

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.01.2019

CORAM

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

S. A.No.15 of 2013

Bhavani Weavers Cooperative
Production and Sales Society Ltd.,
No.E.H. 29, Rep.by its Special Officer,
Bhavani, Bhavani Taluk,
Erode District. Appellant/Appellant/Defendant

Vs.

Geetha Respondent/Respondent/Plaintiff

Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree dated 24.07.2012 made in A.S.No.17 of 2011 on the file of the Sub Court Bhavani confirming the judgment and decree dated 30.03.2011 made in O.S.No.310 of 2006 on the file of the Principal District Munsif Court, Bhavani by allowing this Second Appeal.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.N.L.Rajah
Senior Counsel for MR. E.Jayasankar

JUDGMENT

Challenge in this second appeal is made by the defendant against the judgment and decree dated 24.07.2012 made in A.S.No.17 of 2011 on the file of the Sub Court, Bhavani, confirming the judgment and decree dated 30.03.2011 made in O.S.No.310 of 2006 on the file of the Principal District Munsif Court, Bhavani.

2. The suit has been laid by the plaintiff for permanent injunction and for cost.

3. For the sake of convenience, the parties herein shall be referred to as per the rank assigned in the suit.

4. Heard both sides.

5. The learned counsel appearing for the appellant/defendant submitted that the First Appellate Court by passing the judgment and decree had dismissed the appeal in the absence of the appellant, which is contrary to the provisions of Order 41 Rule 17 CPC, which reads as follows:-

" 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 make 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.

(2) Hearing appeal ex parte - Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte".

6. The learned counsel, therefore, submitted that as per the Order 41 Rule 17 of Civil Procedure Code (CPC), the First Appellate Court cannot decide the matter on merits in the absence of the appellant and even specific bar is there to pass an exparte order under Order 41 Rule 17, which clearly prohibits the First Appellate Court to decide the matter on merits. Whereas, in the present case, in the absence of the appellant, the First Appellate Court decided the appeal on merits. Since the First Appellate Court decided the appeal on merits, the appellant herein preferred the second appeal without any option. He further submitted that if the First Appellate Court dismissed the appeal for non-appearance of the parties, in that case, the present appellant would have filed an application under Order 41 Rule 19 of CPC for the purpose of readmission of the appeal. But, in the present case, the appellant lost such an opportunity to file application under Order 41 Rule 19 of CPC. In spite of the specific bar in the Order 41 Rule 17 of CPC, the First Appellate Court proceeded to decide the Appeal on merits, which is totally against law, and therefore, he prays to set aside the judgment and decree passed by the First Appellate Court. In support of his contention, he relied upon the following judgments reported in 2008(2) CTC 391 in the case of Thankayyan Vs Edwin Shaji, wherein, it is held as follows:-

" 13. The appellant filed an Application to set aside the ex parte judgment and decree dated 07.12.2006 in A.S.No.125 of 2005 before the First Appellate Court in I.A.No.156 of 2007 along with an Application in I.A.No.155 of 2007 to condone the delay of 95 days in

filing the Application to set aside the judgment and decree in A.S.No.125 of 2005. The learned Appellate Judge, without adverting to the provisions of Order 41, Rule 21 of the Code of Civil Procedure, which permits an Application at the instance of the respondent to rehear the Appeal which was decided ex parte passed a mechanical order. As per the said provision, if the respondent satisfied the Court that the notice was not duly served on him or that he was prevented by sufficient cause from appearing when the Appeal was called on for hearing, the Court shall rehear the Appeal on such terms as to costs or otherwise as it thinks fit to impose upon him. The provision in Order 41, Rule 21 of the Code of Civil Procedure is intended to come to the rescue of a respondent, who was prevented by sufficient cause from appearing during the hearing of the Appeal and when such an Application is filed, the Court is enjoined to deal with the same on merits. The learned Subordinate Judge, without appreciation the provision in Order 41, Rule 21 of the Code of Civil Procedure, passed a mechanical order that there is no right to file the Application before the said Court, as there is no Appeal pending before the Court and rejected the Application as per order dated 26.04.2007 and the said order is extracted below:

"Petition filed under Order 41, Rule 21 and Section 151 of CPC to set aside the decree in A.S.No.125 of 2005.

2. Records perused. There is no Appeal pending before this Court. Already the Appeal was disposed of. The petitioner has no right to file this petition before this Court. Hence in the interest of justice the petition is dismissed. No costs".

14. By dismissing the application, the learned Subordinate Judge really caused prejudice to the present appellant. The provisions of Order 41, Rule 21 of the Code

of Civil Procedure is extracted below, for better appreciation:

"21.Re-hearing on Application of respondent against whom ex parte decree made: Where an Appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the Appeal; and, if he satisfied the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the Appeal was called on for hearing, the Court shall re-hear the Appeal on such terms as to costs or otherwise as it thinks fit to impose upon him".

(ii) Yet another judgment of the Hon'ble Supreme Court, in the case of Ghanshyam Dass Gupta Vs Makhan Lal reported in (2012) 8 SCC 745, it is held as follows:-

"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".

7. The learned counsel further reiterated that, if the First Appellate Court dismissed the appeal on account of non appearance of the appellant, the appellant would have obviously got the right to file an application under Order 41 Rule 19 of CPC to seek for its restoration. But, since the First Appellate Court proceeded to dismiss the Appeal by deciding on merits, in the absence of the appellant, the appellant has lost the opportunity to file Application seeking for restoration. Therefore, the learned counsel contended that the principles laid down in the above judgments squarely applicable to the present case and hence, prays for setting the judgment and decree passed by the First Appellate Court.

8. On the other hand, the learned Senior Counsel appearing for the respondent fairly admitted that the First Appellate Court passed the judgment and decree on merits, in the absence of both the appellant and the respondent, which is totally against the provisions contemplated under Order 41 Rule 17 CPC.

However, he strongly contended that the appellant is bound to explain the reason for his non appearance before the First Appellate Court and even atleast before this Court and the appellant has not given any valid reason for their non appearance before the First Appellate Court at the time of final hearing. Therefore, he stated that the appellant has to file separate application under Order 41 Rule 21 of CPC before the lower Court to explain the reason for non appearance before the First Appellate Court at the time of final hearing. In this regard, the learned Senior Counsel relied upon the following decisions of the Hon'ble Supreme Court i) in the case of Harbans Peshad Jaiswal Vs Urmila devi Jaiswal reported in (2014) 5 SCC 723 and ii) in the case of Abdur Rahman and others Vs Athifa Begum and others reported in (1996) 6 SCC 62.

9. He further submitted that according to the above judgments, the appellant has to explain the reason for non appearance before the lower Court at the time of final hearing by way of filing appropriate application. He, therefore, insists this Court to issue direction to the appellant to file appropriate application before the First Appellate Court explaining the reason for non appearance.

10. In reply to the aforesaid submission of the learned Senior Counsel for the respondent, the learned counsel for the appellant submitted that the judgment and decree passed by the First Appellate Court is on merits. Since the First Appellate Court decided the matter on merits in the absence of the appellant, which is totally against the provisions of Order 41 Rule 17 of CPC, this appellant has preferred the present appeal to set aside the same. Had the First Appellate Court dismissed the appeal on the ground of non-prosecution, without going into the merits, then, the appellant would have had an opportunity to file an appropriate application under Order 41 Rule 19 CPC to set aside the exparte order by providing sufficient reason for non appearance. But, in the present case, no such situation arose to explain the reason for non appearance before the First Appellate Court. As indicated above, since the First Appellate Court passed the judgment and decree on merits and not on default, the question of filing of separate application before the First Appellate Court explaining the reason for non appearance by invoking the provision of Order 41 Rule 21 of Civil Procedure Code does not arise and the remedy left open to the appellant is to approach this Court by way of a Second Appeal seeking to set aside the judgment and decree passed by the First Appellate Court, which the appellant has rightly done.

11. Heard the arguments on both sides and perused the records.

12. Both the learned counsel for the appellant and the learned Senior Counsel for the respondent fairly admitted the fact that the First Appellate Court should not have proceeded to decide the Appeal on merits in the absence of the appellant, which is against the provisions of Order 41 Rule 17 CPC. Therefore, both the learned counsels fairly conceded to set aside the judgment and decree passed by the First Appellate Court, which is pronounced in the absence of the appellant. There is no issue on this point. Therefore, the substantial question of law framed by this Court at the time of admission of the Second Appeal, viz., Whether the lower appellate Court has committed an error in dismissing the appeal on merit in the absence of representation on behalf of the appellant much against the mandate provided in Order 41 Rule 17(1) of the Civil Procedure Code?, is answered in favour of the appellant, in view of the admission of the learned counsel on both sides.

15. Now, the issues that have to be decided in this Appeal is i) whether the appellant has to file a separate application to explain the reason for their non appearance before the First Appellate Court at the time of hearing the First Appeal and this issue will arise only when the appeal was dismissed for default. But no such situation has come into play in the present case, because, the First Appellate Court had not dismissed the appeal for default on account of non appearance of the appellant but dismissed the same by deciding on merits in the absence of the appellant. The First Appellate Court should not have gone into merits of the appeal and dismissed the same in the absence of the appellant, which is totally against the provisions of Order 41 Rule 17 of CPC.

16. The learned Senior Counsel for the respondent referred to the judgment of the Hon'ble Supreme Court in the case of Harbans Peshad Jaiswal Vs Urmila devi Jaiswal (cited supra). In the said case, it is seen that the respondent filed a suit, wherein, the Trial Court decreed the suit in respect of B Schedule property and dismissed the same with regard to A schedule property. Challenging the said judgment of the trial Court both the appellant and the respondent preferred two appeals before the High Court of Andhra Pradesh. The Andhra Pradesh High Court decided both the appeals together on merits, (which was in the absence of the appellant), whereby, the Appeal filed by the respondent was allowed and the appellant was dismissed. Challenging the dismissal of the appeal on account of non prosecution as well the judgment and decree granted in favour of the respondent in the Appeal filed by the respondent, the appellant preferred two Civil Appeals. In the said judgment, the Hon'ble Supreme Court held that the course of deciding the appeals filed by the two rival parties in the absence of either of the parties was available to the High Court

as sub-rule (2) of Rule 17 Order 41 categorically permits it. Consequently, the Hon'ble Supreme Court dismissed both the appeals by holding that they did not find any reason to recall the appeal filed by the appellant which dismissed for default, since the appellant failed to provide sufficient reason for non appearance, which was rightly taken note of by the High Court of Andhra Pradesh while dismissing the Appeal filed by the respondent.

17. Though the learned Senior Counsel for the respondent relied upon the aforesaid decision of the Hon'ble Supreme Court in support of his contention that the judgment passed by the First Appellate Court in the absence of the appellant was not interfered by the Hon'ble Apex Court, this Court would like to point out that it was only due to the reason that the Hon'ble Supreme Court found that the First Appellate Court heard the appeal filed by the plaintiff therein as well on merits while dismissing the appellant's/defendant's appeal. Further, this Court would like to point out the principle laid down by the Hon'ble Supreme Court in the aforesaid decision is, when the appeal was dismissed on merits in the absence of the appellant counsel, it is liable to be set aside and the said principle alone is squarely applicable to the present case also and not the judgment rendered thereunder, as, the said decision of the Hon'ble Supreme Court was passed taking into consideration of the facts of the case, which is entirely different to the facts of the present case.

18. Thus, as rightly pointed out by the learned counsel for the appellant there is no need to file any separate application under Order 41 Rule 19 to explain the reason for non appearance before the First Appellate Court and only remedy available to the appellant is to file the second appeal challenging the judgment and decree passed by the First Appellate Court, which was decided/dismissed on merits without hearing the appellant, and the appellant had done so rightly. Hence, this Court is of the view that the judgment and decree of the First Appellate Court was hit by Order 41 Rule 17 CPC. Therefore, I am inclined to set aside the impugned judgment and decree of the First Appellate Court, which is contrary to the provisions of Order 41 Rule 17 of CPC. Further, in the case on hand, the question of filing application under Order 41 Rule 17 does not arise, as no such situation arose for moving such application before the First Appellate Court on account of the fact that the appeal was not dismissed due to default, but decided, dismissed on merits and has been put to challenge under this appeal.

19. In the result, the Second Appeal is allowed and the judgment and decree passed by the First Appellate Court is set aside and the matter is remanded back to the First Appellate Court for adjudication on merits after giving opportunity to

both the parties and shall complete the same within a period of three months from the date of receipt of a copy of this judgment. No costs.

Sd/-
Assistant Registrar(CS-VIII)

//True copy//

Sub Assistant Registrar

dpq

To

1. The Sub Court, Bhavani

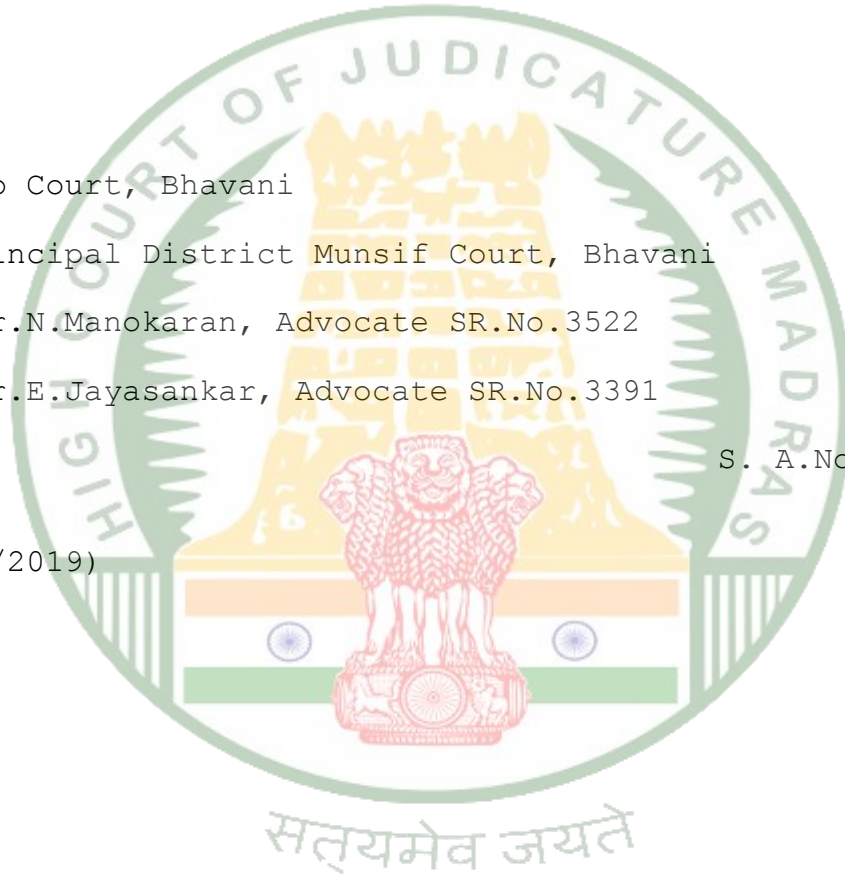
2. The Principal District Munsif Court, Bhavani

+1cc to Mr.N.Manokaran, Advocate SR.No.3522

+1cc to Mr.E.Jayasankar, Advocate SR.No.3391

S. A.No.15 of 2013

GJ(CO)
GMY(01/04/2019)



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