

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05. 10.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)Nos.2315 & 2316 of 2011
and M.P.No.1 of 2011

Orders reserved on 11.09.2017	Orders pronounced on 05.10.2017
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Fairmacs Transport Corporation
 No.244, Angappa Naicken Street,
 Chennai 600 001.

.. Petitioner in
 both C.R.Ps'

Vs.

1. Central Power Research Institute
 Sir C.V.Raman Road,
 Rajambal Vilas Extension,
 2nd Stage, PO
 Bangalore 560 094
 Rep. By its P/A Agents
 United India Insurance Co. Ltd.

2. United India Insurance Co. Ltd.,
 Divisional Office No.1,
 21/1, Mission Road,
 Bangalore 560 027.

.. Respondents in
 both C.R.Ps'

COMMON PRAYER: Civil Revision Petitions filed under Article 227 of the Constitution of India against the fair and decretal orders passed by the 2nd Fast Track Court, Chennai dated 21.06.2011 in I.A.Nos.34 & 35 of 2011 in O.S.No.11915 of 2010.

For Petitioner : Mr.V.Lakshmi Narayanan
for Mr.P.Giridharan
For Respondents : Mr.Rajan
for M/s.D.Bright Joseph

COMMON ORDER

These Civil Revision Petitions have been filed against the fair and decretal orders dated 21.06.2011 passed by the 2nd Fast Track Court, Chennai, in I.A.Nos.34 & 35 of 2011 in O.S.No.11915 of 2010.

2. The issue and parties involved in both the Civil Revision Petitions are one and the same, therefore disposed of by this common order.

3. The petitioner in both the Civil Revision Petitions is defendant and respondents are the plaintiffs in C.S.No.133 of 2004 on the file of the Original Jurisdiction of this Court, which was then transferred to the City Civil Court and renumbered as O.S.No.11915

of 2010 on the file of the 2nd Fast Track Court, Chennai. The respondents filed the said suit for recovery of Rs.14,73,608/- together with interest at 21% per annum. The said plaint was presented in the original side of this Court on 05.10.1998. The Court fee payable is Rs.18,262/-. The respondents presented the plaint with Court fee of Rs.1000/-. The Registry returned the plaint on 06.10.1998, pointing out various defects apart from the deficit Court fee of Rs.17,262/-. The respondents re-presented the plaint in the year 2002 along with Application Nos.1591 and 1592 of 2002 for condonation of delay in representation of the plaint and condone delay in payment of deficit Court fee. Both the applications, after notice and after substituted service were allowed by the learned Master on 10.07.2003. The plaint was again returned by the Registry on 31.12.2003 for certain other compliances. The respondents re-presented the plaint on 03.02.2004 and the suit was numbered as C.S.No.133 of 2004. While the suit was pending in this Court, summons were not served on the petitioner. Due to pecuniary jurisdiction, the suit was transferred to the City Civil Court and renumbered as O.S.No.11915 of 2010 and posted to Fast Track Court No.II at Chennai. The suit summons were served on the petitioner. The petitioner filed I.A.No.34 of 2011 to dismiss the suit

for non prosecution and I.A.No.35 of 2011 to reject the plaint in O.S.No.11915 of 2010.

4. According to the petitioner, the respondents did not present the suit with sufficient Court fee and did not pay the Court fee within the time limit granted by the Court and therefore, the plaint is liable to be rejected under Order 7 Rule 11 C.P.C. The reasons given by the respondents in Application Nos.1591 and 1592 of 2002 are not correct. The respondents have stated that they could not pay the correct Court fee as Court fee stamp papers were not available. According to the petitioner, during the period from 1998 to 2002, thousands of cases were filed by the litigants by paying the proper Court fees. The respondents did not properly prosecute the Application Nos. 1591 and 1592 of 2002 and has not sent notice to the correct address of the petitioner. Even after numbering of the plaint by this Court, the respondents did not prosecute the suit properly for serving summons on the petitioner. Only when the suit was transferred to City Civil Court, summons sent to the old address were served on the petitioner by the post man at the present address. The suit transaction relates to the contract of carriage dated 04.10.1995 and all the documents were destroyed and all the

employees who were in the employment of the petitioner during the year 1995, who may have knowledge of transaction have either retired or left employment of the petitioner. In view of inordinate delay in non prosecution, the suit is liable to be dismissed summarily and plaint has to be rejected for not paying the proper Court fee within the time granted by the Court. The Court has to take entire delay from the date of transaction and not only the delay in representation.

5. The respondents filed counter affidavit and denied various allegations made by the petitioner. The respondents submitted that the Court can allow a person to pay the deficit Court fee at any stage of the proceedings as per the order passed under Section 149 C.P.C. The order passed by this Court dated 12.03.2003 in Application Nos. 1591 and 1592 of 2002 has become final. The respondents have taken all the steps permitted by law to get the suit numbered. Even after receiving summons, the petitioner has not taken any steps to set aside the said order. The respondents have sent notice and mentioned the name of the petitioner as per the consignment notes dated 04.10.1995 filed as document Nos.2 and 3 in the suit. Even according to the petitioner, he has shifted his

place of business only two streets away from the original address and has not made any arrangements with the post office to serve the letter in the present address. The applications filed under Section 151 C.P.C and Order 7 Rule 11 C.P.C are not maintainable and prayed for dismissal of the suit.

6. The learned Judge, considering the averments in the affidavit and counter affidavit, dismissed both the applications on the ground that this Court has admitted the suit, the petitioner has not filed written statement after receipt of summons and has not made out any case for rejection of plaint under Order 7 Rule 11 C.P.C. The learned Judge also rejected the contention of the learned counsel for petitioner that learned counsel for respondents is not entitled to file counter affidavit and only party respondents can file counter affidavit.

7. Against the said order dated 21.06.2011 made in I.A.Nos.34 and 35 of 2011 in O.S.No.11915 of 2010, the present two Civil Revision Petitions are filed by the petitioner.

8. The learned counsel appearing for the petitioner contended that the respondents have not paid Court fee within the time granted by this Court under Order 14 Rule 10 (1) of the original side of rules of this Court and plaint ought to have been rejected under Order 7 Rule 11 C.P.C instead of condoning the delay. The respondents have not complied with mandatory requirements of C.P.C by failing to pay the Court fee as per Tamilnadu Court fee and Suit Valuation Act. The learned Judge, failed to observe that the delay in re-presentation of the suit; payment of deficit Court fee; and taking steps to serve on the petitioner are inexcusable. The learned Judge ought to have taken into consideration the entire delay in prosecuting the case from the date of contract and learned Judge erred in taking into consideration only delay in representation and delay in payment of deficit Court fee. After lapse of 13 years, there will not be a fair trial as the documents relating to the suit transaction and employees have left service. The learned Judge failed to see that respondents have paid only a token/nominal Court fee of Rs.1000/- which amounts to improper presentation and the plaint is liable to be rejected since the defective plaint was not represented within the time limit prescribed as per Rules of practice.

The suit is also liable to be dismissed for not taking steps to serve the suit summons on the petitioner even after the suit was numbered. The learned Judge failed to take note and discuss the fact that only the junior counsel on record has filed affidavit in respect of the Application Nos.1591 and 1592 of 2002. It is well settled that the affidavit filed by an Advocate on record in support of the application is not proper and not acceptable. The learned counsel appearing for the petitioner, in support of his contentions relied on the following judgments:

(i) Order of this Court dated 04.08.2017 made in O.P.No.350 of 2017 and Application No.3513 of 2017:

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"13. The first argument raised in support of the OP is that the order of the Master in Application No.2396 of 2017 condoning the delay has become final and cannot be questioned at this stage. As pointed out by the respondents, the order of the Master dated 21.4.2017 is not an appealable order. The opportunity to question the same thus arose only upon the listing of this Original Petition for admission before court. The right of the respondent to question the delay is thus preserved to be raised as a challenge to the admission of the O.P. This Court, vide decision in Civil Suit No.882 of 1984 and Application No.3191 of 1986 in the case of

Union of India vs. M/s. Cavalier Shipping Company, Madras and another, (copy circulated) had occasion to consider a similar situation where a delay in re-presentation in excess of 17 years was condoned by the Master exparte. Notwithstanding the general rule that the condonation of delay in re-presentation would be a matter between the Court and the party causing such delay, Justice M.Srinivasan carved out an exception to the general rule in cases where the delay is significant and the condonation itself is seen to be mechanical and without reference to the quantum of delay. In conclusion, the learned Judge accepts the application of the defendant to dismiss the suit, setting aside the order of the Master condoning the delay. This principle would be applicable all the more in a case such as the present one where there is no justification offered, let alone established, for the delay of 1070 days."

(ii) 2007 (3) TNLJ 370 (Civil) in the case of Ramiah and another Vs. R.Palaniappan:

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 "29. In the present case, the delay in re-presentation was huge. The reasons given for the delay even on the face of it do not merit acceptance. Yet, the delay was condoned. After three years of prosecution of plaint, the Court permitted the first respondent to

pay the deficit Court fees, which was almost the entire Court fees payable, without notice to the other side, contrary to 2003 (2) MLJ 305 (supra). It is definitely open to the petitioners to complain to this Court that absolutely no justifiable reasons were made out and that there was a glaring infirmity and abuse of process of law, and this Court is bound to examine the grievance of the petitioners."

(iii) (2012) 7 SCC 738 in the case of A.Nawab John and others

Vs. V.N.Subramaniam:

.....
"42. We have already noticed that under Order 7 Rule 11, a plaint, which has not properly valued the relief claimed therein or is insufficiently stamped, is liable to be rejected. However, under Rule 13, such a rejection by itself does not preclude the plaintiff from presenting a fresh plaint. It naturally follows that in a given case where the plaint is rejected under Order 7 Rule 11 and the plaintiff chooses to present a fresh plaint, necessarily the question arises whether such a fresh plaint is within the period of limitation prescribed for the filing of the suit. If it is to be found by the Court that such a suit is barred by limitation, once again it is required to be rejected under Order 7 Rule 11 Clause (d). However, Section 149 CPC, as interpreted by this Court in

Mannan Lal, confers power on the court to accept the payment of deficit Court fee even beyond the period of limitation prescribed for the filing of a suit, if the plaint is otherwise filed within the period of limitation. Therefore, the rigour of Order 7 Rule 11 CPC and also Section 4 of the Tamil Nadu Act is mitigated to some extent by Parliament when it enacted Section 149 CPC. We may not forget that Limitation is only a prescription of law; and legislature can always carve out exceptions to the general rules of limitation, such as Section 5 of the Limitation Act which enables the Court to condone the delay in preferring the appeals, etc."

.....

"44. It is well settled that the judicial discretion is required to be exercised in accordance with the settled principles of law. It must not be exercised in a manner to confer an unfair advantage on one of the parties to the litigation. In a case where the plaint is filed within the period of limitation prescribed by law but with deficit court fee and the plaintiff seeks to make good the deficit of the court fee beyond the period of limitation, the court, though has discretion under Section 149 CPC, must scrutinise the explanation offered for the delayed payment of the deficit court fee carefully because

exercise of such discretion would certainly have some bearing on the rights and obligations of the defendants or persons claiming through the defendants. (The case on hand is a classic example of such a situation). It necessarily follows from the above that Section 149 CPC does not confer an absolute right in favour of a plaintiff to pay the court fee as and when it pleases the plaintiff. It only enables a plaintiff to seek the indulgence of the court to permit the payment of court fee at a point of time later than the presentation of the plaint. The exercise of the discretion by the court is conditional upon the satisfaction of the court that the plaintiff offered a legally acceptable explanation for not paying the court fee within the period of limitation."

(iv) 1989 2 law weekly 371 in the case of The Union of India, rep. By the Regional Director, (Food) Southern region, Madras V. Cavalier Shipping Co.:

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 "7. Thereafter, the plaint was numbered on 15.12.1984 and summons were issued to the defendants in January, 1985. The defendants have taken out the application (A.No.3193 of 1986) for dismissing the suit, after discovering that the

inordinate delay of over seventeen years was condoned by the Master without notice to them. The validity of the order of the Master condoning the delay is challenged by the defendant, though not by way of appeal or by application to set aside the same, but by way of this application to dismiss the suit. As the defendants did not have any notice in the application for condonation of delay, they are certainly entitled to challenge the validity of the order in this application."

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"13. In the present case, it is stated in the affidavit filed by the Manager of the second defendant that the important papers like Charter-party, Bill of Lading and other documents were destroyed long ago and the second defendant is not aware whether the first defendant is carrying on business or not. Hence, it is clear that it is impossible to have a fair trial in this proceedings. The defendants will be put to irreparable hardship and serious prejudice if the trial goes on."

9. Per contra, the learned counsel appearing for the respondents contended that the plaint was presented with deficit Court fee due to the fact that Court fees stamp papers were not available during the time of filing suit. Subsequently, the clerk of the respondents left service and plaint could not be represented. The

respondents represented the plaint with Application Nos. 1591 and 1592 of 2002 to condone the delay in representation and delay in payment of deficit Court fee. Both the applications were ordered after notice to the petitioner. The notice sent to the petitioner was returned with endorsement as "left" and therefore after substituted service, both the applications were allowed. The Court has power to condone the delay and extend the time for payment of deficit of Court fee under Section 149 C.P.C. The petitioner has not challenged the order of this Court condoning the delay in payment of Court fee and therefore the respondents have paid Court fee within the time limit. The petitioner has not challenged the said order and therefore the said order has become final. Once the Court condoned the delay in paying the deficit Court fee, the petitioner is not entitled to maintain application for rejection of plaint. The respondents have taken all the steps as per the rules to serve the petitioner by filing suit summons and batta. The respondents cannot be penalized for the delay on the part of the Court to serve the summons on the petitioner and prayed for dismissal of both the Civil Revision Petitions.

10. Heard the learned counsel appearing for the petitioner and respondents and perused the materials available on record and considered the judgments relied on by the learned counsel appearing for petitioner.

11. The respondents filed suit for recovery of a sum of Rs.14,73,608/-, based on the contract dated 04.10.1995. The respondents presented the plaint by paying only Court fee of Rs.1000/-. After the Registry returned the plaint, the respondents filed Applications Nos. 1591 and 1592 of 2002 to condone the delay in representation and condone delay in payment of deficit of Court fee. In both the applications, notices were ordered to the petitioner. Both the applications were allowed after service of notice to the petitioner by substituted service, by paper publication, by affixture in Court notice Board and affixture in last known address. The contention of the respondents that without challenging the said order which has become final, the applications to reject the plaint is not maintainable in view of the judgment of this Court relied on by the learned counsel for the petitioner. This Court in the judgments relied on by the learned counsel for petitioner, have held that even

without challenging the order condoning the delay and extending time for payment of deficit of Court fee, the defendant can file application to reject the plaint. While considering the application to reject the plaint, the Court has to consider whether the delay in representation and extension of time was granted after the Court being satisfied with the reason given by the plaintiff. This view is taken by the Courts in view of the fact that the Courts have power under Section 148 and 149 C.P.C to extend the time for payment of deficit of Court fee. This power is discretionary power and has to be exercised judicially. The Court cannot mechanically order the application without being satisfied with the reason given by the plaintiff. In the present case, the petitioner has not produced the order of this Court dated 12.03.2003 made in Application Nos.1591 and 1592 of 2002. There is nothing on record to show that learned Master of this Court has not exercised his discretionary power judicially and whether learned Master has given valid reason for allowing the said application. The Hon'ble Apex Court in the judgment reported in **2009 AIR SCW 5385 in the case of P.K.Palanisamy Vs. N.Arumugham and another** has held as follows:

.....

"8. Appellant while presenting the plaint inter

alia contended that sufficient court fee stamps were not available in the sub-treasury. The Presiding Officers of the local Civil Courts in a given situation would be aware thereof. It may, therefore, consider the prayers made in that behalf by a suitor liberally. If court fees are not available in a sub-treasury for one reason or the other, the court having regard to the maxim "*lex non cogit ad impossibilia*" would not reject such a prayer.

Payment of court fees furthermore is a matter between the State and the suitor. Indisputably, in the event a plaint is rejected, the defendant would be benefited thereby, but if an objection is to be raised in that behalf or an application is to be entertained by the court at the behest of a defendant for rejection of the plaint in terms of Order VII, Rule 11(c) of the Code, several aspects of the matter are required to be considered.

Once an application under Section 149 is allowed, Order VII, Rule 11 (c) of Code will have no application.

It is for that additional reason, the orders extending the time to deposit deficit court fee should have been challenged.

Filing of an application for rejection of plaint in a case of this nature as also having regard to the events which have taken place subsequent to registration of the suit appears to us to be a *mala fide*.

If the learned trial Judge did not entertain the said plea, the High Court should not have interfered therewith."

.....

"10. We have, however, serious reservations as to whether the civil court could hear a defendant before registering a plaint. The Code does not envisage such a situation. When a suit is filed, the Civil Court is bound by the procedures laid down in the Code. The defendant upon appearing, however, in certain situations, may question the orders passed by the Civil Court at a later stage."

"11. We would assume that the respondents were entitled to a notice before registration of plaint under Section 149 of the Code. Indisputably, the courts were required to assign reasons in support of their orders. Had the validity and/or legality of those orders been challenged before an appropriate court, it would have been possible by the plaintiffs to contend that the defendants had waived their right by their subsequent conduct and they would be deemed to have accepted the same. Even on later occasion, the courts would assign reasons upon satisfying itself once over again. If an order has been passed without hearing the one side, he may be heard but by reason

thereof, the plaint would not be rejected outrightly. Before doing so, the applications of the plaintiff under Section 149 of the Code have to be rejected.

In Buta Singh (Dead) By LRs. v. Union of India[(1995) 5 SCC 284], it was held:

"The aid of Section 149 could be taken only when the party was not able to pay court fee in circumstances beyond his control or under unavoidable circumstances and the court would be justified in an appropriate case to exercise the discretionary power under Section 149, after giving due notice to the affected party....."

12. As per the above judgments, once the application filed under Section 149 C.P.C is allowed, the Order 7 Rule 11 C.P.C will have no application. The said judgment of the Hon'ble Apex Court is squarely applicable to the facts of the present case. In view of the fact that the learned Master of this Court has exercised his power under Section 149 C.P.C, the application under Order 7 Rule 11 is not maintainable. Further, the petitioner has not proved that the respondents have deliberately delayed in serving summons on the petitioner. The contention of the learned counsel appearing for the

respondents that respondents cannot be penalized for the delay of the Court in serving the suit summons on the petitioner has considerable force.

13. For the foregoing reasons, both the Civil Revision Petitions are dismissed as devoid of merits. No costs. Consequently, connected miscellaneous petition is closed.

05.10.2017

Speaking/Non-speaking order

Index : Yes

gsa

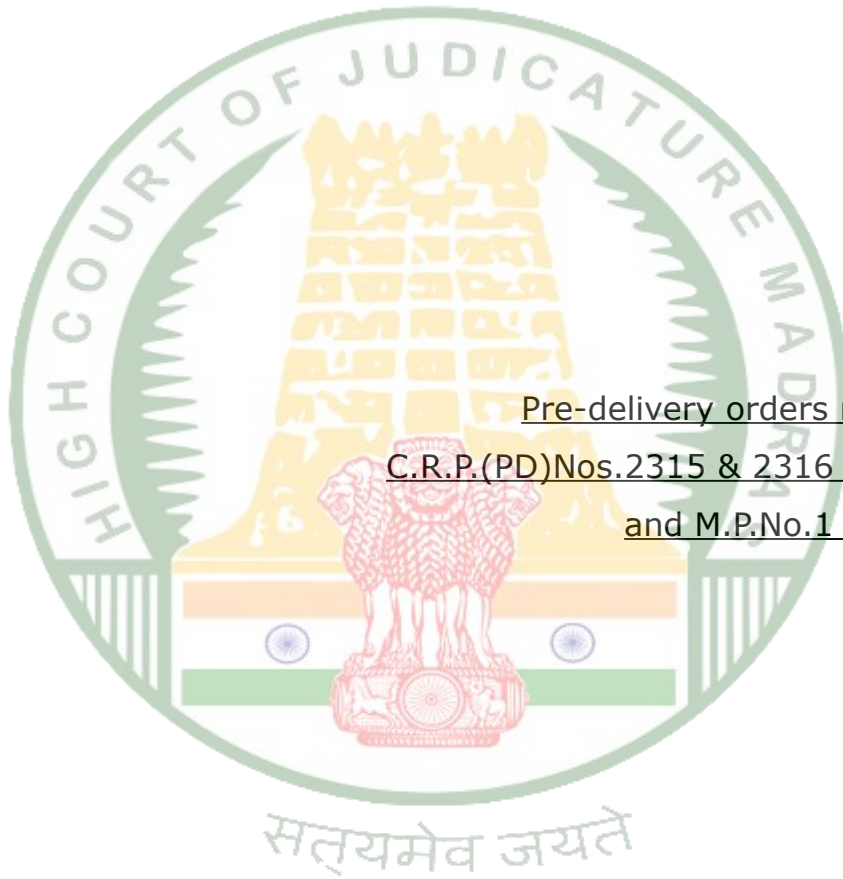
Note: Issue order copy on 06.10.2017

To

1. The United India Insurance Co. Ltd.,
Divisional Office No.1,
21/1, Mission Road,
Bangalore 560 027.
2. The Fast Track Court No.II,
Chennai
3. The Central Power Research Institute
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