

Kathavelu Vs. Murugesan

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Court : Chennai

Decided On : Apr-27-2001

Reported in : (2001)2MLJ802

Judge : Prabha Sridevan, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 9, Rule 13

Appeal No. : C.R.P. No. 1970 of 1999

Appellant : Kathavelu

Respondent : Murugesan

Advocate for Def. : Mr. V. Lakshmi Narayanan, Adv.

Advocate for Pet/Ap. : Mr. M. Sriram, Adv.

Judgement :

ORDER

1. The petitioner is the plaintiff, aggrieved by the order setting aside the ex parte decree. The petitioner filed O.S.No.2827 of 1982 for partition of half share in the suit property. The respondent is the second defendant. The first defendant, who is not a party to the civil revision petition, is the brother of the petitioner. Both the respondent and the other defendant were originally represented by the same counsel. But they filed separate written statements. The case was taken up for trial

and issues were framed. On 22.2.1990, the evidence of P.W.1 was recorded. The matter was posted on 27.2.1990, on which date the Advocate for the respondent herein reported instructions'. The respondent was set ex parte and preliminary decree was passed on 7.3.1990. The respondent filed I. A. No. 707 of 1994 for setting aside the ex parte decree. According to him, on 27.2.1990 he was not present in Court and the Advocate had reported 'no instructions' , but he could not appear in Court because of acute dysentery for which he took native treatment and he was prevented by 'sufficient cause'. Since he has substantial defence in the suit, it was necessary to set aside the ex parte decree. The District Munsif, Tiruchy dismissed the interlocutory application on the ground that sufficient cause had not been made out. Aggrieved thereby the respondent filed C.M.A.No.27 of 1996. The learned Subordinate Judge allowed the appeal. Against that, the present civil revision petition has been filed.

2. Mr. Rajendran, learned counsel for the petitioner submitted that the conduct of the respondent was not at all bona fide. The suit was decreed on merits and therefore, an application under Order 9, Rule 13, CPC is not maintainable. He relied on the decision reported in K.R. Chinnathambi Gounder v. Bhanumathy, 1998 (2) LW 271 in which this Court dismissed the application under Order 9, Rule 13, CPC, because there was no bona fide on the part of the petitioner and his only intention was to drag on the matter.

3. Mr. V. Lakshmi Narayanan, learned counsel for the respondent on the other hand submitted that if the ex parte decree is not set aside it would cause irreparable injury. According to him, he had purchased the suit property, which was subject of the partition suit, from the brother of the petitioner and therefore, the ex parte decree if allowed to stand would grievously prejudice his rights. The learned counsel would submit that, in any event, Order 9, Rule 13, CPC provides that the Court shall make an order setting aside the ex parte decree and therefore, the learned Subordinate Judge had rightly allowed his appeal. He also submitted that assuming without admitting that the decree had been passed by the learned Judge on merits the proviso to Order 9, Rule 13, CPC would show that when the decree is set aside against the defendant who applies under the said rule and the decree is of such a nature that it cannot set aside against one defendant alone, it

may be set aside as against all or any of the other defendants. The learned counsel also brought to the notice of the Court that after the appeal was allowed, the Trial Court had taken up the suit for hearing and the petitioner was also examined as P.W.1. Further the petitioner had also filed a memo to bring on record the legal representatives of his brother. Therefore, having participated in the proceedings before the Lower Court in compliance with the order passed by the learned Subordinate Judge it is now not open to the petitioner to attack it. The learned counsel relied on,

- (1) Adivi Suryaprakasa Rao v. (Timmalapalli) Sreeramulu, AIR 1931 Mad. 6;
- (2) S. Venkatrama Aiyar v. Unnamalai Ammal G.P. Srivastava v. R.K. Raizada, ;
- (4) Kunchan Achari Padmanabhan Achari v. Yohannan Thomas, and
- (5) Smt: Benibai v. Smt. Champabai, . According to him, the ex parte decree must be set aside.

4. The present case is not one in which a decree was passed ex parte because summons was not duly served. Order 9, Rule 13 provides for two contingencies which if satisfied the Court shall make an order setting aside the decree. One is when summons is not duly served and the other when the defendant is prevented by any sufficient cause from appearing when the suit was called on for hearing. In this case obviously the first contingency is not applicable. We may also look at Order 17, Rule 2, CPC, which provides that when a party fails to appear on any date to which the hearing of the suit is adjourned the Court may either proceed to dispose of the suit in one of the modes directed under Order 9 or make such other order as it thinks fit. In. Mulla's Code of Civil Procedure, 13th Edition the commentary under Order 17, Rule 2 it is stated,

'The effect of this is to assimilate the procedure in cases where there is default of appearance at an adjourned, hearing with that in cases where there is such default at the first hearing.'

5. This distinction is also drawn between the 0.9 and 0.17 in the observations of the Supreme Court in Sangram Singh v. Election Tribunal, ,

'If the defendant does not appear at the adjourned hearing (irrespective of whether or not he appeared at the first hearing) Order 17, Rule 2 applies and the Court is given the widest possible discretion either to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit.'

6. In this case, it is evident that it was an adjourned date of hearing. The respondent knew that the suit was posted for hearing on 27.2.1990 because his affidavit runs thus:

'I am the 2nd defendant in the suit. My advocate not finding me on 27.2.1990 had reported no instructions for me and I was set ex parte and decree passed. I submit that owing to acute dysentery for which I took native treatment on the said date I could not appear in court nor could I send word through anybody about my sudden indisposition. I was prevented by sufficient cause. My absence is neither willful nor wanton. I have got substantial defence in the suit. I have been throughout diligent in prosecuting the proceedings.'*(Italics supplied)*

7. The explanation was, for not being present in Court on 27.2.1990. But ex parte decree was passed on 7.3.1990. No explanation is given as to why the respondent was not present on 7.3.1990. The documents produced in the paper-book as well as the certified copy of the evidence of P. W. 1 are useful to trace the chronological sequence of events. On 22.2.1990, examination of P.W.1 in chief was over; cross-examination only by the first defendant; no cross-examination by the respondent; P.W.1 evidence closed; On 27.2.1990 respondent was unwell allegedly because of acute dysentery. On 7.3.1990, preliminary decree was passed on merits. On 8.3.1990, the respondent applied for order copy under copy application No.3476. Though the respondent may have been unwell on 27.2.1990, he knew the case was adjourned to 7.3.1990 and there is no explanation for his absence on that date. It is evident that he was aware of the ex parte decree that was passed on-7.3.1990, since he has applied for the copy of the judgment and decree on 8.3.1990. Apparently, thereafter stamps were called for on 5.4.1990. Again the respondent appears to have fallen ill and forgetting the matter, the copy application was struck off. Therefore, he filed an application to restore the copy application No.3476 that was struck off. This is I.A.No.386 of 1992. This was filed

two years after the ex parte decree. The order passed in this interlocutory application has been annexed in the typed set of papers. The learned Judge finds that though the copy application was struck off on 5.4.1990 the affidavit in I.A.No.386 of 1992 was filed only on 9.1.1991, nine months after 5.4.1990. The District Munsif, Trichy did not accept the case' of the petitioner, which is,

'subsequently owing to my totally forgetting the matter the printing charges not deposited..... it remain unnoticed till date.'

8. The learned Judge therefore, rejected the application on the ground that the trial of the suit had begun and was part-heard. The respondent had been set ex parte because he did not attend the Court on the date of hearing namely 27.2.1.990. Therefore, the evidence has been recorded and the learned Judge holds that,

Therefore, according to the learned Judge this was a decree on merits and a preliminary decree that had been passed and he did not accept the circumstances given by the respondent for not paying the printing charges in time and I.A.No.386 of 1992 was dismissed on 29.3.1993.

9. Incidentally the respondent had filed the application for setting aside the ex parte decree on 4.4.1999 itself. But he has not taken any steps to move the application until 1994. The interlocutory application is numbered as I. A. No. 707 of 1994 after four long years. This matter was kept in abeyance and the petitioner was prevented from taking any further steps pursuant to the passing of the preliminary decree. In deciding the I. A. No. 707 of 1994, the petitioner examined himself as P.W.1. In his oral evidence he had stated as follows:

Therefore, according to P.W.1, the case was scheduled as a list case on 20.2.1990. But he had dysentery from 18.2.1990 for 3 days. In cross-examination, however, he has stated that he was on medical leave from 18.2.1990 to 8.3.1990, and that is only 18 days. Therefore, they are self-contradictory. After having said in his chief examination that he was down with dysentery for 30 days he obviously could not escape, in the cross-examination, admitting the fact that he had applied for the order copy on 8.3.1990, the day after the preliminary decree was passed. This is why the Trial Court disbelieved his case. The Trial Court rightly held that

the respondent ought to have atleast marked his leave certificate to show that he was on medical leave from 18.2.1990 to 8.3.1990. His case that he was ill from 18.2.90, is itself dubious, because in the affidavit in support of I.A. No. 707 of 1994, his case is that he did not appear on 27.2.1990 only because he was ill and taking treatment on 'that date'. We have already seen that his application to restore the copy application had been dismissed on the ground the respondent had not made out sufficient cause for the Court to believe his case. If the respondent had been genuinely aggrieved by that order, he would have taken steps to challenge the order in I.A.No.386 of 1992 whereby his copy application was struck off. The order in that interlocutory application was passed on 29.3.1993.

10. Atleast thereafter a bona fide litigant would have moved the interlocutory application filed under Order 9, Rule 13, CPC. This respondent does not. He waits for one more year and moves the application only in 1994. The Court should be satisfied that the party was prevented by sufficient cause, while deciding an application under Rule 13 of Order 9, C.P.C. The test whether a cause is sufficient will be passed, only if the Court is satisfied that the reason for absence is genuine. The suitor must satisfy the Court that his explanation is adequate and also that his absence was not mala fide or deliberate. The decisions relied on by the respondent are not applicable to the facts of this case since those were cases where the Court was satisfied that the absence of the party on the relevant date was not intentional. In *G.P. Srivastava v. R.K. Raizada*, relied on by the respondent, the Supreme Court held that Courts have wide discretion and no hard and fast guidelines can be prescribed. But the Supreme Court also held that,

'In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional.'

11. In this case, the respondent has not explained why he was not present in the Court on 7.3.1990. His absence was clearly intentional since he filed the copy application on 8.3.1990. His absence was clearly mala fide since he waited for 4 long years before moving the application under Order 9, Rule 13 was filed on

4.4.90. In this case, merely because he filed the application on 4.4.1990 within the statutory time specified should the Court held that he 'approached' the Court immediately. I have my reservations and my doubts. The respondent filed the application but he 'approached' the Court after 4 years. The mala fide in his conduct is written in 'bold letters' for everyone to see.

12. In the decision relied on by the respondent in Smt. Benibai v. Smt. Champabai, , the Madhya Pradesh High Court held that though an application under Order 9, Rule 13, CPC, cannot be allowed on humanitarian grounds, the Court should not close their eyes to the realities of the case. The reality in this case is a sharp litigant who thinks he can play ducks and drakes with the Court. So he shall have his come-uppance. The decision reported in K.R. Chinnathambi Gounder v. Bhanumathy, 1998 (2) LW 271 is applicable to this case.

'Even assuming that on the date of the ex parte order, he was not able to be present before the Court due to illness, there is no reason as to why he did not pursue the matter for about five years. The act of the petitioner in filing the application belatedly would show that he is only interested in dragging on the proceedings, which should not be allowed by the Court.'

13. The next question that we have to address ourselves is whether the petitioner by appearing before the Trial Court after the order of the Appellate Court is barred from moving the civil revision petition. To support this position the learned counsel for the respondent relied on 5. Venkatrama Aiyar v. Unnamalai Animal . In that case , the District Judge had remanded the matter on 5.3.1946 for fresh disposal. Both parties participated in the trial, and thereafter, the suit was dismissed on 3.7.1946. Then the plaintiff filed an appeal against the order of remand dated 5.3.1946. His appeal was filed in time. But yet this Court held that the appellant who had chosen to take his chance of a favourable decision after remand, cannot also agitate the validity of the order of remand, not having signified their non-acceptance of a fresh hearing. There this Court held that an appeal against remand order is not maintainable, after a decision had been obtained in the rehearing after remand.

14. In this case the order had been passed on 31.8.1998. The copy was made ready on 4.3.1999. The revision had been filed within the statutory time that is allowed. The learned counsel for the petitioner submitted that it was true that the Trial Court took up the matter on 13.4.1999 and a memo had also been filed for bringing on record the legal representatives of D1. According to the learned counsel if he had not participated in the proceedings on that date, the suit might have been dismissed for default. Therefore, he had no choice in the matter and he would submit that at the earliest juncture he had moved the civil revision petition and obtained stay. Had the Trial Court disposed of the suit, before this petitioner had moved this revision petition, then perhaps that decision would be applicable. But it is not so in this case. No doubt the Trial Court had taken up the matter but before any further progress was made interim stay had been obtained. I do not think the respondent can argue that the civil revision petition is not maintainable on this ground.

15. The Trial Court had refused to set aside the decree dated 7.3.1990, not only on the ground that the decree was one obtained on merits and was not an ex parte decree, but also because the Learned Judge was not satisfied that sufficient cause had prevented the respondent from attending the Court on the relevant date. The reference to the respondent's past conduct is not to penalize him for that, but only to trace the course the case had taken. The learned counsel for the respondent complained that, the Trial Court ought to have issued notice to the party when the Advocate reported 'No instructions'. In other cases, maybe, but not in this case where the respondent has applied for a copy of the judgment and decree, with alacrity the very next day. This party had notice and did not need the Court to inform him.

16. The Appellate Court's reasoning for interfering with the well-reasoned order of the Trial Court is clearly not sustainable.

17. In the result, the order of the Court below is set aside. The civil revision petition is allowed with costs of Rs. 1000. Consequently, C.M.P.No. 10650 of 1999 is closed.

