

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.03.2020

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

C.R.P.(PD) No.2065 of 2016 and
CMP.No.10754 of 2016

V.Raghupathi

... Petitioner

vs.

1. Thamarai Selvi

2. G.Karthik

3. Minor G.Velmurugan

... Respondents

Civil Revision Petition filed under Article 227 of Constitution of India against the Fair and Decretal Order dated 20.04.2016 made in I.A.No.100 of 2015 in I.A.No.135 of 2013 in O.S.No.145 of 2012 on the file of the learned Sub Court, Sankari.

For Petitioners

:

Mr.N.Manokaran

For Respondents

:

Mr.V.V.Sairam

ORDER

This Civil Revision Petition has been filed against the order dated 20.04.2016 made in I.A.No.100 of 2015 in I.A.No.135 of 2013 in O.S.No.145 of 2012 on the file of the Sub Court, Sankari.

2. The suit in O.S.No.70 of 2012 was filed by the respondents seeking for the relief of partition and permanent injunction. Pending suit, an application in I.A.No.135 of 2013 was filed by the petitioner seeking to remove the name of the first plaintiff from the plaint, since she is a minor and the said application was allowed vide order dated 18.06.2014. As the Plaintiffs did not appear to contest the suit, an exparte decree has been passed on

18.06.2014 in O.S.No.145 of 2012. In order to restore the suit, another application in I.A.No.100 of 2015 was filed by the respondents herein under Order 9 Rule 13 and Section 151 Civil Procedure Code. The Court below vide order dated 20.04.2016 allowed the Application on payment of a cost of Rs.1,000/- (Rupees One Thousand only) to the petitioner herein. Challenging the same, the present Civil Revision Petition has been filed.

3. The contention of the learned counsel for the petitioner is that Order 9 Rule 9 of the Civil Procedure Code may not be applicable to the facts of the case. It is the further contention of the petitioner that the respondents have filed the suit by describing the first plaintiff as major. Hence, the petitioner herein, on earlier occasion, had filed I.A.No.135 of 2013 to remove her name from the Plaint, which was allowed on 18.06.2014 and consequently, the suit was dismissed on 18.06.2014 and therefore it cannot be taken on file under Order 9 Rule 9 of Civil Procedure Code.

4. The contention of Mr.V.V.Sairam, learned counsel appearing for the respondents is that the Lower Court has rightly recalled the exparte order dated 18.06.2014 by imposing costs of Rs.1,000/- (Rupees One Thousand Only), as no decision was rendered on merits and only an exparte decree has been passed and therefore, the very same Court has got powers to recall its order. It was further contended that if the order (though exparte) has been passed touching upon the merits of the matter, then the remedy of appeal lies .

5. In reply, the learned counsel for the petitioner submitted that

admittedly, the plaintiffs did not appear before the Trial Court and therefore, the suit was dismissed for default. It goes without saying that once the suit was decreed, the only remedy for the respondents herein is to file an appeal under Order 32 Rule 1 of Civil Procedure Code. The learned counsel for the petitioner would draw the attention of this Court to the decision of this Court in the case of *P.Kumaran and another Versus V.Ramaswami and Others* reported in (2015) 4 MLJ 146. Paragraph 20 of the said Judgment is extracted hereunder:

"20.From the reading of the dictum laid down in the above judgments, it could be seen that there is a clear distinction between the dismissal of the suit for default of appearance and decision dismissing the suit for other kinds of default. If the suit is dismissed for default of appearance of the plaintiff, the application to set aside filed under Order 9 can be entertained. In the instant case, the suit was dismissed not on the reason for default of appearance of the plaintiffs. The suit was dismissed by the learned Single Judge for non-filing of the proof affidavit by the plaintiff as directed by the First Bench of this Court within a stipulated time. Therefore, the nature of order passed by the Court will fall within the ambit of deciding the suit in terms of language of Order 17 Rule 3 of C.P.C. Since the order of dismissal dated 07.11.2014 is not based on the non-appearance of the plaintiffs, but based on the other kind of default, namely, non-filing of proof affidavit as directed by the First Bench of this Court, the submission made by the learned counsel for the applicants/plaintiffs that the order passed by the learned Single Judge has to be construed as if the order has been passed adopting any one of the modes under Order IX of C.P.C, cannot be accepted. Therefore, the application filed by the applicants/plaintiffs to set aside the order of dismissal dated 07.11.2014 under Order IX Rule 7 of C.P.C. is not maintainable. The proper remedy for the applicants/plaintiffs is only to file an appeal as against the order of dismissal of the suit dated 07.11.2014. Hence, the present application is liable to be dismissed. "

6. The learned counsel for the petitioners also relied upon the

Judgment of the Apex Court in the case of **Rasiklal Manickchand Dhariwal and Another Vs. M.S.S.Food Products** reported in (2012) 2 MLJ 595 (SC).

Paragraphs 34 and 35 are extracted hereunder:

"34. The contention, at the first blush, appears to be attractive but has no substance at all. In the first place, once the hearing of the suit is concluded; and the suit is closed for judgment, Order IX Rule 7 of the Code has no application at all. The very language of Order IX Rule 7 makes this clear. This provision pre-supposes the suit having been adjourned for hearing. The courts, time out of number, have said that adjournment for the purposes of pronouncing judgment is no adjournment of the "hearing of the suit". On March 17, 2005, the trial court in the present case did four things, namely, (i) closed the evidence of the plaintiff as was requested by the plaintiff; (ii) ordered the suit to proceed ex parte as defendants failed to appear on that date; (iii) heard the arguments of the Advocate for the plaintiff; and (iv) kept the matter for pronouncement of judgment on March 28, 2005. In view of the above, Order IX Rule 7 of the Code has no application at all and it is for this reason that the application made by the defendants under this provision was rejected by the trial court.

35. Secondly, once the suit is closed for pronouncement of judgment, there is no question of further proceedings in the suit. Merely, because the defendants continued to make application after application and the trial court heard those applications, it cannot be said that such appearance by the defendants is covered by the expression "appeared on the day fixed for his appearance" occurring in Order IX Rule 7 of the Code and thereby entitling them to address the court on the merits of the case. The judgment of Bombay High Court in Radhabai Bhaskar Sakharām⁶ on which reliance has been placed by the learned senior counsel for the appellants, does not support the legal position canvassed by him. Rather in Radhabai Bhaskar Sakharām⁶, the Division Bench of the Bombay High Court held that if a party did not appear before the suit was heard, then he had no right to be heard. This is clear from the following statement in the judgment :

".....Until a suit is actually called on, a party is entitled to appear and defend. It may be that he is guilty of delay and if that is the case he may be mulcted in costs. But if he does not appear

before the suit is heard, then he has no right to be heard....."

(Emphasis supplied)

7. Heard the learned counsel appearing on either side and perused the materials available on record.

8. The main plea urged by the learned counsel appearing for the respondents is that unless or otherwise the Judgment and Decree is passed on merits, the very same court has got powers to recall its order. It was further argued that in case the suit was specifically posted for the appearance of either the plaintiff or the defendant and they failed to appear, then there is every justification for the Trial Court to proceed with the matter on merits, as if the party is present and documents available, in the absence of which, the Court has got power to recall its order. However, in the present case, the suit was merely dismissed for default without discussing the merits of the matter.

9. Though the argument put forth by the learned counsel for the respondents appears to be sound at the first blush, the provisions of Civil Procedure code is otherwise and do not extend its helping hand to the respondents. Once Judgment and Decree has been passed against the plaintiffs, the remedy lies only by way of an Appeal under Order 32 Rule 1 of Civil Procedure Code and very same Court has no powers to recall its order. Once the suit is dismissed, it is open to the respondents herein to prefer an Appeal.

S.VAIDYANATHAN, J

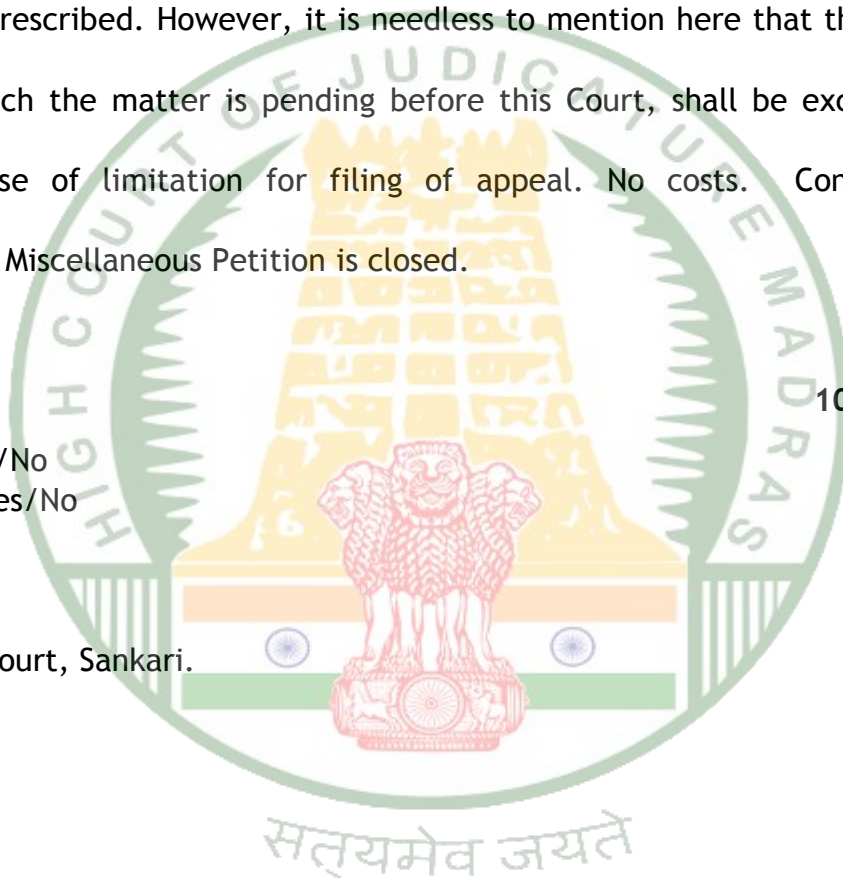
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10. In fine, finding force in the contention of the learned counsel for the petitioner, this Civil Revision Petition is allowed and the order dated 20.04.2016 in I.A.No.100 of 2015 in I.A.No.135 of 2013 in O.S.No.145 of 2012 is set aside. It is open to the respondent to file an appeal, if so advised, within the time prescribed. However, it is needless to mention here that the period, during which the matter is pending before this Court, shall be excluded for the purpose of limitation for filing of appeal. No costs. Consequently connected Miscellaneous Petition is closed.

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To:

The Sub Court, Sankari.



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