

Rajaram and Arjunan Vs. Murugesan @ Sokkan

Rajaram and Arjunan Vs. Murugesan @ Sokkan

SooperKanoon Citation : sooperkanoon.com/826337

Court : Chennai

Decided On : Jun-07-2002

Reported in : (2002)2MLJ587

Judge : A.S. Venkatachalamoorthy, J.

Acts : Code of Civil Procedure (CPC) - Sections 47

Appeal No. : C.R.P. (NPD) No. 1980 of 2001 and C.M.P. No. 10697 of 2001

Appellant : Rajaram and Arjunan

Respondent : Murugesan @ Sokkan

Advocate for Def. : M. Muthappan, Adv.

Advocate for Pet/Ap. : J. Pothiraj, Adv.

Disposition : Revision petition allowed

Judgement :

ORDER

A.S. Venkatachalamoorthy, J.

1. On 26.9.1990 at about 8.15 p.m., the respondent Murugesan was proceeding in a cycle in Madurai - Virudhunagar road from south to north. One Thiyagarajan, servant of Muthumari came from the opposite direction in a two wheeler TMT 1182

belonging to the said Muthumari at a high speed and violating the traffic rules and dashed against the respondent.

2. The respondent filed a claim petition in M.C.O.P.No.1333 of 1991 on the file of Motor Accidents Claims Tribunal (Sub-Court), Virudhunagar and in which the said Muthumari and the Insurance Company were impleaded as parties. On the hearing date that was on 11.3.1992, as Muthumari did not appear before the Court even after receiving summons, the Tribunal passed an order setting him exparte. Subsequently on 7.12.1992, Muthumari died. However, this was not brought to the notice of the Court. The Court finally disposed of the matter on 4.2.1994 by passing an award holding that the injured respondent would be entitled for a compensation of Rs.45,000/- with interest recoverable only from Muthumari and the Insurance Company was completely exonerated.

3. The respondent Murugesan filed a petition in E.P.No.36 of 1996 in M.C.O.P.No.1333 of 1991 for executing the award against the sons of Muthumari, who are the petitioners herein. During the pendency of the same, petitioners herein filed E.A.No.104 of 2000 in the said E.P.36 of 1996 under Section 47 of Code of Civil Procedure, praying the Court to declare that the award passed by the Tribunal against Muthumari on 4.2.1994 is not valid and enforceable since Muthumari died long prior thereto, that was on 7.12.1992 and further to declare that the properties of the petitioners cannot be brought for sale since the properties are ancestral properties, which the sons and daughters of Muthumari orally partitioned and they are enjoying their respective shares.

4. The respondent/Claimant resisted the petition inter alia contending that as the order setting Muthumari exparte was passed on 11.3.1992 when he was very much alive, it is not open to the petitioners to come forward with the plea that the award is non-est in law. The respondent raised various other contentions as well.

5. The learned Subordinate Judge by an order dated 19.3.2001 dismissed E.A.No.104 of 2000 on the ground that the order setting Muthumari exparte was passed at the time when he was very much alive and that further even after the death of Muthumari the matter was effectively contested by the Insurance Company (the other respondent in the M.C.O.P.), and only thereafter the award

came to be passed.

6. Before this Court, the learned counsel appearing for the petitioners contended that as only under the award, Tribunal for the first time fastened the liability on Muthumari and as admittedly Muthumari was not alive on that day, the award is non-est in the eye of law and that being so, there is no question of the respondent executing the award.

7. On the other hand, the learned counsel for the respondent contended that the order setting Muthumari *ex parte* was passed only on 11.3.1992 when he was very much alive and that further the said order continued to be in force till the award came to be passed and in those circumstances, the claim of the petitioners cannot be accepted.

8. At this juncture it is necessary and useful to refer to the relevant provisions of Code of Civil Procedure. Order 9 Rule 6 reads as under,

(1) whether the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then - (a) when summons duly served, the Court may make an order that the suit be heard *ex parte*;

Prior to 1976 amendment, Rule 6(1)(a) referred *supra* was differently worded and it was as under,

'if it is proved that the summon was duly served, the Court may proceed *ex parte*.'

Order 9 Rule 7 reads as under,

'Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.'

9. The Supreme Court had occasion to consider the above provisions viz., Order 9 rule 6 (1)(a) as it stood originally prior to 1976 in the case of *SANGRAM SINGH v. ELECTION TRIBUNAL, KOTAH*, wherein the Supreme Court observed as under,

'(25) Now to analyse R.6 and examine its bearing on the first hearing. When the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if it is proved that the summons was duly served -

'(a) the Court may proceed 'ex parte". The whole question is, what do these words mean? Judicial opinion is sharply divided about this. On the one side is the view propounded by Wallace, J. in AIR 1925 Mad 1274 (H)', that 'ex parte' merely means in the absence of the other party, and on the other side is the view of O'Sullivan J., in 'AIR 1945 Sin 98 (D)', that it means that the Court is at liberty to proceed without the defendant till the termination of the proceedings unless the defendant shows good cause for his non-appearance. The remaining decisions, and there are many of them, take one or the other of those two views.

(26) In our opinion, Wallace J., and the other Judges who adopt the same line of thought are right. As we have already observed, our laws of procedure are based on the principle that, as far as possible, no proceeding in a Court of law should be conducted to the detriment of a person in his absence. There are of course exceptions, and this is one of them. When the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the Court may proceed in his absence. But, be it noted, the Court is not directed to make an 'ex parte' order.

Of course the fact that it is proceeding 'ex parte' will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an 'ex parte' decree or other 'ex parte' order which the Court is authorised to make. All that R.6 (1)(a) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, namely to proceed in the absence of one of the parties. The contrast in language between R.7 and R.13 emphasises this.

10. By virtue of 1976 amendment when a defendant absence himself even after receiving summons on the hearing date, then the Court passes an order setting him exparte. If an order setting the defendant is not passed, the Court cannot proceed further to record the evidence and decide the matter. Or in other words, all that Rule 6(1)(a) does is, to remove the bar and which enables the Court to

proceed further as per law. It has to be borne in mind that it is not as if, if an order setting respondent/defendant ex parte is passed, the defence is struck off. The Court cannot grant an ex parte decree against the absenting defendant merely because he has been proceeded ex parte. The Court is duty bound to weigh the claimant/plaintiff's case to decide whether any relief could be granted. Certainly the Court has to consider the interest of the absenting respondent/defendant and not to rely on the evidence otherwise unreliable, simply because the case is ex parte. It has to be noted, only when the Court passes the decree, liability on the respondent/defendant gets fastened and not before that. As the Supreme Court in **SANGRAM SINGH v. ELECTION TRIBUNAL, KOTA** (cited supra) observed, the order setting ex parte made against the defendant not to be taken in the sense of ex parte decree. Also refer,

(a) **Monmatha Kumar v. Josada Lal**

(b) **Satyendra Nath v. Narendra Nath**

(c) **Gurunath Eknath v. Laxmibai Govind**

(d) **State of W.B. v. Lakshmi Narayan, .**

11. Coming to the case on hand, the award was passed on 4.2.1994 fixing the liability solely on Muthumari when admittedly Muthumari died long prior thereto, that was on 7.12.1992. In these circumstances, the position is that the award has been passed against the dead person and hence non-est in law. Once this Court comes to the above conclusion, then the question of executing the award does not arise. In this view of the matter, the revision petition has to be allowed.

12. In the result, the civil revision petition is allowed. However, there will be no order as to costs. Consequently, C.M.P.No.10697 of 2001 is closed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com