence on that day before him and failed to take necessary action for further prosecution of the suit, for which time schedule had already been fixed by the Division Bench. The learned Single Judge has not modified the order passed by the Division Bench

dated 27.08.2014. Whatsoever time schedule fixed by the Division Bench has been maintained by the learned Single Judge. The remedy sought for in the present application is totally misconceived and untenable in the facts and circumstances of the case. Thus, the 1st respondent/D1 sought for dismissal of the application.

8.The learned counsel appearing for the applicants/plaintiffs submitted that the time schedule fixed by the Division Bench for the disposal of the suit while dismissing the OSA was completely modified by the learned Single Judge, on 17.09.2014, after framing the issues. As per the order of the learned Single Judge, the documents ought to have been filed by the plaintiffs on or before 06.10.2014. Since 06.10.2014 was declared as holiday on account of *Moharam*, the suit was posted before the learned Master on 07.10.2014 and on that day, it was represented that the two applications were filed by the applicants/plaintiffs'; one application was filed to receive additional documents and another application was filed for framing additional issues. The said applications have to be ordered only by the Court. But, instead of directing the Registry to post the matter before the Court, the learned Master kept the additional documents on his file. That is the reason why, on 07.11.2014 when the suit came up before

the learned Single Judge, the applicants/plaintiffs were not in a position to file the proof affidavit. But, on 07.11.2014, the learned Single Judge dismissed the suit stating that the applicants/plaintiffs had not filed the proof affidavit as per the directions of the Division Bench within the stipulated time.

9. In this regard, the learned counsel appearing for the applicants/plaintiffs submitted that the time frame fixed by the Division Bench was subsequently modified by the learned Single Judge. The learned counsel for the applicants/plaintiffs, by inviting the attention of this Court to Order 1 Rules 7 & 8 of Original Side Rules, submitted that the rules are only for convenient disposal of the suit by the Court. Though time frame was fixed by the Division Bench, the learned Single Judge can always dictate the schedule of the time for convenient disposal of the suit. Infact, the learned Single Judge has modified the time frame fixed by the Division bench at the time of framing the issues on 17.09.2014. While so, on 07.11.2014 when the matter came up before the Court, the learned Single Judge ought to have granted time to file proof affidavit, since the application filed by the plaintiffs for production of additional documents and application for framing additional issues are pending, unless an order has been

passed in the said application the applicants/plaintiffs cannot file proof affidavit. But, the learned Single Judge, by taking into account the time schedule fixed by the Division Bench, has dismissed the suit. The learned counsel for the applicants/plaintiffs submitted that the applicants/plaintiffs are always ready with the proof affidavit; thus, the learned counsel for the applicants/plaintiffs sought for setting aside the order of dismissal of the suit.

10. But, it is the submission of the learned Senior Counsel appearing for the 1st respondent/D1 that it is incorrect to state that the learned Single Judge has modified the time schedule fixed by the Division Bench by order dated 27.08.2014, while framing the issues. In fact, the learned Single Judge by order dated 17.09.2014 has maintained the same time frame, which was given in the order of the Division Bench, for the purpose of disposal of the suit. In this regard, the learned Senior Counsel appearing for the 1st respondent/D1, by inviting the attention of this Court to the adjudication of the learned Master dated 07.10.2014, 15.10.2014, 20.10.2014 & 27.10.2014 and submitted that the plaintiffs' counsel neither produced any evidence nor filed proof affidavit on those days, in spite of the time granted by the learned Master. In fact, on 27.10.2014 the learned counsel for the

applicants/plaintiffs had requested the learned Master only to post the matter before the Court . Hence, when the matter came up on 07.11.2014 before the learned Single Judge, it was brought to the notice of the Court by the learned counsel for the 1st respondent/D1 that the time schedule agreed to and ordered by the Division Bench has to be followed for the expeditious disposal of the suit. Therefore, the learned Single Judge by taking into account the time schedule fixed by the Division Bench, dismissed the suit, since the applicants/plaintiffs failed to produce evidence before the Court and failed to take any action for the purpose of expeditious disposal of the suit. In this regard, the learned Senior Counsel appearing for the 1st respondent/D1 submitted that the nature of the order passed by the learned Single Judge would fall under Order 17 Rule 3 of CPC; hence, the application filed by the applicants/plaintiffs to set aside the dismissal order is not maintainable and the remedy for the applicants is only to file an appeal as against the impugned order of dismissal. In support of his contentions, the learned Senior Counsel appearing for the 1st respondent/D1 has relied upon the following decisions_

**(i)1918(34) MLJ 24 (Prativadi
Bhayankaram Pichamma Vs. Kamisetti
Sreeramulu and ors)**

(ii) AIR 1979 Madras 135 (C.Chennaiya Naidu Vs. Panchayat Board)

(iii) (2006) 9 SCC 187 (Thakur Ji Ram Janki Ji Vs. Shankar Dayal)

(iv) 2011(9) SCC 678 (Shiv Contex Vs. Tirgun Auto Plast (P) Ltd.)

(v) 1968 Madras 222 (Gopal Gounder Vs. Amnujammal)

11. The learned counsel appearing for the 2nd respondent/D2 has also made an elaborate argument, contending that the time schedule for the disposal of the suit was agreed upon by both the parties; therefore, when the applicants/plaintiffs have not filed the proof affidavit as per the time schedule, the learned Master has no other alternative, except to post the matter before the Court. The learned Single Judge has also, by considering the time schedule fixed by the Division Bench, correctly dismissed the suit for non-production of the evidence. Hence, the remedy for the applicants/plaintiff is only to file an appeal as against the said dismissal order passed by the learned Single Judge.

12. The learned counsel appearing for the 3rd respondent/D3 submitted that as per the order of the learned Single Judge, the additional documents ought to have been filed by the plaintiffs on or before 06.10.2014. Since 06.10.2014 was declared as holiday, on the next day i.e., on 07.10.2014 the applicants/plaintiffs have filed an application for filing additional documents. Since the applicants/plaintiffs have filed the application to additional documents within the time frame fixed by the learned Single Judge, absolutely there is no need for the applicants/plaintiffs to get an order from the Court for receiving the additional documents. Only if a party intends to file any other additional document during the course of the trial, then only the order of the Court is necessary. Therefore, the reasons assigned by the applicants/plaintiffs that they were not in a position to file the proof affidavit since no order was passed in the application filed filed them to receive the additional documents, cannot be accepted. The learned counsel for the 3rd respondent/D3 further submitted that since the applicants/plaintiffs have not filed the proof affidavit as per the time schedule fixed by the Division Bench, now the only remedy for the applicants/plaintiffs is to file appeal against the impugned order of dismissal; therefore, the present application filed by the applicants/plaintiffs is not maintainable. Thus, the learned counsel for

the 3rd respondent/D3 sought for dismissal of the application.

13. But, by way of reply, the learned counsel appearing for the applicants/plaintiffs invited the attention of this Court to Order 17 Rule 3 of CPC and submitted that if the parties are, or any of them is, absent, the Court may proceed under Rule 2. The Rule 2 of Order 17 says that the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX. In the instant case also on 07.11.2014 when the learned Single Judge dismissed the suit as the plaintiff was not present before the Court. Hence, the order of dismissal passed by the learned Single Judge has to be construed as if that order has been passed by the Court by adopting one of the modes under Order IX of CPC. Therefore, according to the learned counsel for the applicants/plaintiffs, the present application filed by the applicants/plaintiffs under Order 9 Rule 7 of CPC is very well maintainable and as such, there is no need to file an appeal for the applicants/plaintiffs and this Court itself can set aside the impugned order of dismissal of the suit for default.

14. Heard the submissions made on either side and perused the materials available on record.

15. Though very many contentions have been raised on either side, I am of the opinion, the only question that has to be decided in this application is_ *Whether the present application filed by the applicants to set aside the order of dismissal of suit under Order 9 Rule 7 of CPC is maintainable (or) whether the applicants/plaintiffs have to seek their remedy by filing an appeal as against the order of dismissal dated 07.11.2014?*

16. According to the learned counsel appearing for the applicants/plaintiffs, though the Division Bench has framed the time schedule for expeditious disposal of the suit, subsequently the same has been modified by the learned Single Judge by order dated 17.09.2014; in fact, this Court under Order 1 Rules 7 & 8 of Original Side Rules can modify the time schedule for convenient disposal of the suit; under such circumstances, the dismissal order passed by this Court dated 07.11.2014 can be set aside and the matter may be posted for trial.

17. In the regard, the learned counsel for the applicants/plaintiffs invited the attention of this Court to Order 17 Rule 3 of CPC and submitted that if the parties are or any of the them is absent, the

Court may proceed under Rule 2. Further, Rule 2 of Order 17 says that the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX. Therefore, according to the learned counsel for the applicants/plaintiffs, the present application filed by the applicants/plaintiffs under Order 9 Rule 7 of CPC is very well maintainable and as such, there is no need to file an appeal for the applicants/plaintiffs and this Court itself can set aside the impugned order of dismissal of the suit for default.

18. But, in my considered opinion, all these submissions made by the learned counsel for the applicants/plaintiffs cannot be considered at this stage, since this Court has already dismissed the suit by citing the non-filing of proof affidavit as per the time frame fixed by the Division Bench, as a reason. The question as to whether the present application is maintainable or the remedy to the applicants is only to file an appeal, could be decided only based on the nature of the order passed by this Court. Therefore, it would be appropriate to extract the relevant portion of the dismissal order passed by this Court on 07.11.2014. Para 9 of the order dated 07.11.2014 reads as follows_

“9. Since the plaintiffs have not filed the proof affidavit as per the direction of the First Bench within the stipulated time and even now,

they are not ready with proof affidavit, the suit is dismissed for default. No costs.”

From a perusal of the dismissal order passed by the learned Single Judge, I am of the opinion that the applicants have failed to produce proof affidavit before the Court within the time framed fixed by the Division Bench. The suit was not dismissed on the ground of non-appearance of the applicants/plaintiffs. Therefore, the submission made by the learned counsel for the applicants/plaintiffs that the nature of the order falls under Order 17 Rule 3 of CPC, cannot be accepted. When that being the position, I am of the opinion that the proper remedy for the applicants is only to file an appeal as against the impugned dismissal order.

19. In this regard, a useful reference could be placed in some of the judgments:-

In **1918(34) MLJ 24 (Prativadi Bhayankaram Pichamma Vs. Kamiseti Sreeramulu and ors)** it has been held by this Court as follows_

“4. The question raised by this reference relates to the scope of Rules 2 and 3 of

Order XVII of the Civil Procedure Code. Rule 1 empowers the Court on proper cause being shown to grant time to the parties at their instance and to adjourn the suit on such terms as to costs as it thinks fit. Rule 2 provides that if the parties or any of them fail to appear on the adjourned date; the Court may dispose of the suit in one of the modes directed in that behalf in Order IX or make such other order as it thinks fit. Order IX relates to the procedure to be followed on the date fixed in the summons for the parties to appear and provides for the consequence of non-appearance. Rule 3 provides that the Court may dismiss the suit if both parties fail to appear. Where the plaintiff appears and not the defendant, Rule 6 empowers the Court to decide the suit *ex parte* if the summons has been duly served on the defendant in time to enable him to appear. Where the defendant appears and not the plaintiff, Rule 8 directs that the Court should dismiss the suit wholly or partially if the claim or any part is not admitted. Rule 9 entitles the plaintiff to have the dismissal set aside if he satisfies the Court that he had sufficient cause for non-appearance. Rules 7 and 13 enable the

defendant who failed to appear to set aside the *ex parte* order or decree against him on shewing proper cause for his non-appearance. Rule 3 of Order XVII empowers the Court to decide the suit forthwith notwithstanding the failure of either party to whom time is granted to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary for the progress of the suit. It will thus be seen that Rule 2 of Order XVII empowers the Court to apply to adjourned hearings the same procedure to be followed in case of failure of the parties to attend at the first hearing. It however expressly empowers the Court instead of proceeding under Order IX to pass such other order as it thinks fit. There is therefore nothing to prevent the Court from adjourning the case to another day if the parties fail to appear and the Court thinks that in the interests of justice it should not dismiss the suit or decree it *ex parte*. This should be borne in mind as it has been strenuously argued before us on the strength of some of the observations in some of the decisions referred to in the course of argument that the view taken in *Chandramathi Ammal v.*

Narayanasami Aiyar (1909) I.L.R. 33 M. 241, is likely to entail great hardship on the defaulting party. Where the Judge thinks that a defaulting party has proved his case, he is not bound to apply the provisions of Order IX but can adjourn the case to another day in case he fails to appear and I am sure no Judge with any sense of justice would dismiss a just claim which he considers proved simply because a party fails to appear on an adjourned date. On the other hand it seems to me to be pretty plain that the application of Rule 3 will be the harder of the two courses as Rule 3 empowers the Court to proceed to decide the suit forthwith on the materials before it. So far as the plaintiff is concerned the Court may dismiss the suit on the merits if the evidence on record does not prove plaintiff's case. It may pass a decree if the defendant is absent and there is formal proof of plaintiff's claim or the onus is on the defendant. The dismissal of the suit or passing of a decree being on the merits, the only remedy of the party aggrieved will be by appeal or review. It is difficult to see what the use of an appeal will be if there was no application for adjournment which

was refused. The case will have to be considered by the Appellate Court and decided on the materials before it and the Court cannot in very many cases say that the decision of the lower Court on the materials before it is erroneous. As regards review, the scope of Order XLVII is more restricted than that of Order IX. If the plaintiff's evidence is sufficient, then the defendant if he appears will be entitled to let in his evidence in the absence of the plaintiff and it will often be extremely difficult to determine how far reliance ought to be placed on evidence which has not; been tested by cross-examination. The provisions of rule of are certainly more stringent than the provisions of Rule 2 and except in cases where the case has been closed on both sides and the adjournment is only for argument, it is difficult to see how any decision on the materials before the Court can be satisfactory."

In ***AIR 1979 Madras 135 (C.Chennaiya Naidu Vs. Panchayat Board)***, it has been held as follows_

"5. I agree with the view of the learned District Judge. I do not agree with the argument of

Mr. Krishnan, learned counsel for the defendant, that the dismissal of the suit in this case should be equated to a dismissal for default of appearance by the plaintiff. There is a clear-cut distinction between the dismissal for default of appearance and a decision dismissing the suit for other kinds of default. If the plaintiff is absent when a suit is called, it is open to the Court to dismiss the suit for default for appearance. Such a dismissal is not a decision in the suit, but a refusal by the Court to deal with the suit, because of the absence of the party. Where, however, the plaintiff is present, but for some reason or other, he does not prosecute the suit, then the Court is enjoined under Order 17 Rule 3 to 'decide the suit'. The implication of the rule is that if there are some materials before the Court at the stage at which the default of the party occurs, then the Court is nevertheless obliged to decide the suit on the basis of the those materials already on record. But, it may well happen that a default may occur on the part of a party who is present in Court, and at a time when there are no materials or no adequate materials for the Court to proceed upon for the purpose of deciding the suit on merits. Even in such a case, the Court has somehow to proceed with the suit, and when it does so it will be only 'deciding' the suit, in terms of the language of

Order 17 Rule 3. Whereas in this case, the plaintiff being present, commits default, in the sense that he does not get on with the trial by calling evidence, then the Court may have no alternative except to dismiss the suit. But even so, what the court does when it dismisses the suit for non-prosecution is to decide the suit. It is a decision in the suit, a decision of the suit and none the less so for its being dismissed for default. If so much is granted, the decision of the Court in this case must be regarded as a decree against which an appeal certainly lies. I am, therefore, in agreement with the learned District Judge when he upheld the maintainability of the appeal."

In **(2006) 9 SCC 187 (Thakur Ji Ram Janki Ji Vs. Shankar Dayal)** it has been held by the Hon'ble Supreme Court has follows_

"Order 17 Rule 3 of the Code of Civil Procedure, 1908 enables the court, when time has been granted to a party to produce evidence and he fails to do so or the case of either default on the part of the party with regard to the further progress in the suit, to either (a) if the parties are present, proceed to decide the suit forthwith, or (b) if the parties are, or any of them is, absent,

proceed under Rule 2 Order 17.”

In ***AIR 1968 Mad 222 (Gopal Gounder Vs. Amnujammal)*** it has been held as follows_

“.....The learned Judges held that in such circumstances the plaintiff appeared at the hearing of the suit and the dismissal of the suit could only be in the circumstances under Order 17, Rule 3, C.P.Code. In this case, the plaintiff's counsel reported no instructions because the application for transfer on the ground that the plaintiff cannot secure a fair trial was dismissed. The plaintiff was however in court. Apparently she ought to have been directed to proceed with the case and the plaintiff ought to have pleaded helplessness in such circumstances and the learned District Munsif dismissed the suit I am bound by the decision of the Division Bench reported in AIR 1949 Mad 78, and in those circumstances, I am unable to agree with the view taken by Krishnaswami Nayudu, J.in. I hold that the plaintiff should be deemed to have appeared on the date when the suit was dismissed and if the plaintiff did appear within the meaning of ratio of AIR 1949 Mad 78, then the disposal must be deemed to be one under Order 17, Rule 3 C.P.C. It is not disputed by the learned counsel for the petitioner that if the disposal were

to be held to be one under Order 17, Rule 3 C.P.C. an appeal will lie.

In the appeal so filed by the plaintiff the learned Subordinate Judge directed the retrial of the case and this appears to be absolutely in the interest of justice. I do not think that there is any error of jurisdiction in so far as the order complained of is concerned. The civil revision petition is dismissed. There will be no order as to costs."

20. From the reading of the dictum laid down in the above judgments, it could be seen that there is a clear distinction between the dismissal of the suit for default of appearance and decision dismissing the suit for other kinds of default. If the suit is dismissed for default of appearance of the plaintiff, the application to set aside filed under Order 9 can be entertained. In the instant case, the suit was dismissed not on the reason for default of appearance of the plaintiffs. The suit was dismissed by the learned Single Judge for non-filing of the proof affidavit by the plaintiff as directed by the First Bench of this Court within a stipulated time. Therefore, the nature of order passed by the Court will fall within the ambit of "deciding the suit" in terms of language of Order 17 Rule 3 of C.P.C. Since the order of dismissal dated 07.11.2014 is not based on the non-appearance of the plaintiffs, but based on the other kind of default, namely, non-filing

of proof affidavit as directed by the First Bench of this Court, the submission made by the learned counsel for the applicants/plaintiffs that the order passed by the learned Single Judge has to be construed as if the order has been passed adopting any one of the modes under Order IX of C.P.C, cannot be accepted. Therefore, the application filed by the applicants/plaintiffs to set aside the order of dismissal dated 07.11.2014 under Order IX Rule 7 of C.P.C. is not maintainable. The proper remedy for the applicants/plaintiffs is only to file an appeal as against the order of dismissal of the suit dated 07.11.2014. Hence, the present application is liable to be dismissed.

For the foregoing reasons, the application is dismissed.

13.01.2015

Internet : Yes / No
Index : Yes / No
ssv

R.SUBBIAH, J.

SSV

Pre-delivery order

in

A.No.7620 of 2014

in

C.S.No.121 of 2007

13.01.2015