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**(2010) 11 MAD CK 0258**

**Madras High Court**

**Case No:** C.R.P. (NPD) No. 346 of 2005

C. Madhu

APPELLANT

Vs

K. Vajravel

RESPONDENT

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**Date of Decision:** Nov. 26, 2010

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 17 Rule 2, Order 9 Rule 13
- Constitution of India, 1950 - Article 227

**Citation:** (2011) 1 CTC 438 : (2011) 8 RCR(Civil) 2693

**Hon'ble Judges:** T.S. Sivagnanam, J

**Bench:** Single Bench

**Advocate:** C. Sanjay, for V. Nicholas, for the Appellant; No appearance, for the Respondent

**Final Decision:** Allowed

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**Judgement**

@JUDGMENTTAG-ORDER

T.S. Sivagnanam, J.

This Revision has been filed under Article 227 of the Constitution of India against the judgment and decree dated 11.2.2004 in I.A. No. 1549 of 2003 in MCOP No. 608 of 2002 on the file of the Motor Accidents Claims Tribunal and Special Sub Court, Dharmapuri at Krishnagiri.

2. The Respondent in MCOP No. 608 of 2002 is the Petitioner herein and the claimant in MCOP No. 608 of 2002 is Respondent herein. The Respondent herein filed a Claim Petition before the Tribunal claiming a sum of Rs. 3 Lakhs as compensation for the injury sustained by him in a road accident, which took place on 29.8.2001. According to the claimant, the Petitioner drove his TVS 50 Moped in a rash and negligent manner and dashed against him from behind, which caused the injuries. The Petitioner herein resisted the claim petition by filing a counter affidavit denying the accident and objected to the quantum of compensation claimed.

3. The Tribunal framed two questions for consideration, as to whether the Petitioner was rash and negligent in driving the Moped, which resulted in the accident and whether the Respondent/claimant is entitled for compensation. Before the Tribunal, the Respondent examined himself as C.W.1 and the Doctor was examined as C.W.2. On the side of the Respondent, 4 documents were marked as Ex.C1 to Ex.C.4. It appears that though the Petitioner had filed a counter statement and appeared through counsel, he did not lead any oral evidence and did not mark any documents.

4. In fact, a perusal of the original records of the Tribunal shows that the matter was posted on 12.3.2003 for the Petitioner to lead evidence and the matter was adjourned on two occasions and since the Petitioner did not lead any oral evidence or mark any documents, the evidence on the side of the Petitioner was closed and the claim petition was ordered by order dated 8.4.2003 on merits granting compensation of Rs. 70,000/- with interest at 9% from the date of claim petition.

5. The Petitioner herein filed I.A. No. 1549 of 2003 under Order 9 Rule 13 CPC to set aside the ex parte order judgment and decree 8.4.2003 in MCOP No. 608 of 2002. In the affidavit filed in support of the petition, the Petitioner pleaded that he was about to start to the court on 25.3.2003 to give evidence but developed severe abdominal pain and therefore could not attend the court and the evidence on his side was closed and the judgment was pronounced on 8.4.2003. The application filed by the Petitioner under Order 9 Rule 13 CPC was opposed by the Respondent herein by filing counter. The primary objection taken in the counter is that the Tribunal decided the claim petition on merits and the judgment and decree has been passed on 8.4.2003 discussing various points and it is a decree after contest and therefore the only remedy available to the Petitioner is to file an appeal and the petition under Order 9 Rule 13 CPC is not maintainable. The Tribunal sustained the objection filed by the Respondent herein and dismissed the I.A. No. 1549 of 2003 by judgment and order dated 11.2.2004. As against the said judgment and order, the present Revision has been filed.

6. The learned Counsel for the Petitioner would submit that there were genuine reasons, which prevented the Petitioner from attending the court on 25.3.2003 and the Court ought to have considered the cause pleaded by the Petitioner. Further, the learned Counsel would submit that if the Respondent was absent, the Court ought to have passed an order under Order 17 Rule 2 CPC and not under Order 17 Rule 3 CPC and therefore the application under Order 9 Rule 13 Code of CPC is maintainable.

7. The learned Counsel for the Petitioner in support of his contentions placed reliance on the following decisions:

1. [Prakash Chander Manchanda and Another Vs. Janki Manchanda,](#)

2. B. Janakiramaiah Chetty v. A.K. Parthasarathi and Ors. reported in 2003 (2) CTC 242

3. [Sri Mahaveer Waste Factory and Others Vs. Swadeshi Cotton Mills and Others,](#)

4. Soopi Haji and 4 Ors. v. R.M. Ramanathan Chettiar reported in 1993 (2) Law Weekly 146.

8. Though the Respondent has been served in the present Revision and his name is printed in the cause list, he has not entered appearance through counsel.

9. I have considered the submissions made by the learned Counsel for the Petitioner and perused the materials on record including the original records from the Tribunal.

10. The only point to be considered in the present Revision is as to whether the petition filed by the Petitioner under Order 9 Rule 13 CPC is maintainable. The records of the Tribunal were called for and perused and it is seen that the evidence on the side of the claimant was closed on 26.2.2003 and the matter was posed on 12.3.2003 for the evidence on the side of the Petitioner/Respondent. On 12.3.2003, since the Petitioner herein did not produce any evidence, once again the matter was posted on 25.3.2003 as a last chance. Even on 25.3.2003, since no evidence was let in on the side of the Petitioner/Respondent, the evidence on the Petitioner's side was closed and the matter was posted for orders on 8.4.2003. On 8.4.2003, the Tribunal passed judgment and order. A perusal of the order reveals that the Tribunal decided the matter on merits and awarded compensation.

11. To decide as to what the relief the Petitioner is entitled to, it is necessary to decide whether the remedy under Order 9 Rule 13 CPC was available to the Petitioner.

12. In Prakash Chander Manchanda and Anr. v. Janki Manchanda, referred supra, the Hon'ble Supreme Court considered this very issue. In the said case, before the trial court, the Plaintiff's evidence was over and the case was posted for Defendant's evidence, as the Defendant failed to appear and evidence on the side of the Defendant was closed, argument on behalf of the Plaintiff was heard and as there was no appearance on behalf of the Defendant, the Trial Court passed a decree. The Defendant therein claimed that he came to know about the decree only later and filed an application under Order 9 Rule 13 CPC to set aside the ex parte decree, which was dismissed by the Trial Court, holding that the case was disposed of not in accordance with Order 17 Rule 2, but under Order 17 Rule 3 and therefore application under Order 9 Rule 13 was not maintainable. Their Lordships after considering Order 17 Rules 2 and 3 held as follows:

It is clear that in cases where a party is absent the only course as mentioned in Order 17 Rule 3(b) is to proceed under Rule 2. It is therefore clear that in absence of the Defendant, the Court had no option but to proceed under Rule 2. Similarly the language of Rule 2 as it now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the

modes directed under Order 9. The explanation to Rule 2 gives a discretion to the court to proceed under Rule 3 even if a party is absent but that discretion is limited, only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9 of the Code of Civil Procedure. It is therefore clear that after this amendment in Order 17 Rules 2 and 3 of the CPC there remains no doubt and therefore there is no possibility of any controversy.

7. It is also clear that Order 17 Rule 3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of Defendant was closed nobody appeared for the Defendant. In this view of the matter it could not be disputed that the court when proceeded to dispose of the suit on merits had committed an error.

13. The Hon"ble Supreme Court in the case of B. Janakiramaiah Chetty v. A.K. Parthasarathi and Ors. (referred supra) considered a similar question as to whether the remedy under Order 9 was lost or not, when the evidence on the side of the Defendant was closed as they failed to appear and a decree was passed. Their Lordships considered the point as to whether in the first instance the Trial Court therein had resorted to the explanation to Rule 2 of Order 17 and held as follows:

8. The Explanation permits the Court in its discretion to proceed with a case where substantial portion of 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. As the provision itself shows, discretionary power given to the Court to be exercised in a given circumstances. For application of the provision, the Court has to satisfy itself that (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the Court to adopt any of the modes provided in Order 9 or to make such order as he things fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the Rules, conferring discretion on the Court to act under the specified circumstance, i.e., where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the Court may in its discretion deem as if such party was present. Under Order 9, Rule 3 the Court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6 and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation was "proceed with the case".

Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the Court or not.

9. In Rule 2, the expression used is "make such order as it deems fit", as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17, Rule 3(b) only course open to the Court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the Court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the Court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule. While Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the Court to decide the suit forthwith. The basis distinction between the two Rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the Court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the Explanation may proceed with the if that prima facie is the position. The Court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision.

(emphasis supplied)

14. In *Soopi Haji and 4 Ors. v. R.M. Ramanathan Chettiar*, referred supra, a Hon'ble Division Bench of this Court considered the procedure to be followed by trial court in cases of absence of parties and after relying on the Full Bench decisions of this Court and various other decisions held as follows: "It is further unfortunate that in a trial on the original side of this Court, when such was the situation that the Plaintiffs were present and Defendants were absent, attention of the Court was not drawn to Rules 2 and 3 of Order 17, particularly, the amendment by the Amendment Act 104

of 1976. Order 17 which contains rules as to adjournments, has existed too long for any person not knowing the true effect of the rules under it, the various interpretations by the leading judgments of the Courts, High Court Amendments to the Rules therein and the amendment by the Parliament to set at rest any controversy as to the interpretation of the Rules therein.

...The clear words, "if the parties are, or any of them is absent proceed under Rule 2", thus leave no manner of doubt though the in all cases of the absence of the party, the order has to be passed under Rule 2 and not under Rule 3. The words in Rule 2, "or make such other order as it thinks fit" do not mean that the Court may proceed to dispose of the suit in the absence of a party under Rule 3. Rule 3 is not attracted at all in the case of the absence of a party and thus "or make such other order as it thinks fit" must mean an order other than to proceed to dispose of the suit in one of the modes directed in that behalf by O.9 of the Code but surely not to dispose of the suit on merits. "Such other order" may be a further adjournment to enable the party, which is absent to appear or to regulate the proceedings in some other manner.

...When we come across of this case, we have no hesitation in holding the learned single judge has committed error of law in holding that the application under Order 9 Rule 13, of the Code to set aside the decree in the suit passed in the absence of the party as well as its counsel is not maintainable.

15. As noticed above, in the instant case there was no evidence on the side of the Petitioner/Respondent on 25.3.2003, the evidence on his side was closed and in such circumstances, the Court ought to have proceeded to dispose of the matter in accordance with Order 17 Rule 2 CPC in any one of the modes prescribed under Order 9 of the CPC and explanation of Rule 2 is inapplicable. Therefore, the application filed by the Petitioner under Order 9 Rule 13 Code of CPC was maintainable and therefore the order passed by the Tribunal which is impugned in this Revision is liable to be set aside.

16. It is to be noted that the Claim Petition was filed on 11.5.2002 and the Respondent/claimant has stated that he was working as a Clerk in the Civil Supplies Corporation and on account of the injury sustained, he had suffered disability. Considering the facts and circumstances of the case, this Court is of the view that the Petitioner should be put on some condition while the matter is being remanded.

17. In the result, the above Civil Revision Petition is allowed and the order passed by the Tribunal is set aside subject to the condition that the Petitioner deposits a sum of Rs. 30,000/- (Rupees thirty thousand only) to the credit of MCOP No. 608 of 2002 within a period of six weeks from the date of receipt of a copy of this order. On such deposit, the Tribunal shall take up the matter and afford opportunity to the Petitioner to lead evidence and then decide the matter afresh on merits and in accordance with law.