

(1939) 02 MAD CK 0009
In the Madras High Court

Paturi Venkateswara Rao and Another	APPELLANT
Vs	
Parvataneni Subrahmanyam	RESPONDENT

Date of Decision : 09-02-1939

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 3

Citation : AIR 1939 Mad 974 : (1939) 50 LW 430 : (1939) 2 MLJ 611

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—Defendants 1 and 7 in the original suit, who were respondents 1 and 7 in the petition in the Court below, are the petitioners in

this Court. They seek to revise the order of the Subordinate Judge of Masulipatam dated the 6th August, 1937. By that order the Subordinate

Judge restored a suit which had been dismissed for default on 14th January, 1937. The plaintiff's application for restoration was opposed by

defendants 1 and 7 on two grounds : (1) that the decision in the suit was not one dismissing the suit for default but that it was a disposal under

Order 17, Rule 3, CPC and (2) that there were no sufficient grounds to set aside the default order. The Subordinate Judge held on both points

against the defendants and restored the suit on terms. This revision petition is directed against the said order and it is urged before me by Mr.

Lakshmayya the learned Counsel for the petitioners that the disposal was not under Order 17, Rule 2 but was one under Order 17, Rule 3 and

that there is no finding by the Subordinate Judge that the plaintiff had sufficient cause for not appearing on 14th January, 1937, on which date the

suit was dismissed.

2. As regards the first point it is contended that time had been granted to the plaintiff on the day of the previous hearing for production of his

witnesses and that therefore the dismissal of the suit on 14th January, 1937, was one made under Order 17, Rule 3. What happened on that day

was that Mr. P. Lingayya who was appearing for the plaintiff was away from town, that another gentleman Mr. Sitaramayya applied for an

adjournment and that being refused he took no further part in the proceedings. He was apparently not instructed to conduct the suit. The plaintiff

was then asked to go into the witness-box and give evidence. But he evidently felt that he could not go on with the suit in the absence of any

pleader duly instructed to conduct the case on his behalf. On these facts I am satisfied that the case falls under Order 9, Rule 9. The mere physical

presence of the party has been held not to take the case out of Order 9, Rule 9. Similarly, the mere fact that a pleader who had no instructions to

conduct the suit asks for an adjournment is not appearance in the suit whether he formally reported no instructions or not, if all that he did that day

was to apply for an adjournment and nothing more. This is not a case in which any act was done by the pleader on the date of the hearing in the

conduct of the suit. The decision relied upon by Mr. Lakshmayya in *Govindarajulu Naidu v. Imperial Bank of India, Vellore (1934) 68 M.L.J.*

123 : ILR 58 Mad. 817 does not therefore apply. The other decision relied on by him, namely, *S.S. Balakrishna Aiyar and Another Vs.*

Muthammal, is one in which on the facts of that case the learned Judges held that the pleader did actually appear. I am not prepared to take the

decision as laying down any general proposition of law applicable to all cases. In this case, Mr. Sitaramayya was not the Advocate originally

engaged by the plaintiff and was apparently instructed only to apply for an adjournment and not to conduct the suit. Adjournment having been

refused, it is clear that he took no further part in the proceedings and whether he actually stated that he withdrew or not is immaterial. I hold that

there was no appearance so as to preclude an application for restoration of the suit.

3. On the second question whether the plaintiff had sufficient cause for not appearing or for not being ready on 14th January, 1937, it is no doubt

true that there is no clear finding by the Subordinate Judge in the order under revision. He ought to have definitely found whether the plaintiff had

sufficient cause for not appearing on 14th January, 1937. But I do not think that any useful purpose will be served by sending the case back for a

finding on that point. I have myself gone into the evidence and I find that the plaintiff had sufficient cause for not appearing on 14th January, 1937,

in the sense of being ready to go on with the trial of the suit. The mere physical appearance of the plaintiff on the day of the hearing, as already

observed, is no appearance in the suit. Vide Gopal Rao v. Maria Susayya Pillai (1906) 17 M.L.J. 225 : ILR 30 Mad. 274, and Mittadar Venkoba

Rayar v. Mittadar Kadiriappa Goundar (1914) M.W.N. 344.

4. The lower Court has given costs to the defendants and that is enough panacea for them. I accordingly dismiss this revision petition but in the

circumstances I make no order as to costs.