

E. Krishnamurthy and anr. Vs. Abdul Jaffar

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Court : Chennai

Decided On : Feb-10-1997

Reported in : 1997(2)CTC85

Judge : Raju and ;S.M. Abdul Wahab, JJ.

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

Appeal No. : L.P.A. No. 141 of 1991 and CMP. No. 13969 of 1991

Appellant : E. Krishnamurthy and anr.

Respondent : Abdul Jaffar

Advocate for Def. : R. Thiagarajan, Adv.

Advocate for Pet/Ap. : T.V. Ramanujam, Sr. Adv.

Judgement :

ORDER

D. Raju, J.

1. The above appeal has been filed under Clause 15 of the Letters Patent against the order of a learned single Judge dated 5.9.1991 dismissing C.M.A. No. 837 of 1991 thereby confirming the order of the learned trial Judge dismissing the application filed by the appellants under Order 9 Rule 13 of the Code of Civil

Procedure, thereby declining to set aside the *ex parte* decree passed in the matter. Aggrieved against the rejection of the application to set aside the *ex parte* decree, the appellants filed, as noticed earlier, C.M.A. No. 837 of 1991. The learned single Judge was not inclined to agree with the reasons assigned by the appellants for the non-appearance and therefore dismissed the appeal. Hence the above letters Patent Appeal.

2. Even at the initial stage, Mr. R. Thiagarajan, learned counsel for the respondent, raised an objection on the maintainability of the appeal relying upon the decision reported in *Resham Singh Pyara Singh v. Abdul Sathar*, : (1996)1SCC49 where under the Apex Court held that no Letters Patent Appeal could be maintained in similar circumstances. Mr. T.V. Ramanujam, learned Senior Counsel appearing for the appellants, invited my attention to a Division Bench Judgment of this court reported in *V.S. Boopathi Vijayaraghavan Chettiar v. C.S.B.B. Radha Rukmani Ammal*, 1984 T.L.N.J. 392 and contended that unlike the decision of the Apex Court, the decision of the Division Bench is directly in respect of an application filed under Order 9 Rule 13 of the Code of Civil Procedure and the further orders on appeal passed thereon. In *Rukmani v. H.N. Thirumalai Chettiar*, : AIR1985 Mad283 , yet another Division Bench of this Court held that Letters Patent Appeal against the order initially passed under Order 39 Rule 1 of the Code of Civil Procedure is maintainable against the order passed in exercise of appellate jurisdiction in a civil Miscellaneous Appeal by a learned single Judge of this Court.

3. We have carefully considered the submission of the learned counsel appearing on either side. In our view, the decision of the Apex Court has to be and is the last word on the subject. It may be noticed that as against the order passed on an application under Order 39 Rule 1 of the Code of Civil Procedure also an appeal is entertained by this Court only Under Section 104 read with Order 43 Rule 1(r) of the Code of Civil Procedure in contrast to such appeals entertained in this Court against an order passed on an application under Order 39 Rule 1, of the Code of Civil Procedure, Under Section 104 read with Order 43 Rule 1(d) of the Code of civil Procedure. On principle, we could not appreciate the existence of any difference based on the provisions under which it has been initially filed, be it under Order 39 Rule 1 or under Order 9 Rule 13 of the Code of Civil Procedure.

As a matter of fact, we have taken a similar view also in L.P.A. Nos. 102 to 105 of 1991 on 6.2.1997 applying the ratio of the decision of the Apex Court noticed above. Consequently, we sustain the preliminary objection raised about the maintainability of the Letters Patent Appeal and without expressing any view on the merits of the claim dismiss the appeal under Clause 15 of the letters Patent as not maintainable. It is needless to point out that the dismissal of the appeal as not maintainable does not preclude the appellants' liberty to vindicate any of their rights in accordance with and as is permissible under law. No costs. Consequently, C.M.P. No. 13969 of 1991 is dismissed as no longer necessary.

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