

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 17.08.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)No.2120 of 2012
and
M.P.No.1 of 2012**

1.Prema

2.Suguna

.. Petitioners

Murugappan

.. Respondent

Vs.

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the judgment and decretal order of the Court of the III Additional District Judge, Puducherry in I.A.No.3 of 2011 in A.S.No.185 of 2006, dated 09.03.2012.

For Petitioners : Mr.V.Raghavachari

For Respondent : Mr.T.M.Naveen
for M/s.K.P.Jotheeswaran

ORDER

The appellants in A.S.No.185 of 2006 is the civil revision petitioners before this Court, challenging the order passed in I.A.No.3 of 2011 in A.S.No.185 of 2006, dated 09.03.2012, seeking to set aside the dismissal order dated 29.01.2010 and to restore the appeal on file so as to enable the petitioners to defend their case for proper adjudication, passed by the learned III Additional District Judge, (F.A.C.) Pondicherry.

2.The case of the petitioners/appellants is that they are the legal heirs of the deceased/appellants 1 and 2, who are the parents. The Amin from the Additional Sub-Judge, Pondicherry came to their residence and stated about service of notice in the E.P.No.93 of 2010 in O.S.No.18 of 1998. Under such circumstances, they are persuaded to know the detailed particulars of the E.P. and found out the previous proceedings of the appeal, which was disposed on 29.01.2009. The appeal was preferred by their father, who died pending appeal and after his death, their mother continued the proceedings and she also died leaving the third and fourth petitioners. The learned counsel of their mother namely Thiru.C.S.Narasimhan has also been undergone

by pass surgery for his heart ailment and not attending the Court and thereby neither their mother nor her counsel were not able to attend the Court, as they are undergone long ailments for their diseases. Hence, the petition was filed to set aside the dismissal order dated 29.01.2010 and to restore the appeal on file so as to enable the petitioners/appellants to defend their case for proper adjudication.

3. On receipt of the notice, the respondent has appeared and filed his counter stating that admittedly the petitioners are residing in the suit property, the petitioners 3 and 4 were living along with their parents namely the first and second petitioners in the appeal, who are the deceased. The respondent also stated that there is no jurisdiction in alleging that the petitioners did not know anything about the case. The respondent also states that the petitioners have also not given the dates of death of Velayudam and Kousalya @ Kamsala. If the correct date of their death is given, this Court can easily come to the finding that the petition is time barred.

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4. The respondent also come forward by saying that the first and second petitioners have preferred the appeal against the judgment and decree passed by the learned Additional Sub-Judge, Pondicherry on

13.07.1999 and after giving fair opportunity to all the parties, the III Additional District Judge, Pondicherry, was dismissed the appeal on 29.01.2009. Along with the appeal, the said Velayudam and Kousalya @ Kamsala have filed CMP.No.21296 of 1999 for stay of execution before this Court, in which granted an interim stay on condition by directing the appellants to pay a sum of Rs.1,200/- towards past mesne profits and also to pay a sum of Rs.150/- per month from March 2000 on or before 5th day of every succeeding month. Failing compliance of any one of the conditions, the interim order granted shall stand vacated automatically.

5. Though the condition imposed by the Court, the above conditions have not been properly complied by the appellants 1 and 2 and hence, the order of stay was automatically vacated. Thereafter, the appellants have filed another petition for extension of time and even thereafter the appellants have defaulted in payment of future mesne profits. The order of the Court was not properly complied with. Therefore, the judgment dated 29.01.2009 made in A.S.No.185 of 2006 was passed on merits after hearing both sides. In the said Judgment, this Court elaborately discussed all the points under dispute and delivered judgment on merits. The judgment on merit cannot be

set aside by the same Court. Hence, he prays for dismissal of the petition.

6.Considering both side arguments, the learned III Additional District Judge, Pondicherry, was pleased to dismiss the application filed in I.A.No.3 of 2011 on 09.03.2012, on the ground that the order was passed on merits in A.S.No.185 of 2006. Therefore, that cannot be treated as exparte judgment and it cannot be set aside. If at all the petitioners/appellants aggrieved on the judgment, they ought to have approached this Court and hence dismissed the application. Challenging the said order in I.A.No.3 of 2012, dated 09.03.2012, on the file of the III Additional District Judge, (F.A.C.) Pondicherry, this civil revision petition has been filed.

7.I heard Mrs.Srimathi for Mr.V.Raghavachari, learned counsel appearing for the petitioners and Mr.T.M.Naveen, learned counsel appearing for the respondent.

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8.It is admitted case that the appeal was filed by the appellants 1 and 2, who are the parents. Whether the petition filed by the petitioners/appellants under Order 41 Rule 17 read with Section 151 of

C.P.C. is maintainable or not?

9.It is the case of the petitioners that the parents were filed the appeal in A.S.No.185 of 2006 and the said appeal was not known by the petitioners. On receipt of the notice in E.P.No.93 of 2010 in O.S.No.18 of 1998, on perusal of the documents that the grounds filed by the petitioners/appellants, it is seen that the appellants 1 and 2 namely Mr.Velayudam and Kousalya @ Kamsala were died. Therefore, the 3rd and 4th appellants were impleaded as the parties, who are the petitioners 3 and 4 and the daughters were not at all impleaded as a party as legal heirs of the deceased Velayudham. On perusal of the above documents in respect of memo of grounds filed in A.S.No.185 of 2006, how the Court has implead the wife Kousalya @ Kamsala/2nd appellant alone in the appeal. When the petitioners 3 and 4 were received the notice in E.P.No.93 of 2010 in O.S.No.18 of 1998 then only they came to know about the filing of the case by the appellants, since they were not added as a party in O.S.No.185 of 2006.

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10.On perusal of the judgment passed on 29.01.2009 in A.S.No.185 of 2006 by the learned III Additional District Judge, Pondicherry, it is made clear that the petitioners 3 and 4, who are the

daughters were not impleaded as a parties and no adjudication was conducted by the Court itself. After receiving notice in the E.P.No.93 of 2010, then only the petitioners 3 and 4 were impleaded themselves for filing application for setting aside the dismissal of the application on 29.01.2009. Though the order was passed on merits, but both the parties namely the appellants 3 and 4 as well as the respondent have not given the death certificate of the parents of the appellants 3 and 4. But, it is admitted fact that the order passed in A.S.No.185 of 2006, on 29.01.2009, these petitioners 2 and 3 were not added as party in the suit. These facts are not clearly gone into by the learned III Additional District Judge, Pondicherry. There is no averment in respect of death of the appellants 1 and 2. But, in para-8 of the order in I.A.No.3 of 2011, it was stated that the case was posted for several hearings i.e. for more than 15 hearings. These facts were not properly adjudicated by the learned III Additional District Judge, Pondicherry, but the appeal was dismissed on merits.

11.It is also made clear in para-7 of the judgment in I.A.No.3 of 2011 that when the appeal was pending, the first appellant was died and hence it was posted for orders and also ordered steps to implead the L.R.s of the 1st appellant. As the 2nd appellant was the only L.R. of

the 1st appellant, she was impleaded as L.R. of the deceased 1st appellant and accordingly filed amended memorandum of appeal and proceeded with the appeal. Subsequently, the sole contesting 2nd appellant did not appear before the Court. In para 8 of the order, it states that on 27.01.2009, the written arguments was filed on the side of the respondent. Even, after filing the written argument on the side of the respondent, there is no representation from the appellants side and posted the appeal on 28.01.2009. Since there was no representation from the appellant, the appeal was posted for judgment on 29.01.2009. From the above, it can be seen that the 2nd appellant was given sufficient opportunity to argue the matter and inspite of that there was no representation from her. The order in I.A.No.3 of 2011 states as follows:

"7.Heard both sides. Perused the case records. On perusal of case records, it is seen that the respondent has filed a suit against the appellants for declaration of title and for recovery of possession in respect of the suit property. The trial court after hearing both sides and perusing the case records, decreed the suit in favour the respondent and aggrieved by the said judgment and decree, the appellants have preferred the above appeal. When the

appeal was pending, the first appellant was died and hence it was ordered for steps to implead the L.Rs. of the first appellant. As the second appellant was the only L.R. of the first appellant, she was impleaded as L.R. of the deceased first appellant and accordingly filed amended memorandum of appeal and proceeded with the appeal. Subsequently, the sole contesting second appellant did not appear before this court.

8. On perusal of docket order, it is seen that the appeal was posted for amendment Memorandum of Appeal to 17.8.2007, 7.9.2007, 24.9.2007, 22.10.2007, 26.11.2007, 11.12.2007, 18.12.2007, 7.1.2008, 22.1.2008, 7.2.2009, 15.2.2008, 21.2.2008, 27.2.2008, 3.3.2008, 26.3.2008 and 17.4.2008. Then the appeal was posted for argument of appellant side to 17.4.2008, 18.6.2008, 7.7.2008, 15.7.2008, 25.7.2008, 1.8.2008, 20.8.2008, 5.9.2008, 17.9.2008, 15.10.2008, 13.11.2008, 21.11.2008, 1.12.2008, 5.12.2008, 10.12.2008, 15.12.2008, 17.12.2008, 23.1.2008, 7.1.2009, 9.1.2009, 20.1.2009, 22.1.2009, 23.1.2009 and 27.1.2009. On 27.1.2009, the written argument was filed on the side of

the respondent. Even after filing the written argument on the side of the respondent, there is no representation from the appellant side and posted appeal to 28.1.2009. Since there was no representation from the appellant, the appeal was posted for judgment on 29.1.2009. From the above, it can be seen that the second appellant was given sufficient opportunity to argue the matter and inspite of that, there was no representation from her."

12.As per the provisions under Order 41 Rule 17 of CPC, the said provision is given below for easy reference:

"Rule 17. Dismissal of appeal for appellant's default.- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may take an order that the appeal be dismissed.

Explanation.- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits."

13.As per the provisions, it is made clear that as per the Rule

17(1) of Order 41 deals with the dismissal of appeal for appellant's default. The above mentioned provision, even without explanation, if literally read, would clearly indicate that if the appellant does not appear when the appeal is called for hearing, the court has to dismiss the appeal. The provision does not postulate a situation where, the appeal has to be decided on merits, because possibility of allowing of the appeal is also there, if the appellant has a good case on merits; even if no body had appeared for the appellant. The Hon'ble Apex Court has very clearly held that in the case of **Ghanshyam Dass Gupta v. Makhan Lal** reported in (Civil Appeal No.5950 of 2012 dated 21.08.2012 as follows:

"We are, in this case, called upon to consider whether the High Court was justified in deciding the appeal on merits in the absence of any representation on behalf of the appellant, in view of Explanation to Order 41 Rule 17(1) CPA. The said provision is given below for easy reference:

"Rule 17. Dismissal of appeal for appellant's default.- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may take an order that the appeal be dismissed.

Explanation.- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.”

Rule 17(1) of Order 41 deals with the dismissal of appeal for appellant's default. The above mentioned provision, even without explanation, if literally read, would clearly indicate that if the appellant does not appear when the appeal is called for hearing, the court has to dismiss the appeal. The provision does not postulate a situation where, the appeal has to be decided on merits, because possibility of allowing of the appeal is also there, if the appellant has a good case on merits; even if no body had appeared for the appellant. Prior to 1976, conflicting views were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 CPC. Some High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for appellant's default.

Conflicting views raised by the various High Courts gave rise to more litigation. The Legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, Explanation to sub-rule (1) of Rule 17 of Order 41 CPC was added by Act 104 of 1976, making it explicit that nothing in sub-rule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left un-represented on the day fixed for hearing the appeal. The reason for introduction of such an explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate court that there was sufficient cause for non-appearance. Such an opportunity is lost, if the courts decide the appeal on merits in absence of the counsel for the appellant."

14. The Hon'ble Supreme Court in yet another case in ***Abdur Rahman and Others v. Athifa Begum and Others*** reported in ***(1996) 6 SCC 62***, wherein the scope of explanation to Rule 17(1) of Order 41 of CPC came up for consideration. While interpreting the said provision, the Hon'ble Apex Court took the view that the High Court

could not go into the merits of the case if there was no appearance on behalf of the appellant.

15. Per contra, the learned counsel appearing for the respondent has produced the judgment of the Hon'ble Supreme Court in the case of ***Harbans Pershad Jaiswal (Dead) By Legal Representatives v. Urmila Devi Jaiswal (Dead) By Legal Representatives*** reported in ***(2014) 5 Supreme Court Cases 723*** held as follows:

"16. Having said so, the question that arises is that even if the appeal was to be dismissed in default, whether that order warranted to be recalled on application made by the appellants. As is clear from the reading of Rule 19 of Order 41, the appellants were supposed to show sufficient cause for their non-appearance. The High Court has given categorical finding that no such address on this aspect or argued that the reason given by the appellants in the application filed before the High Court for non-appearance amounted to sufficient cause and the order of the High Court is erroneous on this aspect. As a result, even if we treat the order of the High Court deciding the appeal of the appellants on merits was not proper and proceed further by

substituting it with the order dismissing the said appeal in default, we do not find any reason to recall the order dismissing the appeal in default.”

16. Though the judgment produced by the learned counsel appearing for the petitioner/appellant in Civil Appeal No.5950 of 2012 is made clear that the first appellate Court namely the III Additional District Judge, have no right to pass orders in the appeal on merits. The appellants are absented. Since the Hon'ble Supreme Court in the appeal made clear that the Sub-rule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate Court to dismiss the appeal on merits, where the appellant remained absent or left unrepresented on the day fixed for hearing the appeal. The reason for introduction of such an explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate Court that there was sufficient cause for non-appearance. Such an opportunity is lost, if the Courts decide the appeal on merits in the absence of the counsel for the appellant.

17. This case is squarely applicable in the present case, since the petitioners/appellants had given the proper reason for their non-

appearance. The learned III Additional District Judge, Pondicherry has also stated in para 7 and 8 in the order in I.A.No.3 of 2011 that though several adjournments were given to the appellants 1 and 2, but they were not chosen to appear, the order was passed on merits, since in para-8 of the order in I.A.No.3 of 2011, the learned III Additional District Judge, Pondicherry, stated that on 27.01.2009, the written argument was filed on the side of the respondent. Even, after filing the written argument on the side of the respondent, there is no representation from the appellant side and posted the appeal on 28.01.2009. Since there was no representation from the appellants, the appeal was posted for judgment on 29.01.2009. Accordingly, on 29.01.2009, the judgment was passed in A.S.No.185 of 2006.

18. Therefore, from the above averments in para-8 in the order made in I.A.No.3 of 2011, it is made clear that these appellants 1 and 2, who are the original appellants in I.A.No.185 of 2006 were not appear before the Court and the case was disposed on merits, by the learned III Additional District Judge, Pondicherry and hence the order was totally wrong as per the order passed by the Hon'ble Apex Court in Civil Appeal No.5950 of 2012. Since if the appeal was passed on merits, an opportunity should be given to the appellants to convince

the appellate Court, but the same was taken away by the learned First Appellate Court, this was total violation of the principles of natural justice. Even if the appellants were absented, the Court has no right to pass orders in the appeal on merits. But the Court should have dismissed the appeal only on default, since the provision also made clear. The Rule 17(1) of Order 41 CPC is very clear that where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may take an order that the appeal be dismissed, but proviso very categorically held that the First Appellate Court does not empowering to dismiss the appeal on merits. The Hon'ble Apex Court also held that in the above judgment in Civil Appeal No.5950 of 2012 that the provision also does not postulate a situation where, the appeal has to be decided on merits, because possibility of allowing of the appeal is also there, if the appellant has a good case on merits, even if no body had appeared for the appellant. Therefore, the very order passed by the learned Judge in dismissing the application filed by the petitioners/appellants in I.A.No.3 of 2011 to set aside the order dated 29.01.2010 and to restore the appeal on file so as to enable the petitioners to defend their case in A.S.No.185 of 2006.

19. Therefore, to give an opportunity to the petitioners/ appellants, this Court warranting interference in the order passed in I.A.No.3 of 2011 in A.S.No.185 of 2006, dated 09.03.2012, on the file of the learned III Additional District Judge, Pondicherry, and the same is to be set aside the order passed in I.A.No.3 of 2011, and to restore the appeal on file to decide the same on merits by giving fair opportunity to both the parties.

20. In the result:

(a) the civil revision petition is allowed by setting aside the order passed in I.A.No.3 of 2011 in A.S.No.185 of 2006, dated 09.03.2012, on the file of the learned III Additional District Judge, Pondicherry;

(b) the learned III Additional District Judge, Pondicherry, has directed to take up the Appeal without giving any adjournments to either parties and to dispose of the Appeal on merits within a period of two months from the date of receipt of a copy of this order. Both the parties are hereby directed to give their fullest co-operation for

early disposal of the Appeal in A.S.No.185 of 2006. No costs. Consequently, connected miscellaneous petition is closed.

17.08.2017

Index:Yes
Speaking Order

vs

To

The III Additional District Judge,
Puducherry.



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M.V.MURALIDARAN, J.

VS



**Pre-Delivery order made in
CRP(NPD)No.2120 of 2012
and
M.P.No.1 of 2012**

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