

**(1934) 09 MAD CK 0054**  
**In the Madras High Court**

Sannidhi Chinnasubbarayudu

APPELLANT

Vs

Godasi Veeraswami and Another

RESPONDENT

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**Date of Decision :** 28-09-1934

**Acts Referred:**

**Citation :** AIR 1935 Mad 196 : 155 Ind. Cas. 575 : (1935) 41 LW 117

**Hon'ble Judges :** Walsh, J

**Bench :** Division Bench

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## **Judgement**

Walsh, J.—The plaintiff who was a minor brought a suit on a pronote S.C.S. No. 284 of 1932 on the file of the Subordinate Judge's Court of Amalapuram which was first dismissed for default. On this a petition was put in to set aside the dismissal order and restore the suit to file and the Court passed the following order:

Defendant 1 affixed again : service sufficient against defendant 1 : absent and ex parte Defendant 2 also called, absent. Petition allowed.

2. This order is the subject of Civil Revision Petition No. 1736 of 1933. It is argued that the Court should have stated the reasons why it held that the plaintiff had sufficient reasons for his absence) at the date of the hearing. I am not inclined to interfere in this Revision Petition because the plaintiff being represented by his guardian it would appear that whether the latter had sufficient reasons for non-appearance or not the suit had to be restored to file: vide Venkataratnam v. nagappa 1934 Mad 616 following Kesho Prasad v. Hirday narain (1880) 6 C.L.R. 69 and Kathaswamy Chettiar v. Ramachandran 1934 Mad 428. The Civil Revision Petition is dismissed with costs. On the same day on which the suit was restored to file the learned Subordinate Judge proceeded to try it and as the defendants were ex parte and as the plea was want of consideration gave an ex parte decree to the plaintiff. This forms the subject matter of Civil Revision Petition No. 1644 of 1934. It is quite clear that the learned Subordinate Judge failed to observe the provision of Order 9, Rule 13 which lays down that the Court

shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.

3. Hence it was clearly illegal for the Court to proceed with the suit on the same day on which it restored the suit to file. The injustice to the defendants was obvious. They might not have been prepared to contest the petition for restoration to file, and in fact on the law stated above it would be useless for them to do so, but they might have meant to contest the suit itself. It is however argued for the respondent that the petition is not maintainable because the correct procedure is that laid down in Section 17, Provincial Small Cause Courts Act, and it is contended that the petitioner should have applied to set aside the ex parte decree and at the same time have deposited in Court the amount due under the decree or have given security. This argument overlooks the fact that the only grounds on which defendant 1 (petitioner) could have asked the lower Court to have the ex parte decree set aside are those set out under Order 9, Rule 13 i.e., that he was not served with notice or was for some sufficient cause unable to attend Court on the day of hearing. The ground which he takes here is that the Court's decree itself is illegal because the Court had no right to dispose of the suit on that day. This is a Small Cause suit in which there was no appeal against the decree and there is no provision by which the Court can be asked to set aside its own ex parte decree on the ground that it is illegal. Order 47 will not apply as there is no error apparent on the face of the judgment or decree. Consequently the only remedy is by way of revision. Sir Dinsha Mulla states under Order 9, Rule 13 as follows:

A defendant against whom an ex parte decree is passed is at liberty to set aside the decree under this rule, or to appeal from the decree, or to apply for review of the judgment. He is entitled to apply under this rule to set aside the decree and at the same time to appeal from the decree. Further, he is entitled to appeal from the decree without a previous application to set aside the decree under this rule. Similarly he is entitled to apply for review without previously applying under this rule. If he applies under this rule, and his application is rejected, he is entitled under Order 43 Rule 1 to appeal from the order rejecting the application.

4. The case quoted by him is *Raj Narain Purkait v. Ananga Mohan Bhanduri* (1899) 26 Cal 598. I do not see how it can be contended that when the petitioner has no other remedy, except by way of revision to the High Court if he is to put forward his strongest ground for having the decree set aside, there can be any objection to interference in revision. This Civil Revision Petition No. 1644 of 1933 is therefore allowed with costs. The decree of the lower Court is set aside and the suit remanded for disposal according to law.