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CMA.(MD)No.851 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 25/04/2024

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The Hon'ble Mr.Justice **G.ILANGOVAN**

CMA (MD) No. 851 of 2021

and

CMP (MD) No. 7902 of 2021

Someshwari : Appellant/Petitioner/
1st Respondent

Vs.

1.Palanivelu : 1st Respondent/
1st Respondent/Petitioner

2.The Branch Manager,
National Insurance Company Ltd.,
Pudukkottai District. : 2nd Respondent/
2nd Respondent/
2nd Respondent

PRAYER:-Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of CPC, to set aside the fair and decreetal order passed in IA No.208 of 2018 in MCOP No. 192 of 2011, dated 08/08/2019 on the file of the Additional District Court, Pudukkottai.

For Appellant : Mr.K.Baalasundharam
Senior Counsel
for M/s.R.Paranjothi

For 1st Respondent : No appearance

For 2nd Respondent : Mr.V.Sakthivel



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JUDGMENT

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This Civil Miscellaneous Appeal is filed seeking to set aside the judgment and decree, dated 08/08/2019 passed in MCOP No.192 of 2011 by the Additional District Judge, Pudukkottai.

2.The facts in brief:-

MCOP No.192 of 2011 was filed by the 1st respondent herein before the Motor Accident Claims Tribunal/Additional District Court, Pudukkottai, seeking compensation amount of Rs.5,00,000/- for the injuries sustained by him in the occurrence took place on 24/12/2008. In that petition, this appellant namely Someshwari was impleaded as the 1st respondent being the owner of the offending vehicle. She appeared through Advocate. After full trial, the Tribunal passed an award directing the appellant herein to pay a sum of Rs. 2,64,200/- to the claimant and the 1st respondent herein with 7.5% interest.

3.That petition was dismissed against the Insurance Company and against which, no regular appeal was preferred. But an application was taken out by this petitioner in IA No.208 of 2018 in MCOP No.192 of 2011 before the Tribunal stating that even before the



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occurrence, she sold the Car bearing registration No.TN-55-A-9444 to one Tamilarasan. At the time of sale, the Insurance policy was also in force. To that effect, she filed a counter also. Her Advocate advised her to inform the date of hearing so that they can file an application to implead the purchaser. Later, she shifted her residence to Chennai due to son's college education. So she could not contact her Advocate also because of the change of residence. When she came to down to her native place, she received a notice in the execution petition. Only thereafter, she came to know about the award. Because of the above said situation, she could not appear and contest in the claim petition effectively. Seeking an order to set aside the *ex-parte* order passed on 30/03/2016, this application was filed.

4.That was resisted by the 1st respondent. The Tribunal dismissed the petition stating that the original claim petition was decided on merits. Order 9 Rule 13 CPC application will not lie.

5.Against which, this Civil Miscellaneous Appeal is preferred.

6.Heard both sides.



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7.Perusal of the records and the proceedings shows that before the trial court, the case was posted on 30/07/2010 for filing counter on the side of the petitioner. As counter was not filed, she was set *ex-parte* on that date and enquiry was ordered. Later, petition was filed to set aside petition in IA No.958 of 2018. That was allowed on 03/12/2012. But thereafter, there was no set aside. But failed to produce evidence on her side. Finally, an award was passed.

8.Now a simple question, which arises for consideration is whether in the facts and circumstances of the case, petition under Order 9 Rule 13 CPC will lie.

9.In the opinion of the trial court, since the order was passed on merits and not an *ex-parte* order, Order 9 Rule 13 CPC will not lie.

10.The learned Senior Counsel appearing for the appellant would rely upon the decision of the Hon'ble Supreme Court in ***G.Rama Raj (D) by L.Rs. Vs. Sri Muthukumarasamy Permanent Fund Ltd and other (2019(4)CTC 122)***. Now, he would submit that the above said judgment will apply to the present facts and circumstances of the case and so, the petition will lie.



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11. In that case, the Hon'ble Supreme Court went in detail about the procedure involved Order 9 Rule 13, Rules 2 and 3 CPC.

12. Order 9 Rule 6(a) CPC is extracted herein:-

"6. Procedure when only Plaintiff appears.-(1) Where the Plaintiff appears and the Defendant does not appear when the Suit is called on for hearing, then-

(a) When Summons duly served-If it is proved that the Summons was duly served, the Court may make an Order that the Suit be heard ex-parte."

13. So, as per this provision, after receipt of the summons, if the defendant failed to appear, then the suit may be heard ex-parte.

14. Order 17, Rule 2 & 3 CPC reads as under:-

"Order 17, Rule 2 and 3:

2. Procedure, if parties fail to appear on day fixed.- Where, on any day to which the hearing of the Suit is



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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 9 or make such other as it thinks fit.

Explanation.-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 day 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.

3.Court may proceed notwithstanding either party fails to produce evidence, etc.-Where any party to a Suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his Witnesses, or to perform any other act necessary to the 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."



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15. Here, Order 17 Rule 2 will bar since on the adjournment date of hearing, the appellant failed to appear and produce her evidence. When that is being the position, discretion is conferred upon the trial court to select either any one of the modes prescribed under Order 9. Here, due to the absence of the appellant, the Tribunal did not thought it fit to set the appellant *ex-parte*, but proceeded to hear the matter. In that matter, the trial court thought it fit set the petitioner *ex-parte* and thereafter, proceeded to decide the matter. But here, there is no such procedure. As mentioned above, the appellant was not set *ex-parte*. Only in case of the order passed by the appellate court to set the appellant *ex-parte*, then she can maintain the petition under Order 9 Rule 13 CPC and not otherwise. So, the petition filed by the appellant before the trial court is not proper and remedy available to her is to file regular appeal.

16. Considering the above said position, if the regular appeal is preferred against the final order passed by the trial court, then the time taken by the appellant in pursuing this matter will be excluded for calculating the period of limitation while filing the appeal along with condone delay application.



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17. With the above said liberty, this Civil Miscellaneous Appeal is **dismissed**. No costs. Consequently, connected Miscellaneous Petition is closed.

18/04/2024

Index: Yes/No
Internet: Yes/No
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To,

1. The Additional District Judge,
Pudukottai.
2. The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGO VAN, J

er

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