



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 11.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.R.P. (PD) (MD) No.1928 of 2017
and C.M.P. (MD) No.9913 of 2017

Ayesha Bi (Died)

1. Anwar Sheriff
2. Sultan Sheriff
3. Ibrahim Sheriff
4. Basheer Sheriff
5. Dawood Sheriff
6. Sameem

... Petitioners 1 to 6/Defendants 2 to 7

-vs-

A.Jhan Bi

... Respondent/Plaintiff

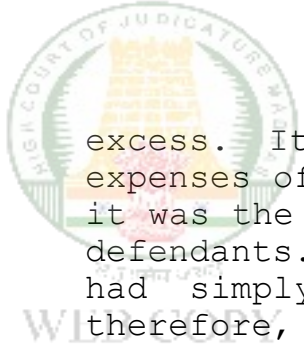
Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India praying to set aside the judgment and decree dated 17.09.2004 against O.S.No.91 of 1997 on the file of the learned District Munsif Court, Trichy and allow the same by allowing this Civil Revision Petition.

For Petitioners : Mr.K.Baalasundharam
For Respondent : Mr.A.Haja Mohideen

O R D E R

The Revision Petitioners are the defendants 2 to 7 in O.S.No.91 of 1997 on the file of the learned District Munsif Court, Trichy and in the suit, the plaintiff / respondent herein sought for partition of the suit schedule property declaration, etc. The suit was decreed exparte on 17.09.2004 in favour of the plaintiff, pursuant to non appearance of the defendants before the Trial Court, against which, they have filed the present petition for setting aside the judgment and decree dated 17.09.2004.

2. It is the case of the revision petitioners that the plaintiff is the daughter of the deceased Ayesha Bi and other defendants are the sons of the said Ayesha Bi. Their father had died on 31.01.1975 and the plaintiff got married in the year 1983. It is the further case of the petitioners that out of the whole property, the plaintiff's share was restricted only to 14/192 shares and therefore, the value claimed by the plaintiff is bolstered up and



excess. It is further stated that the amount borrowed towards expenses of the marriage of the plaintiff was not yet discharged and it was the duty cast upon the plaintiff to repay the tax paid by the defendants. The Trial Court, without considering all these aspects, had simply decreed the suit in favour of the plaintiff and therefore, the said judgment and decree needs to be reversed and is liable to be set aside.

3. Learned counsel for the petitioners has relied upon the following judgments in support of his contention that because the defendants remain exparte in the suit, Court cannot pass a judgment without giving any reasons.

i) ***C.N.Ramappa Gowda vs. C.C.Chandregowda (Dead) by L.Rs. and another, reported in 2013 (4) CTC 865;***

"16. As a consequence of the aforesaid analysis and the reasons recorded hereinabove, we are of the view that the High Court was legally justified in setting aside the judgement and decree of the trial court and allowing the appeal to the limited extent of remanding the matter to the trial court for a de-novo trial after permitting the defendant-respondent to file the written statement. The appeal consequently stands dismissed. However, we are conscious of the fact that the Plaintiff/Appellant for no fault on his part has been forced to entangle himself in the appeal before the High Court as Respondent giving rise to an appeal before this Court, although the Defendant/Respondent had leisurely failed to file written statement in spite of numerous opportunities to file the same and also had failed to cross-examine the plaintiff witnesses, but once the decree for partition of half share was passed in favour of the Plaintiff/Appellant, the Defendant/Respondent promptly challenged the same by filing an appeal before the High Court. Since the disposal of the suit for partition has now been dragged into a protracted retrial of the suit, we consider it legally just and appropriate to balance the scales of equity and fairplay by awarding a sum of rupees twenty five thousand by way of a token cost to the Plaintiff/Appellant to be paid by the Defendant /Respondent expeditiously as the impugned order of the High court directing retrial shall be given effect to only thereafter.

17. The appeal thus stands dismissed subject to the payment of cost by the Defendant/Respondent to the Plaintiff/Appellant."



ii) ***N.Maheswari vs. Mariappan and others, reported in 2013***
(2) CTC 388;

"10.I am in entire agreement with the submissions made by the learned counsel appearing for the revision petitioner that this is an extraordinary case, in which, this Court has to exercise its power under Article 227 of the Constitution of India, as for the first time, I have come across such a judgment that has been passed by the trial Court in O.S.No.3 of 2002. I am appalled and disgusted with the way the trial Court disposed off the suit and though I would like to say more, judicial restraint requires this Court from saying much more without giving notice to the presiding officer.

11.Obviously, the trial Court knows that the suit itself has not been pressed against the defendant No.2 and it is the first defendant who was set ex-parte, which means, no decree could be passed against the second defendant and the suit is to be treated as dismissed in so far as the second defendant is concerned. In so far as the defendant No.1 is concerned, even though he remained ex-parte, a duty is cast upon the trial Court to frame necessary issues and to give a judgment on the basis of the evidence adduced by answering those issues. The Court cannot simply pass a judgment and decree as prayed for without giving any reasons, just because the defendant remained ex-parte. In fact, the onus is more on the part of the trial Court when defendant / defendants remain ex-parte, as the trial Court has to go through the plaintiff's evidence, his claim, etc. to find out whether the plaintiff has proved his case. Merely because there is no contest, as the defendant does not appear, it does not mean that the plaintiff has proved his case in entirety. In so far as the case in hand is concerned, it is a typical example of mis-carriage of justice as the trial Court after framing three issues, did not discuss anything with regard to those issues by evaluating the evidence and simply decreed the suit in a slip-shod manner, that too, against the second defendant also when the plaintiff himself admits that he has not pressed the suit against the second defendant.

12.When such a judgment has been passed by the trial Court, this Court cannot close its eyes and direct the revision petitioner to go to the Appellate Court when the judgment and decree is apparently on the face of it illegal. Hence, I have no hesitation in exercising the



powers under Article 227 of the Constitution of India in interfering with the judgment passed by the trial Court and the same is set aside as illegal and opposed to the provisions of C.P.C.

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13. In the result, the Civil Revision Petition is allowed and O.S.No.3 of 2002 is dismissed in so far as the second defendant / the third respondent herein is concerned, as the matter has reached its finality as against the second defendant / third respondent herein. In so far as the first defendant is concerned, the matter is to be remanded to the trial Court to pass a judgment after adducing evidence and answering the three issues framed by the trial Court. As already observed by me, just because the first defendant remained ex-parte, it does not mean that the plaintiff has proved his case as against the first defendant. Therefore, the trial Court has to re-consider the claim of the plaintiff against the first defendant on the basis of the evidence adduced and after deciding the issues framed by the trial Court.

14. In the result, the Civil Revision Petition is allowed and O.S.No.3 of 2002 is remanded for fresh consideration in so far as the first defendant / second respondent herein is concerned. In so far as the second defendant is concerned, as the plaintiff / first respondent herein himself has not pressed the suit against him, the same is dismissed against the second defendant / third respondent herein. No costs."

iii) ***K.Balakrishnan vs. S.Dhanasekar, reported in 2018 (2) CTC 859;***

"24 Therefore, in the light of the decisions of the Hon'ble Supreme court as well as the decision of the Division Bench of this court reported in 2011(3) L.W. 80 (supra), while passing the exparte judgment, the trial court has not satisfied the requirement under Section 2 (9) of C.P.C. The trial court has passed a cryptic and unreasoned judgment in granting exparte decree in favour of the plaintiff.

25 Therefore, this court is of the view that the judgment and decree passed by the trial court in O.S.No.24 of 2012 are not in consonance with the provisions of the Code of Civil Procedure and also the principles laid down by the Hon'ble Supreme Court as well as this Court. Hence, there is an error apparent in the judgment of the trial court in O.S.No.24 of 2012 on the file of I Additional District Munsif, Salem and the



same is liable to be set aside. The lower appellate Court also without considering the aforesaid provisions and settled principles of law, has dismissed the appeal. Therefore, the judgment and decree passed by the lower appellate Court is also set aside. Therefore, the questions of law as framed in the present Second Appeal are answered in favour of the appellant/ defendant. It is made clear that the Second Appeal decided in favour of the appellant only in respect of passing of ex parte judgment in the suit.

26 In view of the above, the Second Appeal is allowed. The judgment and decree passed in O.S.No.24 of 2012 on the file of I Additional District Munsif, Salem is hereby set aside. Consequently, judgment and decree passed in A.S.No.52 of 2013 by the II Additional Sub Court, Salem confirming the judgment and decree passed by the trial court in O.S.No.24 of 2012 is also set aside and remanded to the trial court to pass a reasoned judgment after considering the oral and documentary evidence placed on record. No costs. Consequently, connected miscellaneous petition is closed."

iv) **Meenakshisundaram Textiles vs. Valliammal Textiles Ltd., reported in 2011 (3) CTC 168;**

"19. Their Lordships L.Sandreson, C.J., J.Woodroffe and A.Mookerjee, JJ in the case of J.B.Ross v. C.R.Scriven, ILR 43 Cal.1001, while considering Order IX Rule 6, observed as follows:-

"19. Under Order IX, Rule 6, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then if it is proved that the summons was duly served the Court may proceed ex parte, "Proceed ex parte" means "proceed to take and determine evidence" and "this is what the summons in the suit says. The summons does not say that on failure to appear the plaintiff is entitled to a judgment by default, but on the defendant's failure to appear the case will be heard and determined ex parte, that is, in his absence by the taking of evidence."

In Amrit Nath v. Roy Dhunput, 1871 (15) WR 503, it has been observed as follows:

"Mere absence of the defendant does not of itself justify the presumption that the plaintiffs case is true. The Court has no jurisdiction to pass ex parte decree without any evidence being given by or on behalf



of the plaintiff and the provision of Order VIII Rule 10 apply only when the Court has required the defendant to file a written statement."

20. It is also relevant to point out that under Section 96(2) of the Code of Civil Procedure, an appeal may lie from an original decree passed ex parte. Two remedies are available to an aggrieved person to question the ex parte decree. One is that he may file an application to set aside the ex parte decree as provided under Order IX Rule 13 of Code of Civil Procedure. In such event, the Court which passed the judgment and decree will have to consider the reasons for setting aside such judgment and decree, which may be more or less the explanation as to the failure of non-appearance. The other remedy is that he may prefer an appeal under Section 96(2) and in such event, the appellate Court should necessarily go into the merits and find out whether the decree could be set aside or not. In case an appeal is laid, in the absence of reasons in the judgment, the appellate Court has to necessarily remand the case to the trial Court for fresh consideration. For that reason, the judgment should contain the reasons and should be in conformity with the provisions of Section 2(9) read with Order XX Rule 4 of the Code of Civil Procedure.

21. From the above discussions, it is manifestly clear that even a judgment rendered ex parte and a decree is drawn on the basis of that judgment, it is appealable. In case that judgment and decree become final without there being any appeal, the decree is executable. In that sense, there is no difference between a judgment and decree and an ex parte judgment and decree. In view of the above, in the event the defendant is set ex parte, the Court should be extra careful in such case and it should consider the pleadings and evidence and arrive at a finding as to whether the plaintiff has made out a case for a decree. In this context, it may also be mentioned that though a detailed judgment is required in a contested matter, an ex parte judgment should show the application of the minimum requirement of consideration of the pleadings, issues, evidence and the relief sought for rendering such judgment.

22. If the above law is kept in mind, in our opinion, the judgment and decree dated 8.7.2009 passed by the Court below in O.S.No.16 of 2005 are not in



conformity with the provisions of the Code of Civil Procedure and are liable to be set aside. For the same reason, the order and decretal order dated 26.8.2010 in I.A.No.1776 of 2009 in O.S.No.16 of 2005 passed by the Court below are also liable to be set aside. Accordingly, the order and decretal order challenged in this appeal are set aside and the suit in O.S.No.16 of 2005 is restored to file. Since the suit is of the year 2005, the learned trial Judge is directed to complete the recording of evidence by the end of April, 2011 and pronounce the judgment before 15th of June, 2011. Both the learned counsel for the appellant and the respondent have agreed to co-operate with the trial Judge for pronouncement of the judgment within the stipulated time. The civil miscellaneous appeal is allowed with the aforesaid observations and directions. Consequently, M.P.No.1 of 2010 is closed. No costs."

4. Learned counsel for the petitioners, after elaborate argument and discussions, has fairly submitted that the revision petitioners have filed a separate suit in O.S.No.154 of 2017 on the file of the learned District Munsif, Trichy, seeking to declare the decree and judgment made in O.S.No.91 of 1997 as non-est in law, unenforceable and null and void and therefore, they may be given liberty to pursue the said suit.

5. In view of the above submission,

a) this Civil Revision Petition is dismissed, by granting liberty to the petitioners to pursue with the suit filed by them in O.S.No.154 of 2017 before the learned District Munsif, Trichy;

b) the learned District Munsif, Trichy is directed to dispose of the suit in O.S.No.154 of 2017 within a period of three months from the date of receipt of a copy of this order, by conducting the trial on day-to-day basis without giving any unnecessary adjournments to either parties and both the parties are directed to give their fullest cooperation for early disposal of the suit within the time stipulated by this Court as above.

No costs. Consequently, connected Miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar (CS-III)



To:

1. The District Munsif,
Trichy.

2. The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC To MR.K.BAALASUNDHARAM, Advocate SR. NO. 72483

+1 CC To MR.A.HAJA MOHIDEEN, Advocate SR. NO. 72322

C.R.P. (PD) (MD) No.1928 of 2017

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