

APPELLATE—CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Oldfield.

PALANIAPPA CHETTY (SECOND RESPONDENT IN APPEAL SUIT
No. 98 OF 1919 IN THE HIGH COURT), PETITIONER,

1921,
March, 10.

v.

SUBHAMANIA CHETTY AND TWO OTHERS (APPELLANT RESPON-
DENTS NOS. 1 AND 3 IN APPEAL SUIT No. 98 OF 1918), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Ex parte decree against one of the defendants—Appeal by another defendant against the decree of Original Court—Ex parte defendant, a party respondent in the appeal—Application to set aside ex parte decrees made to the Appellate Court pending appeal, whether competent.

Where a decree was passed *ex parte* against one of the defendants, and an appeal against the decree preferred by another defendant was pending in the Appellate Court, an application by the former defendant to set aside the *ex parte* decree passed against him can be made only to the Original Court which passed the decree and not to the Appellate Court. *Sankara Bhatta v. Subraya Bhatta*, (1907) I.L.R., 30 Mad., 535, distinguished; *Chenna Reddi v. Peddaobi Reddi*, (1909) I.L.R., 32 Mad., 416 (F.B.), applied.

PETITION praying the High Court to set aside the *ex parte* decree passed against the petitioner by the Court of the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 95 of 1918, pending disposal of appeal No. 98 of 1919, preferred therefrom to the High Court.

A decree was passed by the Original Court *ex parte* against the petitioner who was the first defendant in the case, and after contest against the other defendant. The latter appealed to the High Court against the decree and impleaded the former defendant as one of the respondents to the Appeal. During the pendency of the Appeal in the High Court, the former, the *ex parte* defendant, filed in the High Court an application to set aside the *ex parte* decree. The respondents objected that the petition could not be made in the Appellate Court.

K. Ramachandran Ayyar and *K. S. Lakshmana Ayyar* for petitioner.

C. V. Anantakrishna Ayyar and *C. S. Venkata Achariyar* for respondents.

PALANIAPPA
CHETTY
v.
SUBRAMANIA
CHETTY.

The Court delivered the following JUDGMENT:

This is a petition by the second respondent in this Appeal under Order IX, rule 13, Civil Procedure Code, to set aside an *ex parte* decree obtained against him in the lower Court in the suit now under Appeal, and in support of this application reliance was placed on *Sankara Bhatta v. Subraya Bhatta*(1). That was a case in which the application was made after the appeal had been disposed of and the case is, therefore, distinguishable. That case, however, proceeds upon the ground that the filing of the Appeal divested the lower Court of the power to entertain that application. There was some warrant for that view in earlier decisions at the time when that judgment was given, but the matter has been abundantly considered since, and we think it must now be taken as settled, at any rate in all the other High Courts, that the mere filing of an Appeal does not take away the jurisdiction of the lower Court to entertain such an application as this. We may also observe that *Ramanathan Chetty v. Narayanan Chetty*(2), as to the proper Court to which a review application should be made and which was relied on in *Sankara Bhatta v. Subraya Bhatta*(1) was subsequently overruled by a Full Bench of this Court to which WALLIS, C.J. was a party [*Chenna Reddi v. Peddaobi Reddi*(3)]. This question has been elaborately considered in a number of recent cases [*Mathura Prasad v. Ram Charn Lal*(4), *Gajraj Mali Tiwarin v. Swami Nath Rai*(5) and *Kumud Nath Roy Chowdhury v. Jolindra Nath Chowdhury*(6)] and we are clearly of opinion, on the authority of these decisions and also of the Full Bench decision of this Court [*Chenna Reddi v. Peddaobi Reddi*(3)] that this application should have been made to the lower Court and not to this Court. Order IX, rule 13, expressly provides that the party may apply to the Court by which the decree was passed, and the petitioners were clearly wrong in presenting their petition to this Court pending the appeal, and ought to have gone to the lower Court. In the result, the petition will be returned to the petitioner to enable him to take such further action on it as he may be advised. The petitioner will pay counter-petitioner's costs.

K. L.

(1) (1907) I.L.R., 80 Mad., 535.

(2) (1904) I.L.R., 27 Mad., 602.

(3) (1909) I.L.R., 32 Mad., 416 (F.B.).

(4) (1915) I.L.R., 37 All., 208.

(5) (1917) I.L.R., 39 All., 18.

(6) (1911) I.L.R., 38 Cal., 394.