

(1973) 09 MAD CK 0021
In the Madras High Court

C. Easwaramoorthy

APPELLANT

Vs

Ramakrishnan

RESPONDENT

Date of Decision : 07-09-1973

Acts Referred:

Citation : (1975) ILR (Mad) 650 : (1978) 87 LW 898 : (1974) 2 MLJ 137

Hon'ble Judges : N.S. Ramaswami, J

Bench : Division Bench

Judgement

N.S. Ramaswami, J.—This revision petition raises the question as to whether the plaintiff is entitled to refund of half the Court-fees on the suit having been dismissed as settled out of Court but in which there was originally an ex parte decree which was later set aside. There is no direct authority on the point. Section 69 of the Court-fees Act (XIV of 1955) says that:

Whenever any suit is dismissed as settled out of Court before any evidence has been recorded on the merits of the claim half the amount of all fees paid in respect of the claim or claims in the suit shall be ordered by the Court to be refunded to the parties by whom the same have been respectively paid.

In the present case, there was an ex parte decree and that decree was set aside on the defendant's filing an application. Ultimately, the matter was settled out of Court and the suit was dismissed accordingly. The plaintiff applied for refund of half the Court-fee on the footing that Section 69 of the Court-fees Act applies. The Court below has held that evidence having been once recorded, that is, when the suit was decreed ex parte, the plaintiff is not entitled to a refund. The question for consideration is whether the ex parte evidence recorded, on the basis of which a decree was passed and which had been subsequently set aside, is "evidence recorded on the merits" as contemplated u/s 69 of the Court-fees Act.

2. There is authority for the proposition raised by the learned Counsel that the evidence recorded while passing an ex parte decree, which was ultimately set

aside, is not evidence at all. Therefore, the fact that the Court did record evidence at the ex parte stage, does not debar the plaintiff from getting a refund of half the Court-fees u/s 69 of the Act. In *Solamalai Mudaliar Vs. Vadamalai Muthiran*, . a promissory note was proved while recording ex parte evidence. Subsequently, the ex parte decree was set aside and the matter went for trial. The defendant objected to the admissibility of the promissory note as not properly stamped. The plaintiff invoked Section 36 of the Indian Stamp Act. The question arose as to whether the plaintiff could so invoke Section 36 of the Stamp Act on the strength of the fact that the promissory note has already been admitted in evidence at the ex parte stage. This Court held at page 275 that:

When the promissory note was put in at the second trial the document did not remain as evidence. The whole ex parte proceedings had been set aside and the trial of the suit had to commence do novo....the promissory note had to be tendered in evidence at the second trial as the previous proceedings proved abortive in law when they were set aside.

Technically, no doubt, the suit is regarded as the same though the ex parte decree might be set aside. But in substance the proceedings are different when they recommence at the setting aside of ex parte decree.

In *Phani Bhusan Mukherjee Vs. Phani Bhusan Mukherjee and Others*, . it has been held:

The effect of the order setting aside the ex parte decree is that all proceedings subsequent to the stage of the defendant's non-appearance would no longer bind him. In other words, as the defendant's non-appearance was condoned by the setting aside of the ex parte decree, the evidence which was recorded in his absence will not also be admissible against him.

The same view is expressed by the Allahabad High Court in *Mst. Lakshmi Devi Vs. Roongta and Co. and Others*, .

3. All these decisions proceeded on the footing that the ex parte evidence should be treated as non est once the ex parte decree is set aside. I respectfully agree with that view. If the ex parte decree is set aside, the parties would be in the same position as they were before recording of ex parte evidence. If the suit is settled out of Court after the ex parte decree is set aside, such settlement is clearly before "any evidence has been recorded", for, the ex parte evidence originally recorded had been wiped out, as it were, by the setting aside of the proceeding. When the settlement was reported there was no evidence on record. That means that Section 69 of the Court fees Act is applicable to this case and the plaintiff is entitled to refund of half the Court-fees. The civil revision petition is allowed accordingly, but there will be no order, as to costs,