

(2009) 07 MAD CK 0083

In the Madras High Court

Case No : C.M.A. (MD) No's. 276 and 277 of 2009, M.P. (MD) No's. 1 and 2 of 2009 and Caveat P. (MD) No. 172 of 2009 in C.M.A. (MD) No. 276 of 2009

Karthikeyan

APPELLANT

Vs

R. Vasanth and Kannan @ Rajendran

RESPONDENT

Date of Decision : 20-07-2009

Acts Referred:

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

Citation : (2009) 07 MAD CK 0083

Hon'ble Judges : G.M. Akbar Ali, J

Bench : Single Bench

Advocate : M. Vallinayagam, for the Appellant; V. Perumal, for R1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

G.M. Akbar Ali, J.—These civil miscellaneous appeals are arising out of the common order passed in I.A. No. 63 of 2008 in O.S. No. 40

of 2005 and I.A. No. 64 of 2008 in O.S. No. 48 of 2004, dated 17.09.2008, on the file of the Additional District Court (Fast Track Court),

Thoothukudi.

2. The facts of the case are as under:

A suit in O.S. No. 40 of 2005 has been filed by Kannan/1st respondent herein against his father Kannan @ Rajendran and Karthikeyan/appellant

herein before the Additional District Court(Fast Track Court), Thoothukudi for declaration of title and for consequential relief of injunction

restraining the 1st defendant not to alienate the suit property to the 2nd defendant.

3. For convenience sake the plaintiff in O.S. No. 40 of 2005 is referred as plaintiff and the plaintiff in O.S. No. 45 of 2004 who is the 2nd

defendant in O.S. No. 40 of 2005 is referred as defendant/appellant in these appeals. A suit in O.S. No. 48 of 2004 has been filed by

Karthikeyan/appellant herein against Kannan @ Rajendran/2nd respondent herein/1st defendant in O.S. No. 40 of 2005 before the learned

Additional District Judge (Fast Track Court), Thoothukudi, for specific performance.

4. The case of the plaintiff in O.S. No. 40 of 2005 is that the suit property absolutely belongs to him. As his father/first defendant, who had no right

in the suit property, had entered into a sale agreement with the 2nd defendant, he had filed and prayed for a declaration of title and injunction. This

suit was resisted by the 2nd defendant.

5. The 2nd defendant, who is the agreement holder, had filed O.S. No. 48 of 2004, would state that he had entered into a sale agreement with the

father of the plaintiff and had paid substantial amount of the sale price and was ready and willing to perform his part of the contract. However, this

suit was filed against the father of the plaintiff and the same was resisted by the sole defendant.

6. Both the suits were taken up together and a joint trial was conducted. The evidence was recorded in O.S. No. 40 of 2005 and documents were

also marked including the sale agreement with further endorsements. The plaintiff was examined as P.W.1 and one more witness was also

examined as P.W.2. The 1st defendant in O.S. No. 40 of 2005, who is also the sole defendant in O.S. No. 48 of 2004 was also examined as

D.W.1 and was also cross-examined.

7. After closing the evidence of the plaintiff and also the examination of the 1st defendant in O.S. No. 40 of 2005 as D.W.1, the 2nd defendant in

O.S. No. 40 of 2005 and the plaintiff in O.S. No. 48 of 2004 have filed an application in I.A. No. 6 of 2008, for appointment of an Advocate

Commissioner and the same was dismissed on 07.02.2008. The appellant has filed an application in I.A. No. 14 of 2008 to re-open the case as

the evidence on the side of the defendant was closed and the said application was allowed on 11.02.2008 and the matter was adjourned from time

to time for recording the evidence of the defendant. Finally, it was posted on

03.04.2008. Even, on that date also the appellant herein was not present and hence, the evidence was closed and the matter was posted for arguments on 08.04.2008.

8. However, the dismissal of the Commission application in I.A. No. 6 of 2008 was challenged before this Court by filing a Civil Revision Petition

and the same was allowed and again the evidence was re-opened and the matter was posted for defense evidence. Again, the defendant was

called absent on 23.06.2008 and the evidence was closed and the suit was posted for arguments on 25.06.2008. On that date also, the defendant

did not appear before the court and the counsel stated ""no instruction"". Hence, the court below heard the matter and pronounced a common

judgment on 02.07.2008, by allowing the suit in O.S. No. 40 of 2005 and dismissing the suit in O.S. No. 48 of 2004.

9. The 2nd defendant, who is the agreement-holder had filed two petitions challenging the judgment and decree in O.S. No. 40 of 2005 and O.S.

No. 48 of 2004, on the file of the Additional District Court(Fast Track Court), Thoothukudi, under Order 9 Rule 13 of C.P.C. to set aside the ex-

parte decree and to re-open the case. The case of the appellant is that he could not appear before the court below when the matter was posted for

evidence and therefore, he has not adduced any evidence and hence, the court below had passed an ex-parte decree.

10. These two petitions were resisted by the plaintiff/respondent. After elaborate enquiry, the trial court has held that the court had proceeded

under Order 17 Rule 2 of C.P.C. as a substantial portion of evidence had already been recorded and therefore, the decree passed on 02.07.2008

is a decree on merits and not an ex-parte decree. Aggrieved by the above finding of the trial court, the defendant in O.S. No. 40 of 2005, who is

the plaintiff in O.S. No. 48 of 2005, has preferred these Civil Miscellaneous Appeals on the ground that the decree passed on 02.07.2008 is an

ex-parte decree and not a decree on merits.

11. The only legal point to be considered in these appeals are whether the judgment and decree dated 02.07.2008 is passed a decree on merits

under Order 17 Rule 2 or an ex-parte decree?

12. The learned Counsel for the appellant would submit that the court below is wrong in holding that the substantial evidence on the part of the

defendant was adduced, whereas, the defendant was not even examined before the Court and even though he had shown genuine and sufficient

reasons for his non-appearance on 25.06.2008 and the court had simply closed the evidence and therefore, it could be treated only as ex-parte

decree and for that the learned Counsel for the appellant relied upon the following judgments:

B. Janakiramaiah Chetty Vs. A.K. Parthasarathi and Others, and T. Kalyanasundaram Vs. M.S. Arumuganayakar, .

13. The learned Counsel for the respondent would submit in spite of several opportunities given to the defendant to adduce evidence, the

defendant had failed to appear before the court below and the court below has rightly closed the evidence and heard the arguments and delivered

the judgment. Therefore, the learned Counsel would submit that the court below has passed the judgment and decree only on merits and it is not an

ex-parte decree.

14. Before deciding this issue, it is pertinent to note that the consequences of events. Earlier a suit in O.S. No. 48 of 2004 has been filed by the

defendant, who is the appellant herein against the sole defendant for specific performance of the sale agreement. A suit in O.S. No. 40 of 2005 has

been filed for declaration of title and injunction by the son of the executant of the sale agreement. However, both the suits were tried together and

evidence was adduced and witnesses were examined and documents were also marked. The first defendant in O.S. No. 40 of 2005, who is the

sole defendant in O.S. No. 48 of 2004 was also examined as D.W.1 and he was also cross-examined. It is also pertinent to note that he was

cross-examined by the agreement-holder and the sale agreement with endorsements were also marked. The plaintiff's evidence was closed on

18.12.2007 and thereafter, the defendant filed an application for appointment of an Advocate Commissioner, which was dismissed on 07.02.2008

and the defendant's side evidence was also closed and afterwards, an application to re-open the case was filed, which was allowed on

11.02.2008. Finally, the matter was adjourned for several times for adducing the defendant's side evidence and posted finally on 03.04.2008. As

he has not come forward to adduce evidence, the evidence was closed and the matter was posted for arguments on 08.04.2008.

15. Since the Commission application was allowed by this Court in revision, the defendant filed an application to re-open the evidence, which was

also allowed on 23.06.2008, for adducing evidence and again it was also closed for the non-appearance of the defendant and the matter was

posted for arguments on 25.06.2008. On that date, the learned Counsel for the defendant endorsed ""no instruction"" and the matter was heard and

judgment was delivered on 02.07.2008. This shows that the court below had given ample opportunities to the defendant to adduce his evidence.

However, it is to be seen that whether the court below had proceeded under Order 17 Rule 2 or passed an ex-parte decree?

Order 17 Rule 2 reads as follows:

(2) Procedure if parties fail to appear on day fixed. Where, on any day to which the hearing of the suit is 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 of Order IX or make such order as it thinks fit.

Explanation: Where the evidence of 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.

16. In a judgment reported in B. Janakiramaiah Chetty Vs. A.K. Parthasarathi and Others, , the Apex Court has held as follows:

8. In order to determine whether the remedy under Order IX is lost or not what is necessary to be seen is whether in the first instance the Court

had resorted to the Explanation of Rule 2.

9. The Explanation permits the Court in its discretion to proceed with a case where substantial portion of 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. As the provision itself shows, discretionary power

given to the Court to be exercised in a given circumstances. For application of the provision, the Court has to satisfy itself that (a)substantial

portion of the evidence of any party has been already recorded: (b)such party has failed to appear on any day and (c)the day is one to which the

hearing of the suit is adjourned. Rule 2 permits the Court to adopt any of the modes provided in Order IX or to make such order as he thinks fit

when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an

exception to the general power given under the rule, conferring discretion on the court to act under the specified circumstance i.e. where evidence

or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit

has been adjourned. If such is the factual situation, the Court may in its discretion deem as if such party was present.

17. In yet another judgment of the Division Bench of this Court reported in T. Kalyanasundaram Vs. M.S. Arumuganayakar, , it has held as

follows:

6. The Honourable Supreme Court of India in the judgment referred to earlier while interpreting Order 17 Rules 2 and 3 had laid down the Law as

hereunder:

In Rule 2, the expression used is ""make such order as it deems fit"", as an alternative to adopting one of the modes directed in that behalf by Order

9. Under Order 17, Rule 3(b) only course open to the Court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a

discretion to the Court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has

already led evidence on a substantial part thereof. If the position is not so, the Court has no option but to proceed as provided in Rule 2. Rule 2

and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any

special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule. While

Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the Court to decide the suit forthwith. The basic distinction

between the two Rules, however, is that in the former, any party has failed to

appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the Court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present. The crucial expression in the Explanation is ""where the evidence or a substantial portion of the evidence of a party"". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the Explanation may proceed with the case if that prima facie is the position. The Court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision. This clearly has imprints of an ex parte adjudication and not of a decision on merits. There is not even any indication as to what evidence was evaluated and/or whether the merits were tested.

From the above, it is clear that Law laid down by the Supreme Court in the above referred to judgment is binding on us.

This is a case where P.W.1 to 5 have been examined in chief and the defendant did not cross-examine the witnesses, the plaintiff's side witness was closed and the suit stood adjourned for defense. Even thereafter, the defendant did not take part and the decree was passed.

18. In a decision in (Janakiramaiah Chetty v. Parthasarathi) reported in 2003 (2) CTC 242, the Supreme Court has laid down the scope of Order

17 Rule 2 as

The Trial Court in this case had no jurisdiction to pass a decree on merits and it ought to have disposed of the suit only in terms of Order 17 Rule 2

without the aid of the Explanation to the said sub rule. In the light of our decision, namely, the decree dated 13.10.2003 would only be an ex parte

decree and not a decree on merits, we have no other go except to hold that the application under Order 9 Rule 13 filed by the defendant is maintainable.

19. In the light of the above referred rulings of the Supreme Court, it is necessary to see whether the trial Court satisfied itself that:

- a) a substantial portion of evidence of any party has already been adduced and
- b) the said party failed to appear on any day to which the hearing of the suit is adjourned

If the above points are answered affirmatively, then the Court may proceed with the case as if such party was present.

Therefore, whenever the court proceeds under Order 17 Rule 2 of C.P.C., the above said conditions are to be looked into by the trial Court.

20. In the instant case, the suits are one for declaration of title and for consequential relief of injunction and the other suit is for specific performance

of a contract and the appellant had adduced substantial portion of evidence by cross-examining the plaintiff and the executant of the sale agreement

and he had failed to appear on the day to which the hearing of the suit was adjourned and the court had proceeded with the case, as if such party

was present.

21. Therefore, in order to determine whether the judgment and decree was passed under Order 17 Rule 2 as a decree on merit or an ex-parte

decree, it is essential to satisfy the above two conditions viz., whether a) a substantial portion of evidence of any party has already been adduced

and b) whether said party failed to appear on any day to which the hearing of the suit is adjourned.

22. Whenever, the Court proceeds under Order 17 Rule 2 and 3 of C.P.C., the trial court should satisfy itself on the above said two conditions. It

is also advisable that the court may record its reason for proceeding under Order 17 Rule 2 or 3 whichever is applicable to avoid misconception

by the parties.

23. As per the records, it is clear that the case was posted on 23.06.2008, for further evidence of the defendant and since he has not appeared

and the evidence was again closed and the case was posted on 25.06.2008 for arguments. On that day also, the learned Counsel for the defendant

reported ""no instruction"" and after hearing the arguments, the judgment was

delivered on 02.07.2008. Therefore, it is a decree on merits and not a decree on ex-parte. The court below had rightly dismissed the applications filed under Order 9 Rule 13, therefore, I have no reason to interfere.

24. In view of the above, the common judgment and decree, dated 02.07.2008 in I.A. No. 63 of 2008 in O.S. No. 40 of 2005 and I.A. No. 64

of 2008 in O.S. No. 48 of 2004 are confirmed. Hence, the Civil Miscellaneous Appeals fail and the same are dismissed.