

GAHC010120502024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/212/2024

SHREE PRAKASH SINGH
S/O LATE BISHWANATH SINGH,
RESIDENT OF VILLA C TATA RAISINA RESIDENCY, GOLF COURSE
EXTENSION ROAD, SECTOR 59, GURGAON, HARYANA, 122101

VERSUS

TRISHIT DHAR
S/O LATE TRIBENI MOHAN DHAR,
RESIDENT OF NATIONAL HIGHWAY, SILCHAR, PO AND PS SILCHAR, DIST
CACHAR, ASSAM

Advocate for the Petitioner : MR. S D PURKAYASTHA, MS S.S.BORA

Advocate for the Respondent : MR. S K GHOSH, MS F AHMED

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

Date : 08.11.2024

Heard Mr. S.D. Purkayastha, learned counsel for the petitioner and Mr. S.K. Ghosh, learned counsel for the respondent.

2. In this petition, under Article 227 of the Constitution of India, the petitioner

has put to challenge the correctness or otherwise of the order dated 01.11.2022, passed by the learned Civil Judge No. 1, Cachar, Silchar, in Title Suit No. 113/2022; the order dated 24.05.2023, passed in Misc. (J) Case No. 28/2023, and the order dated 14.03.2024, passed by the learned Civil Judge No. 1, Cachar, Silchar, in Misc. (J) Case No. 288/2023, arising out of Title Suit No. 113/2022.

3. It is to be noted here that vide impugned order dated 01.11.2022, the learned trial Court had dismissed the petition filed by the petitioner praying for time to file written statement and thereby, proceeded ex-parte against the petitioner/defendant. It is also to be noted here that vide impugned order dated 24.05.2023, the learned trial Court had refused to condone the delay of 62 days for want of sufficient cause and vide impugned order dated 14.03.2024, the learned trial Court had rejected the petition filed by the petitioner under Order 9 Rule 7 of the CPC for setting aside the ex-parte order dated 01.11.2022.

4. Mr. Purkayastha, learned counsel for the petitioner, submits that in Title Suit No. 113/2022, the petitioner is arraigned as a defendant. On account of COVID-19 pandemic and due to his involvement in a proceeding under the Income Tax Act, he could not file written statement within stipulated time for which the learned Civil Judge No. 1, Cachar, Silchar decided to proceed ex-parte, vide impugned order dated 01.11.2022.

4.1. Thereafter, the petitioner had filed a petition in the said Title Suit No. 113/2022, to vacate the said ex-parte order, dated 01.11.2022. However, vide impugned order dated 14.03.2024, the learned Civil Judge No. 1 Cachar, Silchar had dismissed the petition under Order 9 Rule 7 of the CPC.

4.2. Thereafter, the petitioner had filed another petition under Order 9 Rule 13

of the CPC, read with Section 151 of the CPC, for condonation of delay of 62 days in preferring an application under Order 9 Rule 13. However, the learned Civil Judge No. 1, Cachar, Silchar had dismissed the same, vide impugned order dated 24.05.2023.

4.3. Mr. Purkayastha further submits that prior to that, the petitioner had also preferred another petition No.186/20 for extension of time for filing written statement. However, the learned trial Court dismissed the same and decided to proceed ex-parte. Mr. Purkayastha, further, submits that there was no wilful negligence on the part of the petitioner and that his entire family was suffering from COVID-19 pandemic and some of his staff also suffered demise on account of COVID-19 pandemic and that he was also involved in another proceeding under the Income Tax Act, for which he could not pursue the matter in time and the delay for filing the petition for setting aside the ex-parte decree under Order 9 Rule 13 of the CPC was not intentional, rather it was circumstantial and therefore, it is contended to set aside the aforementioned impugned orders and to allow the petitioner to contest the proceeding in Title Suit No. 113/2022.

4.4. Mr. Purkayastha has referred to a decision of Hon'ble Supreme Court in the case of **Lal Devi and Anr. vs. Vaneeta Jain and Ors.**, reported in **(2007) 7 SCC 200**, to contend that ex-parte decree has to be set aside in the interest of justice. Referring to another decision of Hon'ble Supreme Court in the case of **Kailash vs. Nanhku and Ors.**, reported in **(2005) 4 SCC 480**, Mr. Purkayastha submits that the provision under Order 8 Rule 1 of the CPC is directory in nature and not mandatory and the Court has the power to extend time in filing the written statement beyond the 90 days as provided under Order 8 Rule 1 of the CPC. He has also referred to another decision of Hon'ble Supreme Court in the case of **J. Kumaradasan Nair and Anr. vs. IRIC**

Sohan and Ors., reported in (2009) 12 SCC 175, and submits that mere wrong quoting of a section or non-quoting of a provisions of law would, by itself, not sufficient to take away the jurisdiction of a Court, if otherwise such jurisdiction is vested in it by law, and even if the Court finds that this revision petition is not maintainable, it may treat the same as an appeal and thereafter, can deal with the same.

5. On the other hand, Mr. Ghosh, learned counsel for the respondent has vehemently opposed the petition. He raised a question about the very maintainability of this revision petition. Referring to various provisions of the CPC, Mr. Ghosh submits that an appeal lies against impugned orders and this revision petition is not maintainable in view of availability of alternative remedy and therefore, Mr. Ghosh has contended to dismiss the petition. Mr. Ghosh has referred to a decision of the Rajasthan High Court in the case of **Mangal Singh vs. Sagar Mal**, reported in 1956 0 Supreme(Raj) 238, to contend that an order passed under Order 9 Rule 13 of the CPC is appealable and no revision lies in the High Court against the same.

6. Having heard the submissions of the learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the impugned orders dated 01.11.2022, 24.05.2023 and 14.03.2024, and also gone through the case laws referred by the learned Advocates of both sides.

7. Since the issue of maintainability of this petition is raised, this Court is of the view that before delving a discussion into the merit of the points raised in this petition, the issue of maintainability has to be dealt with at the very threshold.

8. It is well settled by Hon'ble Supreme Court in catena of decisions that the jurisdiction under Article 227 of the Constitution of India cannot be invoked where statutory alternative remedy by way of an appeal is available. Hon'ble Supreme Court in the case of *Mohamed Ali vs. V. Jaya and Ors.*, reported in (2022) 10 SCC 477, has categorically held in paragraph Nos. 17, 18 and 19 as under:

“17. Even otherwise and as observed hereinabove, against the ex parte judgment and decree, the remedy by way of an appeal before the first appellate court was available. Therefore, the High Court ought not to have entertained the revision application under Section 115CPC and under Article 227 of the Constitution of India. The High Court ought not to have entertained such a revision application challenging the ex parte judgment and decree. Once there was a statutory alternative remedy by way of an appeal available to the defendants, the High Court ought not to have entertained a writ petition or revision application under Article 227 of the Constitution of India.

18. At this stage, the decision of this Court in *Virudhunagar Hindu Nadargal Dharma Paribalana Sabai v. Tuticorin Educational Society*; (2019) 9 SCC 538, is required to be referred to. In the said decision, it is observed and held by this Court that wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under CPC, will deter the High Court and therefore, the High Court shall not entertain the revision under Article 227 of the Constitution of India especially in a case where a specific remedy of appeal is provided under the CPC itself. While holding so, it is observed and held in paras 11 to 13 as under:

“11. Secondly, the High Court ought [*Tuticorin*

Educational Society v. Virudhunagar Hindu Nadargal, CRP (MD) No. 1084 of 2018, order dated 21-8-2018 (Mad)] to have seen that when a remedy of appeal under Section 104(1)(i) read with Order 43 Rule 1(r) of the Code of Civil Procedure, 1908, was directly available, Respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In *A. Venkatasubbiah Naidu v. S. Chellappan*; (2000) 7 SCC 695] , this Court held that 'though no hurdle can be put against the exercise of the Constitutional powers of the High Court, it is a well-recognised principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a constitutional remedy'.

12. But courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure, and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi-judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which Respondents 1 and 2 invoked the jurisdiction of the High Court. This is why, a 3-member Bench of this Court, while overruling the decision in *Surya Dev*

Rai v. Ram Chander Rai, (2003) 6 SCC 675], pointed out in *Radhey Shyam v. Chhabi Nath*, (2015) 5 SCC 423 that “orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts”.

13. Therefore, wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self-imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself.”

19. Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand, the High Court ought not to have entertained the revision petition under Article 227 of the Constitution of India against the ex parte judgment and decree passed by the learned trial court in view of a specific remedy of appeal as provided under the Code of Civil Procedure itself. Therefore, the High Court has committed a grave error in entertaining the revision petition under Article 227 challenging the ex parte judgment and decree passed by the learned trial court and in quashing and setting aside the same in exercise of powers under Article 227 of the Constitution of India.”

9. Now, advertng to the facts herein this case, I find that the attorney of the petitioner had received notice of the injunction petition in Title Suit No. 113/2022. But, as stated, he was not informed about the notice and the date for appearance on 12.07.2021. However, later on he came to know about the same

and engaged his lawyer, who had filed a petition before the court seeking time. But, he also did not intimate him about the status of the case. Accordingly, the learned trial court had decided to proceed ex-parte and passed ex-parte order on 01.11.2022. Thereafter he had engaged a new lawyer , who had filed a petition to condone delay of 62 days in preferring application under order IX-Rule 13 CPC read with Section 151 of the CPC for setting aside the ex-parte order dated 01.11.2022. But, on account of failing to show sufficient cause, the learned trial court, vide order dated 24.05.2023 had dismissed the same. It also appears that thereafter, on 14.03.2024, the petitioner had filed another petition under Order X Rule 7 read with Section 151 CPC for vacating the ex-parte order. But, the same was also came to be dismissed 14.03.2024. And, under this circumstance the present petition is being filed under Article 227 of the Constitution of India.

10. But, in view of the categorical pronouncement of the Hon'ble Supreme Court in paragraph No. 19 of the decision **Mohamed Ali** (supra) an appeal would lie. And in view of the alternative remedy, being available under CPC, this petition under Article 227 of the Constitution of India is not at all maintainable.

11. Therefore, without going into the merit of the points, so raised in this petition, this Court is inclined to dismiss the same. However, liberty will remain with the petitioner to approach the court again by filing appropriate petition.

12. In terms of above, this revision petition stands disposed of. The parties have to bear their own cost.

JUDGE