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C.R.P. No. 3201 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.07.2024

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THE HONOURABLE MR. JUSTICE P.DHANABAL

C.R.P. No. 3201 of 2022
and
C.M.P. No. 17055 of 2022

R.Yasotha ... Petitioner / Petitioner / 1st Respondent

Vs.

1. P.Akilan ... 1st Respondent / 1st Respondent / Petitioner

2. The Branch Manager,
M/s. Tamil Nadu State Transport Corporation Ltd.,
Salem Division,
No.12, Ramakrishna Road,
Salem District.

3. The New India Assurance Co. Ltd.,
Rep by its Branch Manager,
Madanagopalapuram,
Perambalur District. ... Respondents 2 & 3 / Respondents 2 & 3 /
Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, 1950, to set aside the fair and decreetal order dated 10.02.2022 passed in I.A. No. 4 of 2021 in M.C.O.P. No. 142 of 2015 on the file of the Motor Accident Claims Tribunal at Perambalur (In the Court of Chief Judicial Magistrate, Perambalur).



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For Petitioner : Mr. R.Venkatesulu
For R1 and R2 : No appearance
For R3 : M/s. K.Thirunavukkarasu

ORDER

This Civil Revision Petition has been preferred as against the order dated 10.02.2022 passed in I.A. No. 4 of 2021 in M.C.O.P. No. 142 of 2015 on the file of the Motor Accident Claims Tribunal, Perambalur / the Chief Judicial Magistrate, Perambalur, wherein, the petitioner herein has filed petition to condone the delay of 1024 days in filing the petition under Order IX Rule 13 of CPC to set aside the Exparte Award dated 22.01.2018 in M.C.O.P. No. 142 of 2015 and the same was dismissed as not maintainable since the main petition was contested by other respondents and order was passed.

2. According to the petitioner, she is the 1st respondent in the main petition, who was the owner of the vehicle which involved in the accident. The main M.C.O.P. was filed by the 1st respondent herein as against the petitioner and 2nd and 3rd respondents. Before the Trial Court, the petitioner/1st respondent was set *exparte* and thereafter, the matter was contested by other respondents and an Award was passed on 22.01.2018 Therefore, the Trial Court has passed order and dismissed the petition as not maintainable.



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3. The learned counsel appearing for the petitioner would contend that the petitioner was arrayed as 1st respondent in the main petition. In the main petition, the petitioner/1st respondent was set *exparte*. In the order itself, the Trial Court mentioned about the *exparte* of this petitioner/1st respondent and passed order. Before the Trial Court, the other respondents have not contested the case properly. In fact, the driver of the petitioner/1st respondent had valid licence to drive the transport vehicle on the date of accident and he obtained licence from the RTO Office, Chidambaram, Cuddalore District but the Insurance Company has examined the officials of RTO Office at Perambalur and thereby, the Trial Court came to a conclusion that the driver of the petitioner/1st respondent had no valid licence and passed decree of pay and recovery. Before the Trial Court this petitioner was set *exparte* and other respondents contested the case and then Award was passed. Thereafter, the petitioner filed petition to set aside the *exparte* decree passed against her under Order IX Rule 13 of CPC along with petition under Section 5 of the Limitation Act to condone the delay of 1024 days, but the Trial Court has dismissed the condone delay petition as not maintainable, since other respondents contested the case and award was passed on merits. Against which, this petition is filed. Since the petitioner was set *exparte*, she was unable to adduce evidence on her side and only she filed petition to set aside



the *exparte* decree passed against her. Therefore, the order passed by the Trial Court is liable to be set aside.

4. The learned counsel appearing for the 3rd respondent would contend that already, before the Trial Court, on the side of the main petitioner/claimant and respondents examined the witnesses and after contesting the case, the matter was disposed of on merits and no *exparte* order was passed. Therefore, the petitioner herein has no right to file petition to set aside the *exparte* order along with condone the delay application. The Trial Court has passed reasoned order. Therefore, the order passed by the Trial Court is in order and the present Civil Revision Petition is liable to be dismissed.

5. This Court heard both sides and perused the materials available on record.

6. On perusal of records, it is observed that the petitioner/1st respondent was set *exparte* on 31.03.2015 and thereafter the case was contested by other respondents and Award was passed on 22.01.2018 after full trial. Thereafter, the petitioner herein has filed petition to condone the delay of 1024 days in filing the petition under Order IX Rule 13 of CPC but the said petition was



dismissed as not maintainable since the order was contested and not *ex parte* order. Though the petitioner/1st respondent was set *ex parte* before the main proceedings, according to the Trial Court since the other respondents have adduced evidences, the claim was decided based on those evidences. Therefore, the order is on merits, thereby, dismissed the petition as not maintainable. According to the petitioner, she was set *ex parte* and without her presence the main petition was decided, therefore, the decree is *ex parte* decree.

7. At this juncture, it is relevant to refer the judgment of this Court in ***Vimalammal -vs- Duraisamy Naidu--*** reported in **2003 (3) CTC 339**, wherein this Court in para no.9 held as follows:-

"A defendant against whom an ex parte decree is passed has several remedies open to him. He can file petition under Order 9, Rule 13 to set aside the ex parte decree and if there is sufficient cause for his absence or if he shows that summons had not been served, such ex parte decree can be set aside. If summons in a suit is fraudulently suppressed and the decree is obtained, such an aggrieved person can also file a separate suit for setting aside the decree on the basis of the fraudulent suppression of summons. Even without taking recourse: todift, aforesaid remedies, an aggrieved defendant, against whom an ex parte decree has been passed, can also file an appeal



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challenging the decree on merit. However, in such an appeal he can succeed only if it is established that the judgment of the trial Court is erroneous in law or in fact."

The Hon'ble Supreme Court of India in a case in **Bank of India -vs- M/s. Mehta Brothers & Ors.** reported in (2009) 1 LW 439 in para nos. 19 and 20 held as follows:-

"19. Now, let us interpret the provisions under Order 9 Rule 13 of the Code and particularly examine the scope of the proviso to Order 9 Rule 13 of the Code. In the light of the issue framed by us, as noted hereinafter, we need to ascertain whether under Order 9 Rule 13 of the Code, it is permissible for the court, on an application of a defendant against whom a decree has been passed ex parte, to set aside the decree also against the other defendants appearing in the same suit and dismissed on contest.

20. At the risk of repetition, we may also examine whether the Division Bench of the High Court was justified in setting aside the judgment of the learned Single Judge to the extent that the decree of dismissal passed in favour of Respondents 1 to 5 could also be set aside along with the ex parte decree being set aside against Respondent 6 or, whether under Order 9 Rule 13 of the Code, the court on an application by a defendant against whom the decree has been passed ex parte can set aside the decree not only against the defendant applying for setting aside the ex parte



decree but also the decree passed in favour of the other defendants who appeared and contested the suit."

On a careful perusal of those judgments, it is clear that the only requirement for the applicability of Order IX Rule 13 is that the decree should be *exparte* against the defendant applying to have it set aside. Thus, the language of the Order IX Rule 13 does not suggest that for the order to apply the decree must be entirely *exparte*. Even the other defendants contested the suit and decree passed on merits, if any of the defendants was set *exparte*, they can file application under Order IX Rule 13 to set aside the *exparte* decree. If the *exparte* decree is indivisible, the entire decree has to be set aside, i.e., not only against the person who applied to set aside the *exparte* decree but also against other persons who already contested the case. If the decree is divisible, then as against the defendants who filed petition to set aside the *exparte* decree under Order IX Rule 13 alone can be set aside.

8. In the case on hand also the petitioner was set *exparte* and the main petition was contested by other respondents, therefore as far as this petitioner is concerned it is *exparte* decree and the petition under Order IX Rule 13 is well maintainable.



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9. The Trial Court has relied the judgment of this Court in ***Tamil Nadu State Transport Corporation, (Kumbakonam Division IV) Ltd., through its Branch Manager, Trichy -vs- The Tiruchirapalli Consumer Co-operative Wholesale Stores, Trichy*** reported in ***[2011 (1) TNLJ 177 (Civil)***, wherein this Court has not discussed about the judgment of Hon'ble Supreme Court of India in ***Bank of India -vs- M/s. Mehta Brothers & Ors.*** reported in (2009) 1 LW 439. Further the petition was disposed on merits and not on maintainability. Therefore, the said case law cited by the Trial Court is no way relevant to the facts of the case.

10. In view of the above said discussions, this Court is of the opinion that the Trial Court failed to consider that the petitioner was set exparte in the main petition and the petition under Order IX Rule 13 of CPC is maintainable irrespective of the fact that other respondents have contested the case and it was decided on merits and decree was passed. Therefore, the order passed by the Trial Court is unsustainable and the same is liable to be set aside. It is for the Trial Court to decide as to whether the order passed in the main petition is indivisible or not, if the decree is divisible then to pass order in respect of the petitioner. Otherwise pass order in respect of entire decree. Since this petition is filed only to condone the delay in filing the petition under Order IX Rule



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13, the Trial Court has to see the merits of the case in condoning the delay and thereafter has to decide the Order IX Rule 13 petition. Since the Trial Court dismissed the petition on the ground that not maintainable, merits of the petition has not been tested by the Trial Court. Therefore, the Trial Court has to pass order in the Section 5 of the Limitation Act application i.e., I.A. No. 4 of 2021 in M.C.O.P. No. 142 of 2015 on merits.

11. In the result, this Civil Revision Petition is allowed and the order dated 10.02.2022 in I.A. No. 4 of 2021 in M.C.O.P. No. 142 of 2015 passed by the Trial Court is set aside, and the matter is remanded back to the Trial Court for fresh consideration on merits. No costs. Consequently, the connected Miscellaneous Petition is closed.

30.07.2024

Index : Yes/No
Speaking order : Yes/No
NCC : Yes/No
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To

The Motor Accident Claims Tribunal at Perambalur.



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P.DHANABAL, J.,

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