

(1923) 03 MAD CK 0042
In the Madras High Court

Bava Levvai Sahib and Others

APPELLANT

Vs

Ammeenammal and Others

RESPONDENT

Date of Decision : 16-03-1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22(1), Order 9 Rule 13

Citation : AIR 1924 Mad 107 : 79 Ind. Cas. 968 : (1923) 45 MLJ 805

Hon'ble Judges : Oldfield, J

Bench : Division Bench

Judgement

Oldfield, J.—This appeal is against the final decree passed in a partnership suit. The course of the proceedings before the District Munsif

was that, after the preliminary decree had been passed, the scope of the enquiry was defined in an order dated 25-9-1916 and the suit was then

posted for evidence.

2. On the date, to which it was adjourned, the 1st defendant did not appear to adduce his evidence; and the District Munsif declared him ex parte.

A decree was afterwards given on the basis of the evidence adduced by the other parties to the proceedings; and against that decree there was an

appeal to the Lower Appellate Court, by the 1st plaintiff. There was also a memorandum of objections by the 1st defendant, in which he

complained inter alia of his having been debarred from producing evidence. The lower appellate Court held that his absence on the date of hearing

was sufficiently explained and the District Munsif's order placing him ex parte and excluding his evidence was not justified. It therefore remanded

the suit directing that his evidence should be taken, and we first deal with the appeal so far as it is against that direction.

3. It is urged that the 1st defendant was not entitled to bring his objection to the enquiry, based on his having been placed ex parte before the

appellate Court in a memorandum of objections, unless in the words of Order 41, Rule 22 (1), C.P.C., he could have taken his point by way of

appeal. The right of a person who has been placed ex parte to impugn the decree ultimately passed on that was recognised in *Krishna Aiyar v.*

Kuppan Ayangar ILR 30 M. 54 subject to the qualification, which is emphasized in *Badvel Chinna Asethu v. Vattipalli Kesavayya* (1919) 39

M.L.J. 697 that he has not moved the Court of first instance to set aside the ex parte decree under Order IX Rule 13 of the Code of Civil

Procedure. It is urged however that in effect the 1st defendant had so moved the Court, because before the decree was passed, but under the

incorrect impression that it had been passed, he presented a petition asking the District Munsif to allow him to make a defence and produce his

evidence and the District Munsif disposed of that petition on its merits. Such a petition is not a remedy recognised by the Code; and we do not see

how the fact that it was intended to be and believed to be a petition recognised by the Code can alter its real nature or give it and the order passed

on it a legal effect, to which they would not in fact be entitled. Taking this view, we regard the case in *Krishna Aiyar v. Kuppan Aiyangar* ILR 30

M. 54 as in point, and hold that the 1st defendant is entitled to object to the order placing him ex parte in his memorandum of objections. Nothing

has been said here against the lower appellate Court's conclusion that he was wrongly placed ex parte, and its decree so far as it directs the

District Munsif to hear his defence and to take his evidence must therefore stand.

4. The lower appellate Court's decree however went further than that, because it set aside the decree of the District Munsif in toto and remanded

the suit for disposal according to law with a direction that further evidence might be adduced by all the parties with reference to the order dated

25-9-1916 already referred to as defining the scope of then enquiry. That order was objected to on its merits, not only by the 1st defendant in his

memorandum already referred to, but also by the 1st plaintiff in his grounds of appeal and by two other plaintiffs in their memorandum of

objections. Unfortunately all this seems to have been lost sight of by the lower appellate Court. For it has made no reference at all in its order of

remand to the merits of those objections. We consider that it would be futile, so long as those objections are outstanding and undisposed of, to have further enquiry or further evidence taken on the lines, to which the majority of those concerned object. We must therefore set aside the lower appellate Court's order except in so far as it recognises the right of the 1st defendant to take part and adduce evidence in the future proceedings and direct it to consider the remaining grounds set out in the appeal and memoranda of objections by him and the other parties. When it has dealt with those objections on their merits, it will again remand the case. Costs here and in the lower appellate Court will be costs in the cause and be provided for in the order to be passed. Stamp value will be refunded on application.