

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.01.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.765 of 2015
and M.P.No.1 of 2015

1.Ashwin Sabanayagam

2.Rajendran Sabanayagam
Power of Attorney holder of
Mr.Ashwin Sabanayagam

.. Petitioners

Vs.

The Catholic Syrian Bank Ltd.,
Zonal office
Rani Seethai Hall, 7th floor
603, Anna salai, Chennai-600 006.

.. Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, against the order dated 10.02.2015 made in O.S.No.4768 of 2014 on the file of the XV Additional City Civil Court, Chennai.

For Petitioners : Mr.Roshan Balasubramanian

For Respondent : Mr.V.Bhiman for
M/S.Sampath Kumar Associates

ORDER

The Civil Revision Petition is filed against the order dated 10.02.2015 made in O.S.No.4768 of 2014 on the file of the XV Additional City Civil Court, Chennai.

2. The petitioners are the defendants and respondent is plaintiff in O.S.No.4768 of 2014 on the file of the XV Additional City Civil Court, Chennai. The respondent filed said suit for recovery of a sum of Rs.20,04,146/- with interest at the rate of 17.25% per annum and with a charge on the suit schedule property. According to the respondent, the respondent was a tenant under the first petitioner in respect of the property at Door No.227, Kilpauk Garden road, Kilpauk, Chennai-10. The second petitioner is the power agent of the first petitioner. The agreement of lease is dated 01.04.2013 and monthly rent is Rs.1,75,000/-. The respondent paid advance of Rs.17,50,000/-. As per the terms of the agreement, respondent issued three months prior notice to the petitioners on 11.07.2013 and vacated and handed over the premises to them on 12.10.2013. The respondent called upon the petitioners to refund the advance amount of Rs.17,50,000/-, failing which, they will initiate legal proceedings for recovery of the said amount together with interest

at 18% per annum. The petitioners sent a reply through their counsel on 30.11.2013 stating that after adjusting the service tax liabilities and electricity charges, they are willing to pay a sum of Rs.10,03,631/-. The respondent by reply dated 17.03.2014 agreed to receive the said sum under the protest. The petitioners did not pay the said sum and hence, the respondent filed the said suit.

3. The petitioners filed an application under Order VII Rule 11 read with Section 151 C.P.C. for rejection of plaint on 10.02.2015. According to the petitioners, respondent paid Rs.12,00,000/-, when the first lease commenced from 01.10.2007. The second lease agreement was entered into on 06.10.2012 and advance amount was fixed at Rs.17,50,000/- and respondent paid balance amount, totalling Rs.17,50,000/-. The respondent is liable to pay service tax and service tax payable from October 2007 to August 2012 is Rs.7,36,656/-. According to the petitioners, the respondent can get refund of service tax paid on their behalf. In view of the above facts, the petitioners sought for rejection of plaint under Order VII Rule 11 read with Section 151 C.P.C.

4. The suit came up for hearing on 10.02.2015. The petitioners after entering appearance did not file written statement within 30 days as per the Order VIII Rule 1 C.P.C. The Court considering the fact that the Court has power to extend the time up to 90 days and 90 days expired on 10.02.2015, set the petitioners exparte and posted the suit for exparte evidence on 24.02.2015. The learned Judge returned the application filed by the petitioners for rejection of plaint on the ground that the petitioners were set exparte.

5. The petitioners filed present Civil Revision Petition seeking for the following reliefs:

"(a) Set aside the order dated 10.02.2015 in O.S.No.4768 of 2014 passed by the learned XV Additional City Civil Judge, Chennai;

(b) Direct the learned XV Additional City Civil Judge, Chennai, to impound the lease agreement dated 01.04.2013 filed by the respondent in O.S.No.4768 of 2014; and

(c) Strike off O.S.No.4768 of 2014 as an abuse of the legal process;

6. The learned counsel for the petitioners contended that in application for rejection of plaint, the Court has to consider only the averments made in the plaint and documents relied on by the plaintiff. Averments made in the written statement and other documents relied on by the defendant are not relevant to consider the application for rejection of plaint. He further contended that the learned Judge has committed an irregularity in directing the petitioners to file written statement. When the application is filed under Order VII Rule 11 CPC, the Court has to consider the said application even when the defendant has not filed written statement and the Court cannot direct the petitioners/defendants to file written statement. The Court has power to reject the plaint at any stage of the suit. The learned counsel for the petitioners referred to the grounds of revision and submitted that the respondent has suppressed the lease deed mentioned therein. The plaint is liable to be rejected on the ground of suppression of material facts. In support of his contention, the learned counsel for the petitioners relied on the following judgment of the Hon'ble Apex Court reported in **2003 (1) SCC 557 (Saleem Bhai and others v. State of Maharashtra and others)**;

"9. A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial Court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial Court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the Court as well as procedural irregularity. The High Court, however, did not advert to these aspects."

7. The learned counsel for the petitioners further submitted that the suit has been instituted by the respondent through K.A.Antony, who claims to be the Joint Zonal Manager of the respondent. The respondent has not filed any document i.e.,

Memorandum of Association, Articles of Association, Board Resolution etc. The respondent has not filed any document to show that K.A.Antony has been authorised to institute the suit on behalf of the respondent. This defect is incurable and suit is not maintainable and the plaint is liable to be struck off under Article 227 of the Constitution of India. The verification of the pleadings is not in conformity with C.P.C. and prayed for striking off the plaint in O.S.No.4768 of 2014. In support of his contention, the learned counsel for the petitioners relied on the following judgment of the Hon'ble Apex Court reported in **(2016) 14 SCC 275 (R.K.Roja v. U.S.Rayudu and another)**;

"5. Once an application is filed under Order VII Rule 11 CPC, the Court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (election petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement. In case, the application is rejected, the defendant is entitled to file his written statement thereafter (See Saleem Bhai and others v. State of Maharashtra and others 2003 (1) SCC 557). But once an application for rejection is filed,

the Court has to dispose of the same before proceeding with the trial Court. To quote the relevant portion from paragraph-20 of Sopan Sukhdeo Sable case (2004) 3 SCC 137:

"20. Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word shall is used, clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. " "

8. Per contra, the learned counsel for the respondent contended that admittedly, advance of Rs.17,50,000/- was paid to the petitioners and the same is refundable, when the respondent vacated and handed over the vacant possession to the petitioners. The respondent vacated and handed over the vacant possession to the petitioners on 12.10.2013 after giving three months notice. As

per the agreement, the petitioners ought to have returned the advance amount of Rs.17,50,000/- on 12.10.2013 itself. In reply to the notice issued by the respondent through their counsel on 07.11.2013 calling upon the petitioners to refund the said amount of Rs.17,50,000/-, the petitioner in their reply dated 30.11.2013 stated that a sum of Rs.10,03,631/- is payable by them after deducting alleged payment of service tax and electricity charges. Even though the respondent agreed to receive the said sum under protest, the petitioners did not pay the said sum. Earlier lease agreement expired due to lapse of time and only the lease deed dated 01.04.2013 was in force and the respondent terminated the said agreement by giving three months notice dated 11.07.2013 and vacated and handed over the possession to the petitioners on 12.10.2013. The respondent has not suppressed any material facts. Whether the respondent is liable to pay service tax or not can be decided only by the evidence let in by the parties during trial. Thiru.K.A.Antony is the Joint Zonal Manager, who is the Principal Officer of the respondent and as per C.P.C., he is entitled to verify the plaint on behalf of the respondent. The learned Judge has set the petitioners exparte on 10.02.2015 rightly, as the petitioners have not filed written statement within 90 days from the date of

receipt of summons and have not sought for extension of time. The learned Judge has rightly returned the application filed by the petitioners as they were set *ex parte*. The petitioners are not entitled to seek three reliefs in one Civil Revision Petition. The petitioners have not made out any case for setting aside the *ex parte* order dated 10.02.2015 and have not made out any case without filing any application to set aside the *ex parte* order and not made out any case for striking off the plaint and also impounding the agreement dated 01.04.2013. The petitioners have not made out any case either for rejection of plaint or striking off the plaint. Therefore, he prayed for dismissal of the Civil Revision Petition. The learned counsel for the respondent relied on para-6 of the judgment of the Hon'ble Apex Court reported in **(2016) 14 SCC 275 (R.K.Roja v. U.S.Rayudu and another)**, which was relied on by the learned counsel for the petitioners and the same is extracted hereunder:

"6. In Saleem Bhai case (2003) 1 SCC 557, this Court has also held that:

"9. a direction to file the written statement without deciding the application under Order VII Rule 11 cannot but be a procedural irregularity touching the exercise of jurisdiction by

the trial court.”

However, we may hasten to add that the liberty to file an application for rejection under Order VII Rule 11 of the CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement.”

9. Heard the learned counsel for the petitioners as well as the respondent and perused the materials available on record and judgments relied on by counsel for the parties.

10. The respondent filed suit for recovery of money. The respondent paid advance of Rs.17,50,000/-, when the lease was granted to them, which is refundable by the petitioners, when the respondent vacates and hands over the possession. Admittedly, respondent handed over vacant possession to the petitioners on 12.10.2013 and the petitioners have taken vacant possession of the petition premises from the respondent. But the petitioners did not refund the advance amount. In the reply notice dated 30.11.2013, the petitioners admitted that they are liable to refund a sum of Rs.10,03,631/- after deducting or adjusting service tax and electricity charges payable by the respondent. The petitioners have

not paid even this amount.

11. As far as suppression of material facts is concerned, the respondent has admitted that when the lease agreement dated 01.04.2013 was entered into between the petitioners and respondent, the total advance amount paid by the respondent is Rs.17,50,000/- and the same is liable to be refunded by the petitioners as per the lease agreement dated 01.04.2013. In view of the same, earlier two lease agreements referred to by the petitioners have no relevance to the claim of the respondent.

12. Further, the contention of the learned counsel for the petitioners that the respondent is liable to pay service tax and electricity charges is concerned, the petitioners have to substantiate their contention by letting in evidence during trial and the said issue can be decided only after appreciating the evidence let in by the respondent and petitioners.

13. As far as filing of the suit is concerned, the same is governed by Order IV Rule 1 C.P.C. As per Order IV Rule 1(1) C.P.C., the plaint can be presented by an Officer appointed by the plaintiff.

In the case of limited company, the Principal Officer can verify the suit on behalf of the plaintiff. In the present case, K.A.Antony, the Joint Zonal Manager of the respondent, who is Principal Officer of the respondent, has verified the plaint. The respondent is the limited company and Principal Officer is entitled to verify the plaint. Whether K.A.Antony has power to represent the respondent or not can be decided only by appreciating evidence let in by the parties.

14. The judgment of the Hon'ble Apex Court relied on by the learned counsel for the petitioners reported in **2003 (1) SCC 557 (Saleem Bhai and others v. State of Maharashtra and others)** is not applicable to the facts of the present case. In the said judgment, the defendant was directed to file written statement as a condition for considering the application for rejection of plaint under Order VII Rule 11 C.P.C. In the present case, the learned Judge did not direct the petitioners to file written statement. On the other hand, the petitioners were set exparte on their failure to file written statement and application filed by the petitioners was returned on the ground that the petitioners were already set exparte.

15. The power of this Court under Article 227 of the

Constitution of India is a discretionary power. This power has to be exercised sparingly only when the proceeding is abuse of process of law, vexatious, frivolous and on the facts of the suit is barred by law and suit does not disclose any cause of action. In the present case, none of the condition exist warranting striking off the plaint exercising extraordinary discretionary power under Article 227 of the Constitution of India.

16. Considering all the materials on record, the contention of the learned counsel for the petitioners as well as respondent and order of the learned Judge dated 10.02.2015, I hold that the petitioners have not made out any case for any of the reliefs sought for in the Civil Revision Petition. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Index : Yes/No
Speaking/Non-Speaking Order

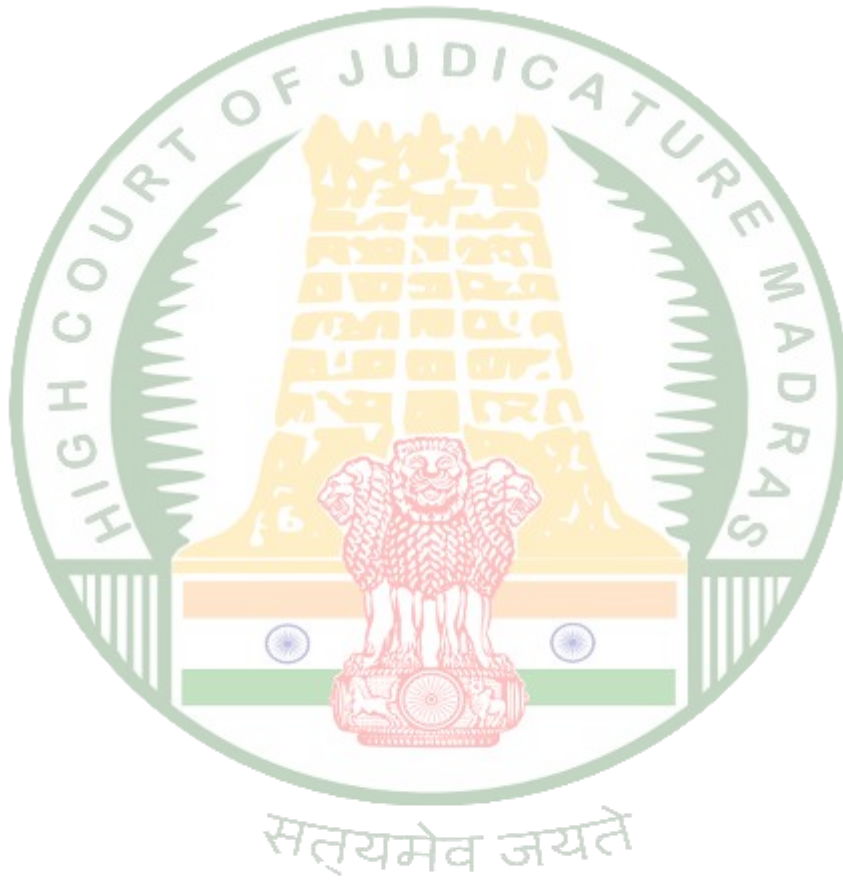
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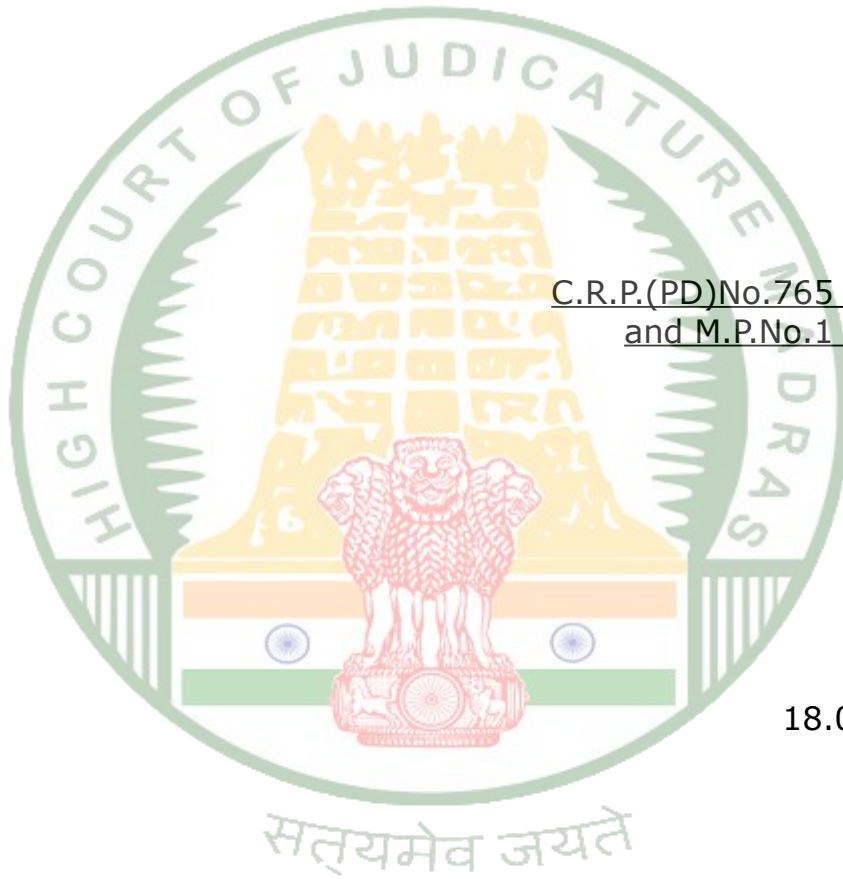
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V.M.VELUMANI, J.

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