

(1986) 01 MAD CK 0045
In the Madras High Court
Case No : C.R.P. No. 3206 of 1985

Rengammal

APPELLANT

Vs

N. Srinivasan and Another

RESPONDENT

Date of Decision : 03-01-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3(a), Order 9 Rule 11, Order 9 Rule 13, Order 9 Rule 9

Citation : (1986) 01 MAD CK 0045

Hon'ble Judges : M. N. Chandurkar, C.J

Bench : Single Bench

Advocate : S. Selvarathinam, for the Appellant; T. Somasundaram, for the Respondent

Final Decision : Allowed

Judgement

M. N. Chandurkar, C.J.—The petitioner is the plaintiff. She has filed a suit on the basis of a mortgage executed by one Narayanaswami who is the father of defendants 1 and 2. The mortgage is dated 2nd June, 1969 A preliminary decree was passed by the trial court on 23rd November, 1982. It appears that during the pendency of the suit, the defendants claimed protection under the Debt Relief Act, Tamil Nadu Act 13 of 1980 read with Tamil Nadu Act 11 of 1981. Defendants 1 and 2, therefore, applied for a stay of the suit pending the determination of their right to the benefit of the Debt Relief Act by the appropriate authorities. This application for stay of the suit was rejected by the trial Court. A revision petition filed against the order declining to stay the suit was also rejected by this Court on 15th November, 1982. Thereafter the suit was taken up on 22nd November, 1982. It appears that on that date, the second defendant was not present but the other defendant was present. Prior to this, the first defendant was already examined and cross-examined by the plaintiff. When the suit was taken up on 22nd November, 1982, the plaintiff was cross-examined on behalf of the defendants 6 to 11. The trial Court proceeded to decide the suit on merits, having regard to the Explanation to O.17, R.2, C.P.C., O. 17, R. 2 and

the Explanation thereto reads as follows :?

"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 by O. 9 or make such other order as it thinks fit.

Explanation :? 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."

2. A preliminary decree having been passed, defendants 1 and 2 alone applied to the trial Court under O.9, R.13, C.P.C., for setting aside the decree on the ground that the decree was an ex parte decree and that they were unable to remain present on 22nd November, 1982, because they received information on 30th November, 1982. What the intimation was about is not very clear. The only relevant paragraph in which this is stated reads as follows :?

Myself and my brother were away to attend our domestic affairs and we were not able to be present for the trial of the suit posted to 22nd November, 1982 and information received by us today, i.e., 30th November, 1982. When we contacted our advocate, we learnt that he had reported "no instructions" and a preliminary decree was passed ex parte against us on 22nd November, 1982.

According to the plaintiff, the application for setting aside the ex parte decree was not maintainable and the only remedy for the present petitioners was to file an appeal against the preliminary decree.

3. The Principal Subordinate Judge, however, took the view that the application for setting aside the ex parte decree was maintainable having regard to the Division Bench decision of this Court in Pugal v. Kamala and another 97 L.W. 236. The learned Judge found that defendants 1 and 2 will have to be given an opportunity to contest the case. He, therefore, set aside the ex parte decree on payment of costs of Rs. 200. This order is now challenged in this revision petition.

4. The learned counsel appearing on behalf of the plaintiff contended that the learned Subordinate Judge was in error in holding that the decree was an ex parte decree and that an application for setting aside the ex parte decree under O.9, R.13, C.P.C. was maintainable. According to him the decision of the trial Court was a decision on merits and having regard to the Explanation to O.17, R.2, C.P.C. the decree could be set aside only in appeal. The learned counsel for defendants 1 and 2 argued that the requirement of Explanation to O.17, R.2 C.P.C. is that the evidence or a substantial portion of the evidence of any party must have been recorded and then only if such a party fails to appear on the date to which the hearing of the suit was adjourned the Court has jurisdiction to proceed with the case as if such party was present. It is pointed out that the evidence on behalf of defendants 1 and 2 was still to be recorded and therefore

the learned Subordinate Judge was not justified in invoking the Explanation to O.17, R.2, C.P.C. Therefore, according to the learned counsel the court had jurisdiction to set aside the ex parte decree under O.13, C.P.C.

5. Under O.17, R.2, C.P.C., discretion has been given to the court in case parties or any of the parties fail to appear on the date to which the hearing of the suit is adjourned to dispose of the suit in one of the modes directed in that behalf by O.9, C.P.C. There is also discretion to make any other order as the Court thinks fit. Under O.9, C.P.C., the court has jurisdiction to dismiss the suit where neither party appears when the suit was called on for hearing. O.9, R.11, C.P.C. prescribes the procedure in case of non-attendance of one or more of several defendants. It provides if there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed and the court shall at the time of pronouncing judgment make such order as it thinks fit with respect to the defendants who do not appear. Therefore, in so far as the absence of the defendants or some of the defendants is concerned, the trial Court was entitled to proceed with the suit. The Explanation to O.17, R.2 C.P.C. however though styled as an Explanation is really a substantive provision which vests discretion in the court to proceed with the suit as if the party who was absent was present. This can, however, be done only where the evidence or the substantial portion of the evidence of a party who fails to appear, has already been recorded. In other words, the Explanation enables the Court to proceed with the suit and decide the same on merits as if the party was present, though in fact the party was absent on the date to which the hearing of the suit was adjourned, provided, of course, that the evidence of the party who is absent or substantial evidence of such part has already been recorded. The decision given in a case where the Court proceeds under the Explanation is really a decision on merits. When the Explanation provides that the party though absent will be treated as being present, it obviously contemplates that the decree passed in such circumstances cannot be described as not an ex parte decree in the sense that the party who was absent had no opportunity to contest the claim made against it or give evidence in support of its defence to the claim. The decision in such a case is by law treated as a decision given after a full trial in the presence of the defendant. In such a case the provisions of O.9, R.13 C.P.C. will not be applicable because the decree cannot be treated like an ex parte decree as generally understood.

6. The decision relied upon by the learned Judge does not seem to support his view that the application for setting aside the decree, as though it was an ex parte decree, was maintainable on the facts of the present case. In *Pugal v. Kamala*, and another 1985 T.L.N.J. 221 on which reliance has been placed on behalf of the defendants and on which the learned Subordinate Judge has relied, it was held that mention of the provision of O.17 R.3(a) C.P.C. while dismissing a suit was not conclusive of the question whether the decision was on merits or not. The Division Bench pointed out that in every case the court will have to lift the veil and find out whether really the decision was on merits and if the court

comes to the conclusion that the suit happened to be dismissed really on the ground of non-prosecution on the part of the plaintiff, then notwithstanding the fact that the provision of O.17 R.3(a), C.P.C. has, been cited by the Court, it will be open for consideration whether the order was really one of mere dismissal for non-prosecution or on merits. On the facts of that case, the Division Bench took the view that notwithstanding the fact that the Court purports to act under O.17, R.2, C.P.C., if the circumstances set out by the court are such that an order under O.9 read with O.17, R.2 C.P.C. would be legally justified and the actual order passed is one which could be legally passed under O. 9 read with O. 17, R 2, C.P.C. it was permissible for the court to entertain an application for restoration under O. 9, C.P.C. The facts of that case will show that when the plaintiff's suit was taken up for trial, the plaintiff applied for time on the ground that he had to obtain certain documents. The adjournment was refused and the suit was dismissed by the learned Judge sitting on the Original Side. The learned Judge had observed while dismissing the suit that the plaintiff had declined to lead evidence and prosecute the suit. On an application for restoration of the suit being made, it was held that the application was not maintainable, as the dismissal of the suit was held to be on merits. The Division Bench having taken the view that the suit was dismissed for non-prosecution it was held that the application for restoration of the suit was maintainable.

7. The decision of the Division Bench has, in my view, no relevance at all to the facts of the present case. Defendant No. 1 had earlier examined himself and was cross-examined. There is nothing to show that any further evidence on behalf of defendants 1 and 2 had remained to be given. Even the application for setting aside the ex parte decree does not mention that substantial evidence was not recorded as contemplated by the Explanation to O. 17, R.2 C.P.C. We must, therefore, assume that the entire evidence on behalf of defendants 1 and 2 had already been recorded. The only course open to the trial court after the suit had been taken up for hearing was to examine the plaintiff, who was examined and cross-examined by the other defendants who were present. A disposal of the suit after the evidence of the defendants and the plaintiff is recorded must be treated as a decision on merits for the purpose of the Explanation to O.17, R.2 C.P.C. since the Court decided to proceed with the suit. Such decision must be treated as a decision reached on the footing that fictionally the defendants were present. The intention behind the newly added Explanation appears to be to give discretion to the Court to proceed with the case in which substantial evidence on behalf of the party who fails to appear has already been recorded and thereby reduce the delay in the disposal of the suit where parties are not diligent enough and remain absent on the date to which the suit has been adjourned.

8. Mr. Somasundaram appearing for the respondents has brought to my notice another decision of the Division Bench in Messrs. M.A. V R. Natarajan Nadar & Sons v. M/s. P.R.K. Nainar & Co. 1985 T.L.N.J. 221. Even that decision does not seem to be of any assistance to defendants 1 and 2. While construing O. 17, R.2, C.P.C. and the Explanation thereto, the Division Bench observed that the

discretion under R.2, should be exercised judicially and that the discretion to dispose of the suit on merits should be exercised on judicial consideration. With this proposition there can hardly be any dispute. On the facts of that case, it was found that the evidence of the plaintiff alone was recorded and closed and the defendants did not go into the witness box. The defendants sought an adjournment which was granted. Later, the court assuming that the defendant was adopting delaying tactics, decided to set ex parte under O. 17, R.2. The application for setting aside the ex parte decree was rejected by the Subordinate Judge holding that there was no ex parte decree and the suit was disposed of after trial. The Division Bench referred to the progress of the suit and found that when the defendants were asked to proceed with the trial on 27th March 1984, they declined to proceed with the trial, the counsel reported no instructions and the case was fixed for argument on 17th March 1984. The defendant's counsel had withdrawn his vakalat on 23rd March 1984, after reporting no instructions. However, the same counsel filed another vakalat on 24th March, 1984. The suit came to be adjourned from time to time when the case was finally taken on 16th April, 1984 and the court directed the respective counsel to proceed with the case and since the defendants' counsel was not ready, the court proceeded under O.17, R.2 C.P.C. and the judgment was pronounced on 16th April, 1984. This decree was held by the Division Bench as having been passed not after full trial and the remedy of the defendants was found to be by way of an application under O.9, R.13, C.P.C. While referring to the Explanation to O.17, R.2 C.P.C., the Division Bench pointed out that on the facts of that case the Explanation was not attracted because the defendants had not led any evidence. It will thus appear that a decision before the Bench was given on the facts of that case and does not lay down any proposition of law on which defendants 1 and 2 can rely.

9. After hearing the learned counsel for the parties, I am therefore, satisfied that the trial court was in error in holding that the application under O. 9, R.13, C.P.C. was maintainable.

10. This revision petition is allowed, the order of the Subordinate Judge setting aside the ex parte decree is set aside and the application filed by defendants 1 and 2 for setting aside the ex parte decree stands rejected.

11. The learned counsel appearing for defendants 1 and 2 wanted me to observe that they are at liberty to file an appeal against the ex parte decree and that the delay which has been occasioned by prosecuting a wrong remedy should be excused when an appeal is filed. These are matters on which no direction can be given. It is for defendants 1 and 2 to approach the appropriate forum to seek remedy of appeal, if they are so advised and it will be open to the appropriate court to decide whether it will entertain such a prayer for excusing the delay in filing the appeal. The revision petition is accordingly allowed. However, there will be no order as to costs.