



C.R.P(MD)Nos.1986 and 1987 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 23.06.2023

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.R.P.(MD)No.1986 of 2015
and M.P(MD)No.2 of 2015

Ramu @ Raman (Died)

Subbaiah @ M.K.Ramasamy (Died)

R.Vallatharasu

... Petitioner/ Petitioner / 5th Respondent

Vs.

1.Muthurakku

2.Anjalai

3.Amirthavalli

4.Palaniammal

5.Balakrishnan

6.Balu @ Baluchamy

7.Thiruvaiya

8.Ayyavu @ Irulamathu

9.Subramanian

10.Balamurugan

11.Valli

12.Velu

13.Shanmugaveli

14.Shanmugam

15.Vettal

16.Subramanian

17.Irulandi

18.Rakku

19.Mariammal

20.Baladivya

21.Minor Thirumurgan

22.Minor Mounika

23.Minor Jeyamurugan

... Respondents/Respondents/Petitioners



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PRAYER: This Civil Revision Petition is filed under Section 115 of Civil Procedure Code against the fair and executable order passed by the Subordinate Judge, Paramakudi, Ramanathapuram District in I.A.No.95 of 2012 in A.S.No.3 of 2009 dated 20.06.2014.

For Petitioner : Mr.V.Srinivasan

ORDER

This Civil Revision Petition is filed assailing the order passed by the learned Subordinate Judge, Paramakudi, Ramanathapuram District in I.A.No.95 of 2012 in A.S.No.3 of 2009 dated 20.06.2014. For the sake of convenience, the parties herein are referred to as arrayed in I.A.No.95 of 2012.

2. I.A.No.95 of 2012 was filed by the petitioners/appellants 2 and 5 under Section 151 of the Code of Civil Procedure, 1908 seeking to remove the appellants 4, 5, 11, 14, 15 in A.S.No.3 of 2009 on the file of the Subordinate Judge's Court at Paramakudi, thereby removing their names from the ranking of the appellants 4, 5, 11, 14, 15 in the said appeal. The suit in O.S.No.98 of 2004 on the file of the District Munsif Court at Paramakudi was filed by one Ramu @ Raman and two others as against 17 defendants. Among the defendants, one Saravanan was the 17th defendant. The said Saravanan, that is, the 17th defendant was set *ex parte* along with the defendants 4, 5, 11, 14, 15 in the suit and thereafter the same was adjudicated on merits and was finally decreed on merits on 05.09.2008.



3. As against the said judgment and decree in O.S.No.98 of 2004, an appeal in A.S.No.3 of 2009 was filed together by the defendants/the appellants 4, 5, 11, 14, 15 in A.S.No.3 of 2009 on the file of the Subordinate Judge's Court at Paramakudi. Among the defendants, who preferred the said appeal except 17th defendant, namely, the defendants 4, 5, 11, 14, 15 contested the original suit on merits, while the 17th defendant was set *ex parte* by the Trial Court. The claim of the petitioner in I.A.No.95 of 2012 in A.S.No.3 of 2009 is that, the person who were set *ex parte* in the trial proceedings should not be allowed to prefer an appeal as an appellant but should be impleaded as one of the respondents. The petitioners categorically contended that the 17th defendant could not file the said appeal along with the other appellants, who contested the original suit on merits. Of the total 17 defendants before the original suit except the defendants 4, 5, 11, 14, 15 all the other defendants were arrayed as respondents in the said appeal. Hence, the petitioners by filing the said I.A in I.A.No.95 of 2012 prayed to declare that the 17th defendant is not entitled to file along with the aforesaid defendants as appellants. The learned trial Court was pleased to dismiss the said I.A.

4. Heard the learned Counsel for the revision petitioner and the respondents at length. The learned Counsel for the revision petitioner took me through the various grounds of the revision petition preferred by him.



5. It would be the contention on the side of the respondents before the trial court that though the 7th respondent / 7th appellant / 17th defendant remained *ex parte* in the trial Court, he has every right to file an appeal against the said judgment and decree and there is no legal embargo for him to be added as an appellant along with the other appellants. According to them, the petitioner is not entitled to dictate terms / dictum to him to get impleaded as one of the respondents instead of the 7th appellant in the said appeal.

6. The learned Counsel for the petitioner further insisted that the only legal remedy available to the 17th defendant who was set *ex parte* was to file an application to set aside the *ex parte* decree under Order IX, Rule 13 of the Code of Civil Procedure. He further contended that persons who have failed to set aside the *ex parte* decree have no *locus standi* to file an appeal under Section 96 of the Code of Civil Procedure.

7. The point to be decided in this case is, whether the 17th defendant who was set *ex parte* could prefer an appeal on merits, without setting aside the *ex parte* judgment and decree passed as against him. When the *ex parte* decree is passed, the remedy available to the 17th defendant, who was set *ex parte* is to file an appeal under Section 96(2) of the Code of Civil Procedure, 1908 and to file an



application to set aside the *ex parte* decree in terms of Order IX, Rule 13 of the Code of Civil Procedure. Order IX, Rule 13 of the Code of Civil Procedure is extracted as follows:

"13. Setting aside decree ex-parte against defendant. ___ In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside? and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no decree passed ex parte shall be set aside merely on the ground of any irregularity in the service of summons, if the Court is satisfied, for reason to be recorded, that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim.]

[Explanation.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]"



9. The explanation to the above provision makes it clear that, though the defendant, who is set *ex parte* can take recourse to both the proceedings of filing an appeal and to file an application to set aside the *ex parte* decree simultaneously, in case the appeal being disposed of at the first instance, then the defendant's application to set aside the *ex parte* decree would be subject to the order passed by the Appellate Court. Thus there is no statutory bar to avail two remedies simultaneously subject to the above condition. In this case, without preferring to file an application to set aside the *ex parte* decree and judgment passed as against him on 27.02.2004, the 17th defendant has joined hands with the defendants 1, 2, 10, 12, 14 and 16 to file an appeal as against the judgment and decree passed by the learned trial Court in O.S.No.98 of 2004 as the 7th appellant in A.S.No.4 of 2009. A right to question the correctness of a decree in a first appeal is a statutory right and the 7th respondent / 7th appellant / 17th defendant cannot be curtailed from exercising such a right. The right to file an appeal is not a mere procedural matter but it is a substantial right.

10. Hence, this Court is of the considered opinion that the 7th respondent/7th appellant/17th defendant shall not be deprived of his statutory right merely on the ground that he failed to prefer an application to set aside the *ex parate* decree passed as against him under Order IX, Rule 13 of the Code of Civil Procedure,



1908. However, it is necessary to make it clear that incase of the dismissal of the first appeal in A.S.No.3 of 2009 thereafter, the 7th respondent/7th appellant/17th defendant cannot file an application under Order IX, Rule 13 of the Code of Civil Procedure.

11. The Hon'ble Apex Court in the case of ***Bhanu Kumar Jain Vs. Archana Kumar and Others reported in [MANU/SC/1079/2004]*** has dealt with a similar issue. The relevant portion of which is extracted as follows:

"35. However, it appears that in none of the aforementioned cases, the question as regard the right of the defendant to assail the judgment and decree on merit of the suit did not fall for consideration. A right to question the correctness of the decree in a First Appeal is a statutory right. Such a right shall not be curtailed nor any embargo thereupon shall be fixed unless the statute expressly or by necessary implication say so. [See Deepal Girishbhai Soni v. United India Insurance Co. Ltd. MANU/SC/0246/2004 : AIR2004SC2107 and Chandravathi P.K. and Ors., v. C.K. Saji and Ors., MANU/SC/0128/2004].

36. We have, however, no doubt in our mind that when an application under Order 9, Rule 13 of the Code is dismissed, the defendant can only avail a remedy available there against, viz, to prefer an appeal in terms of Order 43, Rule 1 of the Code. Once such



an appeal is dismissed, the Appellant cannot raise the same contention in the First Appeal. If it be held that such a contention can be raised both in the First Appeal as also in the proceedings arising from an application under Order 9, Rule 13, it may lead to conflict of decisions which is not contemplated in law.

37. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex-parte hearing by the Trial Court and/ or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the First Appeal filed by him against Section 96(2) of the Code on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Choudhari that the 'Explanation' appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this court in Rani Choudhury (supra), P. Kiran Kumar (supra) and Shyam Sundar Sarma v. Pannalal Jaiswal and Ors., MANU/SC/0944/2004 : 2005(181)ELT163(SC) .

38. We, therefore, are of the opinion that although the judgment of the High Court cannot be sustained on the premise on which the same is based, the Respondents herein are entitled to raise their



contentions as regards merit of the plaintiff's case in the said appeal confining their contentions to the materials which are on records of the case."

12. In another case of **N.Mohan Vs. R.Madhu** reported in **[MANU/SC/1601/2019]**, the Hon'ble Supreme Court of India has dealt with a similar issue. The relevant portion of which is extracted as follows:

"13. Considering the scope of Order IX Rule 13 Code of Civil Procedure and the statutory right to appeal under Section 96(2) Code of Civil Procedure, after referring to Bhanu Kumar Jain, in Bhivchandra Shankar More, this Court held as under:

11. It is to be pointed out that the scope of Order 9 Rule 13 Code of Civil Procedure and Section 96(2) Code of Civil Procedure are entirely different. In an application filed Under Order 9 Rule 13 Code of Civil Procedure, the Court has to see whether the summons were duly served or not or whether the Defendant was prevented by any "sufficient cause" from appearing when the suit was called for hearing. If the Court is satisfied that the Defendant was not duly served or that he was prevented for "sufficient cause", the court may set aside the ex parte decree and restore the suit to its original position. In terms of Section 96(2) Code of Civil Procedure, the appeal lies from an original decree passed ex parte. In the regular appeal filed Under Section 96(2) Code of Civil Procedure, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. Merely because the Defendant pursued the remedy under Order 9 Rule 13 Code of Civil Procedure, it does not prohibit the



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Defendant from filing the appeal if his application under Order 9 Rule 13 Code of Civil Procedure is dismissed.".....

16. When the Defendant filed appeal under Section 96(2) Code of Civil Procedure against an ex-parte decree and if the said appeal has been dismissed, thereafter, the Defendant cannot file an application under Order IX Rule 13 Code of Civil Procedure. This is because after the appeal filed under Section 96(2) of the Code has been dismissed, the original decree passed in the suit merges with the decree of the appellate court. Hence, after dismissal of the appeal filed Under Section 96(2) Code of Civil Procedure, the Appellant cannot fall back upon the remedy under Order IX Rule 13 Code of Civil Procedure."

13. In view of the above judgments, this Court is of the considered view that the argument of the revision petitioner does not hold good and this Civil Revision Petition is liable to be dismissed. However, I would like to make it clear that the the 7th respondent/7th appellant/17th defendant would not be permitted to raise any contention as to the correctness or otherwise of the *ex parte* decree passed by the learned District Munsif Court at Paramakudi or as to the existence of the sufficient case for his non appearance on that particular date before the Trial Court. But it is his statutory right to argue the first appeal on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs are not



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sufficient for passing a decree in their favour.

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14. With the above said observation, this Court is inclined to dismiss this Civil Revision Petition. Accordingly, this Civil Revision Petition stands dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition stands closed.

23.06.2023

Index : Yes/No
Internet : Yes/No
CM/BTR

To

1. The Subordinate Judge, Paramakudi, Ramanathapuram District
2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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L.VICTORIA GOWRI, J.

CM

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