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**Kumara Pillai Vs. Thomas**

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**SooperKanoon Citation** : sooperkanoon.com/721529

**Court** : Kerala

**Decided On :** Nov-15-1960

**Reported in** : AIR1961Ker287

**Judge** : T.K. Joseph, J.

**Acts** : Code of Civil Procedure (CPC) , 1908 - Order 9, Rule 7

**Appeal No.** : C.M.A. No. 75 of 1959

**Appellant** : Kumara Pillai

**Respondent** : Thomas

**Advocate for Def.** : K.K. Mathew,; George Vadakkel and; M.A. Joseph, Advs

**Advocate for Pet/Ap.** : P. Kochukrishna Pillai, Adv.

**Disposition** : Appeal allowed

**Judgement** :

**T.K. Joseph, J.**

1. The plaintiff has preferred this civil miscellaneous appeal from an order of the Subordinate Judge, Mavelikara, remanding the suit to the trial court. The suit was for recovery of money from defendants 1 and 2, father and son, on the basis of oral loans. On the date of first hearing the second defendant did not appear and

an order declaring him ex Parte was passed. The first defendant filed a written statement denying the transactions. While the trial was proceeding the second defendant made an application on 12-8-1955 for setting aside the order declaring him ex Parte.

This was an application under Order 9, Rule 7 Code of Civil Procedure, and not under Rule 13 as observed by the appellate Court more than once. The second defendant's application was allowed, his written statement was admitted and he was examined. The trial court Passed a decree against the second defendant and dismissed the suit against the first defendant. The second defendant took up the matter in appeal and the learned Subordinate Judge remanded the suit holding that the evidence recorded before the second defendant enteredappearance could not be used against him and that the same should be taken afresh.

2. The plaintiff who has Preferred this civil miscellaneous appeal contends that the view taken by the court below cannot he supported as the order on the second defendant's application was not one setting aside a decree passed ex parts. According to the appellant all that the second defendant could claim was an opportunity to cross-examine thewitnesses examined during the Period of his non-appearance.

3. Several decisions were cited by both sides most of which deal with the effect of an order setting aside a decree passed ex parte. It is unnecessary to refer to those decisions as this is not a case of setting aside an ex parte decree. Wallace, J., considered the effect of an order under Order 9, Rule 7, Code of Civil Procedure, in Venkatasubbiahv. Lakshminarasimhan, 49 Mad LJ 273 : (AIR 1925 Mad 1274) and observed:

'One cardinal principle to be observed in trials toy a court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing. It follows that a party should not be deprived of that right, and in fact the court has no option to refuse that right, unless the Code of Civil Procedure deprives him of it. Is there any rule of procedure then which gives power to a court to say to a party when he appears to plead his case that it cannot heat him because at the previous hearing he was absent? I do notso read Order 9, Rule 7.

That applies to a Partywho wishes to be relegated back to the position which he would have been in if he had appeared at a previous hearing at which he was absent, andwho wishes the Proceedings taken in his absence to be taken over again in his presence, so that he may regain the opportunities of cross-examination, etc., which he lost by his absence. After all 'ex parte' only means that the party has not been heard because he was absent and the adjournment of the Rearing 'ex parte' in. the words of Rule 7 appliesonly to the heaving on the particular day when that hearing and adjournment 'ex parte' was made. I do not sec any ground for extending its operationto all subsequent hearings of the suit'.

This decision was considered in Perumal v. Kondamma, AIR 1939 Mad 385. Varadachariar, J., held:

'..... .Among the authorities referred to bythe District Munsiff it is sufficient to refer to the judgment of Wallace, J., in 49 Mad LJ. 273: (AIR J.925 Mad 1274). The principle enunciated by the learned Judge is that even a defendant who fails to show good cause for his previous non-appearance is not debarred from participating in the further conduct of the case and that the original order only covers the Period during which the party was originally absent. He proceeds to point out that where good cause for non-appearance is shown, the party would be relegated back to the position which he would have been put in if he had appeared at the previous hearing i.e., that proceedings which have taken place in his absence could be re-opened so as even to give him the opportunity of cross examining witnesses that had been examined in his absence. This principle has generally been adopted in most of the reported cases vide Pattanna v. NeeliChetti, ILR 51 Mad 597: (AIR 1927 Mad 1197): Arumugam Pillai v. Kandaswami Pillai, AIR 1928 Mad 211 (2); and Harba v. Mt. Chandrabhaga, AIR 1931 Nag 122, The extreme view taken in Oudh is opposed to the Preponderance of authority'.

The decision of Wallaee, J., was followed by Staples, A, J. C., in AIR 1931 Nag. 122. The learned Judicial Commissioner has pointed out the remedies open to a party who failed to appear at the first hearing and against whom an order declaring him ex parte has been passed. The following passage from his judgment may be extracted:

'..... ....Order 9, Rule 6, is not meant to be apenal clause but is only meant to prevent undue delay. If the defendant chooses not to appear after he has been served, the court may proceed in his absence, but if he subsequently appears he ought not to be debarred from taking any further Part in the proceedings even if he can show no good cause for his absence: all that the Code says in Order 9, Rule 7, is that, if he does show good cause, the ex parte order may be set aside and the defendant heard in answer to the suit, as if he had appeared on the date fixed. That means that the case is put back to the stage at which it had arrived when the defendant first failed to appear; and the defendant suffers no loss or disadvantage through his non-appearance except perhaps an order for costs. If however the defendant fails to show good cause, he cannot claim any rehearing, and what has already taken place in his absence must stand. As regards future proceedings however he should not he debarred from appearing and contesting the suit.

The case of an ex parte decree is of course different, because there the suit has been heard and has been finally decided. It would be inequitable then to reopen the matter unless the defendant can show good cause for his non-appearance. Where however a case is still sub judice, the defendant should not, I think, be further prejudiced by his absence than by the fact that all proceedings that took place in his absence will stand and he should be allowed to take part in future proceedings and to defend the case. An ex parte order does not in itself mean that the defendant shall be debarred for ever from taking all Part in the trial: all it means is that the trial shall proceed in his absence and that anything that takes place in his absence shall hold good. A decree however is in its nature final and when an ex parte decree is passed, there can be no question of any future appearance by the defendant who has now become a judgment-debtor; and, unless he can show good cause for his non appearance, the decree will stand unless and until it is set aside on appeal.'

I may add that this view was approved by Varadachariar, J., in the decision cited earlier.

4. I am in respectful agreement with the above view. The position is that the second defendant against whom an order declaring him ex parte was passed on

the date of the first hearing is entitled to come in and take part in the trial at a later stage. If he agrees to be bound by what has taken Place during his absence he need not make an application under Order 9, Rule 7, C.P.C., and get the order set aside; he can continue from the stage at which he appears.

However, if he desires to cross-examine the witnesses examined before he entered appearance he can apply under Rule 7 and get an order, in which case he can claim an opportunity to cross-examine the witnesses examined before he entered appearance. In such a case, what he seeks is to be relegated back to the position he would have been in if he was present on the day on which evidence was taken. Had he been so Present he would have got an opportunity to cross-examine the plaintiff's witness. This is the right which he can exercise after getting an order under Order 9, Rule 7.

5. The case has to bo examined in the light of the above principle. After the second defendant filed his written statement it was stated that additional issues were not necessary. He did not make an application for the cross-examination of the plaintiff or his witnesses who were examined ear' her, It may be pointed out that his father, the first defendant, who raised identical contentions badcross-examined these witnesses.

The plaintiff was, no doubt, examined again, but that was on his application. As the second defendant did not choose to avail himself of the right to cross-examine these witnesses he cannot contend in appeal that the evidence of those witnesses cannot be used against him. The suit was pending for more than a year after the second defendant filed his written statement, and there were six postings for final hearing,

Yet, he did not ask for an opportunity to cross-examine the plaintiffs witnesses. In these circumstances the lower appellate court was not justified either in holding that the evidence recorded before the second defendant entered appearance was not binding on him. or in remanding the suit. The proper course would have been to hear arguments on the evidence on record and to decide the case. The order of remand must therefore be set aside.

6. In the result, I set aside the order of remand and send back the case to the lower appellate court for disposal according to law and in the light of the observations made above. Costs here will becosts in the cause and will be provided for in thedecree to be passed by the lower appellate court.

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