

IN THE COURT OF THE DISTRICT JUDGE, KASARAGOD

Present: Sri.S. Manohar Kini, B.Sc. LLM, District Judge.

Tuesday, the 30th day of October 2018/ 8th Karthika 1940.

C.M.A. No. 1 OF 2018

Between:-

K.M. Majeed, aged 46 years, S/o K. Mohammed,
R/at Chengala, East Bevinje, P.O. Thekkil Ferry,
Chengala village, Kasaragod Taluk and District. } Appellant/
Petitioner/
Defendant

And

O.M. Shahul Hameed, aged about 58 years,
S/o Mohammed, R/at Raziya House,
Padanna village and post, Hosdurg Taluk,
Kasaragod District. } Respondent/
Plaintiff/
Respondent.

On appeal from the order dated 30.11.2017 passed by the
Subordinate Judge of Kasaragod in

I.A.No. 234/2017 in O.S.No. 7/2015.

Between

O.M. Shahul Hameed : Plaintiff/ Defendant

And

K.M. Majeed : Defendant/Petitioner

This appeal coming on 5th day of October 2018 for final hearing
before me in the presence of Sri. Benny Jose Advocate for the
appellant; and of Sri. I.V. Bhat, Advocate for Respondent; and having
stood over to this day for consideration the court passed the following:-

JUDGMENT

Appeal against the order dated 30.11.2017 on IA 234/2017 in OS
7/2015 on the file of the learned Subordinate Judge Kasaragod.

1. Appellant approached the lower court with IA 234/2017 under
Order 9 Rule 13 CPC seeking to set aside the ex parte decree passed

against him in the suit on 18.7.2017. The lower court dismissed the petition on 30.11.2017 in the following manner:

In spite of repeated posting, the counsel for the petitioner did not appear to argue the matter. Hence petition dismissed for default. No costs.

2. According to the appellant, the lower court ought to have considered his petition on merits as the counsel attached to the office of the appellant (?) was always representing the matter. He points out that the counsel whose name appears in the petition may not represent the matter personally and may depute his colleagues to represent for him. That was what had happened in his case, he contends.

3. Learned counsel for the respondent opposed the appeal. According to the counsel, appeal itself is not maintainable since what is challenged therein is an order of dismissal for default and the remedy of the appellant was to seek its restoration by the lower court. Counsel also contended that it was in fact a judgment and decree passed under Order 17 Rule 3 CPC and not an ex parte decree that had been passed by the lower court and the remedy if at all, was to have challenged by a regular appeal.

4. Heard.

5. This court went through the judgment of the lower court. The

lower court had at para 5 of the judgment noted that learned counsel for the defendant (appellant) reported no instruction when the case was in the final list for trial and therefore the defendant was called absent and set ex parte. At a later part of the judgment (para 5), however, the lower court referred to the contentions of the defendant and held that he did not convert his pleading into evidence. This court finds that the lower court in fact proceeded under Order 17 Rule 3(b) read with Rule (2).

6. All said and done, the present appeal is not maintainable because the order challenged in it is not an order passed on merits on the petition filed by the appellant under Order 9 Rule 13 CPC. It is not an appealable order falling under Order 43 Rule 1(d) CPC. Appellant's remedy was to seek restoration of the dismissed petition before the lower court.

7. In view of the above conclusion the appeal is dismissed with costs to the respondent without prejudice to the right of the appellant to seek restoration of IA 234/2017 before the lower court subject to the law of limitation.

Pronounced in open court this the 30th day of October 2018.

DISTRICT JUDGE

Typed by : Mallika.P
Compared by: Shyja.

Fair/Copy of order
in CMA No.1/2018
Dated: 30.10.2018.