

Chidambaram Vs. Kalidas and ors.

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Court : Chennai

Decided On : Mar-25-1976

Reported in : AIR1977Mad108; (1977)1MLJ46

Judge : Suryamurthy, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 9, Rule13 - Order 17, Rule 3

Appeal No. : Civil Revn. Petn. No. 2630 of 1975

Appellant : Chidambaram

Respondent : Kalidas and ors.

Judgement :

ORDER

1. This Civil Revision Petition is against the order of the learned Principal Subordinate Judge, Pondicherry, dismissing the petition under O. 9, R. 13 C.P.C., filed by the defendant in the suit to set aside a decree passed on 24-1-1975, which according to the revision petitioner, the defendant, is only an ex parte decree.

2. S. C. No. 115 of 1974 on the file of the Court Pondicherry was instituted by the respondents herein for recovery of a sum of Rs. 540/- due as arrears of rent. The suit was contested by the defendant. Subsequently, at the stage of the trial, the defendant was absent and the counsel for the defendant was also absent on 24-1-1975. Instead of setting the defendant ex parte and passing an ex parte decree,

the learned Principal Subordinate Judge of Pondicherry purported to decree the suit as prayed for under O. 17, R. 3 C.P.C., after P.W. 1 was examined and Ex. A-1 was marked. He did not even hold that the claim had been proved. Subsequently the petition for setting aside the ex parte decree was filed before the same learned Subordinate Judge. He refused to set aside the ex parte decree because he took the view that the suit has been decreed under O. 17, R. 3 C.P.C., and that therefore the petition under O. 9, R. 13 C.P.C., is not maintainable.

3. This view of the learned Subordinate Judge cannot be sustained. O. 17, R. 3 C.P.C., applies only to cases where the parties are present. Where on the date of the trial the defendant is absent the court cannot proceed under O. 17, R. 3, but should proceed under O. 17, R. 2 C.P.C., by setting the defendant ex parte and decreeing the suit after recording the evidence if the claim of the plaintiff is proved. The decree passed by the learned Subordinate Judge is in fact an ex parte decree even though he purported to pass a decree under O. 17, R. 3 C.P.C.

4. A similar view has been taken by Beil, J., in Venkataratnam v. Apparao AIR 1948 Mad 80. Even though it was a case where the court proceeded under O. 17, R. 3 C.P.C., and dismissed the suit. On merits the ratio of that decision will apply to the facts of the instant case.

5. In K. Somasundaramma v. Seshagirrao, AIR 1947 Mad 378 Wadsworth, J., speaking for the Bench has observed:--

'Here the plaintiff was physically absent during the later portions of the arguments of defendant's lawyer and at the time when the case was closed. We may take it that the learned Subordinate Judge should in such circumstances have passed an order dismissing the suit for default, and that when he did not do so, but purported to pass a decree based on a finding on the merits against the plaintiffs, the plaintiff will not on the reasoning of the Full Bench in ILR 41 Mad 286 : AIR 1918 Mad 143 (Pichamma v. Sreeramulu) be deprived of the remedy of applying under O. 9, R. 9 for the restoration of the suit on the ground that it has really been dismissed for default.' Therefore, the C. R. P. is allowed, the order of the lower court dismissing I. A. No. 375 of 1975 is set aside and the matter is remanded to the lower court for fresh enquiry and disposal of the application treating it as an application under O.

9, R. 13, C.P.C. and treating the decree as an ex parte decree. I may add that the question whether there was sufficient cause for the non-appearance of the defendant should be gone into by the trial court without reference to any of the observations made by this court. There will be no order as to costs.

6. Revision allowed.

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