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C.R.P. Nos.2207 and 2208 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 27.03.2023

Delivered On : 20.12.2023

Coram

THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

C.R.P.Nos.2207 and 2208 of 2021

and

C.M.P.Nos.16719, 16726 and 16729 of 2021

C.R.P.No.2207 of 2021

1.Sivasamy

2.Palanisamy

.. Petitioners/Respondents/Plaintiffs

Vs.

1.Sarasammal

2.Neelavathi

.. Respondents/Petitioners/2nd & 4th Defendants

Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the Fair and Decretal Order dated 12.02.2021 made in I.A.No.1612 of 2017 in O.S.No.191 of 2011 on the file of the learned District Munsif, Avinashi.

C.R.P.No.2208 of 2021

1.Sivasamy

2.Palanisamy

.. Petitioners/Respondents/Plaintiffs

Vs.

1.Karuppathal

2.Mani

.. Respondents/Petitioners/1st & 3rd Defendants



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Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the Fair and Decretal Order dated 12.02.2021 made in I.A.No.1614 of 2017 in O.S.No.191 of 2011 on the file of the learned District Munsif, Avinashi.

For Petitioners .. Mr.P.Kannan
in both cases

For Respondents .. Mr.V.Anandha Murthy
in both cases

COMMON ORDER

Both the Civil Revision Petitions had been filed seeking to set aside the Fair and Decretal Order dated 12.02.2021 made in I.A.Nos.1612 and 1614 of 2017 in O.S.No.191 of 2011 on the file of the learned District Munsif, Avinashi.

2. The learned Counsel for the Revision Petitioners submitted that the Revision Petitioners are the Plaintiffs in the suit in O.S.No.191 of 2011 on the file of the learned District Munsif, Avinashi. The Defendants had entered appearance and filed written statement, issues were framed and the Suit was posted for Trial. In the Trial, the second Plaintiff was examined as P.W-1. Exs.A-1 to A-18 were marked. Subsequently, it was repeatedly



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adjourned for cross examination. Since P.W-1 was not cross examined after grant of sufficient opportunities, the learned District Munsif, Avinashi had posted the case for further witness for the Plaintiffs. Accordingly, P.W-2 and P.W-3 were also examined in chief and posted for cross examination. Even after examination of P.W-2 and P.W-3, the case was repeatedly posted for cross examination. Ultimately on 16.09.2017 the case was posted for arguments. Still the Defendants did not file any Petition to set aside the *ex parte* Order. Thereafter, arguments heard and on merit the learned District Munsif, Avinashi had pronounced the Judgment on 10.10.2017. Subsequently, the Defendants 1 and 3 filed I.A.No.1614 of 2017 and Defendants 2 and 4 filed I.A.No.1612 of 2017 under Order IX Rule 7 of CPC. Order IX Rule 7 of CPC can be invoked only when the proceedings are pending before Court. The learned District Munsif had after hearing arguments, pronounced Judgment on merits on assessment of the evidence. Therefore, the Plaintiffs as Respondents in I.A.No.1612 of 2017 as well as I.A.No.1614 of 2017 had filed counter vehemently objecting to the Petition under Order IX, Rule 7 of CPC and also contending that since the Judgment was passed on merit, the Defendants have to prefer an Appeal under Order



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XVII, Rules 1 to 3 of CPC.

3. The learned District Munsif, Avinashi, ignoring the vehement objection of the Plaintiffs as Respondents in I.A.Nos.1612 and 1614 of 2017 had mechanically passed orders thereby setting aside the *ex parte* decree. Aggrieved by the orders passed in I.A.Nos.1612 and 1614 of 2017 the Plaintiffs had filed two Civil Revision Petitions in C.R.P.Nos.2207 and 2208 of 2021.

4. It is the contention of the learned Counsel for the Revision Petitioners that the order passed by the learned District Munsif, Avinashi, is not well reasoned order as per Order IX, Rule 7 of CPC and as per Order XVII, Rules 1 to 3 of CPC. Therefore, the Order passed by the learned District Munsif, Avinashi allowing the I.A.Nos.1612 & 1614 of 2017 are to be set aside. In support of his contention, the learned Counsel for the Revision Petitioners has placed reliance on the reported Ruling of the Hon'ble Supreme Court of India in **(2003) 5 SCC 641 [B.Janakiramaiah Chetty -vs- A.K.Parthasarathi and others]** and **(2019) 6 SCC 387**



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[Bhivchandra Shankar More -vs- Balu Gangaram More and others].

5. The learned Counsel for the Respondents Thiru.V.Anandha Murthy submitted his arguments. As per his submissions, the suit in O.S.No.191 of 2011 on the file of the learned District Munsif, Avinashi was filed by the Revision Petitioners for the relief of declaration of title to the suit properties and for permanent injunction against the Defendants. The Plaintiffs are related to the Defendants. After filing of the written statement, issues were framed and suit was proceeded for trial. The evidence of the Plaintiffs was recorded by the learned District Munsif, Avinashi. In spite of several chances, the Defendants did not cross-examine the Plaintiffs' witnesses. Therefore, the learned District Munsif, Avinashi, had decreed the suit *ex parte*. The Defendants filed Petition under Order 17, Rule 3 which was dismissed and the judgment was pronounced and *ex parte* decree granted. Subsequently, the Defendants 1 and 3 filed Petition I.A.No.1614 of 2017 in O.S.No.191 of 2011 seeking to set aside the *ex parte* decree stating that the Defendants were not granted opportunity to cross examine Plaintiffs witnesses. Also the Defendants were not granted



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opportunity to depose evidence. Under those circumstances, against the *ex parte* decree granted by the Court, the Defendants could not file any appeal. Therefore, the Petitions filed under Order IX, Rule 13 of CPC seeking to set aside the *ex parte* decree was allowed. The well reasoned order of the learned District Munsif, Avinashi, does not warrant any interference by this Court. These Civil Revision Petitions lack merits and are to be dismissed.

6.Also it is the contention of the learned Counsel for the Respondents that the Petition filed under Order IX, Rule 13 C.P.C. was allowed on payment of costs of Rs.3,000/-. Therefore, the Plaintiffs are in no way prejudiced. It is the further contention of the learned Counsel for the Respondents that the Plaintiffs and the Defendants belong to the same family. The Plaintiffs are the son of Subbiah Gounder. The first Defendant is the wife of the Subbiah Gounder. She had settled the property in favour of the Defendants. The second Defendant in the suit had executed settlement deed vide Document No.2177 of 2011 in respect of her $\frac{1}{4}$ share in favour of the fourth Defendant. The first Defendant executed settlement deed vide document No.2178 of 2011 in favour of the third Defendant.



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Therefore, the suit filed by the Revision Petitioners as Plaintiffs seeking declaration of title on the basis of an alleged Will executed by Subbiah Gounder based on which the Plaintiffs seeks declaration of title to the suit properties and restraining the Defendants from interfering with the peaceful possession and enjoyment of the property is not at all maintainable as the said Subbiah Gounder died intestate. The Will alleged to have executed by the father of the Plaintiffs is fabricated by the Plaintiffs which is not a *bona fide* Will. Therefore, the *ex parte* decree granted in favour of the Plaintiffs had caused miscarriage of justice to the Defendants 1 to 4. Therefore, they had filed Petitions seeking to set aside the decree and for the Court to pass a contested judgment based on cross examination of the witnesses of the Plaintiffs. It is the contention of the learned Counsel for the Defendants 1 to 4 the Respondents herein that the suit properties were enjoyed by the Plaintiffs and the Defendants 1 to 4 in common enjoyment. Therefore, the learned Counsel for the Respondents submitted that the well reasoned order of the learned District Munsif, Avinashi, allowing the *ex parte* decree petition seeking to set aside on imposing heavy cost of Rs.3000/- is justified it does not warrant any interference. Therefore, these Civil Revision



Petitions are to be dismissed as having no merits.

7. In support of his contention, the learned Counsel for the Respondents relied on the rulings of the Hon'ble Supreme Court in ***MANU/SC/0115/2019 [G.Ratna Raj (D) by L.Rs. -vs- Sri Muthukumarasamy Permanent Fund Ltd., and others]***.

8. Point for consideration:

Whether the order passed by the learned District Munsif, Avinashi, dated 12.02.2021 in I.A.Nos.1612 and 1614 of 2017 in O.S.No.191 of 2011 is to be set aside as perverse?

9. On consideration of the rival submissions and on perusal of the rulings relied by the learned Counsel for the Revision Petitioners and the Respondents and on perusal of the Plaintiffs' written statement, issues framed and the judgment pronounced by the learned District Munsif, Avinashi, it is found that the suit property was the property of Subbiah Gounder the father of the Plaintiffs 1 and 2 and the Defendants 2 to 4. The first Defendant is the wife of Subbiah Gounder. Therefore, as per the



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written statement filed by the Defendants 1 to 4, the suit property was in common enjoyment of the Plaintiffs and the Defendants. Whereas the Plaintiffs had stated in the plaint that the deceased Subbiah Gounder had executed a Will in favour of the Plaintiffs which is disputed by the Defendants. It is true that after evidence of the Plaintiffs was recorded and the suit was adjourned to several dates for cross examination of the Plaintiffs by the learned Counsel for the Defendants. Since the Defendants had not cross examined inspite of several chances, the Plaintiffs seeking relief under Order XVII, Rule 3 of CPC was dismissed by the learned District Munsif and the suit was decreed *ex parte*. The contention of the learned Counsel for the Revision Petitioners is that it is a well considered judgment on merit based on oral evidence of the Plaintiffs and the documents filed by the Plaintiffs. The suit having been decreed *ex parte* the learned District Munsif, Avinashi ought to have rejected the Petitions filed by the Defendants under Order IX, Rule 13 of CPC so that the Defendants ought to have filed appeal under Order XLIII of CPC is not found acceptable.



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10. On perusal of the order passed by the learned District Munsif, Avinashi, the introduction paragraph itself states that it is a petition filed under Order IX, Rule 13 C.P.C. Whereas it is the contention of the Plaintiffs that the judgment delivered by the learned District Munsif, Avinashi in the suit in O.S.No.191 of 2011 is based on appreciation of evidence and therefore, the petition under Order IX, Rule 7 C.P.C. is not maintainable. As per the Plaintiffs it is a petition filed by the Defendants under Order IX, Rule 7 C.P.C. Whereas in the introduction paragraph of the order, the learned District Munsif, Avinashi, had described the petition as the petition filed under Order IX, Rule 13 C.P.C. On perusal of the order it is found that the learned District Munsif, Avinashi, had considered the vehement objection of the learned Counsel for the Respondents in I.A.Nos.1612 and 1614 of 2017 (Plaintiffs in the suit) and stated that for complete adjudication *ex parte* decree is to be set aside. Under those circumstances, the contention of the learned Counsel for the Revision Petitioners that the learned District Munsif, Avinashi, ought to have rejected the petition under Order IX, Rule 13 C.P.C. so that the Defendants had to file an appeal against *ex parte* decree does not hold good in this case and



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had imposed heavy cost. Therefore, it is a well reasoned order which does not warrant any interference by this Court.

11. Only if the trial Judge rejects an application under Order IX, Rule 13 CPC setting out the reason for rejecting such an application, then the Defendants had to file appeal under Order XLIII of CPC. It is the discretion of the learned trial Judge on the facts and circumstances of each and every case whether the Petition under Order IX, Rule 13 CPC is to be allowed or is to be rejected or is to be dismissed. Here the Plaintiffs had sought declaration of title to the properties that was in common enjoyment and possession of the Plaintiffs and Defendants. The Plaintiffs had filed suit seeking exclusive title against the Defendants who are none other than the wife and daughters of Subbiah Gounder. Under those circumstances, the order passed by the learned trial Judge allowing the Petition under Order IX, Rule 13 CPC is found justified. He had exercised the discretion vested in him. The contention of the learned Counsel for the Revision Petitioners/Plaintiffs that the Petition under Order IX, Rule 13 CPC ought to have been dismissed or rejected stating that it is a well reasoned judgment



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based on appreciation of evidence. Therefore, the only remedy available to the Defendants is to file a regular appeal under Order XLIII of CPC cannot at all be accepted. The learned Judge had considered the subject matter of the suit and had arrived at a conclusion that it was not in the interest of the Defendants that an *ex parte* decree for declaration of title to the suit property was granted. Therefore, for full contested judgment he had rightly allowed the petition under Order IX, Rule 13 CPC. Also with imposing heavy cost. Therefore, it is a well reasoned order. The Defendants 1 to 4 had disputed the alleged Will executed by Subbiah Gounder in favour of the Plaintiffs 1 and 2. Also on perusal of the plaint averments it is found that the Plaintiffs claim that Subbiah Gounder executed a Will in favour of the Plaintiffs. At the same time, the Plaintiffs claimed in the plaint that Subbiah Gounder died intestate. In the written statement the Defendants had clearly disputed the Will and stated that the Plaintiffs themselves had stated Subbiah Gounder died intestate. Therefore, the Will relied on by the Plaintiffs had been disputed by the Defendants. Those are the subject matters to be considered based on evidence let in by both parties. Therefore, the contention of the learned Counsel for the Revision



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Petitioners that the learned trial Judge ought not to have allowed the Petition to set aside the *ex parte* decree cannot at all be accepted as the learned Judge had failed to exercise the discretion vested in him which warrants interference by this Court under Article 227 of the Constitution of India.

12. Reliance was placed by the learned Counsel for the Respondents in the reported rulings cited by the learned Counsel for the Revision Petitioners in **(2019) 6 SCC 387 [Bhivchandra Shankar More -vs- Balu Gangaram More and others]** which states that under Order IX, Rule 13 CPC the Defendant has to prove that the summons were not duly served on him. Also the Defendant has the right to file appeal only under those circumstances the Petition under Order IX, Rule 13 CPC is maintainable.

13. In the reported ruling of the Hon'ble Supreme Court in **(2003) 5 SCC 641 [B.Janakiramaiah Chetty -vs- A.K.Parthasarathi and others]** it is stated that Order IX, Rule 13 CPC for non appearance of the party on the date fixed and explanation to Order XVII, Rule 2 and Order XVII, Rule 3 of



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CPC had been explained. The power conferred on the Court is permissive and not mandatory. In case of failure of the party to appear on the date of hearing, the Court has discretion to proceed with the case on being *prima facie* satisfied on the facts of the case that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit the Court must record its satisfaction. In the absence of any indication as to what evidence was valued and/or whether merits were tested, decree passed by the Court is in the nature of an *ex parte* decree and hence liable to be set aside under Order IX, Rule 13 CPC. In the said judgment, it has been observed that the power conferred on the trial Court under Order XVII, Rule 2 of CPC 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 order as it thinks fit. In that under explanation it is stated 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 date 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. Under Rule 3 it is stated as



follows:

“3. Court may proceed notwithstanding either party fails to produce evidence, etc., – Where any party to a suit to whom time had been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, –

(a) if the parties are present, proceed to decide the suit forthwith: or

(b) if the parties are, or any of them is, absent, proceed under Rule 2.”

In order to determine whether the remedy under Order IX 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.

The Explanation permit, 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 to be exercised in a given circumstances. 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 IX 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 IX 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.



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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.

14. Here is the case, all these definitions had been considered by the trial Judge while allowing the Petition under Order IX, Rule 13 CPC. It is stated that in the reported ruling that the Order XVII, only gives discretion to proceed further when the party fails to appear. The Court may adopt any methods mentioned under Order IX CPC. Therefore, here in this case the learned Judge had decreed the suit based on the evidence of the Plaintiffs alone available in this case.

15. After filing of the Petitions under Order IX, Rule 13 CPC, the learned Judge had considered the facts that it is not a contested judgment where the Defendants had clearly stated in the written statement that the property was in common enjoyment and possession of the Plaintiffs and Defendants and the father of the Plaintiffs and Defendants 2 to 4 died intestate, the Will claimed by the Plaintiffs is disputed by the Defendants.



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Under those circumstances, there are materials for setting aside *ex parte* decree. Under those circumstances, the *ex parte* decree was set aside by imposing heavy cost for failure of the Defendants in not cross-examine the Plaintiffs witnesses inspite of repeated chances. Therefore, the reported ruling cited by the learned Counsel for the Revision Petitioners/Plaintiffs is found applicable against the order passed by the learned trial Judge. If the trial Judge had dismissed the petition then what is stated in the reported ruling will be applicable though the Defendants file a regular appeal against the order passed by the learned trial Judge. Also the Defendants can file appeal against the *ex parte* judgment and decree. Here the learned trial Judge had exercised discretion vested in him and had rightly set aside the *ex parte* decree by imposing heavy cost.

16. The reported ruling of the Hon'ble Supreme Court in ***MANU/SC/0115/2019 [G.Ratna Raj (D) by L.Rs. -vs- Sri Muthukumarasamy Permanent Fund Ltd., and others]*** relied by the Respondent is found acceptable in the facts and circumstances of the case. In the reported decision, preliminary decree for suit for mortgage was



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passed. *Ex parte* decree was passed against the Defendants. *Ex parte* decree was passed after the Defendants had engaged Counsel, filed written statement, issues were framed, Plaintiff was examined as P.W-1 and Defendants had cross-examined the Plaintiff. When the case was posted for recording Defendants' evidence, the Defendants did not appear in the suit. Therefore, the Court proceeded *ex parte* against the Defendants. The Division Bench of this High Court held that the preliminary decree dated 25.02.2003 was an *ex parte* decree. Therefore, application filed by the Defendants under Order IX, Rule 13 CPC was maintainable with a view to find out as to whether such decree could be set aside under Order 9 Rule 13 of the Code or not. The Petition under Order IX, Rule 13 CPC was allowed imposing cost of Rs.10,000/- by the Defendants to be paid to the Plaintiffs. The civil suit was restored to file with a direction to dispose of the suit on merits and in accordance with law. In that judgment, the Hon'ble Supreme Court had held that the Defendants proceeded *ex parte*. Defendants were found not to have led any evidence, the Court could only proceed under Order XVII, Rule 3 (b) r/w. Order XVII, Rule 2 of CPC for disposal of the suit by taking recourse to one of the modes directed under Order IX, the



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trial Court did proceed to hear the suit *ex parte* by taking recourse under Order IX, Rule 6(a) in terms of Order XVII, Rule 2 CPC because on that day, the plaintiff was present when the suit was called on for hearing whereas the defendants were absent. The same facts are found in the fact of this case. Therefore, the reported ruling of the Hon'ble Supreme Court relied on by the learned Counsel for the Respondents in ***MANU/SC/0115/2019 [G.Ratna Raj (D) by L.Rs. -vs- Sri Muthukumarasamy Permanent Fund Ltd., and others]*** is squarely applicable to the facts of this case.

17. In the light of the above discussion, the submission of the learned Counsel for the Revision Petitioners is rejected. The submission of the learned Counsel for the Respondents is accepted. The point for consideration is answered in favour of the Respondents and against the Revision Petitioners. The order dated 12.02.2021 allowing the petitions with cost in I.A.Nos.1612 and 1614 of 2017 in O.S.No.191 of 2011 on the file of the learned District Munsif, Avinashi does not warrant any interference by this Court under Article 227 of the Constitution of India which is confirmed.



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In the result, both these **Civil Revision Petitions are dismissed.** The order dated 12.02.2021 allowing the petitions with cost in I.A.Nos.1612 and 1614 of 2017 in O.S.No.191 of 2011 on the file of the learned District Munsif, Avinashi, is confirmed. The learned District Munsif, Avinashi, is directed to dispose off the suit in O.S.No.191 of 2011 on merit as per law within a reasonable period. No costs. Consequently, connected miscellaneous petitions are closed.

20.12.2023

srm

Internet: Yes/No

Index: Yes/No

Speaking/Non-speaking order

To

1.The District Munsif, Avinashi.

2.The Section Officer,
V.R.Section,
Madras High Court,
Chennai.

20/22



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SATHI KUMAR SUKUMARA KURUP, J.

At the time of pronouncing the order, the learned Counsel for the Revision Petitioners submitted that since the Revision Petitioners are senior citizens and the suit is of the year 2011, the learned District Munsif, Avinashi, may be directed to dispose off the suit within a stipulated time considering the case of the Petitioners from the point of view as senior citizens based on the direction of the Hon'ble Supreme Court.

2.Considering the submission of the learned Counsel for the Revision Petitioners, the learned District Munsif, Avinashi, is directed to dispose off the suit in O.S.No.191 of 2011 within a reasonable period by giving top priority to senior citizens case and without giving any unwarranted adjournments.

20.12.2023

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SATHI KUMAR SUKUMARA KURUP, J.,

srm

Order made in
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20.12.2023