

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.09 .2020

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

C.R.P (PD).No.4226 of 2018
and C.M.P.No.23194 of 2018

RAJA SIR ANNAMALAI CHETTIAR TRUST,
Represented by its hereditary Trustee,
Dr.A.C.Muthaiah
Adayar House, Kotturpuram,
Chennai.

...Petitioner

-Vs-

K.Mahadevan

... Respondent

Prayer:

Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the order dated 28.09.2018 made in I.A.No.283 of 2018 in O.S.No.120 of 2010 on the file of the Additional District Munsif Court, Chidambaram.

For Petitioner : Mr.R.Srinivas for
Mr.S.Sithirai Anandam

For Respondent : Mr.R.Rajaramani

ORDER

This revision is at the instance of the plaintiff in O.S.No.120 of 2010 against an order made in I.A.No.283 of 2018 which is an application filed under Order IX Rule 13 of the Code of Civil Procedure, to set aside the exparte decree passed in the said suit.

2. The suit is one for ejectment and recovery of arrears of rent. The suit has had a chequered progress. It appears that there was an order setting the defendant exparte and the same was set aside and thereafter the suit proceeded for trial. The plaintiff's witness was examined and cross examined. Since the defendant did not chose to let in evidence, the trial Court passed an exparte decree on 09.02.2018. The very next day that is on 10.02.2018, the defendant filed an application to have the exparte decree set aside.

3. The learned trial Judge upon being convinced about the reasons assigned for the absence on 09.02.2018, allowed the application and set aside the exparte decree. Aggrieved by the same, the plaintiff has come up with this Civil Revision petition.

4. The reason given for the absence on 09.02.2018 is that an application was filed to decide the maintainability of the suit as the preliminary issue and the suit was posted on 05.02.2018 for further evidence of the plaintiff, the plaintiff's counsel had made an endorsement that there is no further evidence on the side of the plaintiff. It is stated that the defendant happened to be in Chennai and to his surprise he came to know that the suit was adjourned to 06.02.2018 for defendant's evidence and it was posted on 07.02.2018, on which date, he was set exparte and the suit was posted for Judgment on 09.02.2018. The diary extract for the hearing on 07.02.2018 was reflected in the net only at about 6 pm. Since his counsel happens to be from Chennai, he could not make arrangement for his counsel to be at Chidhambaram, the very next day.

5. This application was resisted by the petitioner / plaintiff contending that there was an earlier default on the part of the petitioner and the suit was decreed exparte on 07.12.2016, that exparte decree was set aside and thereafter the suit was adjourned for various reasons and the cross examination of PW1 was completed on 13.12.2017. An application

was filed by the plaintiff seeking to recall PW1 and those applications were allowed on 21.12.2017. PW1 was recalled and Exs.A9 to A13 were marked. The suit was adjourned for cross examination of PW1 on 29.01.2018, 01.02.2018 and 05.02.2018. The Cross examination of PW1 was completed. Therefore, the defendant has been delaying the proceedings in the suit.

6. The trial Court accepted the reasons assigned for the absence on 09.02.2018 and allowed the application. It will be pertinent to point out that no plea was taken in the counter filed by the plaintiff / petitioner that the decree is one on merits and not an ex parte decree.

6. In the revision, Mr.R.Srinivas, learned counsel appearing on behalf of Mr. Mr.S.Sithirai Anandam, for the petitioner would contend that the Judgment rendered on 09.02.2018 is one on merits and has been passed by the trial Court, invoking the explanation to Order XVII Rule 2 of the Code of Civil Procedure.

7. I am unable to countenance the said claim of the counsel for the petitioner. Order XVII Rule 2 of the Code of Civil Procedure reads as

follows:

“Procedure if parties fail to appear on day fixed:

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other orders as it thinks fit.”

Explanation:- Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

8. A bare reading of the provision would show that a mandate of the Code is to proceed *exparte* against a party who is absent. Only in exceptional circumstances envisaged by the explanation, a Court is empowered to proceed on merits even in the absence of a party. A reading of the explanation would show that if the evidence or substantial portion of the evidence of a party has already been recorded and such party fails to appear, the Court is empowered to proceed with the suit on merits, despite such non appearance. The essential prerequisite to enable the Court to proceed on merits, *dehors* the absence of a party is that the

evidence of the party who is absent, should be on record. In this case, it is clear that the evidence of the defendant has not been recorded. PW1 was examined and he was cross examined in full. No witness was examined on the side of the defendant nor was any evidence produced on the side of the defendant. In such situation, the Court had no option to proceed exparte. The Court has also proceeded exparte, the Court has not disposed of the matter on merits. In fact the Judgment rendered by the Court on 09.02.2018 clearly states that the defendant has been set exparte. Therefore, it is not a Judgment rendered by the Court, invoking the explanation to Order XVII Rule 2 of Code of Civil Procedure.

9. Mr.R.Srinivas, learned counsel appearing for the petitioner would however vehemently argue that if a party had been given a chance to produce his evidence and he fails to produce, then the Court is entitled to proceed on merits. I do not think such an argument could be accepted. When the provisions in the code are clear that the Court can proceed on merits only under given circumstances, the Court shall not proceed on merits if the requirements of the rule are not satisfied. It is always open to the Court to proceed exparte and conclude the proceedings.

10. In view of the above, I do not think the argument of the learned counsel for the petitioner could be accepted. The revision itself, in my opinion, is a wasteful exercise which has delayed the progress of the suit by almost two and half years at the instance of plaintiff itself. The plaintiff has failed to realise that discretion is better part of valour. Hence the revision fails and it is accordingly dismissed. No costs. Consequently, connected miscellaneous petition is closed.

08.09.2020

Index : No
Speaking order
vum

To
The Additional District Munsif Court, Chidambaram.

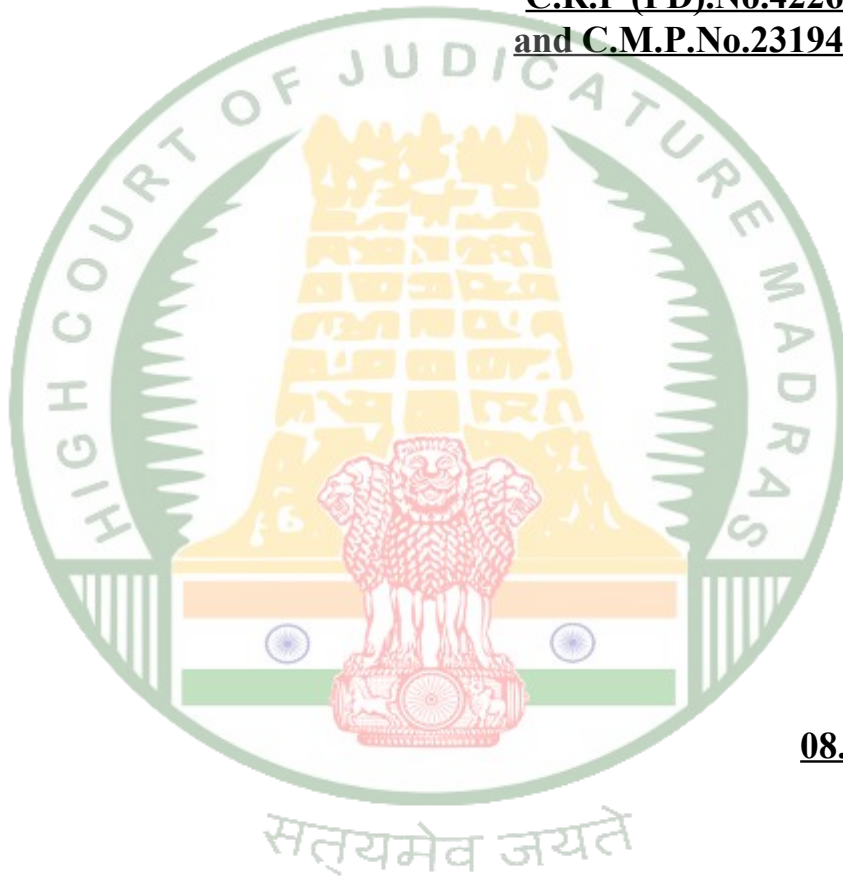
R.SUBRAMANIAN, J.

WEB COPY

vum

C.R.P (PD).No.4226 of 2018

C.R.P (PD).No.4226 of 2018
and C.M.P.No.23194 of 2018



08.09.2020

WEB COPY