

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.07.2017

CORAM

THE HON'BLE MR.JUSTICE RAJIV SHAKDHER  
AND  
THE HON'BLE MR.JUSTICE ABDUL QUDDHOSE

O.S.A.No.100 of 2017  
and C.M.P.No.6882 of 2017

Rev.Dr.Kurien Thomas,  
President and Director,  
Asha Nivas Social Welfare Centre,  
Regd.No.146/1976,  
No.9, Rutland Gate IV Street,  
Chennai-600 006.

.. Appellant/Defendant

Vs.

1. R.Sundararajan  
2. Sundar Ganesh  
3. Meenakshi Sundaram

.. Respondents/Plaintiff

\* \* \*

Prayer : Appeal filed under Clause 15 of Letters Patent and Order XXXVI, Rule 11 of Original Side Rules, seeking to set aside the Fair and Decretal Order dated 26.07.2016 in Application No.3106 of 2016 in C.S.No.867 of 2002.

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For Appellant : Mr.T.M.Hariharan  
for M/s.N.Nanda Kumar  
and B.Thilakk Narayanan

For Respondents : Mr.V.Lakshminarayanan

JUDGEMENT

(Judgement of the Court was delivered by RAJIV SHAKDHER, J.)

1. This is an appeal preferred against the judgement and Decree Order dated 26.07.2016, passed by the learned Single Judge in Application No.3106 of 2016 in C.S.No.867 of 2002.

1.1. By virtue of the impugned judgement, the learned Single Judge set aside the appellant's application under Order 9, Rule 13 of the Code of Civil Procedure, 1908 (in short, "CPC").

2. Briefly, the dismissal of the appellant's application came about in the background of the following facts :

2.1. The respondents/plaintiffs had filed a suit for declaration, possession and damages qua the appellant herein. Since, the appellant failed to appear, despite being served with the summons in the suit, he was set ex-parte on 28.02.2005. Consequent thereto, the appellant moved an application before the Suit Court, being : Application No.1446 of 2005, to set aside the said order. The said application was filed on 17.03.2005. The application was allowed on 19.09.2006. As a result, the appellant filed a written statement in the suit. We are informed that the written statement was filed in September, 2006.

2.2. There is no dispute that the suit, thereafter, came up before the Court only in 2015. The respondents/plaintiffs filed their affidavit of proof on 16.06.2015.

2.3. Upon the appellant being asked to cross-examine the witnesses of the respondents/plaintiffs, the appellant's counsel informed the Suit Court that he had 'no instructions' in the matter. This occurred in and about July, 2015. Resultantly, the cross-examination of the respondents/plaintiffs' witnesses could not take place.

2.4. In these circumstances, learned Master listed the matter before the Suit Court on 14.03.2016.

2.5. The record shows that the matter was called twice on 14.03.2016, despite which, there was no representation on behalf of the appellant.

2.6. The learned Judge, thereafter, posted the matter 'for arguments', on 18.03.2016. Since, the appellant was not represented, even on the adjourned date, the learned Judge heard the matter ex-parte and passed the judgement on merits on the very same date.

2.7. The appellant, thereafter, filed, as indicated above, an application under Order 9, Rule 13 of the CPC. This application was filed on 12.04.2016. The learned Judge, however, as indicated at the outset, dismissed the application, vide the impugned judgement.

2.8. It is, in this background, the instant appeal has been filed.

3. Quite clearly, the appellant has been remiss in not prosecuting the suit with necessary diligence. Having said so, there are several issues relating to the merits of the case, which arise for consideration. We have come to this conclusion, upon perusing the pleadings filed by the parties, which are available on record.

4. Notwithstanding what is indicated hereinabove, counsels for both parties submit that expedition in the matter is required.

4.1. We propose to pass directions to expedite the suit

proceedings. However, before, we do so, we may deal with one singular objection raised by Mr.V.Lakshminarayanan, in opposition of the appeal, which is that, no appeal would lie against the impugned judgement, as the application preferred under Order 9, Rule 13 of the CPC was dismissed, inter alia, on the ground that the ex-parte judgement and decree was passed on merits.

4.2. On the other hand, learned counsel for the appellant says that, since, the appellant was not present, the only course open to the Court was to proceed in accordance with the provisions of Order 17, Rule 3(b) of the CPC. And, therefore, as necessary consequence, the Court would have to proceed under Order 17, Rule 2, which, in turn, would mean that the options available to the Court were those that are contained in Order 9, Rule 6(1)(a) of the CPC.

4.3. It is based on this that the learned counsel says that the application filed under Order 9, Rule 13 of the CPC was maintainable, notwithstanding the fact that the learned Judge had decided the suit on merits.

4.4. We are inclined to accept the submission of the learned counsel for the appellant. We have reached this conclusion on a plain reading of provisions of Order 17, Rule 3 and Order 17, Rule 2. Clause (a) of Order 17, Rule 3 indicates, where parties are present, the Court may decide the suit on merits. However, where, parties are or any one of them is, absent, proceed to take action under Rule 2. Rule 2 of Order 17 empowers the Court to take recourse to the provisions of Order 9, when, on the adjourned date parties or any one of them is absent. In this case, on the adjourned date, the appellant, i.e., the defendant was absent.

4.5. The Court appears to have taken recourse to the provisions of Order 9, Rule 6(a) and proceeded to pass an ex-parte judgement and decree, albeit, on merits. Clearly, in these circumstances, an application under Order 9, Rule 13 of the CPC would lie, notwithstanding the fact that the exparte judgement was passed on merits. Therefore, in our opinion, as a logical sequitur, an appeal would, in turn, lie to this Court, upon dismissal of such an application.

5. Thus, having regard to the same, we have no difficulty in holding that the objection taken by Mr.V.Lakshminarayanan, qua maintainability of the appeal, cannot be sustained. Accordingly, the impugned judgement and order is set aside. However, taking into account the difficulties that the respondents/plaintiffs have suffered, we intend to issue the following directions :

- (i).The matter will be listed before the learned Master on 12.09.2017; a date, on which, the respondents/plaintiffs will produce their witnesses for cross-examination.
- (ii).The cross-examination will proceed on a day-to-day basis.
- (iii).Immediately, upon conclusion of the cross-examination, the appellant will file the affidavit(s) of evidence of his witnesses, albeit, no later than one week from the date of

conclusion of the cross-examination of the respondents/plaintiffs' witnesses.

(iv).The learned Master, thereafter, will fix a date for cross-examination of the appellant/defendant's witnesses; a date, which will lie in close proximity to the date of closure of cross-examination of respondents/plaintiffs' witnesses.

(v).Upon the learned Master recording the evidence, he shall place the matter before the learned Single Judge, for enabling the parties and/or their counsels to advance arguments on merits of the matter.

7. The appeal is disposed of, in terms of the aforesaid direction. Resultantly, pending application shall stand closed. The appellant will, however, pay cost in the sum of Rs.50,000/- to the respondents/plaintiffs. The said cost will be paid within a period of two weeks from the date of receipt of a copy of this order.

Sd/-  
Asst.Registrar (CS III )

/true copy/

Sub Asst. Registrar

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To

The Sub Assistant Registrar,  
Original Side, High Court,  
Madras.

+1cc to Mr.V.Raghavachari,Advocate sr.50819

+1cc to Mr.B.Thilak Narayanan,Advocate sr.50696

O.S.A.No.100 of 2017  
and C.M.P.No.6882 of 2017

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ss(31/8/2017)

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