

(1974) 08 AP CK 0016

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1303 of 1973

Thummala Suryamma

APPELLANT

Vs

The Andhra Pradesh State Electricity Board and Others

RESPONDENT

Date of Decision : 08-08-1974

Acts Referred:

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

Citation : AIR 1975 AP 90

Hon'ble Judges : Ramachandra Raju, J

Bench : Single Bench

Advocate : C. Poornaiah, for the Appellant; T. Anantha Babu, for the Respondent

Final Decision : Dismissed

Judgement

Ramachandra Raju, J.—This revision is directed against an order setting aside the decree in O. S. No. 172 of 1968 on the file of the Court of the Subordinate Judge, Kakinada under Order 9, Rule 13 C. P. C. treating the decree as one passed under Order 17, Rule 2 C P. C. The plaintiff is the petitioner. One of the objections raised by the petitioner in the lower Court was that the decree passed by the lower Court is one which comes under Order 17, Rule 3 C.P. C. and not under Order 17, Rule 2, C. P. C. and therefore the proper course for the defendant-respondent would have been to file a regular appeal to set aside the decree passed in the suit. The lower Court did not agree with that contention relying on a bench decision of this Court reported in Marothu Suryarao Vs. Paluri Padiyya and Others, .

2. What happened in the present case is that when the suit came up for trial on 12-7-1972 the defendant's counsel asked for an adjournment and it was refused. Thereafter the defendant's counsel did not participate in the hearing of the suit though he actually did not report no instructions. After refusing the adjournment, the Court took evidence on behalf of the plaintiff and after closing the evidence and hearing the plaintiff's counsel decreed the suit.

3. The only argument pressed before the lower Court as well as before me by Mr. Poornaiah learned counsel for the petitioner, is that the fact that the counsel for the defendant did not report no instructions and that he was physically present in Court during the hearing of the case and that as a matter of fact, the lower Court did not set the defendant ex parte would make the decree not an ex parte decree but a regular decree and it would come under Order 17, Rule 3, C. P. C. only. But both in the Full Bench case reported in M. Agaiah Vs. Mohd. Abdul Kereem, and Marothu Suryarao Vs. Paluri Pedyya and Others, , this Court took the view that the mere physical presence on the part of the defendant or his counsel does not make the decree as one under Order 17, Rule 3 C. P. C. if as a matter of fact the defendant did not participate in the hearing of the case. No doubt in the present case, the defendant's counsel did not report no instructions and was present in Court when the case was heard. But what is important is as a matter of fact whether the defendant participated in the hearing of the case or not. Mere physical presence in Court does not amount to participation in the hearing when there is no actual participation as such in the hearing. Therefore, the lower Court rightly came to the conclusion that it was a decree passed only under Order 17, Rule 2 C. P. C. and not under Order 17, Rule 3, C.P. C. and therefore it is an ex parte decree which can properly be set aside as provided under Order 9, Rule 13 C. P. C. without the need for filing a regular appeal.

4. Sri Poornaiah also, however, argued on merits that the lower Court should not have set aside the ex parte decree. The lower Court gave some reason to come to the conclusion that this is a fit case where the ex parte decree can be set aside and the defendant given an opportunity. I do not think the case requires interference in revision.

5. Accordingly there are no merits in the civil revision petition and it is dismissed but in the circumstances, without costs. Revision.