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JAYAPRAKASH & ANR.

v.

T. S. DAVID & ORS.

(Civil Appeal No. 883 of 2018)

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JANUARY 25, 2018

[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]

Code of Civil Procedure, 1908 – Or.IX, r.13 – Setting aside of ex parte decree – Suit for specific performance of agreement for sale of suit property filed by appellants on the ground that respondents-defendant nos.1 and 2 failed to complete sale transaction as per the terms of agreement despite taking the advance money from appellants and instead sold the suit properties to defendant nos.3 and 4 – Respondents remained ex parte since inception – Ex-parte decree passed against respondents jointly and severally – Defendant no.3 and 4 applied for setting aside the ex parte decree under Or.IX, r.13 – Trial court set aside the ex parte decree and restored the original suit to its file to decide the suit afresh on merits – On remand, defendant nos.1 and 2 remained ex parte – Trial court again decreed the suit against all the four defendants – Defendant nos.3 and 4 filed appeal before High Court – High Court allowed the appeal and again remanded the case to trial court for fresh trial – Whether High Court was justified in remanding the case to trial court for its denovo trial – Held: Defendant nos. 1 and 2 were entitled to a notice of the proceedings under Or.IX, r.13 in terms of local amendment made by the State of Kerala in the first proviso to Or.IX, r.13 wherein the words “after notice to them” were inserted – This local amendment made in the first proviso was applicable to defendant nos. 1 and 2 – No notice was served on defendant Nos. 1 and 2 before setting aside the ex parte decree and in their absence, the suit was restored – This was one irregularity committed by the trial court while restoring the entire suit, though it was for the benefit of defendant Nos. 1 and 2 – After the suit was restored at the instance of defendant nos. 3 and 4, the trial court committed another error inasmuch as it again did not issue fresh notice of the suit to defendant nos. 1 and 2 – In other words, defendant nos. 1 and 2 were entitled for a fresh notice of the

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suit once restored despite their non-appearance in the first round of trial in the suit and in Or.IX, r.13 proceedings – The two legal infirmities call for remand of the case to the trial court for fresh adjudication of the civil suit on merits in accordance with law – Specific performance – Decree – Ex-parte decree – Notice. A

Dismissing the appeal, the Court B

HELD: 1. The Trial Court will now issue fresh notice to defendant Nos. 1 and 2 in the suit by usual mode of service and then by substituted service, if need arises. It is only after the service of the suit is held complete on defendant Nos. 1 and 2, the Trial Court will proceed with the trial in the suit on merits. [Para 22][266-D] C

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 883 of 2018.

From the Judgment and Order dated 05.11.2014 of the High Court of Kerala at Ernakulam in RFA No. 541 of 2007. D

C. S. Rajan, Sr. Adv., A. Raghunath, Ms. Pushpa Devi Sikri, Advs. for the Appellants.

Thomas P. Joseph, Sr. Adv., V. Sreedha Reddy, Abhijit Sengupta, Jayant Muthraj, C. K. Sasi, Advs. for the Respondents. E

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J. 1. Leave granted.

2. This appeal is filed by the plaintiffs against the final judgment and order dated 05.11.2014 passed by the High Court of Kerala at Ernakulam in R.F.A. No.541 of 2007 whereby the High Court allowed the appeal filed by defendant Nos. 3 & 4 (respondent Nos.1 & 2 herein) and set aside the judgment and decree dated 20.02.2007 passed by the sub-Court, Kottayam in O.S. No.337 of 2001. F

3. In order to appreciate the short controversy involved in the appeal, few relevant facts need mention hereinbelow. G

4. The appellants are the plaintiffs whereas the respondents are the defendants in the civil suit out of which this appeal arises.

5. The appellants filed a civil suit being O.S. No. 337/2001 against the respondents (defendants) in the Court of Principal Sub-Judge, H

A Kottayam for specific performance of the agreement (Ex-A-1) for sale of suit properties to the appellants by the respondents (defendant Nos. 1-4) for a total consideration of Rs.5,70,000/-.

B 6. According to the appellants, since defendant Nos. 1 and 2 (original owners of the suit properties) failed to sell the suit properties to the appellants as per the terms of the agreement despite taking advance money from the appellants and instead sold the suit properties to defendant Nos. 3 and 4, the appellants filed the suit against defendant Nos. 1 to 4 seeking specific performance of the agreement (Ex-A-1) against defendant Nos. 1 and 2.

C 7. The defendants (respondents) were served by substituted service. They, however, remained *ex parte* since inception. The Trial Court, therefore, on 27.02.2004 passed an *ex parte* decree against the defendants (respondents) jointly and severally.

D 8. Thereafter, defendant Nos. 3 and 4 applied for setting aside of the *ex parte* decree dated 27.2.2004 under Order 9 Rule 13 of the Code of Civil Procedure, 1908. The Trial Court, by order 20.12.2006, allowed the application and set aside the *ex parte* decree and restored the original suit to its file to decide the suit afresh on merits.

E 9. On remand, defendant Nos. 3 and 4 filed the written statement. So far as defendant Nos. 1 and 2 are concerned, they remained *ex parte*. The Trial Court, by judgment/decreed dated 20.02.2007, again decreed the suit against all the four defendants jointly and severally.

F 10. Defendant Nos. 3 and 4 felt aggrieved and filed first appeal before the High Court. By impugned judgment, the High Court allowed the appeal and while setting aside the judgment/decreed of the Trial Court again remanded the case to the Trial Court for fresh trial on merits. In the opinion of the High Court, the Trial Court did not decide the issues arising in the case properly and, therefore, the entire case needs a fresh consideration with a liberty to parties to adduce further evidence. The case was accordingly remanded to the Trial Court.

G 11. The plaintiffs felt aggrieved by the impugned judgment and have filed this appeal by way of special leave in this Court.

H 12. Therefore, the short question, which arises for consideration in this appeal, is whether the High Court was justified in remanding the case to the Trial Court for its *de novo* trial.

13. Heard Mr. C.S. Rajan, learned senior counsel appearing for the appellants and Mr. Thomas P. Joseph, learned senior counsel for respondent Nos. 3 & 4 and Mr. C.K. Sasi, learned counsel for respondent Nos. 1 & 2. A

14. Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in this appeal. B

15. In our opinion, the remand order of the High Court to try the suit afresh on merits appears to be correct, though we uphold the remand order on additional grounds, which were not taken note of by the High Court and nor urged here. In our opinion, therefore, the remand of the case to Trial Court is otherwise called for. C

16. It is not in dispute that all the four defendants (1 to 4) suffered *ex parte* decree on 27.02.2004 jointly and severally. It is also not in dispute that only defendant Nos. 3 and 4 applied to the Court for setting aside the decree under Order 9 Rule 13 of the Code. This application was allowed by the Trial Court by order dated 20.12.2005 which resulted in setting aside of the entire *ex parte* decree against all the defendants, including defendant Nos. 1 and 2 though they did not apply for its setting aside. The suit was accordingly restored to its file for fresh trial on merits. D

17. In our view, defendant Nos. 1 and 2 were entitled to a notice of the proceedings under Order 9 Rule 13 of the Code in terms of local amendment made by the State of Kerala in the first proviso to Order 9 Rule 13, wherein the words “after notice to them” were inserted. This local amendment made in the first proviso to Order 9 Rule 13 was applicable to defendant nos. 1 and 2. When enquired, it was stated that no notice was served on defendant Nos. 1 and 2 before setting aside the *ex parte* decree and in their absence, the suit was restored. This was, in our view, one irregularity committed by the Trial Court while restoring the entire suit, though it was for the benefit of defendant Nos. 1 and 2. E F

18. Be that as it may, in our considered opinion, after the suit was restored at the instance of defendant Nos. 3 and 4, the Trial Court committed another error inasmuch as it again did not issue fresh notice of the suit to defendant Nos. 1 and 2. In other words, defendant Nos. 1 and 2 were entitled for a fresh notice of the suit once restored despite their non-appearance in the first round of trial in the suit and in Order 9 Rule 13 proceedings. G H

A 19. The Trial Court, however, again decreed the suit by judgment/decree dated 20.02.2007 *ex parte* against defendant Nos. 1 and 2 but after hearing only defendant Nos. 3 and 4. It is against this judgment and decree which was impugned in appeal by defendant Nos. 3 and 4, which was again set aside by the High Court by impugned judgment
B resulting in remand of the case to the Trial Court for fresh trial on merits giving rise to filing of this appeal by the plaintiffs.

20. As mentioned above, though we are inclined to uphold the remand order, but that we do so on the basis of aforementioned two grounds noticed by us in the proceedings in the suit and in Order 9 Rule
C 13 proceedings. The two legal infirmities noticed by us in the proceedings call for remand of the case to the Trial Court for fresh adjudication of the civil suit on merits in accordance with law.

21. In the light of the foregoing discussion, the appeal fails and is accordingly dismissed.

D 22. The Trial Court will now issue fresh notice to defendant Nos. 1 and 2 in the suit by usual mode of service and then by substituted service, if need arises. It is only after the service of the suit is held complete on defendant Nos. 1 and 2, the Trial Court will proceed with the trial in the suit on merits.

E 23. So far as defendant Nos. 3 and 4 are concerned, they are already served and hence they are not entitled to any notice.

24. Parties to appear before the Trial Court in the Suit on 05.02.2018 to enable the Trial Court to proceed in the trial as directed above. The Trial Court will decide the suit on merits strictly in accordance with law
F expeditiously.