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C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.10.2023

CORAM:

THE HON'BLE Mrs.JUSTICE **V.BHAVANI SUBBAROYAN**

**Civil Revision Petition No.2125 of 2023 &
C.M.P.No.12944 of 2023**

TalasilaAsha

...Petitioner

Vs.

S.Adhikesavan

...Respondent

Civil Revision Petition filed under Article 227 of the Code of Civil Procedure to set aside the fair and decreetal dated 08.02.2023 made in I.A.No.3 of 2022 in O.S.No. 343 of 2022 on the file of Principal District Judge, Chengalpet.

For Petitioner : Mr.K.Senthilkumar

For Respondent : Mr.R.N.Amarnath for
Mr.S.Premkumar

O R D E R

The present petition has been filed to set aside the fair and decreetal dated 08.02.2023 made in I.A.No.3 of 2022 in O.S.No. 343 of 2022 on the file of Principal District Judge, Chengalpet.

2. The brief facts of the case are as follows:-

The respondent/plaintiff/landlord filed a suit against petitioner/defendant/ tenant in O.S.No.343 of 2022 to eject the petitioner



C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

from the suit schedule property and to pay the arrears of rent of Rs.63,75,000/- for a period from April 2020 to May 2022 to the respondent.

Pending suit, the respondent / landlord filed an application in I.A.No.3 of 2022 praying to direct the petitioner / defendant to produce the bank guarantee for the entire arrears of rental amount for the period from 10.04.2020 to 10.05.2022 for a sum of Rs.63,75,000/- till pending disposal of the suit, failing which to issue an order of civil arrest as against the petitioner / defendant. On 08.02.2023, the learned Principal District Judge, Kancheepuram, directed the petitioner/ Defendant to pay or deposit the rental arrears of Rs.63,75,000/- on or before 30.03.2023 in default ordered that the petitioner/defendant loses the opportunity of defending the case. Challenging the same the present Revision is filed.

3. The learned counsel for the petitioner would submit that the petition is not maintainable in the present suit, since it is a suit contemplated under Section 16 of the Civil Procedure Code. Rule 1 of Order 38 CPC does not contemplate furnishing security for any amounts due, but is a provision for furnishing security for 'appearance'. Specifically where the defendant has absconded or is about to abscond or leave the local limits of the court and where the presence is required. In the instant case, there is no allegation whatsoever of this nature and the petitioner not only entered appearance through a counsel, but also filed a suit against the



C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

respondent in O.S. 18 of 2020 which is pending on the file of Additional District Munsif Court, Alandur and there is no cause for furnishing any security, much less a Bank guarantee. The amount claimed is not an admitted amount.

4.The learned counsel for the petitioner also submits that the court below gravely erred in directing the petitioner to deposit a sum of Rs.63,75,000/- on or before 30.03.2023 and further proceeded to direct that on failure to pay the said amount, the petitioner would lose the opportunity to defend. Further, the court below ought to have seen that order XXXVII contemplates arrest first before a Security is furnished and does not contemplate denying the petitioner the opportunity to contest the suit. Hence prayed to set aside the order passed by the trial Court.

5. On the other hand, the learned counsel for the respondent would submit that on 24.12.2019 after an elaborate discussion between both the parties, the petitioner mutually agreed to vacate the suit premises within 3 months from the date of the said endorsement. Within 10 days from the date of endorsement i.e., in the month of January 2020, the petitioner / defendant, without disclosing the above said fact of endorsement has filed a suit for permanent injunction as against the respondent in O.S.No.18/2020 before the learned Additional District Munsif, Alandur and



C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

the same is pending before the said Court. Taking advantage of filing a suit, the petitioner wantonly refused to pay the rent from the month of April 2020 inspite of repeated demands. The respondent is a senior citizen attained the age of 65 years and also a cardio patient, bye-pass surgery was done and also inserted pace maker. The said rental income is the only source of income to fulfill the respondent's family commitments and for his medical treatment. Hence prayed to dismiss the Revision.

6. That apart, the learned counsel for the respondent relies on the following Judgments to substantiate his case:-

(i) Judgment of Hon'ble Supreme Court reported in 2022 SCC Online SC 829 [Asha Gupta Vs. Vineet Kumar]

(ii) Judgment of Hon'ble Supreme Court reported in 1989 SCC online Mad 270 [Narayana Nadar Vs. Jayakodi Ammal]

(iii) Judgment of Hon'ble Supreme Court reported in 2002 SCC Online Mad 505 [Hema Vs. Parthasarathy]

(iv) Judgment of Hon'ble Supreme Court reported in 2020 SCC Online SC 49 [Desh Raj Vs. Balkrishnan (dead)]

(v) Judgment of Hon'ble Supreme Court reported in (2006) 3 Supreme Court Cases 699 [Jet Ply Wood (P) Ltd., and another Vs. Madhukar Nowlakha and Others]



C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

7. Heard the learned counsel on either side and perused the documents placed on record.

8. The Point now arise for consideration before this Court is 'Whether the trial court was right in allowing the application filed under Order 38 Rule 1 CPC ?'

9. It is necessary to extract Order 38 Rule 1 of Civil Procedure Code

Where defendant may be called upon to furnish security for appearance.—Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave 1[India] under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

That apart, Section 16 of CPC is also extracted below for useful reference:-



C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

WEB COPY

“Suits to be instituted where subject-matter situate.—Subject to the pecuniary or other limitations prescribed by any law, suits—

(a) for the recovery of immovable property with or without rent or profits”

10. It is no doubt that the respondent / plaintiff had filed the suit to eject the petitioner / defendant from suit property along with rental arrears and the same would fall under Section 16 of CPC. That apart, the court below while rendering order in I.A.No.3 of 2022 on 08.02.2023 had stated that ***“The technical plea raised by the respondent / defendant cannot be accepted since admittedly there is a rental arrears of Rs.63,75,000/- and further, it proceeds to state that if no proper order is passed against the petitioner, there is every possibility to prolong the suit without contesting in the interest of justice,*** this Court is completely in agreement with the said portion, because on going through the adjudication of the trial court in I.A.No.3 of 2022, it is seen that the matter was referred to lok adalat for settlement, that apart, for production of bank guarantee and for filing counter, the matter was adjourned on several hearings, further, though arguments were concluded on 19.12.2022 and posted for orders on 23.01.2023, it was again reopened for clarification on 23.01.2023, again adjourned to 27.01.2023, thereafter, the impugned order was passed.



C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

WEB COPY

11. On a perusal of the counter filed by the petitioner in I.A.No.3 of 2022 it is seen that nowhere the petitioner has disputed the landlord - tenant relationship, however, stated that *any claim after such termination can only be in the nature of damages for use and occupation or mesne profits, which cannot be automatic, but has to be followed only by the court.* Further, in the suit, the respondent has contended that the petitioner has not paid rent from April, 2020 taking advantage of the suit filed by the petitioner. Further, the rental agreement was entered on 12.09.2019 between the petitioner and the respondent, wherein the agreed rent was Rs.2,55,000/- per month, however, the same seems to be terminated on 24.09.2019.

12. It is relevant to point out that the Judgment rendered by the Hon'ble Supreme Court reported in 2022 SCC Online SC 829 [Asha Rani Gupa Vs. Vineet kumar] referred supra, which squarely applies to the present case on hand, wherein the said appeal, arose out of a suit for eviction and recovery of arrears of rent as also damages for use and occupation by the plaintiff / appellant therein as against the defendant / respondent, wherein by order dated 01.03.2017, the trial court struck off the defence of the defendant / respondent for failure to pay or deposit the due rent, which was approved by the revisional court therein vide order dated 18.01.2018 and the same has been set aside by the High Court vide



C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

order dated 02.11.2018. The Hon'ble Supreme Court in the said Judgment at Paragraph Nos 44 to 46, has held as under:-

44. In the totality of facts and circumstances, we are clearly of the view that there was absolutely no reason for the High Court to have interfered in the present case, where the Trial Court had struck off the defence after finding that there was no evidence on record to show the payment or deposit of rent in favour of the plaintiff by the defendant- respondent. The Revisional Court had also approved the order of the Trial Court on relevant considerations. Even the High Court did not find the pleas taken by the defendant-respondent to be of bonafide character, particularly when survey number of the shop let out to him was clearly stated in the sale deed executed in favour of the plaintiff. We find it rather intriguing that, despite having not found any cogent reason for which discretion under Rule 5 of Order XV CPC could have been exercised in favour of the defendant-respondent, the High Court, in the last line of paragraph 45 of the order impugned, abruptly stated its conclusion that: 'yet the defendant/tenant deserves some indulgence'.

45. With respect, the said conclusion of the High Court could only be said to be an assumptive one, being not supported by any reason. In paragraph 44, of course, the High Court observed with reference to the decisions of this Court that the discretionary power must be exercised with great circumspection but, such enunciation by this Court cannot be read to mean that whatever may be the fault and want of bonafide in the defendant/tenant, he would be readily given the so-called 'indulgence' of not striking off defence. Such an approach is neither envisaged by the statutory provisions nor by the referred decisions. In fact, such an approach would simply render the relevant provisions of law rather nugatory. The expected circumspection would require the Court to be cautious of all the relevant facts and the material on record and not to strike off the defence as a matter of routine. However, when a case of the present nature is before the Court, disclosing deliberate defiance and volitional/elective non-performance, the consequence of law remains inevitable, that the defence of such a defendant would be struck off.

46. For what has been discussed hereinabove, the impugned order as passed by the High Court cannot be approved and is required to be set aside.

13. It is to be mentioned that in case of suits for recovery of money,



C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

the Delhi High Court has held that no woman can be arrested (**M/s Chelsia Mills V/s M/s Choras girl**, A.I.R. 1991, Delhi 129). It is pertinent to mention here that in case of suits instituted under Section 16 of the code, no order of arrest can be passed before judgment in the following cases:

- i.Suit for re-possession of immoveable property;
- ii.Suit for partition of immoveable property;
- iii.Suit of prohibition or redemption or for redemption of mortgage of such immoveable property;
- iv.Suit for acquiring rights for benefits in any immoveable property;
- v.Suit for sale of immoveable property; and
- vi.Suit for creating charge on immoveable property. (Order 38, Rule 1 and section 16).

Therefore, the court below, on 08.02.2023 has rightly directed the respondent / defendant to pay the arrears of Rs.63,75,000/- on or before 30.03.2023, in default, the respondent / defendant will lose the opportunity to defend the case, however, the petitioner without complying with the said condition, has come up with the present Revision during June, 2023, without taking a single step to deposit even a penny, which is a clear abuse of process of court.

14. In view of the above and considering the facts and circumstances of the present case and the judgment of the Hon'ble Supreme Court referred supra, the present Revision is liable to be dismissed.

Accordingly, the present Revision is dismissed. Consequently,



C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

connected miscellaneous petition is closed. No costs.

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10.10.2023

Index:Yes/No;Internet:Yes/No
Speaking / Nonspeaking order
ssd

To
The Principal District Judge,
Chengalpet.



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C.R.P. No.2125 of 2023 &
C.M.P.No.12944 of 2023

V.BHAVANI SUBBAROYAN J.

ssd

Civil Revision Petition No.2125 of 2023

10.10.2023