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CRP.Nos.2088, 2089 & 2091 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.11.2024

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.R.P.Nos.2088, 2089 & 2091 of 2024
and C.M.P.Nos.11163 to 11165 of 2024

M.Saravanan

.. Petitioner in all CRPs

Versus

N.Ponnurangam

.. Respondents in all CRPs

Common Prayer:- Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order and decretal orders dated 27.03.2024 passed by the learned XXII Assistant Judge, City Civil Court, Chennai in I.A.Nos.3, 1 and 2 of 2024 in O.S.No.5014/2021.

In all CRPs

For Petitioner : Mr.N.Sivaprakash

For Respondent : Mrs.T.Jayanthi

COMMON ORDER

C.R.P.No.2088 of 2024 has been filed challenging the order of the dismissal in I.A.No.3 of 2024 filed for grant of unconditional leave to defend the suit in O.S.No.5014 of 2022.



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1.b. C.R.P.No.2089 of 2024 has been filed challenging the order of the dismissal in I.A.No.1 of 2024 filed to condone the delay of 348 days in filing the application for setting aside the exparte order dated 05.01.2023 passed in the above suit.

1.c. C.R.P.No.2091 of 2024 has been filed challenging the order of the dismissal in I.A.No.2 of 2024 filed to set aside the exparte order dated 05.01.2023 passed in the above suit.

2. The brief background of the case is as follows:

2.a. The respondent has filed a suit for recovery of a sum of Rs.4,00,000/- together with interest @ 24% p.a., According to the respondent, the petitioner approached him for a hand-loan for running his travel business and has executed a promissory note. After several request, the defendant/revision petitioner has issued a cheque on 27.04.2022 bearing No.000002 drawn on the UCO Bank, Pallikaranai Branch in favour of the plaintiff. When the cheque was presented for encashment on 28.04.2022, the same was returned with a memo stating "Insufficient Funds". Hence, legal notice was issued by the plaintiff on 23.05.2022 for



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repayment of the borrowed amount and filed a suit. The suit was decreed exparte on 05.01.2023. Hence, the above applications were filed before the Trial Court and the same were dismissed. Challenging the same, these revisions.

3. It is the contention of the revision petitioner in the application that there is no privity of contract between the plaintiff and the defendant. The petitioner's father in law, late S.Peter Devadoss had borrowed a sum of Rs.7 lakhs from one Mr.Singaram, advocate and the said Singaram had obtained 6 cheques. Since, the petitioner's father in law was unable to repay the amount, an unregistered sale deed was executed by the petitioner's father in law. In the same deed, as per the instructions of the said Singaram, the sale amount was shown as Rs.12,75,000/- in the document so that the income tax problem and stamp duty can be avoided, but assured that Rs.14,00,000/- will be paid to the petitioner's father in law and handed over the unfilled cheques. Thereafter, Singaram paid Rs.8,00,000/- and the balance amount of Rs.6,00,000/- has to be paid, however, the same has not been paid. Therefore, petitioner's father in law lodged a complaint before the Commissioner of Police, Vepery. In order to take revenge, the said



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Singaram had set up one Venkatesan and filed a suit as against the petitioner's father in law. Thereafter, the present suit has been filed by the plaintiff who is set up by Mr.Singaram. According to the petitioner, there is no privity of contract. He has contended that though the summons in the above case had been served to the petitioner due to the sudden death of the petitioner's father in law, he had to take up the responsibility of the entire final rituals and family commitments. Therefore, he had handed over the summons in the above suit to one Dinesh Kumar to appear on the petitioner's behalf. Thereafter, Mr.Singaram met the petitioner and assured that he would inform the plaintiff to withdraw the suit. Hence, the petitioner was under the fond hope that the above suit will be withdrawn. However, the petitioner received a notice in E.P.No.3371 of 2023. Therefore, there was a delay of 348 days in filing the application for setting aside the exparte order.

4. Counter has been filed by the respondent denying the entire allegations and submitted that the amount has been received by the petitioner/defendant for purchase of vehicle for his travel business and promised to re-pay with interest @ 24% pa and had executed a promissory



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note. Upon several requests, the defendant/revision petitioner has issued a cheque, on presentation, the same was dishonoured. Hence, the present suit. Since the petitioner did not appear before the Trial Court, the suit was decreed ex parte. The revision petitioner filed applications before the Trial Court to setting aside the ex parte order, for condoning the delay in filing the application for setting aside the ex parte order and leave to defend the suit. The Trial Court vide the impugned orders, dismissed the applications. Challenging the same, these revisions.

5. The learned counsel for the revision petitioner submitted that summons has been served on the petitioner since his father in law died due to the sudden death. He was in charge of the entire family affairs and entrusted the vakalat to one Dinesh Kumar. Thereafter, Mr.Singaram met the petitioner and assured that he would inform the plaintiff to withdraw the suit. Hence, the petitioner was under the fond hope that the above suit will be withdrawn. However, the same has not been withdrawn. According to him, even at the time of filing the revisions, he had already deposited 25% of the suit claim before the Trial Court, i.e., Rs.2,05,984/-. Hence, submitted, the delay has to be condoned by giving a liberal approach.



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6. Whereas, the learned counsel for the respondent submitted that the revision as against the dismissal of the ex parte order is not maintainable and the delay has not been properly explained. In support of his submissions, he also placed reliance upon the judgment of the Hon'ble Supreme Court dated 01.12.2023 made in SLP.No.5489 of 2021 in the case of the *Koushik Mutually Aided Cooperative Housing Society vs. Ammena Begum and another*, wherein, the Hon'ble Apex Court has held as follows:

" 15. Against the order passed under Order IX Rule 13 CPC rejecting an application for seeking setting aside the decree passed ex-parte, an appeal is provided. When an application is filed seeking condonation of delay for seeking setting aside an ex-parte decree and the same is dismissed and consequently, the petition is also dismissed, the appeal under Order XLIII Rule 1(d) CPC is maintainable. Thus, an appeal only against the refusal to set aside the ex-parte decree is maintainable whereas if an order allowing such an application is passed, the same is not appealable.

16. Thus, when an application or petition filed under Order IX Rule 13 CPC is dismissed, the defendant can avail a remedy by preferring an appeal in terms of Order XLIII Rule 1 CPC. Thus, Civil Revision Petition under Section 115 of the CPC would not arise when an application/petition under Order IX Rule 13 CPC is dismissed. Thus, when an alternative and effective appellate remedy is available to a defendant, against an ex-parte decree, it would not be appropriate for the defendant to resort to filing of revision under Section 115 of the CPC challenging the order refusing to set aside the order of setting the defendant ex-parte. In



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view of the appellate remedy under Order XLIII Rule 1(d) CPC being available, revision under Section 115 of the CPC filed in the instant case was not maintainable.

7. Heard both sides and perused the materials placed on record.

8. With regard to the delay in filing the application to set aside the exparte order is concerned, the petitioner has pleaded that there was no privity of contract with the respondent and it is the further contention that due to the death of his father in law, as he did all the rituals, he handed over the case bundle and Vakalat to one Dinesh Kumar and further, Singaram with whom the main transaction has taken place had informed that the suit will be withdrawn by the respondent/plaintiff, however, the same was not withdrawn. Upon notice in the Execution Petition, the petitioner immediately filed the applications.

9. Though the Trial Court found that the petitioner's father in law died on 15.10.2021 and the suit summons was served upon the revision petitioner on 28.09.2022, this Court is of the view that while considering the application under Section 5 of the Limitation Act, the Court has to keep in mind the expression "sufficient cause" must receive a liberal construction so as to advance substantial justice and general delays be condoned in the



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interest of justice and particularly when the length of delay is not so huge and explanatory reasons has been given. In the absence of anything showing malafide or deliberate delay as a dilatory tactics, the Court should lean in favour of the substantial justice by condoning the delay. The delay in this case is only 348 days in filing the application to set aside the exparte order. The revision petitioner as directed by this Court has also deposited 25% of the suit claim before the Trial Court, i.e., Rs.2,05,984/-. Therefore, as there was no materials produced on record to show that there were delaying tactics adopted by the petitioner. Though the petitioner was not vigilant in appearing on time before the Court, the same cannot be put against him to take away his substantial right to defence.

10. Considering the nature of the pleadings, this Court is of the view that one more opportunity may be given to the petitioner to put forth his defence, since, he has already deposited a part of the suit amount before the Trial Court. Hence, the order dismissing the application I.A.No.1 of 2024 filed to condone the delay in filing the petition to set aside the exparte order is hereby set aside.



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11. As far as the revision against the order dismissing the petition filed to set aside the exparte order is concerned, it is relevant to note that application in I.A.No.2 of 2024 has not been dismissed, it has been closed.

The order in I.A.No.2 of 2024 dated 27.03.2024 reads as follows:

... This petitioner is filed by the petitioner/defendant under Order XXXVII, Rule 4 of CPC to set aside the ex-parte decree passed in O.S.No.5014 of 2022 dated 05.01.2023. Petition to condone delay in I.A.No.1 of 2024. Hence, this petitioner is hereby closed."

12. Similarly, revision against the order dismissing the application filed seeking leave to defend the suit is concerned, it is relevant to note that the said application in I.A.No.3 of 2024 is also closed in light of the dismissal of I.A.No.1 of 2024.

13. In fact, the above order clearly indicates that the applications have not been dismissed, the same have been closed without recording any reasons as to whether they are allowed or dismissed. Therefore, the question of filing an appeal does not arise at all. In the event the application filed to set aside the exparte decree is dismissed, the defendant can avail the remedy in terms of Order XLIII Rule 1 of CPC. The Hon'ble Apex Court in SLP.No.5489 of 2021 has held that when an application is filed seeking



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condonation of delay and for setting aside an ex-parte decree and the same is dismissed and consequently, the petition is also dismissed, the appeal under Order XLIII Rule 1(d) CPC is maintainable. Whereas, as it is stated above, the Trial Court has not passed any order dismissing the application to set aside the exparte decree. This Court is of the view that when the order has been passed in contravention to statutory provisions and without any finding, merely because the application has been closed, it cannot be stated that only appeal will lie. Therefore, when the Order itself is illegal and not in terms of the well established procedure, there is no bar for the High Court under Article 227 of the Constitution of India to interfere with that Order by entertaining the revision.

14. It is also to be noted that the Hon'ble Supreme Court in the case of *State of U.P. vs. District Judge, Unnao and others* reported in (1984) 2 SCC 673 has held that since the appellant had established that he was prevented by sufficient cause from preferring appeal in time, it is sufficient for the High Court to invoke its jurisdiction under Article 226 or 227 of the Constitution of India to reverse the trial court's order of refusal to condone delay in the interest of justice.



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15. Though the judgment in the Koushik Mutually Aided Cooperative Housing Society (cited supra) has held that in view of the appellate remedy under Order XLIII Rule 1(d) CPC being available, revision under Section 115 of the CPC is not maintainable, however, in that judgment, the earlier judgment of the Hon'ble Supreme Court in State of U.P (referred above) was not considered. The 5-Judge Constitution Bench of the Hon'ble Supreme Court in the case of *National Insurance Company Limited vs. Pranay Sethi* reported in (2017) 16 SCC 680 has held that in any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts. The relevant portion of the judgment reads as follows:

“35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has



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been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in National Insurance Company Limited vs. Pranay Sethi, reported in (2017) 16 SCC 680. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it.”

16. At any event, as discussed above, the present case is only against the closure of application, not against the dismissal of the application. Hence, the revision is maintainable.

17. Accordingly, the Orders passed in the applications in closing the petition to set aside the exparte decree; petition seeking leave to defend the suit and dismissing the application filed seeking to condone the delay in filing the set aside petition as against the exparte decree, are set aside.

18. The Trial Court is directed to hear the applications in I.A.No.2 & 3 of 2024 filed under Order IX Rule 13 of CPC and leave to defend the suit on merits and pass orders within a period of three months from the date of receipt of a copy of this Order. It is made clear that while passing order, the Trial Court shall take into consideration of the fact that the petitioner has



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already deposited a part of the decretal amount, no malafides established against him, liberal approach shall be taken for advancing substantial justice. In the event of allowing such applications, the Trial Court shall dispose of the suit within a period of eight months thereafter.

19. Accordingly, these revisions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

08.11.2024

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Index : Yes/No

Internet : Yes/No

To,

The XXII Assistant Judge
XXII Assistant City Civil Court
Chennai



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N.SATHISH KUMAR, J.,

dhk

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