

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.11.2018

CORAM

THE HONOURABLE MR.JUSTICE M.S.RAMESH

Civil Revision Petition (PD) No.3129 of 2018 and
C.M.P.No.17998 of 2018

Dhanalakshmi (died)

1. Ms.Vasanthi
2. Mr.Ravikumar
3. Mr.Karunakaran
4. Mr.Giridharan
5. Mr.S.Baskaran

... Petitioners

..vs..

1. Mrs.Sulochana
2. Mr.Ganapathi
3. Mrs.Chitra
4. Mrs.Veni
5. Mrs.Meera
- Alamelu Ammal (died)
- Ramalingam (died)
6. Mr.Athimoolam
7. Mr.Thanigachalam
8. Mr.Chinna Kutty @ Nagan
9. Mrs.Mallika
10. Mrs.Kanmani
11. Mr.Raman
12. Mr.Lakshmanan
- Mythili (died)
- 13.Ms.Sangeetha

... Respondents

Prayer :- Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal Order dated 04.08.2018 in I.A.No.03 of 2018 in unnumbered A.S.No.Nill of 2008 in O.S.No.75 of 2007 on the file of the

Principal District Judge, Dharmapuri.

For Petitioners : Mr.R.Manickavel

For Respondents : Mr.P.Valliappan – R1-R5

No appearance – R6 - 13

ORDER

The Order under challenge is rejection of the application filed under section 5 of the Limitation Act to condone the delay of 531 days in filing an appeal against the decree and judgment dated 22.06.2016 passed in O.S.No.75 of 2007.

2. The Court below had come to the conclusion that the appeal itself is not maintainable and the remedy available to the petitioner is only in preferring Civil Miscellaneous Appeal or reviewing the Order passed in I.A.3 of 2018 in O.S.No.75 of 2007. While holding so, the Court below had relied upon the judgment of the Honourable Supreme Court reported in **AIR 1956 Patna 28 [Rajeshwar Prasad Singh Vs. Ambika Prasad Singh]**.

3. The learned counsel for the petitioner submitted that the reasoning of the Court below in coming to the conclusion that the appeal itself is not maintainable is opposed to law. In so far as the maintainability of the appeal is concerned, the law has been settled in **2002 Supreme Court Cases**

561[P.Krian Kumar Vs. A.S.Khadar and others] wherein it has been held that even after dismissal of the set aside application, the petitioners will have statutory right of first appeal against the ex parte decree under section 96 (2) of Code of Civil Procedure. As such it cannot be said that the appeal itself is not maintainable against the ex parte decree. In any case such appeal could be subject to the Law of Limitation.

4. The only ground on which the trial Court had proceeded to reject the application is that the appeal itself is not maintainable and therefore, had not gone into the reasoning given by the petitioner in his application seeking condonation of delay of 531 days in preferring the appeal.

5. The relevant portion of the judgment reported in **2002 Supreme Court Cases 561[P.Krian Kumar Vs. A.S.Khadar and others]** reads as follows :

“11. The only contention raised on behalf of the appellant is that on a true interpretation of the explanation to Order IX Rule 13, CPC the application for setting aside the ex-parte decree must be held to be incompetent in view of the dismissal of the appeal filed by respondent No.2. It was urged that even if the appeal was dismissed on the ground of limitation, the application under Order IX Rule 13 for setting aside the ex parte award would not be maintainable. Order IX Rule 13, CPC reads as under:

ORDER IX RULE 13, CPC "Setting Aside decree ex parte against defendant : In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient to appear and answer the plaintiff's claim.] [Explanation Where there has been an appeal against a decree passed ex-parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree]."

12. Explanation was added to Order IX Rule 13 with effect from February 1, 1977 by the Code of [Civil Procedure \(Amendment Act, 1976\)](#). Prior to its enactment a defendant burdened by an ex parte decree could apply under Order IX

Rule 13 for setting aside the ex parte decree. He could also file an appeal under [Section 96](#) against the ex parte decree. The mere fact of filing the appeal did not take away the jurisdiction to entertain and dispose of an application for setting aside an ex parte decree. Only in the cases in which the trial court decree merged with the order of the appellant court by reversal, confirmation or varying it, the trial court was precluded from setting aside the ex parte decree. Where the trial court decree did not merge with the appellate court order the trial court was at liberty to proceed with the application for setting aside the ex-parte decree. Such instances arose when the appeal was dismissed in default or where it was dismissed as having abated by reasons of omission by the appellant to implead the legal representatives of a deceased respondent or where it was dismissed as barred by limitation. Explanation was added to discourage the two pronged attacks on the decree i.e. by preferring an application to the trial court under Order IX Rule 13 for setting aside the decree and by filing an appeal to the superior court against it. The legislative attempt incorporating the Explanation to Order IX Rule 13 is to confine the defendant, to either one of the remedies made available to him and not both. Dismissal of the appeal on any ground, apart from its withdrawal constituted a bar on the jurisdiction of the trial court to set aside the ex-parte decree. With the introduction of the explanation, no application to set aside the ex-parte decree would be maintainable where the defendant filed an appeal and the appeal was disposed of on any ground, other than the ground that the appeal have been withdrawn by the appellant.

13. The scope of explanation to Order IX Rule 13 was considered by this Court in [Rani Choudhury vs. Lt. Col. Suraj Jit Choudhury](#) [1982 (2) SCC 596]. In the said case, the wife who had filed the appeal in this court had obtained an ex-parte decree of divorce against her husband in the matrimonial court. Husband had preferred an appeal in the high court alongwith an application under [section 5](#) of the Limitation Act for condonation of delay in filing the appeal. The High Court dismissed the appeal as time barred. Respondent then moved an application under Order IX Rule 13, CPC for setting aside the ex parte decree. The matrimonial court dismissed the application on the ground that sufficient cause was not shown for condoning the delay. In appeal, however, the High Court took the view that explanation to Order IX Rule 13, CPC did not create any bar to the maintainability of the application under that rule as the appeal against the ex parte decree had not been dismissed on merits, but on the ground of delay. By not accepting the application for condonation of delay meant as if no appeal had been preferred. This Court allowed the appeal and set aside the judgment and order of the High Court. The main judgment was written by R.S.Pathak,J. It was held:

"The Code of Civil Procedure (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply under Rule 13 of Order 9 for setting aside an ex parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to effacing

it. It obliged the defendant to decide whether he would prefer or have the decree set aside by the trial court under Rule 13 of Order 9. The legislative attempt incorporated in the Explanation was to discourage a two-pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground, he was denied the right to apply under Rule 13 of Order 9. The disposal of the appeal on any ground, whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation."

6. The aforesaid observation of the Honourable Apex Court is self explanatory. As such, the statutory right of an appeal under section 96(2) of Code of Civil Procedure would be available to the unsuccessful petitioner, even after the dismissal of the set aside application. Since the Court below had not ventured to discuss about the reasoning given by the petitioner herein with regard to the delay, it would be appropriate to remand back the matter for fresh consideration of the reasons assigned in the application for the delay and as to whether such reasoning can be termed as sufficient cause.

7. In view of the above observation of this Court that an appeal against the ex parte decree is maintainable, the Order of the Court below dated 04.08.2018 passed in I.A.No.03 of 2018 in A.S.No.Nil of 2018 in O.S.No.75 of 2007 is set aside and consequently, the matter is remanded back to the learned

Principal District Judge, Dharmapuri for fresh consideration. The learned Principal Judge shall also endeavour to complete the proceedings in I.A.No.3 of 2018 in the unnumbered appeal within a period of 60 days after giving due opportunity to both sides.

8. Accordingly, this Civil Revision Petition is disposed of. Consequently, the connected miscellaneous petition is closed. No cost.

26.11.2018

vrc

Index: Yes

Speaking order

To

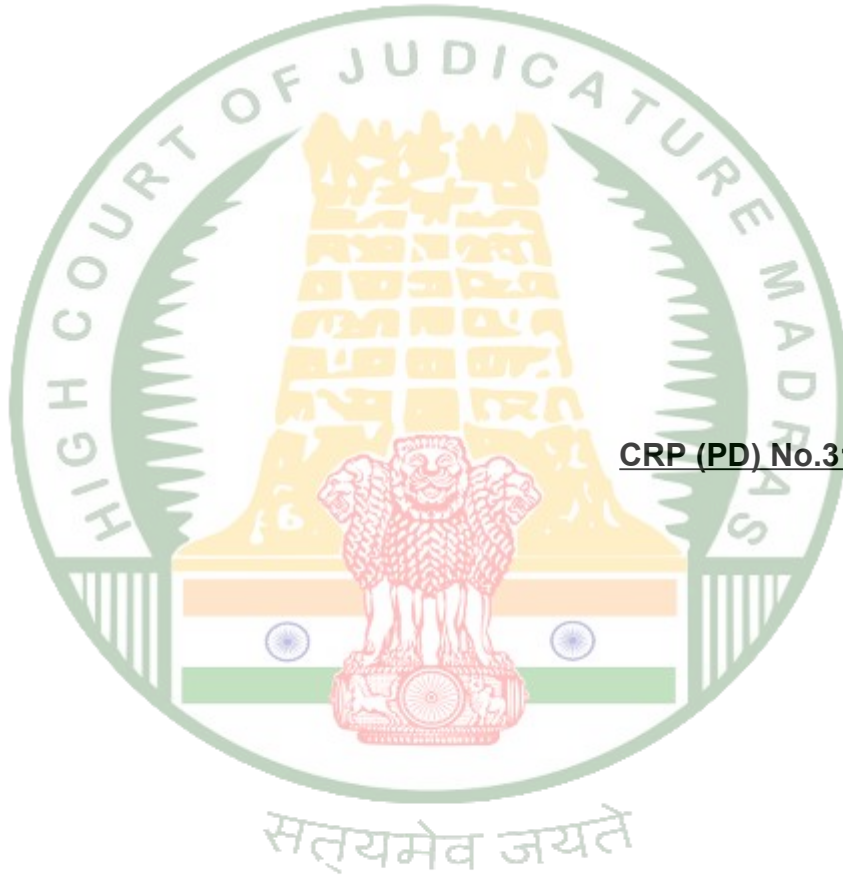
The Principal District Judge,
Dharmapuri.



WEB COPY

M.S.RAMESH, J.

vrc



CRP (PD) No.3129 of 2018

WEB COPY

26.11.2018