

(1995) 09 KL CK 0013
In the High Court Of Kerala
Case No : C.R.P. No. 22 of 1990

M/s Mathes Trading Company

APPELLANT

Vs

Relish Foods (P) Ltd.

RESPONDENT

Date of Decision : 12-09-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 8 Rule 10, Order 9 Rule 13

Citation : (1995) 09 KL CK 0013

Hon'ble Judges : M.M. Pareed Pillay, C.J;P. Shanmugam, J

Bench : Division Bench

Advocate : Elizabeth Mathai Idicula, for the Appellant; N. Muraleedharan Nair, for the Respondent

Judgement

M.M. Pareed Pillay, C.J.—Appellant who is the plaintiff in O.S. 72 of 1987 of the Additional Sub Court, Alleppey challenges the order in L.A. 724 of 1988. The Interlocutory Application was filed by the respondent (defendant) under Order 9 Rule 13 C.P.C. to set aside ex parte judgment and decree. The application was allowed by the trial Court on payment of costs Rs. 100/-. Contention of the plaintiff is that the interlocutory application under Order 9 Rule 13 is not maintainable as decree was granted in its favour under Order 8 Rule 10 C.P.C. on the failure of the defendant to file its written statement. It is contended that as the defendant was not declared ex parte and as the decree has been granted as aforesaid the interlocutory application was not legally maintainable and the only course open to the defendant was to have filed appeal before the proper Court.

2. On 24-5-1988 the suit for realisation of money was decreed. On previous occasions the trial Court granted time to the defendant to file written statement. On 24-5-1988 defendant's counsel applied for time. That was vehemently opposed by the plaintiffs counsel. The Sub Judge did not grant further time and he pronounced the judgment as required under Order 8 Rule 10 C.P.C. Exts. A-1 to A-5 were marked. Holding that plaint claim stands proved plaintiff was granted decree to recover the suit claim with 6% interest from the date of suit till

realisation.

3. The question that arises for consideration in this case is whether interlocutory application filed under Order 9 Rule 13 C.P.C. is maintainable or not. In other words, contention of the plaintiff that the only course open to the defendant is to have filed appeal against the judgment and decree has to be considered.

4. Order 8 Rule 10 provides that where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment, a decree shall be drawn up. Order 8 Rule 1 enjoins the defendant to file his written statement of defence at or before the first hearing or within such time as the Court may permit. Rule 9 postulates that no pleadings subsequent to the written statement of a defendant other than by way of defence to a set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit. Certainly the court can require written statement or additional written statement from the defendant and fix a time for presenting the same. Rule 10 enables the court to pronounce judgment against the defendant if he fails to present the written statement within the time permitted by the Court. On the pronouncement of such judgment a decree has to be drawn up.

5. Thus, from a reading of the above provisions it can be seen that the defendant as a matter of right can file written statement at or before the first hearing or within such time as permitted by the Court. Rule 9 enables the Court to require written statement or additional written statement within a specified date. In a case where defendant failed to file written statement Rule 10 comes into play. As already noted, Rule 10 enables the Court to pronounce judgment on the basis of the evidence before it.

6. In such a case whether defendant can file petition under Order 9 Rule 13 to set aside the judgment and decree on the ground that it is an ex parte judgment against him or that he has to file appeal against it arises for consideration. In *Haridas v. Madhavi Amma* (1987 (2) KLT 701) Padmanabhan J. held that decree passed under Order 8 Rule 10 can be set aside under Order 9 Rules 13 and appeal alone is not the remedy available to the party aggrieved. He held thus:

The mere fact that there is right of appeal against the ex parte decree is no reason to hold that an application under O.9 R. 13 is not maintainable. Remedy under O.9 R.13 and that by way of appeal are not mutually exclusive. There is no bar in resorting to both the remedies simultaneously or any of them alone. Only thing is that when both remedies are attempted and one succeeds the other becomes infructuous since the object and effect of both is the same.

In *Krishnadas v. Chathu* (1989 (1) KLT 605) Radhakrishna Menon J. held that decree passed under Order 8 Rule 10 cannot be treated as an ex parte decree within the meaning of Order 9 Rule 13 and hence petition to set aside such a

decree under Order 9 Rule 13 is not maintainable and appeal is the only remedy open to a party. In view of the apparent conflict between the two decisions, the case was referred to the Division Bench for hearing.

7. Learned counsel for the defendant relied on *Manick Peter v. Surendranathan* (1987 (2) KLT 328) where a Division Bench of this Court held that petition under Order 9 Rule 13 is maintainable against the decree passed under Order 8 Rule 10 for failure of the defendant to file written statement. The Division Bench held that ex parte decree passed under Order 8 Rule 10 is not to be treated differently from any other decree ex parte liable to be set aside under Order 9 Rule 13. In the above decision, Division Bench referred to *Prakash Chander Manchanda and Another Vs. Janki Manchanda*, in support of its conclusion that petition would be maintainable against the decree passed under Order 8 Rule 10 for failure of the defendant to file written statement. The Supreme Court had occasion to consider the case where the defendant remained absent and on his side no evidence was adduced. The Supreme Court held that Order 17 Rule 2 and not Rule 3 applies and the Court can proceed ex parte against the defendant under Order 9. It was further held that in such a case defendant can file application under Order 9 Rule 13 for setting aside the ex parte decree. Following the Supreme Court ruling Division Bench of this Court held that in a case where the defendant and his counsel failed to appear in court and the Court proceeded to dispose of the suit under Order 9 Rule 10 such disposal has to be treated in accordance with Order 17 Rule 2 and hence ex parte decree passed under Order 8 Rule 10 cannot be treated differently from any other decree ex parte liable to be set aside under order 9 Rule 13. In *Krishnadas's case* (1989 (1) KLT 605) *Radhakrishna Menon J.* had no occasion to consider the aforesaid Supreme Court decision. In the case in hand, defendant's application for time by its counsel was not granted by the Sub Judge and he pronounced the judgment against the defendant as required under Order 8 Rule 10. Exts. A-1 to A-5 on the side of the plaintiff were marked. On the strength of the documentary evidence the Sub Judge held that the plaintiff claim stood proved. Thus, it can be seen that the Sub Judge proceeded under Order 17 Rule 2.

8. Explanation to Order 17 Rule 2 is to the effect that where the evidence or 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. In the instant case, no evidence was recorded. As this is not a case where evidence of the plaintiff or substantial portion of his evidence was recorded the explanation is not attracted. In a case where the explanation is attracted the Court can exercise its discretion and proceed with the case as if the defendant was present in the Court. As the defendant was absent the Court should have proceeded only under Order 17 Rule 2; Rule 2 enables the Court to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit in a case where the defendant failed to appear. This is a case where the Sub judge has proceeded to dispose of the suit

under Order 17 Rule 2. The explanation to Order 17 Rule 2 certainly confers a discretion on the Court to proceed under Rule 3 even if a party is absent under the circumstances mentioned. In *Prakash Chander v. Janki Manchanda*. (A.I.R. 1987 8.C. 42) Supreme Court considering Order, 17 Rule 2 and Rule 3 held thus: It is clear that in cases where a party is absent only course is as mentioned in O.17 (3) (b) to proceed under R.2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under R. 2. Similarly the language of R. 2 as now stands also clearly lays down that if any one of the parties fails to appear, the court has to proceed to dispose of the suit in one of the modes directed under O.9. The explanation to R. 2 gives a discretion to the Court to proceed under Rs. 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the Court has no option but to proceed to dispose of the matter in accordance with O. 17 R. 2 in any one of the modes prescribed under O.9, Civil PC. It is therefore clear that after this amendment in O.17 R. 2 and 3, Civil P.C. there remains no doubt and therefore there is no possibility of any controversy.

Thus, the settled legal position is that in a case where a decree was passed under Order 8 Rule 10 for failure of the defendant to file written statement Order 9 Rule 13 petition is maintainable. Contention of the plaintiff that the defendant has not been set ex parte as per the judgment and therefore application under Order 9 Rule 13 is not maintainable and the only course open to it is to have filed appeal before the proper Court is not tenable. The impugned order does not warrant interference. In the result, C.R.P. is dismissed.

Trial Court is directed to dispose of the suit with utmost expedition and at any rate before 23-12-1995.