

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.02.2021

PRONOUNCED ON : 04.03.2021

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P.(NPD)No. 3222 of 2017
and C.M.P.No.15104 of 2017

1. Craft AD: Publicity and Promotion,
No.31, Navaneethammal Street,
Saligramam, Chennai - 600 093.
2. Saravanan
C/o.Craft Ad
No.31, Navaneethammal Street,
Saligramam, Chennai - 600 093. Petitioners

Vs.

M/s. Next Radio Ltd.,
Rep by its Sr. Manager -
Accounts and Collections,
M.Venkatesan,
Having its Branch Office at
No.15, Romar House, I Floor,
Jaganathan Road,
Nungambakkam,
Chennai - 600 034.

Registered Office at
156, D.J.Dadajee Road,
Behind Everest Building,
Tardeo, Mumbai - 400 034.

... Respondent

Prayer :- The Civil Revision Petition filed under Section 115 of C.P.C., to set aside the fair and decretal order dated 21.06.2017 in I.A.No.9 of 2017 in O.S.No.5259 of 2016 passed by the XIX Additional City Civil Court, Chennai.

For Petitioners : Mr.A.Thirumaran

For Respondent : Mr.Subhang P. Nair

ORDER

The Civil Revision Petition is directed as against the fair and decretal order dated 21.06.2017 in I.A.No.9 of 2017 in O.S.No.5259 of 2016 passed by the learned XIX Additional Judge, City Civil Court, Chennai, thereby dismissing the petition filed by the petitioners seeking leave to defend the suit.

2. The petitioners are the defendants and the respondent is the plaintiff. The respondent filed suit for recovery of money as against the petitioners in O.S.No.5259 of 2016. In the said suit, the petitioners filed

petition seeking leave to defend the suit. It was dismissed and aggrieved by the same, this present Civil Revision Petition.

3. The learned counsel appearing for the petitioners would submit that the suit itself is not maintainable under Order 37 of C.P.C. The first petitioner is the business entity and the second petitioner is the proprietor and therefore, the same person should not have been arraigned twice which is not permissible under law. The respondent caused private notice on 08.12.2016 with a copy of the plaint alone and the plaint documents were not furnished to the petitioners till 02.01.2017. Therefore, the mandatory provisions under Order 37 Rule 3(1) of C.P.C., did not comply with by the respondent. The notice of appearance was sent to the respondent as early as on 08.12.2016 and the respondent did not file summons for judgment till 02.01.2017. On the said day only, the plaint documents were served to the petitioners which is violation of the provisions laid down under Order 37 of C.P.C. Therefore there are so many triable issues available in the present case and it cannot be tried summarily under Order 37 of C.P.C.

4. Per contra, the learned counsel appearing for the respondent contended that there is a specific provision to challenge the order passed under Order 37 Rule 3(1) of C.P.C., by way of appeal and as such this Civil Revision Petition is not at all maintainable. In support of his contention, he relied upon the following judgments :-

- i) 2013 (2) LW 949 - *Shivsu Canadian Clear International Ltd Vs. Freightcan Global Logistics Pvt. Lt.,*
- ii) 2014 (2) CTC 828 - *Praveenkumar Vs. The Hongkong and Shanghai Banking Corporation Ltd.,*
- iii) 2001 (1) LW 295- *Sundaram Mortos Vs. B.Lalitha*
- iv) 2009 (2) SCC 432 - *Wada Arun Asbestos Pvt Ltd., Vs. Gujarat Water Supply and Sewerage*
- v) 2013 (2) MWN (Civil) 663 - *S Sudha Vs. Rangaswamy Builders Pvt. Ltd.*
- vi) CRP.No.4975 of 2014 - *M Ilambaranthi Vs. Matrix Cellurar (International) Services Pvt. Ltd.,*
- vii) 2008 (14) SCC 457 - *Southern Sales and Services and others Vs. Sauermilch Design and Handels*
- viii) 2007 (2) SCC 275 - *Ajay Bansal Vs. Anup Mehta & ors.*
- ix) 2004 (74) DRJ 65 - *VS Saini & Ors Vs. DCM Ltd.*

5. Heard Mr.A.Thirumaran, learned counsel appearing for the petitioners and Mr.Subhang P.Nair, learned counsel appearing for the respondent.

6. The point for consideration is as to whether the Civil Revision Petition is maintainable as against the order passed under Order 37 Rule 3 of C.P.C. If an order declining leave to defend a summary suit, thereby making a judgment inevitable can be attacked in a Revision and also in an Appeal, it would lead to the anomalous situation where the summary suit becomes more tedious and time consuming than an ordinary action for recovery of money.

7. In this regard, the learned counsel appearing for the respondent relied upon the judgment reported in **2007 (2) SCC 275** in the case of **Ajay Bansal Vs. Anup Mehta & ors** as follows :-

"12. A decree passed in a summary suit where leave to defend the suit has been refused is almost automatic. The consequence of passing a decree cannot be avoided."

13. Ordinarily, an application under Article 227 of the Constitution of India would not be maintainable where an appeal lies. An appeal lay from the decree under Section 96 of the Code. When an appeal could be filed, ordinarily, an

application under Article 227 of the Constitution of India would not be entertained.

14. A decree passed subsequent to the refusal of leave to defend could either be under Order XXXVII Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even based on oral evidence formally proving, say, the execution of a promissory note by the defendant. It may not be proper or necessary to apply the theory of "dependent order" in such circumstances. For one, the theory may not apply. Even if this Court were to set aside the order of the court below and give the defendant leave to defend the suit, the decree that is passed may not go automatically. It may have to be set aside. Secondly, the defendant can always go to the court which passed the decree and move under Rule 4 of Order XXXVII of the Code to reopen the decree.

15. The theory of "dependant order" may not apply in a case of this nature because even if this Court were to set aside the order refusing leave to defend, the decree subsequently passed may not fall by itself. It has still to be set aside

either by resort to Order XXXVII Rule 4 or by way of an appeal, or by some other mode known to law. In a given case like the present one as it may not be proper to interfere with the decree merely because in an appeal against an order refusing leave to defend, this Court is inclined to take a different view. [See V.S. Saini & Anr. v. D.C.M. Ltd., AIR 2004 Delhi]

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18. *In the aforementioned situation, we are of the opinion that interest of justice would be met if we direct the writ petition to be converted into a first appeal. The respondents may file certified copy of the judgment and decree. Deficit court fee, if any, should also be paid by the respondents. Filing of such certified copy and deposit of court fee, if any, must be completed within eight weeks from date. Indisputably, it would be open to the appellant to raise the contention that it was a fit case where the learned Civil Judge could have granted leave to defend the suit. All the contentions of the parties shall, however, remain open."*

8. The above judgment is followed by this Court in the case

reported in **2014 (2) CTC 828** in the case of **Praveenkumar Vs. The Hongkong and Shanghai Banking Corporation Ltd.**, as follows :-

"52. In *Ajay Bansal vs. Anup Mehta and others (cited supra)* the Division Bench of the Hon'ble Supreme Court of India has also held that:

The defendant in such a case can also be left to appeal against the decree and therein challenge the order refusing leave to defend in terms of Section 105(1) of the Code.

53. In view of the ratio laid down in the above cited decision, when the appeal is maintainable against the dismissal of the leave to defend the suit petition under Section 96 C.P.C., the revision petition under Section 115 C.P.C., is not maintainable."

9. The learned counsel also relied upon the judgment reported in **2009 (2) SCC 432** in the case of **Wada Arun Asbestos Pvt Ltd., Vs. Gujarat Water Supply and Sewerage** which reads as follows :-

"13. It is in the aforementioned backdrop, the question as to whether a revision petition was

maintainable against an order granting conditional leave must be considered. We will proceed on the basis that an order imposing a conditional leave to defend the suit was a jurisdictional question and, thus, a revision application would be maintainable as has been held by various High Courts, notable amongst them are The New Ashapuri Co-operative Housing Society Ltd. and Anr. v. Arvindkumar Manilal Patel ; Fateh Lal v. Sunder Lal, Modi Ram and Anr. v. Smt. Sugan Bai; and A.K. Velan v. Narnyanan and Co. (P) Ltd.

14. But if a right of appeal from the decree is conceded to a defendant, in our opinion, he cannot be denied a right to challenge an order which was subject to revision in his memorandum of appeal filed from the decree ultimately passed."

In the above case the Hon'ble Supreme Court of India held that in respect of order granting conditional leave to defend the suit may be considered.

10. He also relied upon the judgment of this Court reported in **2001 (1) LW 295** in the case of **Sundaram Mortos Vs. B.Lalitha** as follows:-

"13. In that view of the matter, without going into the merits of the case, this Court comes to the conclusion that the revision is not per-se maintainable and this Court opines that the interlocutory order refusing leave to defend partakes the form of judgment and only a regular and substantive appeal can be filed against the said interlocutory order dated 11.09.2001, if so aggrieved and that the Civil Revision Petitioner/First Defendant/Applicant will have to pay necessary Court fee in appeal and in that view of the matter, the Civil Revision Petition is dismissed. In the circumstances of the case, the parties are directed to bear their own costs. The connected miscellaneous petition is closed."

11. In view of the above dictum laid down by the Hon'ble Supreme Court of India, this Court is of the considered view that as against the refusal of leave to defend the suit filed under Order 37 of C.P.C., the

Revision is not maintainable and the order passed in I.A.No.9 of 2017 in O.S.No.5259 of 2016 refused to leave to defend the suit is in the form of judgment and only a regular and substantive appeal can be filed, if so aggrieved.

12. Accordingly, this Civil Revision Petition is dismissed as not maintainable, where an appeal lies. However, the present civil revision petition can be converted into an appeal on condition that the petitioners shall file the certified copy of the judgment and decree in O.S.No.5259 of 2016 with requisite Court fee. There shall be no order as to costs. Consequently connected miscellaneous petition is closed.

04.03.2021

Internet : Yes

Index : Yes/No

Speaking order/Non-speaking order

rts

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G.K.ILANTHIRAIYAN, J.

rts

To

1. The XIX Additional Judge,
City Civil Court, Chennai
2. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.



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