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**(1981) 08 MAD CK 0049**  
**In the Madras High Court**

M. Govindaswami Pillai

APPELLANT

Vs

C.T. Balasubramania Thevar

RESPONDENT

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**Date of Decision :** 31-08-1981

**Acts Referred:**

**Citation :** (1982) ILR (Mad) 226 : (1982) 95 LW 81 : (1982) 1 MLJ 126

**Hon'ble Judges :** R. Sengottuvelan, J

**Bench :** Division Bench

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**Judgement**

R. Sengottuvelan, J.—This civil revision petition arises out of the order of the Subordinate Judge of Nagapattinam, passed in O.S. No. 70 of 1978 negating the claim of the plaintiff in the suit for the refund of one half of the court-fees paid in the plaint u/s 69 of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955 (hereinafter referred to as the Act).

2. The civil revision petitioner herein filed a suit O.S. No. 70 of 1978 on the file of the Subordinate Judge of Nagapattinam, against one C. T. Balasubramania Thevar, claiming a sum of Rs. 29,238. The defendant in the written statement alleged discharge of part of the suit claim by payment and part of the claim by supplying electrical goods. After framing issues, the suit was posted in the list for trial on 16th August, 1979 and on that day the suit was opened and Exhibits A-1 and A-2 were filed by consent on the side of the plaintiff. The suit stood adjourned to 13th August, 1979 for further evidence and it was adjourned several times thereafter. When the case was taken up on 7th September, 1979, it was reported that the matter was being settled and was again adjourned to 11th September, 1979 and 12th September, 1979 as the plaintiff was absent. Subsequently on an application, the order of dismissal was set aside on 11th October, 1979 and the suit was again taken up for trial. On 22nd October, 1979, the plaintiff's counsel made an endorsement on the plaint stating that the matter is settled out of Court and the suit may be dismissed as settled out of Court and prayed for refund of half the court-fees. The learned Subordinate Judge held that in view of the fact that the suit was opened and Exhibits A-1 and

A-2 were marked by consent on the side of the plaintiff, the plaintiff is not entitled to the relief prayed for. As against the order of the Subordinate Judge refusing to pass an order of refund of half of the court-fee, this civil revision petition is filed.

3. Mr. V. Rajanarayanan, representing Mr. R. Krishnamoorthy, counsel for the civil revision petitioner, submits that Exhibits A-1 and A-2 were marked previously and the suit itself was dismissed after the Exhibits were marked and when the suit is restored to file, the previous marking of Exhibits becomes non est and as such there is no bar for refund of half the court-fees. The question for determination in the civil revision petition is whether the marking of the documents Exhibits A-1 and A-2 will cease to have effect in view of the dismissal of the suit, and whether after the suit is restored to file, the plaintiff is entitled to refund of half the Court-fees on the ground the suit claim is settled out of Court.

4. Section 69 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955 reads as follows:

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.

Explanation. - The expression "merits of the claim" shall have the meaning assigned to it in Section 12.

The "merits of the claim" is defined in Explanation to Section 12 of the abovesaid Act as follows:

In this section, the expression "merits of the claim" refers to matters which arise for determination in the suit, not being matters relating to the frame of the suit, mis-joinder of parties and causes of action, the jurisdiction of the Court to entertain or try the suit or the fee payable but inclusive of matters arising on pleas of res judicata, limitation and the like.

The section provides for refund of half the court-fees in cases the suit is dismissed as settled out of Court before any evidence has been recorded on the "merits of the claim". Recording of evidence on the "merits of the claim" has been construed in several decisions of this Court as well as other High Courts. In the case reported in S.V.K.M. Ratnasamy Nadar and Brothers Vs. K. Subbuswami Iyer and Another, , Natesan, J., had an occasion to consider whether marking of two exhibits in a suit, without letting in oral evidence, will amount to recording of evidence. In that case, two exhibits were marked as evidence in the suit. But before any oral evidence was recorded in the suit, it was reported as settled out of Court and was dismissed. The trial Court rejected the application for refund of half the Court-fee paid on the plaint u/s 69 of the Act. In revision, this Court held according to Section 69, even marking of Exhibits will amount to recording of evidence on the merits of the claim and the party would not be entitled to

benefits of Section 59. The record generally means an official written report of public proceedings, as of a legislature or Court of law. Evidence in a case can both be oral and documentary and instances were not infrequent, where cases were disposed of purely on documentary evidence at times massive. The word recorded with reference to documentary evidence alone would be clear if the marginal heading of Order 13, Rule 7, Civil Procedure Code, was referred to, which speaks of recording of admitted and return of rejected documents. Documentary evidence also formed part of the record of the case, and therefore, got recorded like oral evidence. Holding that marking of exhibits will amount to recording of evidence, Natesan, J., rejected the claim of the plaintiff for refund of half the court-fees. But in this case, the facts are different since after the marking of Exhibits A-1 and A-2, the suit was dismissed for default and once again restored to file on the application by the plaintiff. We have to consider whether the recording of the evidence by marking Exhibits A-1 and A-2 will continue to exist even after the suit is dismissed for default and once again restored to file. No decision pertaining to this question had been brought to by notice.

5. In the case reported in *C. Easwaramoorthy Vs. Ramakrishnan*, , the effect of ex parte evidence recorded in a case before the ex parte decree is set aside is considered by N. Section Ramaswami, J. The suit was decreed ex parte after recording ex parte evidence. The ex parte decree was set aside on the defendant filing an application and ultimately the matter was settled out of Court and the suit was dismissed accordingly. When the plaintiff applied for refund of half the Court-fees u/s 69 of the Act, the trial Court held that the plaintiff is not entitled to refund of half the Court-fees since ex parte evidence has been recorded. In revision, this Court 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. 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 after the setting aside of ex parte decree. Taking this view, this Court held that the plaintiff is entitled to refund of half the Court-fees u/s 69 of the Act.

6. In the case reported in *M.S. Mani Vs. K.N. Velayudham Chettiar*, , a similar question arose before this Court. The plaintiff obtained an ex parte decree and filed execution proceedings. However, the ex parte decree was later set aside. After setting aside the ex parte decree, when the case came up for hearing the suit was dismissed as settled out of Court. The claim for refund of half the court-fees u/s 69 of the Court-Fees and Suits Valuation Act was rejected by the trial Court on the ground that there has been a recovery of a sum of Rs. 19,855 in execution. On revision, Sethuraman, J., held following the decision of N.S. Ramaswami, J., in *C. Easwaramoorthy Vs. Ramakrishnan*, , that on account of

the setting aside of the ex parte decree, the ex parte evidence should be treated as non est. 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, on setting aside the ex parte decree. As a result of the setting aside of the decree, realisation in execution would lose its validity. If necessary, the petitioner might have been ordered to bring back the said amount to the credit of the suit as there can be no realisation in execution of a decree, which had ceased to exist. The fact that there has been execution of the decree would be of no consequence and after the decree was set aside, the parties would be restored to the position which they occupied prior to the passing of the decree. In this view, the revision was allowed and the plaintiff was found to be entitled to an order of refund of one-half of the court-fees.

7. Now, we have to consider whether in a case where some evidence is recorded and then the suit is dismissed for default, and then restored, the evidence recorded becomes non est, just as the ex parte evidence is held to be non est after the ex parte decree is set aside. In my view there cannot be one rule in respect of matters where an ex parte decree is set aside and another rule in respect of a suit dismissed for default and once again restored to file. Just as in the case of setting a-side the ex parte decree, the prior proceedings becomes non est similarly when a suit is dismissed for default and once again restored to file, the proceedings prior to the restoration also become non est. Considered in this view, in this case the documents Exhibits A-1 and A-2 were marked and subsequently the suit was dismissed for default. Afterwards on the restoration of the suit to file, the marking of Exhibits A-1 and A-2 cannot be said to continue since though the suit technically remains the same, proceedings have started de novo. The marking of Exhibits A-1 and A-2, will not survive after restoration of the suit. After the suit was dismissed for default, the plaintiff could have as well obtained the return of the documents even prior to the restoration of the suit and hence it cannot be said that the marking of Exhibits A-1 and A-2 will continue even after the suit is restored to file. The fact that the documents were marked by consent prior to the dismissal of the suit will not in any way alter the situation.

8. I am of the view that the principles laid down in the aforesaid two decisions in C. Easwaramoorthy Vs. Ramakrishnan, and in M.S. Mani Vs. K.N. Velayudham Chettiar, , may as well be applied to the facts of this case also. The view of the learned Subordinate Judge that the marking of Exhibits A-1 and A-2 in proceedings prior to the restoration of the suit will amount to recording of evidence after the suit is restored to file does not appear to be correct. There is no recording of evidence after the suit is restored to file and the evidence recorded before the dismissal and the restoration of the suit to file becomes non est. Since before the recording of evidence the suit is settled out of Court, in the de novo proceedings after the suit is restored to file, the plaintiff is entitled to refund of half the Court-fees. Hence the order of the Subordinate Judge is set

aside and this civil revision petition is allowed and the plaintiff is declared to be entitled to refund of half the court-fees paid on the plaint.