

Pani and anr. Vs. Vasudevan

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Court : Chennai

Decided On : Mar-09-1988

Reported in : (1988)1MLJ400

Appellant : Pani and anr.

Respondent : Vasudevan

Judgement :

Nainar Sundaram, J.

1. This appeal is directed against the judgment and decree in O.S. No. 128 of 1975 on the file of the Subordinate Judge of Dindigul. The appellants are the second-defendant; and the purchaser of the suit-property subsequent to the judgment and decree of the Court below, who has been brought on record as a second appellant by orders passed in C.M.P. No. 3248 of 1981 on 31.7.1981. There is no need to go into the merits of the case, since I feel obliged to sustain the legal point raised by Mrs. Bhavani Kumar, learned Counsel for the second-appellant. This submission of the learned Counsel for the second-appellant has got the support of the learned Counsel for the first-appellant. On 18.10.1978, the counsel for the second-defendant, who alone was on record at that time, reported 'no instructions'. The second-defendant was obliged to appear in person. The plaintiff examined himself as P.W. 1 in Chief and Exs. A-1 to A-7 were marked. When the second-defendant was called upon to carry on with the cross-

examination of P.W. 1, the second-defendant presented an application, seeking an adjournment for the purposes of engaging a counsel to proceed with the matter. Taking note of his request, the Court below adjourned the matter from 18.10.1978 to 19.10.1978. On 19.10.1978, the second-defendant remained Ex Parte. The Court below, instead of proceeding with the matter on the ground that the second-defendant did not appear on 19.10.1978 and on the other hand the plaintiff was present on that day, under Order 9 read with Order 17, Rule 2 of the Code of Civil Procedure, hereinafter referred to as the Code, chose to proceed under Order 17, Rule 3 of the Code and decided the matter on merits and after assessing the evidence placed on behalf of the plaintiff, decreed the suit of the plaintiff, as prayed for. As stated above, this appeal is directed against the judgment and decree of the Court below.

2. Mrs. Bhavani Kumar, learned Counsel for the second-appellant-the subsequent purchaser, would submit that once it was found that the second-defendant, who alone was on record on the day in question, remained Ex Parte. the Court below ought to have proceeded only under Order 9 read with Order 17, Rule 2 of the Code and it ought not to have proceeded under Order 17, Rule 3 of the Code and this has caused a grave prejudice to the second-defendant in that if the matter had been proceeded with under Order 17, Rule 2 of the Code, there would have been an opportunity to the second-defendant to have the Ex Parte proceedings set aside, making out a case therefor. Learned Counsel for the second-appellant rightly points out that since the Court below proceeded with the matter under Order 17, Rule 3 of the Code, the second-defendant had no other go, except to prefer this appeal and in this appeal the merits of the case could not be canvassed, because the decision of the Court below rests purely on the unilateral evidence of the plaintiff and the opposite party, namely, the second-defendant, had not placed any evidence in substantiation of his case. Order 17, Rule 3 of the Code reads as follows:

Court may proceed notwithstanding either party fails to produce evidence, etc: Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the

Court may, notwithstanding such default.

(a) if the parties are present, proceed to decide the suit forthwith, or

(b) if the parties are, or any of them is, absent, proceed under Rule 2.

Order 17, Rule 2 of the Code reads as follows:

Procedure if parties fail to appear on day fixed: Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed 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.

Explanation: Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

The language of Order 17, Rule 3(b) of the Code is unambiguous, when it says that if the parties or any of them are absent, the Court has to proceed under Order 17, Rule 2 of the Code. Order 17, Rule 2 of the Code specifies the procedure if parties fail to appear on the day fixed and it invokes Order 9 of the Code. It is a well accepted proposition that Rules 2 and 3 of Order 17, of the Code are mutually exclusive and Rule 2 applies to all cases of absence of parties whether time was granted or not to do any of the acts mentioned in Rule 3 of Order 17, while Rule 3 of Order 17 applies only to cases where parties are present and commit default of the kind mentioned in that Rule. Here we find that the second-defendant, who alone was on record, remained Ex Parte, and the Court below ought to have proceeded only under Order 17, Rule 2 read with Order 9 of the Code. Instead of doing that, the Court below has proceeded under Order 17, Rule 3 and as rightly contended by the learned Counsel for the second-appellant, this had brought a prejudicial situation to the second-defendant, in that he was disabled from seeking to set aside the Ex Parte Proceedings if that had followed. The appellants could not canvass the merits of the case in this appeal, because there is no evidence rebutting the evidence of the plaintiff. In this view, this appeal is allowed and the

matter is remitted to the file of the Court below for it to proceed under Order 17, Rule 2 read with Order 9 of the Code. The second-appellant herein will stand recorded as the third-defendant in the suit. There will be no order as to costs in this appeal. The first-appellant, who has preferred the appeal paying the court-fees, is entitled to refund of the same. Considering the fact that the suit is of the year 1975, the Court below, pursuant to this order of remittal, will do well to take up and proceed with the matter with expenditure.

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