



S.A.No.889 of 2002

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.04.2023

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

S.A.No.889 of 2002

1.Saida Banu(Died)
2S.Ajzal Batcha(Died)
(A2 is brought on record as LR of the deceased
sole appellant vide order dated 27.11.19)
3.Ooma Ghazala Parveen
4.Afnan Fathima
5.Athufa Mariyam
6.Mohammed Ishaque
7.Minor Arfa Zainab
(Rep. by her mother third appellant)
(A3 to 7 are brought on record as
LRS of the deceased 2nd appellant vide
Court order dated 06.01.2022)

...Plaintiffs/Appls./Appls.

-Vs-

1.Ramasami(Died)
2.Balachandar
3.Sundaramoorthy
4.Krishnamoorthy(Died)
5.Kumar
6.Palani



S.A.No.889 of 2002

*(R3 to R6 are brought on record
as LRS of the deceased 1st respondent
vide Court Order dated 08.01.2018)*

7.Dhanapackiam

8.Minor Sowmiya

9.Minor Shalini

... Defts./Respts./Respondents

*(Minors 8&9 rep. by their mother
and natural guardian Dhanapackiam)*

*(R7 to R9 are brought on record as LRS of
the deceased 4th respondent vide Court
order dated 08.01.2018)*

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 28.12.2001 passed in A.S.No. 175 of 2001 on the file of the Additional District Court, Trichi, preferred against the judgment and decree dated 03.04.2001 passed in O.S.No.404 of 1990 on the file of the III Additional District Munsif Court, Trichi.

For Appellants : Mr.R.Subramanian

For Respondents : Mr.Anand Chandrasekar
for M/s.Sarvabhauman Associates



WEB COPY



S.A.No.889 of 2002

JUDGMENT

The first appellant herein is the plaintiff has filed a suit in O.S.No. 404 of 1990 against the original respondents before the III Additional District Munsif Court, Trichirappalli, to declare the ex-parte decree passed in O.S.No.845 of 1987 on 10.03.1988 as null and void and also a consequential relief for permanent injunction to implead the ex-parte order. The trial Judge, after the trial, dismissed the suit for default. Against which, the first appellant herein filed an appeal before the Additional District Court, Trichirappalli, in A.S.No.175 of 2001. The said appeal was dealt with by the lower appellate Court and dismissed the same. Aggrieved over the same, the first appellant/plaintiff has filed the present second appeal before this Court raising the following substantial questions of law:

“1)Whether in law the Courts below are not wrong in failing to see that a decree granted ex-parte without notice to the defendant is null and void.

2)Whether in law the Courts below are right in finding that notice was not required to the defendants in the



S.A.No.889 of 2002

petition under Order 9 Rule 9 of C.P.C to restore a suit dismissed for default.

3)Whether in law the Courts below are right in omitting to see that the procedural law not having been followed the decree is null and void.”

2.The case of the first appellant is that the respondents herein/plaintiffs filed a suit in O.S.No.845 of 1987 before the District Munsif Court, Trichirappalli, against the original appellants herein for injunction. In the said suit, ex-parte order was passed on 28.01.1988 for non-filing of written statement. During the pendency of the said suit, the second defendant viz., Mohammed Ishaq. Thereafter, the case was posted on 29.01.1988 for taking ex-parte evidence. On that day the respondents herein did not appear. Therefore, the suit was dismissed for default, on 29.01.1988. Thereafter, they filed a petition in I.A.No.194 of 1988 to restore the said suit. The said application was allowed and the suit was taken on file, on the same day ie., on 10.03.1988, without following the procedure contemplated under Order 9 Rule 9 of C.P.C and the said suit was dismissed for default on



S.A.No.889 of 2002

the same day itself. Though the plaintiffs/respondents herein filed an application to restore the suit, the Court ought to have issued notice to the defendant/appellant herein. In that application, without following the procedure, ex-parte evidence was taken on 10.03.1988 and the suit was decreed on the same day itself as against the first appellant herein and she did not know about the ex-parte decree. Without giving notice and without the knowledge of the first appellant herein, the respondent, with the connivance of the respondents' counsel, got ex-parte decree decree, is null and void.

3. Therefore, the appellants herein filed the present suit in O.S.No. 404 of 1999 to declare the ex-parte decree passed in O.S.No.845 of 1987 as nullity on the ground of fraud. Further, the lower Appellate Court failed to consider the fact that the trial Court has rightly dismissed the suit in O.S.No. 845 of 1987 for default on 29.01.1988. Thereafter, the respondents herein/plaintiffs filed the application to restore the said suit. The said application was allowed, without serving notice to the first appellant herein



S.A.No.889 of 2002

and the said suit was decreed as ex-parte. Therefore, ex-parte decree would not bind the first appellant herein. Therefore, the trial Court has not followed the procedure contemplated under Order 9 Rule 9 and allowed the application in I.A.No.194 of 1988 on 10.03.1988. Therefore, the second appeal is to be allowed.

4.The case of the respondents/plaintiffs is that the respondents originally filed the suit before the District Munsif Court, Trichirappalli, in O.S.No.845 of 1987 for injunction. In the said suit, summon was served to the respondents/plaintiffs herein and they did not file written statement, despite sufficient opportunity was given. Since they were called absent, set ex-parte on 28.01.1988 and thereafter, the case was posted on the next day ie., on 29.01.1988 for taking ex-parte evidence on the side of the respondents/ plaintiffs. Since the respondents/plaintiffs did not appear on 29.01.1988, the suit was dismissed for default. Subsequently, the respondents/plaintiffs filed an application in I.A.No.194 of 1988 to set aside the dismissal order and restore the said suit. The said application was



S.A.No.889 of 2002

allowed on 10.03.1988 and the suit was restored and ex-parte evidence was taken. The suit was decreed on the same day, ie., on 10.03.1988., since the respondents herein/plaintiff did not file written statement. Thereafter, the respondents/plaintiffs filed restoration application. The trial Court took the interlocutory application, based on the endorsement made by the respondents/plaintiffs' counsel and allowed the said application and the suit was restored and ex-parte decree was passed on the same day. Therefore, there is no lapse on the procedure.

5.Further, it is stated that the first appellant/defendant, who suffered an ex-parte decree has two remedies of either to file an application under Order 9 Rule 13 of Code of Civil Procedure to set aside the ex-parte decree or to file an appeal before the Appellate Court and the same has not been done. Instead of invoking either under Order 9 Rule 13 of C.P.C., or Section 96 of CPC, straightaway the appellant/defendant filed the suit on the ground of fraud. Therefore, the trial Court and the lower Appellate Court have rightly appreciated the facts of the case and dismissed the same.



S.A.No.889 of 2002

Hence, the second appeal is liable to be dismissed.

6.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents and perused the materials available on record.

7.While admitting the second appeal, this Court considering the material and facts, formulated the following substantial questions of law:

“1)Whether in law the Courts below are not wrong in failing to see that a decree granted ex-parte without notice to the defendant is null and void.

2)Whether in law the Courts below are right in finding that notice was not required to the defendants in the petition under Order 9 Rule 9 of C.P.C to restore a suit dismissed for default.

3)Whether in law the Courts below are right in omitting to see that the procedural law not having been followed the decree is null and void.”



S.A.No.889 of 2002

8. Admittedly, the original respondents herein filed the suit in O.S.No.845 of 1987 against the original appellant herein, for injunction before the District Munsif, Trichirappalli. Since non-filing of written statement by the defendants in that suit, they were set ex-parte and the Court passed ex-parte order against them, on 28.01.1988. Thereafter, the case was posted for taking ex-parte evidence, since non appearance of the respondents/plaintiffs, the suit was dismissed. Pursuant to which, they filed an application to restore the suit and the same was allowed and ex-parte decree was passed. The only contention of the appellants herein is that since the suit was dismissed for default and later, it was restored, without giving notice or summon to the first appellant/defendant. Therefore, ex-parte decree passed by the trial Court without giving notice to the first appellant/defendant is vitiated on the ground of fraud and it is null and void. Therefore, decree passed in the suit was null and void.

9. The appellant raised the substantial questions of law as stated above. However, considering the materials, this Court, while admitting the



S.A.No.889 of 2002

second appeal, formulated the substantial questions of law as stated above.

Question No.1

10.A careful reading of the entire plaint, pleadings, evidence and the judgment of both the Courts below and also the substantial questions of law formulated by this court, after hearing the appeal and on seeing the entire records, this Court does not find any substantial question of law. No doubt, non-appearance of the parties, the suit was dismissed as ex-parte. Subsequently at the instance of the parties, either to set aside the ex-parte decree or to restore the dismissal order, notice has to be served to the other side. Under Order 9 Rule 9 of C.P.C, made clear that on deciding this application, notice has to be served to the other side. However, in this case, the respondents/plaintiffs herein filed a suit in O.S.No.845 of 1987 against the first appellant/defendant herein for injunction. In that suit, summon was duly served to the appellant herein and she also entered appearance through counsel viz., Swaminathan and the case was adjourned at the request of the appellants/plaintiffs for filing written statement, even after giving an



S.A.No.889 of 2002

opportunity to the appellant herein, she did not file written statement till 28.01.1988 and therefore, when the matter was listed on 28.01.1988 for filing written statement, the appellant herein did not file written statement, ex-parte order was passed and the case was adjourned to 29.01.1988 for taking ex-parte evidence on the side of the respondent/plaintiff. Since the respondent/plaintiff herein did not appear for taking ex-parte evidence, the suit was dismissed on 29.01.1988 for default. Subsequently, the respondent/plaintiff filed an application to set aside the dismissal order passed by the trial Court and such application was taken on file in I.A.No. 194 of 1988 and the same was allowed on 10.03.1988 and subsequently, ex-parte evidence was taken on the same day and ex-parte decree was passed as against the appellant/defendant. Therefore, the main contention of the appellant herein is that before restoring the suit, the trial Court ought to have sent notice to other side viz., the appellant/defendant in that suit and without following the procedure contemplated under Order 9 Rule 9, simply restored the suit, even without giving notice to the defendant in that suit/appellant herein. It is noted that on 28.01.1988 when the case was listed



S.A.No.889 of 2002

for filing written statement of the appellant herein since she did not file the written statement she was set ex-parte on the ground of non filing of the written statement exparte order was passed and case was posted to next day for taking ex-parte evidence, due to non-appearance of the respondent herein for taking ex-parte evidence, the case was dismissed for default. It shows that on the date of passing of dismissal order, the appellant already remained ex-parte. Therefore, merely because notice was not given before restoring the suit, the decree is not vitiated on the ground of fraud in the absence of establishing collusion and fraud.

Question No:2

11.On a careful perusal of the records, it is seen that while invoking the provisions under Order 9 Rule 9 of C.P.C., notice is to be sent to the other side, whereas, in this case, even prior to dismissal of the suit, the appellant herein/defendant in that suit remained ex-parte and ex-parte order was passed. The appellant has not filed any application under Order 9 Rule 7 of C.P.C, to set aside the ex-parte order. When the suit was listed on 29.01.1988, the respondents/plaintiffs did not appear. Therefore, the suit



S.A.No.889 of 2002

was dismissed. Thereafter, when the respondent/plaintiff filed an application in I.A.No.194 of 1988 to restore the suit under Order 9 Rule 9 of C.P.C., the learned counsel made an endorsement that since the appellant/defendant was already set ex-parte, no notice is necessary to send. Based on that, the said application was taken on file without sending notice to the appellant/defendant and ex-parte decree was passed. Since the appellant/defendant already entered appearance in that suit and also engaged the counsel, she did not file written statement and ex-parte order was passed. On the date of passing of order of dismissal of suit for default was passed, the defendant was already set ex-parte subsequently, suit was dismissed for default. The appellant herein had not taken any steps to set aside ex-parte order passed against her, therefore, no prejudice would be caused however, she has got remedy to file either petition to set side ex-parte decree or appeal challenging the ex-parte decree but not fresh suit to set aside ex-parte decree null and void in the absence of proof of fraud or collusion.



S.A.No.889 of 2002

Question No.3

12.The respondents/plaintiffs filed an application in I.A.No.194 of 1988 to restore the appeal. Based on the endorsement made by the counsel for the respondents/plaintiffs, the Court without giving notice to the appellant/defendant, restored the suit and ex-parte decree was passed. Therefore, the present suit has been filed. However, instead of filing the present suit, he ought to have filed an application to set aside the ex-parte decree by invoking Order 9 Rule 13 of CPC or an appeal under Section 96 of C.P.C challenging the ex-parte decree passed against her and without invoking that, she filed a separate suit on the ground that there was a fraud. Once there are enabling provisions are available to the appellant to set aside the ex-parte decree passed against her in O.S.No.845 of 1987. The appellant ought to have invoked those provisions and without invoking those provisions, she filed a fresh suit only on the ground of fraud. Since because certain procedures are not followed, the decree cannot be nullity on the ground of fraud. The defendant therein has got remedy under specific provisions. However, in this case, since collusion or fraud has not been



S.A.No.889 of 2002

established, the decree passed in O.S.No.845 of 1987 dated 29.01.1988 cannot be declared as null and void. Hence, the substantial question of law No.3 is answered accordingly.

13.On perusal of the entire materials, this Court has found that admittedly when the respondents filed an application in I.A.No.194 of 1988 to restore the suit, the learned counsel has made an endorsement that no notice need to be given to the appellant/defendant, since she was already remained ex-parte for non-filing of the written statement, no notice is necessary to send. Based on which, the trial Court, without issuing notice, passed ex-parte decree. The appellant/defendant herein has not established that the respondents/plaintiffs obtained ex-parte decree by fraud. Since it was only an ex-parte decree, the appellant/defendant has got remedy to set aside the ex-parte decree by filing application under Order 9 Rule 13 C.P.C., before the same Court or filing appeal before the Appellate Court. Unless he is able to establish that the decree was obtained by fraud, the fresh suit is not maintainable.



S.A.No.889 of 2002

WEB COPY

14. Under these circumstances, this Court does not find any valid reason to allow this appeal and there is no perversity in the judgment of the trial Court and the first appellate Court. The substantial questions of law formulated by this Court in the appeal, are answered accordingly as against the appellants.

15. In the result, the Second Appeal fails and the same stands dismissed. No costs.

11.04.2023

NCC: Yes/No

Index: Yes/No

Internet: Yes/No

To

1. The Additional District Court,
Trichi.
2. The III Additional District Munsif Court,
Trichi.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A.No.889 of 2002

P.VELMURUGAN,J.

Ns

S.A.No.889 of 2002

11.04.2023