



C.R.P.(MD)No.1702 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 04.08.2023

CORAM:

THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

C.R.P.(MD)No.1702 of 2019

S.Somasundara Gurukkal

... Revision Petitioner/Petitioner/
Plaintiff

-vs-

Chithambaram Gurukkal

... Respondent/Respondent/
Defendant

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 06.03.2019 in I.A.No.431 of 2015 in O.S.No.301 of 2015 on the file of the Principal Sub Court, Pudukkottai.

For Petitioner : Mr.M.Gandhirajan

For Respondent : Mr.S.Parthasarathy

ORDER

The present Civil Revision Petition has been filed by the petitioner under Article 227 of the Constitution of India, against the fair and decreetal



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order dated 06.03.2019 in I.A.No.431 of 2015 in O.S.No.301 of 2015 on the file of the Principal Sub Court, Pudukkottai.

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2. The petitioner is the plaintiff and the respondent is the defendant before the Court below.

3. For the sake of convenience, the parties will be referred to as per the litigative status before the trial Court.

4. According to the plaint, the petitioner has filed the suit for recovery of a sum of Rs.2,00,000/- (Rupees Two Lakhs only) with future interest. While the suit was pending, the plaintiff has filed an application for the attachment of the property before judgment.

5. The said application was resisted by the respondent, and after hearing both sides, the Court below has dismissed the application and rejected the prayer of the petitioner, vide order dated 06.03.2017. Aggrieved with the order, the petitioner has come before this Court by way of revision petition filed under Article 227 of the Constitution of India.



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6. The learned counsel for the petitioner would submit that the very dismissal order in an application filed under Order XXXVIII Rule 5 of C.P.C, and that, the reason stated by the Court below is perverse. Hence, he prayed to allow this Civil Revision Petition.

7. However, the learned counsel for the respondent would submit that as per Order 43 Rule 1(q) of C.P.C, against the order passed under Order XXXVIII Rule 2 of C.P.C, the only remedy is to prefer a regular appeal as provided under Order 43 of C.P.C and not filing Civil Revision Petition. Hence, prayed to dismiss this petition.

8. For ready reference, Order XLIII Rule 1(q) of C.P.C is extracted hereunder:

“ORDER XLIII – APPEALS FROM ORDERS

1. An appeal shall lie from the following orders under the provisions of Section 104, namely:-

.....

(q) an order under Rule 2, Rule 3 or Rule 6 of Order XXXVIII;”



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9. However, the learned counsel for the petitioner would submit that they filed an application only under Order XXXVIII Rule 5 of C.P.C, and not under Order XXXVIII Rule 2, 3 or 6 of C.P.C. Hence the same does not come under the provisions of Order XLIII Rule 1(q) of C.P.C, and they further relied upon the judgment of the Panjab-Hariyana High Court in ***Civil Revision No.2147 of 2013 (Gurdeep Singh Vs..M/s.Krishna Agricultural Steel)*** dated 21.01.2016, and submit that the very revision is maintainable.

10. No doubt, Order XLIII Rule 1(q) CPC do not speak about an order passed under Order XXXVIII Rule 5 of C.P.C., which only deals to furnish security. Whereas, in the petition, the petitioner sought for a prayer of attachment. Therefore, though the petitioner mentioned wrong provision in their petition as if Order XXXVIII Rule 5 of C.P.C, which will not militate the spirit of Order XLIII of C.P.C. Further on harmonious reading of the prayer sought for in the petition, it only comes under Order XXXVIII Rule 6 of C.P.C, as the petitioner ultimately sought for the relief of attachment.

11. Therefore, this Court is of the view that, as rightly submitted by the learned counsel for the respondent, the instant revision is not maintainable



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before this Court in view of Order XLIII Rule 1 (q) of C.P.C. The only available remedy to the petitioner is to prefer regular appeal. It is useful to refer to the judgment reported in **2022 (10) SCC 477 (Mohamed Ali Vs.V.Jaya and another)** and paragraph Nos.17 to 19 are as follows:

“17. Even otherwise and as observed hereinabove, against the exparte judgment and decree, the remedy by way of an appeal before the First Appellate Court was available. Therefore, the High Court ought not to have entertained the revision application under Section 115 of CPC and under Article 227 of the Constitution of India. The High Court ought not to have entertained such a revision application challenging the exparte judgment and decree. Once there was a statutory alternative remedy by way of an appeal available to the defendants, the High Court ought not to have entertained a writ petition or revision application under Article 227 of the Constitution of India.

18. At this stage, the decision of this Court in the case of Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and Ors. Vs. Tuticorin Educational Society and Ors.; (2019) 9 SCC 538, is required to be referred to. In the said decision, it is



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observed and held by this Court that wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under CPC, will deter the High Court and therefore, the High Court shall not entertain the revision under Article 227 of the Constitution of India especially in a case where a specific remedy of appeal is provided under the CPC itself. While holding so, it is observed and held in paragraphs 11 to 13 as under:

“11. Secondly, the High Court ought to have seen that when a remedy of appeal under Section 104(1)(i) read with Order 43, Rule 1(r) of the Code of Civil Procedure, 1908, was directly available, Respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In A. Venkatasubbiah Naidu v. S. Chellappan [A. Venkatasubbiah Naidu v. S. Chellappan, (2000) 7 SCC 695] , this Court held that “though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well recognised principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a constitutional remedy”.



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12. But courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure, and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasijudicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which Respondents 1 and 2 invoked the jurisdiction of the High Court. This is why, a 3member Bench of this Court, while overruling the decision in *Surya Dev Rai v. Ram Chander Rai* [*Surya Dev Rai v. Ram Chander Rai*, (2003) 6 SCC 675] , pointed out in *Radhey Shyam v. Chhabi Nath* [*Radhey Shyam v. Chhabi Nath*, (2015) 5 SCC 423 : (2015) 3 SCC (Civ) 67] that “orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts”.



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13. Therefore wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of selfimposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself.”

19. Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand, the High Court ought not to have entertained the revision petition under Article 227 of the Constitution of India against the exparte judgment and decree passed by the learned Trial Court in view of a specific remedy of appeal as provided under the Code of Civil Procedure itself. Therefore, the High Court has committed a grave error in entertaining the revision petition under Article 227 challenging the exparte judgment and decree passed by the learned Trial Court and in quashing and setting aside the same in exercise of powers under Article 227 of the Constitution of India.”



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12. The above reported judgment is self explanatory, and that as per the above judgment, when there is a provision providing a regular appeal, the jurisdiction under Article 227 of the Constitution of India cannot be entertained.

13. Therefore, this Court is of the view that this Civil Revision Petition is not maintainable. However, the petitioner is given a liberty to prefer regular appeal under Order XLIII of C.P.C, within a period of four weeks from the date of receipt of this order, if he is advised to do so. In such an event while calculating the limitation, the period in which this civil revision petition is pending, is ordered to be excluded as per Section 14 of the Limitation Act.

14. In the result, this Civil Revision Petition is **dismissed**. There shall be no order as to costs.

04.08.2023

NCC : Yes/No
Index : Yes / No
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To
1. The Principal Sub Court,
Pudukkottai.



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C.KUMARAPPAN,J.

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