

G RATNA RAJ (D) BY LRS.

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v.

SRI MUTHUKUMARASAMY PERMANENT
FUND LTD. & ANR.

(Civil Appeal Nos. 2582-2583 of 2011)

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FEBRUARY 01, 2019

**[ABHAY MANOHAR SAPRE AND
DINESH MAHESHWARI, JJ.]**

*Code of Civil Procedure, 1908 – Or.XVII, r.2, Explanation – C
Applicability of – In order to attract Explanation to Or.XVII, r.2, the
party which has led evidence and has led substantial part of the
evidence if fails to appear on any day to which the hearing of the
case is adjourned, the Court may treat “such party” as “present”
on that day and is accordingly empowered to proceed in the suit – D
In the instant case, the defendants were proceeded ex parte – It was
defendant who did not lead the evidence and therefore, Explanation
to Or.XVII, r.2 would not apply – Therefore, since the defendants
were proceeded ex parte and were found not to have led any evidence
in the suit, the Court could only proceed under Or.XVII, r.3 (b) r/w
Or.XVII, r.2 for disposal of the suit by taking recourse to one of the
modes directed in that behalf by Or.IX of the Code – Trial court
(Single Judge) had proceeded to hear the suit ex parte by taking
recourse to Or.IX, r.6 (a) in terms of Or.XVII, r.2 because on that
day, the plaintiff was present when the suit was called on for hearing
whereas the defendants were absent despite service of summons
and, accordingly, trial court passed the preliminary decree – Such
decree was an “ex parte decree” within the meaning of Or.IX, r.6 (a)
r/w Or.IX, r.13 of the Code and, therefore, could only be set aside
under Or.IX, r.13 on making out a sufficient ground by the
defendants – Division Bench of High Court was justified in allowing
the applications filed by defendant no.1 under Or.IX, r.13 and in
consequence was justified in setting aside the preliminary decree
treating the said decree as ‘ex parte decree’ – Interference with the
said order is not called for – Trial court is directed to decide the
suit on merits in accordance with law – Ex parte decree – Party,
appearance of.*

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A Dismissing the appeals, the Court

- HELD:** In the instant case, the plaintiff's evidence was recorded and his case was also closed. The defendants were placed *ex parte* on the date when the case was fixed for recording defendants' evidence but the same was not recorded due to the defendants' absence on the said date. In such a situation arising in the case, the case at hand would not fall under Explanation to Order XVII Rule 2 because in order to attract the Explanation, "such party" which has led evidence or has led substantial part of the evidence, if fails to appear on any day to which the hearing of the case is adjourned, the Court may treat "such party" as "present" on that day and is accordingly empowered to proceed in the suit. If the plaintiff had remained absent and was found to have led evidence, the Court could have invoked its powers under Explanation to Order XVII Rule 2 treating the plaintiff as "present" for passing appropriate orders. Such is, however, not the case here. Similarly, in converse situation, if the defendants had remained absent (as has happened in this case) on that date and if it would have noticed that they had adduced the evidence either fully or substantially prior to the date on which they were proceeded *ex parte*, the Court could have invoked its powers under Explanation to Order XVII Rule 2 of the Code treating the defendants as "present" on that day for passing appropriate orders in the suit. Such is, however, again not the case here. Since the defendants were proceeded *ex parte* and were found not to have led any evidence in the suit, the Court could only proceed under Order XVII Rule 3 (b) read with Order XVII Rule 2 for disposal of the suit by taking recourse to one of the modes directed in that behalf by Order IX or could have made any other order as it thinks fit. The Trial Court (Single Judge) is directed to decide the Original Suit on merits in accordance with law. [Paras 23-24, 26-28, 33][853-A-C, D-F; 854-F]
- G *B. Janakiramaiah Chetty v. A.K. Parthasarthy & Ors.*
(2003) 5 SCC 641 : [2003] 3 SCR 369 – relied on.

Case Law Reference

[2003] 3 SCR 369 relied on Para 22

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. A
2582-2583 of 2011.

From the Judgment and Order dated 11.01.2008 of the High Court
of Judicature at Madras in OSA Nos. 299 & 300 of 2006.

Ambhoj Kumar Sinha, Ashwariya Sinha, Advs. for the Appellants.

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R.Anand Padmanabhan, Prawal Chaturvedi, Ms. Nishaka Tyagi,
Pramod Dayal, S. Gowthaman, Advs. for the Respondents.

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J. 1. Application for substitution
is allowed.

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2. These appeals are directed against the final judgment and order
dated 11.01.2008 passed by the High Court of Judicature at Madras in
O.S.A. Nos.299 & 300 of 2006 whereby the Division Bench of the High
Court allowed the appeals filed by respondent No.1 herein.

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3. The controversy involved in these appeals lies in a narrow
compass. However, in order to appreciate the same, few relevant facts
need mention hereinbelow.

4. The original appellant-G Ratna Raj (since dead and now
represented by his legal representatives) was the plaintiff whereas
respondent No.1 was defendant No.1 in the civil suit out of which these
appeals arise. Respondent No.2 is impleaded as party respondent in this
Court by order dated 06.02.2014.

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5. The original plaintiff(appellant herein)-G Ratna Raj filed a Civil
Suit No.131/1999 against the defendants (Sri Muthukumaraswamy Fund
Ltd.-Respondent No.1 herein and Balajee & Ors.) in the High Court of
Madras on its original side jurisdiction for redemption of mortgage and
for permanent injunction in relation to the mortgaged property.

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6. The defendants on being served entered their appearance and
filed their written statement. The Trial Court, on the basis of pleadings,
framed the issues. The plaintiff examined himself as PW-1. The
defendants cross-examined the plaintiff. Thereafter, the plaintiff closed
his case. The case was accordingly posted for recording defendants'
evidence.

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7. At that stage of the proceedings, the defendants did not appear
in the suit and, therefore, the Court proceeded *ex parte* against them.

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- A The proceedings in the suit then continued as *ex parte* against the defendants. The plaintiff then got himself re-examined in the proceedings. He, however, could not be re-cross-examined by the defendants because they were already proceeded *ex parte* in the proceedings.
8. The Trial Court (Single Judge) by judgment/decrees dated 25.02.2003 passed a preliminary decree against the defendants in relation to the suit property. This led to filing of the two applications (IA No.340/2006 and IA No. 341/2006) by defendant No.1 before the Trial Court.
9. So far as IA No. 341/2006 is concerned, it was filed under Order 9 Rule 13 of Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”) for setting aside of the preliminary decree dated 25.02.2003 and so far as IA No.340/2006 is concerned, it was filed for condonation of delay in filing the application under Order 9 Rule 13 of the Code.
10. By order dated 14.03.2006, the Single Judge dismissed both the applications and held that the application filed by defendant No.1 under Order 9 Rule 13 of the Code was not maintainable because the preliminary decree dated 25.02.2003 was not an “*ex parte* decree”. In other words, he was of the view that since the preliminary decree dated 25.02.2003 was not an *ex parte* decree, an application under Order 9 Rule 13 of the Code could not be filed for its setting aside.
- E 11. Defendant No.1 felt aggrieved and filed appeals before the Division Bench of the High Court. By impugned order, the Division Bench allowed the appeals and set aside the order of the Single Judge. The Division Bench held that the preliminary decree dated 25.02.2003 was an *ex parte* decree passed in the civil suit by the Trial Court (Single Judge) and, therefore, the application filed by defendant No.1 under Order 9 Rule 13 of the Code was maintainable with a view to find out as to whether such decree could be set aside under Order 9 Rule 13 of the Code or not.
- G 12. The Division Bench, therefore, allowed the application filed by defendant No.1 under Order 9 Rule 13 of the Code subject to their paying a cost of Rs.10,000/- to the plaintiff. The civil suit was accordingly restored to its original file for its disposal on merits in accordance with law. It is against this order, the plaintiff has felt aggrieved and filed the present appeals by way of special leave in this Court.
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13. The short question, which arises for consideration in these appeals, is whether the Division Bench was justified in setting aside the preliminary decree dated 25.02.2003 by holding the same to be an “*ex parte* decree” for the purpose of Order 9 Rule 13 of the Code. A

14. Heard learned counsel for the parties.

15. Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in these appeals. B

16. In our opinion, the question involved in these appeals is required to be decided keeping in view the provisions of Order 9 Rule 6 (a) and Order 17 Rules 2 and 3 of the Code. C

“Order 9 Rule 6 (1)(a)”

6. Procedure when only plaintiff appears- (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then-

(a) When summons duly served – If it is proved that the summons was duly served, the Court may make an order that the suit be heard *ex parte*; D

17. Rule 6(1)(a) provides that where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then if the summons is held duly served on the defendant, the Court may make an order that the suit be heard *ex parte*. E

18. Order 17 Rules 2 and 3 read as under :

“Order 17 Rules 2 & 3”

2. Procedure if parties fail to appear on day fixed.—Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit. F

***Explanation.*—Where the evidence or a substantial portion of the 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, the court may, in its discretion, proceed with the case as if such party were present.** G

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- A **3. Court may proceed notwithstanding either party fails to produce evidence, etc.—**Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default,—
- B (a) if the parties are present, proceed to decide the suit forthwith; or
- C (b) if the parties are, or any of them is, absent, proceed under Rule 2.”
- D 19. Order 17 Rule 2 of the Code provides that where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or make such other order as it thinks fit.
- E 20. The Explanation appended to Order 17 Rule 2 of the Code provides that where the evidence or a substantial portion of the 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, the court may, in its discretion, proceed with the case as if such party was present.
- F 21. Order 17 Rule 3 of the Code, however, provides that where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, (a) if the parties are present, proceed to decide the suit forthwith, or (b) if the parties are, or any of them is, absent, proceed under Rule 2.
- G 22. The scope of Order 17 Rule 2 and Order 17 Rule 3 of the Code came up for consideration before this Court in the case of **B. Janakiramaiah Chetty vs. A.K. Parthasarthy & Ors.**, (2003) 5 SCC 641 wherein Justice Arifit Pasayat speaking for the Bench held in paras 7 to 10 as under:
- H “**7. In order to determine whether the remedy under Order 9 is lost or not what is necessary to be seen is whether in the first instance the Court had resorted to the Explanation of Rule 2.**

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 is to be exercised in a given circumstance. 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 thinks 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 rule, 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 are "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 thinks fit", as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the 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

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- A 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 basic 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.
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- E 10. 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 case 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.”
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- H 23. Now when we examine the facts of the case at hand keeping in view the law laid down in the case of **B Janakiramaiah Chetty**

(supra), we find that the plaintiff's evidence was recorded and his case was also closed. It is not in dispute that the defendants were placed *ex parte* on the date when the case was fixed for recording defendants' evidence but the same was not recorded due to the defendants' absence on the said date. In other words, it was a case where the defendants did not lead any evidence.

24. In such a situation arising in the case, in our view, the case at hand would not fall under Explanation to Order 17 Rule 2 of the Code because in order to attract the Explanation, "such party" which has led evidence or has led substantial part of the evidence, if fails to appear on any day to which the hearing of the case is adjourned, the Court may treat "such party" as "present" on that day and is accordingly empowered to proceed in the suit.

25. In this case, the party, who was absent and was proceeded *ex parte* was the "defendants" and they had not led any evidence whereas it was the plaintiff, who was present and had led his evidence.

26. In other words, if the plaintiff had remained absent and was found to have led evidence, the Court could have invoked its powers under Explanation to Order 17 Rule 2 of the Code treating the plaintiff as "present" for passing appropriate orders. Such is, however, not the case here.

27. Similarly, in converse situation, if the defendants had remained absent (as has happened in this case) on that date and if it would have noticed that they had adduced the evidence either fully or substantially prior to the date on which they were proceeded *ex parte*, the Court could have invoked its powers under Explanation to Order 17 Rule 2 of the Code treating the defendants as "present" on that day for passing appropriate orders in the suit. Such is, however, again not the case here.

28. We are, therefore, of the view that since the defendants were proceeded *ex parte* and were found not to have led any evidence in the suit, the Court could only proceed under Order 17 Rule 3 (b) read with Order 17 Rule 2 of the Code for disposal of the suit by taking recourse to one of the modes directed in that behalf by Order 9 of the Code or could have made any other order as it thinks fit.

29. As mentioned above, the Trial Court did proceed to hear the suit *ex parte* by taking recourse to the Order 9 Rule 6 (a) in terms of

- A Order 17 Rule 2 of the Code because on that day, the plaintiff was present when the suit was called on for hearing whereas the defendants were absent despite service of summons and accordingly the Trial Court passed the preliminary decree. Such decree, in our opinion, was an “*ex parte* decree” within the meaning of Order 9 Rule 6 (a) read with Order 9 Rule 13 of the Code and, therefore, could be set aside under Order 9 Rule 13 on making out a sufficient ground by the defendants.

30. In view of the foregoing discussion, we are of the view that the Division Bench was justified in allowing the applications filed by defendant No.1 under Order 9 Rule 13 of the Code and, in consequence,

- B Rule 13 on making out a sufficient ground by the defendants.
- C was justified in setting aside the preliminary decree dated 25.02.2003 passed in O.S. No.131/1999 treating the said decree as “*ex parte* decree”.

31. So far as the finding on the question of sufficient ground for setting aside of the *ex parte* decree is concerned, suffice it to say, it being a pure question of fact, the same does not call for any interference

- D by this Court. A finding on such question is binding on this Court.
- E Moreover, we find that the Division Bench imposed a cost of Rs.10,000/- on defendant No.1 payable to the plaintiff as condition for setting aside the *ex parte* decree. Defendant No.1, therefore, must pay the cost to the plaintiff.

- F 32. As a result of the foregoing discussion, we find no merit in these appeals, which are accordingly dismissed.

33. The Trial Court (Single Judge) is now directed to decide the Original Suit No. 131/1999 on merits in accordance with law preferably within a period of one year as an outer limit. Since the original plaintiff has died and his legal representatives are already brought on record in

- G these appeals, the Trial Court will permit the plaintiff to amend the cause title in the plaint and bring on record the legal representatives(appellants herein) to enable them to prosecute the suit on merits in accordance with law.

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Devika Gujral

Appeals dismissed.