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*APPLICATION No.1255 of 2023
in C.S.No.530 of 2011*

RESERVED ON : 10.03.2023

PRONOUNCED ON : 17.03.2023

APPLICATION No.1255 of 2023
in
C.S.No.530 of 2011

R.N.MANJULA, J.

The applicant is the fourth defendant in the suit.

2. This application has been filed to condone the delay of 432 days in filing the Application to set aside the ex-parte decree dated 15.11.2021.

3. **Averments in the application in brief:-**

The suit has been filed by the first respondent/plaintiff for recovery of money. The suit has been decreed ex-parte on 15.11.2021. The plaintiff has also filed a criminal case in C.C.No.1233 of 2016 before the Magistrate Court for the offence under Section 138 of The Negotiable Instruments Act. In the said case, warrant was been issued and the same is pending. The applicant/4th defendant took steps to recall the warrant on 24.11.2022. Thereafter, he applied for the certified copies of complaints and received the same on 02.01.2023. Only at that stage, the applicant/4th defendant came to know about the present Civil Suit and that he has been arrayed as 4th defendant in the same. Immediately, the applicant engaged an advocate and through his



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counsel only he came to know on 10.02.2023 the suit has been decreed for a sum of Rs.21,88,11,451.96/- along with interest @ 36% from the date of suit till the date of realisation and that the decree will binding the defendants jointly and severally. The applicant/4th defendant also came to know that an application has also been filed by the plaintiff for seeking leave to sue and it was allowed on 29.06.2011. The applicant/4th defendant is taking steps to revoke the said order also. Despite the applicant/4th defendant had instructed his counsel to take steps to set aside the ex-parte decree, his counsel did not take any steps and hence, a delay of 432 days had occurred.

3.1. The first defendant-Business India is a partnership firm formed by the father of the applicant Late Hotchand Gopaldas Advani along with his brother Ashok Hotchand Advani through a Partnership Deed dated 22.12.1978 to carry on the business of publication of magazines on a non-profit basis. The other brother of the applicant by name Rajkumar Hotchand Advani and the applicant were inducted into partnership firm only on 01.01.1980. The applicant had no role in the partnership firm and he did not get any profits also. The applicant's father died on 09.05.1991 and his brother Rajkumar Hotchand Advani also died on 27.12.2001. During that time, the applicant expressed his wish to exit from the partnership and accordingly, resigned from



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the partnership firm on 18.11.2003 and the same is reflected in a deed of partnership dated 03.11.2010.

3.2. The first respondent/plaintiff has filed a suit by impleading the applicant/4th defendant as a party by furnishing a wrong address. Since the applicant/4th defendant did not reside in the said address, he could not get the summons from the Court. It appears that the summons has been served through one Ravi Agarwal on 10.12.2011, but the same was not intimated to the applicant/4th defendant and he came to know about the pendency of the suit only on 10.02.2023. This Court has got no jurisdiction to entertain the suit. There is no cause of action for the suit. As the applicant has got the knowledge about the pendency of the suit recently just to avoid any technical difficulties, he has filed a petition to condone the delay of 432 days in filing the application to set aside the ex-parte decree dated 15.11.2021 as against him.

4. Counter of the first respondent/plaintiff in brief:-

After the suit was filed by the first respondent/plaintiff for recovery of a sum of Rs.21,88,11,451.96/- along with interest from the date of suit till the date of realisation, the defendants 1, 2 and 4 had entered appearance by engaging a counsel. They even filed a common counter affidavit in the



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application filed by the first respondent/plaintiff for getting an interim order.

Despite several opportunities were given for filing written statement, the defendants did not file their written statement and hence, they were set ex-parte on 27.08.2021. As they did not take any steps to set aside the order, the suit was decreed on 15.11.2021 as prayed for. The summons for the defendants 1 to 3 were sent and served on them. Only after getting notice in the application filed by the first respondent/plaintiff and receiving the suit summons sent in the suit, the applicant had entered appearance by engaging a counsel. Having participated in the suit proceedings and filed a counter in the application filed by the first respondent/plaintiff, the applicant has filed this petition with false and frivolous allegations. The last instalment for the Hire Purchase Agreement is due on 01.03.2003 and during which time, the applicant was a partner in the first defendant-Company. So, the subsequent resignation or retirement of the applicant/4th defendant from the the partnership firm will not absolve his liability under the Hire Purchase Agreement dated 31.03.1998. In the Hire Purchase Agreement itself, there is a clause about the jurisdiction and in which the parties have agreed that the Civil Court in Madras will be the jurisdiction in case of any dispute arises. The applicant has not given any acceptable reasons for 432 days delay in



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filing the application to set aside the ex-parte order. This application has been filed just to prevent the first respondent/plaintiff from enjoying the fruits of the decree and hence, the application should be dismissed.

5. Both side submissions heard and records perused.

6. The learned counsel for the applicant submitted that the applicant came to know about the suit proceedings only on 10.02.2023 after he got the papers of criminal proceedings filed by the first respondent/plaintiff in C.C.No.1233 of 2016 before the Magistrate Court, since the summons in the suit was not served to the correct address and the summons was received by one Ravi Agarwal, the applicant did not have the knowledge about the suit proceedings; the applicant, who is a partner in the partnership firm as well, had resigned his partnership on 18.11.2003; hence, the applicant is not liable for the suit amount and the applicant did not play any active role in the partnership firm and he did not manage the affairs of the Firm; only because the first respondent/plaintiff sent summons to wrong address it could not be served upon him and in view of the genuine reasons stated by the applicant, the delay should be condoned.

7. The learned counsel for the first respondent/plaintiff submitted that the applicant was admitted into partnership firm as early as on 01.01.1980 and



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the Hire Purchase Agreement was entered on 31.03.1998 and during that time, the applicant was a partner in the Firm. The liability against the applicant cannot be absolved if he chooses to retire from the partnership firm without the consent of the first respondent/plaintiff, who is one of the creditor of the firm. Since the application lacks *bona fide* in view of the falsehood stated by the applicant, the application should be dismissed.

8. The records would show that the applicant had made his appearance through counsel and had filed vakalat. He has also filed a common affidavit along with the other applicants for the application filed by the first respondent/plaintiff for getting interim order. The applicant was very much a partner at the time of the Hire Purchase Agreement and all the subsequent dates when the first defendant-firm became liable to pay the dues.

9. The first respondent/plaintiff has filed a suit against the defendants for recovery of money. The first defendant is the partnership firm in which the other defendants are partners. The applicant, who is the fourth defendant is also a partner in the partnership firm by name Business India, constituted by his father. The suit has been filed by the first respondent/plaintiff basing upon the Hire Purchase Agreement dated 31.03.1998. Even as per the statement of the applicant/4th defendant, he was inducted as a partner in the partnership



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firm as early as in the year 1980 and he continued to be the partner of the firm.

The applicant was one of the partners during the time when the Hire Purchase Agreement was entered between the partnership firm and the first respondent/plaintiff. The suit summons have been sent to the same address for the other defendants. Even though the applicant/4th defendant claimed that he relinquished from the partnership firm during 18.11.2003, the same was not intimated to the first respondent/plaintiff. In such context of the matter, the applicant cannot claim that the transaction pertaining to the Hire Purchase Agreement will not bind him in his capacity as a partner of the firm.

10. In fact, the records would show that the applicant has made his appearance by engaging his counsel and the name of the counsel was printed in the cause list dated 15.11.2021. The applicant had filed a common affidavit along with other defendants. So, in all probabilities, there are possibilities that the applicant would have the knowledge about the pending suit even before 10.02.2023. The same is evidenced from the cause list prepared on 15.11.2021. Only because the applicant/4th defendant could get the summons, he could engage the counsel in order to proceed the suit proceedings. The applicant, who is a partner during the time of executing the Hire Purchase Agreement, cannot deny his joint and several liability for the amounts due in



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pursuant to the Hire Purchase Agreement. The unilateral resignation of the applicant from the partnership firm subsequent to the Hire Purchase Agreement will not absolve his liability, because the same was not approved by the first respondent/plaintiff.

11. The applicant, who had already made his appearance, had chosen to file this application by falsely stating that he was not aware of the proceedings. The first respondent/plaintiff has proved the appearance of the applicant after the suit was filed. The applicant did not diligently contest the suit and allowed it to become ex-parte. The other partners are not strangers, but brothers of the applicant and hence, there is every likelihood that he would have known about the proceedings even if his submission that he did not receive summons is taken to be true. Since the summon has been sent to the very same address where the brothers of the applicant were residing. So the reason stated by the applicant is not acceptable.

12. In this regard, the learned counsel for the applicant attracted the attention of this Court to the judgment of Hon'ble Supreme Court held in ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others*** reported in (2013) 12 SCC 649. In the said case, the Hon'ble Supreme Court has given certain guidelines for condoning the delay



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and that will be very helpful in appreciating the application filed to condone the delay. In the said judgement, it is held that lack of *bona fide* on the part of the applicant seeking condonation is a relevant fact and that would affect the merits of the application. For the sake of clarity, paragraph 21.5 from para 21 is extracted as under:-

“21. From the aforesaid authorities the principles that can broadly be culled out are:

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.”

13. In the case on hand also, the applicant did not prove his *bona fide* and he has filed this application knowing well about the pending proceedings in C.S.No.530 of 2011. Hence, I do not find any merits in the application.

14. In the result, this application is dismissed.

17.03.2023

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