



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.02.2020

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

C.R.P. (NPD) (MD)Nos.2298 to 2301 of 2010

1.K.Bakthavasalam(died)
2.K.Rajasekharan
3.Lekshmi Bai
4.Siva Anantha Krishnan
5.Pradeepa ... Petitioners in all petitions

(Petitioners 3 to 5 brought on record as Lrs of the deceased
1st Petitioner vide court order dated 06.08.2018 in CMP
4009 to 4012 of 2018)

vs.

1.M.Kalipillai
2.K.Sarojini ..Respondents in C.R.P. (MD)No.2298/10
1.Hemalathakumari
2.K.Sarojini ..Respondents in C.R.P. (MD)No.2299/10
1.Krishnakumari
2.K.Hemalathakumari
3.P.Radha Bai
4.K.Sarojini ..Respondents in C.R.P. (MD)No.2300/10
1.M.Kalipillai
2.Hemalathakumari ..Respondents in C.R.P. (MD)No.2301/10

COMMON PRAYER: These Civil Revision Petitions filed under Section 115 of the Civil Procedure Code, against the fair and decreetal order dated 03.08.2009 made in unnumbered CFSR Nos.9, 10, 8 and 15 of 2008 in A.S.Nos.174, 171, 178 and 167 of 2004, respectively on the file of the Principal District Judge, Kanyakumari at Nagercoil.

For Petitioner	: Mr.P.Thiyagarajan (in all petitions)
For R1	: Mr.A.Arumugam for M/s.Ajmal Associates
For R2	: No Appearance (Respondents in C.R.P. (MD) Nos.2298 & 2299/10)
For R2	: Mr.A.Arumugam for M/s.Ajmal Associates
For RR1, 3 & 4	: No Appearance (Respondents in C.R.P. (MD) No.2300/2010)
For R1 and R2	: Mr.A.Arumugam for M/s.Ajmal Associates (Respondents in C.R.P. (MD)No.2301/2010)



COMMON ORDER

These Civil Revision Petitions have been filed by the appellants in A.S.Nos.167, 171, 174 and 178 of 2004 against the orders rejecting applications filed by the appellants to rehear the appeals under Order 41 Rule 19 of the Civil Procedure Code.

2. These applications have been rejected even without numbering on the ground that the judgment, dated 27.11.2007 made in those appeals is one on merits and an application for rehearing will not lie. The action of the learned District Judge in dismissing the applications for rehearing without numbering stems out of ignorance of the provisions of Civil Procedure Code regarding rehearing of an appeal.

3. Order 41 Rule 16 of the Civil Procedure Code confers right on the appellant to begin arguments in the appeal. Order 41 Rule 17, which deals with consequences of non appearance of the appellant, reads as follows:-

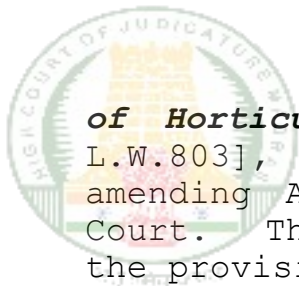
"...17.Dismissal of appeal for appellant's default:- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

*[Explanation-Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.]
....."*

4. Explanation was inserted by Act 104 of 1976 with effect from 01.02.1977. A reading of the provisions would clearly show that duty is cast upon the appellate Court to dismiss the appeal for default, if the appellant does not appear. The very fact that the Sub Rule 2 of the Order 41 Rule 17 empowers the appellate Court to hear the appeal exparte, where the appellant appears and the respondent does not appear, would clearly demonstrate that the intendment of the legislature was to denude the appellate Court of the power to dismiss the appeal on merits in the absence of the appellant or the appellant's counsel.

5. Perusal of the papers also shows that the appellants' counsel reported 'no instructions' on the date, when the appeals were called on for hearing. Therefore, the appellate Court ought not to have proceeded to this pore of the appeals on merits. Even if the said judgment is pronounced on merits, it should be taken as a judgment on default.

6. The learned counsel for the petitioners would rely upon the judgment of the Hon'ble Supreme Court in **The Secretary, Department**
<https://hcservices.ecourts.gov.in/hcservices/>



of Horticulture, Chandigarh and another Vs. Raghu Raj [2009-1-L.W.803], wherein the effect of the explanation inserted by the amending Act 104 of 1976 was considered by the Hon'ble Supreme Court. The Hon'ble Supreme Court after considering the effect of the provisions had held as follows:-

WEB COPY

".....44.It is true that in the instant case, the appeal before the High Court was not an appeal from Original Decree (First Appeal), but an Appeal from Appellate Decree (Second Appeal). But Rule 1 of Order XLII which deals with Appeals from Appellate Decrees (Second Appeals) lays down procedure and expressly states that the Rules of order XLI shall apply so far as may be to Appeals from Appellate Decrees. Prima facie, therefore, it appears that once an appeal is admitted and is placed for hearing i.e., hearing on merits, it can be dismissed for default by cannot be decided on merits in absence of appellant (or his advocate).

45.In view of the fact, however, that in our opinion, on the facts in their entirety, the High Court ought not to have proceeded to decide the appeal, we hold that the impugned order of the High Court is liable to be set aside. In view of this conclusion, we clarify that we may not be understood to have expressed final opinion one way or the other as regards interpretation of Rule 17 of Order XLI read with Rule 1 of Order XLII.

....."

7. In view of the above decision of the Hon'ble Supreme Court, I am of the opinion that the orders of the lower appellate Court rejecting applications for rehearing will have to be set aside and they are accordingly, set aside. The lower appellate Court is directed to number the applications filed in C.F.S.R.Nos.8, 9, 10 and 15 of 2008 in A.S.Nos.167, 171, 174 and 178 of 2004 respectively and dispose of the same on merits without being influenced in any manner by the observations made in this order. Resultantly, these Civil Revision Petitions are allowed, however, in circumstances, without costs.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)



To

The Principal District Judge,
Kanyakumari at Nagercoil

COPY TO

The Section Officer, VR Section,
Madurai Bench of Madras High Court, Madurai (2 copies)

+1 CC to Mr.P.THIYAGARAJAN, Advocate (SR-6522[F] dated 14/02/2020)

+1 CC to M/s.AJMAL ASSOCIATES, Advocate (SR-6847[F] dated
18/02/2020)

C.R.P. (NPD) (MD) Nos. 2298 to 2301 of 2010
14.02.2020

VB(16.03.2020) 4P 6C