
(2009) 08 MAD CK 0283

Madras High Court

Case No: C.R.P. (NPD) No"s. 1689 to 1692 of 2009 and M.P. No"s. 1+1+1+1 of 2009

Roy Augustine Akkara

APPELLANT

Vs

Sha Dipchand Dalaji and Others

RESPONDENT

Date of Decision: Aug. 21, 2009

Hon'ble Judges: S. Palanivelu, J

Bench: Single Bench

Advocate: K.F. Manavalan, for the Appellant; Srikanth, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S. Palanivelu, J.

The petitioner is defendant in OS Nos.4462 of 2008, 4461 of 2008, 4459 of 2008 and 4460 of 2008 on the file of V Additional Judge, City Civil Court, Chennai.

2. The suit has been filed by the respondents for recovery of money along with interest,. When the case was posted for hearing on 08.08.2008, since the petitioner was not present before the court, he was called absent and set ex parte and the ex parte decree was also passed on the same day. Hence, he filed petition Order 9 Rule 13 of the CPC to set aside the ex parte decree passed against him.

3. In the affidavit, he has stated that he received the summons in the suit and notice in the Application No. 10248 of 2008 for attachment before judgment on 08.08.2008 when he was proceeding to the office of the counsel to instruct them to appear on his behalf, he met with an accident and his car was damaged. Since he was not able to instruct his counsel, the case was called and the ex parte decree was passed on the same day. The reasons for not appearing before the court on 08.08.2008 is not wilful nor wanton, but due to the aforesaid reasons, that he has got a good case to defend the suit or merits and that no opportunity was afforded to him.

4. In the counter affidavit, allegations in the affidavit have been denied and the further stated that he has not complied with the condition mentioned in the summons which he received, that the petition filed under Order 9 Rule 13 is not maintainable. The petition should have been filed under Rule 37 Rule 4 of CPC, containing special circumstances. But in the affidavit no such special circumstances have been mentioned and that this application is not in consonance with Order 37 of CPC.

5. The learned counsel for the petitioner Mr.K.F.Manavalan, submitted that not filing an application under Order 37 of CPC is not wrong, since the petitioner was not aware of the nature of the proceedings that the suit was filed under Order 37 of CPC and that he has shown his bona fide before the court by filing application properly on 11.08.2008 itself.

6. The learned counsel appearing for the respondent would submit that petition should have been filed under Order 37 Rule 4 of CPC, that as per the settled propositioning law, the petitioner should have mentioned the defence in the affidavit itself and in the absence of the requirements, the petition has to suffer dismissal. It is advantageous to extract relevant provisions, which goes thus: Order 37, Rule 4 of CPC Power to set aside decree : After decree, the court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit.

7. The learned counsel appearing for the respondent places it reliance upon a decision of the Hon"ble Supreme Court reported in [Rajni Kumar Vs. Suresh Kumar Malhotra and Another](#), wherein Their Lordships while discussing the import of provisions of Order 37 Rule 4 of CPC held that it is not enough for the defendants to show special circumstances which prevent him from appearing or applying for leave to defend and he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9. The Supreme Court further held as follows:

".....12. Now adverting to the facts of this case, though the appellant has shown sufficient cause for his absence on the date of passing ex-parte decree, he failed to disclose facts which would entitle him to defend the case. The respondent was right in his submission that in the application under Rule 4 of Order 37, the appellant did not say a word about any amount being in deposit with the respondent or that the suit was not maintainable under Order 37. From a perusal of the order under challenge, it appears to us that the High Court was right in accepting existence of special circumstances justifying his not seeking leave of the court to defend, but in declining to grant relief since he had mentioned no circumstances justifying any defence."

8. Following the principle laid down by the Apex Court, it is held that when a defendant filed a petition under Order 37 of CPC is filed to set ex parte decree along with the special circumstances as required by Rule 4 Order 37 CPC, he has also to furnish the details of defence in the affidavit and in the absence of which, the said petition could not be entertained by the court. In the view of this matter, since the affidavit filed by the petitioner of this case is benefit of the particulars with regard to the defence to be taken by him, the petition is held not maintainable. Hence the order challenged before this court does not suffer from factual or legal infirmity which deserves to be confirmed and accordingly it is confirmed.

9. In fine, the Civil Revision Petition is dismissed. No costs. Consequently, the connected Miscellaneous Petitions is dismissed.