



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.03.2022

Coram

The Hon'ble Mr. Justice **C.V.KARTHIKEYAN**

C.R.P.NPD.No.4051 of 2018

1.Kanniyappan
2.Neelakandan

... Petitioners/Plaintiffs

Vs.

1.Kuppi Reddy (Died)
2.Mohanammal
3.Chandrakumar
4.K.Balaji
5.Geethanjali
6.Asha Latha
7.K.Sujatha

... Respondent / Defendant

Respondent 2 to 7 brought on record as LR's
of the deceased R1 viz., Kuppi Reddy vide
Court order dated 09.02.2022 made in CMP.
No.12491, 12492 & 12486 of 2021 in
CRP.No.4051 of 2018.

Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order in I.A.No.298 of 2017 in O.S.No.248 of 2009 dated 11.08.2018 passed by the District Munsif Court, Katpadi.

For Petitioner

..

Mr.Murugamanickam,
Senior Counsel
for Mr.B.Sundarapandiyan



R1 .. Died
For R2 to R7 .. Mr.R.Krishnaswamy

ORDER

This Civil Revision Petition has been filed questioning the order dated 11.08.2018 in I.A.No.298 of 2017 passed by the District Munsif Katpadi in Vellore District, which Interlocutory Application had been filed by the plaintiffs in O.S.No.248 of 2009. The said suit in O.S.No.248 of 2009 had been filed by the revision petitioners herein seeking declaration of title over the suit property and for mandatory injunction against the defendant.

2.A perusal of the records show that it was originally filed before the District Munsif Court, Walajabad and the same had been transferred to the District Munsif Court at Katpadi.

3.I am informed that written statement had also been filed in the said suit. Issues had been framed. Parties were invited to adduce evidence. The 2nd plaintiff was examined as PW-1 and had grazed the witness box and tendered evidence and his evidence was recorded. During the course of evidence, he marked Exs.A1, A2 and A3 and also Exs.C1 and C2. The defendant did not appear and therefore, was set ex-



parte. The plaintiffs also did not appear subsequently either to subject themselves for cross-examination or to let in further evidence. Therefore, a judgment was passed on 30.11.2011.

4. In the said judgment, the learned District Munsif, Katpadi had stated the facts and also that the Commissioner had inspected the property and had also filed Exs.C1 to C2 and that the plaintiffs were also examined and that documents were also marked, but then proceeded to dismiss the suit. After much time, I.A.No.298 of 2017 came to be filed by the plaintiffs, seeking to condone delay of 2056 days in filing the application to restore the suit, which was dismissed according to him for default on 30.11.2011. A counter was filed in the said application. An order was passed on 11.08.2018, dismissing the said application. That particular order is questioned in this present Civil Revision Petition.

5.The learned Senior Counsel appearing on behalf of the revision petitioners pointed out the judgment passed and stated that the said judgment cannot qualify as a judgment under Order 20 Rule 4 CPC. The learned Senior Counsel, took the Court through the order which is now challenged in this revision petition and pointed out that the focus of the learned District Munsif, Katpadi, was to justify the judgment on the ground that it was a judgment passed taking advantage of explanation to



Rule 2 of Order 17 CPC and since the evidence of the plaintiffs was available and since the plaintiffs did not appear, the Court, had therefore, proceeded to pass an order on merits. But, it should be kept in mind that the defendant had already been set exparte. Therefore, the judgment cannot be one on merits, but only an exparte judgment. Even in a exparte judgment, the conditions under Order 20 Rule 4 CPC will have to be necessarily be applied. This would indicate that since written statement had been filed, issues will have to be framed and it is necessary to answer the issues during the course of judgment.

6.Unfortunately, even though PW-1 was examined and Exs.A1 to A3 were marked and Exs.C1 and C2 were also marked, there is no reference to those documents in the judgment even though in the body of the judgment, the learned District Munsif, Katpadi had referred about the report of the Advocate Commissioner.

7.Be that as it may, the issues which are canvassed by the learned counsel for the respondent is that, this being a judgment according to the learned counsel under explanation to Rule 2 of Order 17 CPC the proper approach would have been to file an appeal against the judgment. The suit cannot be restored, since the suit had attained finality by the passing of judgment and an appealable judgment had been passed and the



judgment and decree should be challenged only by filing an appeal under

Order 41 CPC.

8. In this connection, learned counsel for the respondent relied on **(2003) 5 SCC 641, B. Janakiramaiah Chetty v. A.K. Parthasarathi and Others**, wherein the Hon'ble Supreme Court had considered explanation to Rule 2 of Order 17 CPC and in a suit for recovery of money, where written statement was also filed by the defendant and where issues had also been framed, the Hon'ble Supreme Court had held as follows:

“7. In order to determine whether the remedy under Order 9 is lost or not what is necessary to be seen is whether in the first instance the Court had resorted to the Explanation of Rule 2.

8. The Explanation permits the court in its discretion to proceed with a case where substantial portion of 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. As the provision itself shows, discretionary power given to the court is to be exercised in a given circumstance. For application of the provision, the court has to satisfy itself that: (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c)



the day is one to which the hearing of the suit is adjourned. Rule 2 permits the court to adopt any of the modes provided in Order 9 or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the rule, conferring discretion on the court to act under the specified circumstance i.e. where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the court may in its discretion deem as if such party was present. Under Order 9 Rule 3 the court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6 and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are “proceed with the case”. Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the court or not.



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9. In Rule 2, the expression used is “make such order as it thinks fit”, as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the only course open to the court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the rule. While Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the court to decide the suit forthwith. The basic distinction between the two rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the court. The power conferred



is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

10. The crucial expression in the Explanation is “where the evidence or a substantial portion of the evidence of a party”. There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The court while acting under the Explanation may proceed with the case if that prima facie is the position. The court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision.

9. The learned counsel for the respondent also relied on **(2019) 11**



Muthukumarasamy Permanent Fund Limited and Another, wherein again the Hon'ble Supreme Court had examined the implications of the explanation to Rule 2 of Order 17 CPC and had also examined the application under Order 9 Rule 6(1)(a) and Order 9 Rule 13 CPC and had observed as follows:

“24. In other words, if the plaintiff had remained absent and was found to have led evidence, the Court could have invoked its powers under Explanation to Order 17 Rule 2 of the Code treating the plaintiff as “present” for passing appropriate orders. Such is, however, not the case here.

25. Similarly, in converse situation, if the defendants had remained absent (as has happened in this case) on that date and if it would have noticed that they had adduced the evidence either fully or substantially prior to the date on which they were proceeded ex parte, the Court could have invoked its powers under Explanation to Order 17 Rule 2 of the Code treating the defendants as “present” on that day for passing appropriate orders in the suit. Such is, however, again not the case here.

26. We are, therefore, of the view that since the defendants were proceeded ex parte and were found not to have led any evidence in the suit, the Court could only proceed under Order 17 Rule 3(b) read



with Order 17 Rule 2 of the Code for disposal of the suit by taking recourse to one of the modes directed in that behalf by Order 9 of the Code or could have made any other order as it thinks fit.

27. As mentioned above, the trial court did proceed to hear the suit ex parte by taking recourse to Order 9 Rule 6(a) in terms of Order 17 Rule 2 of the Code because on that day, the plaintiff was present when the suit was called on for hearing whereas the defendants were absent despite service of summons and accordingly the trial court passed the preliminary decree. Such decree, in our opinion, was an “ex parte decree” within the meaning of Order 9 Rule 6(a) read with Order 9 Rule 13 of the Code and, therefore, could be set aside under Order 9 Rule 13 on making out a sufficient ground by the defendants.”

10. In that particular case, it was found that the plaintiff had remained absent, but had let in evidence and the Hon'ble Supreme Court held that the Court should have invoked the powers under the explanation to Rule 2 of Order 17 CPC and should have treated the plaintiff as being present for passing appropriate orders in the suit. It was also stated that the Trial Court did not proceed to hear the suit exparte by taking recourse



was absent. A preliminary decree was passed. It was opined that such decree was an ex-parte decree, within the meaning of Order 9 Rule 6(a) read with Order 9 Rule 13 of CPC.

11. In the instant case, as observed by me earlier, the defendant was absent. He had already been set ex-parte. The 2nd plaintiff had tendered evidence. Thereafter, when the judgment is passed, it would only be an ex-parte judgment. If the plaintiff had tendered evidence and had marked documents and was absent later either to present himself for cross-examination or for continuation of cross-examination, then the Court could treat the plaintiffs as being present and proceed further with examination of the defendant or note that the plaintiff had not come forward to subject himself for cross-examination. The Court had again an option, either to dismiss the suit for non-appearance of the plaintiff or permit the defendant to let in evidence and then proceed to pass a judgment on the basis of the available evidence. Substantial evidence would mean not just the evidence of the plaintiff, but evidence in full.

12. In the instant case, it should be kept in mind that the defendant was absent. Naturally, there was no defendant to controvert the case of the plaintiffs. This, I agree would not automatically mean that the suit



should be decreed. The Court has a right to examine the merits of the case, even if the defendant is ex-parte, but it has to be seen whether such judgment passed by the Court renders a suit to be restored for non-appearance of the plaintiffs or whether an appeal will have to be filed.

13. Here the judgment itself suffers, since the judgment does not conform to the stipulations under Order 20 Rule 4 CPC. Therefore, entering into further discussion, whether an appeal will have to be filed or the suit will have to be restored, itself becomes otiose, since the judgment is not in conformity with Rule 4 Order 20 CPC and cannot be considered as a judgment in the eyes of law. If the judgment is wiped out, then the suit will have to be restored back and the parties will have to be given an opportunity to present the case once again. Unfortunately, the reasons for the delay had not been addressed by the learned District Munsif, Katpadi.

14. I would therefore remand the matter back to examine the reasons given for delay of 2056 days. The observations made by me with respect to the judgment and the nature of the judgment are only to the limited purpose of passing this order in the Civil Revision Petition.



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15.Let the learned District Munsif, Katpadi, re-examine the reasons given to condone the delay and if required permit the parties to let in evidence and then pass an order on the reasons for delay.

16.With the above observations, the Civil Revision Petition is allowed. The order dated 11.08.2018 in I.A.No.298 of 2017 passed by the learned District Munsif, Katpadi, is set aside and the matter is remanded back to the Trial Court for fresh consideration of I.A.No.298 of 2017 in manner known to law.

16.03.2022

Internet:Yes/No

Index:Yes/No

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To

The District Munsif Court, Katpadi.



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C.V.KARTHIKEYAN,J.

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