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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 23.03.2023

+ CM(M) 968/2022 & CM APPL. 40638/2022, CM APPL. 9089/2023, CM APPL. 9090/2023

MS RANJITA BETARBET Petitioner
versus

SUBIR BANERJEE Respondent

Advocates who appeared in this case:

For the Petitioner : Ms. Anisha Banerjee, Adv.

For the Respondent : Ms. Maryada Banerjee, Adv.

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

1. Ms. Anisha Banerjee, learned counsel appearing for the petitioner submits that she is unable to appear in person as she has fractured her foot, however, has appeared and argued the issue of maintainability through VC.

2. This Court has taken a consistent view in various matters to the effect that challenge to the dismissal of an application under Order VII Rule 11 CPC, 1908 would not fall within the purview of under Article 227 of the Constitution of India and has to be necessarily dealt with, under appropriate provision under the Code of Civil Procedure, 1908.

3. The aforesaid view is taken on the basis of the judgment of the Hon'ble Supreme Court rendered in ***Shiv Shkati Coop. Housing Society Vs. Swaraj Developers*** reported in (2003) 6 SCC 656 whereby it was held that amendments in the year 2002 to the Code of Civil Procedure, 1908 in respect of provision of Section 115 CPC would bar the Court under Article 227 of the Constitution of India to deal with dismissal of an application under Order VII Rule 11 CPC. The relevant para is reproduced as under:-

“32. A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes" then the revision is maintainable. But on the contrary, if the answer is "no" then the revision is not maintainable. Therefore, if the impugned order is interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject-matter of revision under Section 115. There is marked distinction in the language of Section 97(3) of the Old Amendment Act and Section 32(2)(i) of the Amendment Act. While in the former, there was a clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32(2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation.”

4. The said view is further fortified by the judgment of Hon'ble

Supreme Court in ***Sadhna Lodh Vs. National Insurance Co. Ltd. and Another*** reported in (2003) 3 SCC 524 wherein it was held as under:-

“6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Articles 226/ 227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149 (2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act (see National Insurance Co. Ltd. v. Nicol/etta Rohtagi!). This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to the High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of illustration, where a trial court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115 CPC, in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State Legislature has barred a remedy of filing a revision

petition before the High Court under Section 115 CPC, no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of the High Court under Article 226 of the Constitution.”

5. In view of the aforesaid ratio and settled law laid down by the Hon’ble Supreme Court in the aforesaid judgments, this Court is of a clear and considered opinion that the dismissal of an application under Order VII Rule 11 CPC, 1908 could be challenged under the provision of Section 115 of the Civil Procedure Code, 1908 and not under Article 227 of the Constitution of India.

6. No doubt, that the exercise of jurisdiction on such aspects may be overlapping, however, once a specific remedy is available under a particular statute, in this case, the Code of Civil Procedure, 1908, the alternate remedy under the writ jurisdiction under Article 227 of the Constitution of India exercising supervisory jurisdiction, ordinarily, ought not to be exercised.

7. That having said, it is also relevant to note that the challenge to an order of dismissal of an application under Order VII Rule 11 CPC, 1908 ordinarily entails challenge on merits raised in such application and not the procedural aspects of exercise of such jurisdiction of the civil Court. It is trite that the Constitutional Courts under Article 227 of the Constitution of India, exercise jurisdiction to correct the errors of procedures and such errors which materially affect the procedure as specified in the Code of Civil Procedure, 1908.

8. Keeping that in view, it is clear that the petition under Article 227 of the Constitution of India challenging the dismissal of an application

under order VII Rule 11 CPC, is clearly not maintainable.

9. However, having regard to the fact that the notice was indeed issued in the present petition and that the petition has been pending for quite some time now, this Court is of the considered view that interest of justice would be subserved to grant liberty to the petitioner to file an appropriate petition before this Court under the appropriate provision of law within four weeks from today.

10. The order dated 14.09.2022 passed by this Court particularly paragraph 5 observed as under:-

“Further proceedings in the suit, if any, would remain subject to the outcome of these proceedings”

Keeping in view of the interim order, this Court considers it appropriate to extend the same for next four weeks from today within which the alternate remedy be availed.

11. In view of the aforesaid direction, the petition is disposed of with no order as to costs.

12. Pending applications also stand disposed of.

TUSHAR RAO GEDELA, J .

MARCH 23, 2023/ms