

(2018) 02 MAD CK 0301

MADRAS HIGH COURT

Case No: 10 of 2017

Ebenezer Vasekaran
Edward

APPELLANT

Vs

Kezia G.Edward & Ors.

RESPONDENT

Date of Decision: Feb. 6, 2018

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 96](#), [Section 2\(2\)](#), [Order 9Rule 9](#), [Order 17Rule 3](#) -
Appeal from original decree - Definitions

Citation: (2018) 02 MAD CK 0301

Hon'ble Judges: J.Nisha Banu

Bench: Single Bench

Advocate: G.Ramanathan, M.P.Senthil

Final Decision: Dismissed

Judgement

1. This appeal suit has been filed by the appellant / plaintiff against the judgment and decree, dated 06.10.2016, passed in O.S.No.113 of 2015 by

the learned District Judge, Kanyakumari District at Nagercoil.

2. For better appreciation, the rank mentioned in the Court below are taken up.

3. The brief facts which are necessary to decide this appeal are as follows: The plaintiff is the son of the 1st defendant and brother of the 2nd and

3rd defendants. The 4th defendant is the daughter of the 2nd defendant. According to the plaintiff, the plaint schedule properties originally

belonged to his father and after his death, the plaintiff and the defendants 1 to 3 have been enjoying the same as joint owners. While so, the

defendants 1 and 2 attempted to alienate item No.1 of the plaint schedule property through forged documents. Hence, he has filed the suit for

partition of the plaint schedule properties, declaration of the Will and Settlement deed as null and void, and for permanent injunction restraining the

defendants 1, 2 and 4 from alienating the suit properties. At the time of filing the suit, the plaintiff has failed to state the correct address of the 3rd

defendant, who was in abroad and therefore, notice could not be served. After getting information about the correct address of the 3rd defendant,

the plaintiff has filed an application in I.A.No.327 of 2016 for amendment of the address mentioned about the 3rd defendant in the plaint. The

Court below has dismissed the suit itself stating that the plaintiff is wasting the valuable time of the Court by abusing and unfair means, against which

the present appeal has been filed by the plaintiff.

4. The learned counsel appearing for the plaintiff would submit that as the plaintiff did not state the correct address of the 3rd defendant in the

plaint, he had filed an amendment petition, but the trial Court, without deciding the said amendment petition, has erroneously dismissed the suit itself

for non prosecution, without any valid reason. Relying upon Order 17 Rule 3 C.P.C., he would further submit that as the trial Court dismissed the

suit while the learned counsel for the plaintiff was physically present, the dismissal of the suit can be taken as on merits and hence, the appeal lies.

He would further submit that in case, this Court dismisses the appeal on the ground of maintainability, the appellant / plaintiff may be given liberty to

file restoration application before the trial Court with an observation to exclude the period spent in this appeal.

5. The learned counsel appearing for the respondents 1, 2 and 4 would submit that the plaintiff has filed the vexatious suit, in order to harass, his

own mother, who is an octogenarian and close relatives, and he wantonly dragged the matter endlessly by furnishing the false address of the 3rd

defendant in the suit to make sure that the summon is not served to the 3rd defendant. He would further submit that as the plaintiff has been

adopting dilatory tactics, the trial Court on 06.09.2016 has specifically directed the plaintiff to take steps to the correct address of the 3rd

defendant, which was furnished by the respondents 1, 2 and 4 in the earlier hearings. In spite of the same, the appellant / plaintiff, once again, took

summons to the wrong address wantonly in order to delay the proceedings and subsequently, took out an amendment application in order to

amend the address of the 3rd defendant. In the said application also, the plaintiff has wantonly furnished the wrong address, in spite of knowing the

correct address and hence, the trial Court has dismissed the suit for non prosecution. He would further submit that instead of filing an application

for restoration of the suit under Order 9 Rule 9 C.P.C., the appellant / plaintiff has wantonly filed the present appeal under Section 96 C.P.C.

which is not maintainable. Thus, he prayed for dismissal of the appeal.

6. The issue to be decided in this appeal is: Whether the present appeal is maintainable under Section 96 of C.P.C. as against dismissal of the suit

for non prosecution?

7. When the similar issue arose for consideration, a learned Single Judge of this Court in P.Ganesan Vs. UCO Bank rep. by its Branch Manager,

Namagiripet and two others, reported in 1998 (II) CTC 290, has held in paragraph No.8 as follows:

8. Section 2(2), CPC defines a "decree" thus:-

"Decree" means the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the

parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the

rejection of a plaint and the determination of any question within Section 144 but shall not include:-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.....

Section 96, CPC provides for appeals only from decrees. It is under Section 96, CPC, right to prefer appeal is provided. The procedure is under

Or.41, CPC. So the substantive right to prefer an appeal is only under Section 96, CPC and that must be from a decree. Under section 2(2),

CPC dismissal for default is not a decree.

8. In the above decision, when the very same argument relying on Order 17 Rule 3 C.P.C was put forth by the learned counsel, the learned Single

Judge, after relying on various decisions, has held in paragraph Nos.9 to 17, 19 and 20 as follows:

9. Learned counsel for respondent relied on Order 17, Rule 3, CPC. It says that witness for plaintiff may be present. It says that

witness for plaintiff may be present. But if he is not in a position to perform a thing that is necessary for the progress of the suit, the

Court is entitled to decide the case forthwith. In the case on hand, plaintiff's witness was present. But he was not prepared to

proceed with the case. The Court also decided the case simultaneously. It was, therefore, argued that the dismissal is on merits, and

consequently an appeal lies. It was also contended that for dismissal for default, there should not be any appearance of the party, and

in this case, the witness was physically present before Court. So, when the witness has physically appeared before Court, the

provisions of Order 9, CPC have no application. Learned counsel submitted that Order 9, CPC deals with appearance of parties and

the consequence of non- appearance of parties. Only in cases where the parties have not appeared, the consequence under Order 9,

CPC will follow and he also laid emphasis on the provisions of Order 17, Rule 3 (b), CPC which says that "if the parties or any of

them is absent, proceed under Rule 2". The further argument of learned counsel for petitioner is that under Or. 17 Rule 2, CPC the

court is entitled to dismiss a suit for default only if the party is absent. Sub-rule (b) Rule 3, CPC cannot apply. The decision can only

be on merits and, therefore, appeal is maintainable. I do not think that the contention of learned counsel for respondent could be accepted.

10. What is meant by "appearance" under Or.9 and under Or.17, CPC has come up for consideration in many cases.

11. In one of the very early decisions of our High Court reported in Kaliappa v. Kumarasami, AIR 1926 Mad. 971 at 973 the

learned Judges of the Division Bench have said thus:-

The real question for determination at issue is whether the appearance mentioned in Order 3, Rule 1 is merely a physical

appearance, or whether it must be an appearance with the intention of pleading in a suit. It is argued for respondents that mere

physical appearance is sufficient, but if this is so it would be an appearance if a party happened to be anywhere on the Court

precincts with or without the knowledge of the Court. It is therefore rather difficult to accept the argument that mere personal

appearance is sufficient. It is clearly, we think, intended that the appearance must be, not as a man, but as a party and with the

intention of acting as such party in that suit. If this is correct, then the mere fact that the party was present in Court when his pleader

reported no instructions would not amount to an appearance for he is merely there as the person who was represented by his

pleader. The pleader acted on his behalf and when he ceased to do so, the party took no further part in the proceedings. The mere

fact that he was in Court cannot make it an appearance in the suit. ...""(Italics Supplied)

12. In, Kuruvilla Chandy v. Hassan Bava Rawther, 1969 K.L.T. 402, in para 3, V.R. Krishna Iyer, J. (as he then was), has held

thus:-

Non-appearance at the hearing of the suit is a sine qua non for the applicability of Order 17, Rule 2. Mere physical presence in

Court cannot be taken cognisance of and in effect that is non-appearance at the hearing. If that is so, it would be a case coming under

Rule 2 of Order 17. A pleading asking for adjournment and declining to proceed with the case on refusal of adjournment cannot be

said to have appeared for the plaintiff. It is not the presentation of the person but the presentation of the case that constitutes effective

appearance. ...""(Italics supplied)

13. In *Manibala Dassi v. Tamizuddin Saha and another*,, a learned Judge of that High Court went to the extent of saying that if a party

has engaged a Counsel, the appearance must be by the party with the Counsel. In that case, it was held thus:-

Where a party is not able to conduct his suit because his lawyers were not ready for the hearing after refusal of adjournment to them

by the court, it is a sufficient cause for non-appearance within the meaning of Order 9, Rule 6, CPC.

It is not a case of a party pleading the negligence of a lawyer as an excuse for her own default but the case of a party who has

suffered because of the refusal of the lawyer or lawyers to conduct the case.

When a petition for adjournment by a lawyer is rejected and he retires from the case, the mere physical presence of the party in the

precincts of the Court does not constitute an appearance within the meaning of Order 9 Rules 6 and 8. The word appearance under

Order 9 has a technical meaning and does not mean more physical presence. When a party does not want to conduct his case in

person but engages a lawyer, the appearance of such party must be an appearance through that lawyer when the suit in question is

called on for hearing.

14. In *Allah Bux v. Budha*, AIR 1939 All. 451, it was a case where an appeal was dismissed for default. Appellant was present in

Court. The question was, whether the dismissal was one for default or on merits. It was held thus:-

Appearance in the legal sense does not mean mere physical presence within a certain local area or a room or anything of that kind.

It means that a party or somebody on his behalf either expressly in words or by his conduct demands an adjudication from the Court.

It is possible that a party to a suit or other proceeding might physically be present in a Court and might not make his presence known

to it. In these circumstances, there is no appearance in the legal sense of the term.

15. In *Damodar Das v. Raj Kumar Das*, AIR 1922 Pat. 485 a Division Bench of that High Court has held thus:-

The mere presence of a party in court unless he is there for the purpose of conducting his case, is not an appearance within the

meaning of CPC; nor does the presence of his pleader who has been instructed to represent him on previous occasions constitute an

appearance, unless he is instructed to represent him on the occasion in question and attends for that purpose. Where defendant's

pleader who was present took no part in the trial except to ask for an adjournment, which was refused, and the defendant, although

present in court also took no part in the trial, and the court, after hearing evidence and arguments on plaintiff's behalf, decreed the

suit, held the decree being *ex parte* was liable to be set aside under Order 9 Rule 13 for sufficient cause.

16. From the above settled legal position, it is clear that even though the manager of the plaintiff- Bank was present, his physical

presence alone will not be sufficient. His appearance must be for the purpose of making a further progress of the suit. The Manager

was not prepared to get along with the case. Though the Bank had engaged a Counsel, he was also not present. Under the above

circumstances, it cannot be said that there was appearance as contended by first respondent's Counsel.

17. The argument of the respondent that under Order 17 Rule 13 CPC, the trial court was justified in passing the decree and,

therefore, an appeal is maintainable also cannot be accepted.

18.

19. Order 17 Rules 2 and 3, CPC was amended under Act 104 of 1976. After the Amendment, the said Rules came for

interpretation by the Supreme Court in, *Prakash Chander Manchanda v. Janki Manchanda*, . After extracting Rules 2 and 3 of Order

17, CPC. Their Lordships held that, ""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. ...""(Italics) I have already held that it is not the physical presence of the party that is essential, but his

appearance must be for the further progress to the suit. If this is the interpretation for appearance, naturally he must be treated as

absent. If that be so, the only course open to the Court is to dismiss the case for default. The Honourable Supreme Court has held

thus:-

...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 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 remains absent and for that

party no evidence has been examined upto 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 Code of Civil Procedure there remains no doubt and therefore there is no

possibility of any controversy. In this view of the matter it is clear that when in the present case on October 30, 1985 the case was

called nobody was present for the defendant. It is also clear that till that date the plaintiffs evidence has been recorded but no

evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned.

It is therefore clear that upto the date i.e., October 30, 1985 when the trial court closed the case of defendant, there was no evidence

on record on behalf of the defendant. In this view of the matter therefore the explanation to Order 17, Rule 2 was not applicable at

all. Apparently when the defendant was absent Order 17, Rule 2 only permitted the court to proceed to dispose of the matter in any

one of the modes provided under Order 9.

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. Unfortunately even on the review application, the

learned trial court went on in the controversy about Order 17, Rules 2 and 3 which existed before the amendment and rejected the

review application and on appeal, the High Court also unfortunately dismissed the appeal in litnine by one word"".

In the case on hand, the trial court has noted that though the plaintiff-Bank's Manager was present, he refused to proceed with the

trial. Therefore, the trial court was very conscious in holding that the suit is hereby dismissed for non-prosecution of the case. It may

be further seen that no part of the evidence was taken and there is no adjudication of rights of parties as per the definition of the term

"decree".

20. In Puthuvachola Muhammed v. Narayanikutty Amma and others, 1991 (3) ILR (Kerala Series) 593 it has been held thus:-

A dismissal of the suit for default bars the plaintiff from bringing a fresh suit on the same cause of action. Rule 8 provides for passing

only an order that the suit be dismissed and not a decree of dismissal. The remedy of a plaintiff whose suit has been dismissed for

default is only by way of an application under Rule 9 of Order 9 to get dismissal set aside. The order of dismissal is not appealable.

The fact that the court below has drawn up a decree in accordance with the judgment in no reason to hold that what has been passed

by the court is a decree and not an order. Section 96 of the Code contemplates an appeal from an original decree passed ex parte

but not from an order of dismissal of the suit for default. That order is not made applicable either under section 104 or under Order

XLIII, Rule 1, CPC. Any order of dismissal for default is excluded from the definition of decree in section 2(2) of the Code. The

result is that no appeal lies against an order dismissing the suit for default"".

There is no common law right of appeal unless the Statute provides for it. From a suit which is dismissed for default, there is no right

of appeal and, therefore, the Court below acted illegally in entertaining the appeals and further remanding the case to the trial Court.

The lower appellate Court acted without jurisdiction.

9. The dictum laid down in the above decision is squarely applicable to this case. Further, in this case also, though the learned counsel appearing

for the plaintiff was physically present before the trial Court, his appearance was not for further progress to the suit, but for dragging the matter

further under the guise of seeking time for serving notice to the third defendant and therefore, the appearance of the counsel cannot be taken as

appearance in the legal sense of the term and thus, the contention of the learned counsel relying upon Order 17 Rule 3 C.P.C. cannot be accepted.

10. In yet another decision in Firdous omer (dead) by LR's. and others Vs. Bankim Chandra Daw (dead) by LR's and others, reported in (2006) 6

SCC 569, the Hon"ble Supreme Court has held that a dismissal of the suit for non prosecution or for non appearance of the plaintiff is not a

decree as specified by Section 2(2) of C.P.C. itself and it is not appealable as a decree.

11. In view of the above, the present appeal is not legally maintainable.

12. With regard to the liberty sought for by the learned counsel for the appellant / plaintiff is concerned, it is seen from the records that as stated by

the contesting defendants, the plaintiff had adopted dilatory tactics by filing a false address of the 3rd defendant and even after receipt of the

correct address of the 3rd defendant, he wantonly took notice to the wrong address, that too at the last moment. About one year was wasted only

in the process of serving notice to the 3rd defendant, which would support the submission of the learned counsel for the contesting defendants that

only in order to harass his own mother, who is an octogenarian and sisters, he had instituted the frivolous suit and adopted the dilatory tactics. The

manner, in which the case has been proceeded by the plaintiff, reflects the intention of the plaintiff in delaying the matter.

13. Considering the dilatory tactics of the plaintiff, the trial Court has dismissed the suit for default, against which the plaintiff ought to have filed an

application under Order 9 Rule 9 C.P.C. for restoration and instead the plaintiff has filed the present appeal. It is submitted by the learned counsel

for the appellant / plaintiff, in the decree alone, it is stated that the suit is dismissed for non prosecution and due to confusion, he has filed the

appeal. Even a layman could understand from the bare perusal of the judgment of the trial Court that the suit was dismissed only due to the unfair

means of the plaintiff and it was not on merits. The appellant / plaintiff himself has stated in the grounds of appeal that ""the learned Judge ought to

have decided the case on merits"", which would go to show that knowing fully well that he has to approach the Court below under Order 9 Rule 9

C.P.C for restoration, he has purposefully filed the present appeal. The attitude of the plaintiff would further go to show that in order to gain his evil

intention of delaying the matter, he has filed the present appeal which is not at all maintainable. It is a clear case of abuse of the process of law. The

attitude of the appellant / plaintiff is condemnable and the same cannot be tolerated. In fact, the appellant / plaintiff has wasted the valuable time of

this Court also and the worst affected is the first defendant, who is the aged mother of the plaintiff. Under such circumstances, this Court is not

inclined to give such liberty in this case, though, in the normal course, the Court would grant such liberty.

14. In view of the above, this appeal suit is dismissed with the cost of Rs.50,000/-. Consequently, connected miscellaneous petition is also

dismissed.