

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.04.2015

(Orders reserved on 16.04.2015)

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Application Nos.2182 and 2183 of 2015
in
C.S.No.247 of 2013

1. R.Mathiazhagan
2. Rajinish Kumar Rai

.. Applicants in both the
applications/defendants 1 and 2

Vs.

1. P.J. Ethiraj
2. P.E. Naveenkumar
3. S.V.Tamizhselvan

.. Respondents 1 to 3 in both the
applications/plaintiffs

4. M.Kumar

.. Fourth Respondent in both the
applications/third defendant

Application No.2182 of 2015 is filed and the Judge's Summons issued under Order 14 Rule 12 of the Original Side Rules of this Court, to set aside that portion of the order dated 23.02.2015 passed by the learned Master of this Court, in Application No.6504 of 2014 in C.S.No.247 of 2013, requiring the applicants to deposit a sum of Rs.3 crores on or before 06.04.2015 as a condition precedent to set aside the order dated 22.09.2014 passed against the applicants.

Application No.2183 of 2015 is filed and the Judge's Summons issued under Order 14 Rule 8 of the Original Side Rules of this Court, read with Section 151 CPC, to grant stay of further proceedings pursuant to the order dated 23.02.2015 passed by the learned Master of this Court, in

Application No.6504 of 2014, pending disposal of the set aside application.

Civil Suit No.247 of 2013 is numbered and the plaint is filed under Order 4 Rule 1 of the Original Side Rules of this Court, read with Order 37 CPC read with Order 7 Rule 1 CPC, praying to pass a judgment and decree against the defendants:

(a) to direct the defendants 1 and 2 herein to pay the suit claim amount of Rs.5.70 crores (Rupees five crores and seventy lakhs only) together with interest at the rate of 18% per annum to be reckoned from the date of the suit, i.e. from 01.04.2013 till the date of payment;

(b) to pass personal decree against the defendants 1 and 2 herein for re-payment of Rs.5.70 crores together with interest at the rate of 18% per annum to be reckoned from the date of the suit, i.e. from 01.04.2013 till the date of re-payment and

(c) to award costs of the suit.

For applicants : Mr.D.Nelliappan

For respondents: Mr.N.Jothi for Mr.M.C.Govindan for RR-1 to 3

ORDER

The applicants in both the applications are the defendants 1 and 2 in C.S.No.247 of 2013. The respondents 1 to 3 herein as plaintiffs, filed the above suit for recovery of a sum of Rs.5.70 crores, together with interest at the rate of 18% per annum. The plaintiffs filed the said suit only against the defendants 1 and 2 and they have not sought for any relief against the third defendant.

2. The defendants 1 and 2 did not file any application for

unconditional leave to defend the suit within the stipulated time from the date of receipt of summary suit summons. Hence, the summary suit was listed on 01.09.2014 for further adjudication. When the suit was listed again on 22.09.2014, no application seeking leave to defend the suit, was filed, though the learned counsel for the defendants 1 and 2 was present on that day. Therefore, the defendants 1 and 2 were set ex-parte and the main suit was posted for perusal and judgment on 10.10.2014. Again, when the suit was listed on 13.10.2014, at request, it was adjourned to 28.10.2014 for clarification regarding the application filed for attachment before judgment.

3. In the meantime, the defendants 1 and 2 filed application in A.No.6504 of 2014 to set aside the ex-parte order, dated 22.09.2014, stating that they were present on the said date in the open Court and that the case was adjourned to 10.10.2014. It was further stated that, to their shock and surprise, they came to know that they have been set ex-parte on 22.09.2014 itself. The said application in A.No.6504 of 2014 was heard by the learned Master of this Court, and the same was allowed on 23.02.2015 on condition that the defendants 1 and 2 shall deposit their admitted liability amount of Rs.3 crores in the suit account on or before 06.04.2015. Challenging the said order, the defendants 1 and 2 have filed the present appeal (application) before this Court in A.No.2182 of 2015 to set aside the portion of the order requiring them to deposit a sum of Rs.3 crores as a condition precedent for allowing the said application. They have also filed

A.No.2183 of 2015 for stay of further proceedings of the order passed by the learned Master on 23.02.2015 in the said application. This Court, by order dated 06.04.2015, granted interim stay and the same is being extended periodically.

4. Learned counsel appearing for the applicants/defendants 1 and 2 submitted as follows:

The defendants 1 and 2 were set ex-parte on 22.09.2014 and immediately, they have filed A.No.6504 of 2014 on 13.10.2014 to set aside the ex-parte order. While allowing such application, the Court is not justified in imposing such onerous condition. No ex-parte decree was passed in this case, and therefore, the conditions enumerated under Order 9 Rule 13 CPC cannot be applied while considering the application filed under Order 9 Rule 7 CPC. The appellants (applicants)/defendants 1 and 2 also questioned the jurisdiction of this Court to entertain the said suit, and therefore, when such issue touching the root of the matter is raised by the defendants 1 and 2, imposing such onerous condition to set aside the ex-parte order, causes great hardship to them. They have so far paid Rs.40,000/- during the mediation process, pending suit, and therefore, there is bona-fide on the part of the defendants 1 and 2 in prosecuting the matter.

5. In support of the above contentions, learned counsel appearing for the appellants/defendants 1 and 2 relied on a decision of the Honourable

Supreme Court reported in 2002 (5) SCC 30 (Vijay Kumar Madan Vs. R.N.Gupta Technical Education Society) to contend that the onerous conditions or terms will not be imposed while allowing the application under Order 9 Rule 7 CPC.

6. Per contra, learned counsel appearing for the respondents 1 to 3, who are the plaintiffs in the above suit, submitted as follows:

The defendants 1 to 3 were duly served with notice on 17.03.2014, 21.03.2014 and 22.03.2014 respectively. They have not filed any application seeking leave to defend the suit. On the other hand, in the reply notice, dated 14.09.2012, shown as Document No.10 in the plaint, the defendants have admitted the borrowal of Rs.3 crores from the plaintiffs. The defendants have no defence in the above suit and the defendants 1 and 2 have deliberately allowed proceedings to set them ex-parte. They have not given the essential details in their application in A.No.6504 of 2014 filed before the learned Master seeking to set aside the ex-parte order. In the summary suit, systematic and time bound legal steps have to be taken to defend the suit and no legal concession will be granted. The learned Master rightly directed the defendants 1 and 2 to deposit a sum of Rs.3 crores.

7. Heard both sides and perused the materials placed before this Court.

8. The respondents 1 to 3 herein as plaintiffs, filed the above suit for

recovery of a sum of Rs.5.70 crores with interest at the rate of 18% per annum, from the defendants 1 and 2, who are the applicants herein. It is seen that the said suit was listed on 22.09.2014 before the learned Master, on which date, though the learned counsel for the defendants 1 and 2 was present, the defendants 1 and 2 have not filed any application seeking leave to defend the suit. Therefore, the learned Master set them ex-parte on 22.09.2014 considering their non-filing of the application seeking leave to defend the suit and posted the matter for perusal and judgment on 10.10.2014. It is further seen that the suit was again listed on 13.10.2014 for clarification regarding the application filed by the plaintiffs for attachment before judgment in A.No.1808 of 2013. Another application in A.No.1809 of 2013 was also filed by the plaintiffs, praying to pass a judgment and decree in respect of the suit claim. On 13.10.2014, the applicants herein as defendants 1 and 2, filed an application in A.No.6504 of 2014 seeking to set aside the ex-parte order, dated 22.09.2014, stating that they were actually present in the Court on 22.09.2014 along with their counsel and however, to their utter shock and surprise, they have been set ex-parte. The learned Master of this Court found that the reasons stated for non-filing of the application seeking leave to defend the suit, were not genuine and however, on going through the merits of the claim made by the plaintiffs and by giving a finding that there is a clear admission by the defendants 1 and 2 about the borrowal of Rs.3 crores from the plaintiffs for

purchase of a land at Pondicherry, the learned Master came to the conclusion that it was justifiable to allow the application with a condition to deposit a sum of Rs.3 crores to the credit of the suit account. Accordingly, the said application in A.No.6504 of 2014 was allowed on condition of the defendants 1 and 2 depositing the admitted liability of Rs.3 crores to the suit account on or before 06.04.2015.

9. This Court, while entertaining the present applications in A.Nos.2182 and 2183 of 2015, granted an order of interim stay on 06.04.2015, which had been periodically extended and the same is still in force.

10. In this case, the applicants who are the defendants 1 and 2, were set ex-parte on 22.09.2014. They have filed A.No.6504 of 2014 to set aside the ex-parte order, wherein they have stated some reasons in support of their prayer in the said application. The learned Master allowed the said application by imposing a condition to deposit a sum of Rs.3 crores to the suit account on or before 06.04.2015. It is to be noted that the learned Master has not rendered any finding that the reason stated in the application that the applicants/defendants 1 and 2 were present on 22.09.2014 in the Court, is not factually correct. On the other hand, the learned Master found that the reasons stated for not filing an application seeking leave to defend the suit, were not genuine.

11. In my considered view, when a party was set ex-parte and before

an ex-parte decree is passed against him, if he files an application to set aside the ex-parte order, the Court has to see whether the reason stated in the application, justifies the prayer for setting aside the ex-parte order or not. On the other hand, in this case, the learned Master has proceeded to go into the merits of the claim made by the plaintiffs, more particularly, with regard to the alleged admission made by the defendants 1 and 2 in respect of the borrowal of a sum of Rs.3 crores from the plaintiffs in the reply notice, dated 14.09.2012 and imposed a condition of depositing Rs.3 crores by the defendants 1 and 2 to the suit account, while allowing the application to set aside the ex-parte order. As rightly contended by the learned counsel for the applicants/defendants 1 and 2, such a condition is certainly an onerous one, as admittedly, no ex-parte decree is passed against the defendants 1 and 2. Even in respect of the alleged admission made by the defendants 1 and 2 in respect of the borrowal of Rs.3 crores is concerned, it is an admitted position that the plaintiffs have already filed an application in A.No.1808 of 2013 under Order 12 Rule 6 CPC for attachment before judgment, along with A.No.1809 of 2013 for passing a judgment and decree in respect of the suit claim, which are still pending and not processed with. The learned Master has also recorded the said fact in his order. Therefore, if the plaintiffs are to rely upon the alleged admission made by the defendants 1 and 2 in respect of a part of the suit claim, it is always open for them to proceed with the above said application

and seek a decree under the above said procedures of the CPC, if they have a strong case for such decree. Without doing so and without there being any decree having been passed against the defendants 1 and 2 (applicants herein), subsequent to the said ex-parte order, imposition of such a condition is certainly onerous, especially while considering the application seeking for setting aside the ex-parte order.

12. Further, even as per Order 7 Rule 5 of the Madras High Court Original Side Rules, the plaintiff is entitled to a decree for the sum claimed in the plaint, in default of the defendant obtaining such leave or if he fails to defend in pursuance of such leave. As stated already, no such ex-parte decree was passed against the defendants 1 and 2 in this case. On the other hand, the defendants 1 and 2 were only set ex-parte and even before passing of such ex-parte decree, they have filed the application to set aside the order setting them ex-parte.

13. It is also to be noted that the defendants 1 and 2 have subsequently filed the application under Order 7 Rule 5 of the said Original Side Rules of this Court, seeking leave to defend the suit. The said fact is also recorded by the learned Master in the order under challenge. It is further to be noted that the plaintiffs' counsel expressed 'no objection' to allow the said application for setting aside the ex-parte order, however with a prayer for imposing condition to direct the defendants 1 and 2 to deposit the admitted liability of Rs.3 crores.

14. Under the above stated facts and circumstances, I am of the view that while allowing the said application in A.No.6504 of 2014, the learned Master has in fact proceeded to decide the matter as the one under Order 12 Rule 6 CPC in the application filed by the plaintiffs for judgment on admission, when the fact remains that the said application filed by the plaintiffs under the said provision of law in A.No.1809 of 2013, has not yet come up for consideration before the learned Master, as has been found by the learned Master himself. Therefore, the question as to whether the defendants 1 and 2 are liable to pay the said sum of Rs.3 crores to the plaintiffs, is an issue that has to be considered and decided only in the application filed by the plaintiffs under Order 12 Rule 6 CPC, i.e. in A.No.1809 of 2013, and such an exercise is not required to be done while dealing with the application filed by the defendants 1 and 2 in A.No.6504 of 2014 under Order 9 Rule 7 CPC praying for setting aside the order setting them ex-parte.

15. At this juncture, the decision of the Honourable Supreme Court, relied on by the learned counsel for the applicants (appellants/defendants 1 and 2) reported in 2002 (5) SCC 30 (Vijay Kumar Madan Vs. R.N.Gupta Technical Education Society), can be safely quoted. In the said decision, the Honourable Supreme Court, while considering the scope of imposing onerous condition while allowing the application under Order 9 Rule 7 CPC, has observed in paragraphs 7 and 8 as follows:

"7. Power in the court to impose costs and to put the defendant-applicant on terms is spelled out from the expression "upon such terms as the court directs as to costs or otherwise". It is settled with the decision of this Court in *Arjun Singh Vs. Mohindra Kumar* [AIR 1964 SC 993] that on an adjourned hearing, in spite of the court having proceeded ex parte earlier the defendant is entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be reflected back and reopen the proceedings from the date wherefrom they became ex parte so as to convert the ex parte hearings into bi-parte. While exercising power of putting the defendant on terms under Rule 7 the court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been in if he had not applied under Rule 7. So also the conditions for taking benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the court may not in the garb of exercising power of placing upon terms make an order which probably the court may not have made in the suit itself. As pointed out in the case of *Arjun Singh* [AIR 1964 SC 993] the purpose of Rule 7 in its essence is to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation.

8. Costs should be so assessed as would reasonably compensate the plaintiff for the loss of time and inconvenience caused by relegating back the proceedings to an earlier stage. The terms which the court may direct may take care of the time or mode of proceedings required to be taken pursuant to the order under Rule 7. For example, keeping in view the conduct of the defendant-applicant, the court may direct that though the ex parte proceedings are being set aside, the defendant must file the written statement within an appointed time or recall for cross-examination at his own cost and expenses the witnesses examined in his absence or that the defendant shall be allowed not more than one opportunity of adducing his evidence and so on. How the terms are to be devised and made a part of the order would depend on the facts and circumstances of a given case. In short, the court cannot exercise its power to put the

defendant-applicant on such terms as may have the effect of prejudging the controversy involved in the suit and virtually decreeing the suit though ex parte order has been set aside or to put the parties on such terms as may be too onerous..... .."

(emphasis supplied)

16. Considering the above stated facts and circumstances and the law laid down by the Honourable Supreme Court in the said decision, I am of the view that the impugned order passed by the learned Master in A.No.6504 of 2014, dated 23.02.2015, cannot be sustained, insofar as imposing the condition on the appellants (applicants/defendants 1 and 2) to deposit a sum of Rs.3 crores to the credit of the suit account, is concerned. Accordingly, Application in A.No.2182 of 2015 is allowed and the order under challenge insofar as the said portion imposing the condition to deposit Rs.3 crores, is set aside. However, considering the fact that the appellants/applicants/defendants 1 and 2 have not filed their application seeking leave to defend the suit within time and also considering such lapse and prolonging of the proceedings, this Court is of the view that the plaintiffs should be compensated by imposing costs on the appellants/defendants 1 and 2, while setting aside the impugned order setting them ex-parte. Accordingly, the appellants/defendants 1 and 2 are directed to pay a sum of Rs.25,000/- (Rupees twenty five thousand only) as costs to the respondents 1 to 3/plaintiffs, within a period of two weeks

from the date of receipt of a copy of this order. Consequently, A.No.2183 of 2015 is closed, without costs.

23.04.2015

Index: Yes

Internet: Yes

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1. The Master, High Court, Madras.
2. The Sub-Assistant Registrar (Original Side), High Court, Madras.

K.RAVICHANDRABAABU,J

Order in
Application Nos.2182 and
2183 of 2015
in
C.S.No.247 of 2013

23.04.2015