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O.S.A.No.112 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.08.2024

CORAM :

THE HON'BLE MR.JUSTICE S.S.SUNDAR
AND
THE HON'BLE MR.JUSTICE K.RAJASEKAR

O.S.A.No.112 of 2023

Hiroo Hotchand Advani
S/o Late Hotchand Gopaldas Advani .. Appellant

v.

1. Integrated Finance Company Limited
rep.by its Authorised Signatory
Having its registered office at "R 10"
II Floor, Prem Nagar Colony
South Boag Road, T.Nagar
Chennai 600 017
2. Business India
rep.by its Partner Mr.Ashok Hotchand Advani
14th Floor, Nirmal Building
Nariman Point, Church Gate
Mumbai 400 021
3. Mr.Ashok Hotchand Advani
Partner, Business India
21, Frameroze Course



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Marine Drive, Mumbai 400 020

Mr.Rajkumar Hotchand Advani (deceased)

Partner, Business India

14th Floor, Nirmal Building

Nariman Point, Church Gate

Mumbai 400 021

(3rd defendant is given up and memo recorded

as per order dated 24.02.2021

in C.S.No.530 of 2011)

.. Respondents

Memorandum of Grounds of Original Side Appeal under Order XXXVI, Rule 9 of the Original Side Rules read with Clause 15 of the Letters Patent, against the order dated 17.03.2023 passed by the learned single Judge in Application No.1255 of 2023 in C.S.No.530 of 2011.

For Appellant :: Mr.P.S.Raman
Senior Counsel for
Mr.B.Arvind Srevatsa

For Respondents :: Mr.V.P.Raman for R1/Caveator

JUDGMENT

(Judgment of the Court was made by S.S.SUNDAR,J.)

This original side appeal is directed against the order of the learned single Judge dated 17.03.2023 passed in Application No.1255 of 2023 in C.S.No.530 of 2011.



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2. The brief facts that are necessary for the disposal of this appeal are as follows:-

The first respondent herein, as plaintiff, filed the suit in C.S.No.530 of 2011 to direct the defendants jointly and severally to pay a sum of Rs.21,88,11,459.96p along with future interest at 36% per annum from the date of plaint till the date of realisation. The first defendant is the partnership firm and the other defendants including the appellant are partners. It is the case of the appellant/fourth defendant that he was admitted into the partnership on 01.01.1980 and the partnership was at will. It is now contended by the appellant that he resigned from the partnership on 18.11.2003 and the suit was filed in the year 2010 when the appellant was no longer a partner of the first defendant firm.

3. It is not in dispute that an ex parte decree was passed on 15.11.2021. Therefore, the appellant filed an application to set aside the ex parte decree along with an application to condone the delay of 423 days in filing the petition to set aside the ex parte decree. In the affidavit filed in



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support of the petition to condone the delay, the appellant has raised several grounds on the merits of the claim. Even though the receipt of summons was not seriously disputed, the contention of the appellant is that he was not residing in the address where the suit notice was sent and summons were subsequently served. Since the appellant has engaged a counsel as found from the records, this Court need not go into the issue whether there was proper service of notice or summons. Even though it is not stated in the original affidavit filed in support of the petition to condone the delay, in the affidavit filed before this Court, a specific contention is raised that the appellant had entrusted the case to be handled by his brother, who is also a partner of the first defendant firm. It was in that context, the learned Senior Counsel appearing for the appellant submitted that the appellant may also be shown some indulgence for not putting forth all these facts in the affidavit filed in support of the petition to condone the delay.

4. The delay in this case is inordinate and the explanation offered by the appellant has been considered by the learned single Judge while



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dismissing the application to condone the delay of 423 days. The first respondent has filed the suit against four defendants including the appellant. The fact that the appellant was a partner of the firm originally is not in dispute. However, the appellant, according to him, was not a partner when the suit was filed. The liability of the firm against any third party can be fastened on the partners of the firm, if the transaction relates to the period covered at the relevant point of time.

5. This Court will not go into the contentious issues raised by the appellant on merits. However, going by the facts and circumstances of this case, the appellant has made out a prima facie case that there are arguable points and contentious issues. The suit claim appears to be based on the hire purchase agreement, which was executed on 31.03.1998 for a sum of Rs.95 lakhs and odd. The suit was filed in 2010 on the basis of some amount paid by the first defendant firm acknowledging the debt just one year prior to the institution of the suit.



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6. In an application filed to set aside the ex parte decree or in the application to condone the delay in filing the petition to set aside ex parte decree, this Court may not decide the applications on the merits of the suit claim. However, in this case, only to examine the bonafides of the appellant, this Court finds that the appellant's bonafides in filing the application at a belated date, cannot be doubted. However, the fact remains that the appellant has not stated all the reasons in the affidavit filed in support of the application before the learned single Judge. However, from the counter affidavit filed by the first respondent/plaintiff, we are unable to find any material to discard the statements of the appellant in the affidavit. This Court and the Hon'ble Supreme Court have always been liberal while considering the petition to condone the delay. The aggrieved party, in an application to condone the delay, is expected to give bonafide reasons to the satisfaction of the Court. When the litigant owes a duty to the Court to explain the delay, the reason cannot be expected with mathematical precision, as has been reiterated by this Court and the Hon'ble Supreme Court. There cannot be a strict or rigid formula that can be adopted in all



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cases. The application is dismissed by the learned single Judge, merely because the appellant has participated in the proceedings at an earlier stage and has engaged an Advocate, who has filed Vakalat on behalf of the appellant. The statement of the appellant in the affidavit that the case was entrusted to his brother and that he did not inform the ex parte decree at the relevant point of time, cannot be discarded. Since the delay could have been avoided by the appellant by acting with due diligence, this Court finds that the delay can be condoned by putting the appellant on terms.

7. As we have recorded already, the bonafides of the appellant cannot be doubted, as we find that the appellant will be put to irretrievable loss, if he is deprived of an opportunity to contest the suit on merits, particularly when there are triable contentious issues. The appellant may be able to satisfy the Court that he was not a partner when the suit was filed and that the liability fastened on him on facts, could have been avoided if an opportunity is given to the appellant. It is also to be noted that the ex parte decree is with interest at 36% per annum for the entire suit claim till



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realisation. The decree as it is may not be sustained ordinarily. Therefore, this Court is unable to sustain the order of the learned single Judge refusing to condone the delay of 423 days in filing the petition to set aside the ex parte decree for the reasons stated in the order. Accordingly, the appeal is allowed and the order of the learned single Judge in Application No.1255 of 2023 in C.S.No.530 of 2011 is set aside, on condition that the appellant pays a sum of Rs.75,00,000/- through cheque/demand draft in favour of the first respondent firm within a period of four weeks from the date of receipt of a copy of this order. The submission of the learned Senior Counsel appearing for the appellant that the said sum can be disbursed to the depositors is recorded. This order will now enable the appellant to get a favourable order from the learned single Judge in the other application filed to set aside the ex parte decree. The appellant is also directed to file the written statement within a period of four weeks from the date of receipt of a copy of this order and on filing such written statement, it is for the learned Judge hearing the matter on the original side to frame issues within a reasonable time and to proceed with the trial of the suit, taking into



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consideration that the suit is of the year 2010. Consequently,
C.M.P.No.13126 of 2023 is closed. No costs.

Index : yes/no
Neutral citation : yes/no

(S.S.S.R.,J.) (K.R.S.,J.)
14.08.2024

ss

To

The Sub Assistant Registrar (O.S.)
High Court, Madras



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AND
K.RAJASEKAR,J.

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