

(2000) 11 MAD CK 0030
In the Madras High Court

Arumugha Gounder and Others

APPELLANT

Vs

Smt. Palaniammal and Others

RESPONDENT

Date of Decision : 07-11-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2

Citation : (2001) 1 LW 167 : (2001) 1 MLJ 15

Hon'ble Judges : Prabha Sridevan, J

Bench : Division Bench

Judgement

Prabha Sridevan, J.—The defendants are the appellants.

2. The first appellant, Arumugham who died pending appeal, is the father of one Palaniswamy and one Subramaniam, who was arrayed as the

second defendant and is now the second appellant. The first respondent is the widow of the said Palaniswamy and the respondent Nos. 2 and 3

are their children. Arumugham's wife predeceased him. Since Arumugham did not take care of the respondents after the death of his son, they

asked for partition of the joint family properties on several occasions. Since the appellants did not come forward to give the respondents their

share and continued to enjoy the joint family properties, respondents were constrained to file the suit for their one third share in the property and

for mesne profits. According to the respondents, the properties which have to be partitioned include house properties, agricultural lands including

coconut trees and power loom factories. The second appellant alone filed the written statement in which the relationship was admitted. However,

according to him the existence of coconut trees was baseless and the income from the lands as stated by the respondents and right in respect of

complaint was also denied. It was also stated in the written statement that the first appellant had incurred debts on behalf of the family and

therefore, any partition of the properties can only be done after adjusting the amounts due under the debts, since the respondents will also have to

bear their share of the liability in the joint family property. Subject to this the second defendant submitted that the suit may be decreed.

3. The learned Subordinate Judge, Tiruppur who tried the suit framed four issues. After the evidence on the side of the plaintiff was concluded the

defendants did not come forward to give evidence, in spite of several adjournments. And on the last date of adjournment i.e., on 17.7.1987, the

respondents counsel reported no instructions. Therefore, the learned Judge proceeded to decide the case on merits under Order 17, Rule 2 and

decreed the suit as prayed for. Aggrieved by this the defendants have filed the appeal.

4. Mr. S. Raghunathan, learned Counsel for the appellants submitted that the court below erred in deciding the case on merits. According to the

learned Counsel the court failed to follow the procedure laid down under Order 17, Rules 2 and 3 of the Civil Procedure Code. When the counsel

had reported no instructions, the court could only have set the appellants ex parte and not decided the suit on merits.

5. Mr. A. Shivaji, learned Counsel for the respondents referred to the decision reported in Narayana Gounder Vs. Devaki Ammal and another, ,

where the defendant's counsel had reported no instructions and the question of whether the trial court was correct in deciding the suit on merits

came up for consideration. In this decision this Court held that,

In the instant case, the appellant had cross-examined the witnesses on the side of the plaintiff and it could not be said that he did not have the

necessary opportunity earlier to mark documents and examine witnesses. The opportunity had been lost by the appellant and at this distance of

time he cannot seek to have another opportunity and in my view, it will be a mockery of the judicial process. It can be safely held that what the

lower appellate court had done was to treat the case as an ex parte decree and refuse to give an opportunity to the defendant to have the matter

reopened on merits. I am clearly of the view that the appellant is not entitled to have the luxury of reopening the case all over again.

Therefore, the learned Counsel submitted that the appellants had only themselves to blame for allowing a decision to be passed on merits. It is seen

the appellants have been successful in thwarting the legal representatives of the predeceased son of the family from getting their share in the

property and enjoying what is legally due to them. The learned Counsel also was fair in inviting the attention of the Court to other decisions of this

Court in which the learned Judges have taken a view contrary to that cited above.

6. This case has an interesting question. Order 17, Rule 2 of CPC lays down the procedure to be followed when on the date of which the hearing

of a suit is adjourned the court may proceed to dispose of the suit in the modes laid down Order 9 of Civil Procedure Code, or make such other

order as it thinks fit. An explanation has been given to Rule 2 by the Amendment Act of 1962, which states that,

if any party's evidence or substantial portion thereto has already been recorded, the court may proceed, notwithstanding his absence as if the party

is present.

Rule 3 lays down the procedure to be adopted by Court when the suit has been adjourned for the purpose of producing evidence or to cause

attendance of the witness or to perform any other act necessary for further progress of the suit. And when such time is granted to the party and the

party fails to produce or to do such act as it has been called upon to do, the court may proceed to decide the suit forthwith as if the parties are

present or to proceed under Rule 2 if the parties are or any of them is absent.

7. The decision reported in Malkiat Singh and Anr. v. Joginder Singh and Ors. AIR 1998 S.C. 258, was relied on by the learned Counsel for the

appellant for the purpose that when the parties were not present, when the counsel reported no instructions, the court ought to have issued notice

to the parties. In the said decision reliance was placed on an earlier decision reported in Tahil Ram Issardas Sadarangani and others Vs.

Ramchand Issardas Sadarangani and another, , where the Supreme Court held that, when the parties were not present in a court and the counsel

withdrew from the case and there was nothing to show whether the petitioners had notice of hearing of the case on that day, in the interest of

justice a fresh notice for actual date of hearing should have been issued. Therefore factually in the cases that arose for consideration before the

Supreme Court, it was found that the parties were not at fault and therefore, they should not suffer.

8. But in this case this is not so. The appellants herein had clearly adopted all methods to delay legal process or to thwart the respondents right in

the family properties. The court records also show that on an earlier occasion the appellant's counsel had reported no instructions and they had

been set ex parte and the suit was decreed as prayed for on 4.2.1986. Subsequently, on 5.2.1987, the ex parte decree was set aside. I am not for

a moment penalizing the parties for their past conduct. But the past events would definitely show that the parties had been fully aware of what is

going on and also aware of how they could successfully delay the proceedings in accordance with the provisions laid down in the code itself. It is

clear that they are not novices to litigation. The court below also has taken pains to set out the manner in which the appellants had conducted

themselves during the trial. The learned Judge states that after the evidence on the side of the plaintiff was closed, the plaintiff witnesses having be

cross examined by the counsel for the defendant, the matter was adjourned for the defendant's evidence. On that day the defendants did not turn

up and their counsel asked for adjournment. It was adjourned. On that date also the defendants did not turn up. The counsel filed an application

for adjournment. Thereupon, the court again adjourned the matter. On that date the defendants did not turn up. The counsel again filed an

application for adjournment for a specific date viz., 16.7.1987. Even on that date the defendants did not turn up. It was adjourned to 17.7.1987.

The counsel, who had hitherto filed applications on behalf of the parties seeking adjournment when the matter had been specifically posted for the

evidence of the defendants, reported no instructions. The defendants were called and thereafter the court below proceeded to deal with the case

on merits. I have referred in detail to the events set out by the court below only to demonstrate that by no stretch of imagination can it be said that

the parties had no notice of the adjournment. Therefore, the court cannot be faulted for not issuing notice to the party when the counsel reported

no instructions. It is clear that each adjournment was sought only upon the directions of the parties, since the adjournment was sought for on

application. It is impossible to accept the submission made by the learned Counsel for the appellant that it is not known what compelled the

counsel to report no instructions. The counsel's statement that he had no instructions was clearly made at the behest of the party. Therefore, the

two decisions of the Supreme Court relied on by the learned Counsel for the appellant will not apply to this case.

9. We next come to the other submission made by the learned Counsel for the appellants that the court below ought not to have proceeded with

the case and decide the same on merits when the parties are absent. This is not a case where Order 17, Rule 2 of CPC will apply because the

procedure under Order 17, Rule 2 is applicable when there is a general adjournment and the parties or any of them fail to appear. This is a case

where the party to the suit has been granted time for a specific purpose. So Rule 3 will apply. I have already stated that time is granted to the party

to do the particular thing mentioned in the rule.

10. In this case time was given to the appellant to let in their evidence, not once, but several times. They did not do so. They committed default.

Rule 3 also lays down the procedure, which the court should follow when the party commits default. As per this rule, in spite of the default by the

party to do one or the other facts mentioned in the schedule the court may proceed to decide the suit forthwith if the parties are present or adopt

the procedure laid down in Rule 2 if the parties are or any of them is absent. Now we turn to Rule 2. Rule 2 provides that on the failure of the

party to appear before the court may dispose of the suit in accordance with provisions of Order 9 or make such other order as it thinks fit. In this

case since the parties were absent the learned Counsel for the appellant submitted the court erred in deciding the suit on merits. Therefore,

according to the learned Counsel all that the court ought to have done is to follow the provisions of Order 9 as per Order 17, Rule 2, CPC and set

the appellant ex parte giving them the opportunity to set aside the order and contest the suit on merits instead of driving them to an appeal. Prior to

the 1976 amendment, the court had the power to decide the suit forthwith whether the parties were present or absent. From the objects and

reasons, it is seen that the amendment was intended to define the scope of Rule 3 so as to make it clear what action can be taken by the court

when the parties are present and when they are absent.

11. In the decisions reported in Chidambaram Vs. Kalidas and Others, , this

Court has held that Order 17, Rule 3 would apply only to cases where parties are present. If on the date of trial the defendant is absent the court cannot proceed under Order 17, Rule 3, Civil Procedure Code, but should proceed under Order 17, Rule 2, CPC by setting the defendant ex parte and decreeing the suit after recording the evidence, if the plaintiff's claim is proved.

12. In the decision reported in *V. Ramakrishnan Vs. K. Raju*, has held that such other order as it thinks fit cannot be construed to include the

power to pass a judgment on merits since if that were so the legislature would have used the words "decide the suit forthwith", which is found in

Rule 3. Yet another decision of this Court is reported in *N.A. Suyambulingam Vs. V.K. Swaminathan and Another*, where the Division Bench

held that the first defendant who had been set ex parte was entitled to have the ex parte order set aside since he had not let in any evidence on his

behalf. In that case P.W.1's evidence was in progress when the counsel for the first defendant withdrew his appearance and the first defendant

was set ex parte. The evidence of P.W.1 was continued and the second defendant was examined and a decree was passed thereafter. When the

application of the first defendant to set aside the ex parte decree was dismissed by the trial court he came up on appeal to this Court, where the

learned single Judge allowed the appeal which was confirmed by the Division Bench. In that case, there can be no controversy since the

adjournment was not as per the Rule 3 and it was not as if the first defendant had been granted time to do a particular act which he defaulted.

13. In the decision reported in *Pani and Another Vs. Vasudevan*, this Court had occasion to consider the scope of Order 17, Rules 2 and 3,

CPC and held that

if the parties are absent, the court below ought not to have decided the matter on merits.

But on facts in that case neither the defendant nor the counsel was present on the relevant date and therefore, it will not apply to the instant case.

14. The decision reported in *Kamakshi Vs. Jugraj Jain*, was one where the counsel for the defendant was not present and the defendant was a

woman having no legal knowledge. Therefore, the learned Judge held that the party's presence will not amount to appearance by the party and

therefore, held that an application to set aside under Order 9, Rule 13, CPC was maintainable.

15. The decision reported in *Suyambulingam v. V.K. Swaminathan* (1988) 1 L.W. 368 and *V. Ramakrishnan Vs. K. Raju*, are also not applicable

to this case, since in those cases on the relevant date neither the defendant nor this counsel was present.

16. The decision reported in *Chidambaram Vs. Kalidas and Others*, and the decision reported in *S. Sundaram Pillai and Another Vs. S. Kannan*

and *Another*, , where the validity of an order passed under Order 17, Rule 3, C.P.C. were considered are not applicable, since in those cases

there was no representation on behalf of the defendant nor was the defendant present.

17. The decision relied on by the learned Counsel for the respondent, however, appears to apply to this case. Several adjournments were given for

the defendant to examine their witnesses and subsequently, after enough time had been given, the counsel reported no instructions. The learned

Judge held as follows:

The appellant was given an opportunity not once, but twice, and he did not avail of the same resulting in his suffering a decree for which he had to

thank himself.

18. In this decision the learned Judge had referred to the decision of the Supreme Court in *Prakash Chander Manchanda and Another Vs. Janki*

Manchanda, , in which the Supreme Court held as follows:

Order 17, Rule 3, CPC as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was

closed nobody appeared for the defendant and therefore, it could not be disputed that the court when proceeded to dispose of the case on merits

had committed an error.

19. The learned Judge while holding that the trial court had rendered its judgment before the judgment of the Supreme Court also found that the

trial court had really no option in the said case because of the previous history.

20. Reliance was placed on the following passage in *N. Ravindra Devadigo v. Sebastian Britto* AIR 1989 Karn. 280:

It is in that context, I now examine whether the presence of the counsel who did not participate in the proceedings in the small cause suit for

eviction when the plaintiff was giving evidence and amount to appearance or not. If the counsel had no instructions, he had only the choice to retire

from the case, but he cannot plead want of instructions and still claim that on that account the defendant should be treated as absent and ex parte.

Therefore, his non-participation by cross-examining the plaintiff, in defence of defendant's case cannot be an excuse to plead that the decree and

judgment passed in the small cause suit was one under Order 17, Rule 2 and not under Order 17, Rule 3 of the C.P.C. On that date when the

plaintiff was examined, the defendant was not required to do anything at all. Therefore, pressing into service Sub-rule (2) of Order 17 of the

C.P.C. is not of any assistance to the petitioner. The petition therefore must fail.

21. The question whether the word, "appearance" is confined to the personal appearance of the parties came up for consideration before the

Division Bench in the High Court of Madhya Pradesh in *Madanlal Kanhaiyalal v. Jai Narayan Gendalal Jatav* AIR 1972 M.P. 8:

The word "appear" in Rule 2 is not confined to personal appearance of parties. A party may appear in the court by an agent or pleader also. It has

been a debatable point whether it is appearance of the party when a counsel, although present in court, reports no instructions. We are clearly of

the view that this question must be answered according as the counsel merely informs the court want of instructions, or seeks an adjournments and

when adjournment is refused, he withdraws on the ground of not being ready with evidence, or on the grounds that he had instructions merely to

seek an adjournment. A counsel sometimes reports no instructions when his fee is not paid or when his client does not equip him with necessary

information regarding the material facts. In such a case, when the counsel reports no instructions it is just to show that he is not ready to go on. In

fact, this is in accord with his duty to the court and by doing so, he shows ordinary courtesy to the court so that the court has not to wait for him.

Such reporting of no instructions is an act of the counsel in his personal capacity. But where the counsel appears and seek an adjournment, his

appearance is on behalf of the party. Once he has so appeared his reporting no instructions, when adjournment is refused, does not tantamount to

non-appearance of the party. There is no difference in such appearance of the counsel and the appearance of the party whom he represents. If the

party had appeared in person and had sought an adjournment but the adjournment had been refused and then the party had abstained from taking part in the proceedings or disappeared from the court room, it would not be a case of non-appearance of a party so as to attract Rule 2.

Therefore, if reporting of no instructions by the counsel is of the latter kind and the court decides the suit on merits, it will be under Rule 2 and not under Rule 3.

22. In the decision reported in *Tulsiram Bhagwandas Vs. Sitaram Srigopal*, , the Division Bench of the Calcutta High Court had held that:

Appearance contemplated by Order 17, Rule 2 need not be in person, but appearance by a lawyer is also valid and sufficient appearance.

In fact, in this judgment the Calcutta High Court has also held that:

the power to ""make such other order as it thinks fit"". In Order 17, Rule 2 would mean that the court can adjourn the suit or it can decide the suit on

merits if there are materials on record for doing so.

23. In the instant case, it is difficult to find fault with the procedure adopted by the court below. That the parties were aware of each date of

hearing, is clear from the records. On 28.4.1987, the evidence of P.W.2 was recorded. P.W.2 is the Junior Engineer of the Tamil Nadu Electricity

Board. Ex.B-1, which is a letter addressed to Arumugham Gounder, the deceased first appellant is marked through them. This shows the active

participation of the parties at the various dates of hearing. Thereafter, as stated above it is only on application by the defendants/appellants that the

matter was adjourned on several dates. The decision of the Madhya Pradesh High Court comes to the aid of the respondents herein. The report of

no instructions by the counsel in the instant case is obviously not an act of the counsel in his personal capacity. But it would amount to abstaining

from taking part in the proceedings on behalf of the party. Therefore, in this case it has to be held that it was not an instance of non-appearance of

party warranting the adoption of the procedure laid under Order 17, Rule 2. It is only thereafter that the court below had come to the conclusion

that the matter should be decided on merits and had proceeded to decide the same upon the materials available before the court. Therefore, the

objection of the learned Counsel for the appellant that the procedure adopted by the court below in unjust is rejected. Apart from the question of

law raised regarding the legality of the procedure adopted by the court no other arguments were advanced by the counsel for the appellant. The

learned Counsel for the appellant would merely say that the findings on issues 1 and 2 ought not to have been decided without giving the

defendants an opportunity and therefore, the proper procedure would be atleast to remand it to the lower court for the finding on the said issues.

24. The share claimed by the respondents is not disputed. In fact the main objection seems to be that the decree in respect of the power loom

factory and godown must be set aside since it belong to one Natarajan. The court below on a consideration of the documents viz. Exs-A5 to A-6

came to the conclusion that the power loom factory and go-down belong to the first appellant herein. Apart from the evidence of P.W.1, who is

the first respondent the court below also took into account the evidence of P.W.2, the Junior Engineer of Electricity Board had spoken to the fact

that it was only the first appellant who had applied for power connection for the power loom factory. The other witness viz., P.W.3 who is a Union

Leader has also spoken to the fact that the power loom factory and the godown were joint family properties. By no stretch of imagination could

the evidence of the Junior Engineer of the Electricity Board and the Union Leader be said to be "interested". The fact that the first appellant the

father-in-law of the respondent applied for power connection and thereafter withdrew it as spoken to by P.W.2, Junior Engineer, Tamil Nadu

Electricity Board, also demonstrates that the first appellant would stoop to any length to deprive the family of the predeceased son of their share in

the family property. Therefore, the finding of the court below as regards the entitlement of the respondents share in the power loom factory and the

go-down is perfectly correct. The other issue is regarding the debts. The court below rejected the contention of the appellant and that the debts

incurred by the first appellant was on behalf of the joint family. According to the appellants any share in the property taken by the respondents will

only be subject to their share in the debt. This issue has also been discussed in detail in issue No. 1 by the court below. The court below had found

in favour of the respondents on both the issues. The court below had come to this conclusion on the materials placed before it.

25. As held by the learned Judge in the decision reported in Narayana Gounder Vs. Devaki Ammal and another, , if the appellants find themselves

in a sorry position they have only themselves to thank. They were evidently under the impression that they could scuttle the progress of the suit by adopting evasive tactics. The court below granted indulgence once. When the counsel for the appellants sought for adjournment on applications, the court below again granted the same on several occasions. It was only when it was evident that the reporting of non instructions by the counsel was at the instance of the party that the court below proceeded to decide on merits as if the parties were present; the appearance of the counsel for the appellants was held to be appearance of the appellants themselves. The above decision and the reasoning of the learned Judge of the Karnataka High Court are applicable to this case on all fours.

26. I see no reason to interfere with the judgment of the lower court. The appeal is dismissed with costs.